IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hainan Dehong Real Estate Development Corporation v. 0952130 B.C. Ltd.,* 2024 BCSC 2362

Date: 20241224
Docket: S169201
Registry: Vancouver

Between:

Hainan Dehong Real Estate Development Corporation and Hainan Kinghouse Real Estate Development Corporation

Plaintiffs

And

0952130 B.C. Ltd. doing business as a sole proprietor Dominion Lending Centres – A Better Way, Viva Pro-Mortgage Services Inc. doing business as Dominion Lending Centres – A Better Way X300138, Christopher Con-Yue Lee and Frank Gang Lee

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the plaintiffs:	A. Mackay C. Peddle
Counsel for defendant 0952130 B.C Ltd. doing business as Dominion Lending Centres – A Better Way:	A. Morrison
Counsel for defendants Viva Pro-Mortgage Services Inc. doing business as Dominion Lending Centres – A Better Way X300138, and Frank Gang Lee:	C. Cheng
The Defendant Christopher Con-Yue Lee, appearing in person:	C. Lee

Place and Date of Trial/Hearing	Vancouver, B.C. October 23-27, October 30 to November 3, 16-17, 2023, January 22-24, February 26-27 and March 11-12, 2024
Place and Date of Judgment:	Vancouver, B.C. December 24, 2024

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[1] The plaintiffs claim that they paid a refundable commitment fee of USD $500,000 to Westbay Partners Services Ltd. (“Westbay”) for the purpose of securing financing for a land development project in China (the “Hainan Project”). The loan never materialized and Westbay did not return the commitment fee. The plaintiffs bring this action in, among other causes, professional negligence and negligent misrepresentation seeking to recover their losses.

[2] The plaintiffs say that they retained the services of a mortgage broker who, either independently or through one of the corporate defendants, acted in a professional capacity to assist the plaintiffs in securing the financing, but that the defendants failed to fulfill the duties owed to the plaintiffs.

[3] The plaintiffs also allege that Westbay’s representative, who lives in Vancouver and met with the plaintiffs’ representative, is liable for fraudulent or negligent misrepresentation. They allege that he made numerous representations that he knew were false, which induced the plaintiffs to pay the commitment fee. The plaintiffs also argue that he kept the funds for himself, rather than forwarding them to the company that was supposed to syndicate the loan.

[4] The material events took place in 2015 and numerous contemporaneous documents were entered into evidence. However, the parties' interpretation of those documents and their recollection of events and discussions differ. Thus, the credibility and reliability of the parties’ testimonies will be key in resolving the legal issues.

[5] For the reasons set out in this judgment, I find that the claims against all defendants, with the exception of Christopher Lee, have not been substantiated. With regard to Christopher Lee, I conclude that the plaintiffs have established on a balance of probabilities that he is liable to them for USD $500,000 for fraud and/or fraudulent misrepresentation.

I. UNDISPUTED FACTS

A. The Parties

[6] The plaintiff Hainan DeHong Real Estate Development Corporation ("DeHong"), is a company incorporated in China. The plaintiff Hainan Kinghouse Real Estate Development Corporation ("Kinghouse"), was thought to own the property on which the development was to be built. However, it was later discovered that, in fact, DeHong owns the property.

[7] Both plaintiffs (collectively, "Hainan") are family companies, and the sole shareholder of both is Cexen Fu ("Mr. Fu"). Other than by signing contracts on behalf of the plaintiffs, Mr. Fu had no direct involvement in any of the material events. Mr. Fu's daughter, Julie Fu ("Ms. Fu"), acted as the representative for both plaintiff companies throughout. All the plaintiffs' dealings with the defendants were carried out by Ms. Fu. For convenience, any reference in this judgment to Ms. Fu or Hainan is a reference to the plaintiffs (even though Ms. Fu is not a party), except when discussing issues for which the companies' separate legal entities are relevant.

[8] Although born and raised in China, Ms. Fu completed a degree at Simon Fraser University and lives in Vancouver. She is a representative for her family's companies in Canada and is the only member of her family who speaks English. She testified on behalf of the plaintiffs.

[9] With regard to the transactions at issue in this case, Ms. Fu received legal advice from Edmond Luke, a partner at Fasken ("Mr. Luke"), and an associate, Jasmin Zeng (Ms. Zeng). Mr. Luke was called as a witness in the plaintiffs' case.

[10] The defendant 0952130 B.C. Ltd. doing business as a sole proprietor Dominion Lending Centres – A Better Way ("ABW") is a franchise of the national brand Dominion Lending Centres Inc. ("DLC"). DLC has over 180 mortgage broker franchisees across Canada. Lekhraj Chand, a director of ABW ("Mr. Chand"), testified on its behalf.

[11] The defendant Frank Lee is a licensed mortgage broker, and his professional services company is the defendant Viva Pro-Mortgage Services Inc. doing business as Dominion Lending Centres – a Better Way X300138 (“Viva Pro”). For convenience, references in this judgment to Frank Lee will include a reference to Viva Pro, unless it is necessary to distinguish between the two.

[12] ABW was the franchisee with which Frank Lee and Viva Pro were associated during the relevant period. The nature of that association is a contested issue. The plaintiffs allege that ABW is directly or vicariously liable on a joint and several basis for Frank Lee and Viva Pro's actions. Both ABW and Frank Lee oppose that position.

[13] The defendant Christopher Lee (no relation to Frank Lee) was the Canadian representative and a director of Westbay, which ultimately offered to syndicate a loan for the Hainan Project. Christopher Lee was also a director of other companies connected to the impugned transaction. Christopher Lee is a chartered accountant and a chartered professional accountant. He is accused of fraudulent or negligent misrepresentation, which he denies.

B. Mortgage Brokers

[14] Frank Lee is a licensed mortgage broker. Whether he acted in that capacity for the Hainan Project is a contested issue, but many other facts relevant to that issue are not disputed.

[15] Mortgage brokers in British Columbia are a regulated profession under the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 [*MB Act*]. Mortgage brokers must have their license associated with a brokerage firm. In this case, Frank Lee was associated with ABW during the relevant times.

[16] “Mortgage broker” is defined in s. 1 of the legislation to mean a person who does any of the following:

> (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;

> (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;
>
> (c) carries on a business of buying and selling mortgages or agreements for sale;
>
> (d) in any one year, receives an amount of $1 000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;
>
> (e) during any one year, lends money on the security of 10 or more mortgages;
>
> (f) carries on a business of collecting money secured by mortgages;

[17] In addition, s. 1 defines a "submortgage broker" as "any person who … actively engages in any of the things referred to in the definition of mortgage broker and is employed … by, or is a director or a partner of, a mortgage broker".

[18] Prior to joining ABW, Frank Lee was with DLC – Citywide Mortgages. He transferred his license to ABW in the latter half of 2014. The contracts amongst Frank Lee, Viva-Pro, and ABW, and between Viva-Pro and ABW are relevant to determining the legal nature of their relationship.

[19] Frank Lee and ABW entered into a contract in August 2024. Frank Lee incorporated Viva Pro as his professional services company, and in March 2015 entered into a co-brokerage agreement with ABW as the brokerage, Frank Lee as principal, and Viva Pro as the co-Broker. Relevant portions of that agreement are reproduced and discussed later in this judgment.

C. The Richmond Purchase

[20] In June 2014, Ms. Fu was looking to complete her first major commercial real estate transaction on behalf of her family's companies. She made an offer to purchase a large tract of land located at 7931 Alderbridge Way in Richmond (the "Richmond Purchase"). The Richmond Purchase was conducted through another Fu family company (1007500 BC Ltd.). The purchase price was $65 million, with a $32 million mortgage.

[21] Ms. Fu's realtor for that transaction, Philip Yao, recommended Frank Lee to her for arranging a mortgage for that purchase. When she learned that Frank Lee

was associated with DLC, she did an internet search and was comforted that DLC had over 500 branches in Canada.

[22] Shortly after their first meeting, Frank Lee informed Ms. Fu about further information and documents she needed to provide for him to start the process of finding financing for the property purchase. However, no other documents were signed until the completion date, at which time a cost of credit disclosure form was signed. Both Frank Lee and Mr. Chand testified that it was not unusual to have no written agreement between the mortgage broker and the client until the finalization of the financing obtained. Mr. Chand confirmed that no money is earned until a mortgage is secured and the deal signed.

[23] There is no dispute that Frank Lee acted in his professional capacity as a mortgage broker for Ms. Fu in the Richmond Purchase.

[24] Frank Lee obtained a commitment letter from a commercial lender, CMLS Financial Ltd. (“CMLS”) for the purchase of the property. During the Richmond Purchase, Ms. Fu sought legal advice from Mr. Luke and he made specific recommendations for changes to the CMLS commitment letter. Most, if not all, of the changes were accepted.

[25] Ms. Fu also obtained her own commitment letter from a contact she had at the Bank of China. Frank Lee ultimately agreed to accept a lower broker fee to make the CMLS offer more appealing, and the CMLS offer is the one Ms. Fu accepted. Frank Lee testified that lowering his fee to make the CMLS deal more appealing was Mr. Luke’s suggestion to him, which was consistent with Ms. Fu’s recollection.

[26] The agreement for funding for the Richmond Purchase was addressed to the buyer, which was a numbered company owned by the Fu family. However, the address was “c/o Frank Lee” and the street address was “140-7320 King George Highway” in Surrey. That is the location of ABW’s office. There is no dispute that the address had a typographical error because ABW’s address is suite 104, not 140.

[27] Ms. Fu had understood that Frank Lee's fees would be deducted from the financing to be obtained after the deal closed. Frank Lee sent an invoice payable to Mr. Luke and Ms. Fu for $176,000 for his role in the Richmond Purchase, and asked that the cheque be made out to ABW. Fasken paid his invoice on behalf of Ms. Fu and her family's company. The mortgage on that property and resulting commission were the largest ever received by both Frank Lee and ABW.

D. The Hainan Project

[28] Around the time when the Richmond Purchase was closing, Ms. Fu asked Frank Lee to assist her again, this time on a land development project in China. The timing and content of these initial conversations are disputed, as are numerous other facts. However, the general chronology of what happened and when is largely uncontested.

1. General Chronology of Events

[29] The following represent my findings of fact:

a) Sometime in early 2015, Ms. Fu asked Frank Lee to assist her in finding financing for a large land development on Hainan Island, China for her family's companies (the plaintiffs).

b) In the initial phone call, Frank Lee told Ms. Fu that his license did not allow him to provide mortgage broker services for transactions outside British Columbia, and that he had no experience doing business in China.

c) Despite that, shortly after the initial conversation, Frank Lee agreed to assist Ms. Fu in some capacity. The nature of the agreed upon capacity is a contested issue, as are the words used by him when agreeing to assist Ms. Fu.

d) Shortly thereafter, Frank Lee introduced Christopher Lee to Ms. Fu as the Canadian representative of Westbay. Christopher Lee claimed that William Otieno was a principal of Westbay. On behalf of Westbay,

Christopher Lee immediately expressed interest in arranging financing for the Hainan Project.

e) Ms. Fu and Frank Lee had numerous conversations by telephone and email, as well as in-person meetings (which took place at a McDonald's restaurant in West Vancouver) about finding financing for the project. Christopher Lee was in attendance for some but not all of those in-person meetings.

f) Westbay's first proposal for an agreement to find suitable financing for the Hainan Project was set out in a letter dated February 24, 2015 (the "First Proposal"). That letter was signed by William Otieno, identified as a partner of Westbay, as were all subsequent versions and the final, signed agreement.

g) Westbay offered another nine versions of the First Proposal. All were for the potential syndication of a loan (the "Draft Proposals").

h) All the Draft Proposals were discussed by Ms. Fu and Frank Lee. Ms. Fu sought advice from Mr. Luke on two of the Draft Proposals.

i) Ultimately, Westbay and Ms. Fu (on behalf of the plaintiffs) came to an agreement. Ms. Fu's father signed the agreement, which is dated March 11, 2015 (the "Westbay Agreement"). The following are the most relevant features of the Westbay Agreement:

    i. The loan amount would be USD $100 million to be divided in two tranches of $50 million dollars each.

    ii. The agreement had a five-year term.

    iii. The interest rate was 3.8% per annum.

iv. The plaintiffs had to pay USD $500,000 as a commitment fee to be "deposited at an account nominated by [Westbay]". The fee was refundable.

v. Clause 7 stated that the loan would be syndicated through Westbay or one of its affiliated companies, specifically named as Red Nile Capital Limited (UK) or Roxschild Imark International Limited (Hong Kong). Clause 35 stated that Westbay intended to "syndicate all or part of the commitment to one or more private equity funds, real-estate investments trust and high net worth individuals".

vi. Clause 39 stated, in part:

> … If the Loan does not close due to [Westbay] not being able to secure the full Loan amount, [Westbay] shall reimburse the Commitment Fees in full.
>
> [Westbay] will return the Commitment Fee in full immediately upon the Borrower's demand less [Westbay's] reasonable legal and tax advisor costs incurred for the structuring and syndication of the loan.

vii. The letter was addressed to Kinghouse "c/o Frank Lee, Dominion Lending Centre, 140-7320 King George Highway" in Surrey, B.C.

viii. Appendix 1 to the Westbay Agreement set out the bank details for transfer of the commitment fee. The identified account was the Roxschild account at HSBC in Hong Kong (the "Roxschild Account").

j) In May 2015, the parties realized that the property at issue was owned by DeHong, not Kinghouse. Mr. Fu signed a novation agreement to substitute DeHong for Kinghouse on the Westbay Agreement.

k) In May 2015, Ms. Fu, Frank Lee, and Christopher Lee travelled to Hainan Island, China to view the proposed development site. The plaintiffs paid all expenses for that trip.

l) In an email sent on May 18, 2015 to Ms. Fu, Frank Lee indicated that he and Christopher Lee had met with Savills, a valuation company, to

arrange an appraisal of the property to be developed. Savills sent Frank Lee a draft of the valuation in mid-June 2015. In his reply email, Frank Lee asked Savills to reconsider the valuation of the property. Savills reconsidered and raised the appraisal value four-fold.

m) In November 2015, Westbay notified Hainan that it could not secure financing for the transaction and promised to return the refundable fee.

n) Westbay has not refunded the commitment fee.

[30] The plaintiffs say that on March 12, 2015, they paid USD $500,000 into the Roxschild Account that they believed to be owned by Westbay. Christopher Lee admits that this money was paid into that account and accepts that the plaintiffs paid those funds. ABW and Frank Lee, however, submit that this Court has insufficient evidence to conclude which plaintiff or if either of them paid that fee. They say that this evidentiary gap is material and precludes the plaintiffs from succeeding in this litigation.

2. Draft Proposals and Important Correspondence

[31] As noted above, there were many Draft Proposals before the Westbay Agreement was concluded. Typically, each version differed from the previous one, but sometimes the differences were minor. All versions were sent to Frank Lee by Christopher Lee, and Ms. Fu received versions directly from Frank Lee. Some statements in emails accompanying some of the Draft Proposals are relevant, as are other emails not attaching the drafts exchanged around the same time.

[32] The following timeline constitutes my findings about the Draft Proposals and associated correspondence (all dates are in 2015):

a) February 24, 1:56 PM: Christopher Lee emailed Frank Lee stating that Westbay had completed their review of the project and “a high level due diligence on Kinghouse”. He wrote they were in a position to move forward and “formalize this engagement”.

b) February 24, 9:07 PM: Christopher Lee emailed Frank Lee stating that he is attaching the "engagement letter from the London Office". This version was addressed to Kinghouse in name, but with no address. The letter referenced "recent meetings … held with Chris Lee, our Westbay Partner based in Vancouver". The letter stated that Westbay "ha[d already] approached a number of property investment funds, private equity houses and individual investors in the UK, France and Cyprus" to gauge interest in the Hainan Project [emphasis added]. The proposed loan amount was USD $75 million for a three-year term with a "Retainer Fee" of GBP £50,000, a contingency fee of GBP £175,000, and a completion fee of 3% of the financing secured (minus retainer and contingency fee).

c) February 25, 12:23 PM: Christopher Lee emailed the next version of the Draft Proposal which was addressed to "[Kinghouse]/Frank Lee", and he wrote that it was the "engagement letter with your name in the contract". Christopher Lee's email stated that he had spoken to Mr. Otieno about the fees, and that there was no objection to the retainer "being held by me here in Canada". There were no changes to the proposed retainer and contingency fees, but the completion fee was now 3.5%. Frank Lee responded to Christopher Lee by email saying he would "present" the letter to Ms. Fu.

d) February 27, 9:17 AM: Christopher Lee emailed the next Draft Proposal, which was addressed to Hainan "c/o Frank Lee" and had ABW's address listed as 140-7320 King George Highway in Surrey. The content of the letter was quite different in that there was no longer a retainer or contingency fee. Instead, it had a "commitment fee" of USD $1,125,000 on a maximum loan amount of $75 million. There was no completion fee. It also stipulated that the security of the loan would be:

    i. a "first lien deed of trust on the entirety of the property consisting of the Project";

ii. an assignment of the architect's contract for design(s) of the Project consented to by the architect"; and

iii. a "first lien security interest in the plans, specifications and materials employed in the construction of the Project".

e) February 27, 12:27 PM: Christopher Lee emailed another Draft Proposal stating that the letter was a "revised copy that just [*sic*] been updated with our discussion points". The completion fee was re-inserted to be 3.25% of the total loan value secured less the commitment fee. The commitment fee was revised to $500,000. For the first time, there is identification of "Red Nile Capital Limited" as a company affiliated with Westbay through which the loan might be syndicated.

f) March 2, 11:47 AM: Frank Lee emailed Ms. Fu the same version of the Draft Proposal that Christopher Lee sent to him on February 27 (above). Frank Lee's accompanying email stated:

> I've asked them to drop the initial commitment fee deposit from $750,000 to $500,000. I'm still trying to see if we can lower the interest a bit more. As you know, international rates are higher than Canadian rates. Real estate in Canada is viewed to be safer, more stable than other parts of the world, especially in China.

g) March 3, 8:18 PM: Ms. Fu forwarded the preceding email and attachment to Mr. Luke.

h) March 3, 11:27 PM: Mr. Luke emailed Ms. Fu with Frank Lee copied on the email. Mr. Luke had numerous questions and concerns about Westbay's proposal. He also had a conversation with Ms. Fu and Frank Lee that evening. Mr. Luke's email raised the following topics, among others:

i. He questioned whether, as a foreign entity, Westbay could get a "first lien deed of trust on the entirety of the property" or whether title insurance was even available for property in China.

ii. He questioned why Westbay was seeking a construction contract when, typically, the developer is also the construction contractor.

iii. He was doubtful how Westbay as a foreign entity could tend money in China and take security over assets located there without licensing and government approvals. Therefore, Mr. Luke made the following recommendation:

> My recommendation is to structure the loan facility as a preferred equity investment by foreign party in a Chinese-Foreign Joint Venture with the Chinese developer. For example, Westbay can lend the loan proceeds to a borrower incorporated in Hong Kong and take the shares of the Hong Kong corporation as security. The Hong Kong corporation injects the loan proceeds as registered capital into a Chinese incorporated Chinese-Foreign Equity Joint Venture as the Foreign Joint Venture Partner, while the Chinese developer injects the land into the Equity Joint Venture as the Chinese Joint Venture Partner. The Joint Venture Agreement can provide that the Foreign Joint Venture Partner (ie. Hong Kong corporation) receives a preferred repayment of its registered capital plus a return of 3.8%. …

iv. He stated that if Westbay was willing to consider his recommended structure, "it may be worth consulting with Chinese and international legal counsel to confirm the details", which, after those details were "worked out", could be incorporated into the proposal. He wrote that he did not "think the current Commitment Letter as presented will work … and should not be agreed to and signed".

i) March 4, 12:14 AM: Frank Lee emailed Mr. Luke and Ms. Fu writing, in part:

> Thank you for your feedback …These are excellent points which I will bring forward to the folks at Westbay, and one of their principals who resides here… They do have investment partners who have and are holding loans on properties in China. I will explore this further with them so that we can ensure that the loans (i) satisfactory with both the lends and [Ms. Fu]; and (2) that it is compliant with international laws and lending practices. This document was drafted by one of the principals of Westbay who is also a lawyer practising in London. However, as you mentioned, he might not have too much exposure to commercial mortgages.

j) March 4, 6:39 AM: Christopher Lee emailed Frank Lee stating, among other things, that the extension of the term to five years was approved by "[his] London office" which would "finance the additional two years from our balance sheet". He added two points "just to give you visibility on the mechanics of the loan on our side based on discussion with our syndicate partners". The first was a discussion about why a fixed rate loan in USD was being offered. The second point was:

> There is a risk of the Chinese currency also losing value viz the dollar. This is not likely due to wider trading considerations the Chinese [government]has but it is a risk. Its [sic] up to Julie whether she wants to hedge her side of the transaction.

k) March 5, 1:28 PM: Christopher Lee forwarded to Frank Lee an email from Mr. Otieno sent earlier that day, at 11:03 AM, prefaced with the following: "For your eyes only. This is the response that came back from the London boys Read through it and give me a call and lets [*sic*] decide how we can proceed". The forwarded email from Mr. Otieno stated in part:

> Thank you for your email covering the points Hainan's legal representatives in Canada have raised about [Draft Proposal 1]. …
>
> Please allow me to reiterate the points I made to you over the phone which I hope will put into context our position.
>
> a) As you are aware, [Westbay's] preferred methodology and approach for most of our financing transactions is as follows:
>
> i) Secure (in principle) acceptable commercial terms for any financing from interested parties;
>
> ii) Ensure the Borrower commits to proceeding with the transaction by paying the requisite transaction fees;
>
> iii) Lock in the commercial terms with the financing parties through the syndication process;
>
> iv) Agree the structure for providing the financing and supporting documentation through the Term Sheet Process;
>
> v) Agree final terms through the Contract Process;
>
> vi) Close.
>
> b) With the above in mind, we have tried to accommodate Hainan's requests to provide a Commitment Letter despite this not being part of our process. …

> c) Regarding the specific comments raised by legal counsel (highlighted below), let me cover these in turn:
>
> > i) On point 1) and 2) below[1], please note that [Westbay] has not financed a property transaction in China before. All our transactions with Chinese counter-parties have been in the commodities space. …
>
> …
>
> [Westbay] would not be willing to go through a protracted structuring phase at this stage of the process as we prefer to crystallise these during what would be our Term Sheet Phase. In any event, we are unfortunately running out of time as most of our syndication partners had given us a deadline of Friday 6th March to confirm our commitment to proceed.
>
> [Emphasis added.]

l) March 7, 9:32 AM: Christopher Lee forwarded the next Draft Proposal. The loan was now for USD $100 million. For the first time, clause 7 stated that the loan will be syndicated through Westbay or its affiliated companies, specifically naming Red Nile Capital Limited (UK) or Roxschild Imarketing International Limited (Hong Kong). The commitment fee was listed as $1 million, but in his email sending this version to Frank Lee, Christopher Lee wrote that it could be crossed out and to let Ms. Fu know that "you spoke with me to leave it the same deposit". Christopher Lee's email identified other features including new clauses.

