COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Zuo v. Chen,*
2026 BCCA 109

Date: 20260318
Docket: CA50488, CA50489

Docket: CA50488

Between:

Jia Zuo

Appellant
(Plaintiff)

And

Tony Chen and RE/MAX City Realty

Respondents
(Defendants)

- and -

Docket: CA50489

Between:

Jia Zuo

Appellant
(Plaintiff)

And

Shing Yip Investments Ltd. (BC0195996) and CBRE Limited

Respondents
(Defendants)

Before: The Honourable Justice Griffin
The Honourable Justice Fleming
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated February 3, 2025 (*Zuo v. Chen*, 2025 BCSC 168, Vancouver Dockets S206643 and S1811316).

Counsel for the Appellant: G. Cameron
K.F. Milinazzo

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Counsel for the Respondents, Tony Chen & RE/MAX City Realty:	S. Gladders R.K.W. Lau
Counsel for the Respondent, Shing Yip Investments Ltd. (BC0195996)	B.F. Morley D. Melnick
Place and Date of Hearing:	Vancouver, British Columbia February 13, 2026
Place and Date of Judgment:	Vancouver, British Columbia March 18, 2026

Written Reasons by:
The Honourable Justice Gomery

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Fleming

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Summary:

A buyer and a vendor contracted for the purchase of commercial real estate. The purchase failed to close after evidence of environmental contamination prevented the buyer from obtaining financing. The buyer sued the vendor for fraudulent misrepresentation, and her real estate broker for negligence. The vendor counterclaimed for breach of contract. The trial judge dismissed the claims and granted the vendor judgment on the counterclaim. The buyer appeals. The appellant says the judge erred by (1) failing to recognize imputation of knowledge in relation to the fraudulent misrepresentation claim, (2) misapprehending certain evidence and wrongfully declining to admit portions of an expert report in relation to the negligence claim, and (3) failing to consider relevant legal principles in relation to the counterclaim.

Held: Appeals dismissed. While the trial judge's analysis of what was known to the vendor was flawed, she did not err in concluding that any representations made were not intended to induce the appellant to enter the contract and did not have that effect. Nor did she err in her factual findings regarding the negligence claim. Although the judge erred in refusing to admit certain evidence, that exclusion did not make a difference in the result. The appellant's argument regarding the counterclaim fails through the application of uncontested findings and settled law. Had the appeals turned on the point raised by the appellant, the appellant, in any event, would not have been granted leave to advance the point, which was abandoned at trial.

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Reasons for Judgment of the Honourable Justice Gomery:

<u>Overview</u>

[1] Shing Yip Investments Ltd. owned a commercial property in Vancouver. It agreed to sell the property to Jia Zuo for $8.25 million. The contract was initially subject to clauses permitting Ms. Zuo to obtain and approve environmental phase 1 and 2 reports and to her obtaining first mortgage financing, but she waived the benefit of these subject clauses without obtaining the environmental reports. Subsequently, a report she obtained disclosed environmental contamination on the basis of previous use of the property as a gas station. Ms. Zuo then failed to obtain financing and refused to complete.

[2] Ms. Zuo immediately sued Shing Yip and subsequently commenced a separate action against her real estate broker, Tony Chen. The two actions were tried together. The claim against Shing Yip as framed at trial was for the tort of

deceit or fraudulent misrepresentation. Ms. Zuo maintained that she had been tricked into entering into the contract by a false representation, made by Shing Yip's agent, Michael Moriarty, to her agent, Mr. Chen, that Shing Yip was not in possession of any environmental reports. In fact, another agent of Shing Yip, Jordan Eng, was in possession of a report disclosing the past use of the property as a gas station and that it was contaminated. This was a report of environmental consultants, Golder Associates, sent to Mr. Eng by the property's tenant five years earlier.

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[3] Ms. Zuo's claim against Mr. Chen was that he negligently failed to discover the past use of the property and failed to warn her against removing the subject clauses when she did.

[4] Shing Yip counterclaimed against Ms. Zuo for breach of contract. Initially, it sought specific performance. Some time later, upon obtaining confirmation from Ms. Zuo that she remained uninterested in purchasing the property, it relisted and sold the property to a third party for $5.58 million, realising a loss of $2.67 million by comparison to the $8.25 million Ms. Zuo had agreed to pay.

[5] The trial judge dismissed both of Ms. Zuo's claims. She considered that the claim against Shing Yip failed on multiple grounds including the absence of any representations made to Ms. Zuo personally, Mr. Moriarty's unawareness of the Golder report and its contents, and the absence of any fraudulent intention on the part of Shing Yip. She considered that Ms. Zuo had failed to establish that Mr. Chen was negligent or that any negligence on his part had caused Ms. Zuo loss. The judge granted Shing Yip judgment on the counterclaim against Ms. Zuo in the amount of $2.67 million.

[6] Ms. Zuo appeals. She submits that the judge made errors of law and fact and seeks a new trial and dismissal of the counterclaim. For the reasons that follow, I would dismiss the appeals.

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Background

[7] The property is located on MacDonald Street on Vancouver's west side. Shing Yip bought it in 1979. Throughout Shing Yip's ownership, it was tenanted by the Insurance Corporation of British Columbia ("ICBC") for use as a driver licensing centre.

[8] Shing Yip is a British Columbia company owned and operated by residents of Hong Kong. The property was its only asset. Beginning in 2005, Shing Yip delegated management of the property to Mr. Eng. He collected the rent, paid expenses, and dealt with ICBC. ICBC's only contact was with Mr. Eng.

[9] Mr. Eng is a realtor by profession. He practised through Success Realty.

[10] In late 2017, Shing Yip decided to list the property for sale. It listed the property not with Mr. Eng and Success Realty but with Mr. Moriarty's firm, CBRE Limited. Beginning in January 2018, CBRE began marketing the property. Mr. Eng was not at all involved in the marketing.

