

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhong v. Alan Hu Personal Real Estate Corporation*,  
2025 BCSC 40

Date: 20250110  
Docket: S220461  
Registry: Vancouver

Between:

**Pei Hua Zhong**

Plaintiff

And

**Alan Hu Personal Real Estate Corporation, Alan Hu,  
Lingxia Tao and Colonial Pacific Realty Ltd. dba  
Re/Max Colonial Pacific Realty**

Defendants

Before: The Honourable Justice Francis

## Reasons for Judgment

Counsel for Plaintiff:

E. Logan

Counsel for Defendants, Alan Hu Personal  
Real Estate Corporation and Alan Hu:

R. Lo

Counsel for Defendant, Lingxia Tao

G. Lee

Place and Date of Trial:

Vancouver, B.C.  
October 28-November 1, 2024  
November 4-8, 2024  
November 12, 2024

Place and Date of Judgment:

Vancouver, B.C.  
January 10, 2025

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**I. OVERVIEW**

[1] In November 2017, the plaintiff, Pei Hua Zhong, approached a local realtor, Alan Hu, seeking help with selling his home in in South Surrey, B.C., and purchasing a new property. About a month later, Mr. Zhong identified a property that he was interested in purchasing, located at 2038 174 Street in Surrey (the “2038 Property”). In late December 2017 and early January 2018, Mr. Hu acted for Mr. Zhong in making two offers to purchase the 2038 Property. Neither of these offers resulted in the successful purchase of the 2038 Property by Mr. Zhong. By January 2, 2018, the Property had been sold to a friend of Mr. Hu, Lingxia Tao. On January 17, 2018, Ms. Tao assigned her contract of purchase and sale to Mr. Hu, who ended up purchasing the 2038 Property for himself. Mr. Hu sold the 2038 Property in August 2022 for a profit of more than \$1.2 million.

[2] Mr. Zhong claims against Mr. Hu for breach of fiduciary duty, professional negligence, and breach of contract. He seeks to have Mr. Hu found liable for disgorging the profits he made on the sale of the 2038 Property. He also claims against Ms. Tao for unlawful act conspiracy and claims that she is jointly and severally liable for his damages.

[3] For the reasons that follow, I have found that Mr. Hu breached his fiduciary duties to Mr. Zhong and is liable to disgorge the profits he made on the sale of the 2038 Property. Having found that Mr. Zhong is entitled to a disgorgement remedy for Mr. Hu’s breach, it is unnecessary for me to consider Mr. Zhong’s alternative claims against Mr. Hu in contract and tort. With respect to the liability of Ms. Tao, she has done nothing to make herself liable to Mr. Zhong, and I find that as a result, the civil conspiracy claim against her must fail.

**II. ISSUES**

[4] The legal issues I must determine are:

- a) Is Mr. Zhong’s claim statute-barred?
- b) What actions of Mr. Hu, if any, amounted to a breach of his fiduciary duty to Mr. Zhong?

- c) If Mr. Hu did breach his fiduciary duty to Mr. Zhong, what damages are available to Mr. Zhong?
- d) Is Mr. Zhong entitled to punitive damages against Mr. Hu?
- e) Is Ms. Tao liable in conspiracy?

[5] Before considering the legal issues, I must first find the facts. In this case, the evidence of the witnesses cannot be reconciled on a number of material issues. I therefore must carefully assess the credibility and reliability of the parties and other witnesses with respect to matters of fact that are pertinent to my determination of the legal issues at play. I will therefore first review the uncontested facts, and then discuss the process for finding contested facts. Then I will consider the contested facts on material issues and make my findings.

### **III. UNCONTESTED FACTS**

[6] Mr. Zhong is a man of modest means who works in the tourism industry. In 2008, he moved to Canada from China with his wife and son. In 2014, he was able to purchase a home for his family in South Surrey, located at 15425 Poplar Drive (the “Poplar Drive Property”) for \$748,000.

[7] Mr. Zhong had a friend who had enjoyed a significant profit from purchasing and selling real property in the Grandview Heights neighbourhood of South Surrey. As a result, Mr. Zhong decided that he too wanted to move to this neighbourhood. On November 10, 2017, his friend introduced him to Mr. Hu. Mr. Zhong told Mr. Hu that he wished to sell the Poplar Drive Property and purchase a new home in Grandview Heights. He asked Mr. Hu to assist him with both the sale of his Poplar Drive Property and the purchase of a new property.

[8] In early December 2017, Mr. Zhong decided that he wanted to make an offer to purchase the 2038 Property, which was listed for sale for \$2.5 million. On December 5, 2017, Mr. Zhong asked Mr. Hu about the assessed value of the 2038 Property. Mr. Hu advised him that the assessed value was \$2,044,000.

[9] On December 6, 2017, Mr. Zhong and Mr. Hu began texting over WeChat about Mr. Zhong making an offer to purchase the 2038 Property. On December 13, 2017, Mr. Zhong made an offer to purchase the 2038 Property for \$2.06 million.

[10] The Poplar Drive Property was listed for sale on December 17, 2017.

[11] After some back and forth with the seller of the 2038 Property (the “Vendor”), on December 18, 2024, Mr. Zhong and the Vendor executed a contract of purchase and sale for Mr. Zhong to purchase the 2038 Property for \$2.1 million (the “First Contract”). There were three buyer’s subjects in the First Contract: financing, a home inspection, and a title search. The subject removal date was December 29, 2017.

[12] On December 14, 2017, Mr. Zhong received mortgage approval from his bank to finance his purchase of the 2038 Property. Mortgage approval was conditional on him having funds for a down payment of \$735,000, which required him to sell the Poplar Drive Property before funds would be advanced by the mortgage lender.

[13] As the subject removal date approached, the Poplar Drive Property had not yet been sold. Mr. Zhong was concerned about removing the financing subject on the First Contract in the absence of an offer to purchase the Poplar Drive Property.

[14] At this time, Mr. Hu was on vacation with his family and with his friend, Ms. Tao, and her family. The two families were in Las Vegas together from December 25, 2017 until January 4, 2018.

[15] On December 28, 2017, at 10:15 am, having not yet received an offer to purchase the Poplar Drive Property, Mr. Zhong sent a message to Mr. Hu asking him to contact the Vendor to seek to postpone the subject removal deadline in the First Contract. He also asked Mr. Hu to negotiate a postponement of the completion date in the First Contract to mid-March 2018.

[16] Later in the day on December 28, 2017, Mr. Zhong communicated over WeChat with Patty Chen, an advisor at CIBC. She sent him the following message at 7:20 pm (translated from Chinese):

If you believe you will have an accepted offer before the end of February, even [if] the completion date is after February. You can consider removing the subject, because we can make a bridge loan. If you are not confident, then you have to look for another one.

