

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zuo v. Chen*,
2025 BCSC 168

Date: 20250203
Docket: S206643
Registry: Vancouver

Between:

Jia Zuo

Plaintiff

And

Tony Chen and RE/MAX City Realty

Defendants

- and -

Docket: S1811316
Registry: Vancouver

Between:

Jia Zuo

Plaintiff

And

Shing Yip Investments Ltd. (BC0195996) and CBRE Limited

Defendants

And

Jia Zuo

Defendant by way of Counterclaim

Before: The Honourable Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.
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December 9–10 & 12–13, 2024

Place and Date of Judgment:

Vancouver, B.C.
February 3, 2025

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Introduction

[1] These reasons address two related actions initiated by Jia Zuo. Both actions arise from a failed real estate transaction.

The Parties

[2] In action S1811316, Ms. Zuo claims damages for fraudulent misrepresentation from the defendants Shing Yip Investments Ltd. (BC0195996) (“Shing Yip”) and CBRE Limited (“CBRE”). Shing Yip is a British Columbia company with its ownership located in Hong Kong. Shing Yip initiated a counterclaim in action S1811316. CBRE is a company incorporated pursuant to the laws of Nova Scotia and extra-provincially registered in British Columbia. CBRE was named by Ms. Zuo as a defendant as a “stakeholder” and did not appear at trial and took no position.

[3] In action S206643, Ms. Zuo claims damages for negligence and breach of contract from the defendants Tony Chen and RE/MAX City Realty (“RE/MAX”). I note that at his examination for discovery on July 26, 2022, portions of which were read into the record, Mr. Chen identified himself as Wei Cheng. I have referred to him in these reasons as Mr. Chen in accordance with the style of cause.

[4] Ms. Zuo was born and educated in China. She came to Canada in 2006. Sometime after arriving, she began working for Merchant Services, selling credit card processing terminals to businesses. Since 2009, she and her husband have run an ICBC-accredited vehicle repair business.

[5] Ms. Zuo met and befriended Mr. Chen when he was running a print shop. Sometime afterwards, Mr. Chen obtained his mortgage broker’s license, and Ms. Zuo discussed mortgages with him.

[6] In 2018, Ms. Zuo and her husband were looking to invest in real estate. Although not entirely clear on the evidence, Ms. Zuo may also have represented other investors (family and friends). She learned that the building and land that housed the Insurance Corporation of British Columbia’s (“ICBC”) driver testing site, at 4126 MacDonald St. in Vancouver (the “Property”), was listed for sale.

[7] By then, Mr. Chen was a licensed realtor working with the defendant RE/MAX. Ms. Zuo spoke to Mr. Chen about the Property, its location, and the price at which it was listed. She was interested in making an offer on the Property, and, on behalf of Ms. Zuo, Mr. Chen made inquiries of the defendant CBRE, the listing agent. In her cross-examination by counsel for Shing Yip, Ms. Zuo said that she did not intend to redevelop the Property and intended to keep ICBC as a tenant.

[8] The Property was listed at \$8.25 million. Mr. Chen learned that the owners of the Property were considering another offer. When that offer fell through, Ms. Zuo presented an offer.

Ownership of the Property

[9] The Property was owned by Shing Yip, a British Columbia company. Shing Yip's shareholders are Koon Ma and King Chan; both of whom reside in Hong Kong. Beginning in 2010, Shing Yip was generally run by Mr. Ma and Ms. Chan's daughter Maggie Ma, who also lives in Hong Kong. The Ma family operates a Hong Kong construction company. In 2018, the year in which the transaction at issue in these proceedings arose, the Ma family owned about 10 properties in China, Hong Kong, and Canada, including the Property. Shing Yip purchased the Property as an investment and a source of stable revenue income in 1979 and the Property is Shing Yip's only asset. At the time, the Property consisted of the land and a one-storey building tenanted by ICBC and used as drivers' licence centre. ICBC was Shing Yip's only tenant.

[10] Shing Yip was not an active owner. At all material times, it hired property managers to manage the Property. Beginning in 2005, and full-time as of 2010, the Property manager was Success Realty and specifically Jordan Eng, a realtor at Success Realty. Mr. Eng was responsible for managing the property including collecting the rent, paying expenses, and dealing with ICBC, which included negotiating lease renewals. He testified at trial.

[11] During Ms. Ma's time running Shing Yip, Shing Yip only communicated with Success Realty when there was a lease renewal or a specific issue that had to be

addressed. Ms. Ma had only driven by the Property once or twice on visits to Canada.

[12] Shing Yip had no issues with ICBC as its tenant. ICBC was a stable tenant that paid the rent and consistently renewed their lease. Shing Yip never communicated directly with ICBC. ICBC's contact was with Mr. Eng.

Dealings between Mr. Eng and ICBC

[13] On October 5 and 6, 2011, Jag Johl of ICBC inquired about the purpose of two capped wells located on the north of the Property. Ms. Johl stated that ICBC was undertaking renovations to the licensing centre, and that these two wells might affect some proposed sewer upgrades required for the renovations. ICBC had been advised not to proceed with work in the area of the wells until it had more information.

[14] Mr. Eng wrote to Ms. Johl advising her that he had spoken to his predecessor property manager, Patrick Lai, and Mr. Lai said that the wells were drilled in the early 1990s by the owners as part of an environmental investigation for financing. He informed her that the wells were no longer in use and should not hinder ICBC's sewer work.

[15] On October 7, 2011, Ms. Johl asked Mr. Eng whether there was any indication of contamination on the site and whether he was willing to share test results with ICBC. There was no record of any response.

[16] On October 20, 2011, Ron Clifford of ICBC wrote to Mr. Eng. Mr. Clifford advised Mr. Eng that ICBC's contractor was arranging for groundwater testing from the wells. If no contamination was found, ICBC would proceed with the excavation and remove one of the wells. Mr. Clifford indicated that if contamination was found, Shing Yip may have responsibility for removal of contaminated groundwater and soil from the Property.

[17] On October 25, 2011, Mr. Eng's mother wrote to Mr. Clifford on behalf of Success Realty. She referred him to the terms of ICBC's 2008 Lease Renewal, which provided:

The Tenant accepts the environmental condition of the Premises "as-is" and the Landlord shall not be responsible for any claims from the Tenant for environmental hazards related to the Premises.

Ms. Eng notes that the "as-is" term in the lease renewal was specifically negotiated in anticipation of ICBC's renovation of the building.

[18] Almost a year later, on October 15, 2012, Mr. Clifford emailed a letter to Mr. Eng and asked that Mr. Eng ensure that Shing Yip was made aware of the contents of the letter and its attachments. The letter stated that historic records indicated that the Property had previously operated as a gasoline service station, as had a property directly to the north and across the street. Environmental assessment and monitoring of soil and groundwater undertaken by Golder Associates indicated the presence of petroleum hydrocarbon and metal contaminants in the soil and groundwater beneath the premises and of the possibility of offsite migration of residual contaminants. Golder Associates recommended that any future construction activities on the site be preceded by a soil and groundwater condition assessment. Copies of the Golder Associates report were purportedly enclosed with the letter.

[19] Mr. Eng testified that he communicated infrequently with Shing Yip, a company that he described as being extremely inactive as an owner. He testified that he never read the Golder Associates report and did not forward it to Shing Yip. He also testified that he never had a conversation with Ms. Ma, or anyone at Shing Yip, about the ICBC letter, the report attached to it, or the potential contamination issues. His evidence in that regard remained unshaken. He explained that because the environmental condition of the property was ICBC's responsibility under the lease renewal, and because the letter did not require any action from Shing Yip, he did not forward the letter to Ms. Ma, who was Shing Yip's key decision-maker. Shing Yip did not need to know about it.

[20] Mr. Eng was asked in cross-examination about whether he was deliberately keeping the landlord in the dark. His answer was a clear and emphatic “no”. I accept his evidence in that regard as, despite being pressed in cross-examination, he remained consistent and unshaken. His evidence was also consistent with the terms of the 2008 ICBC Lease Renewal.

Decision to List the Property for Sale

[21] In late 2017, Martin Moriarty, a real estate agent working for CBRE, wrote to Shing Yip to inquire whether it was interested in selling the property. Mr. Moriarty testified that he contacted Shing Yip directly to solicit their business. Mr. Moriarty and his CBRE business partner, Chris Taylor, had recently sold a nearby property for a good price in a hot market.

[22] Ms. Ma received the CBRE letter, discussed it with her father, and agreed to meet Mr. Moriarty.

[23] On November 24, 2017, Mr. Moriarty, Ms. Ma, and Koon Ma met in Hong Kong, and Shing Yip agreed to list the property with CBRE as its listing broker. Both Ms. Ma and Mr. Moriarty testified that they did not discuss environmental reports or potential contamination of the Property at their Hong Kong meeting.

[24] On November 27, 2017, Shing Yip entered into an exclusive listing agreement with CBRE. Ms. Ma signed the agreement on behalf of Shing Yip.