[11] Ms. Zuo is a businesswoman with experience purchasing commercial property. In 2018, she learned that the property was for sale and consulted with Mr. Chen with a view to making an offer. Through Mr. Chen, she presented an initial offer to purchase the property for $7.75 million and ultimately negotiated the contract to purchase it for $8.25 million. The contract was settled on February 27, 2018.

[12] The contract contained an information summary sheet setting out "information about this contract" that included the following:

> 6. TITLE: (Clause 22) It is up to the Buyer to satisfy the Buyer on matters of zoning or building or use restrictions, toxic or environmental hazards, encroachments on or by the Property and any encumbrances which are staying on title before becoming legally bound. … If you as the Buyer are taking out a mortgage, make sure that title, zoning and building restrictions are all acceptable to your mortgage company. …

[13] The environmental and financing subject clauses were as follows:

> 2) Subject to the Buyer obtaining and approving the Environment Report Phase 1 & 2 on or before March 15, 2018.
>
> 3) Subject to a new first mortgage being made available to the buyer on or before March 15, 2018. This condition is for the sole benefit of the Buyer.

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[14] Ms. Zuo paid an initial deposit of $50,000 on February 17, 2018, and a second deposit of $450,000 on March 31, 2018, following removal of the subject clauses on March 15. When Ms. Zuo signed a document to remove the subject clauses, she had not obtained a Phase 1 (or a Phase 2) environmental report and she had not secured mortgage financing.

[15] Ms. Zuo retained environmental consultants to perform a phase 1 environmental assessment and obtained a report on June 12, 2018. Through Mr. Chen, she advised Shing Yip that the report indicated that the property had been used as a gas station and may be contaminated.

[16] The purchase of the property did not close as contemplated in the contract on July 30, 2018.

[17] On October 15, 2019, Shing Yip sold the property to a third party for $5.58 million.

<u>The arguments on appeal</u>

[18] In her factum, Ms. Zuo alleges four errors in the judgment under appeal. The first relates to the dismissal of her deceit claim against Shing Yip and comprises three sub-errors, namely:

> Considering “corporate knowledge” rather than the imputation of knowledge from an agent to a principal, overlooking the proof of facts arising from documents which were in the possession of that agent, and requiring a representation be made to the principal rather than her advising agent as a precondition to finding fraud;

[19] The next two alleged errors relate to the negligence claim against Mr. Chen. They involve (1) misapprehending admissions made by Mr. Chen on discovery and

other evidence, and (2) the judge's refusal to admit portions of an expert report (the "Klein report") in evidence.

[20] The final error alleges a failure to consider legal principles governing the counterclaim. Ms. Zuo acknowledges that this contention requires her to obtain leave to renew a submission she expressly abandoned in final argument before the trial judge.

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[21] I will address the issues, arguments, and standard of review in three stages: first, in relation to the dismissal of the deceit claim against Shing Yip; second, in relation to the negligence claim against Mr. Chen; and finally, in relation to the counterclaim.

The deceit claim against Shing Yip

[22] Ms. Zuo pleaded the following fraudulent misrepresentation:

> 15) Shing Yip intended to and did induce Ms. Zuo to enter into the [contract of purchase and sale] by making misrepresentations (through CBRE). Particulars of those misrepresentations are:
>
> > 15a) repeatedly assuring Tony Chen, Ms. Zuo's agent, that it did not have any copies of any environmental reports; …

[23] The pleading goes on to particularize other misrepresentations that were abandoned at trial.

Legal framework

[24] A claim of deceit involving a representation that induced the making of a contract has five elements:

a) a representation of fact made by a representor to a representee;

b) the representation was false;

c) the representor must have known that the representation was false at the time it was made;

d) the representor must have intended that the representee would act on the representation; and

e) the representee must have been induced to enter into the contract in reliance upon the representation;

Wang v. Shao, 2019 BCCA 130 at para. 24, leave to appeal ref'd, 38704 (14 November 2019); *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25.

[25] It has been clear since *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.) at 374, that the requirement of knowledge of the falsity of the representation (requirement (c)) may be satisfied by recklessness as to whether the representation was true or false: *Bruno Appliance and Furniture, Inc. v. Hyrniak*, 2014 SCC 8 at paras. 18–19.

[26] Deceit is an intentional tort and requirements (c) and (d) address separate aspects of the intention required. Collectively, knowledge of the falsity of the representation (requirement (c)) and the intention that the representee will act on the representation (requirement (d)) are sometimes characterized as a single requirement of fraudulent intent. However, knowledge and intention are analytically distinct and in some circumstances, including the case at hand, it is necessary to keep the distinction in mind. The intention required is an intention that the representee will act, not an intent to defraud. The point is made in a leading text, Spencer Bower and Turner, *The Law of Actionable Misrepresentation*, 3rd ed. (London: Butterworths, 1974) at 118–119, where the authors state:

> … although fraud necessarily involves an intention on the part of the representor that the representee shall act in the way in which he does eventually act, yet there is no necessity to prove any intention further or more remote than this—and certainly the *motive* of the representor is quite irrelevant. … A false representation made without honest belief in its truth will be fraudulent if made with intention that the representee act upon it, even if it be made without any demonstrable motive or intention whatever.

[27] The distinction between knowledge of falsity and intention to induce is potentially important in cases involving representations made by or to agents of a litigant because inquiries into knowledge and the intention accompanying the

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representation may have to focus on different individuals. In this case, Ms. Zuo relies on the knowledge of Mr. Eng as knowledge possessed by Shing Yip, while pointing to a representation made by Mr. Moriarty as the selling agent on behalf of Shing Yip.