Also, Clause 11 of that version of the Draft Proposal stated that Westbay and Hainan "will agree on the final transaction/lending structure during the contract stage after consulting their legal and tax advisors" and it was anticipated that a "yet to be named Special Purpose Vehicle" would be created to allow Hainan to ultimately own the assets and through which Westbay would disperse the funds. Clause 12, addressing security for the loan, was revised to state that Westbay and Hainan would agree on a type of security that is adequate and acceptable and "may include [Westbay] taking a lien on shares of the [special purpose vehicle]".

[1] This is a reference to Mr. Luke's concerns about whether a foreign entity could get a "first lien of trust" and title insurance; see above at paragraph (h).

m) March 8, 4:34 PM: Frank Lee forwarded the latest Draft Proposal to Ms. Fu, identifying the new clauses in identical language from Christopher Lee's email. However, with regard to the commitment fee, Frank Lee wrote "I negotiated with Chris/Westbay on your behalf to reduce this amount from $1million to $500,000". The attached Draft Proposal had a commitment fee of $1 million but it had been crossed out by hand and $500,000 was hand-written in.

n) March 9, 9:16 AM: Ms. Fu forwarded Frank Lee's email above to Mr. Luke and Ms. Zeng seeking advice. I infer by the timeline herein that the version she sent to Mr. Luke did not have any information about the account into which funds would be paid.

o) March 9, 12:41 PM: Christopher Lee sent an updated Draft Proposal to Frank Lee identifying that the "only difference" was the appendix identifying the bank details for transfer of the commitment fee. The appendix listed Red Nile Capital Limited at Barclays Bank in London.

p) March 10, 12:54 AM: Christopher Lee emailed Frank Lee a version of the Draft Proposal in which the bank listed in the appendix was revised to indicate the Roxschild Account in Hong Kong.

q) March 10, 8:10 AM: Mr. Luke emailed Ms. Fu stating that the proposal was "better but still has a lot of problems", which he then outlined. He suggested changes including that the commitment fee be deposited into a lawyer's trust account in Canada to be held in accordance with the terms of the agreement. He also suggested a new clause outlining six specific situations that would trigger the return of the commitment fee from Westbay to Hainan "notwithstanding any provisions to the contrary".

r) March 10, 9:29 AM: Ms. Fu sent a reply email to Mr. Luke and stated that she raised the idea of paying the fee in Canada "but they don't have any firm here …so [it] seems [they] don't want to mix personal and cooperate

[*sic*] funds", adding that it was changed to Hong Kong and she knew "they really could have their way to give me the fund in mainland but I may tell you in person. Luckily they knew some Chinese way of solving problem". She also asked if Mr. Luke could recommend a Hong Kong lawyer.

s) March 10, 10:03 AM: Frank Lee sent Ms. Fu the next Draft Proposal which stated that the interest rate remained at 3.8% and that the 3.25% completion fee was the "lowest they could go". He added that the "good news is that you can wire the deposit money to the TRUST ACCOUNT with Roxschild Imark International (HK) Ltd. in Hong Kong", and that they are "okay with the funds being used in a few months if the Commitment Deposit of $500,000 is deposited into the Trust Account". Frank Lee added at the end of the email: "I know you wanted a lower rate for the fees but Chris and I have done our best".

t) March 10, 11:01 AM: Mr. Luke emailed Ms. Fu in response and stated that it "would be fine to change my suggestion to lawyer's trust account in Hong Kong". He also stated that he was glad that Westbay "has experience lending money in China" and recommended a lawyer in China.

u) March 10, 6:50 PM: Ms. Fu emailed Frank Lee repeating Mr. Luke's recommended changes.

v) March 10, 6:52 PM: Frank Lee forwarded Ms. Fu's email above to Christopher Lee and asked to speak with him.

w) March 10, 7:17 PM: Christopher Lee forwarded an email by Mr. Otieno to Frank Lee, which was sent that day at 10:35 AM, stating "we are happy for the Commitment Fees to be transferred into the Roxschild account at HSBC in Hong Kong", and that the "fees would sit in a segregated client nominee account … in line with the regulations that cover commingling of client funds required by our primary group regulators the FSA in the UK and the MFSA in Malta".

x) March 11, 9:14 AM: Christopher Lee forwarded to Frank Lee another email that he received from Mr. Otieno stating that they needed to discuss it "ASAP". Mr. Otieno's email to Christopher Lee indicated that he had accepted and made a number of changes to the Draft Proposal. Mr. Otieno's email added:

> I have also just got a all from "Nick Ring asking whether we are still going ahead with the syndication as their investment committee meets on Friday to discuss but the agenda items need to go in by close of business today. I said we would confirm by 6pm today.
>
> Let me know Hainan would like to proceed but in any event, I think we need to formally close this today as I cant [sic] afford to burn any more bridges with out syndication partners.

y) March 11, 5:41 PM: Frank Lee emailed Christopher Lee indicating the signed Westbay Agreement was attached.

E. The Litigation

[33] This action had two previous trial dates adjourned. Before me, the trial was originally set for 12 days, but in the end, it occupied 21 days, with four, non-consecutive continuations.

[34] The plaintiffs' first witnesses were Frank Lee and Christopher Lee, who were called as adverse witnesses. Both also testified and were cross-examined in their own cases.

[35] Christopher Lee represented himself throughout the trial, although he did have legal representation earlier in the life of this action. However, it was necessary to take time to explain the trial procedure to him to ensure a fair trial. This encompassed, at times, explaining the potential negative consequences of some procedural steps he was contemplating, including the inadvisability of his absence during a portion of the trial to attend a business meeting.

[36] These factors compounded the challenges facing the Court in assessing the evidence. This statement is not a criticism of any party or counsel, but it does explain, in part, the length of time it has taken to render this judgment.

1.The Pleadings

[37] The plaintiffs seek damages for professional negligence, negligence, negligent misrepresentation, and breach of contract against ABW and Frank Lee. The plaintiffs allege that both owed a duty of care as mortgage brokers to (i) make inquiries and engage in basic due diligence about the accuracy of representations made by them, and (ii) to ensure representations made by them were accurate and not misleading. The plaintiffs allege that ABW and Frank Lee failed to meet the standard of care and ordinary skills of a mortgage broker, in general, by failing to give due diligence in assessing Christopher Lee and Westbay, and whether it was "safe" to pay the commitment fee to the Roxschild Account.

[38] The plaintiffs also allege that ABW and Frank Lee breached their contractual duties to the plaintiffs. They also say, further, or in the alternative, that ABW is vicariously liable to the plaintiffs for Frank Lee's actions.

[39] In their response, Frank Lee and Viva Pro say that Ms. Fu asked them to assist with communication and to obtain an appraisal only in Frank Lee's personal capacity, which they did. They say that there was never a contract to provide professional services to the plaintiffs, and thus they owed no duty of care as a mortgage broker, or as a professional. They first deny that they made any representations alleged. If they did, they then deny that they owed a duty of care in relation to those representations. And if they did owe a duty of care, they further deny that the plaintiffs relied on those representations. Frank Lee and Viva Pro also plead that if the plaintiffs suffered loss, that it was caused by the intervening conduct by Westbay, Christopher Lee, and/or Roxschild, and that the plaintiffs did not mitigate any loss they suffered.

[40] ABW specifically denies that it had a contractual relationship with the plaintiffs, and pleads that it owed no duty of care to them. It denies that Frank Lee acted as an agent or in any other capacity sufficient to legally bind ABW to the plaintiffs. ABW further pleads that the plaintiffs relied on their legal advisors who were negligent, and thus the advisors contributed to any loss suffered, or, in the

alternative, that the plaintiffs failed to heed the legal advice they received, which led to any loss suffered. ABW pleads that the plaintiffs had a duty to protect their own interests, and they failed to do so when entering the agreement while disregarding the advice from their lawyers. ABW also denies that the plaintiffs suffered any loss or damage.

[41] As against Christopher Lee, the plaintiffs seek damages for fraudulent or negligent misrepresentation and/or negligence and punitive damages. They allege that he made representations that he knew were false, or was reckless about their truth for the purpose of inducing the plaintiffs to pay the commitment fee and pay for a trip to China, thereby causing the plaintiffs to suffer loss.

[42] Christopher Lee pleads that he was a “contractor” of Westbay and denies that he represented Westbay as an experienced and reputable financing company to the plaintiffs. Alternatively, if he did make that representation, he submits it was substantially true. He also says that any representations he made were true, but if they were not, that the plaintiffs suffered no loss as a result of them.

[43] The plaintiffs sought production of documents from HSBC in Hong Kong. On September 21, 2022, the Hong Kong High Court granted an order requiring HSBC to disclose the following documents to the plaintiffs:

a) Full particulars and records of all remittances and/or transfer of funds made into the Roxschild Account in the amount of $500,000 (defined in that order as the Commitment Fees) on or about 11 March 2015;

b) Full particulars and record of all remittances and/or transfer of funds made out of the Roxschild Account in connection with the $500,000; and

c) The account opening documents including account signatories, correspondence, records, account statements, “Know Your Client” documents, and information relating to any trusts and/or nominees and computer entries.

[44] On October 10, 2023, the Hong Kong High Court required HSBC to swear a business records affidavit relating to the production of documents, and that affidavit was produced on October 13, 2023 and provided to the plaintiffs.

2. Orders Sought

[45] The plaintiffs seek the following orders:

a) ABW, Viva Pro, and Frank Lee pay to the plaintiffs on a joint and several basis, together with Christopher Lee, USD $500,000 plus pre-judgment interest as at November 21, 2015 and post-judgment interest.

b) An order that Christopher Lee is liable for an additional $100,000 as repayment of the expenses for the trip to China in May 2015, plus pre-judgment and post-judgement interest.

c) If the Court finds Christopher Lee liable on the basis of deceit or fraudulent misrepresentation, a direction that this judgment be brought to the attention of the Chartered Professional Accountants of BC.

II. CREDIBILITY AND RELIABILITY

[46] Before addressing the legal issues, I comment on witnesses' credibility and reliability. The credibility and reliability of the testimonies of Ms. Fu, Frank Lee, and Christopher Lee are pivotal issues in the case (for convenience, I refer to these three as the "Main Witnesses"). The parties disagree about the weight to be attached to the Main Witnesses' testimony.

A. Legal Principles

[47] The legal test for assessing credibility is well-known and long-settled. The oft-cited passage below comes from *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of

> assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[48] The following passage from *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739, aff'd 2020 BCCA 130, leave to appeal to SCC ref'd, [2020] S.C.C.A. No. 218 is also helpful in summarizing the approach and factors to consider in assessing credibility:

> [91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> [92] Some additional factors which may impact credibility include the following:
>
> a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.
>
> b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn,* 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones,* 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone,* 2012 BCSC 1359 at para. 9.
>
> c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;

> d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration),* 2002 FCT 368 at paras. 19 and 21;
>
> e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;
>
> f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey,* 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and
>
> g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.
>
> [93] A court should not be overly focused on the demeanor of a witness or the smoothness of their presentation. Testifying at trial, which in this case included extensive cross-examinations on matters occurring almost seven years ago, is a stressful endeavor. Special care should be given not to equate difficulties in providing evidence through an interpreter with evasiveness. In this case Allen Liu, Gary Chow and Candy Chen provided their evidence through an interpreter and I have taken the difficulties inherent in translated evidence into account in assessing their credibility.

[49] It is important to recognize the distinction between credibility and reliability. Credibility refers to the truthfulness of a witness, whereas reliability refers to the accuracy of a witness's testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104. A witness that is not credible is not reliable, but the opposite is not necessarily true, as unreliable witnesses are not necessarily being dishonest. It may be that other factors have intervened to negatively affect the accuracy of their recall or perceptions.

B. Discussion

[50] The trial started about nine years after the events in this lawsuit took place. The Main Witnesses' testimonies consisted largely of their recollection of numerous conversations between or amongst them. There are also numerous emails and documents that were created and exchanged around the same time those conversations took place.

[51] When witnesses have significantly different recollections of the same event or conversation, it is challenging for the Court to determine whose recollection is more

reliable, and therefore most probably true. The Court can also consider a witness's overall credibility, and whether that assessment has a positive, negative, or neutral impact on their reliability regarding specific recollections. In this context, looking at the evidence holistically rather than in a piece-meal fashion may be helpful. It is also useful to consider the overall narrative of a witness's evidence to measure the degree to which it represents a reasonable interpretation of the events that is consistent with other evidence, especially with the objective evidence.

[52] Even if a witness's credibility is unimpaired, it is reasonable to expect that the passage of time could impact the reliability of their recall of events. For example, it may be unusual for people to recall the precise words spoken during a conversation that took place many years ago, absent a cogent reason for them to have that specific recall. It must also be acknowledged that when recalling events, words spoken, or one's thoughts and understanding about an issue or event, memories may be shaped to varying degrees by intervening events, including their present understanding of that issue or event. Where the details of what happened have significant consequences, such as in this litigation, that process may also be influenced by the desire to get a favourable outcome. These processes are not necessarily conscious ones. This raises the possibility that a person's recall is not an accurate memory, but what the person has come to believe or understand in the intervening time.

[53] At the same time, the Court must be alive to the possibility that witnesses may deliberately adjust, modify, or completely change their true recollections when testifying driven by the desire to succeed in the litigation. This would obviously reflect poorly on their credibility.

[54] These precepts reflect common characteristics and potential frailties of human memory and human experience. In my view, the manner and extent to which the Main Witnesses acknowledged the potential that their testimony was based on flawed memories because of the foregoing is relevant to my assessment of their evidence.

[55] Where contemporaneous documents exist, the Court has the benefit of objective evidence to assist in its assessment. If a witness's recollection is inconsistent with a contemporaneous document, but the witness remains firm in their recollection, that witness's credibility and reliability may be significantly eroded. Also significant is the degree to which a witness's trial testimony differs from evidence given at their examination for discovery (the "XFD") and their explanation for that difference.

C. General Comments on Main Witnesses' Credibility and Reliability

[56] In this case, I find the credibility and/or reliability of each of the Main Witnesses' testimony was affected by the aforementioned factors to varying degrees.

1. Julie Fu

[57] The defendants submit that the number of instances where Ms. Fu's trial testimony differed from her evidence given at the XFD impairs her credibility and/or reliability to a significant degree. Ms. Fu explained this difference by claiming that the pace of questioning at the XFD made her confused. The defendants dispute Ms. Fu's claim that her improved recall of events at trial, as opposed to at her XFD, represents a genuine recollection. Instead, they submit that her recall at trial is attributed to her simply having reviewed the documents in preparation. They allege that the reliability of her trial testimony is significantly eroded because it is most likely a reconstruction of events most favourable to her legal strategy rather than a reflection of her independent memory. In addition, the defendants note that Ms. Fu was frequently argumentative during cross-examination and needed to be directed to answer the question asked.

[58] The plaintiffs contend that Ms. Fu testified in a cautious and truthful matter, at times making appropriate concessions. They assert that there is a reasonable explanation for why her trial evidence about the timing of certain events differed from her XFD evidence, which is that she was not presented with a number of dated documents at the XFD that were shown to her at trial.

[59] The plaintiffs also submit that Ms. Fu's evidence was corroborated by the testimonies of Mr. Luke and Christopher Lee on a number of important facts. They also assert that her evidence was mostly consistent with the documents, especially when compared to Frank Lee's testimony.

[60] I find the reliability of Ms. Fu's testimony was significantly and negatively impacted by important and material contrasts between her evidence at the XFD and at trial. I am not satisfied in all cases that her explanations for the differences rehabilitated her evidence. I also find that at times she was argumentative and/or evasive during cross-examination, and she did not easily concede points when confronted with potentially contradictory evidence.

[61] I find both the credibility and reliability of her testimony were diminished for the reasons stated above. For that reason, I approach her evidence with caution.

2. Frank Lee

[62] The plaintiffs submit that Frank Lee's testimony bore many hallmarks of unreliability. For that reason, they argue that any conflict between his testimony and either contemporaneous documents or the testimonies of Ms. Fu and Mr. Luke should be resolved by rejecting his evidence. The plaintiffs submit that this approach is necessary because of the frailties of his testimony, which they say was characterized by the following: (i) inconsistencies between his testimony about events or conversations that took place in 2015, and written words contained in documents or emails created contemporaneously; and (ii) the shifting and evolving nature of his testimony on key points, including examples where he tailored his evidence to better suit his legal positions.

[63] Frank Lee fairly acknowledged that his evidence was corrected several times but claimed that he readily conceded when an inconsistency was shown to him. Counsel further submits that Frank Lee did not require direction from the Court to answer the questions put to him directly, especially when compared to Ms. Fu. His position is that he was a more reliable witness than Ms. Fu.

[64] I find that there were numerous and material inconsistencies between Frank Lee's testimony and the reasonable and most probable interpretation of the objective evidence – the emails he wrote during the relevant period. While he occasionally conceded that his trial testimony was flawed when faced with contradictory evidence, he repeatedly maintained that his evidence was true notwithstanding blatant contradictions with what I find to be the most reasonable interpretations of the emails he drafted (some examples are discussed below). One compelling example is the contrast between the content of his March 4, 2015 email to Mr. Luke and his testimony about his interactions with Mr. Luke. I find that at trial, Frank Lee significantly downplayed the nature of his interactions with Mr. Luke to conform to his position that he was merely a friend assisting Ms. Fu.

[65] I also agree with the plaintiffs that Frank Lee's testimony shifted depending upon which counsel was asking him questions.

[66] Given the foregoing, I find Frank Lee's credibility and reliability were both seriously eroded. I approach his evidence with caution.

3. Christopher Lee

[67] The plaintiffs allege fraudulent misrepresentation against Christopher Lee and submit that he lied to the Court. They allege his late production of documents in this litigation itself as reflecting poorly on his credibility and reliability, and further assert that there is reason to believe he may have fabricated documents to accord with his evidence. They allege that some of his evidence was deliberately false, lacking in both corroboration and, at times, being incapable of belief. The plaintiffs also point to the number of times that Christopher Lee was impeached by his XFD evidence, and the nature of the evidence on which he was impeached.

[68] The plaintiffs' position is that no weight should be placed on Christopher Lee's evidence on any key point with the exception of the following: (i) an admission he made in his pleadings or evidence; (ii) evidence he gave contrary to the interests of the other defendants; and (iii) examples where his evidence was corroborated by other reliable evidence.

[69] I agree that Christopher Lee's trial testimony was impeached to a significant degree that negatively affects his overall credibility and reliability. I also find some of the explanations he provided to be suspicious because of the timing of his revelations and the nature of the evidence itself. I also find his conduct in the litigation itself to reflect poorly on his credibility and reliability.

[70] I hasten to point out that I am mindful of my obligation to ensure that someone representing themselves is not unduly prejudiced by the lack of legal counsel. In this case, Christopher Lee had the benefit of counsel during portions of the litigation. More importantly, I am satisfied that he fully understood the nature of the allegations made against him, and the trial process in which he effectively and actively participated. I specifically find that he understood the potential evidentiary and legal consequences of choices he made in the conduct of his defence.

[71] I also find, when assessing Christopher Lee's evidence on a holistic basis together with all the evidence in the case, that his version of events specifically about the Roxschild Account, Mr. Otieno's unavailability, and what happened to the money paid by the plaintiffs defies logic and common sense. His explanation for suspicious facts was far-fetched.

[72] For all those reasons, I find Christopher Lee was not an honest witness and both his credibility and reliability were severely weakened. I approach his evidence with extreme caution.

III. ISSUES

[73] The framework of the parties' submissions differed both in terms of the legal issues in the pleadings and the evidence properly raised. In addition, the parties disagree as to whether the evidence adduced at trial establishes a number of material facts central to each of the disputed issues.

[74] I find it convenient to analyze the issues (which each have subsidiary issues) in the following order:

a) The claims in negligence against Frank Lee;

b) The claims in negligence against ABW;

c) The negligent misrepresentation claims against Frank Lee and ABW;

d) The claims against Christopher Lee; and,

e) Whether the plaintiffs are contributorily negligent.

IV. IS FRANK LEE LIABLE IN NEGLIGENCE?

[75] There is no dispute about the governing legal test. Negligence requires the plaintiffs to establish that: (1) the defendant owed them a duty of care; (2) the defendant's conduct breached the applicable standard of care; (3) the plaintiffs suffered damage; and (4) the damage was caused in fact and at law by the defendant's breach: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 17 [*Deloitte*].

A. Duty of Care

[76] A duty of care arises when there is a close and direct relationship between two parties. The scope of that duty must be carefully defined based on the nature of their relationship, and that is determined by conducting a proximity analysis: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at paras. 31 and 35 [*Maple Leaf Foods*].

[77] The plaintiffs seek to recover pure economic loss alleged to have been caused by the negligent performance of a service (and negligent misrepresentations, analyzed later in this judgment), and as such, two factors are determinative to establishing proximity: the defendant's undertaking and the plaintiff's reliance. This is articulated in *Maple Leaf Foods*:

> [32] In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the

> defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid.*). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (*ibid.*). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose [citations omitted]
>
> [33] Taking *Cooper* and *Livent* together, then, this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. Framing the analysis in this manner also illuminates the legal interest being protected and, therefore, the right sought to be vindicated by such claims.