I personally don't think it should be a problem for a home at this price level (to be sold), but you have to discuss with Alan.

[17] Shortly after Mr. Zhong received this message from Ms. Chen, he sent a message to Mr. Hu at 8:17 pm (translated from Chinese):

Patty said, only an accepted offer is required to do a bridge loan, pay the down payment.

[18] He then sent a further message to Mr. Hu at 8:55 pm that said (translated from Chinese):

Or, we can consider removing the subjects with him. But have the completion postponed until after March 15.

[19] Mr. Hu did not respond to any of Mr. Zhong's December 28 WeChat messages until 10:19 pm on December 29, when he wrote (in English):

We have someone interested who wanted to know if deal went sideways. My seller has instructed me to let deal expire if subjects are not removed today.  
Regards, Alan.

[20] Mr. Hu testified that the above noted text was not from him, but was a copied and pasted text from Alan Andrews, the Vendor's realtor, that Mr. Andrews had sent to Mr. Hu.

[21] Subjects were not removed on the First Contract by the December 29, 2017 deadline and the First Contract expired. Mr. Zhong testified that he remained interested in the 2038 Property and wanted to find a way to purchase it. He decided that he would pursue bridge financing in order to enable him to make an offer on the 2038 Property that was not subject to financing.

[22] On December 31, 2017, Mr. Zhong texted Mr. Hu and asked him whether the 2038 Property was still for sale. Mr. Hu advised him that he would reach out to the Vendor's realtor. On the evening of January 1, 2018, Mr. Zhong and Mr. Hu had a telephone discussion, during which Mr. Zhong instructed Mr. Hu that he wished to make another offer on the 2038 Property. On January 1, 2018 at 11:42 pm, Mr. Zhong emailed a new agreement of purchase and sale to Mr. Hu (the "Second Offer"). In the Second Offer, Mr. Zhong offered to purchase the 2038 Property for \$2,050,000. The Second Offer was not subject to financing. Mr. Hu advised Mr. Zhong that he would send the Second Offer to the Vendor's agent right away.

[23] Also on January 1, 2018, unbeknownst to Mr. Zhong, Mr. Hu referred Ms. Tao, with whom he was vacationing at the time, to Iris Liu, another realtor, so that Ms. Tao could bid on the 2038 Property.

[24] Mr. Hu emailed the Second Offer to the Vendor's agent at 9:31 am on January 2, 2018. The Second Offer was open for acceptance until 9:00 pm on January 2, 2018.

[25] At the same time, on January 2, 2018 at 9:33 am, Ms. Liu emailed an offer to purchase the 2038 Property to the Vendor's agent on behalf of Ms. Tao. Her offer contained a provision reserving the right of the buyer to assign the contract to a third party.

[26] On January 2, 2019 at 2:40 pm, Mr. Zhong texted Mr. Hu and asked him (translated from Chinese): "Still no reply?" Mr. Hu did not respond to this text.

[27] On January 2, 2019 at 4:52 pm, Mr. Zhong sent the following series of texts to Mr. Hu (translated from Chinese):

Tell the seller, a response of 2.1 million, we'll accept. If not agreeable, so be it.

We're not going to talk.

If that's the case, I'll consider a change of plan and not to sell this house now.

[28] Mr. Hu responded to these texts with a single word (translated from Chinese): “OK”.

[29] At 4:59 pm, the Vendor accepted Ms. Tao’s offer to purchase the 2038 property for a purchase price of \$2,098,000.

[30] At 6:40 pm, Mr. Hu texted Mr. Zhong and said (translated from Chinese):

The other party’s agent said, they have come to an agreement with someone else, no need to make any more offers.

I’ll go back and help you find other lots.

[31] Mr. Hu received a referral fee of \$19,245.25 from Ms. Liu for referring Ms. Tao to her for the purchase of the 2038 Property.

[32] On January 17, 2018, Ms. Tao assigned her offer to purchase the 2038 Property to Mr. Hu (the “Assignment”). Mr. Hu did not disclose the Assignment to Mr. Zhong.

[33] Mr. Hu continued to act as Mr. Zhong’s realtor until at least January 30, 2018. He assisted Mr. Zhong with an offer to purchase a separate property on January 30, 2018.

[34] Pursuant to the Assignment, Mr. Hu and his wife closed on the purchase of the 2038 Property on March 16, 2018, and they became the legal title holders. Also in March 2018, Mr. Hu and Ms. Tao and their spouses signed an investor agreement that stipulated their equal ownership interest in the 2038 Property and other properties (the “Investor Agreement”). The Investor Agreement is the subject of separate litigation between Mr. Hu and Ms. Tao.

[35] On September 13, 2021, Mr. Hu and his wife accepted an offer to sell the 2038 Property for \$3,350,000.

[36] In July 2020, Mr. Zhong was driving past the 2038 Property and saw Mr. Hu in front of it. In September 2021, with the assistance of a lawyer, he pulled a copy of the title to the 2038 Property, which indicated that Mr. Hu had purchased the 2038

Property in March 2018. As a result, he filed the notice of civil claim in this action on January 27, 2022.

**IV. CONTESTED FACTS**

[37] There are a number of contested facts that are not necessary for me to resolve, however, some factual issues must be resolved in order for me to fairly decide this case. These include how Ms. Tao came to offer to purchase the 2038 Property, the extent of Mr. Hu’s involvement in Ms. Tao’s purchase of the 2038 Property, and whether Mr. Hu formed an intention to become an investor in the 2038 Property at the time Ms. Tao made an offer to purchase it.

[38] Many of Mr. Zhong’s claims, including the scope of Mr. Hu’s breach of fiduciary duty and the existence of an unlawful act conspiracy between Mr. Hu and Ms. Tao, depend on whose evidence I believe about the events that took place between December 30, 2017 and January 2, 2018, while Mr. Hu and Ms. Tao were in Las Vegas and Ms. Tao successfully bid to purchase the 2038 Property. I have reviewed that evidence in some detail, as I must decide between competing versions of the facts with respect to those events.

**A. Process for resolving credibility issues**

[39] In considering the credibility and reliability of evidence, this Court has recourse to the methodology articulated in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff’d 2012 BCCA 296, leave to appeal to SCC ref’d, [2012] S.C.C.A. No. 392:

[186] Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on

whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[Emphasis added].