[28] As a rule, corporations such as Shing Yip act through agents. The actions of a duly authorized agent are the actions of the agent's principal. Knowledge gained by an agent in the course of the agency is attributed to the principal; it is treated as information known to the principal whether or not in fact it was passed on: *Irving Oil Limited v. S & S Realty Ltd.* (1983), 48 N.B.R. (2d) 1 at para. 12, 1983 CanLII 3798 (C.A.); *Mah v. Wawanesa Mutual Insurance Company*, 2013 ABCA 363 at para. 13; Fridman, *Canadian Agency Law*, 3rd ed (Toronto: LexisNexis, 2017) at 245. A representation that induces a duly authorized agent to act on the principal's behalf is treated as an inducement of the principal: *Weibelzahl v. Symbaluk* (1963), 42 D.L.R. (2d) 281 at 286, 1963 CanLII 462 (B.C.C.A.).

[29] The attribution of an agent's knowledge to the principal is based on a presumption that the agent will inform the principal because that is the agent's duty: *Durbin v. Monserat Investments Ltd.* (1978), 87 D.L.R. (3d) 593, 1978 CanLII 1730 (O.N.C.A.); *ADAG Corporation Canada Ltd. v. SaskEnergy Incorporated*, 2021 SKCA 74 at para. 52, leave to appeal ref'd, 39766 (20 January 2022). As exceptions to the rule, knowledge will not be attributed where the agent was acting in fraud of the principal or where the party claiming attribution was on notice that the knowledge would not, in fact, be passed on: *Bank of Nova Scotia v. Richards*, [1896] 26 S.C.R. 381 at 386–387, 1896 CanLII 66; *HSBC Bank Canada v. Elm City Chrysler*, 2007 NBQB 233 at para. 14, aff'd 2008 NBCA 48.

The judge's reasons

[30] The trial judge identified the five elements of the cause of action in deceit and found that Ms. Zuo failed on all five: reasons, paras. 63–65.

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[31] Concerning the first requirement of a representation by Shing Yip to Ms. Zuo, the judge found that Mr. Moriarty made no representations directly to Ms. Zuo and was not in possession of any environmental reports. She stated:

> [67] Mr. Moriarty made no representations to Ms. Zuo directly. Mr. Moriarty testified that he had no environmental reports with respect to the Property and, if asked, he believed he would have said that to Mr. Chen. However, he testified he was never asked.

[32] Moreover, the judge found that any representations made to Mr. Chen were not communicated to Ms. Zuo. She considered that, in order to establish a fraudulent misrepresentation, the representation must have been communicated to Ms. Zuo: reasons at para. 68. She found that, while Mr. Eng had been informed that the property had previously been operated as a gas station and was probably contaminated, he did not communicate that information to anyone at Shing Yip: reasons at paras. 18–20, 76.

[33] The judge held that fraudulent intent should not be imputed to Shing Yip on the basis of Mr. Eng's knowledge, citing *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72 at paras. 88–89: reasons at paras. 77–81. She found that any assurances given by Shing Yip that it did not have any environmental reports were not intended to be acted upon; rather, the intention was to encourage or require Ms. Zuo to obtain any reports she required on her own: reasons at paras. 88–90. She found that, if any representations were made, Ms. Zuo did not rely upon them to conclude that the property was not contaminated: reasons, paras. 91–93.

The argument on appeal

[34] Ms. Zuo submits that the judge overlooked evidence given by Mr. Moriarty under cross-examination that established a representation consistent with Shing Yip's pleading (reproduced above at para. 22) made by him on Shing Yip's behalf. She contends that the judge erred in law in holding that representations made by Mr. Moriarty to Mr. Chen would have to be communicated to Ms. Zuo, and in failing

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to attribute Mr. Eng’s knowledge and knowledge of the report in his possession to Shing Yip, despite the fact that it was not passed on to Shing Yip.

[35] Ms. Zuo submits that an intention to induce and inducement can be inferred from the evidence of Mr. Moriarty and Mr. Chen, both of whom would have viewed the existence of an environmental report (of which each was personally unaware) as significant. In effect, she argues that an intention to induce and inducement in fact can be inferred from the materiality of environmental contamination.

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Analysis

[36] While I do not agree with all of the judge’s reasoning, in my view, the appeal of the dismissal of the deceit claim against Shing Yip fails on the elements of intention to induce and inducement in fact (requirements (d) and (e)).

[37] In finding that no representation was made, the judge emphasized the absence of a representation made or communicated to Ms. Zuo. While she touched upon Mr. Moriarty’s evidence of his discussions with Mr. Chen at para. 67, her point was that Mr. Moriarty’s evidence of what he said was equivocal. But this does not seem to have been critical to the judge’s reasoning. The more important point was that Mr. Moriarty made no representations to Ms. Zuo directly and any representations made to Mr. Chen were not communicated to Ms. Zuo.

[38] In fact, in cross-examination, Mr. Moriarty accepted that he was sure that he would have told Mr. Chen that Shing Yip did not have any environmental reports. Moreover, I agree with Ms. Zuo that the judge erred in law in assuming that a representation by Shing Yip’s agent, Mr. Moriarty, to Ms. Zuo’s agent, Mr. Chen, could not qualify as a fraudulent misrepresentation founding a claim in deceit. For the purpose of this appeal, I am prepared to assume that the first requirement of a representation was satisfied.

[39] I further accept that Mr. Eng’s knowledge of the Golder report and its contents must be imputed to Shing Yip. The representation that Shing Yip was not in possession of any environmental reports was false, and Shing Yip knew it was false.

The second and third requirements were satisfied. In fairness to the judge, the parties did not bring to her attention the law reviewed above bearing on the imputation of knowledge.