[25] Mr. Moriarty testified that, as is standard for a commercial property broker, following his meeting with Ms. Ma, he requested all of Shing Yip’s documents with respect to the Property. He did not request any environmental reports or ask about the historic use of the Property. CBRE performed its due diligence. Mr. Moriarty described the due diligence as “fairly simplistic” on an asset of the nature of the Property. Specifically, it involved obtaining the title documents, the tax report, and a copy of Shing Yip’s lease with ICBC (the “Lease”). Mr. Moriarty stated that, in his opinion, a lease is often the most important document, as the vendor might not be

aware of unusual clauses in a lease, such as a tenant’s option to purchase, or of a right to terminate a lease on sale.

CBRE’s Listing and Marketing of the Property

[26] Beginning in January 2018, CBRE listed the Property for sale on the Multiple Listing Service and began marketing it. The agents working on the sale were Mr. Moriarty and Mr. Taylor. CBRE’s marketing materials included a brochure titled “Prime Westside Vancouver Development Site with Holding Income”, approved by Mr. Moriarty.

[27] Mr. Eng did not have a role in marketing the Property. Mr. Moriarty testified that he did not have much interaction with Mr. Eng and never discussed the historical use of the Property or environmental reports with him. He was concerned about potential awkwardness as Mr. Eng was a real estate broker and, despite his ongoing involvement with the Property, he had not been given the listing.

Negotiations between Mr. Moriarty and Mr. Chen

[28] Throughout the negotiations leading to Ms. Zuo’s offer, Ms. Zuo was represented by Mr. Chen of RE/MAX, and Shing Yip was represented by Mr. Moriarty.

[29] On February 13, 2018, Mr. Chen contacted CBRE and wrote that his client was interested in the property. Another offer was reportedly being considered at this time. Mr. Moriarty responded to Mr. Chen by email and provided documents related to the Property, including the Lease. The email also attached Lease renewals and modifications.

[30] On February 15, 2018, Mr. Chen emailed Mr. Moriarty acknowledging receipt of the Lease documents and wrote, “[b]y the way, before ICBC, do you know what kind of the tenant was?”

[31] On February 16, 2018, Mr. Moriarty responded, “[n]o idea sir – they have been there a very long time!”

[32] Mr. Chen did not inquire further of Mr. Moriarty about the prior use of the Property. Mr. Moriarty did not discuss the Property's environmental condition with Mr. Chen. He did explain that the vendor was not in Vancouver and knew very little about the Property.

[33] Ms. Zuo presented an offer for the Property, dated February 17, 2018, at an initial offer price of \$7,750,000. The parties negotiated the terms of the offer by marking up and initialling a standard form Contract of Purchase and Sale. Various offers were sent back and forth with handwritten amendments, strikeouts, initials, and signatures.

[34] Mr. Moriarty said that he specifically wanted to include an "as is, where is" clause into the offer because he did not have any information about the Property. He testified that it is standard practice for a listing broker to do this in both sale or lease transactions when they have no information about the Property. The clause puts a potential purchaser (or tenant in a lease transaction) on notice that the seller is not making any representations about the condition of the property and the purchaser should, accordingly, do their own due diligence. Mr. Moriarty's evidence in that regard was not disputed. In fact, his evidence was consistent with the evidence read in from Mr. Chen's discovery by Ms. Zuo's counsel:

Q 255 Okay. And what was your question?

A ...they cross out the on or before the subject removal date, the seller will allow the buyer's bank, land survey, inspection company, oil tank company and environmental inspector access to the property within 24 hours reasonable notice.

So they crossed this one, and also they added the buyer's rights to enter upon the property and also the site profile and as is.

So we had this discussion with the seller's agent why they need to have these kind of clause.

Q Tell me about that discussion.

A So the seller's agent indicated that the seller, they are not in Vancouver. And also for this property they just, like, assigned to the property management company to do the management, to do the rental management for long, long time already, so they do not have any of the idea about this property. So that's why they want to add these kind of clause.

[35] The parties negotiated a subject removal date. Ms. Zuo initially sought a later date by which to remove subjects; Mr. Moriarty wanted an earlier date because of the buoyant and very busy market. He said that there was a lot of interest in the Property. He explained that if the subject clauses were not lifted, Shing Yip may have countered or may have continued to list the property. They agreed on a subject removal date of March 15, 2018.

[36] In the pleadings Ms. Zuo initially filed against Shing Yip, she suggested that the earlier subject removal date was deliberate, for presumably nefarious purposes, but that argument was not pursued at trial. In my view, it could not have succeeded. In the usual back-and-forth between a purchaser and a seller, the date on which subjects will be removed is often a matter for negotiations, and it is common for a seller to prefer an earlier removal date. In this case, after negotiations, the parties agreed on a date.

Contract of Purchase and Sale

[37] Negotiations between Ms. Zuo and Shing Yip continued and a Contract of Purchase and Sale was finalized on February 27, 2018 (the “CPS”). The negotiated purchase price was \$8.25 million, the subject removal date was March 15, 2018, and the closing date was July 30, 2018.

[38] The CPS also included the following terms:

BUYER’S RIGHT TO ENTER UPON THE PROPERTY

The Seller hereby grants to the Buyer and its authorized representatives the right to enter upon the Property during normal business hours upon prior reasonable notice and from the acceptance date of the Contract up to the Closing Date, for the purpose of carrying out such inspections, examination, tests and surveys, including soil tests (no invasive testing or drilling shall be conducted with consent of the seller, such consent may be withheld) as it may deem necessary, provided that (a) any such entry will not unduly interfere with any tenants of the Property, (b) any such entry will be subject to the rights of the tenant under the Lease and will not injure the Property, and (c) the Buyer shall indemnify and save harmless the Seller from any and all lost, cost or damage suffered as a result of the Buyer exercising the rights pursuant to this section.

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 therein.

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.

[39] I note that although Mr. Chen said at his examination for discovery that Shing Yip deleted the clause entitling the buyer to enter upon the Property, in the final version of the CPS provided to me at trial, that provision had not been deleted.

[40] The CPS also included several subject clauses for Ms. Zuo’s benefit. The important ones for the purposes of this dispute are:

Subject to the Buyer, on or before March 15 2018 at the Buyer’s expense, obtaining and approving an inspection report against any defects whose cumulative cost of repair exceeds \$1,000 and which reasonably may adversely affect the property’s use or value. This condition is for the sole benefit of the Buyer. The seller will allow access to the property for this purpose on reasonable notice.

Subject to the Buyer obtaining and approving the Environmental Report Phase 1 & 2 on or before March 15 2018.

Subject to a new first mortgage being made available to the Buyer on or before March 15. This condition is for the sole benefit of the Buyer.

[41] The CPS required an initial deposit of \$50,000, to be paid within 48 hours of Shing Yip accepting Ms. Zuo’s offer to purchase the Property (the “First Deposit”) and a second deposit of \$450,000, to be paid within 48 hours of Ms. Zuo notifying Shing Yip that the conditions precedent set out in section 16 of the CPS had been satisfied or waived (the “Second Deposit”).

[42] Ms. Zuo paid the First Deposit on February 17, 2018.

Subject Removal

[43] On March 15, 2018, Ms. Zuo signed and provided to Shing Yip a document entitled “Removal of ‘Subject to Clause’”. As relevant to this dispute, Ms. Zuo waived the subject clause permitting her to obtain and approve a Phase 1 and 2 Environmental Report, the subject clause permitting her to obtain and approve an inspection, and the subject clause for financing.

[44] When Ms. Zuo waived or removed the subject clauses, she had not begun the process of obtaining a Phase 1 Environmental Report. Nor had she secured financing for her purchase of the Property.

[45] On March 31, 2018, Ms. Zuo paid the Second Deposit. Both deposits are currently held by CBRE.

Post Subject Removal – Prior to Closing

[46] Between March 15 and June 14, 2018, the parties took steps to implement the CPS. Ms. Zuo was put in contact with both ICBC and Mr. Eng to coordinate the transition, and Shing Yip authorized Ms. Zuo to negotiate a lease renewal with ICBC.

[47] Mr. Moriarty testified that, in late May 2018, Ms. Zuo requested that Shing Yip to provide her with expedited access to the Property for the purpose of obtaining a Stage 1 Environmental Report (the “Stage 1 Report”). Shing Yip agreed to move the inspection date for the Stage 1 Report from June 11, 2018, to about May 31, 2018.

[48] Between about May 29 and June 12, 2018, Next Environmental Inc. (“NEI”) accessed the Property and performed its Stage 1 environmental assessment. On June 12, 2018, NEI delivered its Stage 1 Report to Ms. Zuo.

[49] I was advised that on June 14, 2018, Mr. Chen emailed Mr. Moriarty and informed him that the results of the Stage 1 Report indicated the Property had earlier been used as a gas station and may have environmental contamination. On behalf of Ms. Zuo, Mr. Chen demanded that the completion date be extended to September 28, 2018. Shing Yip did not consent to extending the completion date.

[50] On July 4, 2018, Mr. Chen emailed Mr. Moriarty and informed him that the results of the Stage 2 Environmental Report came in from TRI Consulting, which demonstrated the Property had environmental contamination. Mr. Chen requested a two-month extension of the closing date. Mr. Moriarty forwarded this email to Ms. Ma on July 6, 2018.