[78] The court noted the importance of discerning the extent of the defendant's undertaking as it relates to establishing proximity:

> [35] That entitlement, however, operates only so far as the undertaking goes. As this Court cautioned in *Livent*, "[r]ights, like duties, are . . . not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility ☐ that is, of the purpose for which the representation was made or the service was undertaken ☐ necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care" (para. 31, citing Weinrib, and A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This "end and aim" rule precludes imposing liability upon a defendant for loss arising where the plaintiff's reliance falls outside the purpose of the defendant's undertaking. *Livent* makes clear, then, that considerations of undertaking and reliance furnish not only a principled basis for drawing the line in cases of negligent misrepresentation or performance of a service between duty and no-duty, but also for delineating the scope of the duty in particular cases, based upon the purpose for which the defendant undertakes responsibility. Reliance that exceeds the purpose of the defendant's undertaking is not reasonable, and therefore not foreseeable (para. 35).

[79] With regard to reliance, it is helpful to refer to *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, where the court identified five indicia of reasonable reliance in cases of negligence or negligent misrepresentation (para. 43):

> 1. The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made;
>
> 2. The defendant was a professional or someone who possessed special skill, judgment, or knowledge;

> 3. The advice or information was provided in the course of the defendant's business;
>
> 4. The information or advice was given deliberately, and not on a social occasion; and
>
> 5. The information or advice was given in response to a specific enquiry or request.

1. Is it Necessary to Analyze whether a Duty of Care Existed?

[80] The plaintiffs say it is unnecessary to conduct a duty of care analysis in this case for two reasons.

[81] First, the plaintiffs submit that Frank Lee and ABW conceded the existence of a duty of care to the plaintiffs. However, the defendants' position is that Frank Lee was not acting in a professional capacity when assisting Ms. Fu, but only as a volunteer or a "friend". The defendants accept that acting in said roles may give rise to a duty of care but emphasized that the plaintiffs' case was premised on Frank Lee acting in his capacity as a mortgage broker. Thus, even if the defendants had agreed they owed the plaintiffs a duty of care, the parties' positions differ on the scope and content of any duty owed, both of which are reliant, at least to some degree, on discerning the nature of their relationship. For that reason, the defendants assert that it is necessary to conduct an analysis about the duty of care.

[82] Second, the plaintiffs submit that precedents exist which have already established that mortgage brokers owe a duty of care to their clients, as such, it is unnecessary to undertake the analysis here. I agree that where case law confirms that the duty of care in question exists, a full *Anns/Cooper* analysis may be unnecessary: *Rankin (Rankin's Garage & Sales) v. J.J*., 2018 SCC 19 at para. 18. Put another way, "where there is a recognized relationship that gives rise to a presumed duty of care", a full *Anns/Cooper* analysis is unnecessary: *Hill v. Queensbury Strategies Inc*., 2014 CanLII 45416 (O.N.S.C.), 2014 CarswellOnt 18959 at para. 51.

[83] It is true, and not surprising, that courts have found that mortgage brokers owe a duty of care to their clients (*St. Louis v. CIBC Martgages Inc*., 2004 CanLII

34441 (O.N.S.C.), 2004 CarswellOnt 2583 at para. 44), and in some cases, to lenders (*Normak Investments Ltd. v. Belciug*, 2015 BCSC 700 at paras. 117-127; *Lindner v. Allin*, 2002 BCSC 212 at para. 19). The plaintiffs also cite *Bryce v. Rala Investments Ltd*., 2020 BCSC 90 for this proposition, although I note in that case, the defendant conceded that they owed a duty of care as a mortgage broker to the plaintiff: see para. 48.

[84] I am not persuaded by either of the plaintiffs' proposition, and conclude it is necessary to analyze whether a duty of care existed. In my view, both grounds cited by the plaintiffs are undercut by the limited extent of the defendants' concession. At most, they submitted Frank Lee's undertaking was to assist Ms. Fu as a friend and not in a professional capacity as a mortgage broker. The fact that someone *is* a mortgage broker does not necessarily mean that all undertakings they provide are *as* a mortgage broker—more is needed. As noted above, the two determinative factors on proximity analysis in cases of negligent performance of a service are the defendant's undertaking, and the plaintiff's reliance: *Maple Leaf Foods* at para. 32.

[85] In other words, the issue at this point of the analysis is not whether mortgage brokers *generally* owe a duty of care to their clients. The issue is narrower and factual. The exact nature and scope of the undertaking that Frank Lee made to Ms. Fu—the first of the two *determinative* factors outlined in *Maple Leaf Foods*—and then the reasonability of her reliance on said undertaking, must be determined on the facts of this case.

[86] Accordingly, I start by assessing the evidence about what Frank Lee undertook to do with respect to the Hainan Project, and the nature of Ms. Fu's reliance in order to identify whether a duty of care was owed, and if so, its scope. Not only is that necessary for understanding whether the duty was triggered, it will also be important when considering what standard of care applies.

2. Evidence Relevant to the Duty of Care

[87] The plaintiffs' position is that Frank Lee was acting in his capacity as a mortgage broker for the Hainan Project. This position is based on a number of

propositions and circumstances, all of which, the plaintiffs argue, must be viewed together as none of them are necessarily determinative on their own. When doing so, the plaintiffs submit, the inevitable conclusion is that Frank Lee was acting in a professional capacity as a mortgage broker for the Hainan Project.

[88] ABW and Frank Lee's position is that Frank Lee only agreed to assist Ms. Fu as a friend, and did not agree to provide any professional services to the plaintiffs.

[89] The plaintiffs' position is based on facts that are disputed to some degree among the parties. The plaintiffs also submit that the Court must assess the facts cumulatively, which will support the conclusion that Frank Lee owed a duty of care as a mortgage broker to the plaintiffs.

a. Initial Conversations

[90] The parties largely accept the following set of facts:

a) Frank Lee acted in his professional capacity as a mortgage broker in the Richmond Purchase to assist Ms. Fu in finding financing.

b) Ms. Fu was pleased with his work on the Richmond Purchase because she believed him to be honest and professional.

c) Ms. Fu asked Frank Lee to assist her in finding funding for the Hainan Project.

d) Frank Lee initially expressed some concern, but he agreed to assist Ms. Fu.

e) These initial conversations regarding the Hainan Project took place in at least two conversations that occurred within a day or so.

[91] While those basic facts are not controversial, the timing, tone, and content of these conversations are disputed.

[92] Ms. Fu claimed their first conversation about the Hainan Project took place in January 2015. She told Frank Lee about the project, where it was located, and that the plaintiffs were seeking between $75 to $100 million USD.

[93] Ms. Fu acknowledged that, in that first conversation, Frank Lee explained that his license prohibited him from brokering mortgage transactions outside of British Columbia. She also eventually agreed that he told her he had no business experience in China. She then eventually admitted that she was aware at the time that DLC's business did not include mortgages in China. Despite Frank Lee identifying those barriers, she stated that she "still wanted to work with him, because … he was very, very hardworking and very helpful and very nice".

[94] There is no dispute that shortly after the initial conversation, perhaps even the next day, they had a conversation and Frank Lee said he would help her find financing for the Hainan Project.

[95] Ms. Fu testified that, in that first conversation, Frank Lee said that he needed to think about it and would get back to her, saying words to the effect that he would "find a way" to help out, or that he would "figure it out". When they next spoke, she said he used words akin to: "I figured out a way to do it", that he could help her with the mortgage or to "do the finance", and that he would find a lender. She testified that Frank Lee mentioned Christopher Lee in that conversation and told her not to worry about his fee as he would sort that out with Christopher Lee.

[96] Ms. Fu believed Frank Lee had resolved any issues with his license but she made no inquiries of him about that. She testified that she believed Frank Lee would assist her in the same capacity as he did in the Richmond Purchase. She testified that she assumed Frank Lee and/or ABW would "figure out a way to do it", speculating that perhaps DLC might "open a branch in China" or work with contacts in China, although she never stated any of these assumptions in her conversations at the time.

[97] ABW argued Ms. Fu's testimony is suspect because of her intransigent testimony about when the first conversation took place. While the timing of that conversation is not a material fact, ABW submits that the machinations Ms. Fu went to about that timing demonstrates the unreliability of her evidence.

[98] The following summarizes Ms. Fu's evidence about when the initial conversation took place:

a) In her direct testimony, she specifically recalled it took place on January 8, 2015, anchoring it to after the Richmond Purchase completed;

b) In cross-examination, she initially repeated that testimony.

c) Later in cross-examination, it was pointed out to Ms. Fu that the CMLS commitment letter was finalized on January 23, 2015. She then testified that the initial conversation occurred "within days" of January 23, 2015, and certainly before the end of the month.

d) Further on in cross-examination, she denied that the initial conversation occurred earlier than February 20, 2015. However, at her 2020 XFD, she said the initial conversation occurred shortly after February 20, 2015. At her 2022 XFD, she stated that the conversation "definitely" did not occur before February 20, 2015. Despite that, at trial, she insisted that the initial conversation took place before February 20, 2015.

[99] Ms. Fu's explanations for why her trial testimony differed from her evidence at both XFDs included her statements that she did not have a good memory since the events were more than five years ago, and that she had referred to trial documents to recreate in her mind what she thought. ABW contends that while the precise timing is not material, two features of this evidence damage Ms. Fu's reliability and credibility: (i) Ms. Fu's purported certainty about the date, despite acknowledging the difficulty of recalling events from over five years ago; and (ii) her insistence that her trial testimony remains accurate despite the XFDs occurring closer in time to the actual events.

[100] Similarly, ABW points out that at neither XFD did Ms. Fu refer to Frank Lee saying words to the effect that he would "find a way to help her" on the Hainan Project, as she stated in her direct examination. In cross-examination, she conceded that he did not use those words, but that he said "something like that" and that it was the "meaning" of what he said.

[101] The defendants also contend that Ms. Fu's assumption that both Frank Lee and ABW would "find a way" to work on the Hainan Project is unbelievable given the following admissions: (i) she knew in 2015 that Frank Lee was not licensed to arrange mortgages outside of B.C.; (ii) she also knew then that Frank Lee had no experience with financial business in China; and (iii) despite first testifying that she did not know ABW was limited to business in BC, she then admitted that financing mortgages in China was outside the scope of ABW's business and its license. The defendants submit her evidence that she believed DLC may open a branch in China is fanciful and indicative of her unreliability and/or diminished credibility.

[102] Frank Lee's evidence about their initial conversation, on the other hand, shifted during the course of the trial. At first, he testified that he told Ms. Fu that he could not assist to get financing for the Hainan Project because of restrictions on <u>his</u> license. Under subsequent questioning from ABW's counsel, however, he said that this earlier testimony was mistaken—that he had said that "we" could not assist, meaning that neither himself nor ABW could assist, due to the restrictions on both of their licenses. However, I do not find that particular discrepancy to be material, or that it had a significantly negative impact on his credibility.

[103] Under cross-examination from his own counsel during the plaintiff's case, as a witness adverse to the plaintiff's case, Frank Lee expanded upon his initial testimony regarding the initial phone call. He claimed that he: (i) kind of "got mad" at Ms. Fu; (ii) said there was no mortgage broker in B.C. that could help her; and (iii) said words to the effect of, "I don't know how many times I have to tell you my license does not let me work outside of B.C." and "It's a huge amount of money, you have resources in China, why are you asking me this?"

[104] At the same time, Frank Lee admitted that the "last words he said to her" in the initial conversation was something like "I'd see what I could do" but testified that it would only be "as a friend" or as a translator because she was a good client based on their successful completion of the Richmond Purchase. He claimed that he told Ms. Fu he would act in a non-professional capacity. He also testified that he was reluctant to work on the Hainan Project but Ms. Fu "cajoled" or persuaded him.

b. Frank Lee's use of ABW Address and DLC logos

[105] The plaintiffs contend that documentary evidence supports their position that Frank Lee represented himself to be, and was acting as, a mortgage broker for the Hainan Project. They submit that he insisted that his name and ABW's address be included on the Draft Proposals, Westbay Agreement, and Savill's appraisal.

[106] They pointedly rely on his pervasive use of the following signature block on email communications:

> Frank Lee, *B.Com.*
> **Senior Mortgage Planner**
> Dominion Lending Centres – A Better Way
> Offices | West Vancouver |King George Blvd Surrey
> Residential | Commercial | Private Mortgages
> [A thumbnail photograph of Frank Lee]
> **Direct: 604-[XXX-XXXX]**
> Direct Fax: 1-888-838-7543
> E-mail: franklee@dominionlending.ca
> Email: frlee2009@hotmaiol.com
> Web: www.franklee.ca
> DLC – a better way is an independent member of the Dominion Lending Centres Network

[107] They also emphasize that there is not a single document where Christopher Lee or Westbay communicated directly with Ms. Fu or the plaintiffs; all such communications were funnelled through Frank Lee.

[108] Frank Lee testified that he used both his personal email address and an email associated with ABW when communicating with clients about work. Mr. Chand confirmed that there was no policy preventing this practice, and that it was up to individual mortgage brokers what email address they used, and there was no attempt to monitor or supervise which email address they used. ABW was aware that mortgage brokers used ABW's physical address and DLC's name and trademarks for business purposes including on emails, business cards, and websites.

[109] Both Mr. Chand and Mr. Luke also testified that it was typical for mortgage brokers to have their client's name listed on commitment letters c/o the broker.

[110] In addition to his email signature, the plaintiffs submit that Frank Lee's explanations about how and why his name and ABW's address appeared on the Draft Proposals were "extraordinary" in terms of how much it evolved over the course of his testimony. I agree.

[111] The defendants' position is that these factors carry little weight in determining whether professional duties were being supplied. On their own, Frank Lee's signature block and the use of the ABW email may not weigh heavily in determining the status of his role in the Hainan Project, but they are relevant. More importantly, Frank Lee's scattered and inconsistent testimony about how, and why, his name and ABW's address appeared on the documents is indicative as to his overall credibility, reliability, and persuasiveness of his legal position.

[112] By way of illustration, during different phases of his testimony, Frank Lee gave the following evidence:

a) He denied that his name and ABW's address were put on the Draft Proposals at his request. When questioned by his own counsel, he said he had "no explanation" for how they appeared, suggesting that Westbay must have "thought" he was involved.

b) At another time, he said Ms. Fu requested that his name appear on the Draft Proposals, as she was uncomfortable putting her home address on the letter, to which he agreed and communicated that to Christopher Lee. Ms. Fu testified that Frank Lee made this request to Christopher Lee when the three of them met to discuss the first Draft Proposal. She said Frank Lee wanted his name there to ensure that he got paid for the Hainan Project.

c) Frank Lee also claimed that Christopher Lee must have added the ABW address on his own accord when he heard Ms. Fu saying she did not want her home address on the Draft Proposal. Frank Lee also added that Christopher Lee must have already had ABW's address in his possession to insert it.

d) However, at his XFD, Frank Lee said that he never gave Westbay the ABW address. This is contradicted by an email dated February 25, 2015 in which Christopher Lee wrote, "please find attached the engagement letter with your name in the contract", and his testimony that the name was added at Frank Lee's request.

[113] Frank Lee's evidence on the preceding was contradictory and not credible.

c. Frank Lee's Email Communications About his Role

[114] The plaintiffs emphasize that Frank Lee's communication with Mr. Luke, Ms. Fu's legal advisor, is significant. They say that the extent of his communication with Mr. Luke is consistent with him possessing a sophisticated understanding of the proposal; and having agreed to undertake significant professional duties. I will not reproduce, but emphasize here, the communication Frank Lee had with Mr. Luke about the latter's suggested changes to the Draft Proposal as summarized above at paras. 32(h) and (i).

[115] With regard to the concerns raised by Mr. Luke, Frank Lee testified that he did not really understand them, and he denied that he made a commitment to

personally address them with Westbay because he did not know "much" about Westbay.

[116] This contrasts sharply with what he wrote in his emails on March 4, 2015 responding to Mr. Luke. Among other things, Frank Lee wrote that the points raised by Mr. Luke were "excellent", and that he would bring them "forward to the folks at Westbay" who are "holding loans on properties in China". He further wrote that he would explore with them further "to ensure that the loan is (1) satisfactory with both lenders and [Julie Fu] and (2) that it is compliant with international laws and lending practices".

[117] I also find it both relevant and significant that Mr. Luke testified that his impression was that Frank Lee both understood the concerns and would raise them with Westbay.

[118] I also find there is a significant contradiction between Frank Lee's testimony and the statements he made in emails sent to Ms. Fu. At trial, he denied that he had any active role in any negotiations or discussions about the terms of the commitment fee, and claimed he was merely a "go between" acting as a friend to help Ms. Fu. I find that this is incompatible with what he was saying to Ms. Fu at the time, illustrated most clearly by the following:

a) March 2, 2015 email in which he advised Ms. Fu that he asked the commitment fee to be reduced to $500,000 from $750,000, and that he was "still trying to see if we can lower the interest a bit more", adding that "international rates are higher than Canadian rates" as "real estate in Canada is viewed as safer, more stable than other parts of the world, especially China".

b) March 8, 2015 email in which he wrote that he had "negotiated with Chris [Lee]/Westbay" to reduce the amount of the commitment fee from $1 million to $500,000.

c) March 10, 2015 email in which he stated Westbay's position was that "3.25% fee [is] the lowest they can go". Some time later that day, he wrote "after a lot of discussions we have dropped the fee to 3%".

[119] These are only some examples of what I find to be stark contrasts between his testimony that he merely conveyed information between Ms. Fu and Christopher Lee and the emails he authored at the time.

d. The Appraisal

[120] While in Hainan to visit the property in mid-June 2015, Frank Lee communicated directly with Savills about the valuation being prepared. He received the initial reports and wrote:

> Just want to confirm that your valuation is in RMB. It translates to $91 million Cdn. This value is significantly lower than the valuation we had for the size & scope of this project. It is easily 4 to 4.5 times the value you suggested. Please reconsider your valuation. Thanks.

[121] Savills responded and sought instruction on whether the valuation should be on a clear site basis or a project completion basis. Frank Lee said the latter. The valuation then came back with a value of RMB 2,030,000,000, or about $285 million USD. He then advised Saville that he would meet with his client, and once he reviewed the report with them, he would give "the green light to proceed with the final version of this appraisal", which he ultimately did.

[122] Again, Frank Lee's testimony at first was vague about his role in finding or communicating with Savills, suggesting initially that Christopher Lee was meant to arrange it. When referred to the content of his emails to Savills, he insisted that he was merely passing along information from Ms. Fu "as a friend". He admitted that he asked for a correction to ensure ABW was correctly identified—this is after initially claiming he did not know how ABW's name got on the document. He also asked for the removal of the reference for his personal services company, and claimed he referred to Ms. Fu as his client, not because she was his client but because he wanted to appear professional, even though he was only acting as a friend. His explanation does not accord with logic nor common sense.

e. Information Memorandum

[123] An information circular was prepared to solicit investors in the Hainan Project. In his May 14, 2015 email to Ms. Fu and Christopher Lee, Frank Lee stated that he had "finished the information memorandum" and asked them to review it before Christopher Lee would send it to London, adding that it had taken him "a lot of time and energy …to get this done". When first asked about his role in preparing that document, he could not recall it and denied that he gathered any information for it. Overall, I find that he contributed significantly to the creation of that document contrary to his initial testimony about it.

3. Analysis

a. Frank Lee's Undertaking

[124] For the reasons set out below, I do not agree with the defendants' position that Frank Lee was acting merely as a friend. I find instead that through his words and conduct at the time, he portrayed to Ms. Fu that he was acting in a capacity in the Hainan Project with some similarities to what he did for the Richmond Purchase, with the critical proviso that he was not licensed to provide those services for land outside of Canada. I find that any reasonable person apprised of all the circumstances would come to the same conclusion.

[125] I find it unnecessary to make a finding as to exactly when the initial conversations about the Hainan Project between Ms. Fu and Frank Lee took place as everyone agrees it was around January or February 2015, and the exact date is immaterial. However, I agree that the issues identified above about Ms. Fu's testimony about timing compromises the weight I place on her testimony about the conversations generally.

[126] Moreover, I do not accept that either witness can recall the exact words that were spoken, despite them both purporting to do so. I find both witnesses' trial testimonies were tailored to varying degrees, whether consciously or unconsciously, to best align with their legal positions. Thus, I find their claims that they remember exactly what was said to be dubious and unreliable.

[127] I find Frank Lee's testimony about their initial discussions about the Hainan Project had inconsistencies about the content and tone of what he claimed to have said. The idea that he "got mad" at Ms. Fu or suggested that she did not "need" help because of her family's wealth, and then shortly thereafter agreed to assist her out of their "friendship", defies belief.

[128] Although there were differences between Ms. Fu's descriptions at the XFD and trial of the actual words used by Frank Lee in those conversations, there was consistency between her evidence and his about the topics they addressed in their discussions. Also, I found her evidence about the essential nature of what she was told, and her understanding at the time, to have a baseline consistency.

[129] There is no dispute that for the Richmond Purchase, Frank Lee was the mortgage broker for the company that bought the land. Thus, she was the representative of the corporate client, as she was for the Hainan Project.

[130] Notwithstanding Frank Lee identifying the limitations of mortgage broker licenses and his lack of experience in China, he admits that in the initial conversation about whether he could work again with Ms. Fu he also said he would "look into it" because of their success working on the Richmond Purchase. Indeed, both Ms. Fu and Frank Lee expressed a desire to continue a business relationship based on the success of the Richmond Purchase and a mutual feeling that it had gone well. The defendants suggest the reasons she offered for being content to have Frank Lee work on a project in China were suspect; however, the wisdom of her choice does not assist me in determining what words were spoken (and thus what undertaking was given) in those initial conversations.

[131] I add that Frank Lee admitted that Ms. Fu was the wealthiest person he had ever met, and there is no dispute that the Richmond Purchase was the most lucrative deal both he and ABW had completed. Therefore, it is not surprising that Frank Lee would be eager to continue a professional relationship with the Fu family companies. In that context, I do not accept he needed to be "persuaded" by Ms. Fu

to work on the Hainan Project. Moreover, the fact that he responded so quickly is more consistent with him being eager to work.