[40] However, to succeed, Ms. Zuo must establish that the judge erred in concluding that any representations made were not intended to induce Ms. Zuo to enter into the contract, and did not have that effect. These are findings of fact. Ms. Zuo must show that they are undermined by palpable and overriding errors, which is to say, errors that are obvious and determinative of the result: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 25, 36; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.

[41] In making the representation, Shing Yip acted through Mr. Moriarty. Its intention is Mr. Moriarty's intention.

[42] The contract included "as is" and "site profile" clauses, inserted at Shing Yip's request. They stated:

> SITE PROFILE
>
> The Buyer hereby waives, to the extent permitted by law, any requirement for the Seller to obtain or provide to the Buyer a "site profile" or any other environmental report for the Property under the Environmental Management Act (British Columbia) or any regulation in respect thereto.
>
> AS IS
>
> The Buyer acknowledges covenants and agrees that: (I) except as expressly set forth herein, it is purchasing the Property on a strictly "as is, where is" basis; and (II) it enters into this Contract relying solely on its own inspections, it has not relied on any documents or information provided by the Seller or any representation or warranty given by or on behalf of the Seller concerning the Property except as otherwise expressly set out herein and it is the obligation of the Buyer to satisfy himself [sic] (at the Buyer's sole costs and expense) on all matters relating to or affecting the Property.

[43] The judge addressed these clauses in considering whether a representation was made with an intention to induce entry into the contract. She found as follows:

> ***Did Shing Yip intend Ms. Zuo to act on the representation?***
>
> [88] Both Ms. Ma and Mr. Eng testified that Shing Yip was a hands-off landlord. Throughout its ownership, Shing Yip was content to leave the

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> property management responsibilities to its agent. Both Mr. Moriarty and Mr. Chen testified that Mr. Moriarty told Mr. Chen that Shing Yip had limited knowledge about the Property. As a result, the "As Is" and the "Site Profile" clauses were included in the CPS. Mr. Moriarty testified that the reason for these clauses was that Shing Yip could not provide any guarantees about the Property. The read ins from Mr. Chen's discovery also confirmed that this was his understanding of the inclusion of these clauses.
>
> [89] The only reasonable interpretation of the "As Is" and "Site Profile" clauses is as a warning or notification to Ms. Zuo that Shing Yip did not know about the environmental status of the Property and to ensure that she did her own due diligence in that regard. Based on those clauses, Ms. Zuo could not have presumed that the Property was not contaminated. An environmental report might have indicated that the Property was contaminated or that it was not. The absence of a report cannot be indicative or conclusive of either possibility. Even if there had been a clear representation that Shing Yip did not possess any environmental reports, Ms. Zuo's remedy, if she was concerned, was to commission her own reports. She negotiated and obtained a subject clause permitting her to do so.
>
> [90] In the result, Shing Yip made no representation on which it intended Ms. Ma to act.
>
> [Emphasis added.]

[44] I am not persuaded that this reasoning discloses an obvious and determinative error. It was open to the judge to find that by telling Mr. Chen that Shing Yip was not in possession of environmental reports, Mr. Moriarty did not intend to induce Ms. Zuo to enter into the contract. If Mr. Moriarty had been personally aware of the falsity of the representation, Ms. Zuo's argument would be stronger, but he was not.

[45] I am equally unpersuaded that the judge erred in finding that Ms. Zuo was not in fact induced by Mr. Moriarty's representation. Ms. Zuo was the decision maker and, here, it is material that she was unaware of the representation. The judge noted that "there is no evidence that Ms. Zuo had any discussion about environmental reports before signing the [contract] or before she waived the subject clauses" (reasons at para. 91), and that she did not testify that she would have acted any differently had she been told that there were no environmental reports (reasons at para. 93). The judge's findings are not vitiated by a palpable and overriding error.

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[46] Accordingly, in my view, the judge did not err in dismissing Ms. Zuo's claim against Shing Yip for deceit.

The negligence claim against Mr. Chen

[47] Ms. Zuo pleaded that Mr. Chen owed her a duty to take reasonable care in advising her. She pleaded:

> 8. Had Mr. Chen taken reasonable care, he would have discovered that, before the ICBC building was built, the Property had been used as a gas station. Further, the next door property had been used as a gas station more recently than that. Knowledge of either of those facts would have demanded that Mr. Chen advise Ms. Zuo to guard the near certainty the Property being contaminated. In fact, the Property was contaminated within the meaning of the *Environmental Management Act*.
>
> 9. In addition, Mr. Chen should have noticed that there was evidence of previous environmental work being done on the Property.
>
> 10. Mr. Chen breached his duty of care to Ms. Zuo by failing to ensure that she protected herself against the risks of contamination, either by inserting warranties to the effect that the Property was not contaminated, or to allow sufficient time for Ms. Zuo to investigate the possibility of contamination on the Property before she had to remove subject conditions.

[48] She further pleaded that the existence of the "site profile" and "as is" clauses should have alerted Mr. Chen to the need to take extra care in investigating the environmental condition of the property and that he should have warned her that the 26-day interval prior to the subject removal deadline was insufficient to permit the necessary investigations.

[49] Ms. Zuo's theory of her case was that Mr. Chen failed to warn her of the possibility of environmental contamination, making it impossible for her to obtain mortgage financing required to complete the purchase.

[50] At trial, Ms. Zuo called an experienced realtor, Eugen Klein, as an expert witness. On Mr. Chen's objection, the judge ruled inadmissible portions of the Klein report on the bases variously that they stepped outside the scope of his expertise as a realtor because they amounted to opinions on lending practices, were irrelevant, or amounted to opinions concerning the ultimate question that was for the court to decide.