**B. The events of December 30, 2017 – January 2, 2018 according to Mr. Hu**

[40] On January 1 and 2, 2018, while he was communicating with Mr. Zhong about the Second Offer, Mr. Hu and his wife, Hui Ma, were on vacation in Las Vegas with Ms. Tao and her husband, Zhi Chen. According to Mr. Hu's evidence, he was very disappointed when Mr. Zhong did not remove subjects on the First Contract and he expressed this to Ms. Tao and Mr. Chen. He told Ms. Tao that Mr. Zhong had offered \$2.1 million to purchase the 2038 Property. At some point on or around January 1, 2018, Ms. Tao and Mr. Chen told Mr. Hu that they were interested in purchasing the 2038 Property. Mr. Hu testified that he could not help Ms. Tao and Mr. Chen to purchase the 2038 Property because he was already working with Mr. Zhong, but he offered to refer them to another realtor if they wanted to make an offer. He then referred them to Ms. Liu. Mr. Hu claims to have had no further involvement in Ms. Tao's bid for the 2038 Property.

[41] Meanwhile, at around 9:00 or 10:00 pm on January 1, 2018, Mr. Zhong called Mr. Hu. He wanted to make another offer on the 2038 Property. He asked Mr. Hu to draw up the Second Offer, which Mr. Hu did. After Mr. Zhong signed the Second Offer, he sent it to Mr. Hu, who forwarded the Second Offer to Mr. Andrews the next morning around 9 am. According to Mr. Hu, he tried to telephone Mr. Andrews a few times during the day on January 2, 2018, but was unable to get through. Eventually, he reached Mr. Andrews just before 5 pm, and Mr. Andrews told him that the 2038 Property had been sold to someone else.

**C. The Events of December 30, 2017 – January 2, 2018 according to Ms. Tao**

[42] Ms. Tao and Mr. Chen moved to Canada from China in January 2017. Mr. Hu was their realtor for their first property in Canada, a home in South Surrey that they

purchased in June 2017. Ms. Tao was in Canada on a visitor's visa at the time, and was required to pay the foreign buyer's tax on that purchase.

[43] After Mr. Hu assisted Ms. Tao and Mr. Chen with their first property purchase, they became friends. By early December 2017, the two families had decided to go on a vacation together to Las Vegas. They were travelling together in Las Vegas when Mr. Zhong failed to remove subjects on the First Contract.

[44] On or around December 30 or 31, 2018, Mr. Hu, Ms. Tao, and Mr. Chen were chatting in Mr. Hu's hotel room in Las Vegas. Mr. Hu told Ms. Tao and Mr. Chen that he had a client who was trying to buy the 2038 Property. He told them that he thought the 2038 Property was a good investment opportunity because it was a big lot with an older house on it, so it had potential for development. Ms. Tao and her husband were interested in purchasing investment properties in B.C. so they asked Mr. Hu to give them advice about how much they would need to offer to purchase the 2038 Property. He told them that they should offer \$2.1 million. He gave them advice about how to get mortgage financing. As a result of his advice, they determined that it would be difficult for Ms. Tao and Mr. Chen to get a mortgage to purchase the 2038 Property because they already had a mortgage on the house they had purchased in South Surrey. Mr. Hu suggested that he and his wife could invest in the 2038 Property with Ms. Tao and Mr. Chen and they could help with the mortgage financing.

[45] After some discussion, a plan formed amongst Mr. Hu, Ms. Ma, Ms. Tao, and Mr. Chen that they would invest in the 2038 Property together and that they would share the profit 50/50 between the two couples. Mr. Hu told Ms. Tao and Mr. Chen that it was better for someone other than him to help with placing the offer, so he introduced Ms. Tao to Ms. Liu. Ms. Tao understood that she was being introduced to Ms. Liu because Mr. Hu was promoting the house to someone else, and it would not look good if he bought the property himself.

[46] Ms. Tao testified that she never spoke directly to Ms. Liu. All instructions were conveyed by Mr. Hu, and the only thing Ms. Tao did was docu-sign various

documents that were emailed to her for signature. She denies instructing Ms. Liu to amend the standard form agreement of purchase and sale to allow the agreement to be assigned to a third party; in fact, she denies giving any instructions to Ms. Liu at all.

[47] Ultimately, Ms. Tao's bid to purchase the 2038 Property was successful, and an agreement of purchase and sale was reached on the afternoon of January 2, 2018.

[48] Eventually, the two couples reduced their profit-sharing agreement to the written Investor Agreement, which is dated March 29, 2018. The Investor Agreement states that Mr. Hu, Ms. Ma, Ms. Tao, and Mr. Chen will invest in certain properties together and share equally in the profits. I understand that in a separate lawsuit, Ms. Tao and Mr. Chen have sued Mr. Hu and Ms. Ma under the Investor Agreement and alleged that Mr. Hu has not shared the profits from the sale of the 2038 Property with them.

[49] Ms. Tao's evidence was unclear about why she assigned her interest in the 2038 Property to Mr. Hu on January 17, 2018 by way of the Assignment. She testified that the Investor Agreement contemplated that the contract would be assigned to him. She denied that this was done to avoid the foreign buyer's tax. When asked at trial, she could not remember executing the Assignment and did not seem to remember much about it. She also testified that she understood that she would be on title to the 2038 Property, although it is not clear how she anticipated that would happen after the Assignment was executed and she transferred her interest in the 2038 Property to Mr. Hu.

[50] I infer from Ms. Tao's evidence that, once the two couples had decided on the broad terms of their joint investment in the 2038 Property while on vacation in Las Vegas on January 1, 2018, she left it to Mr. Hu to deal with the remaining steps in implementing the plan. She does not appear to have paid careful attention to the legal steps undertaken by Mr. Hu, including the Assignment, because she appears

to have believed that her 50% interest in the 2038 Property was secure as a result of the Investor Agreement.

**D. Evidence of Iris Liu**

[51] Ms. Liu had been a realtor for less than two years when Mr. Hu approached her to act as agent for Ms. Tao in the purchase of the 2038 Property. According to Ms. Liu, she became acquainted with Ms. Tao when Mr. Hu called her and told her that he was referring a client to her to purchase a property. He advised her that he had another client who wanted to purchase the property as well, so he had to refer Ms. Tao out to another realtor to avoid a conflict.

[52] Ms. Liu testified that she believes she spoke on the phone with Ms. Tao, who advised her of the offer price and that she might need to assign the purchase agreement. Ms. Liu was unaware of Ms. Tao assigning the offer to Mr. Hu until close to the completion date in March 2018.

[53] Ms. Liu had difficulty remembering much about this transaction. Most of her evidence about steps she took was prefaced by phrases like “I would have” or “I should have.” This is not surprising, nor a criticism of Ms. Liu as a witness. She is a professional realtor being asked questions about a transaction that took place almost six years ago that she has no special reason to recall. It appears to me that, due to the passage of time and the lack of significance that these events would have had to her life, her recollection is not particularly precise or reliable in terms of specific details.