[132] I do not necessarily find Frank Lee's use of ABW's email or appearance of the logo in the signature block to be significant factors on their own. However, the degree to which he had difficulty answering questions surrounding that, combined with his inconsistency about why, and how, his name and ABW's address appeared on the Draft Proposals is significant. I find that he avoided providing truthful answers in an attempt to persuade the Court that his role was merely as a friend, rather than in any professional capacity.

[133] This point is significantly buttressed by the contrast between his testimony and emails, especially his communication with Mr. Luke. The material point is the degree and nature of the contrast between what he represented to Ms. Fu he was doing when he wrote the emails, and how at trial he described what he did.

[134] This is the case regardless of whether the emails were accurate about his actions. In other words, even if I were to accept that it is true he did not understand Mr. Luke's concerns, or that he did not "negotiate" with Westbay as he testified to at trial (findings that I do not make), anyone reading those emails would reasonably assume the opposite. Thus, I find that Frank Lee, as elucidated by the words he used at the time, represented to Ms. Fu and to Mr. Luke that he was actively involved in negotiating the terms of the agreement with Westbay. I do not accept any reasonable interpretation of his email communications are consistent with him having undertaken being merely a go-between, or simply assisting her as a "friend".

[135] I also find the evidence about the appraisal and information memorandum to be incompatible with the notion that he was merely assisting Ms. Fu as a friend. Since there was no evidence that Frank Lee and Ms. Fu discussed that his role had evolved or changed from their initial discussions, his role with both supports the notion that, from the beginning, he had undertaken to perform services at least somewhat akin to what he had done for the Richmond Purchase, or at least more involved than merely as a friend.

[136] Frank Lee and ABW emphasized that Ms. Fu acknowledged that she was aware Frank Lee and ABW were not licensed as mortgage brokers for land in China, asserting that evidence bars the conclusion that Frank Lee undertook to act *as a mortgage broker* for the Hainan Project.

[137] I do not agree that evidence is determinative, but I agree it is relevant. However, in my view, it is most relevant to the issue of the reasonability of Ms. Fu's reliance. With regard to the undertaking provided, the evidence was uncontroverted that despite mentioning his licensing restriction and lack of experience doing business in China, Frank Lee agreed he would work on the Hainan Project.

[138] The critical conversations in which Frank Lee agreed to work on the Hainan Project were brief, general, and vague, which complicates the analysis. More to the point, the nebulous nature of those conversations is critical to the analysis. That is because the case law has moved away from imposing duties based only on the status of the defendant, and towards the proximity analysis, and as part of that, the defendant's undertaking. The focus on the duty of care analysis is the relationship, or the proximity, that existed between the parties which can be found even if a person was not acting strictly in a full professional capacity. I am reminded of Justice Iacobucci's writing in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 1993 CanLII 146 (S.C.C.) that duty of care is not confined to "professionals"—it is not a threshold requirement—and surrounding circumstances can ground a duty of care notwithstanding the representor's profession: at 117-118.

[139] Furthermore, courts must use caution imposing a duty by implication. To put it another way, "*Maple Leaf* confirmed that undertakings are not to be treated as given at large": *Charlesfort Developments Limited v. Ottawa (City),* 2021 ONCA 410 at para. 37, and more generally at paras. 43-49.

[140] Although there were two conversations, given their close proximity in time, analytically I treat them as one. Accordingly, I find that the undertaking given by Frank Lee was to work on the Hainan Project in a role that had similarities to what he did on the Richmond Purchase, but circumscribed by the limitation on his license and lack of experience in China. Based on those factual findings, I cannot conclude

that Frank Lee gave an undertaking to act in a professional capacity as a "mortgage broker" as that term is understood in British Columbia, for the Hainan Project.

[141] However, that conclusion is not necessarily fatal to the plaintiffs' case, *even though* their position was firmly premised on finding that he had a duty as a mortgage broker. Frank Lee's written submissions aptly explain why:

> If the court refrains from imposing on Frank [Lee] a duty of care of a registered mortgage broker or akin to a mortgage broker, then the court must analyze whether the relationship between Frank [Lee] and [the plaintiffs] was characterized by enough proximity and foreseeability to create a duty of care on [Frank Lee] and to define the scope of that duty. In oral submissions, the court mooted that Frank [Lee] may not have been a registered mortgage broker and was acting as more than a "friend", but the court sought to define where Frank might fall between the two extremes. This court may resolve the tension by applying the test in *Maple Leaf Foods* and use the framework defined by the Supreme Court of Canada to determine that proximity, specifically by looking at whether Frank gave any express undertaking to [the plaintiffs] to perform a duty or service, which undertaking [the plaintiffs] accepted.

[142] Frank Lee goes on to argue that no such undertaking was given, but he has accurately distilled the issue before me.

[143] Given the foregoing discussion of evidence and my analysis, I find, on a balance of probabilities, Frank Lee undertook to Ms. Fu to act as her advisor about financing the Hainan Project. I am not persuaded on a balance of probabilities that the undertaking he gave was to act in a professional capacity as a mortgage broker for the Hainan Project.

[144] I add that the plaintiffs' allegations of negligence against Frank Lee centred on what they saw was his failure to perform "due diligence" on Westbay and Christopher Lee and their trustworthiness and financial stability. Even if I had agreed with the plaintiffs that Frank Lee gave an undertaking to act in a professional capacity as a mortgage broker for the Hainan Project, I do not agree that the evidence supports the conclusion that his undertaking for either the Richmond Purchase or the Hainan Project included performing those tasks.

b. Ms. Fu's Reliance

[145] The defendants submit that regardless of what Frank Lee may have said in agreeing to work on the Hainan Project, the evidence does not support a conclusion that Ms. Fu reasonably relied upon him to act in a professional capacity as a mortgage broker for the Hainan Project.

[146] The defendants focus on what they say is an inherent contradiction within her testimony. On one hand, she admitted that she knew at the time that he was neither licensed to practice, nor had working experience, in China. On the other hand, she testified that Frank Lee said, and she believed, that he "figured out a way" to continue to act for her in a way similar to the role he had in the Richmond Purchase.

[147] I agree this is material to the issue of her reliance. I also agree that her speculation that DLC would "open a branch" in China is farfetched. However, it is not clear to me that this evidence *necessarily* precludes a conclusion that she reasonably relied upon Frank Lee to act in a professional capacity as a mortgage broker. It was not incumbent on Ms. Fu to double-check or challenge Frank Lee about his assessment that he could work with her, notwithstanding his licensing restrictions. As noted, I do not accept his evidence that when he agreed to work with her, he qualified that he would only do so as a friend.

[148] However, what is clear in the case law is that her reliance cannot exceed the undertaking that was provided. This raises the thorny question of how to reconcile her admitted knowledge of Frank Lee's (and ABW's) license restrictions, and his undertaking to perform services that had similarities to what he did on the Richmond Purchase, except for a project in China.

[149] The plaintiffs rely on the degree of similarity of what Frank Lee did on the Richmond Purchase with what he did on the Hainan Project, emphasizing Mr. Chand's evidence that those tasks were typical for a mortgage broker. The plaintiffs assert those tasks included:

a) gathering financial information about the borrower to give to the lender;

b) finding an appropriate lender;

c) negotiating the mortgage amount and interest rate for the borrower;

d) ensuring the appraisal report had a loan to value ratio within the range that was acceptable for the lender; and

e) communicating with the borrower's legal counsel.

[150] What is critically missing from that list is any evidence (from Mr. Chand or otherwise) that it was typical for mortgage brokers to perform due diligence to verify the trustworthiness of lenders, or that in his experience, mortgage brokers at ABW had done so.

[151] I do agree that the list represents tasks undertaken by Frank Lee in the Richmond Purchase, but they do not correspond directly to what I find he undertook to do, and what he did do in the Hainan Project.

[152] Most importantly, the Westbay Agreement was not the same type of financing agreement as the Richmond Purchase. The Richmond Purchase involved a conventional commercial mortgage. Ms. Fu entered a contract on behalf of her family's company with the lender itself. The loan to the company was secured by a mortgage on the land. Frank Lee's services as a mortgage broker was to find that lender and persuade it to make an offer to Ms. Fu which she ultimately accepted.

[153] I agree with the submissions of both Frank Lee and ABW that there are significant and material differences between what Ms. Fu sought and Frank Lee obtained for her in the Richmond Purchase and the Hainan Project.

[154] The payment of the commitment fee represented the plaintiffs' agreement with Westbay that it would market the Hainan Project in an attempt to syndicate the loan, meaning finding other entities to provide the funding for the project. The agreement specifically confirmed the return of the commitment fee if Westbay was unsuccessful in syndicating the loan. In that way, the commitment fee was like a "finder's fee" for Westbay to find lenders. This is significant: Frank Lee had not found

a lender *per se* as he had for the Richmond Purchase, but he had found an entity with the purported capacity to find others who could lend the funds.

[155] In addition, I find it striking that nowhere in the Westbay Agreement is there any precise identification of the land on which the development was going to be built. The opening paragraph refers to "provision of financing" for the "Haikou NDJ West Bank Project". Clause 9 simply describes the project as a "2.2 Mn sq. ft. of Haikou NDJ West Bank … which is to include the construction of a Shopping Centre and Recreation Complex (or any other construction project in Hainan with a similar risk profile)".

[156] Other differences to the Richmond Purchase are also material including that the agreement involved a foreign borrower and foreign lenders. The agreement itself had no certainty or finality on whether or how the funds eventually loaned to the plaintiffs would be tied or secured to the land in China. Clause 11 stated that the parties "will agree on the final transaction/lending structure during the contract stage after consulting their legal and tax advisers" (emphasis added). Clause 12 committed the borrower to providing "adequate and acceptable" security, including possibly Westbay taking a pledge of shares. Stating parties "will agree" is unlikely to be an enforceable contractual term, and a promise to provide "adequate and acceptable" security is vague at best.

[157] The defendants submit these differences are pivotal because they accentuate the limitations they say Frank Lee specifically put on his undertaking: that he was unlicensed to act in a professional capacity as a mortgage broker for land in China.

[158] I agree these factors are important, but it is not clear to me they are independently determinative since it was unknown to both Frank Lee and Ms. Fu what the ultimate terms of the Westbay Agreement would be when Frank Lee agreed to work on the Hainan Project.

[159] However, when combined with other facts, I agree that Ms. Fu's reliance on Frank Lee was substantively more limited than she argued at trial. The plaintiffs' position is that Ms. Fu was heavily reliant upon Frank Lee to act has a mortgage broker, emphasizing the similarity in services he performed in the Richmond

Purchase to those provided for the Hainan Project. To the extent the plaintiffs want to rely on those similarities to define and impose a duty of care, it is fair to look at the extent to which the nature of Ms. Fu's reliance and conduct in both transactions were similar.

[160] In *Maple Leaf Foods,* the Supreme Court of Canada noted that "it is *the intended effect* of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff" such that "the plaintiff's pre-reliance circumstance" becomes an entitlement as against the defendant: at para. 34. However, that "pre-reliance circumstance" is circumscribed by the undertaking provided: *Maple Leaf* at para. 35. In this case, the "pre-reliance circumstances" must be tailored to Ms. Fu's conduct, understanding, and reliance on Frank Lee with regard to the Richmond Purchase.

[161] I find the evidence does not support the plaintiffs' contention that Ms. Fu was as heavily reliant on Frank Lee's advice or services in the Hainan Project as she claimed in her testimony.

[162] In the Richmond Purchase, after Frank Lee obtained the initial offer of a mortgage from CMLS, Ms. Fu of her own accord obtained an offer from the Bank of China, which was then essentially leveraged, at Mr. Luke's suggestion, to persuade Frank Lee to lower his compensation to secure the CMLS offer (see above para. 25). This is demonstrative evidence that Ms. Fu had both the initiative and connections to secure a funding proposal without Frank Lee's knowledge or participation. She also benefited from the negotiation conducted by her legal counsel to reduce Frank Lee's fee to secure a better deal for the plaintiffs.

[163] This is particularly significant because Mr. Chand confirmed that neither a brokerage nor mortgage broker earn any money until a financing deal is successfully completed. Ms. Fu was aware that Frank Lee's fee would simply come out of the funds actually loaned to the company. Therefore, Ms. Fu was free to accept the offer she obtained from the Bank of China, and had she done so, Frank Lee would not have been paid and would have been the mortgage broker for that financing.

[164] Ms. Fu had the same expectation regarding Frank Lee's compensation for his services for the Hainan Project, and confirmed that the two of them never discussed his fee for any work he did.

[165] However, the Westbay Agreement was not an agreement to advance funds to the plaintiffs, and there was no evidence that anyone expected Frank Lee would be paid unless and until there was a successful syndication of the loan and the plaintiffs obtained the funds for financing. In those circumstances, I conclude that Ms. Fu's reliance on Frank Lee simply could not have been the same in the Hainan Project as it had been for the Richmond Purchase. To the degree she testified otherwise, I do not accept her testimony on that point.

[166] Equally important, Ms. Fu sought out Mr. Luke's advice for both transactions. In the Richmond Purchase, he reviewed and suggested changes to the funding agreement (see above para. 24). With regard to the Hainan Project, Mr. Luke expressed serious concerns with the feasibility of the Westbay proposal and Westbay's experience and expertise. He made concrete suggestions, some of which Ms. Fu chose not to follow, including that she obtain advice from a lawyer in China and ensure the commitment fee was deposited in a lawyer's trust account.

[167] Ms. Fu chose not to seek out and retain a lawyer from China. When she was cross-examined about why she did not heed that advice, I found her evidence to be problematic.

[168] At the XFD, she agreed that Mr. Luke advised her that it was not a good idea to proceed with the transaction until she got advice from lawyers familiar with Chinese law. However, she attempted to distance herself from that evidence by saying she did not understand that was Mr. Luke's advice until she was asked those questions at the XFD. That is difficult to reconcile with the objective evidence of the wording in his emails.

[169] She also said that Frank Lee "calmed her down" by suggesting the transaction was not within Mr. Luke's field of expertise, implying that she relied on

Frank Lee to ignore Mr. Luke's advice about that need. Her evidence on this point is not only not unbelievable, it reveals an inherent contradiction and critical flaw in her legal position.

[170] In her testimony and submissions, Ms. Fu portrayed Mr. Luke as representing the "gold standard" of a professional advisor. Given that, I do not accept that she decided to ignore his clear recommendation (including providing a contact) to seek out legal advice from a Chinese lawyer based on a statement from Frank Lee that Mr. Luke's expertise was suspect. Even if Frank Lee made that statement, it is unreasonable for Ms. Fu to prefer and rely on that advice when it directly conflicted with advice from her trusted legal advisor on the precise topic being considered, which is the need for legal advice. Certainly, there was no evidence whatsoever that she believed Frank Lee undertook to provide her with professional advice akin to legal advice, or even advice about legal advisors.

[171] With regard to putting the funds into a lawyer's trust account, she claimed that she asked Mr. Luke about that, and he advised that as long as it was a trust account, that would be sufficient. However, during his testimony, he could not recall having that discussion with her. In any event, the pivotal point is that she was not content to rely only on Frank Lee and specifically sought out Mr. Luke's opinion. I add that was not only with regard to what type of account would safeguard the commitment fee, but also with regard to the terms of the agreement.

[172] The plaintiffs argue that Christopher Lee on behalf of Westbay, with Frank Lee's participation, created a false sense of time pressure to induce Ms. Fu to agree to the Westbay Agreement (see above paras. 32(k) and (x)).

[173] There are two problems with that position. The first is that Ms. Fu agreed she was able to resist that time pressure around March 2, 2015 because she did not believe the terms offered at that point were favourable enough to the plaintiffs. In other words, she was able to exercise her independent judgment about whether to sign the agreement at that point. However, in her testimony and submissions she

claimed she was essentially induced to agree to the terms of the Westbay Agreement by pressure exerted by Frank Lee around March 10 and 11.

[174] I do not find her testimony at trial that Frank Lee pressured her to sign the agreement to be credible. During cross-examination, when it was suggested to her that her ability to resist the pressure around March 2, 2015 belied the notion that she was induced by Frank Lee on March 11, 2015, her testimony was evasive and argumentative, and her explanations were incompatible with common sense.

[175] The second problem is that I find she knew that the information Frank Lee gave to her came from Christopher Lee and Westbay. She was aware that the "urgency" was not created by anything Frank Lee could control.

[176] For those reasons, I am not persuaded that Ms. Fu reasonably relied upon Frank Lee to act in a professional capacity as a mortgage broker for the Hainan Project. Instead, I find that she relied upon him to provide advice about financing the Hainan Project.

4. Conclusions on Duty of Care

[177] For the reasons discussed above, I am not persuaded that Frank Lee owed a duty of care as a mortgage broker to the plaintiffs. Instead, I find that he undertook, and Ms. Fu reasonably relied on him to act as an advisor regarding financing for the Hainan Project.

B. Standard of Care

[178] The plaintiffs rely on case law that articulates the standard of care for mortgage brokers and they tendered no expert evidence at trial. Their position is that the applicable standard is that the mortgage broker is to act reasonably in all the circumstances and that expert evidence is not required in this case. Because I have concluded that Frank Lee did not owe a duty to the plaintiffs as a mortgage broker, the plaintiffs cannot succeed on this point.

[179] However, in the alternative, if I am mistaken and Frank Lee did owe a duty of care as a mortgage broker, I still conclude that the lack of expert evidence in this case would be fatal to the plaintiffs' claims.

1. Legal Principles

[180] Expert evidence on the standard of care in a professional negligence case is generally considered necessary, with two exceptions: where an alleged breach relates to matters that are not technical in nature and within the knowledge and experience of an ordinary person; or where the alleged breach was egregious: *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196 at para. 112.

[181] Courts have commented that where the conduct of a professional is in question, expert evidence may be required to establish whether the impugned conduct conformed to the standard expected of that professional, especially where technical considerations arise that are beyond common understanding: *Bridgewater Tile Ltd. v. Copa Development Corporation,* 2022 BCSC 310 at para. 169; *Integrated Contractors Ltd. v. Leduc Development Ltd.,* 2016 BCSC 1984 at para. 23.

[182] In my view, Justice Norell's discussion of this issue in *Grech v. Stanley,* 2021 BCSC 2169, aff'd 2023 BCCA 348 [*Grech*] is very helpful. *Grech* involved a real estate transaction. At issue was the potential negligence of a real estate agent to a vendor with regard to the agent's recommended list price for the property. It was conceded that the agent owed a duty of care to the vendor, but the parties differed on the evidence required about the applicable standard of care. As in this case, no expert evidence was adduced.

[183] In setting out the applicable legal principles on that issue, Justice Norell refers to *Krawchuk v. Scherbak*, 2011 ONCA 352. In that case, one issue was whether expert evidence was required to determine if a real estate agent breached the standard of care with regard to his reliance on the accuracy of the vendor's representations. The Ontario Court of Appeal stated (quoted in *Grech* at para. 129):

> [125] To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent

> in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence: [citations omitted]. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact [citations omitted]. External indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.
>
> …
>
> [130] The jurisprudence indicates that, in general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence.
>
> [Emphasis added.]

[184] The emphasized portions reinforce the importance of ensuring that the standard of care analysis, including asking whether expert evidence is needed, is tailored to the particular facts of the case and the nature of the issues raised. Justice Norell ultimately concluded expert evidence was required, and therefore the claim failed.

[185] The plaintiffs rely on, among others, *Lindner v. Allin*, 2002 BCSC 212 [*Lindner*] for the proposition that expert evidence is not needed in this case. In *Lindner*, the plaintiffs, who were private lenders, held a second mortgage on residential property that, at the time of foreclosure proceedings by the first mortgagee, was the site of a marijuana grow operation. The property had been damaged by the grow operation, and when the property was sold, there was insufficient equity to repay the second mortgage. The plaintiffs sued, among others, the mortgage broker who brought together the borrower and the plaintiffs.

[186] The chambers judge found the mortgage broker was negligent:

> [19] Williams was negligent because he informed the plaintiffs, people who to his knowledge were relying upon him and his expertise in the area, that the mortgage was a "good mortgage" and the investment secure. He gave this information based on his belief, long outdated, about the employment circumstance of the defendant. But more importantly, his advice that the equity was sufficient was based upon an assessed value of the property evidenced in documents clearly stated to be not for the purpose of mortgage security.

[187] The documents referred to were two appraisals. The first explicitly stated it was not intended to be for mortgage security, nor to be relied upon by third parties. Moreover, the appraisal had done a cursory roadside inspection of the property. The second merely updated the first.

[188] The court commented on the lack of evidence on standard of care:

> [20] There was no evidence brought as to the standard expected of mortgage brokers in the Province of British Columbia in 1996. However, on the face of it, I am satisfied that any standard which would allow a mortgage broker to convey information to those relying upon him which he knows is based upon opinions expressly stated to be not for that purpose, or upon information which he knows or should know is out of date, is negligent. I so find.

[189] However, the court went on to find that the evidence did not disclose when the marijuana grow operation had started. If it started after the second mortgage was registered, the loss could not have been caused by the mortgage broker's negligence: *Lindner* at para. 22. The onus was on the plaintiffs to prove causation of the loss, and therefore the claim was dismissed.

[190] I do not find *Lindner* to be helpful since the facts are distinguishable; the alleged breaches in that case do not match the allegations made by the plaintiffs before me. Among other things, the mortgage broker in that case was handling a mortgage on property in Canada for $65,000 whereas the Hainan Project involved finding financing for a $100 million development in China. Also, in *Linder*, it was the mortgage broker who sought out the plaintiff to facilitate the loan.

[191] More importantly, I prefer the reasoning in the more recent case *Bryce v. Rala Investments Ltd*, 2020 BCSC 90 where virtually the same issue was addressed. The plaintiffs cited *Bryce* in relation to the existence of a duty of care, but I find it helpful on the issue of standard of care.

[192] The plaintiff claimed damages against the defendant mortgage brokers in relation to an appraisal that was provided to him by the defendants. The plaintiff had decided upon retirement to invest some of his finances in private mortgage financing

and enlisted the services of mortgage brokers to recommend mortgage deals to him. The parties successfully concluded about five transactions before the one that resulted in litigation.