[51] On July 26, 2018, Mr. Gregory, Ms. Zuo's counsel, wrote a five-page letter to Shing Yip's solicitor alleging that Shing Yip made fraudulent representations to Ms. Zuo. The final paragraph of the letter reads, "[a]lso the CPS requires an assignment from ICBC attorning to a novated lease with Ms. Zuo. Will Shing Yip be in a position to tender that on Tuesday?"

Closing and Subsequent Listing

[52] On July 30, 2018, Shing Yip's solicitor tendered closing documents to Mr. Gregory's office. Specifically, Shing Yip provided:

- a. a Form A Transfer, executed by Maggie Ma and Koon Ma;
- b. the Vendor's Statement of Adjustments signed by Maggie Ma;
- c. an Assignment of Lease signed by Maggie Ma;
- d. a Notification of Sale signed by Maggie Ma; and
- e. a Statutory Declaration signed by Maggie Ma and Koon Ma.

[53] Ms. Zuo did not complete the purchase of the Property on July 30, 2018.

Relisting

[54] Shing Yip relisted the Property for Sale.

[55] Mr. Moriarty testified that on October 15, 2019, a year and five months later, Shing Yip sold the Property to Penako Holdings Ltd. for \$5.58 million, resulting in an undisputed sale price reduction of \$2.67 million. At trial, Ms. Zuo conceded that if

she is liable for breach of contract, then Shing Yip's damages are \$2.67 million. Mr. Moriarty was not cross-examined about Shing Yip's relisting efforts.

Litigation against Shing Yip—Action No. S1811316

[56] On October 19, 2018, Ms. Zuo sued Shing Yip, seeking the return of her deposits and unspecified damages.

[57] On November 23, 2018, Shing Yip defended against Ms. Zuo's action and filed a counterclaim seeking specific performance of the CPS.

[58] On May 2, 2019, counsel for Ms. Zuo confirmed that Ms. Zuo was not interested in purchasing the Property and that Shing Yip could proceed to relist the Property for sale.

Issues as They Relate to the Defendant Shing Yip

[59] The primary issue as it relates to Ms. Zuo and Shing Yip is whether Shing Yip made a fraudulent misrepresentation to her.

[60] The secondary issue is whether Ms. Zuo is in breach of the CPS by failing to close on the purchase of the Property, and if so, whether Shing Yip should be entitled to damages.

[61] In the notice of civil claim as originally filed, Ms. Zuo alleged that Shing Yip made three separate fraudulent misrepresentations by:

- a. repeatedly assuring Mr. Chen, her agent, that it did not have copies of any environmental reports;
- b. representing to Mr. Chen that Shing Yip had no idea what the Property was used for in the past; and
- c. representing the Property as a "Prime Westside Vancouver Development Site".

[62] After all of the evidence had completed, Ms. Zuo abandoned the second and third allegations set out above. She also abandoned her claims for breach of good faith and breach of contract for failure to provide an estoppel certificate. As a result, the only remaining allegation against Shing Yip is that it made a fraudulent misrepresentation by repeatedly assuring Mr. Chen that it did not have copies of any environmental reports.

The Law with Respect to Fraudulent Misrepresentations

[63] To establish a claim in fraudulent misrepresentation, Ms. Zuo must establish that:

- a. Shing Yip made a representation of fact to her;
- b. the representation was, in fact, false;
- c. Shing Yip knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
- d. Shing Yip intended Ms. Zuo to act on the representation; and
- e. Ms. Zuo relied upon the false representation and thereby suffered a detriment.

[64] *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25 as cited in *Wang v. Shao*, 2018 BCSC 377 at para. 196.

[65] I have concluded that on all five elements of the test, Ms. Zuo fails in her claim against Shing Yip.

Did Shing Yip make a representation of fact to Ms. Zuo?

[66] Shing Yip's decision-maker regarding the sale of the Property was Ms. Ma. She, in turn, acted through her agent Mr. Moriarty.

[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.

[68] Moreover, even if Mr. Moriarty had made a representation to Mr. Chen, it would be insufficient to establish a fraudulent misrepresentation; the representation must have been communicated to Ms. Zuo. Under cross-examination at trial, Ms. Zuo conceded that:

- a. Mr. Chen did not tell her about Shing Yip not having environmental reports until “probably after March 15 [2018]”;
- b. she did not remember discussing whether Shing Yip had environmental reports at any point prior to March 15, 2018;
- c. she did not remember discussing environmental reports prior to signing the CPS;
- d. at the time of “writing” the CPS, she did not talk about environmental reports; and
- e. at the time of signing the CPS, she did not know that an environmental report would be necessary for financing purposes.

[69] There was no evidence from any other witness that a representation about environmental reports was made to Ms. Zuo prior to her entering into the CPS or waiving subjects. To the contrary, Ms. Zuo’s uncontradicted evidence was that she did not consider the issue of Shing Yip possessing environmental reports until after removing the subject clauses.

Was the representation false?

[70] Although I have concluded that no representation was made to Ms. Zuo, I continue the analysis of the other elements of fraudulent misrepresentation on the assumption that Ms. Zuo is arguing that Mr. Eng’s knowledge of the ICBC report should be imputed to Shing Yip or Mr. Moriarty.

[71] Mr. Moriarty testified that, had he been asked about whether he had any environmental reports with respect to the Property, he would have honestly said no. Shing Yip did not have any environmental reports.

[72] Mr. Eng, the property manager, also testified at trial. His evidence was clear, and ultimately uncontested, that he never told anyone at Shing Yip about an environmental report or forwarded such a report to Shing Yip.

[73] Ms. Zuo submitted that the only reason “for refusing the report” was Mr. Eng’s desire to preserve [Ms. Ma’s] plausible ability to deny there were any issues with the Property. Ms. Zuo also submitted that there is only one inference to be drawn from Mr. Eng’s conduct and that was to “clothe Shing Yip with a veneer [of] plausible deniability if questioned about the condition of the Property”. This was not proven in evidence. Mr. Eng said that the environmental condition of the Property was ICBC’s responsibility under the Lease and, as a result, he did not forward ICBC’s October 15, 2012 letter to Ms. Ma. Mr. Eng’s explanation was clear and was not shaken in cross-examination.

Did Shing Yip know that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false?

Knowledge that the Representation was False

[74] In her pleadings, Ms. Zuo made several allegations that Ms. Ma and Mr. Moriarty were aware of the environmental reports:

- a. Shing Yip knew that if it attempted to get an estoppel certificate, or even have ICBC execute any documentation respecting the issues raised by the pollution of the Property, Ms. Zuo would have learned of the contamination of the Property (para. 10);
- b. Shing Yip was in possession of the environmental reports, or, in the alternative, intentionally discarded environmental reports or refused to accept them in order to help it claim ignorance of the fact the Property was contaminated (para. 13);

- c. Shing Yip intended to, and did, induce [Ms. Zuo] to enter into the CPS by making misrepresentations (para. 15);
- d. Shing Yip knew that it had successfully defrauded [Ms. Zuo] (para 16);
- e. Shing Yip deliberately withheld amendments to its lease with ICBC in order to hide the fact of contamination (para 17).

[75] On the evidence, however, it was clear that Mr. Moriarty and Ms. Ma did not know of any environmental report with respect to the Property. Both Mr. Moriarty and Ms. Ma testified that they did not know about the historical use of the Property or any environmental reports. This was not seriously challenged on cross-examination.

[76] In this case, it is only Mr. Eng who may have had knowledge about potential contamination issues on the Property. He received communications from ICBC in 2011 and a letter, attaching a report, in October 2012. He testified, and was not shaken in cross-examination, that he did not read the report nor forward the letter or the report to Shing Yip, and never discussed contamination with anyone at Shing Yip.

[77] Ms. Zuo argues that Shing Yip committed fraud as a result of “corporate knowledge”. Mr. Eng’s receipt of the letter and report from ICBC in 2012, which he did not forward to Ms. Ma, cannot mean that Shing Yip, as a corporation, was necessarily aware of that letter and the report, so as to vest Ms. Ma and Mr. Moriarty with corporate knowledge.

[78] This issue was dealt with in *Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72 [*Motkoski*]. In *Motkoski*, the defendant, a local government, sold a parcel of land to the plaintiff, having commissioned and received a report specifically identifying a contamination issue as a result of the parcel’s prior use as a landfill. The prior use as a landfill was common knowledge in the area, and the environmental report was delivered to the provincial environmental agency. The agency misfiled the report and incorrectly represented to the plaintiff that there were no records of the prior use of the parcel as a landfill. The sale completed on an as-is

basis, and the plaintiff brought an action in fraudulent misrepresentation against the vendor municipality only.

[79] At trial, liability was imposed on the defendant on the basis of concealment and the doctrine of corporate knowledge. The local government could be imputed with knowledge of (or reckless indifference to) the contamination. The decision was overturned on appeal.

[80] Regarding corporate knowledge, the Alberta Court of Appeal wrote:

[88] The trial judge found that because of this “corporate knowledge”, a representation about the suitability of the site (assuming one was made) was false and fraudulent. “Corporate knowledge” can have two different meanings. In some situations knowledge in the mind of any one representative of a corporation will be attributed to the corporation as a whole. If several representatives of a corporation have different pieces of information which, if combined together, are significant, the corporation might be assumed to have that knowledge, even if no one representative of the corporation is sufficiently apprised of all the information to make the connection. The trial judge, however, used the term “corporate knowledge” in its alternative meaning. In some cases a corporation may have files or documents that contain important information. However, the individual employees who are making decisions (or representations) are not actually aware of the information in those documents. The information is “corporate knowledge” in the sense that the corporation has access to it, but the human agents who are acting in the name of the corporation are not actually aware of that information.

