

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Youyi Group Holdings (Canada) Ltd. v.
Brentwood Lanes Canada Ltd.*,
2019 BCSC 739

Date: 20190510
Docket: S128965
Registry: Vancouver

Between:

Youyi Group Holdings (Canada) Ltd. and DHI Holdings Inc.
Plaintiffs

And

**Brentwood Lanes Canada Ltd. and
Maple Ridge Lanes (1982) Ltd.**
Defendants

And

**Xiao Dong Liu, also known as Allen Liu, Pacific Success
Management & Consultants Inc., Pacific Fortuna Management &
Consultants Inc., Kevin Hien, Sunrich Realty Ltd. dba
Amex Sunrich Realty, Franga Holdings Ltd. and
Anken International Investment Corp.**
Defendants by Counterclaim

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

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Introduction

[1] This case concerns a dispute with respect to the enforceability of two contracts made in October 2011, for the purchase and sale of two valuable commercial properties sold as a package deal – one in the Brentwood area of Burnaby and the other in Maple Ridge.

[2] The 4.2 acre Burnaby property (the “Brentwood property”) is located at 5502 Lougheed Highway and is owned by the defendant Brentwood Lanes Canada Ltd. The Brentwood property, being by far the more valuable of the two properties, was the primary focus of the package deal. In an agreement dated October 6, 2011 (the “Brentwood Agreement”) Brentwood Lanes agreed to sell the Brentwood property to the defendant by counterclaim, Pacific Success Management & Consultants Inc., for \$28.8 million. The Brentwood Agreement was eventually assigned to the plaintiff Youyi Group Holdings (Canada) Ltd. (“Youyi Canada”).

[3] The .82 acre Maple Ridge property (the “Maple Ridge property”) is located at 22730 119th Avenue in downtown Maple Ridge and is owned by the defendant Maple Ridge Lanes (1981) Ltd. Pursuant to a separate but linked agreement also dated October 6, 2011, Maple Ridge Lanes agreed to sell this property to Pacific Success Management & Consultants Inc. for \$3.2 million (the “Maple Ridge Agreement”). The Maple Ridge Agreement was eventually assigned to the plaintiff DHI Holdings Inc. (“DHI”).

[4] In these reasons, I will refer to the Brentwood Agreement and Maple Ridge Agreement collectively as the “Purchase Agreements”.

[5] The vendors, Brentwood Lanes and Maple Ridge Lanes (the “Vendors”), are related companies under common ownership and are managed by their president, Jeong Lee. The purchasers, Youyi Canada and DHI (the “Purchasers”), are also related companies under common ownership and are managed by their president Xiao Dong Liu, also known as Allen Liu, who is also a defendant by counterclaim.

[6] The sale of the Brentwood and Maple Ridge properties was scheduled to complete on December 19, 2012. On December 4, 2012, the Vendors wrote to the Purchasers notifying them that they would not be proceeding with the sale and advised that it was their position that the Purchase Agreements had been repudiated or were unenforceable because of various alleged wrongdoings by the Purchasers and the parties' real estate agent, the defendant by counterclaim Kevin Hien, who represented both the Purchasers and Vendors under a dual agency agreement. On December 7, 2012, the Purchasers responded rejecting what they considered to be the Vendors' wrongful repudiation of the Purchase Agreements, which they contend arose as a result of sellers' remorse.

[7] The Purchasers commenced this action on December 18, 2012, seeking specific performance of the Purchase Agreements or damages in lieu of specific performance and later filed certificates of pending litigation against the Brentwood and Maple Ridge properties.

[8] The stakes in this claim are high because of a dramatic increase in the value of commercial property from the time the Purchase Agreements were signed to the date of trial. Since this action was commenced in December 2012, the value of the Brentwood property has increased from approximately \$28.8 million, the then agreed upon sale price, to somewhere around \$76 million, based on a July 2017 appraisal for that property.

Background

[9] The trial of this matter took place over seventy-seven days, including 17 days of closing submissions. This was a long commercial trial by any measure, involving testimony from a number of witnesses and the review of a large number of exhibits. Cross-examination of Allen Liu, the main witness for the Purchasers, took approximately 15 days. Cross-examination of Jeong Lee, the main witness for the Vendors, took just under 4 days. Cross-examination of Kevin Hien took approximately 10 days.