**E. Factual findings about events of December 30, 2017 – January 2, 2018**

[54] I find Mr. Hu to be an unreliable witness about the events that occurred during the critical three-day period when he was vacationing in Las Vegas with Ms. Tao and Mr. Chen. He has given different versions of these events at different times in this proceeding, and has only recently, at trial, admitted that he told Ms. Tao about the 2038 Property and Mr. Zhong’s offer in late December 2017.

[55] In his February 7, 2022 statement to the Real Estate Errors and Omissions Insurance Corporation, Mr. Hu described Ms. Tao's involvement in the purchase of the 2038 Property and omitted significant details about his friendship with Ms. Tao and his own involvement in critical events:

On or about December 30, 2017, Ms. Lingxia Tao approached me and expressed interest in buying the [2038 Property]. I was familiar with Ms. Tao because Alan Hu PREC had acted as her selling/ buyer's agent in the past, approximately seven months earlier. I told Ms. Tao that I could not act for her because I was already acting for another individual who was interested in buying the same property.

[56] In June 2022, Mr. Hu swore an affidavit in support of an application he brought in this proceeding to remove a CPL from title to the 2038 Property (the "June 2022 Affidavit"). Mr. Hu deposed that the opportunity for him to purchase the 2038 Property came up when Ms. Tao's agent approached him about the Assignment in the middle of January 2018. Mr. Hu does not appear to have disclosed to the court any aspect of his involvement in Ms. Tao's successful bid on the 2038 Property. Indeed, the following exchange took place at the hearing of the application to remove the CPL, between Norell J. and counsel for Mr. Hu:

THE COURT: Who was the other purchaser at the time?

CNSL A. BAYLEY: The other buyer?

THE COURT: The other buyer.

CNSL A. BAYLEY: Her name is like Lingxia Tao.

THE COURT: Okay. And is there any relationship between Ms. Tao and your client?

CNSL A. BAYLEY: No, no direct relationship. Or yes, I mean —

THE COURT: Is there any indirect relationship?

CNSL A. BAYLEY: I believe — I don't want to fudge this. He may have been her agent, he may have acted as her agent like three or four years earlier or something. I'd have to clarify that. I mean I don't think she was a complete stranger.

THE COURT: Okay.

CNSL A. BAYLEY: And again as he says in his affidavit, her agent approached him about a possible assignment and that agent was familiar with my client as being someone who, you know, dealt with properties in the area. I think my client mentions — my client says in an affidavit, "So it wasn't

unusual for me to be approached by this agent inquiring about a potential assignment."

[57] This exchange left the Court with a very misleading impression about the extent to which Mr. Hu knew Ms. Tao, and his involvement in her purchase of the 2038 Property.

[58] In his statement to his insurer, in the June 2022 Affidavit, and in his counsel's submissions before Norell J., Mr. Hu failed to disclose that Ms. Tao was his friend, that they were vacationing together at the time Ms. Tao made an offer on the 2038 Property, and that Ms. Tao knew to make an offer on the 2038 Property because Mr. Hu had told her about the First Contract, including the offer price, and put her in touch with a realtor so she could make an offer.

[59] These are not the only instances of Mr. Hu making inconsistent or misleading statements about material facts in the course of this proceeding. For example, at his examination for discovery, he stated that he informed Mr. Zhong about the Assignment and gave Mr. Zhong an opportunity to take the Assignment in January 2018. At trial, he admitted this wasn't true. He also admitted that the June 2022 Affidavit contained evidence that was not true. These examples of Mr. Hu providing sworn evidence that he later admitted was false cause me to be concerned about the extent to which Mr. Hu feels himself bound by his affirmation to tell the truth in court, and the credibility of all of his evidence.

[60] Ms. Tao's description of the events in Las Vegas is consistent with the preponderance of probabilities. It makes sense. She was new to Canada, keen to invest in the real estate market, and optimistic about the investment opportunity presented to her by her new friend, Mr. Hu. She did not speak English and could not interpret an agreement of purchase and sale, so she left it to Mr. Hu to instruct Ms. Liu about the offer that was to be made in her name, knowing that she and Mr. Hu had plans to invest in the 2038 Property together and had an equal incentive to make sure they got the property for the best possible price. She understood

Mr. Hu to be acting as a realtor on her behalf, as he had done earlier in 2017 when he assisted her with the purchase of another property.

[61] Mr. Hu’s version of events—that he simply introduced Ms. Tao to Ms. Liu and stepped out of the way—makes less sense. Ms. Tao was in Las Vegas with Mr. Hu. He’d been her realtor in the past. He told her how much Mr. Zhong had offered for the 2038 Property. Two weeks after Ms. Tao made an offer on the 2038 Property, he took the Assignment into his own name. It is more likely, in my view, that Ms. Tao and Mr. Hu came up with a plan that they would invest in the 2038 Property together, and that at all times Mr. Hu was primarily in charge of instructing Ms. Liu about the terms of the offer and ensuring that the 2038 Property ended up in the hands of Ms. Tao, and ultimately Mr. Hu, and not Mr. Zhong. As such, I accept Ms. Tao’s version of these events and I reject the evidence of Mr. Hu as to what happened in Las Vegas between December 30, 2017 and January 2, 2018.

[62] In short, I accept that Mr. Hu told Ms. Tao about Mr. Zhong’s failed First Contract and invited Ms. Tao to invest in the 2038 Property with him. He intentionally undermined Mr. Zhong’s bid to purchase the 2038 Property so that he could take an interest in the 2038 Property for himself.

**V. ISSUE 1: IS THE CLAIM STATUTE BARRED?**

**A. Law**

[63] Section 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13, provides that a claim will be statute barred if commenced more than two years from the date on which the claim is discovered. The general discovery rules are set out at s. 8:

**8** Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;

(d)that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[64] In interpreting Nova Scotia's similar limitation statute, as well as the common law of discoverability, the Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 [*Grant Thornton*], held that the limitation period for a claim is triggered when a plaintiff discovered, or ought to have discovered through the exercise of reasonable diligence, the material facts on which the claim is based: at para. 40.

[65] The Court also held that the degree of knowledge required to discover the existence of a potential claim is more than mere suspicion or speculation, but it is not so high as to require certainty of liability: *Grant Thornton* at para. 46. What is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently: *Grant Thornton* at para. 48.

**B. Analysis of Limitation issue**

[66] Mr. Zhong commenced his claim on January 27, 2022. As a result, if he discovered the claim at the time he drove past the 2038 Property and saw Mr. Hu in July 2020, or if he discovered the claim when he searched title in September 2021, the claim falls within the statutory two year limitation period. The question I must determine is whether Mr. Zhong knew or reasonably ought to have known that he had a potential claim against Mr. Hu *before* either of these events, more than two years prior to January 27, 2022—that is, whether he discovered his claim prior to January 27, 2020.