[89] Even assuming there was a representation as to the suitability of the site, it could not in these circumstances become fraudulent because of “corporate knowledge”. There is no authority supporting liability on that basis. In order to have such attributed knowledge amount to fraud, something more is needed. Absent fraudulent intention or conduct by one of the individual corporate representatives, fraud cannot be attributed to the corporation: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145, [1990] 3 W.W.R. 690 at p. 161 (C.A.) aff'd on this point [1993] 1 S.C.R. 12 at pp. 22, 54, 74-5. For example, if the person with the key knowledge intentionally withheld it from the representative who is making the critical decision, knowing or intending that others would proceed on false assumptions, that might result in corporate fraud. However, merely because the appellant's archives contained information which the appellant negligently did not access cannot be turned into fraud.

[81] Therefore, even if corporate knowledge could be made out here, Ms. Zuo would still need to demonstrate fraudulent intention or conduct by Ms. Ma or another representative of Shing Yip. She has not done so. I accept that if Shing Yip knew

about an environmental report that disclosed environmental contamination, and intentionally failed to disclose it to Mr. Moriarty, a different finding might have resulted. However, the evidence demonstrates that this was not the case.

Recklessness

[82] As it became evident that Ms. Zuo could not prove actual knowledge by Shing Yip, Ms. Zuo abandoned this line of argument when this trial resumed in December 2024. In Ms. Zuo's closing, she instead alleged that a failure to fully consult with Mr. Eng was the real problem and representing that Shing Yip had no environmental reports was reckless as a result.

[83] In assessing whether Mr. Moriarty recklessly represented that there were no environmental reports when he had not consulted with Mr. Eng, *Motkoski* is again instructive. With respect to what constitutes recklessness, the Alberta Court of Appeal wrote:

[58] Under the second branch, it is sufficient if the defendant did not actually know the statement was false, so long as the statement was made recklessly. "Recklessly" in this context means that the statement was made "without caring whether it was true or false". "Recklessly" does not just mean the statement was made with "very great negligence", nor that it was made in a highly risky context, such that the probability of someone relying on the statement to their detriment was enhanced. As Lord Herschell said in *Derry v. Peek* at p. 375, "making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds". Under neither branch of the test is it sufficient that the defendant "should have known" the truth, or should have been more careful and made further inquiries; actual knowledge or actual indifference to the truth is required.

[84] The Court then dismissed the claim for fraudulent misrepresentation:

[90] ... fraud ordinarily arises from the making of false statements, knowing they are false. The necessary deceitful intention cannot arise if the key decision makers are ignorant of the incorrect fact. Knowledge and ignorance are incompatible opposites. Statements cannot be made recklessly, without caring whether they are true or false, unless the person making the representation is aware, at least, that there is some issue about the truth of the fact. A person who is ignorant of the existence of information that might throw the fact into doubt cannot be reckless in this sense of the word.

...

[93] The appellant concedes that it “could have” discovered the existence of the landfill if it had reviewed the old files given to it by its predecessor, the Yellowhead Regional Planning Commission. That however is a long way from “actual knowledge”, and it does not amount to fraud. It would only amount to recklessness if the appellant deliberately did not look in those old files, because it did not care what was in them. There is nothing on this evidence to support any such recklessness; the uncontradicted evidence was that no one realized what was in those old records, or even turned their minds to their existence.

...

[99] Carelessness or negligence in conducting due diligence is not the same thing as “recklessness”, as that term is used in the law of fraud. While an inference of fraud could possibly be drawn from the trial judge’s findings of a lack of diligence (if the inquiries were deliberately inadequate to conceal the truth), it is unclear whether she applied the correct legal test in defining “recklessness”. If Mr. Beck had a good reason to believe that the landfill was actually on Lot 1 (as opposed to being somewhere on the SE 1/4) but deliberately refrained from making inquiries because he did not care about the truth, that would amount to fraud. However, reckless disregard for the truth on this basis cannot reasonably be inferred from this record. The inquiries of Alberta Environment, and the ordering of the OMNI-McCann report are inconsistent with a reckless disregard for the truth. Negligent or careless reading of the Area Structure Plan, or the failure to follow up on information and hints in that Plan, might amount to negligence, but it is not reckless disregard for the truth.

[85] Therefore, simply the fact that Mr. Moriarty or Ms. Ma “could have” discovered the existence of the expert report is not sufficient. There is no evidence that Mr. Moriarty deliberately avoided seeking out this information because he “did not care”: *Motkoski* at para. 93. Rather, he gave a perfectly cogent explanation for why he did not do so. He was sensitive to the awkwardness that might result because Mr. Eng, a real estate broker, did not get the listing for the Property he had managed for the Ma family for many years.

[86] Moreover, there is no evidence that Mr. Moriarty or Ms. Ma should have suspected the existence of a report or suspected that Mr. Eng may have had or known about such a report. Ms. Ma knew that Shing Yip had not commissioned an environmental report for the Property themselves, and if Mr. Eng commissioned such a report, Ms. Ma would have known about it as he would have invoiced Shing Yip for it. There was no argument raised as to the basis on which Ms. Ma or Mr. Moriarty should have suspected that ICBC, a commercial tenant that had leased

the Property for almost 20 years, would have commissioned an environmental report on its own behalf.

[87] Ms. Zuo did not point to any cases that created a duty on Shing Yip, as the Property vendor, to make certain additional inquiries or face an argument that it had acted recklessly giving rise to a successful claim in fraud. *Motkoski* makes clear that even if Ms. Ma and Mr. Moriarty should have made further inquiries, this is insufficient to constitute fraud: para. 58.

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 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.

Did Ms. Zuo rely on the false representation and thereby suffer a detriment?

[91] As discussed under other elements of the test, there is no evidence that Ms. Zuo had any discussion about environmental reports before signing the CPS or before she waived the subject clauses.

[92] Even if such a discussion had occurred it would, in my view, have been wholly unreasonable for her to rely on a statement that “we do not have any environmental reports” as a basis to conclude that the Property was not contaminated.

[93] Ms. Zuo did not testify that she would have acted any differently had she been told there were no environmental reports.

Concealment of Latent Defect

[94] Finally, I also do not find that the actions of Shing Yip in this case amount to concealment. As stated in *Motkoski*:

[59] In the law of vendor and purchaser “concealment” is a term of art. There is a distinction between “concealment” and non-disclosure, or mere silence, even though in ordinary speech those terms might sometimes be synonymous. Concealment requires a positive step to hide a defect in the land, coupled with an intention to withhold knowledge of the defect from the purchaser. If a defect is concealed, it is treated the same way as a representation that the defect does not exist; concealment therefore often amounts to fraud.

[60] Non-disclosure or mere silence, on the other hand, is just a failure to volunteer information that might be of interest to the other side. Non-disclosure is sometimes unhelpfully referred to in the case law as “mere concealment”, as compared to true “active concealment”. Absent a duty to disclose, non-disclosure generally has no legal consequences, except in those rare cases where the silence amounts to fraud: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 at paras. 76-8; *Freeman v. Perlman*, 1999 BCCA 40, 169 D.L.R. (4th) 133, 65 B.C.L.R. (3d) 97. The non-disclosure of a defect in the premises is generally not actionable unless there is a covenant in the contract that the defect does not exist.

[95] Thus, mere silence or non-disclosure on the part of Shing Yip is not the equivalent of concealment. There was no evidence that Ms. Ma or Mr. Moriarty took any positive steps to hide the reports. In fact, they flagged the risk created by their

lack of knowledge about the environmental state and history of the Property by including the “As Is” condition in the CPS. As stated in *Motskoski*, “[s]pecifically identifying the risk in the contract is the exact opposite of “concealment”; it flags the risk, and allocates it to the purchaser”: para. 70.

Conclusion on the Claim against Shing Yip

[96] For the foregoing reasons, I conclude that Ms. Zuo has not proven that Shing Yip committed fraudulent misrepresentation or concealment. The CPS was binding on her and she was required to close on the purchase of the Property in accordance with its terms. She did not, in breach of contract.

Counterclaim

[97] Pursuant to the CPS, Ms. Zuo was required to complete the purchase of the Property on the completion date of July 30, 2018.

[98] Under the doctrine of *caveat emptor*, a purchaser bears the risk of defects in the quality of a property unless they have protected themselves through a term in the contract. Subject to certain exceptions, including fraud or failure to disclose a latent defect of which the vendor is aware, the doctrine of *caveat emptor* applies to real estate transactions in British Columbia. A vendor is only subject to a duty to disclose when they are aware of the defect or where they make a representation recklessly disregarding its truth or falsity. The onus is on the purchaser to establish that the vendor knew of the defect and failed to disclose it, or actively concealed the defect: *Nixon v. MacIver*, 2016 BCCA 8 at paras. 32–34; *Hawryliw v. Smith*, 2020 SKCA 92 at para. 31.