[10] As is apparent from the extensive cross-examinations, credibility was a central issue at trial and a number of key facts are in dispute. In the background section which follows, I have, for the most part, only set out facts which are not disputed and which concern the matters to be decided upon. I will deal with findings of credibility including my findings regarding the disputed facts later in these reasons.

Jeong Lee and the Properties

[11] Jeong Lee, is the president of the Vendors. He and his father began to invest in real estate in Canada starting in 1995 when the Lees purchased the Maple Ridge property and Maple Ridge Lanes bowling center operation as a qualifying investment for immigration purposes. In 1999, the Lees purchased the Brentwood property and Brentwood Lanes bowling center operation and the Mayfair Lanes bowling center in Saanich as a package. In 2003, the Lees earned a large profit by selling the Mayfair Lanes bowling center and used the proceeds to purchase two more bowling centers in Windsor, Ontario in 2007 and the Westwood Plateau Golf & Country Club in Coquitlam in 2008.

[12] The Brentwood property is a prime, high-density development property in the well developed Brentwood area of Burnaby. It is right next to the Holdom SkyTrain station, which is part of the Millennium SkyTrain line, and within an easy commute to Simon Fraser University. The property is eligible for to be rezoned "RM5" which allows for high density multiple family development. Until December 2010, assuming that RM5 zoning had been obtained, the allowable density on the Brentwood property would have been a 2.6 FAR (FAR being "Floor Area Ratio" – the maximum allowable buildable floor area building relative to lot size).

[13] The allowable density for the Brentwood property changed in December 2010 when the City of Burnaby increased the allowable density in the multi-family zones in the four Burnaby town centers, which included the Brentwood area. The City created a new RM5_s designation under which property owners have the ability to apply for

additional density in exchange for a cash payment to the city or the provision of community amenities. As a result of these changes as of December 2010 the total potential density for a multi-unit residential development on the Brentwood property had almost doubled to 5.0 FAR. From a development standpoint this likely made the property much more valuable to developers interested in a high density, multi-tower, mixed-use commercial and residential high-rise project.

[14] The Maple Ridge property is in downtown Maple Ridge and is also suitable for high density residential development but nowhere near the same scale or value as that possible for the Brentwood property.

The Franga Group

[15] In early April 2011, a group of three insurance industry colleagues, Neil Wong, Gary Chow and Stanley Chow, apparently recognizing the potential to profit from the active British Columbia real estate market, agreed to work together to earn referral fees by putting sellers and buyers of commercial properties together. The original group, which I will refer to in these reasons as the “Franga Group”, was later expanded to include Kevin Hien.

[16] Neil Wong was an insurance broker and a former restaurateur and hotel operator and at the time the Purchase Agreements were concluded, was the father-in-law of Jeong Lee’s long-serving vice president. Gary Chow is also an insurance broker and a shareholder and director of the defendant by counterclaim Franga Holdings Ltd. (“Franga Holdings”). Stanley Chow (no relation to Gary Chow) is an accountant and had worked with both Neil Wong and Gary Chow. None of the members of the original Franga Group had any experience in selling commercial real estate but they did have connections to commercial property owners, which in the case of Neil Wong included hotel owners.

[17] Kevin Hien had become a licenced realtor in Alberta in 1988 and a realtor in British Columbia in 1998. He has worked with the defendant by counterclaim Sunrich

Realty Ltd. (“Amex Sunrich Realty”) since 1998, primarily acting for buyers and sellers of residential property. He had limited experience in commercial real estate sales and had no experience selling high rise development properties before becoming involved in efforts to sell the Brentwood and Maple Ridge properties. I will refer to Kevin Hien and Amex Sunrich Realty collectively as the “Hien parties” in these reasons.

[18] In early April 2011, a meeting was arranged at an IKEA restaurant in Coquitlam between Neil Wong, Gary Chow and Stanley Chow and Kevin Hien. Gary Chow, who had known Kevin Hien for many years, introduced him to the rest of the group. Kevin Hien brought along two clients who were interested in acquiring hotel properties and a discussion ensued regarding the types of properties his clients were interested in purchasing. After the meeting with Kevin Hien’s clients ended and they had left, Neil Wong brought up the idea of asking his friend and insurance client Jeong Lee if he was interested in selling the Lees’ four bowling centers and golf club.