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[51] The judge found that Mr. Chen was not negligent in failing to ascertain previous use of the property as a gas station (reasons at para. 140), notice indications of prior environmental work on the property (at para. 147), ensure that Ms. Zuo was protected under the contract (at paras. 149–150), or to recognize and advise that a 26-day due diligence period was insufficient (at paras. 152–157). She observed that Ms. Zuo actually obtained a phase 1 environmental report within 14 days of requesting it: at para. 155. This meant she had sufficient time to obtain it before removing subjects, had she wanted to do so.

[52] Alternatively, the judge found that, if Mr. Chen was negligent, his negligence did not cause Ms. Zuo's loss for several reasons. First, because she took the risk on her own of removing the subjects that would have allowed her to back out of the deal: at paras. 179–181. Second, to the extent that there was negligence, the evidence did not establish it as a cause of Ms. Zuo's failure to close, "[i]n large part, … because there is little evidence about why Ms. Zuo breached the [contract]": at para. 185. The judge stated:

> [186] Crucially, she has not established on the evidence before me that: 1) the Property was contaminated; 2) the contamination could or should have been uncovered by Mr. Chen earlier; 3) the contamination led to Ms. Zuo's inability to obtain financing; and 4) Ms. Zuo failed to close as a result of the contamination.
>
> [187] Ms. Zuo has not tendered a commitment letter or conditional financing agreement, or any correspondence from a mortgage broker or a lender demonstrating that she would have been provided with funding but for the environmental issues with the Property.
>
> [188] Ms. Zuo did not call evidence from her mortgage broker, an expert in lending practices, NEI (the environmental firm who allegedly completed work on the Property at the material time), or another expert environmental firm.

[53] In addition, the judge noted that Ms. Zuo had spoken with a mortgage broker before the subject clauses were removed. The judge questioned whether, in that light, it was foreseeable that a failure on Mr. Chen's part to advise her of lending requirements would be causative of loss: para. 191.

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Analysis

Factual issues

[54] Mr. Chen did not testify at trial. His evidence was limited to portions of his discovery evidence read in by Ms. Zuo's counsel. This presented a limited and fractured account of what he might have had to say. Ms. Zuo's view was that it sufficed to make out her case; the judge held that it did not. On appeal, Ms. Zuo submits that the judge misapprehended Mr. Chen's admissions.

[55] In her factum, Ms. Zuo further submits that the judge overlooked evidence establishing (contrary to her finding at para. 186 of the reasons, quoted above) that the property was contaminated through prior use as a gas station. Ms. Zuo points to other findings that she says are clearly wrong. She acknowledges that all of these points are factual, requiring a showing of errors that are palpable and overriding.

[56] In oral submissions, Ms. Zuo maintained that the judge misframed the issue, by failing to recognize that the heart of her case involved a failure to warn Ms. Zuo that, by waiving the protection of the subject clauses without a positive environmental report, she was taking a risk that Mr. Chen understood, and she did not. She maintained that, appreciating the claim in this way, the judge's findings as to an absence of causation are not dispositive.

[57] I am not persuaded that the judge's findings are tainted by palpable and overriding errors. Nor am I persuaded by the misframing argument. In my view, the judge's findings as to an absence of causation are dispositive.

Did the judge err in finding that Ms. Zuo had failed to prove the past use of the property and that it was contaminated?

[58] As noted, Shing Yip was in possession of the Golder report indicating that the property had been the site of a gas station and was contaminated. By the time of closing, Ms. Zuo had obtained her own environmental report to the same effect. Shing Yip acknowledged contamination in its response to civil claim. In this context, it may seem odd that the judge should have considered past use and contamination as an issue. But Mr. Chen's pleading did not address the point. As against

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Mr. Chen, past use and contamination had to be proved. And, as the judge observed, no one called the author of either environmental report. There was no direct evidence of contamination from anyone with personal knowledge.

[59] Ms. Zuo submits that the Golder report in Shing Yip's possession, and the covering letter received from ICBC in 2011, establish the contamination, citing *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc (IMV Projects Inc)*, 2018 ABCA 305 at paras. 19–21. Possession of these documents fixed Shing Yip with knowledge of their contents, but did not prove the truth of the statements contained in them even as against Shing Yip (because it did not recognize, adopt or act upon them, and because the matter is one of expert opinion, see *Canadian Natural Resources* at paras. 19, 27), and certainly not as against Mr. Chen.

[60] Ms. Zuo points to an email written by Mr. Eng in 2011, in correspondence with ICBC concerning capped wells observed on the property. Mr. Eng states:

> I spoke with my predecessor, Mr. Patrick Lai. He indicates that the wells were drilled in the early 1990s by the owners as part of an environmental investigation for financing. These wells are no longer in use and should not hinder your sewer work.

[61] Ms. Zuo characterizes the email as an admission by Mr. Eng of environmental investigations by former owners as reported by Mr. Lai. But this is hearsay, even though stated by Mr. Eng in his capacity as an agent of Shing Yip, because he is not speaking from personal knowledge and there is nothing to indicate that Mr. Lai was an agent of Shing Yip at the time of the report.

[62] Ms. Zuo submits that "Mr. Chen made admissions on discovery that investigations after the contract was entered into confirmed historical use of the property as a gas station". But all that Mr. Chen's admissions established was that contamination was reported to him, not that the reports were correct.

[63] While all this may seem too technical, it cannot be said that the judge erred in concluding that contamination and past use were unproven as against Mr. Chen.

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A trial is an adversarial exercise. Absent a formal admission, Ms. Zuo had to prove her case, including even facts that seem to have been accepted by the parties in their dealings at the time of closing, and she could only do so by tendering properly admissible evidence. This she failed to do.

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Did the judge err in giving the Klein report only limited weight?