[193] In May 2010, the mortgage broker advised the plaintiff of an opportunity to invest in a second mortgage of $500,000 which ranked behind a mortgage of $600,000. A 2008 appraisal valued the property at $2.1 million. The appraisal contained typical disclaimers limiting the use which should be made of it.

[194] The plaintiff relied on the appraisal for the purpose of facilitating mortgage financing. The actual value of the property turned out to be substantially less than stated in the 2008 appraisal, which resulted in foreclosure on the property. The plaintiff filed two expert reports indicating significant flaws with that appraisal.

[195] The plaintiff also filed an expert report from a mortgage broker, most of which was ruled inadmissible. However, the report's discussion of the standard of care was admitted and relied upon by the court.

[196] The expert opined about a reliance letter, or letter of transmittal ("LOT"), from an appraisal's author authorizing the use of the appraisal by a party other than the party for whom it was prepared. Specifically, the expert opined that it was standard practice in the mortgage industry for a mortgage broker to: (i) obtain a LOT; (ii) advise the lender to obtain a LOT, or (iii) advise the lender to obtain its own appraisal.

[197] Justice Weatherill was satisfied the mortgage broker met that standard notwithstanding that when the appraisal was sent to the plaintiff, the covering email did not qualify it or caution against relying on it (para. 57). In addition, Weatherill J. found that the mortgage broker at the outset of their relationship told the plaintiff he was free to obtain his own appraisal, advice the plaintiff ignored (para. 55).

[198] It is useful to note that the lack of expert evidence may be fatal in claims involving home construction (*Bridgewater Tile Ltd. v. Copa Development Corporation*, 2022 BCSC 310 at paras. 168-171) and the duties of a project manager

(*Integrated Contractors Ltd. v. Leduc Development Ltd*, 2016 BCSC 1984 at para. 23).

2. Analysis

[199] In its pleadings, the plaintiffs allege Frank Lee failed to meet the following three duties he owed to the plaintiffs:

a) To exercise the care and skill ordinarily exercised by a mortgage broker in British Columbia;

b) To make inquiries and engage in basic due diligence about the accuracy of representations he made; and

c) To ensure his representations were accurate.

[200] The plaintiffs allege Frank Lee's breaches of duties he owed to the plaintiffs were so flagrant that it obviates the need to call expert evidence. In support of this contention, the plaintiffs focused on two areas: (i) advising Ms. Fu that he would assist her to find financing for the Hainan Project, and doing so, despite being licensed to act as a mortgage broker only for property located in British Columbia; and, (ii) communicating in a professional capacity with Mr. Luke, the appraiser, and Christopher Lee on behalf of the plaintiffs.

[201] I do not agree either proposition places this case into the category where no expert evidence is required.

[202] The flaw with the plaintiffs' position is the conflation of Frank Lee's duties under the *MBA* owed to the regulator and the public at large, with a private law duty owed to them. However, the two are distinct and not necessarily interchangeable. Accordingly, it may be obviously contrary to the legislation for him to purport to be a mortgage broker for land in China, but I am not persuaded that is necessarily determinative as to whether he breached the standard of care he owed to the plaintiffs.

[203] That is because the plaintiffs must point to something he did or failed to do that fell short of the standard expected of mortgage brokers, which caused damage to them. Acting outside the scope of his license, and breaching the rules set out in the *MBA*, is primarily a matter for the regulator. Breach of a statutory standard may be one factor in the overall negligence analysis under the common law, but it is not determinative on the issue: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 29, 1999 CanLII 706 (S.C.C.). The statutory standard is not co-extensive with the common law standard of care—to treat them as such would effectively amount to an application of strict liability, which is not the test for negligence: *Haynes v. Haynes*, 2017 BCCA 131 at para. 25.

[204] The plaintiffs second area of focus to establish a flagrant breach of the standard of care is Frank Lee's communication in a professional capacity with Edmond Luke, Savills, and Christopher Lee. This position is difficult to reconcile with Mr. Chand's evidence, upon which the plaintiffs relied, that doing so constituted typical tasks for mortgage brokers.

[205] To my mind, the plaintiffs' argument on this point is really an extension of the first submission -- that purporting to communicate as a mortgage broker with others on behalf of the plaintiffs for a transaction for which he was not licensed breached the standard of care. I repeat my analysis above that I am not persuaded this is such a flagrant breach that expert evidence is unnecessary. This conclusion is buttressed by the existence of evidence suggesting such communication is encompassed within the ordinary tasks of a mortgage broker.

[206] The key to determine whether expert evidence is required is to analyze the specific conduct the plaintiffs allege breached the standard of care, and ask whether that conduct so blatantly fell below the standard of care so as to make expert evidence unnecessary.

[207] The plaintiffs admit there is overlap between their position on this issue (Frank Lee's flagrant breach of a standard of care) and their submissions on negligent misrepresentation. The primary complaints under negligent

misrepresentation are Frank Lee's failure to perform "due diligence" in two areas: (i) the accuracy of representations made by Christopher Lee about Westbay's experience and capacity to syndicate the proposed loan; (ii) and whether the Roxschild Account was a trust account.

[208] I do not agree that any failure to investigate or verify either type of information was conduct so obviously below the expected standard of a mortgage broker that expert evidence is not needed.

[209] There was no evidence that Frank Lee had done that type of investigation or verification of CMLS in the Richmond Purchase, and there was no suggestion of his need to confirm the status of any bank account. Given the plaintiffs' emphasis on what they say was the similarity of duties Frank Lee performed in both transactions, that omission is material.

[210] Also, both topics were the subject of advice Ms. Fu sought and received from Mr. Luke. This significantly diminishes the notion that Ms. Fu expected that Frank Lee would be responsible for verifying that information. In other words, if she herself did not have that expectation, I cannot see how failing to do so can be seen to be such a flagrant breach of the standard of care.

[211] There was no evidence supporting the proposition that it was a typical part of a mortgage broker's tasks to investigate or conduct due diligence into the financial health of viability of a proposed lender. Although Mr. Chand was not qualified as an expert, he was specifically asked that question and disagreed with that suggestion. That evidence may not be determinative, but it is relevant.

[212] Even if either were found to fall within the purview of a mortgage broker's duties, expert evidence is needed to understand what tasks the mortgage broker would need to do to meet the standard. I find those matters are beyond the ken of an ordinary person.

[213] Moreover, the plaintiffs did not specify in what ways Frank Lee failed to meet the purported standard of due diligence. The plaintiffs did not lead evidence nor

assert any of the following components of that failure: what steps should Frank Lee have taken; the intensity of his efforts in taking those steps; the extent to which he could or should have relied on third parties; the time he should have devoted to his inquiries; and, what he ought to have done should his investigation have turned up negative results.

[214] For those reasons, I am unable to conclude that Frank Lee failed to meet any standard of care expected of him, whether acting as an unspecified professional or as a mortgage broker. Accordingly, the plaintiffs' claims in negligence as against Frank Lee cannot succeed.

C. Damages

[215] In the event my conclusion about duty of care and standard of care are mistaken, I will in the alternative examine whether the plaintiffs have proven their damages.

[216] An essential element of the plaintiffs' claim is the requirement to prove they suffered a loss: *Maple Leaf Foods* at para. 18; *Davidson v. Lee, Roche and Kelly*, 2008 ONCA 373 at para. 6. It is well established that a defendant will not be responsible in negligence for that loss unless its breach caused the loss: *Engman v. Canfield*, 2023 BCCA 56 at para. 93.

[217] This requires a causation analysis that has two distinct aspects. The plaintiff must establish factual causation, which means proving that the harm would not have occurred "but for" the defendant's negligent conduct. Factual causation can be established by inference so long as the inference is based on proven facts and not "guesswork or conjecture": *Engman* at para. 94. In addition, the plaintiff must establish legal causation by proving that the actual loss sustained by the plaintiff was a reasonably foreseeable result of the defendant's negligent conduct.

[218] The plaintiffs assert two losses in this case: (i) the payment and failure to refund the commitment fee; and (ii) paying for Frank Lee and Christopher Lee to travel to China.

1. The Fee

[219] The defendants submit that the plaintiffs have failed to meet the evidentiary burden to prove that either DeHong or Kinghouse paid the commitment fee. The grounds upon which they base that position differ amongst the defendants.

a. What Was Pleaded

[220] Counsel for the plaintiffs asserted that the defendants' denial at trial of the fact that the plaintiffs paid the commitment fee took her by surprise. The Court stated it would consider an application by the plaintiffs to re-open the case to adduce further evidence on that point, however counsel informed the Court during closing submissions that she was unable to obtain relevant documents. I note counsel's information was consistent with Ms. Fu's testimony that those documents had not been kept.

[221] ABW challenges the notion that the plaintiffs were taken by surprise by pointing out "it is unnecessary for the defendant to plead that the plaintiff has not suffered by damages because the onus is on the plaintiff to prove damages": *Volovsek v. Boisvenu Alter-Ego Trust #1*, 2021 BCCA 179 at para. 46.

[222] In any event, ABW submits its argument arises on the pleadings so the Court ought not to give relief on the basis of surprise. That is a specific reference to paragraph 23 of the further amended notice of civil claim ("NOCC") which pleads that, around March 12, 2015, Hainan paid the commitment fee by way of wire transfer to the Roxschild Account. ABW's response at paragraph 2 of Division 1 (p. 1) contains a specific denial of the facts in paragraph 23. In addition, ABW denies that the plaintiffs paid the commitment fee "in reliance on any representations or advice provided by Frank Lee, **or at all"** (ABW response, para. 11(v), emphasis added).

[223] With the exception of three paragraphs in the NOCC, Frank Lee only makes a general denial of all facts in the NOCC (Division 1, paragraphs 1 to 3 of his response).

[224] In his response, Christopher Lee makes a general denial of the facts in paragraph 23 of the NOCC, but he admits the facts in paragraph 21 which include a reference to Hainan's agreement with Westbay that Westbay would loan Hainan up to $100 million, and Hainan would pay a refundable commitment fee. Also, at paragraph 19, he responds to the allegation of reliance contained in paragraph 23 of the NOCC but does not mention payment of the fee. At paragraph 29 of his response, Christopher Lee pleads that he has "worked diligently to cause Westbay Partners to repay the Commitment Fee to the plaintiffs, without success".

b. Parties' Positions

[225] The plaintiffs submit the Court can find that the plaintiffs paid the commitment fee, and that the defendants' arguments resisting that finding are flawed. The plaintiffs' position is that the following, when considered together, are sufficient to prove on a balance of probabilities that the plaintiffs paid the commitment fee:

a) The Westbay Agreement legally obligated Hainan to pay the fee.

b) Frank Lee gave Ms. Fu instructions as to which account to pay the funds into, based on information from Christopher Lee.

c) Ms. Fu ordered the transfer of funds to pay the commitment fee to the Roxschild Account by an intermediary because the flow of funds into China is restricted.

d) HSBC documents show that USD $499,998.06 was deposited into the Roxschild Account the day after the Westbay Agreement was signed.

e) Christopher Lee testified that Westbay was not in line to receive any other significant funds around that time that would explain that influx of funds.

f) Westbay issued a receipt stating that funds were received by it and Roxschild.

[226] ABW submits the receipt is hearsay and cannot be accepted for the truth of its contents. It also relies on Ms. Fu's acknowledgement that she does not know and cannot say which company was the source of the funds deposited into the Roxschild Account. Accordingly, ABW says there is no admissible evidence of the source of the funds that the HSBC document established was paid into the Roxschild Account.

[227] In the alternative, even if the receipt could be admitted for the truth of its contents, ABW contends it, too, does not specify which plaintiff paid the commitment fee.

[228] Frank Lee contends that it is not controversial that some entity from the Fu family of companies paid the fee, but the evidence does not establish that the plaintiffs did so.

[229] During cross-examination, Christopher Lee accepted that the plaintiffs paid the fee, although he clarified in his closing submissions that he had no personal knowledge of that fact.

c. Analysis

[230] The plaintiffs argue ABW and Frank Lee's position on this issue, which rests on hearsay and lack of testimony from a person with personal knowledge, cannot succeed. They point out that Ms. Fu was testifying as a corporate representative and as such she need not have personal knowledge: *Gardner v. Viridis Energy Inc*, 2012 BCSC 1816 at paras. 71-80.

[231] That decision was about the obligations of corporate representatives to inform themselves in advance of an examination for discovery. Unlike some other provinces, British Columbia has no rule that imposes an express obligation on any person to be examined for discovery to prepare in advance, but the Court in *Gardner* held that "the obligation of a person being examined for discovery to answer any question within his knowledge or means of knowledge includes the obligation to make reasonable efforts to prepare for the examination for discovery", and that

"[w]hat constitutes reasonable preparation will vary with the circumstances of the particular case": at para. 80.

[232] ABW submits the case is unhelpful because it is restricted to obligations of a corporate representative at an examination for discovery.

[233] The concept that a corporate representative need not have personal knowledge in order to provide evidence binding a corporation is not controversial. However, ABW and Frank Lee make a different point. They emphasize that Ms. Fu was unable to confirm that the commitment fee was actually paid by either plaintiff, as opposed to some other entity within the Fu family companies.

[234] The plaintiffs submit that Christopher Lee's evidence that Hainan paid the commitment fee carries weight because he was in the best position to know. ABW submits that Christopher Lee's testimony does not constitute a formal admission, but even if it did, that admission does not operate as against ABW or Frank Lee. The plaintiffs disagree, arguing that if the Court agrees a loss has been proven, that finding is binding as against all defendants.

[235] In my view, the issue is resolved by another route. There is no dispute whatsoever that the commitment fee was paid. The Court is permitted to draw inferences from established facts. I agree with the plaintiffs that the facts cited above at paragraph 226 tend to prove that the plaintiffs paid the commitment fee. In particular, I find two facts (Ms. Fu's testimony that she was the one to order the transfer of funds to pay the commitment fee to the Roxschild Account by an intermediary, and the HSBC documents showing that USD $499,998.06 was deposited into the Roxschild Account the day after the Westbay Agreement was signed) to be particularly significant on this issue. In addition, Frank Lee's emails, conduct, and testimony are only consistent with his belief and assumption that one of the plaintiffs paid the commitment fee, consistent with Christopher Lee's testimony.

[236] Based on the foregoing, I draw an inference and find on the balance of probabilities that one of the plaintiffs paid the commitment fee.

2. The Cost of the Trip to China

[237] The NOCC contains the claim that the plaintiffs paid approximately $100,000 for Frank Lee, Christopher Lee, and his companion to visit Hainan, China.

[238] ABW submits that the plaintiffs tendered no evidence about the actual costs of that trip, therefore they have not proven that loss. It also submits that the plaintiffs have failed to establish that at the time the alleged negligent conduct occurred, there was no discussion or anticipation of a trip to China, so those costs, even if proven, were not foreseeable.

[239] I agree this loss has not been proven in evidence. I also conclude that the plaintiffs have failed to establish a causative link between the alleged negligent conduct and incurring the cost of this trip.

3. Causation

[240] Apart form the evidentiary issues discussed above, ABW and Frank Lee submit that the plaintiffs have not established that they would not have paid the commitment fee “but for” the alleged negligent conduct and/or representations.

[241] This position harkens back to the lack of evidence about a purported standard of care to perform due diligence into the status of the Roxschild Account. ABW and Frank Lee submit that Frank Lee’s failure to independently verify that the Roxschild account was a trust account did not cause the loss because they say Ms. Fu knew that Frank Lee was merely passing along information he got from Christopher Lee.

[242] Among other things, they point to the timing to support that proposition. The Roxschild Account was not brought to anyone’s attention until the morning of March 10, 2015, and the commitment fee was paid the next day. They submit it was inconceivable for Frank Lee to have been able to verify the status of that account within a day, and that must have been obvious to Ms. Fu.

[243] Moreover, ABW and Frank Lee contend that Ms. Fu relied not on Frank Lee's alleged confirmation about the account but Mr. Luke's assurance that payment to a trust account, not a lawyer's trust account, was acceptable. The evidence on this was unclear as Mr. Luke could not confirm that he had this specific discussion with Ms. Fu. Nonetheless, Mr. Luke did say he does not believe he would have expressed a concern. In any event, Ms. Fu testified she recalled Mr. Luke giving her that advice and that she relied upon it.

[244] It is not clear to me that this necessarily defeats the plaintiff's claim. The plaintiffs' position is that it was the combination of Frank Lee's alleged assurance about the account being a trust account and Mr. Luke's advice that prompted the payment.

[245] Frank Lee submits that even if the Roxschild Account was a trust account and he had been able to verify that for Ms. Fu, that does not guarantee that the commitment fee would have been refunded. His point is that no amount of verification or due diligence could have prevented Christopher Lee and William Otieno from wrongfully keeping the commitment fee.

[246] The plaintiffs' response is that they would not have paid the fee in the first place had they been accurately informed that the account was not a trust account.

[247] However, the loss is not the payment of the fee but the failure to refund it.

[248] I agree with the plaintiffs that the HSBC records tendered for the truth of their contents prove the Roxschild Account was not a trust account, but it is not clear to me that information would have been available to Frank Lee had he attempted to make those inquiries. Furthermore, it strikes me as unreasonable to expect confirmation of that sort could be made in the short duration, especially for a person that Ms. Fu knew had no business experience in China.

[249] Moreover, I am not persuaded that Ms. Fu would not have paid the commitment fee had she learned the account was not a trust account. The plaintiffs' position on this issue is flawed because it requires me to be satisfied on a balance of

probabilities that had Frank Lee engaged in due diligence (the exact nature of which is unspecified), he would have come to the realization that Christopher Lee and/or Westbay would not, in the future, refund the commitment fee. In other words, I am not persuaded the that the plaintiffs could establish that there is a factual link between Frank Lee's failure to accurately verify the status of the Roxschild Account, and Christopher Lee and/or Westbay's failure to refund it.

[250] I also do not agree that the evidence has established legal causation in the sense that it was foreseeable to Frank Lee that the commitment fee, once paid, would not be refunded. This reverts again to the importance of the uncontested evidence that Ms. Fu was aware of Frank Lee's lack of experience at doing business in China. As I have already determined that it has not been established that Frank Lee did, or should have, provided an undertaking, my conclusion on her reliance are crucial, as noted in *Deloitte* at para. 35:

> Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties: a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable.

D. Conclusions on Frank Lee's Negligence

[251] I therefore dismiss the plaintiffs' negligence claim against Frank Lee. I find that the plaintiffs' position that Frank Lee's undertaking for the Hainan Project was *as* a mortgage broker is untenable. Despite my finding that he did make an undertaking to act as an advisor of sorts with regards to the Hainan Project, I find that the plaintiffs have failed to establish what the standard of care would be in such situation, and how that standard was breached. I do not find that the conduct was so egregious as to make the expert evidence on the standard of care unnecessary, or in other words, I do not find that the fact that Frank Lee breached the *MB Act*, on its own, requires me to find that the common law standard of care, in the specific factual circumstances of this case, was breached.

[252] Even if I were to have found that Frank Lee owed a duty of care *as* a mortgage broker, and breached the standard of care owed under that duty, I do not find that the plaintiffs have proven causation. I do not find factual, or legal, causation flowing from the alleged negligent conduct by Frank Lee in his failure to verify that the Roxschild Account was, in fact, a trust account, to the result, which is that Chris Lee/Westbay did not refund the commitment fee.

V. IS ABW EITHER DIRECTLY OR VICARIOUSLY LIABLE?

[253] The plaintiffs' position is that ABW is itself directly liable in negligence, or alternatively, vicariously liable for Frank Lee's actions as ABW's agent with either actual or apparent authority.

[254] ABW submits that the plaintiffs have not pleaded a viable claim of negligence against it. Furthermore, it submits the claim based on agency cannot succeed, primarily because Frank Lee was an independent contractor.

A. ABW's Liability in Negligence

[255] I first address the negligence claim directly against ABW. The plaintiffs base this position on two main factors. The first factor is an alleged failure to supervise Frank Lee, grounded on two points: (i) through ABW's inaction by failing to exercise its authority over him to learn what he was working on; and (ii) by the nature of ABW's business/supervision structure itself, which gave them no insight into Frank Lee's conduct until the transactions conclude. The second factor is in permitting Frank Lee to advertise his association with ABW without any limitations on his licence or territorial limits, as well as allowing Frank Lee to associate with ABW without any statement of the relationship between him and ABW, or the capacity within which he was operating.

[256] ABW's position is that a claim of negligent supervision has not been pleaded, and that the plaintiffs' failure to articulate the material facts and necessary elements of that claim is fatal. ABW also submits that the plaintiffs' position was based, at

least in part or by implication, on the provisions of the governing legislation, the *MB Act*. ABW emphasizes that no breach of the statute was pleaded.

[257] ABW contends that pleadings are foundational, and the fairness of the trial process depends upon proper pleadings: *Mercantile Office System Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21-23. ABW's position is that the plaintiffs' failure to specifically plead negligence with regard to either ABW's failure to generally supervise Frank Lee, or implied breach of any statutory duty, means that I should not consider them in this context.

[258] In their reply submissions, the plaintiffs submitted they would not maintain a claim of stand-alone negligence against ABW in circumstances where ABW says it was taken by surprise. Nevertheless, for the sake of completeness, I analyze the issue.

[259] I agree with ABW that there is no basis in the NOCC to find it liable under the first factor put forward by the plaintiffs, the failure to supervise Frank Lee. To allow that claim to go forward would be fundamentally unfair. Had the claim been maintained, I would have dismissed on that basis alone.

[260] I add that regardless of that conclusion, from a practical perspective, the discussion of that issue would have turned on the same facts discussed below on the issue of vicarious liability. Thus, I am satisfied that had the claim of negligent supervision been pleaded and maintained, my analysis of that issue would have come to the same conclusion, which is that ABW was not liable on that basis.

[261] What remains is the second factor put forward by the plaintiffs, the claim that ABW is negligent by allowing Frank Lee to associate himself with ABW through his communications and advertising without any limitations on his licence, territorial limits, or disclosing the nature of his association with ABW. The plaintiffs particularly note that the email signature used by Frank Lee reproduced above paragraph 107 does not state, or define, the nature of the relationship between him and ABW, whether it be as an employee, agent, independent contractor, or otherwise. The

plaintiffs argue that Frank Lee's email signature does not give a member of the public any indication of any limits on liability, and ABW is thus negligent.