[67] Mr. Hu has admitted that he never disclosed to Mr. Zhong either the existence of the Assignment, or the fact that he personally purchased the 2038 Property. However, he submits that by late 2018, Mr. Zhong must have known that Mr. Hu purchased the 2038 Property because Mr. Zhong discussed this with a friend in November 2018.

[68] Mr. Hu's limitation defence is based on the evidence of Feng Ren Li. Mr. Li testified that on November 5, 2018, Mr. Zhong and his wife visited Mr. Li at his home. At this visit, according to Mr. Li, Mr. Zhong told Mr. Li that he thought Mr. Hu had done something that was not in accordance with regulations, and that if he sued Mr. Hu, he would have his realtor's license taken away. Mr. Li also recalled Mr. Zhong's wife saying words to the effect of, "why would we bother to sue him?" This was the extent of Mr. Li's recollection of his conversation with Mr. Zhong and his wife.

[69] Despite the fact that Mr. Hu was a close friend of Mr. Li, Mr. Li never told Mr. Hu about the fact that Mr. Zhong had threatened to sue him and have his realtor's license taken away.

[70] Mr. Zhong denies that the conversation with Mr. Li about Mr. Hu ever took place. While he admits that he and his wife visited Mr. Li on the evening of November 5, 2018, he says they only stayed for about ten minutes. The purpose of the visit was to pick up vegetables from Mr. Li's garden and their conversation was limited to a discussion of the vegetables, and about Mr. Zhong building his own greenhouse with scrap wood.

[71] Mr. Zhong's wife, Shu Ping Liu, testified and also denied that Mr. Hu was discussed in any capacity when she and Mr. Zhong visited Mr. Li to pick up vegetables on the night of November 5, 2018.

[72] In an affidavit sworn earlier in this proceeding, Mr. Li deposed that he had a conversation with Mr. Zhong about Mr. Zhong suing Mr. Hu, but that this conversation took place on September 25, 2018, not November 5, 2018. When confronted with this inconsistency on cross-examination, Mr. Li testified that he did not check his records before he swore his affidavit, but that he had now checked his records so was sure of the date.

[73] Given Mr. Li's prior inconsistent statement about the date of the alleged conversation he had with Mr. Zhong about suing Mr. Hu, I have concerns about the

reliability of his recollection about what was said. I also find it implausible that, upon hearing Mr. Zhong tell him that he wished to sue his friend, Mr. Hu, and have his license taken away, Mr. Li never alerted Mr. Hu to this potential law suit or to tell him about his conversation with Mr. Zhong.

[74] As such, if I must decide between Mr. Zhong’s recollection of the conversation and Mr. Li’s, I prefer the evidence of Mr. Zhong and his wife. On a balance of probabilities, I do not accept that Mr. Zhong talked to Mr. Li about suing Mr. Hu on November 5, 2018.

[75] I note an additional problem with Mr. Hu’s limitation defence being based solely on Mr. Zhong’s alleged conversation with Mr. Li. Mr. Li described his conversation with Mr. Zhong on direct examination as follows:

Q: During this November 5 2018 meeting with you, Mr. Zhong, and wife, do you remember what was discussed?

A: We chatted for a bit and then Mr. Zhong talked about his purchase of the house saying that the person, Mr. Hu, who was helping him buy the house was doing something that’s not in accordance with regulations, or something that’s not good and if he sued him his realtor license could be taken away.

[76] Mr. Li did not testify that Mr. Zhong told him that Mr. Hu had purchased the 2038 Property, and I cannot infer from his testimony that Mr. Zhong told him this during their November 5, 2018 visit. Therefore, even if Mr. Li’s recollection of this conversation was correct, absent other evidence, it would not be sufficient to establish that Mr. Zhong had knowledge of the most important material fact on which his claim is based—namely that Mr. Hu purchased the 2038 Property for himself while purportedly helping Mr. Zhong to purchase it. The somewhat vague allusion to Mr. Hu “doing something that is not in accordance with regulations or something that’s not good” is not enough, in my view, to establish that Mr. Zhong knew or ought to have known the material facts on which his claim is based.

[77] On the facts before me, I find that Mr. Zhong did not discover his claim against Mr. Hu until, at the earliest, July 2020. As such, the claim is not statute barred.

**VI. ISSUE 2: BREACH OF FIDUCIARY DUTY**

**A. Were Mr. Hu and Mr. Zhong in a fiduciary relationship?**

[78] In order to determine whether Mr. Hu breached his fiduciary duties to Mr. Zhong, I must first determine whether Mr. Hu and Mr. Zhong were in a fiduciary relationship.

[79] In *Mulligan v. Stephenson*, 2016 BCSC 1941, Justice Dickson (as she then was) very helpfully set out the circumstances under which our common law imposes fiduciary duties on parties:

[108] When one party is obliged to act for the benefit of another, and the obligation carries with it a discretionary power, the empowered party becomes a fiduciary. A relationship with these attributes, however created, is marked by confidence and trust. Once created, equity will supervise the relationship by holding the empowered party to the fiduciary's strict standard of conduct. While its specifics may vary, this standard generally requires the fiduciary to act in a loyal and transparent manner in the beneficiary's affairs: *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Strother v. 34464920 Canada Inc.*, [2007] 2 S.C.R. 177.

[109] The nature and circumstances of the relationship give rise to the fiduciary duty in question. Accordingly, they must be examined closely to determine whether and, if so, how the alleged fiduciary can be expected to protect or advance the interests of the alleged beneficiary. Relevant factors for consideration will include matters such as the presence or absence of influence, vulnerability and dependency. If a retainer or other contract is part of the factual matrix, its terms will also be relevant. However, the critical issue is always the actual role of the alleged fiduciary within a particular relationship: *Guerin*; *Lac Minerals Ltd.*; *Galambos v. Perez*, 2009 SCC 48.

[80] The relationship between a realtor and a client is *per se* fiduciary. In other words, there is a strong presumption of a fiduciary obligation on behalf of a realtor, although this presumption can be rebutted on the evidence: *Lee Estate v. Royal Pacific Realty Corp.*, 2003 BCSC 911 at paras. 30–32.

[81] In *DeJesus v. Sharif*, 2010 BCCA 121, the Court of Appeal affirmed this presumption in law that a real estate agent is a fiduciary, and that the onus is on the defendant to rebut that presumption. To rebut that presumption, the defendant must

demonstrate that the relationship was not one of reliance, trust, and confidence: at para. 54.