[99] I have already determined that Ms. Zuo has not proven that Shing Yip had knowledge of the contamination, or were reckless to its existence, nor that they concealed the contamination. Therefore, the doctrine of *caveat emptor* applies.

[100] Pursuant to the terms of the CPS, Ms. Zuo had until March 15, 2018 to satisfy herself regarding the environmental condition of the Property.

[101] On March 15, 2018, Ms. Zuo removed the subject clauses with respect to the Property and, as a result, was obliged to complete the purchase of the Property by the completion date.

[102] Ms. Zuo did not complete the purchase despite requests from Shing Yip that she do so.

[103] Shing Yip relisted the property and in February 2019, sold it to a new purchaser for \$5.58 million, \$2.67 million less than Ms. Zuo was required to pay. As I have said, the quantum of damages is not in issue.

Conclusion on Counterclaim

[104] As I have found that the CPS 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.

Costs

[106] Shing Yip is entitled to the costs of this action and of its counterclaim against Ms. Zuo.

[107] The parties are to exchange written submissions as to costs, not to exceed ten pages each, and a two-page reply. On receipt of costs submissions, I will advise whether additional oral submissions will be required.

Litigation against Tony Chen and RE/MAX City Realty Action No. S206643

[108] Ms. Zuo alleges that Mr. Chen owed contractual and tort duties to take reasonable care in advising her with respect to her intended purchase of the Property.

[109] The claims were particularized at paras. 8–10, 15, and 16 of the notice of civil claim as follows:

- a. Mr. Chen failed to discover that the Property and a neighboring property had previously been used as gas stations;
- b. Mr. Chen failed to notice that there was evidence of prior environmental work being done on the Property;
- c. Mr. Chen failed to ensure that Ms. Zuo protected herself against the risk of contamination either by inserting warranties to the effect that the Property was not contaminated, or by allowing sufficient time for Ms. Zuo to investigate the possibility of contamination on the Property before she had to remove subject conditions;
- d. Mr. Chen failed to recognize that the 26 days between the CPS and the subject removal date were insufficient for completing the necessary investigations; and
- e. Mr. Chen advised Ms. Zuo to remove subject conditions in the contract without doing any environmental investigation and without advising her that she would not be able to get financing without at least a phase 1 environmental report.

[110] Although not specifically pled, presumably Ms. Zuo's claim against Mr. Chen is based on its vicarious responsibility for the actions of its employee or its failure to supervise or monitor its employees. Counsel for Mr. Chen and RE/MAX said, although did not plead, that vicarious responsibility would not be seriously challenged.

[111] At trial, Ms. Zuo also advanced an allegation that Mr. Chen was not qualified to provide commercial real estate services to her. That claim is not included in the notice of civil claim. Mr. Chen and RE/MAX submit that an allegation that was not pleaded cannot properly be advanced at trial or, in the alternative, that the allegation is bound to fail.

[112] Ms. Zuo seeks indemnification from Mr. Chen and RE/MAX for the loss of her deposits paid under the CPS, any amount she must pay to satisfy the counterclaim (as agreed, \$2.67 million), costs, the expenses incurred to investigate the Property, and unparticularized general damages.

Evidence

[113] When the trial commenced in June 2024, I heard Ms. Zuo's evidence and, after a qualification *voir dire* in which I disallowed certain parts of his report, the evidence of Eugen Klein who was qualified as an expert to give opinion evidence with respect to:

- f. the qualifications that a realtor should have before advising a client of commercial transactions;
- g. the investigations a realtor should make at the outset to determine prior uses of a property and to inquire into a client's level of sophistication and understanding;
- h. what a reasonable realtor should have done to investigate the property before a client removed subject clauses;
- i. what a reasonable realtor should have advised a person in Ms. Zuo's position before signing the CPS and removing the subject clauses; and
- j. what a reasonable realtor should have concluded about the manholes that were evident in the photographs of the Property.

[114] After hearing Ms. Zuo's and Mr. Klein's evidence, the defendants elected not to call the defendant Mr. Chen or a defence expert.

[115] Counsel for Ms. Zuo indicated that, as a result, he would call Mr. Chen as an adverse party witness when the trial resumed. That did not occur. Instead, counsel read certain agreed upon questions and answers from his examination for discovery into the record.

[116] As a result, Ms. Zuo's case against Mr. Chen and RE/MAX consisted of her evidence, certain read-ins from Mr. Chen's examination for discovery, and Mr. Klein's evidence.

Ms. Zuo's Evidence

[117] Ms. Zuo's evidence in direct and in cross-examination, as it related to the conduct of Mr. Chen, can be summarized as follows:

- a. Did you have any discussions [with Mr. Chen] in the end of February about how long it would take to get an environmental report? No.
- b. Did you have any discussions [with Mr. Chen] about the necessity of getting an environmental report to get financing? No.
- c. You had no discussions with Mr. Chen about environmental reports before March 15, 2018? Yes.
- d. Were there any discussions with Tony Chen about environmental reports before March 15, 2018? I don't remember.
- e. How about before you signed the contract? I don't remember.
- f. You don't remember conversations with Tony Chen about subject removal? I have lots of conversations with Tony.
- g. You don't specifically recall discussing [the subject removal addendum]? No.
- h. Do you recall discussing subject removal? Yes, some.
- i. Did you talk about it? I see here that he responded, I don't know what he said, there is a voice message there, I can go and check on my phone, I still have them I can check.
- j. Did [Tony Chen] tell you that you needed to get an environmental report? No.

- k. Did [Tony Chen] tell you this is something you'll need to get financing? No.

Mr. Chen's Discovery Evidence

[118] As explained, Mr. Chen did not testify. Instead, counsel for Ms. Zuo read in certain agreed-upon portions of Mr. Chen's discovery evidence summarized as follows:

- a. Mr. Chen checked the City's building system for the past use of the Property (Q. 110);
- b. Mr. Chen checked the contaminated sites registry and confirmed it did not show anything concerning the Property (Q. 115);
- c. Mr. Chen's experience is that competent lenders will not lend money without ensuring there are no environmental problems (Q. 138);
- d. If Mr. Chen had known that the Property was used as a gas station, he would have advised Ms. Zuo not to purchase it because it would be worth less money and the environmental report could mean she would be unable to obtain financing (Q. 149–152);
- e. Ms. Zuo advised Mr. Chen that she had met with a mortgage broker who told her that they did not need the environmental report phase one. Therefore, the environmental report wasn't the big issue when they were doing the subject removal, because normally it is the lender who requires the environmental report (Q. 192);
- f. Mr. Chen advised Ms. Zuo to speak to a mortgage broker regarding whether she needed an environmental report. Ms. Zuo then advised him that she had been informed she did not need an environmental phase 1 report until funding, which surprised Mr. Chen (Q. 198–199, 439, and 450);

- g. Mr. Chen understood that the seller inserted the “site profile”, “as is” and environmental subjects in the contract because they were overseas owners with no direct knowledge of the Property (Q. 255–256);
- h. Mr. Chen did not see any holes on the Property during his walk through with Ms. Zuo (Q. 460–461, 482, 485, and 488); and
- i. Mr. Chen would have had concerns if he had seen test pit holes on the Property during his walk through and would have advised Ms. Zuo to be careful (Q. 490–493).

Mr. Klein’s Expert Evidence

[119] Mr. Klein’s expert evidence regarding Ms. Zuo’s allegations was:

- a. Mr. Klein opined that the standard required of a reasonable licensee would require them to either: (1) review the ortho maps in VanMap; or (2) visit the planning or licensing department at the City of Vancouver to inquire about past property details and uses.
- b. Mr. Klein also opined that if a licensee noticed that their client has not taken appropriate steps to review or mitigate the risks, it would be generally accepted practice to advise their client of any and all risks and, by way of separate letter before subject removal, advise their client of the potential consequences.
- c. Mr. Klein opined that prior to signing the CPS, a prudent licensee would advise the client of the risks, costs and timelines for completing due diligence. The licensee would also suggest that a timeline of two weeks for commercial property due diligence would be virtually impossible for the buyer to meet and, further, express this in a separate letter.
- d. Mr. Klein opined that it would be customary practice for a licensee to be on high alert and to be aware of their client’s steps taken in due diligence. At subject removal, a licensee would review each term with their client and

- understand their level of comfort with the review and the impacts of subject removal. This should similarly be provided in a separate letter of caution.
- e. Mr. Klein further opined that it would be prudent for a licensee to advise their client by way of written letter that removing conditions without an environmental review would likely render the approval for financing almost impossible, and that the future value of the property might be impacted by adverse environmental findings.
 - f. Finally, Mr. Klein opined that it would have been customary for a licensee, having seen the holes in the pictures provided, to conclude that certain things may exist on the property. The licensee would then ensure the environmental firm hired to assist in the due diligence would specifically supply a report on each cover found.

[120] Fundamental to the assessment of Mr. Klein’s expert report was his agreement that he formed his opinions based on the documents he was given to review and the assumptions he was asked to accept regarding the Property transaction. He agreed that if the assumptions changed, his opinion would also change.