[64] The judge found that the Klein report was based on certain assumptions that were not proven in evidence (at para. 121), and concluded that it could be given only limited weight. Ms. Zuo submits that some of the assumptions noted by the judge were in fact proven. In my view, if there were errors in this regard, they were not overriding and determinative. For reasons addressed below, the judge's consideration of the Klein report and Mr. Klein's evidence was not dispositive.

Did the judge err in finding that the due diligence period afforded Ms. Zuo under the contract was sufficient?

[65] Ms. Zuo acknowledges that the judge did not err in finding that a phase 1 environmental report could have been obtained within the due diligence period, that is, before the deadline for removal of the subject clauses. She submits that this finding misses the point: "that if a potential problem is spotted in a Phase 1 report, a Phase 2 is required, and a financing decision, and … it is 'impossible' to do all three of those things in that timeframe if a Phase 1 report indicates possible contamination".

[66] I do not think the judge missed the point. The phase 1 report Ms. Zuo obtained within 14 days of requesting it reportedly disclosed the past use and potential contamination of the property. Had Ms. Zuo requested the report in a timely way, she would have had this information within the due diligence period. She would not have needed a phase 2 report to understand that she had a reason to withdraw from or renegotiate the contract and the opportunity to do so.

Did the judge err in finding that the evidence did not establish that Ms. Zuo could not get mortgage financing without a phase 1 environmental report?

[67] Ms. Zuo submits that the following findings made by the judge are undermined by Mr. Chen's admission on discovery that "no competent lender would lend money on a commercial property without ensuring that there were no environmental problems" and "the lack of a clear environmental report would have meant she couldn't get financing":

> [166] First, there is no evidence that Ms. Zuo could not get financing without a Phase 1 environmental report. The general fact evidence of Mr. Chen and Mr. Klein about their subjective experience with lenders is insufficient to support a finding or inference that Ms. Zuo would have been unable to secure financing without a Phase 1 environmental report in this case. Ms. Zuo testified that, on a prior occasion, she had bought a commercial property without a Phase 1 environmental report.
>
> …
>
> [172] In the absence of objective evidence, I cannot infer that financing would have been unavailable to Ms. Zuo without a Phase 1 environmental report. As I have said, there is no objective evidence to support that the Property was previously a gas station or that it was contaminated. Further, there is no objective evidence to support an inference that if the Property was contaminated, financing would not be available. It is possible that Ms. Zuo could have obtained financing in any event. For example, she might have been able to negotiate financing payable on a successful remediation.
>
> [Emphasis added.]

[68] I do not discern a palpable error in the judge's reasoning in these paragraphs. She acknowledges Mr. Chen's and Mr. Klein's evidence of their understanding, as realtors, of the requirements of commercial lenders. She views it as "subjective", noting that she did not have more objective evidence from a mortgage broker or financing specialist. She notes that Ms. Zuo did not call the mortgage broker she spoke with at the time. She notes that Ms. Zuo had bought a commercial property without a phase 1 environmental report on a prior occasion. She notes an absence of evidence "about what avenues for financing might have been available in the secondary lending market or from other lenders like off shore lenders": at para. 168.

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Did the judge err in her understanding or framing of the negligence claim?

[69] Ms. Zuo's framing argument is an attempt to address the judge's findings that, if Mr. Chen was negligent, his negligence did not cause her to suffer a loss either by entering into the contract or by waiving the subject clauses. The argument is that Mr. Chen's negligence lay in a failure to warn Ms. Zuo of the risks she was running by waiving the protection afforded by the subject clauses without a phase 1 report. Ms. Zuo submits that the judge failed to ask whether harm flowed from a failure to give this warning.

[70] In my view, the argument fails because the judge's findings at paras. 185–188, quoted above, are a full answer to the claim as framed on appeal. The judge understood that the claim involved an alleged failure to advise. She found that Ms. Zuo had failed to prove that the property was contaminated or that contamination resulted in a failure to close the purchase. If Mr. Chen was negligent in any way, his negligence was unconnected to the loss suffered by Ms. Zuo through her breach of the contract by failing to close.

[71] In short, I am unpersuaded that the judge erred in her factual findings, and turn to the argument that she erred in refusing to admit portions of the Klein report.

Admissibility issue

[72] The judge held a *voir dire* to address the admissibility of the Klein report. She considered the leading authorities: *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80, and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. She found that Mr. Klein was qualified by virtue of his education and experience as a managing broker and on various real estate boards to give expert opinion evidence with respect to the professional standards applicable to realtors such as Mr. Chen.

[73] Ms. Zuo challenges the judge's decision to exclude two portions of the report. The first involves responses to questions 3 and 4 addressing lenders' requirements *vis-à-vis* environmental issues concerning commercial properties. The judge considered that this was evidence Mr. Klein was not qualified to give. The second

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involves the response to question A, addressing whether, on the basis of assumed facts, Mr. Chen met the minimum standard required of a realtor in this transaction. The judge excluded this evidence on the basis that it was an opinion bearing on the ultimate issue she would have to decide. There were other exclusions that Ms. Zuo does not challenge.

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[74] Ms. Zuo maintains that the judge erred in law in excluding the expert evidence in issue and seeks a new trial at which this evidence would be properly considered and weighed. Mr. Chen submits that the judge did not err and, even if she did, the rejection of the evidence had no effect on the outcome.

[75] In considering this issue, I must address four questions: (1) the standard of review; (2) the admissibility of the report at questions 3 and 4; (3) the admissibility of the report at question A; and (4) the appropriate remedy if evidence was mistakenly excluded.