[82] It is manifestly clear in this case that the relationship between Mr. Zhong and Mr. Hu was one of reliance, trust, and confidence. The messages between Mr. Zhong and Mr. Hu demonstrate that Mr. Zhong trusted and relied on Mr. Hu to help him navigate the high stakes process of trying to purchase and sell real property in the lower mainland. Indeed, Mr. Hu admits that he was in a fiduciary relationship with Mr. Zhong. As such, I find that Mr. Hu was in a fiduciary relationship with Mr. Zhong at the relevant time, being early December 2017 until sometime after the end of January 2018 when Mr. Hu ceased acting as Mr. Zhong's realtor.

**B. The Scope of Mr. Hu's Fiduciary Duty to Mr. Zhong**

[83] The fundamental undertaking of a realtor is to act, loyally and transparently, in the best interests of the client. The precise scope of his or her duty is informed by applicable professional conduct rules and relevant case law: *Mulligan* at para. 112.

[84] In *Mulligan*, Dickson J. made the following comments with respect to the duty of confidence, which are particularly apt in this case:

[113] A realtor is also obliged to maintain the client's confidences. The duty of confidentiality has long been recognised as a vital element embedded within the fiduciary principle. Further, a realtor must act within the scope of authority granted by the client, assiduously avoid conflicts of interest and promptly disclose any that arise in the course of the fiduciary relationship. All of these duties apply strictly unless and until the parties agree otherwise: *DeJesus*; *D'Atri v. Chilcott*, [1975] O.J. No. 228; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; Real Estate Council Rules, s. 3-3 (c), (e), (i) and (j).

[85] At a minimum, Mr. Hu's fiduciary duty to Mr. Zhong included a duty of confidentiality, a duty to act transparently, and a duty to avoid conflicts of interest and promptly disclose any that arise.

**C. Application to the facts**

[86] Mr. Hu admits that he breached his fiduciary duty to Mr. Zhong by disclosing confidential information about Mr. Zhong's attempted purchase of the 2038 Property

to Ms. Tao when they were in Las Vegas in late December 2017. However, he denies that any of the other steps he took with respect to the 2038 Property were in breach of his duties, including failing to avoid a conflict of interest by taking a personal interest in the 2038 Property, failing to disclose to Mr. Zhong that he had personally taken an assignment of Ms. Tao's interest in the 2038 Property, and failing to submit a third offer on behalf of Mr. Zhong in the amount of \$2.1 million on January 2, 2018.

[87] I will explain why, in my view, Mr. Hu's breach of fiduciary duty was far more profound than simply breaching confidentiality with respect to Mr. Zhong's offer to purchase the 2038 Property.

[88] On the same day that he was purporting to assist Mr. Zhong in making an offer on the 2038 Property, Mr. Hu was actively seeking to undermine Mr. Zhong's ability to purchase the 2038 Property—not only by telling Ms. Tao about it, but by failing to disclose to Mr. Zhong that he had assisted his friend, Ms. Tao, to make a competing bid against Mr. Zhong's bid. As Mr. Drouillard noted in his expert report, “the fact that another buyer, Ms. Tao, was interested in buying the [2038 Property] was material information that could have affected Mr. Zhong's decision making about the kind of offer to make.” Mr. Hu put Mr. Zhong in a position where he was uncompetitive against Ms. Tao, because she had information about how much he was prepared to pay for the 2038 Property, while he was completely unaware of her competing bid. In this way, Mr. Hu was actively working against his client.

[89] Yet more problematic was Mr. Hu's actions in taking the Assignment, less than two weeks after Ms. Tao's offer was accepted by the Vendor, at a time when Mr. Zhong was still interested in purchasing the 2038 Property. To be clear, I do not believe Mr. Hu's evidence that he only formed the intention to purchase the 2038 Property on January 17, 2018. I accept the evidence of Ms. Tao that the two of them formed an intention to invest in the 2038 Property together on or around January 1, 2018. In this way, Mr. Hu was very clearly in a conflict of interest insofar as he

preferred his own interest in purchasing the 2038 Property over that of his client, Mr. Zhong.

[90] Mr. Hu's counsel submitted that Mr. Hu's breaches of fiduciary duty to Mr. Zhong were less significant because he always knew that Mr. Zhong could not really afford to purchase the 2038 Property. They rely on the fact that Mr. Zhong's financial circumstances had not changed since he failed to remove subjects on the First Contract because the Poplar Drive Property had not yet sold. Knowing that Mr. Zhong could not afford the 2038 Property, Mr. Hu had no obligations to help him make further offers on it, nor to disclose that he himself was personally purchasing it.

[91] I do not accept this argument. First, circumstances for Mr. Zhong *had* changed between the time he declined to remove subjects on the First Contract on December 29, 2017, and when he made the Second Offer on January 2, 2018. Mr. Zhong testified that, after he spoke to Patty Chen at CIBC, he decided to proceed with bridge financing in the event he wasn't able to sell his Poplar Drive Property prior to closing on a purchase of the 2038 Property. This is why the Second Offer was not subject to financing. Mr. Zhong was therefore now willing to take on the risk, and possible significant debt burden, of purchasing the 2038 Property in advance of selling the Poplar Drive Property.

[92] Second, even if Mr. Hu subjectively believed that Mr. Zhong could not afford to purchase the 2038 Property, this would not obviate Mr. Hu's fiduciary duty to him. At a minimum, he would be required to speak to Mr. Zhong about his concerns and redirect him to properties that Mr. Hu believed to be more in his price range. Mr. Hu did neither. On the contrary, he allowed Mr. Zhong to believe that Mr. Hu was assisting him in making offers on the 2038 Property while Mr. Hu was actively undermining Mr. Zhong's position by purchasing the property for himself, with the assistance of Ms. Tao.

[93] The only point on which I agree that Mr. Hu did not fall short in his fiduciary duty to Mr. Zhong is in his failure to make a third offer on the basis of the following

series of WeChat messages that Mr. Zhong sent to Mr. Hu in the late afternoon of January 2, 2018:

Tell the seller, a response of 2.1 million, we'll accept. If not agreeable, so be it.

We're not going to talk.

If that's the case, I'll consider a change of plan and not to sell this house now.

[94] These texts were sent at around 4:30 pm on January 2, 2018.

[95] In my view, it is not entirely clear from these texts whether Mr. Zhong was instructing Mr. Hu to make a new offer, or rather to tell the Vendor's realtor what kind of response he expected as a counter to the Second Offer, which was still outstanding at this time. While a more assiduous realtor would likely call their client and ask for clarification of his instructions rather than simply respond, as Mr. Hu did, with the word "ok," I cannot find that it was a breach of Mr. Hu's fiduciary duty to Mr. Zhong for him to fail to understand this text message to contain instructions for making another offer.