[121] In the March 11, 2024, instruction letter provided by Ms. Zuo’s counsel to Mr. Klein, he was asked to make the following assumptions most of which were not proven by the trial evidence:

- a) At page 1, Ms. Zuo was buying the property as an investment with some ideas of redeveloping it, or, perhaps using the land herself. This assumption was explicitly disproven, as Ms. Zuo testified that she was not intending to redevelop the Property and wished to continue to rent to ICBC.
- b) At page 2, Assumption 1: Mr. Chen had very little experience dealing with sale of commercial properties involving land (that is, commercial properties that were not inside buildings). As I have said, Mr. Chen did not testify and

there was no evidence about his experience read in from his discovery evidence.

- c) At page 2, Assumption 2: Doing a phase 1 study required the person doing it to research the historical uses of the property. As I did not hear from an environmental assessment firm, I heard no evidence in this regard.
- d) At page 2, Assumption 5: Five or 10 years before the sale, ICBC had sent the landlord's agent a phase 1 report indicating that further inquiry was required.
- e) At page 3, Assumption 7: The land in issue had been used as a gas station for many years before the ICBC "testing station" was built. There was no admissible evidence on this issue.
- f) Finally, at page 3, Assumption 8: Ms. Zuo's phase 1 report came back saying that further work needed to be done, and accordingly, Ms. Zuo was unable to obtain financing to complete the purchase. This was not proven at trial.

[122] Because of unproven assumptions underlying Mr. Klein's report, his report and his oral evidence can only be given limited weight.

The Allegations against Mr. Chen

[123] With respect to the specific allegations against Mr. Chen, as I will explain, there are gaps in the evidence that do not allow me to make the findings sought by Ms. Zuo.

Improperly Qualified

[124] As it relates to Mr. Chen's lack of qualifications to provide commercial real estate services, Ms. Zuo needed to prove what specific commercial services he was not qualified to provide. These were not articulated in the pleadings or in the evidence. It is not clear whether the allegation relates to the price or value of the Property; the fact that it was a stand-alone property with a single tenant; or some other specific characteristic of the Property or the transaction.

[125] In any event, there is no evidence before me about the experience or qualifications that Mr. Chen held at the material time. There were no read-ins from his discovery in that regard.

[126] Further, beyond Mr. Klein's opinion that a realtor should be competent and experienced with commercial properties, he did not opine on what specific or additional qualifications a realtor would need before providing the commercial services Mr. Chen provided to Ms. Zuo in this case. Mr. Klein gave no direct evidence about what is considered to be competent and experienced and his report did not set that out. There was no evidence about distinctive qualifications or enhanced licenses for different types of real transactions. It is commonly known that realtors may specialize in a particular sector of the real estate market; condominiums, single-family residences, or commercial properties for example. However, in the absence of evidence of special qualifications required for specific transactions, I cannot find that Mr. Chan was unqualified.

[127] There is no evidence that Mr. Chen failed to consider Ms. Zuo's level of competency, sophistication, or "risk appetite" as was set out in her counsel's opening statement. Ms. Zuo did not testify about her "risk appetite".

[128] What I learned from Ms. Zuo's evidence is that she has a Bachelor's degree from China, that she supported her husband in his autobody business, and that they wanted to invest in a property. I also learned that she needed a mortgage of about \$5 million to buy the Property, along with other funds from family of friends, and that she had dealt with mortgage brokers in the past. She testified that she had previously bought a warehouse property as a possible location for an autobody shop and had rented it out instead. She had dealt with the Business Development Bank of Canada in the past and described it as a Canadian bank to assist small businesses. Finally, in addition to her role in the autobody business, she was a director of a numbered company. This suggests some level of sophistication and prior experience in the commercial real estate market.

[129] On the evidence, Ms. Zuo has not established that Mr. Chen was not properly qualified to assist her.

Ms. Zuo's Claim in Contract

[130] Ms. Zuo did not put into evidence her contract with Mr. Chen. It may not have been a written contract but, to the extent it was oral, she gave no evidence of its terms.

[131] I agree with Mr. Chen's counsel's submission that if an implied contract could be established on the evidence, the implied term would require Mr. Chen to take reasonable care to protect Ms. Zuo's interests and the standard expected of him would be the same as the standard to be applied in negligence. Therefore, my findings below with respect to negligence would apply equally to Ms. Zuo's claim in contract, if an implied contract existed.

Ms. Zuo's Claims in Negligence

Failure to Discover Previous Use of the Property

[132] Although the pleadings also make this allegation with respect to a neighbouring property, the neighbouring property was never addressed in the evidence or in the submissions. I thus address this allegation solely as it relates to the Property.

[133] The well-settled elements of negligence are set out in para. 18 of *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35:

- a) the defendant owed the plaintiff a duty of care;
- b) the defendant's conduct breached the standard of care;
- c) the plaintiff suffered damage; and
- d) the damage was caused, in fact and in law, by the defendant's breach.

[134] To prove that Mr. Chen was negligent for failing to discover that the Property was previously used as a gas station, Ms. Zuo, thus, needs to establish that:

- a. the Property was, in fact, previously used as a gas station;
- b. the applicable standard of care required Mr. Chen to undertake due diligence steps that he failed to undertake;
- c. the additional due diligence steps would have uncovered that the Property was previously used as a gas station; and
- d. Ms. Zuo suffered loss, damage, or expense that was caused in fact, or in law by Mr. Chen's failure to undertake due diligence.

[135] No admissible evidence was led by Ms. Zuo that established objectively that the Property was previously used as a gas station. Mr. Chen's observations of the Phase 1 environmental report obtained by Ms. Zuo, after the subject clauses were waived, can be given little weight. It amounts to an after-acquired understanding and, most significantly, the report is not in evidence before me. Mr. Chen's understanding was that the Phase 1 report came back saying that further work needed to be done, and accordingly, Ms. Zuo was unable to obtain financing to complete the purchase. No direct evidence from the City's building department or any other source has established the accuracy of the report upon which Mr. Chen reached his understanding, and no evidence established the accuracy of his interpretation of the report.

[136] I accept that had the report been in evidence, an inference might be drawn that the Property was previously used as a gas station. It was not in evidence.

[137] In any event, Ms. Zuo has not led sufficient evidence to establish that Mr. Chen breached the standard of care. Mr. Klein's expert report opined that a reasonable realtor should either: 1) review the ortho map in VanMap (a service that was available in 2018); or 2) visit the planning or licensing department at the City of Vancouver.

[138] There is no evidence that Mr. Chen failed to take either of these steps. There is evidence from the read-ins of Mr. Chen's discovery that he checked with the City of Vancouver concerning the prior use of the Property and checked the Contaminated Sites Registry to determine whether the Property was included on it. Mr. Klein did not say that a reasonable realtor needed to do both of his suggested due diligence steps.

[139] Finally, on causation, there is no evidence that, had Mr. Chen taken the additional step of reviewing the ortho map in VanMap, he would have discovered the prior use of the Property. The service is no longer available and no archival evidence was led by Ms. Zuo to establish what the ortho map would have revealed.

[140] On the evidence, Ms. Zuo has not established that Mr. Chen's failure to discover the prior use of the Property was as a result of a breach of the standard of care.

Failure to Notice Prior Environmental Work on the Property

[141] To prove that Mr. Chen was negligent in failing to notice prior environmental work on the Property, Ms. Zuo would need to establish:

- a. There was, in fact, evidence of prior environmental work at the Property;
- b. The evidence of prior environmental work was visible during Mr. Chen's site visits;
- c. A reasonable realtor in the circumstances would have noted the evidence of prior environmental work, recognized it as such, and taken steps as a result; and
- d. Ms. Zuo suffered loss, damage, or expense that was caused in fact, or in law, by Mr. Chen's failure to notice the prior environmental work and to take the requisite steps in that regard.

[142] There is no evidence about the location or obviousness of any prior environmental work. In the evidence that was read in from Mr. Chen's examination for discovery, he said that he did not see the boreholes. His evidence was consistent with Mr. Moriarty's, who said that he did not see testing holes when he viewed the Property. Further, Ms. Zuo did not testify that she saw any testing holes when she viewed the Property.

[143] Ms. Zuo tendered photographs as attachments to her counsel's instruction letter to Mr. Klein. The photographs are not properly in evidence. The photographer was not identified, there is no evidence about when they were taken, where they were taken on the Property, or whether what is shown in the photographs would have been visible to Mr. Chen when he visited the Property. I accept that if Mr. Chen acknowledged seeing the holes, he might have been on notice to make further inquiries. However, in his discovery, he said he did not see the holes.

[144] Mr. Klein's evidence concerning this allegation of negligence was premised on the assumed fact of a "licensee seeing the holes" (Q. 10 on page 8 of his report). Mr. Klein opined that if the licensee had seen the holes, they should recommend having an environmental firm investigate and comment on them.

[145] Ms. Zuo does not allege, and Mr. Klein's expert report does not support, that the standard of care required Mr. Chen to conduct a thorough investigation of the Property for the purpose of identifying potential environmental hazards.

[146] Finally, there was no evidence that Ms. Zuo was inclined to hire an environmental firm prior to the subject removal date. To the contrary, she said that she did not think it was a requirement at that stage. As a result, even if Mr. Chen had seen the holes and recommended that Ms. Zuo retain an environmental company, I cannot conclude that she would have done so.