(1) Standard of review

[76] Ascertaining the admissibility of expert evidence involves the consideration and application of a legal test to evidence and, often, the exercise of discretion. The application of a legal test demands deference, except where an extricable question of law is identified: *Housen* at para. 36. In respect of questions of law, the appellate court comes to its own conclusion, without deference. Otherwise, what is required is a palpable and overriding error. An exercise of discretion is reviewable on a different deferential standard, one that asks whether the trial court misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice, or where the judge gave no or insufficient weight to relevant considerations: *Wilton v. Koestlmaier*, 2019 BCCA 262 at para. 57; *R. v. Oppong*, 2021 ONCA 352 at para. 34, leave to appeal ref'd, 39771 (23 December 2021).

[77] In addressing the admissibility of the report at questions 3 and 4, the issue concerns Mr. Klein's qualifications to give the opinions. In *Ahmadian v. Law Society of British Columbia*, 2023 BCCA 470 at para. 69, Willcock J.A. gave judgment for the

Court, referred to the deferential standard applied in respect of discretionary decisions, and stated:

> … Whether a proposed expert witness has sufficient experience to be qualified as an expert in a particular area "is quintessentially a matter for the trial judge": *R. v. Dominic*, 2016 ABCA 114 at para. 21; see also *R. v. Zanolli*, 2023 BCCA 163 at para. 53. …

[78] The admission or exclusion of evidence that trenches upon the ultimate question for the court to decide is not the subject of a hard and fast rule but is also discretionary: *Mohan* at 23–25. Deference is again required.

(2) Admissibility of the report at questions 3 and 4

[79] In unreported reasons on a *voir dire*, the judge stated:

> [13] With respect to questions 3 and 4, I do not agree that Mr. Klein is qualified to give expert evidence about the requirements of traditional lenders *vis-à-vis* environmental reports and their use for commercial property or for lending money on such property. Mr. Klein is not a mortgage broker and never has been one. He is not a mortgage specialist, and he cannot opine on the lending practices of traditional or atypical lenders. Mortgage specialists and brokers have different training and professional standards that apply to them.
>
> [Emphasis added.]

[80] Acknowledging the deference owed the judge, I am of the opinion that she misinterpreted the opinions offered in these sections of the report. Mr. Klein was asked questions about the requirements of lenders, but, in his answers, he was addressing the understandings and practices of real estate brokers (termed "licensees") advising their clients in respect of these matters. This is obvious in his response to question 3:

> 3. What requirements, if any, did traditional lenders have vis-à-vis environmental issues concerning commercial properties such as the ICBC Claims Centre?
>
> In my opinion, it would have been the generally accepted practice in 2018 to advise a commercial property buyer that all commercial lenders would require a Phase I environmental report be conducted on the property prior to any financing being approved.
>
> In my opinion, it would be reasonable for any licensee to assume that an ICBC Claims Centre, given the presence of automobiles and vehicles in disrepair where oil or gas spills may compound over time, traditional lenders

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> would require an in depth review of the commercial property's environmental condition.
>
> [Emphasis added.]

[81] While the point is less striking in Mr. Klein's treatment of question 4, reading this answer in light of what immediately precedes it and in the context of the report as a whole, it remains obvious that he did not lose sight of his role and was speaking to the understanding and practices of licensees. The question and the first part of his answer are:

> 4. What requirements did typical lenders have for lending money on properties such as the one in issue?
>
> In my experience, and at the time of this transaction in 2018, typical traditional lenders required specific investigations for commercial properties that would include an environmental report and a commercial appraisal.
>
> …

[82] Mr. Klein was qualified to speak to the understanding and practices of licensees. This was proper opinion evidence. It was relevant to Ms. Zuo's claim and, in my view, ought not to have been ruled inadmissible.

(3) Admissibility of the report at question A

[83] This part of the report states:

> Finally, from what you know:
>
> A. From the facts that you have been invited to assume, did Mr. Chen meet the minimum standard required of a Realtor respecting this transaction, and
>
> In my opinion, and from the facts provided to me, while the Contract of Purchase and Sale contains most of the clauses found in a customary commercial real estate Contract of Purchase and Sale, I was unable to find the cautionary letter or other documentation from Mr. Chen to the client explaining the risks and impacts of removing any subject conditions without confirmed independent legal advice, written confirmation of financing, or provided Phase I or Phase II environmental reports. In my opinion, the level of competency and care that Mr. Chen provided the client does not meet the duty of care required by a licensee for a commercial transaction at that time.

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[84] Addressing this evidence, the judge stated in his reasons on the *voir dire*:

> [19] I am not satisfied that it is appropriate for Mr. Klein to opine on whether Mr. Chen, and the brokerage he worked for, met the minimum standards required of a realtor and a broker in the circumstances of this case. In my view, that is asking Mr. Klein to provide an opinion on the ultimate issue I have to decide and is inappropriate use of an expert.

[85] In *Mohan* at 24*,* Sopinka J. spoke for the Court in stating that, while the rule that excluded expert evidence on the ultimate question "is no longer of general application, the concerns underlying it remain". Those concerns include the possibility, on one hand, that expert evidence may simply overwhelm the trier of fact and, on the other, that it may often be unhelpful to the trier of fact to hear how the expert would apply their expertise to a factual scenario in which the trier is already deeply immersed. Assessing such concerns is the task of a judge acting as a gatekeeper.

[86] Excluding Mr. Klein's conclusions at question A did not deprive the court of his preceding opinions admitted into evidence concerning what a reasonable realtor should have advised Ms. Zuo before she signed the contract or removed the subject clauses. Mr. Klein opined that it would have been prudent practice for a licensee to have cautioned a person in Ms. Zuo's position in writing of the risks, costs and timelines associated with due diligence and the "virtual impossibility" (in his opinion) of completing the process within the time provided in the contract. He opined that it would be customary and accepted practice for a licensee to "be on high alert in assessing their client's risks" prior to subject removal, and that it would be prudent practice to strongly advise the client, with confirmation in writing, "that removing conditions without an environmental review will likely render the approval for financing almost impossible".