[96] Therefore, in considering Mr. Hu's breach of fiduciary duty to Mr. Zhong, I have not considered his failure to make an offer of \$2.1 million on the afternoon of January 2, 2018 as being an element of that breach. I have, however, found that he fell far short of his fiduciary obligations by, in the face of Mr. Zhong's attempt to bid on the 2038 Property, arranging for Ms. Tao to make a competing bid, with a plan to take a personal interest for himself in the 2038 Property by way of the Assignment.

### **VII. ISSUE 3: REMEDY FOR BREACH OF FIDUCIARY DUTY**

[97] Mr. Zhong seeks a remedy of disgorgement of profits from Mr. Hu. Mr. Hu concedes that he is liable to return the commission he took from assisting Ms. Liu with Ms. Tao's purchase of the 2038 Property, but denies that he should be required to return the profits he earned on the sale of the 2038 Property.

[98] Mr. Hu takes the position that Mr. Zhong suffered no loss, because he would not have been able to afford to purchase the 2038 Property in any event. He also

submits that the doctrine of clean hands prevents recovery for Mr. Zhong, because he too committed wrongs in association with the 2038 Property.

[99] While Mr. Zhong does not seek a constructive trust remedy in this case, he relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346, for the availability of equitable remedies for breach of fiduciary duty in a case with very similar facts.

[100] Equitable remedies are designed to do justice between the parties, but they also can include an element of deterrence. Equitable remedies hold fiduciaries to high standards of trust and probity, which is required for commercial and other social institutions to function effectively: *Soulos* at para. 33.

[101] There are two common remedies for a breach of fiduciary duty. The first compensates the plaintiff for any loss caused by a fiduciary breach. The second deprives the defaulting fiduciary of any profit associated with the breach: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 1991 CanLII 52 [*Canson*].

[102] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 77, the Supreme Court of Canada held that where a fiduciary profits as a result of a conflict of interest, equity requires disgorgement of the resulting profits in order to “deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship.” However, not all breaches of fiduciary duty will give rise to a disgorgement remedy. As noted in *Strother*, a “causal relationship between the breach of fiduciary duty and the profits is required in order for an accounting to be ordered”: at para. 79.

[103] The link required between a breach of fiduciary duty and the award to be ordered must be based “on a common sense view of causation”: *Canson* at 556.

[104] Once a breach of fiduciary duty has been made out, the onus shifts to the defendant to prove the loss would have occurred regardless of the breach. A faithless fiduciary cannot simply speculate on what would have happened had he or she upheld their duty of loyalty: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at

441 – 442, 1994 CanLII 70; *West Fork Ranch v. Marcotte*, 2003 BCSC 1965 at para. 22.

[105] As discussed above, I am unpersuaded by Mr. Hu’s argument that Mr. Zhong could never have purchased the 2038 Property in any event because he lacked the means to do so. Mr. Zhong testified that he was prepared to take on the risk of obtaining a bridge loan pending the sale of his Poplar Drive Property. Despite strenuous cross-examination of Mr. Zhong, his testimony in this regard, and with respect to his financial ability to purchase the 2038 Property using assets available to him, was unshaken.

[106] I am also unpersuaded that the doctrine of clean hands prevents recovery in this case. Mr. Hu argues that Mr. Zhong obtained mortgage approval from the bank by providing false information. Mr. Zhong admitted that he gave the bank inaccurate information about his wife’s foreign income when he applied for a mortgage. As I understand Mr. Zhong’s evidence, he used his wife’s overseas pension to calculate the family’s income, despite the fact that his wife was not yet in receipt of her pension. He claimed that he did this on the advice of Mr. Hu. Mr. Hu submits that this wrong on the part of Mr. Zhong is sufficiently grave that it should prevent his recovery in this case.

[107] Mr. Hu relies on the Supreme Court of Canada’s decision in *Hall v. Hebert*, [1993] 2 S.C.R. 159, 1993 CanLII 141, in which the defence of *ex turpi causa* was discussed in the context of tort liability. In that case, Justice McLachlin (as she then was) noted that the preservation of the integrity of the justice system is the true rationale for the defence, at 179–180:

I conclude that there is a need in the law of tort for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff’s claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law.

[108] Therefore, in determining whether to use my limited power to deny recovery on the basis of Mr. Zhong's wrongful act, I must consider whether recovery for Mr. Zhong would undermine the integrity of the justice system.

[109] In this case, the quantum of income that was wrongly included in the family's income for the purposes of the mortgage application was not in evidence, and Mr. Zhong was not asked when his wife would be eligible to receive her overseas pension. It is therefore extremely difficult to assess the extent to which Mr. Zhong engaged in conduct that was wrongful with respect to his mortgage application. However, even if the pension funds were a significant portion of the family's claimed income, I cannot agree with Mr. Hu's submission that Mr. Zhong "would be profiting from his wrongdoing if a disgorgement order is made from the sale of the 2038 Property (i.e. obtaining the proceeds of sale of a property that he could not have purchased through legal means)".

[110] There are two problems with this argument. The first is the implicit premise that Mr. Zhong's purchase of the 2038 Property would not have completed because of false information in his mortgage application. Even if Mr. Zhong did overstate his overseas income on his mortgage application, it does not follow that the bank would not have advanced the mortgage funds had Mr. Zhong's bid on the 2038 Property been successful. Indeed, the mortgage approval letter Mr. Zhong received from the bank does not require proof of income. It requires "12 months [principal, interest and taxes] to serve as alternative credit worthiness (\$82,138) + down payment (\$735K)." Therefore, if he had met these conditions, the bank would have advanced the funds, irrespective of the status of his wife's overseas income.

[111] Second, the notion that disgorgement of Mr. Hu's profits would result in Mr. Zhong "profiting from his wrongdoing" fails to account for the nature of disgorgement as a remedy for breach of fiduciary duty, as well as the vastly different nature of the two alleged wrongs in this case. Disgorgement is about giving back ill - gotten gains. Mr. Hu made a profit on the purchase and sale of the 2038 Property as a direct result of his decision to prefer his own interests over the interests of his client when he decided to buy the 2038 Property. In contrast,

Mr. Zhong overstated his family's income on a mortgage application. Mr. Zhong's action simply does not rise to a level of wrongdoing that would cause the integrity of the justice system to be undermined if a disgorgement order was made in this case.

[112] As a result, I conclude that Mr. Hu should disgorge his profits from the sale of the 2038 Property.

### **VIII. PUNITIVE DAMAGES**

[113] Mr. Zhong seeks punitive damages against Mr. Hu. He submits that Mr. Hu's conduct was malicious, high handed, and sufficiently offensive to the court's sense of decency, making an award of punitive damages appropriate.

[114] Punitive damages may be awarded when "the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196. The award is exceptional, and limited to where there is "misconduct that represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[115] Punitive damages are not compensatory in nature. They are intended "to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened": *Whiten* at para. 94. They are necessary where "the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence": *Hill* at para. 196.