[262] In my view, the analysis above regarding the significance of these facts to the undertaking Frank Lee provided (see above para. 133) sufficiently answers this claim: the use of ABW and/or DLC logo or marketing materials is insufficient, on its own, to render either Frank Lee or ABW liable in negligence for any conduct by Frank Lee.

[263] However, if I am wrong in that conclusion, I find the claim would fail for the failure to adduce expert evidence about the standard of care required of a brokerage vis-à-vis its co-broker. In my view, expert evidence is needed on the issue of standard of care for the same reasons stated above at paragraphs 200 to 215, which I rely on and adopt here. The plaintiffs did not suggest any conduct of ABW was so flagrantly negligent so as to make expert evidence unnecessary. The lack of expert evidence defeats the claim of negligence as against ABW.

[264] For all those reasons, even if the claim that ABW was liable in its own right in negligence had been properly pleaded and maintained, I would have dismissed it.

B. Vicarious Liability

[265] As noted, I have concluded that the plaintiffs' claim against Frank Lee cannot succeed; therefore, there is no basis to find ABW vicariously liable. Nevertheless, I will in the alternative analyze that issue.

[266] The parties approached the vicarious liability issue differently. The plaintiffs submit that Frank Lee was an agent of ABW who exercised actual, or in the alternative, apparent authority to bind ABW to his duties or obligations in both the Richmond Purchase and the Hainan Project. ABW and Frank Lee submit that Frank Lee was an independent contractor, and as such, argue that vicarious liability cannot be imposed on ABW.

[267] Both routes require an examination of the contracts in place amongst ABW, Frank Lee, and Viva Pro. The plaintiffs also rely on other evidence, primarily from Mr. Chand, as being indicative of an agency relationship.

[268] ABW submits that those facts are completely, or mostly, irrelevant to the central issue, which is the nature of the relationship between ABW and Frank Lee. It also contends that Ms. Fu knew at all times that Frank Lee was acting outside the scope of his license and business in relation to the Hainan Project, and therefore, she must also have known that ABW's involvement was different than it had been in the Richmond Purchase, negating ABW's vicarious liability.

[269] To some degree, the plaintiffs also implicitly rely on provisions of the *MB Act*. I repeat my earlier conclusions that any claim based on failure to supervise Frank Lee or breach of statutory duty must fail for failure to be properly pleaded (above at paras. 257-259). For that reason, it is my view that the statute and any duties under it cannot be the basis on upon which liability is found against any of the defendants.

1. The Contracts

[270] Frank Lee (as sub-broker) and ABW entered into an agreement in August 2014 (the "Broker Agreement"). The following terms of the Broker Agreement are relevant:

a) The contract is titled "INDEPENDENT SUB-MORTGAGE BROKER AGREEMENT". It states that the contract shall be "governed by and construed" in accordance with the laws of the province in which the "Trading Area" is located and the laws of Canada.

b) The first recital reads, in part, that "[t]he SUB-BROKER intends to operate an independent business for his or her own account as a licensed sub-mortgage broker, and wishes to identify his or her business with [ABW] and use the [DLC's] name and trade marks in connection with their mortgage and finance procurement business; and [ABW] wishes to

engage, on a non-exclusive basis, the SUB-BROKER as a Mortgage Originator".

c) Clause 1 contains the following definition of a "mortgage transaction": "any transaction that involves real estate and includes, without limitation, associated insurance, buying, leasing, renting, mortgaging and selling real estate". It also contains the definition of a "SUB-BROKER's Mortgage transaction" as meaning "a mortgage transaction generated by the SUB-BROKER."

d) Clause 2 is titled "BUSINESS OF SUB-BROKER" and reads:

> Subject to the terms of this Contract and the requirements of all applicable licensing regulations, the SUB-BROKER will carry on the business of creating client contacts and assisting these clients with the arranging of mortgages for real estate with an appropriate lender. In identifying his or her business with [ABW], the SUB-BROKER shall act honestly, in good faith, and in a manner which will not harm the goodwill and reputation of the [DLC] brand.

e) Clause 3 is titled "NATURE OF THE RELATIONSHIP" and reads:

> The parties acknowledge and agree as follows: The relationship of the SUB-BROKER to [ABW] is that of contract for service between [ABW] and an independent entrepreneur, and that the SUB-BROKER and [ABW] are not partners or joint ventures with each other. The SUB-BROKER shall have sole discretion as to the management of his or her business, time and resources. The SUB-BROKER shall be responsible for maintaining the professional standards as outlined in this Contract and in compliance with mortgage brokering regulations applicable in this province, which will guide the manner in which the SUB-BROKER operates his or her own business. The SUB-BROKER shall have no authority, without the written authorization of [ABW], to bind [ABW] in any act, promise, representation or contract, or to bind [ABW] to perform any obligations to any third party other than in connection with the SUB-BROKER's mortgage transaction or potential transaction.

f) Clause 4 gives the sub-broker a non-exclusive right to use DLC trademarks for various identified purposes.

g) Clause 6 obliges the sub-broker to "be faithful to and comply with the British Columbia Mortgage Brokers Act and Regulations" as well as ABW's business practices, policies, and procedures.

h) Clause 7 addresses remuneration and, among other things, states that the sub-broker is entitled to "all of the commissions generated by their mortgage transactions, and applicable volume bonuses, minus applicable splits".

i) Clause 8 addresses tax issues, and states that sub-brokers are considered independent contractors for the purposes of taxes, and therefore are responsible for submitting any remittance, statutory withholdings, CPP, or other applicable taxes to appropriate authorities.

j) Clause 10 requires the sub-broker to keep regular and accurate statements of all transactions as required by ABW.

k) Additionally, clause 11 requires that the sub-broker be responsible for all expenses incurred by them in the performance of their duties, except for those that ABW has agreed to pay from its account.

[271] ABW (as brokerage), Frank Lee (as principal), and Viva Pro (as co-broker) entered an agreement in March 2015 (the "Co-Broker's Agreement"). Some features of that agreement emphasized by the parties are:

a) Among the definitions contained in clause 1 are the following:

> Brokerage Business" means a mortgage brokerage business operated by the Co-Broker in accordance with the terms and conditions of this Agreement, and in compliance with the applicable rules and regulations stipulated by the Financial Institutions Commission of British Columbia.
>
> …
>
> "Mortgage brokerage transaction" means any transaction, activity or undertaking which falls within the scope of the Act or for which licensing is required under the Act from time to time;

b) Clause 11 is titled "Exclusive Co-Broker Relationship", and states that throughout the term of the agreement Viva Pro shall engage, and "irrevocably deemed by this Agreement to have engaged", ABW as a co-broker on all transactions in which Viva Pro is or becomes involved.

c) Clause 14 is titled “Co-Broker’s Obligations to Maintain Standards” and it includes, in sub-paragraph, an obligation to comply at all times with “all federal, provincial and municipal laws, regulations, by-laws, orders,” and etc. and to “qualify under and comply with the Act and all other mortgage broker, real estate, consumer protection or other similar laws having application to the Brokerage Business”.

d) Under clause 15, the co-broker agrees to certain covenants. Among the covenants is subclause 15(j), which is in regard to the use of name, and states: “to carry on business under its own name and enter in contracts, banking arrangements, mortgages, security documents, or other instruments or agreements… solely in its own name and without any liability or obligation to the Brokerage thereunder”.

e) Also, subclause 15(l) states that the co-broker will advertise in its name only. However, Schedule A to the agreement states that the co-broker will “ensure the Brokerage’s name appears as an affiliate of the Co-broker on all advertising, business cards, etc.”.

f) Clause 38 states that the parties acknowledge and agree that:

> Each is an independent contractor”, that “no party shall be considered to be the agent, representative, master or servant of any other party … for any purpose whatsoever”, that “no party has any authority to enter into any contract, to assume any obligations or to give any warranties or representation” on behalf of the other, and that nothing in the agreement “shall be construed to create a relationship of partners, joint ventures, fiduciaries, agency or any other similar relationship between the parties. [Emphasis added.].

2.Other Evidence

[272] Mr. Chand testified that in the period 2014 to 2016, there were approximately 50 mortgage brokers associated with ABW. His view was that all mortgage brokers were independent contractors and not employees (I am not accepting his evidence on this point for any purpose than that was his view since this is a contested issue). He testified about a number of features of ABW’s arrangements with Frank Lee, which was consistent with Frank Lee’s own evidence. Specifically, Frank Lee

covered his own expenses, and ABW did not withhold payroll remittance. Frank Lee seldom attended ABW's office. Mr. Chand never heard of Hainan until Frank Lee gave him head's up about possible problems in about March 2016.

[273] The plaintiffs' position is that Frank Lee's use of DLC and ABW's logo, letterhead, business address, and email are significant facts (summarized above at 106 to 114) in favour of their position. Frank Lee and ABW dispute the importance of those factors. However, there is no dispute that Frank Lee used both his personal and ABW email in communication with Ms. Fu and others. He also used the DLC name and trademark on business cards and in his email signature. Mr. Chand testified there was nothing unusual about him doing so. Mr. Chand also agreed there was nothing unusual about Frank Lee putting his name and ABW's address on proposals for lending or commitment letters.

[274] Mr. Chand was asked what constituted the normal and typical tasks of a mortgage broker, and whether Frank Lee carried those out. He confirmed that he did and described those tasks, which included finding an appropriate lender for the borrower, and putting ABW's name on commitment letters, credit disclosure, or other documents to demonstrate that ABW was the head broker. It also included communicating with the lender, including for the purpose of negotiating the mortgage amount and rate, and communicating with the borrower and/or its lawyer, including for the purpose of negotiating the mortgage broker's fee. In addition, mortgage brokers could participate in the inspection of property and review appraisal reports to ensure loan to value ratio was within the range required by the lender.

C. Legal Principles

[275] The parties' submissions focused on different aspects of vicarious liability. Although Ms. Fu testified at one point that she thought Frank Lee was an employee of ABW, that was not the legal basis upon which the plaintiffs argue that ABW is vicariously liable. Instead, they rely on the law of agency, that Frank Lee was an agent of ABW and that his conduct in this case fell within his actual or apparent authority.

[276] It is helpful to look at cases that analyze how to distinguish between independent contractors and employees, since that jurisprudence also comments more generally on vicarious liability and agency. Moreover, ABW relies on that case law to submit that vicarious liability cannot be invoked against it because Frank Lee was clearly an independent contractor, when viewed in light of other evidence and legal principles.

1. Employee or Independent Contractor

[277] The leading case on vicarious liability is *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59 [*Sagaz*]. Stated simply, vicarious liability holds one person responsible for the misconduct of another because of the relationship between the two. A common situation is the vicarious liability of an employer for its employee. Historically, vicarious liability of employers for employees rested on notions of control and "superiority", but that has given way to the modern view that policy consideration should drive the imposition of vicarious liability in order to address concepts such as compensation, deterrence, and loss internalization: *Sagaz* at paras. 29-30.

[278] In *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692 (S.C.C.) [*Curry*], the Court examined when an employer should be held liable for unauthorized acts of its employees, noting that the "fundamental question is whether the wrongful act is sufficiently related to conduct authorized by employer to justify imposition of vicarious liability", which will generally be "appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to employer's desires" (emphasis in original): at para. 41.

[279] In contrast, where the alleged wrongdoer is not an employee but is an independent contractor, vicarious liability will not typically operate to hold someone else liable: *Sagaz* at paras. 3, 33.

[280] To determine whether someone is an employee or contractor, the central question is whether the person performs services as a person in business on his

own account. In *Sagaz*, the Court discussed the numerous approaches and tests on the issue: at paras. 36-45. The Court held, through the unanimous decision penned by Justice Major, that there is "no one conclusive test" that can be applied universally, and that the total relationship between the parties should be examined: at para. 46. The Court continued:

> [47] … The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[281] Labels used by the parties that describe their relationship may also be a relevant factor, although not determinative on the legal question of their status: *Jogia v. RE/MAX Ontario*, 2020 ONSC 733 at para. 41, citing *1738937 Alberta Ltd v. Fair Waves Coffee Inc. (Waves Coffee House)*, 2017 ABQB 714 at para. 36.

2. Agency

[282] The plaintiffs allege that Frank Lee was acting as an agent for ABW.

[283] In *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.*, 2023 BCCA 95, the Court of Appeal adopted the description of agency set out in G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Toronto, Ontario: LexisNexis Canada Inc., 2017) at 5:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.

[284] The Court of Appeal also identified different modes in which an agency relationship can be created, namely, by agreement, implication, subsequent ratification, *estoppel*, or operation of law: at para. 44.

[285] With respect, the plaintiffs' submissions on this point—how the agency relationship was established—are not clear. This is understandable given that the

terms agency, manifestation of authority, and actual or apparent authority are referred to interchangeably in the jurisprudence, as noted by Justice Matthews in *Basyal v. Mac's Convenience Stores Inc.*, 2024 BCSC 2007 at para. 85. I do still, however, find it helpful to analytically deal with the law of agency by first determining whether the agency relationship was created, then determining the scope of authority given under said agency relationship. Given the clear wording of clause 38 of the Co-Broker Agreement that no agency was created (see above para. 272(f)), as well as the plaintiffs' submissions, I assume they rely on the creation of an agency relationship by implication, ratification, or *estoppel*. However, I note that the plaintiffs focused their submissions on "actual" authority and "apparent authority".

[286] Professor Fridman explains these three modes of creating an agency relationship in the following manner:

a) Either express contract, or an implication from a contract, can create an agency relationship: at 41-46. Thus, the agency relationship is created prior to the exercise of said agent's authority. This mode considers the general rules surrounding contract formation and interpretation, in order to find that an agency relationship was created. The analytical focus when it comes to the implied creation of agency relationship, however, is the assent of the alleged principal. Although the principal need not know the true state of affairs—that an agency relationship was created—Professor Fridman notes that mere silence will not be sufficient to imply an agency relationship. There must generally be some conduct to indicate the principal's acceptance of the agency relationship.

b) Ratification can, in reverse, recognize that an agent did what has been done as if there were prior authorization by the principal: at 46-59. Professor Fridman notes three requirements for ratification, that: (i) at the time of the act, the agent purported to act for the principal; (ii) at the time of the act, the agent must have had a competent principal; and (iii) at the time of ratification, the principal was legally capable of doing the act in

question themselves. Ratification must occur through a clear and adoptive act, meaning that although writing may not be necessary, more than mere silence on the part of the principal is needed.

c) *Estoppel*, on the other hand, can hold a principal liable to a person's act if the principal had, by word or conduct, allowed that person to appear to the outside world to be their agent, with the result that third parties dealt with that person as if they were an agent of the principal: at 59-65. In essence, *estoppel* prevents a principal from repudiating an apparent agency—stating afterwards that the true state of affairs was far different from what the third party had reasonably relied upon. Professor Fridman notes three requirements for *estoppel* in this context: (i) intentional statement or conduct by the principal that can amount to a representation that the agent has authority to act on their behalf; (ii) reliance by a third party; and (iii) a resulting alteration of the third party's position, i.e., the representation being the proximate cause of that party's loss or injury.

[287] In order to hold ABW vicariously liable, the plaintiffs must show that an agency relationship was created between Frank Lee and ABW, and that Frank Lee's conduct fell within the scope of actual authority or apparent authority granted to him under said relationship: Fridman at 214. Under either type of authority, the plaintiffs bear the burden to prove that agency relationship: *Amato v. Welsh*, 2016 ONSC 1575 at para. 29.

[288] Actual authority arises when the agency relationship is based on an express grant of authority. In *Keddie v. Canada Life Assurance Co*, 1999 BCCA 541 at para. 23, the Court of Appeal provided this explanation of actual authority:

> [23] *Bowstead on Agency,* supra, at p. 92, further describes and differentiates "actual authority" in the following terms:
>
> > Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealings of the two parties (called here implied authority). "An 'actual' authority is a legal relationship between principal and agent created

> by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties...." [*Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480, 502, per Diplock L.J.]
>
> [Emphasis in original.]

[289] Apparent authority is when the words or conduct of the principal are such that a reasonable person could come to believe the agent is authorized to act on behalf of the principal. In *Keddie*, the Court of Appeal discussed the tests for apparent authority, and why it was not properly invoked on the facts before it:

> [28] A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent.
>
> [29] *Bowstead on Agency*, supra, at p. 284, defines the nature of apparent authority as follows:
>
> > Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.
>
> [30] Fridman, supra, at p. 122, distinguishes apparent authority from the various types of actual authority this way:
>
> > Unlike the kinds of authority which have been discussed in the preceding chapter [types of actual authority], the agent's authority in agency by estoppel is not an actual or real authority at all. That is to say it does not result from consent on the part of the principal, whether express, or implied, according to the rules already discussed, that the agent should have any authority at all, or the kind of authority which he has purported to exercise. The agent's authority here is the product of the principal's conduct, his representation that the agent is authorised to act on his behalf. It is an authority which `apparently' exists, having regard to the conduct of the parties. In fact it does not exist. But as a matter of law, arising out of the factual position, the agent is said to have authority.
>
> [31] What appears to be absent in the case at bar, which the authorities indicate is necessary if the appellant is to make out her case against Canada Life on the basis of apparent authority, is some conduct or representation emanating from Canada Life which would suggest to persons in the position of the appellant that Mr. Horne was acting as Canada Life's agent. It was the

> absence of this element which ultimately led the trial judge to rule as he did in dismissing the appellant's vicarious liability claim.

[290] There are three elements to establish a finding of agency by apparent authority: (i) a representation by the principal to a third party; (ii) reliance on that representation by that third party; and (iii) a change in the third party's position based on that reliance: *Financial Management Inc. v. Planidin*, 2006 ABCA 44 at para. 12.

[291] The parties referred to a number of cases, all of which consistently referred to and applied the preceding legal principles. The extent to which those cases are helpful to my analysis will depend upon the similarity of those facts to the facts at bar, discussed below.

D. Analysis

1. What was the Relationship Between Frank Lee and ABW?

[292] In my view, in light of the evidence and the legal principles discussed, the evidence clearly establishes that Frank Lee was an independent contractor, and not an employee or agent of ABW.

[293] This conclusion rests primarily on the unequivocal language of the Broker Agreement and the Co-Broker Agreement. I acknowledge that the "labels" they may have attributed to their relationship may not be determinative, but the evidence of both Frank Lee and Mr. Chand was consistent with an independent contractor relationship rather than employment.

[294] Among the indicia supporting that conclusion was the following uncontested evidence:

a) Frank Lee paid his own expenses, insurance, and taxes associated with his business;

b) The Broker Agreement provided for payments based on a commission structure, meaning Frank Lee was not paid a salary. This meant Frank Lee's compensation was driven entirely by his own efforts;

c) ABW did not direct Frank Lee's marketing efforts or business strategies;

d) Frank Lee was not under any limitations from ABW in terms of how he operated his business other than the contractual and professional obligations to abide by applicable legislation and regulations;

e) Frank Lee was not required and rarely conducted business at ABW's premises.

[295] Because Frank Lee was an independent contractor and neither an employee nor agent of ABW, the claim in vicarious liability fails.

[296] However, for the sake of completeness, I will discuss the other claims put forward by the plaintiffs based on agency through actual or apparent authority.

2. Actual Authority

[297] As noted above, it was not clear to me the basis upon which the plaintiffs claimed an agency relationship was created. They addressed "actual authority", and I infer that was meant to be an assertion that the agency relationship was created based on the contracts in place between Frank Lee and ABW.

[298] The plaintiffs argue there was actual authority (or, as I have inferred, the creation of an agency relationship) based on language in the contract. I do not agree and find their argument rests on an unsustainable interpretation of portions of the contractual clauses that both ignores clear language supporting the opposite conclusion, and are inconsistent with the contracts when viewed as a whole.

[299] The plaintiffs rely on a portion of clause 3 in the Broker's Agreement (see above para. 271(c) that states Frank Lee would have "no authority without the written authorization of [ABW] to bind [ABW] … to perform any obligations to any

third party" other than in connection with mortgage transactions Frank Lee conducted. The plaintiffs then look to the definition of mortgage transaction, which is "any transaction that involves real estate and includes without limitation … mortgaging … real estate" (see above para. 271(c)).

[300] The plaintiffs argue that since nothing in the definition of mortgage transaction limits it to land in British Columbia, when Frank Lee put ABW's address on the Westbay Agreement, he "bound" ABW to any obligations he had with regard to that transaction.

[301] That interpretation is untenable when one reads the agreement as a whole. It also disregards the clear articulation in the opening words of clause 3 that the parties are independent of one another, and Frank Lee has "sole discretion" in the management of his business, time, and resources.

[302] Although not articulated as such, to the extent the plaintiffs may have intended to argue one could imply in the contract terms that ABW agreed Frank Lee would be its agent, I also find that argument untenable.

[303] Based on the preceding, I do not agree any agency relationship was created and I reject the argument that Frank Lee had actual authority to bind ABW to the plaintiffs in any way.

3. Apparent Authority

[304] Although not explicitly argued in these terms, I have taken the plaintiffs submissions under "apparent authority" to represent an argument that an agency relationship was created by ratification or estoppel. I will follow the flow of the plaintiffs' arguments as presented, but note that in my view, for the reasons expressed below, the plaintiffs have not persuaded me the elements for the creation of an agency relationship, as outlined by Professor Fridman (para. 87 above), for ratification or estoppel have been met.

[305] As noted above, to establish an agent acted with the principal's apparent authority sufficient to impose vicarious liability, there must be a representation made by a principal, relied upon by a third party and upon which the third party changed its position, all of which is considered from the perspective of a reasonable person in the position of that third party.

[306] For this branch of agency, the contractual arrangements amongst Frank Lee, Viva Pro, and ABW are not relevant as they were unknown and unknowable to the plaintiffs. Instead, the focus is on representations made by the principal as viewed from the perspective of a reasonable person.

[307] The plaintiffs' position is that the body of evidence on the following two prongs supports a conclusion that Frank Lee was holding himself as an agent of ABW: (i) his email communication and inclusion of ABW's address on the Westbay Agreement; and (ii) more generally, the concurrence between the functions he performed on the Richmond Purchase with those he did for the Hainan Project.