[147] On the evidence, Ms. Zuo has not established that Mr. Chen's failure to notice the prior environmental work on the Property was a breach of the standard of care expected of a reasonable realtor. In my view, Mr. Chen acted reasonably in making

the CPS subject to Ms. Zuo obtaining and approving an Environmental Report Phase 1 & 2 on or before March 15, 2018, and to an inspection of the Property including by examination, tests, and surveys, including soil tests.

[148] These clauses gave Ms. Zuo the opportunity to retain a qualified consultant to investigate the Property. The decision to waive the conditions, that were solely for her benefit, was hers.

Failure to Ensure Ms. Zuo Was Protected by the Contract

[149] It was not clear to me that this aspect of Ms. Zuo’s claim was still being pursued but, in any event, it cannot succeed. The proposition that Mr. Chen had a duty to insert an environmental warranty is not supported by Mr. Klein’s expert report.

[150] In any event, the inclusion of the subject conditions regarding the right to obtain and approve of environmental reports and an inspection report permitted Ms. Zuo to walk away from the CPS if the subjects were not. A warranty would only have provided her with a right to claim against Shing Yip for breach of contract. In any event, I find that such a warranty would never have been agreed to by Shing Yip based on the insertion of the “As is” clause and the exclusion of any warranties and representations in the CPS.

Failure to Recognize that the 26-day Due Diligence Period was Insufficient

[151] In her pleadings, Ms. Zuo also makes a claim against Mr. Chen for his failure to recognize that 26 days (measured between the date of the original offer to the subject waiver date) was insufficient. At trial, Ms. Zuo advanced the argument that the time period at issue was in fact 18 days (measured between the date of the signed and finalized CPS and the waiver date). In order to prove this claim, Ms. Zuo would need to establish the following:

- a. 26 (or 18) days was, in fact, insufficient for the necessary investigations.

- b. A reasonable realtor in Mr. Chen's position would have determined that 26 (or 18) days was insufficient.
- c. Ms. Zuo suffered loss, damage or expense that was caused in fact, or in law, by Mr. Chen's failure to recognize that 26 (or 18) days for the subject removal clause was insufficient.

[152] The evidence before me does not support an inference that an environmental report could not have been obtained within 26 or 18 days. Mr. Moriarty's and Mr. Klein's fact evidence, based on their professional experiences in obtaining environmental reports as licensees for clients, was that such a report could be obtained in a range of between 10 days to four weeks.

[153] There was no evidence from an environmental consulting firm to confirm what the standard turnaround times were in 2018 for a Phase 1 environmental report, or whether such a report could have been obtained on a "rush" basis given the subject removal date.

[154] Further, Mr. Moriarty testified that a subject removal extension for a Phase 2 environmental report might have been considered if the Phase 1 environmental report indicated a need for further investigation. Mr. Moriarty testified that he thought the subject removal time in the CPS was perfectly reasonable.

[155] In the circumstances, Ms. Zuo has not established that the 26 days as pled, or 18 days after the acceptance of the CPS, for the subject removal period was insufficient. I note that NEI produced a Phase 1 report in 14 days from the date of its retainer.

[156] The subject removal date was a negotiated term. Mr. Chen negotiated the longest period Shing Yip would accept. Ms. Zuo was aware of her option not to remove the subjects if she was dissatisfied.

[157] In response to question 7a, Mr. Klein opined that "for a prudent licensee to suggest the approximate two-week timeline for commercial property due diligence,

environmental/financial review and subject removal, as written in the Contract of Purchase and Sale, would have been virtually impossible for the Buyer to have met”, and “it would have been prudent practice for a licensee at the time to have expressed this to the buyer in writing separate and apart from the Contract of Purchase and Sale”. There were no read-ins from Mr. Chen’s discovery about whether 18 days was sufficient for subject removal. Mr. Klein’s opinion was contradicted by the fact evidence of Mr. Moriarty which supports the inference that a reasonable realtor in Mr. Chen’s position would have considered 18 days sufficient for subject removal. It is also the fact that Ms. Zuo obtained a phase 1 environmental report in less than 18 days.

[158] Finally, as it relates to causation, no loss is attributable to the length of the due diligence period. Mr. Chen negotiated the longest subject removal period that Shing Yip would agree to and did so on the most favourable terms. Ms. Zuo was obliged to make a *bona fide* effort to fulfill the conditions within the time frame negotiated in the CPS. If, having made a *bona fide* effort, she was unable to fulfill the condition, or was not prepared to waive it, she could have walked away from the CPS: *Peier v. Cressey Whistler Townhomes Limited. Partnership*, 2012 BCCA 28 at paras. 21–23.

[159] Ms. Zuo testified that she was aware of her option to refuse to waive the subject clauses. Instead, she chose to waive them without knowing anything about the environmental condition of the Property, and despite being aware by February 27, 2018, that she needed a Phase 1 environmental report as a condition of final approval for mortgage funding. She knew she did not have a commitment letter from a lender. She assumed the risk that she would be unable to confirm mortgage funding without a Phase 1 environmental report and that she would not be able to obtain sufficient funding for the purchase, irrespective of any environmental issues with the Property.

[160] Ms. Zuo was not an unsophisticated first-time homebuyer. She is an experienced businesswoman, with prior experience purchasing commercial property, and had negotiated an \$8.25 million commercial transaction.

Advising Ms. Zuo to Remove Subjects

[161] Ms. Zuo alleges that Mr. Chen advised her to remove subjects without doing an environmental investigation or advising her that she would be unable to obtain financing for the purchase of the Property without a Phase 1 environmental report.

[162] In order to establish a claim against Mr. Chen for improper advice of this description, Ms. Zuo would need to establish the following:

- a. Mr. Chen advised Ms. Zuo to remove subjects without an environmental report or advising her she would be unable to get financing without a Phase 1 environmental report;
- b. Ms. Zuo relied on Mr. Chen's advice in this regard;
- c. Ms. Zuo was unable to get financing without a Phase 1 environmental report;
- d. The Property was unable to pass an environmental assessment to the satisfaction of a bank or other source of mortgage financing;
- e. Ms. Zuo would have otherwise been able to obtain financing if not for the alleged environmental contamination;
- f. A reasonable realtor would not have advised Ms. Zuo to remove subjects or would have advised her that she would be unable to obtain financing without a Phase 1 report; and
- g. Ms. Zuo suffered loss, damage, or expense that was caused in fact, or in law, by Mr. Chen's advice on subject removal.

[163] Given that there was no evidence from Ms. Zuo or Mr. Chen that Mr. Chen specifically advised Ms. Zuo to remove subjects without conducting an environmental investigation, this basis of the claim can be summarily disposed of.

[164] The second aspect of the claim, as made, implies that Mr. Chen actively advised Ms. Zuo to remove subjects, without advising her that she would be unable to get financing. There is no evidence from Ms. Zuo or Mr. Chen that Mr. Chen provided any advice to Ms. Zuo in that regard.

[165] If the allegation is interpreted as an allegation that Mr. Chen generally failed to advise Ms. Zuo that she would be unable to get financing without a Phase 1 environmental report, that allegation also cannot succeed.

[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.

[167] Mr. Klein's report says that Mr. Chen ought to have advised Ms. Zuo that removing conditions without an environmental review "will likely render the approval for financing almost impossible". This was not the subject of read-ins from Mr. Chen's discovery evidence and I cannot make that finding on the basis of Mr. Klein's expert report alone. Further, Ms. Zuo did not testify that she was unable to obtain financing without an environmental review.

[168] I did not hear evidence from an expert mortgage broker or a financing specialist. In the read-ins from Mr. Chen's discovery, he said he advised Ms. Zuo to speak to a mortgage broker about whether she needed an environmental report for financing. To his surprise, she told him she did not. Mr. Moriarty did not testify about their experience with lenders in that regard, and I have no evidence about what

avenues for financing might have been available in the secondary lending market or from other lenders like off shore lenders.

[169] Ms. Zuo's evidence about the information she was given by her mortgage broker, concerning whether financing was available given the result of the NEI Phase 1 report, is hearsay evidence and not admissible for the truth of its contents.

[170] Under the principled approach, hearsay evidence is only admissible if it is necessary and reliable: *R. v. Khan*, [1990] 2 S.C.R. 531, 1990 CanLII 77 (SCC); *R. v. Khelawon*, 2006 SCC 57. This evidence is neither.

[171] The evidence is unnecessary as it was clearly open to Ms. Zuo to call the mortgage broker she spoke with, or any other mortgage broker. The evidence is unreliable because Ms. Zuo is motivated by her own self interest to provide this evidence and there are no other touchstones of its reliability or adequate substitutes for testing its truth and accuracy: *Khelawon*.

[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.

[173] In any event, Ms. Zuo testified that she knew she needed a Phase 1 environmental report as a condition for obtaining mortgage funding. She confirmed that she had spoken with a mortgage broker in this regard and, presumably, she relied on the information she was given by them. Her subjective understanding was that an environmental report was not required until funding. As confirmed by Mr. Chen's discovery evidence, that is what she told him.