[116] Mr. Hu's conduct was deceptive and underhanded. He led Mr. Zhong, with whom he was in a fiduciary relationship, to believe that he was working to help Mr. Zhong purchase the 2038 Property, while at the same time working on an agreement to purchase the 2038 Property with Ms. Tao and successfully outbidding Mr. Zhong. His conduct represents a marked departure from ordinary standards of behaviour and is deserving of denunciation.

[117] However, I am mindful of the fact that punitive damages are exceptional, and reserved for cases where compensatory damages are insufficient to achieve the goal of punishment and deterrence. Under the disgorgement order, Mr. Hu will be responsible for repaying the entirety of the considerable profit he has made from the sale of the 2038 Property. In my view, the disgorgement order in this case will be sufficient to achieve punishment and deterrence, and I decline to award punitive damages.

**IX. LIABILITY OF MS. TAO**

[118] Mr. Zhong submits that Ms. Tao is liable for the tort of conspiracy on the basis that she and Mr. Hu had an agreement to act together to circumvent the interests of Mr. Zhong to purchase the 2038 Property.

[119] As set out by the Court of Appeal in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at para. 5, 1993 CanLII 6870, the elements of the tort of conspiracy are:

- a) an agreement between two or more persons;
- b) concerted action taken pursuant to the agreement;
- c) (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;  
  
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent); and
- d) actual damage suffered by the plaintiff.

[120] For conduct to be “unlawful”, it must constitute an independent tort or some other actionable wrong such as a breach of contract, statute, or fiduciary duty: *XY, LLC v. Zhu*, 2013 BCCA 352 at para. 49.

[121] Mr. Zhong submits that Mr. Hu and Ms. Tao had an agreement to act together to circumvent the interests of Mr. Zhong to purchase the 2038 Property. He argues that the conspiracy in this case was an unlawful act conspiracy. The unlawful act

that Mr. Hu and Ms. Tao allegedly undertook was their agreement to undermine the fiduciary obligations that Mr. Hu owed to Mr. Zhong.

[122] The claim against Ms. Tao raises the question of whether, in a claim for unlawful act conspiracy, each of the conspirators must have committed the unlawful act. This issue was before Justice Butler in *Bank of Montreal v. Tortora*, 2009 BCSC 1140, where he declined to allow an unlawful act conspiracy claim to proceed in circumstances where only one of the conspirators was alleged to have committed an unlawful act:

[45] The key issue raised by this application is whether, under the second branch of the conspiracy test, there must be an allegation that each of the conspirators committed the unlawful acts. In my view, such an allegation is essential to a claim against a conspirator. In this case, the conspiracy claim against Mr. Punja cannot succeed because there is no allegation that he committed a wrongful act.

[46] Before the decision of the Supreme Court of Canada in **Canada Cement**, Canadian courts wrestled with the utility and wisdom of the tort of conspiracy. The comments of Estey J. in that case at 473 describe the tort as an anomaly:

The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*.... In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly.

[47] The extension of the tort to include the second branch of the conspiracy test was confirmed by that decision. However, the Court subsequently made it clear that the tort was not to be extended further. In **Frame v. Smith**, [1987] 2 S.C.R. 99 at 109, 42 D.L.R. (4th) 81, La Forest J. stated: “this Court has made it clear that it does not look kindly upon the extension of this tort, which it regards as an anomaly”.

[48] To extend a conspiracy claim to include co-conspirators who are not alleged to have committed any wrongful conduct would be a further extension of the tort. It would be illogical if a claim in conspiracy could succeed against someone who:

- a) did not have as his predominant purpose the intent to cause injury to the plaintiff, and
- b) did not engage in any unlawful or wrongful conduct directed towards the plaintiff.

[123] On appeal, in *Bank of Montreal v Tortora*, 2010 BCCA 139, Justice Chiasson, writing for the majority, agreed with the reasoning of Butler J.:

[42] In my view, the chambers judge's analysis was correct. The Bank seeks to create a hybrid form of conspiracy, one that derives from knowledge that the conduct of others is not lawful. In my view, such knowledge cannot convert what otherwise would be a lawful act into an unlawful act in the context of a claim for civil conspiracy.

[124] There is no allegation in this case that Ms. Tao committed an unlawful act, other than the suggestion that she was seeking to avoid the foreign buyer's tax. Seeking to plan one's affairs to avoid tax is not in itself an unlawful act, and in any case, Ms. Tao has testified that she was prepared to pay the foreign buyer's tax on the 2038 Property, as she had for the other real property she had purchased in British Columbia. Mr. Zhong has been unable to point to any actionable wrong committed by Ms. Tao with respect to her purchase of the 2038 Property.

[125] Ms. Tao owed no duty in tort or in contract to Mr. Zhong. She testified that she did not even know who Mr. Zhong was when she made the offer to purchase the 2038 Property. She knew about the First Contract insofar as she knew Mr. Hu had a client who had made an offer, but failed to remove subjects, on a purchase of the 2038 Property. However, there is no evidence to suggest that she knew about Mr. Zhong's competing offer on January 2, 2018, or even that she knew that Mr. Hu was still acting as an agent for Mr. Zhong after the December 29, 2017 failure to remove subjects on the First Contract. While I find there was an agreement between Ms. Tao and Mr. Hu to invest together in the 2038 Property, Ms. Tao did not herself commit any unlawful act and she therefore cannot be found to be liable for conspiracy.

## **X. CONCLUSION**

[126] As there is outstanding litigation between Mr. Hu and Ms. Tao about the amount owing under the Investor Agreement, the amount of profit earned by Mr. Hu on the sale of the 2038 Property is unknown. In closing submissions, counsel for Mr. Zhong submitted that disgorgement of profits would entail Mr. Hu paying \$626,000 (half of the \$1.252 million profit made on the sale of the 2038 Property).

However, the accounting as between Mr. Hu and Ms. Tao is the subject of different litigation that is not before me. If, for example, it were determined in that litigation that Mr. Hu was entitled under the Investor Agreement to more than half the proceeds of sale of the 2038 Property, his disgorgement remedy would be greater.

[127] To be clear, Mr. Hu is liable to disgorge all profits he received from the sale of the 2038 Property. If the parties are unable to agree as to what amount that is, they have leave to appear before me for a short application to make submissions on precisely what order ought to be made about the quantum of disgorgement pending the outcome of the other litigation.

[128] In addition to disgorgement of profits, Mr. Hu is also responsible to repay \$19,245.25 (the commission he improperly took for the purchase of the 2038 Property).

[129] If the parties are unable to agree as to costs, they may schedule a short one hour appearance before me to speak to same.

“Francis, J.”