[308] ABW submits the argument cannot succeed because no representations were made by it. With regard to the communication, ABW points out the signature block on Frank Lee's emails contained his contact information, not ABW's. The only communication in which Frank Lee referred explicitly to ABW was at the closing of the Richmond Purchase when he sent his invoice asking the cheque to be made out to ABW as that was the brokerage firm to which he was attached. ABW also emphasizes that it had no knowledge of Hainan until Frank Lee advised Mr. Chand of the potential for litigation in about March 2016.

[309] However, the plaintiffs contend the representation is not about what information is conveyed, but whether it amounts to a "holding out" that the agent has authority to act on behalf of the principal. The plaintiffs submit that "the perception of the client as to the existence of an agency relationship is central to the apparent authority analysis", citing *Thiessen v. Clarica Life Assurance Co.*, 2002 BCCA 501 at para. 33 [*Thiessen*]. They further assert that something as simple as the principal's knowledge and encouragement to its agent to use the principal's stationery,

letterhead, or business cards can establish apparent authority, citing *Schwartz v. Maritime Life Assurance Co.,* 1997 CanLII 14706 (N.L.C.A.), *Dorien v. Devon Capital Corp*, 2002 ABQB 664, aff'd 2003 ABCA 336, and *Thiessen*. The plaintiffs also rely on testimony from Ms. Fu, Christopher Lee, and Mr. Luke about their understanding of Frank Lee's role in the Hainan Project and connection to ABW.

[310] It is not clear to me that the cases relied upon by the plaintiff assist their position. For one thing, *Thiessen, Schwartz,* and *Dorien* all involved clients who paid money to an insurance broker for the purpose, they believed, of the agent investing the money in the defendant insurance company's financial instrument. In all cases, the insurance broker absconded with the money, and the clients sued, arguing the insurance company should be vicariously liable for the theft.

[311] The point in *Thiessen* was that one should consider the perspective of the "outside world", but the focus remains on what the principal has said or implied through its conduct. In other words, I do not read *Thiessen* as expanding or altering the principles of apparent authority as discussed in *Keddie*. Indeed, that is confirmed in *Thiessen* where the Court states "for the purposes of this appeal we need go no further than to uphold the trial judge's order on the basis of the traditional agency analysis undertaken by this court in *Keddie*": at para. 42.

[312] *Thiessen* was an appeal from the trial judge's decision finding the insurance company (Clarica) vicariously liable for the actions of an independent contractor (an insurance broker who embezzled funds from a client). Clarica argued the trial judge erred in imposing liability on it for an intentional tort committed by the broker without its knowledge or concurrence.

[313] The trial judge concluded that the broker did not have actual or ostensible authority to bind Clarica because his role was limited to forwarding applications and funds to Clarica, and there was no proof of any representation made by Clarica that the contractor could issue a policy on its behalf: at para. 21. It was on this point that the Court of Appeal held the trial judge erred. However, the trial judge had also concluded that the broker was not an employee, but she nevertheless applied the

"modern approach" to vicarious liability based on policy reasons as articulated in *Curry* to finding Clarica liable: summarized at paras. 23-24, citing *Curry* at para. 15.

[314] The Court of Appeal noted the issue was complicated because shortly after the trial judge rendered her decision, the Supreme Court of Canada released *Sagaz*. On appeal, Clarica argued that *Sagaz* stood for the proposition that, as a matter of policy, vicarious liability based on the tort of an independent contractor should only be imposed rarely, and that they were shielded from liability because the trial judge found the tortfeasor to be an independent contractor, not an employee. The Court of Appeal did not agree:

> [30] We do not agree *Sagaz, supra,* requires the narrow view the appellant would have us take. Nothing Justice Major wrote precludes the traditional agency basis for vicarious liability discussed in *Keddie*, *supra.* For us the fundamental issue in this case is whether Madam Justice Ross correctly understood the concept of agency that underlies the imposition of vicarious liability on a principal. It matters not whether the agent is characterized as an employee or independent contractor for the purposes of contract law, work-related statutes, or the *Income Tax Act*.

[315] The Court of Appeal in *Thiessen* held that the trial judged erred in her conclusion that the broker did not have ostensible authority to bind Clarica. In part, that error was the "fail[ure] to consider the authority [that] the outside world" would reasonably infer [the broker] had were they in the shoes of the Thiessens and others like them": at para. 32. The Court goes on to note that it was an error to look "only to the principal's perspective, not to that of the vulnerable customer of that principal in the context of the business being done": at para. 33 [emphasis added]. In that case, "the context of the business being done" was the broker receiving funds from the customer ostensibly to invest directly in a Clarica product (an accumulation annuity). The plaintiffs also refer to cases where courts have imposed vicarious liability on employers for sexual assaults committed by their employees, such as *Curry* and *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60.

[316] Those contexts are markedly different from the circumstances of this case. At no time did anyone anticipate that the plaintiffs would directly pay any funds to Frank

Lee and/or ABW. The evidence was consistent that Ms. Fu and Frank Lee anticipated that whatever fee he would get would come out of the loan facility Westbay was supposed to arrange. There was never a suggestion that anyone believed Frank Lee would be paid out the commitment fee. To put it bluntly, the plaintiffs were not at any time entrusting Frank Lee or ABW with their own money.

[317] In that way, Frank Lee was one step removed from the allegedly fraudulent conduct, unlike the insurance brokers in *Thiessen, Dorien,* and *Schwartz* who all perpetrated the fraud. This is significant because the Supreme Court of Canada was explicit in commenting that the modern theory of vicarious liability is driven by policy considerations relating to risk allocation and deterrence.

[318] One can see the logic as that applies to holding the operators of residential schools vicariously liable, as was the case in *E.B.*, or children in care, as was the case in *Curry*. In both situations, vulnerable people are placed in a home where they are at the mercy of the institution to look after all their needs. It also makes sense when individuals trust a broker to invest their funds for them.

[319] The Supreme Court of Canada's articulation of the policy rationale that should underly vicarious liability is based on the sense of fairness in that an "employer puts in the community an enterprise which carries with it certain risk" and that when "those risks materialize and cause injury … despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss": *Curry* at para. 31. The court also refers to deterrence in that the employers are best placed to minimize the harm flowing from the enterprise they put in the community: *Curry* at para. 34.

[320] The plaintiffs and Ms. Fu were sophisticated actors engaged in a multimillion-dollar, international development project. Neither Frank Lee or ABW were providing the financing, nor involved in any way in the project itself, both of which might be considered enterprises carrying "risk".

[321] The plaintiffs specifically rely on *Thiessen* to argue that they, too, were vulnerable by reason of "the risk that [ABW] created" by "grant[ing] its mortgage brokers nearly unbridled authority to conduct their business as they saw fit", allowing them to use trademarks, logos, email signature, addresses, and phone numbers when dealing with potential clients. Even if that created any kind of risk (which I specifically find it did not), it pales in comparison to the risk of individuals entrusting their funds entirely to the discretion of others or being placed in residential care.

[322] Even if one could conclude that Frank Lee's signature block and use of ABW's address on the proposed loan facility amount to "holding himself" out to be acting under ABW's authority, in the words of *Thiessen*, one must view that representation "in the context of the business being done". I find that the business "being done" by Frank Lee for the plaintiffs was, at most, finding a potential lender. Moreover, even by the plaintiffs' own theory of the case, the plaintiffs were not expecting Frank Lee or ABW to guarantee the loan facility, only to find it, and perhaps, at most, negotiate on their behalf for the best deal.

E. Conclusions about ABW's Liability

[323] For the foregoing reasons, ABW is not liable to the plaintiffs either directly in negligence, nor vicariously as an employer or principal. Frank Lee was at all times an independent contractor.

VI. NEGLIGENT MISREPRESENTATION

A. Legal Principles

[324] The parties agree that the test to establish negligent misrepresentation is set out in, among others, *Maple Leaf Foods* at para. 32; *International Culinary Institute of Canada, Inc. v. Grant Thornton LLP,* 2010 BCSC 541 at para. 24; and *Normak Investment ltd. v. Belciug*, 2015 BCSC 700 at para. 85. Basically, the test for negligent provision of a service is identical to the test for negligent misrepresentation. Therefore, I adopt and rely on the discussion above at paragraphs 76-79.

[325] To succeed in a claim of negligent misrepresentation, a plaintiff must prove:

a) The defendant owes a duty of care to the plaintiff based on a special relationship;

b) The defendant made a false or misleading statement of fact to the plaintiff, and did so negligently;

c) The plaintiff reasonably relied on the false or misleading representation; and,

d) The plaintiff suffered a loss arising from its reliance on the false or misleading representation.

[326] It is settled law that actional misrepresentation must pertain to a matter of past or existing fact: *PD Management Ltd. v. Chemposite Inc.,* 2006 BCCA 489 at paras. 12–14.

[327] In addition, negligent misrepresentation may not be made out where the defendant merely acted as an intermediary, such as in *Hamilton v. 1214125 Ontario Ltd.*, 2008 CanLII 27815 at para. 48, where a client understood the defendant was only passing on information for which he had no direct knowledge.

B. Analysis

[328] The plaintiffs submit that the duty of care analysis for negligent misrepresentation is indistinguishable from the analysis for negligence: *Deloitte* at para. 16. Similarly, no party suggested the analysis for standard of care would be different as between the claims for negligence and negligent misrepresentation.

[329] Thus, my reasoning above in respect of duty of care and standard of care for the claim in negligence as against Frank Lee applies with equal force to the claims for negligent misrepresentation, and I repeat and adopt that analysis to dismiss the claim for negligent misrepresentation against Frank Lee.

[330] Similarly, I repeat and adopt my analysis and conclusions regarding Frank Lee's status as an independent contractor, and my analysis and conclusions that ABW was neither directly nor vicariously liable, and dismiss the claims of negligent misrepresentation as against ABW.

[331] However, in the event I am wrong with regard to my conclusions in respect of the duty of care or the standard of care, or in applying my analysis of those issues to the claims for negligent misrepresentation, I will also analyze the other reasons raised by the Frank Lee and ABW as to why the negligent misrepresentation claims against them should fail.

[332] I also acknowledge that it is conceptually possible that the analysis and conclusions regarding duty of care and standard of care, which resulted in a finding of no liability in negligence, could, in some circumstances, lead to a different result with regard to negligent misrepresentation, even though the underlying facts regarding the parties' relationships remains the same. If that approach applies, I rely on the following discussion and conclusions independently to dismiss the claims in negligent misrepresentation.

C. Analysis of the Representations Alleged

[333] The plaintiffs rely on the following representations alleged to have been made by Frank Lee and ABW as contained in the NOCC at para. 15:

a) Christopher Lee was financially secure, had a good reputation, and possessed the "necessary expertise and experience" to finance the Hainan Project.

b) Westbay and Christopher Lee had undertaken financing on the scale of the Hainan Project.

c) Westbay had hundreds of millions of dollars in cash and was involved in oil and gas, including in but not limited to Africa.

d) Westbay had the "necessary expertise and experience to finance the Project, including experience with arranging financing for developments in China".

e) The plaintiffs' interests would be served by obtaining financing from Westbay.

[334] The plaintiffs also allege a number of representations attributable to Christopher Lee and/or Westbay were repeated by Frank Lee in emails that he sent, and those have been proven to be false. In addition, the plaintiffs allege that Frank Lee made representations orally to Ms. Fu that were demonstrated to be false, or at least misleading, and for which liability should follow.

[335] Frank Lee and ABW submit that the plaintiffs cannot succeed in a claim for negligent misrepresentation for one or more of the following three reasons:

a) The representations are not facts, but matters of opinion or promises of future conduct and therefore not actionable.

b) The plaintiffs have not proven the representations are false.

c) Ms. Fu knew that Frank Lee was just passing along representations from Christopher Lee or Westbay.

[336] I find it convenient to assess the representations by category.

1. Representations that are not facts

[337] I agree that some of the representations, even if they had been made by Frank Lee and/or ABW, are not factual assertions that can be actionable for negligent misrepresentation. Those are identified below along with an explanation of my reasoning:

a) whether Westbay and/or Christopher Lee had the "necessary" expertise and experience to facilitate the loan, and that Westbay itself, or through its affiliated companies, had the financial ability to finance the Hainan Project

if no suitable party could be found. Those representations, if made, would be opinions and not facts. This also applies to any statement about Christopher Lee's reputation.

b) whether it was to the plaintiffs' benefit to accept the Westbay Agreement. This would at best amount to a recommendation but it is also the expression of an opinion.

c) the form of the security would be on the property itself, whether through a joint venture or a taking of a lien on shares. This was not a fact, but the identification of a possible structure of a loan (see also discussion about the nature of the Westbay Agreement at paras.153-157).

d) Frank Lee would contact Westbay to "ensure that the [proposed syndicated loan] is (1) satisfactory with both the lenders and [Ms. Fu] and (2) that it is compliant with international laws and lending practices" (see above para. 32(i)). These are not statements of fact, but, at most promises of what he would do. Also, whether or not an agreement complied with international laws or lending practices would clearly be an opinion.

2. Misrepresentations about the Status of the Trust Account

[338] The plaintiffs say Frank Lee's representation that it was okay to pay the commitment fee to the Roxschild Account because it was a trust account has been proven to be false (see above para. 32(s) and below paras. 358, 384). I agree that at trial it was proven that the account was not a trust account. However, I do not agree that is something that Frank Lee knew at the time.

[339] However, the plaintiffs' claim is not just that he made that representation, but that he did so and failed to verify the status of the account, and/or failed to be clear in telling Ms. Fu that he had not done that verification.

[340] In my view, the claim fails because of plaintiffs' failure to adduce any evidence that was part of his duty even if he was acting in a professional capacity as

a mortgage broker, or that it was accepted or common practice, for a mortgage broker to verify the status of a bank account into which a client pays money.

[341] In addition, I find Ms. Fu's testimony on this point was problematic. I find she embellished her answers to emphasize her reliance on Frank Lee, and on many occasions her testimony was difficult to reconcile with answers she gave at the XFD and with the plain meaning and timing of emails sent amongst her, Mr. Luke and Frank Lee about where the commitment fee would be paid. I am unable to find on a balance of probabilities that she asked Frank Lee to "verify" the account was a trust account, or that he told her he had done that verification. Accordingly, the plaintiffs purport to impose liability on the basis that it was implicit that Frank Lee had verified his representation, which amounts to an "implied" representation. In my view, that is not possible as it would stretch the concept of proximity beyond what is acceptable (see discussion above at para. 140 of *Charlesfort Developments Limited v. Ottawa (City),* 2021 ONCA 410).

[342] The same analysis applies with regard to the following representations allegedly made, except that I find the foundation for finding liability for these representations is much weaker, because the evidence was not as clear that Ms. Fu explicitly turned her mind to whether Frank Lee had verified the following:

a) the Draft Proposals were drafted by a Westbay principal who was a lawyer practicing in London;

b) Christopher Lee being a partner at Westbay;

c) Westbay had hundreds of millions of dollars in cash and was involved in oil and gas including but not limited to in Africa.

3. Representations made by Westbay and/or Christopher Lee

[343] Frank Lee and ABW also emphasize that Ms. Fu acknowledged that Frank Lee was facilitating communication between her and Westbay, and in that way acting as an intermediary. For that reason, they submit she must be taken to have

known that the statements Frank Lee made were not his representations but those of Westbay.

[344] I agree with those submissions with regard to the following:

a) Westbay knew of a way to ensure access to funds using “senior government officials” in China. On this point, her trial testimony was different from her evidence at the XFD in a way that was more favourable to her legal position, negatively impacting her credibility generally, but especially on this point.

b) Westbay had obtained favourable terms by blending funds from different investors. This information was included in the Draft Proposal itself and there is no evidence that Frank Lee and Ms. Fu discussed the notion of the loan being syndicated. I do not agree everything contained in a Draft Proposal can be taken to be a representation by Frank Lee.

c) Christopher Lee was financially secure, had a good reputation and possessed the “necessary expertise and experience” to finance the Hainan Project.

d) Westbay and Christopher Lee had undertaken financing on the scale of the Hainan Project;

e) Westbay had hundreds of millions of dollars in cash and was involved in oil and gas including but not limited to in Africa.

f) There was urgency to sign the agreement by March 6, 2015. As noted above, I have already concluded on an evidentiary basis that I do not accept Ms. Fu’s evidence that she was pressured into signing the agreement (see above para. 173-176). I also find the date was included in the draft proposals and therefore Ms. Fu cannot be taken to believe it was Frank Lee’s representation rather than information he was passing along from Westbay.

4. Representations Potentially Actionable

[345] In the event I am mistaken in my analysis and conclusions about duty of care and standard of care as they apply to Frank Lee, or in their direct application to the analysis for negligent misrepresentation, then the following representations have the potential to be actionable, subject to my analysis of whether Ms. Fu reasonably relied upon them.

a) The plaintiffs allege that Frank Lee represented that Westbay had experience with land development in China. Frank Lee and ABW submit Ms. Fu must have known that information was not Frank Lee's representation, but merely information he was passing along from Christopher Lee. However, the plaintiffs point out it has been established that the statement was false, or at least misleading. In the March 5, 2015 ("for your eyes only") email, Christopher Lee confirmed by forwarding Mr. Otieno's email that Westbay's only experience arranging financing in China was with commodities (see above para. 32(k)). Frank Lee could provide no cogent explanation for why he did not provide that clarification to Ms. Fu.

b) A lawyer's trust account and a simple trust account were the same and equally safe. Frank Lee denied that he gave that representation.

D. Reasonable Reliance

[346] As a starting point, I rely on and adopt my analysis and conclusions regarding Ms. Fu's reasonable reliable as discussed under the topic of Frank Lee's liability for negligence (above paras. 146-177), which are equally applicable to this analysis.

[347] With specific regard to reliance on allegedly negligent representations, I also agree with the submissions of Frank Lee and ABW that any reliance she did have was not reasonable for the following reasons:

a) Ms. Fu acknowledged that she was aware Frank Lee had no business experience in China and his license did not authorize him to conduct mortgage transactions in China;

b) She was aware that Frank Lee was passing along information he got from Christopher Lee and/or Westbay.

[348] Frank Lee also submits that the following factors are relevant when assessing the reasonability of Ms. Fu's reliance on any representations made by Frank Lee, and I agree these defeat the claim in negligent misrepresentation:

a) The parties had not known each other for very long, possibly for only about five months by the time Ms. Fu's father signed the Westbay Agreement.

b) Their relationship was not well established, despite that they may have called each other friends. They had only completed one previous business transaction, which by comparison was a simple commercial mortgage transaction for land in Canada.

c) Ms. Fu was present at all the meetings which took place at McDonald's restaurant to hear Christopher Lee's representations directly.

d) Ms. Fu agreed it was important to carefully review the Draft Proposals, and she did so.

[349] With regard to the two representations I described in the preceding analysis as being potentially actionable, I do not find Ms. Fu reasonably relied on either of them. With regard to Westbay's experience, it is notable that in the first communication from Westbay, mention is made of the countries of some potentially interested investors, but there is no mention of Westbay's having done business in China. I find no objective evidence to support the view that it was critical or important to Ms. Fu that Westbay had experience in China. Certainly, her knowledge of Frank Lee's lack of any business experience in China did not dissuade her from wanting

him to work with him. Accordingly, even though it is odd that Frank Lee did not clarify Westbay's Chinese experience, I do not find that was something Ms. Fu relied on.

[350] With regard to the allegation that Frank Lee told Ms. Fu that a non-lawyer's trust account is equally safe to a lawyer's trust account, which he denied, Ms. Fu did not reasonably rely on such a statement from him. She testified that she sought out and got that assurance from Mr. Luke. Even though Mr. Luke does not recall that conversation taking place, he testified he would have given her that assurance. Her evidence on this point was difficult to reconcile with a plain reading of the relevant emails and her answers at the XFD. I conclude Ms. Fu's claim that she relied on Frank Lee for this representation is defeated by her own testimony that she asked for and got that reassurance from Mr. Luke.

E. Conclusions of Negligent Misrepresentation

[351] For all those reasons, in the event I have been mistaken in my analysis of negligence and its applicability to the claims made in negligent misrepresentation, I rely on the foregoing discussion to conclude that neither Frank Lee nor ABW are liable in negligent misrepresentation.

VII. THE CLAIMS AGAINST CHRISTOPHER LEE

[352] As noted above, the plaintiffs' claim against Christopher Lee is based on fraud and/or fraudulent or negligent misrepresentation.

[353] Before turning to the legal analysis, I will set out the facts that are only relevant to his potential liability.

A. Facts

[354] I repeat and rely on, but will not reproduce here, the findings of fact made earlier based on email correspondence exchanged between the Main Witnesses (see above para. 32).

1. Testimony

[355] Based on my assessment of the Main Witnesses' testimonies, I am satisfied the following facts are established on a balance of probabilities:

a) Frank Lee and Christopher Lee first met in 2009 or 2010, when a bank manager introduced them. Frank Lee visited an office in which Christopher Lee was then working and they kept in touch after that.

b) In November 2014, Frank Lee arranged an urgent second mortgage for Christopher Lee for $100,000 which had a higher than usual commercial rate of interest. Contrary to Christopher Lee's testimony, I find it is more likely than not he needed the loan for, among other things, removal of a lien on his property.

c) Very soon after telling Ms. Fu he would work on the Hainan Project, Frank Lee contacted Christopher Lee to see if he knew of anyone who could arrange financing for a project in China. Shortly after that, Christopher Lee told Frank Lee about Westbay. Not very long after that, Ms. Fu met with both Frank Lee and Christopher Lee at McDonald's.

d) The Main Witnesses met at McDonald's virtually each time a new Draft Proposal was sent by Westbay, with the possible exception that one day two versions were sent within three hours, and they may only have met once that day.

e) Christopher Lee tended to talk mostly to Frank Lee at these meetings, but Frank Lee would translate questions Ms. Fu had because she would ask him in Mandarin, which Christopher Lee did not understand.

f) Occasionally Frank Lee would leave the table, and Christopher Lee admitted on a few occasions he would speak directly to Ms. Fu in English about Westbay.