[174] Even if Ms. Zuo was able to establish that Mr. Chen gave her advice regarding financing, any reliance she placed on this advice, after having met with a mortgage broker concerning the financing requirements, would have been unreasonable.

[175] I agree with Justice Beames' analysis in *Linten Developments Ltd. v. Kirschner Mountain Estates Ltd.*, 2022 BCSC 1470 at paras. 222–224. There, the court dealt with an allegation that a listing agent made representations to the buyer's agent and the buyer that a building permit had already been approved for a piece of property. Afterwards, the buyer met with the City planning department and learned that only pre-approval had been granted. The court wrote:

[224] ... I find that when Mr. Zhang had his meeting with the City planning department, any reliance Mr. Zhang placed on the information Ms. Aksen relayed from the listing sheet and the listing agent, rather than on the City planners, was not reasonable. ...

[176] Not surprisingly, six years after Ms. Zuo did not complete the purchase of the Property, she does not recall the discussions she had concerning subject removal. The evidence does establish that she met with at least two lenders about financing the purchase of the Property. She received a commercial lending applicant checklist; understood she needed a Phase 1 environmental report (at least before completion); and had the opportunity to ask the lending or mortgage professionals questions regarding their specific lending requirements.

[177] There is no evidence that the Property was unable to pass an environmental assessment to the satisfaction of a financing company. There are no environmental reports from the spring of 2018 in evidence and, as I have said, no evidence was called from a lending company or a mortgage broker.

[178] As a result, I conclude that Ms. Zuo has failed to establish the material facts necessary to succeed on this allegation. Each of the material facts was not proven in evidence.

Causation

[179] Even if the material facts had been proven, I find that Ms. Zuo has not proven causation.

[180] The purchase of the Property was a large commercial transaction undertaken by a sophisticated investor. Ms. Zuo elected to remove subject conditions on an \$8.25 million purchase knowing that she did not have a commitment on financing. She said that she had friends and family willing to lend her the deposit amount as well as the difference between the \$5 million she was seeking in financing and the balance of the purchase price. Ms. Zuo did not submit any conditional lending letters or an environmental report obtained at the time into evidence. She had not yet completed any due diligence concerning any aspect of the Property.

[181] The evidence does not support that Mr. Chen was responsible for Ms. Zuo's decision to take this risk. She is an intelligent, educated person with experience purchasing prior commercial real estate and she ought to have appreciated the risk herself.

[182] The traditional test for determining causation in negligence cases is the "but for" test, which requires a plaintiff to prove, on a balance of probabilities, that their loss would not have occurred but for the negligence of the defendant. As explained in *Clements v. Clements*, 2012 SCC 32:

[8] ... Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[183] In *Engman v. Canfield*, 2023 BCCA 56, the Court of Appeal affirmed the key legal principles relevant to causation:

- a. A defendant is not liable in negligence unless their breach caused the plaintiff's loss (at para. 93).

- b. The causation analysis involves two distinct inquiries: (1) the plaintiff must establish factual causation by proving that the harm would not have occurred but for the defendant's negligent act; and (2) the plaintiff must also establish legal causation, namely that the actual injury or loss must have been a reasonably foreseeable result of the negligent conduct (at para. 93).
- c. While a plaintiff is not required to adduce "scientific proof" of causation, and a causal link between negligent conduct and a claimed loss can be inferred, any such inferences must be based on proven facts and cannot be simply guesswork or conjecture (at paras. 87 and 94).
- d. It is only in rare circumstances that a court is entitled to draw an inference of causation from no relevant evidence at all, and that is when a defendant's negligence prevents the plaintiff from positively proving the cause of their injuries (at para. 98).

[184] To establish factual causation in her claim in negligence against Mr. Chen, Ms. Zuo needs to establish that, but for his alleged negligence, she would have avoided the losses she claims.

[185] I have concluded that Ms. Zuo has failed to establish a causal link between the alleged actions or inactions of Mr. Chen and her breach of the CPS. In large part, that is because there is little evidence about why Ms. Zuo breached the CPS.

[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.

[189] Even if Ms. Zuo had established that she was unable to obtain financing due to environmental contamination on the Property, the evidence is that she was, or should have been, aware of this following her meeting with her mortgage broker and, importantly, prior to subject removal.

[190] The absence of evidence is not linked to any conduct of the defendants Mr. Chen or RE/MAX. They did not prevent her from proving the cause of her loss.

[191] As it relates to legal causation, given that Mr. Chen was aware of Ms. Zuo's meetings with a mortgage broker, there is an issue of whether it is foreseeable that his alleged failure to advise her of the lending requirements would be causative of any loss.

[192] For these reasons, I conclude that Ms. Zuo's claim against Mr. Chen must also fail for want of causation.

Conclusion

[193] Ms. Zuo has failed to adduce sufficient evidence on which I could find any of the elements of negligence based on any of the allegations advanced in the action against Mr. Chen and/or RE/MAX. As such, her claim is dismissed.

Costs

[194] The defendants are entitled to their costs of defending Ms. Zuo's action.

[195] The parties are to exchange written submissions as to costs, not to exceed ten pages each, and a two-page reply. On receipt of costs submissions, I will advise whether additional oral submissions will be required.

Fault of Others, Contributory Negligence, and Failure to Mitigate

[196] Had I found that Ms. Zuo had established that Mr. Chen breached the standard of care and that his breach was causative of her damages, I would have gone on to consider the fault of others, Ms. Zuo's contributory negligence, and a failure to mitigate.

[197] Although not necessary in light of my findings, I will briefly deal with each of these issues.

Contributory Negligence

[198] What amounts to contributory negligence is well-settled. Contributory negligence is the "want of care by a plaintiff for [their] own safety, or ... for the safety of [their] own property" and the question of "whether a plaintiff has met such a standard must be decided on the particular facts of the case.": *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 at para. 56.

[199] Contributory negligence requires foreseeability. In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 1997 CanLII 307, the Court wrote:

[76] ...The test for contributory negligence was summarized by Denning L.J in *Jones v. Livox Quarries*, [1952] 2 Q.B. 608 (Eng. C.A.) at p. 615:

...Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[200] The evidence establishes that, prior to the subject removal date, Ms. Zuo met with a mortgage broker to obtain information about financing for the purchase of the Property.

[201] If it is the case that there was no possibility that Ms. Zuo could have obtained financing without a satisfactory environmental study, presumably the mortgage

broker, a person knowledgeable about lending practices, would have advised her of this.

[202] If the mortgage broker did not advise Ms. Zuo of this, or provided inaccurate information about the timing or necessity of an environmental study, fault could be attributed to the mortgage broker. Of course, Ms. Zuo has not named a mortgage broker as a party to this action but, the fault of the broker would be attributed to Ms. Zuo: *Adams v. Thompson, Berwick, Pratt & Partners*, 39 D.L.R. (4th) 314, 1987 CanLII 2590 (B.C.C.A.) at paras. 5–7.

[203] Alternatively, if the mortgage broker advised that an environmental report was necessary for financing, Ms. Zuo was contributorily negligent in not following that advice. In either event, it cannot be said that Ms. Zuo relied on Mr. Chen in that regard.

[204] Ms. Zuo chose to take the risk of removing the subject clauses knowing that she did not have a firm financing commitment. Her evidence was that she had been offered pre-approval for amounts that were insufficient for her to purchase the Property and, although she was sure that she could borrow from friends and family for the difference, she did not adduce documentary evidence of that.

[205] There was no evidence that Ms. Zuo took any steps to complete her own due diligence during the subject removal period. Although there is no contract between Mr. Chen and Ms. Zuo in evidence, a realtor is generally retained to advise and assist with respect to locating a property on behalf of a buyer. They are not generally retained to complete due diligence for a client concerning the viability of a commercial property. That is often the role of a business advisor.

[206] In this case, there was no evidence that the arrangement between Ms. Zuo and Mr. Chen extended to him completing due diligence on her behalf. Ms. Zuo should have taken steps to investigate the Property and to satisfy herself as to its suitability for her purposes. On the evidence, Ms. Zuo did not intend to redevelop the property but rather intended to maintain it for investment purposes and to retain

ICBC as the tenant. Not taking steps to investigate the Property constitutes a failure on Ms. Zuo's part to look after her own interests.

Failure to Mitigate

[207] Counsel for Mr. Chen and RE/MAX submit that Ms. Zuo failed to mitigate her damages by:

- a. failing to complete the purchase and remedy any alleged environmental contamination thereafter;
- b. failing to make efforts to seek financing from other lenders after she was allegedly advised by one lender that she could not obtain financing based on the environmental reports;
- c. failing to request additional time to satisfy the subject conditions or extending the completion date; and
- d. admitting damages in the Shing Yip action without contesting CBRE's or Shing Yip's efforts to mitigate their losses. The difference between the price Ms. Zuo agreed to pay for the Property and its eventual resale was admitted at trial without any evidence about Shing Yip's or CBRE's efforts to sell the Property or to remediate the environmental concerns before relisting and selling.

[208] I accept that some or all of these might amount to a failure on Ms. Zuo's part to mitigate her damages.

Conclusion

[209] For all of the foregoing reasons, Ms. Zuo's claims in both actions are dismissed, and she is liable on the counterclaim filed against her by Shing Yip.

“MacNaughton J.”