[87] While other trial judges might have come to a different opinion as to the admissibility of the opinion in response to question A, Ms. Zuo has not shown that the judge, in her role as gatekeeper, misdirected herself, came to a conclusion that is so clearly wrong that it amounts to an injustice, or gave no or insufficient weight to relevant considerations. The substance of the expert's opinion as to what was

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required of a reasonable realtor was before the court. It was open to the judge to conclude that the application of professional standards to the particular facts of the case at hand was a matter for the court, not the expert, and exclude this portion of the Klein report on that basis.

(4) Remedy if evidence was mistakenly excluded

[88] I have concluded that the judge erred in excluding Mr. Klein's answers to questions 3 and 4. The question that follows is whether this evidence would or might have made a difference had it been admitted: *Hixon v. Roberts*, 2004 BCCA 335 at para. 40; *McPhee v. British Columbia (Ministry of Transportation and Highways)*, 2005 BCCA 139 at para. 65.

[89] At most, the excluded evidence might have influenced the judge's assessment that Mr. Chen was not negligent, but Mr. Klein's answers to questions 3 and 4 could not undermine the judge's determination any negligence was not causative of a loss suffered by Ms. Zuo. It follows that the exclusion of the evidence in question did not make a difference in the result.

Conclusion concerning the negligence claim

[90] Accordingly, I conclude that the judge did not err in dismissing the negligence claim. Taking her case at its highest, Ms. Zuo did not establish that any negligence on Mr. Chen's part caused her to suffer a loss.

The counterclaim

The arguments on appeal

[91] Having concluded that Ms. Zuo was in breach of the contract at the time of closing, the judge dealt with the counterclaim briefly. She stated:

> [104] As I have found that the [contract for purchase and sale] was valid and enforceable and that Ms. Zuo failed to close in accordance with its terms, she is in breach of contract.
>
> [105] Ms. Zuo's breach of contract caused Shing Yip to suffer damages in the agreed upon amount of $2.67 million. Ms. Zuo also forfeits her deposits.

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[92] Ms. Zuo submits that the judge erred because both sides were in breach at the closing date. She maintains that Shing Yip was in breach by virtue of its failure to comply with a requirement that it provide an "assignment lease agreement" signed by ICBC as required by the contract. In consequence, she submits that the contract remained in force following the closing date and "having disclaimed specific performance in the Counterclaim, and not establishing that a new closing date had been set and that it was ready, willing, and able to complete on that date, Shing Yip's counterclaim for damages and to retain the deposits ought to have been dismissed".

[93] Ms. Zuo acknowledges that her trial counsel expressly abandoned the point, advanced in her pleading, that Shing Yip had failed to tender an assignment lease agreement required by the contract. She seeks leave, nevertheless, to advance the argument on appeal on the basis that the point was only abandoned in final argument so that all the relevant evidence is in the record.

[94] Shing Yip asks this Court to refuse leave to raise the point, which would require this Court to interpret an obscure contractual requirement without the benefit of findings from the trial judge. It reminds us that the interpretive point is a question of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. Further, it disputes Ms. Zuo's interpretation that an assignment signed by ICBC was required. Even if it was, it submits that the contract was, in any event, breached by Ms. Zuo's ongoing refusal to complete following issuance of her notice of civil claim and that it was therefore entitled to claim damages.

Analysis

[95] Even if Ms. Zuo were permitted to pursue the point she abandoned in the Court below, and her interpretation of the contract were accepted, her argument is bound to fail through the application of uncontested findings and settled law.

[96] Ms. Zuo's argument would establish that neither side was ready, willing and able to complete at the closing date, because Ms. Zuo was refusing to proceed, and Shing Yip had not yet tendered an assignment of the lease acknowledged by ICBC.

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The failure to tender an acknowledged assignment is a technical point, because ICBC had no right to object to the sale or resist becoming a tenant of Ms. Zuo rather than Shing Yip.

[97] The contract remained in force, notwithstanding the failure to close, and it was open to either side to give reasonable notice of its intention to close: *Lal v. Grewal*, 2024 BCCA 149 at para. 19.

[98] Ms. Zuo's issuance of a notice of civil claim evinced a repudiation of the contract. Ms. Zuo's position was that she was not bound to perform because the contract was induced by fraud. As noted, this position has failed.

[99] It was open to Shing Yip to accept the repudiation and claim damages, or to sue for specific performance. It counterclaimed for specific performance, and the contract remained in force. But, later on, it changed course and inquired of Ms. Zuo whether she remained unwilling to close. She persisted in her position and consented that the property be sold to a third party.

[100] In law, Shing Yip's change of course amounted to a belated acceptance of Ms. Zuo's continuing repudiation of the contract. At this point, Shing Yip was entitled to claim damages. The quantum of the claim was agreed at trial.

[101] Ms. Zuo's appeal of the $2.67 million award of damages on the counterclaim fails accordingly. But I should add that I would have refused leave to advance the point abandoned at trial had the appeal turned on it. While it lies within this Court's discretion to hear new issues on appeal, that discretion is exercised sparingly and only where the interests of justice require it: *R. v. Gill*, 2018 BCCA 144 at para. 10. The evidentiary record is incomplete: Ms. Zuo's counsel in this Court candidly acknowledged that certain findings in the reasons were settled among counsel but never formally admitted, and it is unclear how the judge was apprised of them. We cannot be confident that we have a full account of the facts bearing on the point Ms. Zuo would now have us decide. And we do not have the judge's findings interpreting the contractual provision in question. *Sattva* instructs us that the

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interpretation of a non-standard form contract is a question of fact, and making findings of fact is not the role of an appellate court, other than in exceptional circumstances: *Gill* at para. 9.

Disposition

[102] For these reasons, I would dismiss the appeals.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Fleming"

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