[356] I also find the following facts are established on a balance of probabilities based on the Main Witnesses' testimonies:

a) Christopher Lee understood that it was important to the plaintiffs that the commitment fee be paid into a trust account. He told Frank Lee the Roxschild Account was a trust account. Both men agreed they spoke a number of times by phone on March 9, 2015 and March 10, 2015, and it was clear the status of that account was a primary topic. It is inconceivable Christopher Lee would not have confirmed its status as a trust account during those conversations.

b) Although the Main Witnesses' testimony differed as to who proposed the China trip, I am persuaded on a balance of probabilities that it was Christopher Lee's idea. In part, that is most consistent with his forwarding an email about flight prices to Frank Lee on March 14, 2015.

c) Christopher Lee intended to create an atmosphere of urgency in the hope that it would persuade Ms. Fu to sign the agreement. He denied this in his testimony, but I find that is contrary to the objective evidence as follows. On March 5, 2015, Christopher Lee forwarded an email to Frank Lee stating that syndication partners created a deadline of March 6 to sign the agreement (the "for your eyes only" email above para. 32(k)). It is also demonstrated in the March 11, 2015 email that that there was an "investment committee" coming up shortly and they needed confirmation from Ms. Fu about the proposed deal by 6:00 PM because he could not "afford to burn any more bridges with our syndication partners" (see above para. 32(x)).

2. The Roxschild Account

[357] I find the following facts about the Roxschild Account based on documents disclosed pursuant to the Order of the Hong Kong High Court, which were admitted for the truth of their contents:

a) The account was opened in 2012 as a savings/fixed deposit account, not a trust account.

b) A Canadian named James Christopher Wong was the sole authorized signatory and director of Roxschild at that time and the company was described as an “internet and online marketing and advertising agency”.

c) Mr. Wong remained the sole director of Roxschild until the Roxschild Account was closed.

d) Mr. Wong obtained a security device for the account called a secure banking token.

e) The Roxschild Account had a balance of about HKD $37,000 after it was opened but that was mostly depleted by September 2014. About six days prior to the commitment fee being deposited into the account, an automatic withdrawal of HKD $150 (about CDN $25) bounced. The balance at that point was about CDN $92.

f) On March 12, 2015, USD $500,000 was deposited into the account.

g) The account was drained of all funds and closed by HSBC on April 25, 2015.

h) On the following dates, the indicated amounts were transferred from the Roxschild Account to personal accounts held by Christopher Lee (all amounts are in USD):

   i. March 13, 2015, $45,000 to HSBC account Toronto;

   ii. March 13, 2015, $55,000 to RBC account in Toronto;

   iii. March 27, 2015, $25,000 HSBC account in Toronto;

   iv. April 16, 2015, $55,000 to RBC account in Toronto;

v. April 16, 2015, $45,000 to HSBC account in Toronto;

vi. April 20, 2015, $45,307.83 to HSBC account in Toronto;

vii. April 20, 2015, $55,000 to RBC account in Toronto; and

viii. April 21, 2015, $41,525 to HSBC account in Toronto.

i) The indicated amounts on the following dates were transferred from the Roxschild Account:

i. March 13, 2015, $100,000 to Red Nile Capital (UK), a company in which Christopher Lee was a director;

ii. April 20, 2015, $25,000 to Red Nile Capital (UK);

iii. Just under $9,000 to pay incidental expenses including to a Chase Capital credit card.

[358] I find that Westbay issued a receipt to Hainan that same day the funds were deposited into the Roxschild Account. Christopher Lee testified that Westbay issued that receipt once he knew the funds had been deposited, and he confirmed there was no other company obliged at that time to Westbay or Roxschild which could account for that deposit.

3. Testimony from Christopher Lee

[359] Christopher Lee provided the following testimony about his knowledge and involvement with the Roxschild account. My analysis of his assertions is contained below under “Analysis”.

a) Either in the summer 2014, or the year before he bought Roxschild from Mr. Wong for $10,000, he claimed the account had value as a “unique banking facility for international transactions”. However, he could not give any details as to how or when he met Mr. Wong, or how he learned about

Roxschild or of the opportunity to buy it. Nor is it immediately obvious what about the account made it “unique” for international transactions.

b) He said once he purchased Roxschild, he became its sole director and shareholder and was the sole signatory on the account, and the only person with the banking token. He did not explain how it was he obtained the banking token in a manner that he could actually use it without there being a record of that transfer in the documents disclosed by HSBC pursuant to Court Order. He confirmed all transactions on the account from summer 2014 to November 10, 2014 were conducted by him. He confirmed it was not a trust account during that time.

c) At first, he testified he sold Roxschild to Westbay in Hong Kong on November 10, 2014 for $1 million, but that he never actually received that money. He also claimed to have handed the banking token to Mr. Otieno in the presence of HSBC banking officials, although he could not remember that person’s name. He could provide no details as to when he gave Mr. Otieno the token except to claim he no longer had it in his possession in March 2015. However, he eventually admitted in cross-examination that he could not have given Mr. Otieno the banking token on November 10, 2014, since he used it on November 18, 2014 to withdraw GBP 50,000. Again, there is no document disclosed by the bank pursuant to the Court Order to record the transfer of the secure banking token.

d) While he confirmed the account number remained the same after he allegedly sold Roxschild to Westbay, he never inquired of Mr. Otieno whether account was transformed into a trust account.

[360] With regard to the payments into his account, Christopher Lee claimed that the Roxschild owed him EUR 277,585 due to an investment he had made on its behalf relating to an $18 million loan. He claims that beginning on March 13, 2015, Mr. Otieno started depositing funds into his personal account, which in his mind was repayment for that debt. However, he also acknowledged that he began to receive

funds from the Roxschild Account the day after the commitment fee was paid, he asked Mr. Otieno about the source of the funds and the reply was that it was a "lightening trade".

[361] Christopher Lee gave the following evidence about Mr. Otieno, which I assess in the analysis below. He claims he made attempts to refund the commitment fee, but that he was at the "mercy" of Mr. Otieno who he maintained had the banking token. He claimed that Mr. Otieno got cancer which spread to his brain, and that he travelled to India to receive treatment. He further claimed that Mr. Otieno apparently went blind at some point. Christopher claimed this information was passed on to him by a "night nurse" caring for Mr. Otieno.

[362] Christopher Lee produced copies of document that he says demonstrates that Mr. Otieno is a real person which includes a copy of a passport, a website printout, a resume, and other documents. None are original documents, and the plaintiffs challenge their authenticity.

B. Legal Principles

[363] In *Bruno Appliances v. Hryniak*, 2014 SCC 8, the Supreme Court of Canada set out the test for the tort of civil fraud:

> [18] The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:
>
> > First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> [19] This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, 1970 CanLII 25 (SCC), [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311, at pp. 319-20, that tort law requires proof that

> "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".
>
> [20] Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 1904 CanLII 44 (SCC), 35 S.C.R. 330, "fraud without damage gives . . . no cause of action" (p. 340).
>
> [21] From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.
>
> See also: *Bevan v. Husak*, 2024 BCCA 323 at para. 62.

[364] The standard of proof for fraud is the civil standard on the balance of probabilities with the requirement that there be "clear and cogent" evidence in order to ensure proof is rigorous to meet the seriousness of the allegations: *F.H. v. McDougall*, 2008 SCC 53 at paras. 40, 46.

[365] Either knowledge of the falsehood or recklessness about the truth of the representation is required: *Precision Drilling Canada Limited Partnership v. Tangarra Resources Ltd*, 2017 ABCA 378 at para. 33.

[366] The plaintiffs also claim that Christopher Lee can be held liable for the fraud perpetrated by Westbay by piercing the corporate veil. The plaintiffs submit that directors are personally responsible for their own tortious conduct, even if they claim they were acting on behalf of a corporation: *AGDA Systems International Ltd. v. Valcome Ltd* (1999), 43 OR (3d) 101 (Ont CA) at para. 18. In addition, it would be "flagrantly unjust to allow [a director] to hide behind the corporate veil in order to escape liability from improper conduct" (*SHH Management Limited v. Philip*, 2020 BCSC 1411 at para. 332) and for that reason, the corporate veil should be pierced owing to a director's fraud: *Han v. Yan*, 2018 BCSC 1450 at para. 138. This submission depends upon me being satisfied that at the relevant times Christopher Lee was a director of Westbay and/or Roxschild.

[367] Christopher Lee relied extensively on *Port Coquitlam Building Supplies v. 494743 B.C. Ltd*., 2018 BCSC 2146 as being a case where he says allegations of

fraudulent and negligent misrepresentation analogous to those made against him were dismissed. I agree that the case's discussion and application of legal principles is consistent with the prevailing law at issue in this case, including what amounts to an actionable representation, and what must be proven to establish reliance. Thus, Christopher Lee is correct to note that where statements can only be described as "vague, hopeful" statements of a future event, they do not give rise to fraudulent misrepresentation claims.

[368] However, the case is ultimately not helpful beyond that general tenet, since it turned on the trial judge's exhaustive examination of the particular facts in that case, and the evidentiary record. In particular, I find the factual matrix of that case to be distinguishable from the facts before me.

C. Analysis

[369] The plaintiffs submit a review of the whole of the evidence in this case overwhelmingly establishes Christopher's Lee's liability in either fraud or fraudulent misrepresentation. They submit that the Court does not need to make definitive findings about all elements of the fraudulent scheme to find Christopher Lee liable. They submit the evidence establishes beyond doubt that Christopher Lee participated in the fraud and profited from it, and that he was, at the very least, one of the fraudulent actors sufficient to hold him liable in his own right.

[370] They also claim these claims do not depend upon this Court making any finding about the veracity of Mr. Otieno's existence, his condition, or whereabouts. The plaintiffs say that even if one assumes Mr. Otieno is a real person, this Court can draw an inference based on a consideration of the evidence as a whole that, at the very least, Christopher Lee was complicit and/or cooperated with Mr. Otieno (or perhaps others) in perpetrating the fraud.

[371] Christopher Lee denies being involved with any fraud and submits the plaintiffs have failed to prove a fraud was perpetrated. He also submits the plaintiffs have failed to establish that he made any representation that he knew at the time

was false. He also denies that any representations alleged are sufficiently tied to the plaintiffs' loss.

1. Christopher Lee's Status as a Self-Represented Litigant

[372] Christopher Lee asserted that the Court's approach to the legal issues in this case, particularly concerning document production, should be moderated because he was self-represented and "did not appreciate his document production obligations to the same extent as he would have had he been represented by counsel".

[373] I am mindful of the fundamental duty of this Court to ensure a fair trial, a duty heightened when a party is self-represented. However, a trial that is fair must be fair from the perspective of all litigants. I adopt and rely on *M.P.W. v. City of Victoria*, 2019 BCSC 1448, where this Court states its vigilance to ensure fairness to self-represented litigants includes granting to them a margin of leniency, but "does not relieve them of an obligation to comply with the Rules or order made by the Court". I find those comments apply directly to Christopher Lee's claim for leniency regarding deficiencies in his document production.

[374] Christopher Lee was represented at some point in this litigation, and in particular, legal counsel drafted his response. It is inconceivable that legal counsel would not have explained the fundamental obligations regarding document disclosure. In that light, it is important to note that Christopher Lee wanted to rely on documents produced during the trial that he had never previously disclosed. The plaintiffs allege there is sound reason to believe that at least some of those documents were fabricated.

[375] Christopher Lee claimed "he did not anticipate" that he would need to adduce evidence about William Otieno's participation or that he would have to "delve" into his history of dealings with the Roxschild Account or company. I reject that claim given his representation by legal counsel. Among other things, his response explicitly relies on Christopher Lee's involvement with William Otieno, who he pleads have exclusive signing authority on Westbay bank's accounts (Response, paras. 19, 25). His pleadings also claim he had "very limited involvement with Roxschild"

(Response, para. 28), which is contrary to his testimony at trial. It is not believable that he was unaware that he would need to adduce evidence about the nature of his interactions with William Otieno, Westbay, the Roxschild Account, and Roxschild given his own pleading.

[376] In any event, his lack of legal counsel appears to have been a choice. He did not suggest that he was impecunious or otherwise inhibited from hiring counsel, but I acknowledge he claimed it would be very expensive. However, that must be considered in light of his own testimony about the nature of his work and the degree to which he was involved in international financing of a lucrative nature.

[377] I repeat comments I made earlier about the steps taken by this Court during this trial in light of Christopher Lee's status as a self-represented litigant (see above paras. 35-36).

[378] For all those reasons, given the circumstances of this litigation and Christopher Lee's personal circumstances, I conclude it would impede rather than promote overall trial fairness for me to extend to Christopher Lee the considerable leniency he seeks with regard to issues regarding his document production in this case.

2. Christopher Lee's Arguments

[379] Christopher Lee submits the plaintiffs' claim centres on one simple fact: Westbay's failure to return the commitment fee. As such, his position is that the plaintiffs' claim ought to be breach of contract as against Westbay.

[380] I do not agree. The plaintiffs are not limited to what they can claim. They are entitled to pursue the theory of the case they allege, which is that Christopher Lee perpetrated a fraud against the plaintiffs by making statements intending Ms. Fu to rely on them to pay USD $500,000, which he then used for himself.

[381] He also claims that with respect to the claim in fraudulent misrepresentation, the plaintiffs have failed to prove any representations were false. He submits that the

plaintiff is required to do more than raise a suspicion or point to facts open to a multitude of interpretations.

[382] For example, with respect to the Roxschild Account not being a trust account, Christopher Lee emphasizes that he believed it was at the time based on information from William Otieno. He alleges that the plaintiffs cannot prove that he "knew" the funds were not going to be held in trust once they were deposited since that is what he believed.

[383] The problem with this submission, and most of Christopher Lee's submissions, is that I do not find Christopher Lee credible on the material points relating to what happened. In light of the documents disclosed from HSBC and my other findings, I explicitly find he knew the Roxschild Account was not a trust account. So, while his recitation of the applicable legal principles is correct, he has failed to persuade me that the testimony he gave about many material facts in this case are credible or reliable.

[384] Combined with the significant and telling gaps in his document production, I am persuaded on a balance of probabilities that the Westbay Agreement was a sham. The plaintiffs have adduced clear and cogent evidence that Christopher Lee was the driving force behind a fraudulent scheme designed to induce Ms. Fu to pay a USD $500,000 "commitment fee" that he knew would never be returned.

[385] The plaintiffs frame Christopher Lee's deception as being relatively simple, and broken down into three time periods. The first period consists of the initial meeting to establish a relationship with Frank Lee and Ms. Fu. The plaintiffs assert that the first Draft Proposal contained claims meant to "awe" both Frank Lee and Ms. Fu, including that within days, Westbay had approached a number of "property investment funds, private equity houses and individual investors in the UK, France and Cyprus" to gauge interest in funding the Hainan Project. There was no objective, reliable document produced to support those claims.

[386] The plaintiffs say the second period begins with the next version of the Draft Proposal until the agreement was signed, during which Christopher Lee and Westbay created an increasing sense of urgency. The plaintiffs allege this was done in order to persuade Ms. Fu to sign an agreement and pay the commitment fee.

[387] Following that, the plaintiffs say the next period was characterized by a delay in order to minimize the plaintiffs becoming suspicious, thereby forestalling the inevitable point when the plaintiffs would demand a refund. The plaintiffs allege that is the underlying motive for Christopher Lee to have proposed they needed to take the trip to China.

[388] I find the plaintiffs' theory of the case based on the preceding framework is compelling, and consistent with the facts.

[389] This is based on findings noted in the preceding discussion and the following findings:

a) I am not persuaded on a balance of probabilities that there were any actual potential investors approached or who were interested in the Hainan Project. I find it more likely than not that representations made to that effect were false.

b) There is no objective, reliable evidence to establish that there was ever a "meeting of an investment committee" on or about March 6, or that investors were getting impatient with the plaintiffs.

c) Christopher Lee's emails on March 5 and 11, 2015 were deliberately intended to increase the sense of urgency in direct response to the concerns raised by Mr. Luke.

d) I am not persuaded on a balance of probabilities that Christopher Lee sold Roxschild to Westbay, or at all. Nor am I persuaded that at any time the secure banking token was ever transferred out of Christopher Lee's possession. Instead, I find on a balance of probabilities that at all material

times, Christopher Lee owned and controlled both Roxschild and the Roxschild Account based on the evidence adduced, Christopher Lee's admission (contrary to his pleadings) that he "at one time" owned Roxschild, and the lack of contrary documents.

e) That being the case, I also find that he knew and was solely responsible for usurping the commitment fee for his own personal use.

D. Conclusions about Christopher Lee's Liability

[390] I rely on and adopt my analysis and conclusions above at paras. 231-237 regarding payment of the commitment fee. Based on the foregoing, I am satisfied on a balance of probabilities that the plaintiffs have adduced clear and cogent evidence that Christopher Lee is liable to them in the amount of USD $500,000.

VIII. CONTRIBUTORY NEGLIGENCE

[391] Frank Lee and ABW submit, in the alternative, that if they had been found liable in either or both negligence or negligent misrepresentation, the plaintiffs were contributorily negligent.

[392] The principles of contributory negligence apply to reduce liability for both negligence and negligent misrepresentation: *Neidermayer v. Gilles*, 2012 BCSC 143 at para. 111. It focuses on the plaintiff's behaviour and duty to take reasonable care on its own behalf: *Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23 at para. 35.

[393] However, the Court must be careful not to attribute contributory negligence to the reasonability of the reliance. In other words, contributory negligence arises if a party failed to consider that it may harm itself if it does not act reasonably and carefully, which may include a failure to guard against the foreseeable carelessness of others (*Gilles* at paras. 112-113).

[394] The defendants submit that through their own carelessness, the plaintiffs contributed to any loss they suffered based on the following:

a) Ms. Fu failed to heed Mr. Luke's advice that Westbay did not appear to be capable of financing the Hainan Project;

b) Despite Mr. Luke's recommendation, Ms. Fu did not retain a lawyer in Hong Kong to get advice on the proposed loan structure, including whether it was even feasible;

c) Ms. Fu decided to recommend to her father, on behalf of the plaintiffs, that he sign the Westbay Agreement, despite assuming, without confirming, many critical facts related to the transaction, most importantly, whether Frank Lee had confirmed the Roxschild Account was a trust account;

d) Mr. Fu signed the Westbay Agreement, presumably relying solely on Ms. Fu's recommendation (there was no evidence adduced otherwise), despite her inexperience in conducting business in China and very limited business experience, if at all; and

e) Mr. Fu signed the Westbay Agreement on behalf of the plaintiffs despite Ms. Fu failing to retain, engage, or seek advice from anyone in China about the proposed agreement.

[395] I agree that all the preceding factors establish that the plaintiffs were contributorily negligent, which is significantly underscored by the fact that the plaintiffs are Chinese companies with extensive and considerable experience with land development.

[396] Accordingly, had I concluded that Frank Lee and/or ABW were liable in either negligence or negligent misrepresentation, I would have found the plaintiffs contributorily negligent with regard to their liability for 50%.

IX. BREACH OF CONTRACT

[397] The plaintiffs pleaded that Frank Lee and ABW entered into a contract to act as their mortgage broker and that they breached that agreement. The plaintiffs' closing submissions did not address this claim, but in their reply submissions, they

submitted that the claim was being maintained, while acknowledging that it is "largely duplicitous" of the other allegations made against Frank Lee and ABW.

[398] Determining whether an enforceable contract had been formed requires the following elements to be met: (i) there must be an intention for contract; (ii) there must be an agreement on the essential terms; and (iii) the essential terms are certain: *Angus v. CDRW Holdings Ltd*, 2022 BCSC 1001 at para. 7. Specifically, the "prerequisite to a contract claim is that the parties are aware and agree on the terms that can be identified and articulated: *WM Enterprises Inc. v. Consumers Choice Mortgages Inc.*, 2017 BCSC 367 at para. 44.

[399] I agree with ABW that there is no evidence to support the proposition that any contract was ever formed between it and the plaintiffs, and the claim fails on that basis.

[400] I do not accept the plaintiffs have proven on a balance of probabilities that Ms. Fu and Frank Lee came to any agreement in terms that were certain about the services to be performed, the duration of the contract, his fee, or how and what would happen upon a breach of any term. In my view, the basic conditions to establish a claim for breach of contract are not met.

[401] The plaintiffs' position is that the contract for the Hainan Project was formed in the same fashion as the contract for the Richmond Purchase, simply by Ms. Fu asking Frank Lee to find financing, and him agreeing to do so.

[402] I disagree that this establishes a feasible claim in breach of contract. Among other things, Mr. Chand and Frank Lee both testified that until the final deal was signed, Ms. Fu had no obligation to complete a deal with Frank Lee, notwithstanding he had agreed to "help her find financing" (see above para. 164). Moreover, even if I were to find that there was an enforceable contract, the plaintiffs have failed to identify in what way Frank Lee breached that contract. If, for example, the contract was to "help find financing", Frank Lee fulfilled that term once Mr. Fu signed the Westbay Agreement.

[403] In my view, the claim in breach of contract is --as conceded by the plaintiffs— duplicitous of the plaintiffs' claims in negligence and negligent misrepresentation. It also cannot succeed.

X. CONCLUSIONS AND ORDERS GRANTED

[404] Based on this judgment, I grant the following orders:

a) The claims against the defendants Frank Lee and Viva Pro are dismissed;

b) The claims against the defendant ABW are dismissed;

c) Christopher Lee is liable to the plaintiffs in fraud and/or fraudulent misrepresentation in the amount of USD $500,000 plus pre-judgment interest as of November 21, 2015 and post-judgment interest.

[405] The plaintiffs sought an order that I direct counsel to bring this judgment to the attention of the Chartered Professional Accountants of British Columbia. It is not clear to me that Christopher Lee addressed that issue. I grant him leave to do so on the conditions noted below.

[406] The plaintiffs sought leave to provide additional submissions on costs, including possibly seeking special costs.

[407] I grant the parties leave to submit an online request to appear before me, limited to addressing the two issues identified above. That request must be made no later than 30 days from the date of this judgment.

[408] Finally, I want to thank counsel and Christopher Lee for their helpful closing submissions in this case, a task considerably complicated by the trial proceeding over the course of five non-continuous periods.

"Sharma J."