The Franga Group Obtains the Right to Sell and Searches for Buyers

[19] Neil Wong subsequently approached Jeong Lee on or about April 11, 2011, and Jeong Lee advised that he would consider selling his four bowling center properties and golf club for the right price so long as he could retain management of their respective operations for a time through a vendor lease-back arrangement. Neil Wong passed this good news on to his fellow Franga Group team members.

[20] Throughout April 2011 the members of the Franga Group worked on formalizing the terms on which they would work together. This started with a draft team agreement circulated by Neil Wong on April 13, 2011, which all of the Franga Group members, including Kevin Hien, signed. Despite his attempts at trial to distance himself from the Franga Group, it is clear that Kevin Hien had become a full-fledged member of this group by April 2011.

[21] Recognizing that they needed formal authorization to sell the Lee's properties, Neil Wong and Kevin Hien began the process of drafting a form of exclusive listing agreement in the latter half of April 2011. This resulted in the conclusion of an agreement with Jeong Lee on April 29, 2011 (the "April 2011 Authorization and Fee Agreement"). The April 2011 Authorization and Fee Agreement granted Franga Holdings the exclusive right to sell the four bowling centers (but not the golf club) for a total price of \$45 million, with Franga's fee being any amount over a \$45 million sale price.

[22] Jeong Lee did not actually meet the members of the Franga Group, other than Neil Wong who he already knew, until a meeting in early May 2011. This first meeting took place at Brentwood Lanes and was attended by Jeong Lee, Kevin Hien, Neil Wong and Gary Chow. Shortly after this meeting Kevin Hien and Neil Wong completed a marketing brochure for the four bowling centers in both English and Chinese which members of the Franga Group began to circulate. The target market for these properties was high net worth, non-resident Chinese investors.

[23] From May to July 2011, members of the Franga Group searched for buyers for the Lee's properties. Gary Chow was working with a potential buyer who expressed an interest in purchasing only the Brentwood and Maple Ridge properties. Kevin Hien remained in contact with the clients who had participated in the early April 2011 meeting at IKEA and had expressed an interest in the bowling center properties. It soon became apparent to the members of the Franga Group that potential purchasers were primarily interested in the more valuable Brentwood property which Jeong Lee was not prepared to sell on its own.

[24] On July 5, 2011, after further discussions between Neil Wong and Jeong Lee, Neil Wong advised the other members of the Franga Group that Jeong Lee would consider selling the Brentwood and Maple Ridge properties on their own so long as he could lease the properties back for a period of time to allow him to continue to

operate the bowling centers. Neil Wong advised members of the Franga Group that in his view, Jeong Lee would require a combined price of around \$38 million.

[25] On July 7, 2011, Neil Wong sent an email to Gary Chow and Kevin Hien recommending that they seek an offer of \$39.999 million, inclusive of a total 5% commission for buyer's and seller's agents. Neil Wong stated in his email that "[t]here are other interested buyers inquiring about these properties the buyer now need to proceed immediately with their offer before the seller increase the prices" (emphasis added). The marketing brochure originally prepared by Neil Wong and Kevin Hien in May was modified to now include only the Brentwood and Maple Ridge properties, for a combined sale price of \$39.999 million.

[26] On or about July 11, 2011, while the Franga Group's marketing efforts were still underway, Neil Wong discovered that it might be possible to obtain approval from the City of Burnaby for a higher density development on the Brentwood property. On July 13, 2011, he forwarded zoning information he had obtained to Gary Chow and Kevin Hien. In his correspondence, Neil Wong expressed his view that this justified a price higher than the combined \$39.9 million sale price for the Brentwood and Maple Ridge properties that the group had been discussing. The zoning information sent by Neil Wong to the other members of the Franga Group was not provided by him or any other member of the Franga Group to Jeong Lee.

[27] On July 18, 2011, Jeong Lee was asked to and did sign an addendum to the April 2011 Authorization and Fee Agreement (the "July 2011 Fee Addendum"). The July 2011 Fee Addendum modified the original agreement and granted Franga Holdings the exclusive right to sell the Brentwood and Maple Ridge properties as a package for a total price of \$39.999 million and provided that Franga would receive a fee equivalent to 4% of the first \$35 million of the sale price and 20% of the balance of the sale price.

[28] On July 25, 2011, in an effort to generate more interest in the Brentwood and Maple Ridge properties, the Franga Group published an advertisement in a local

Chinese language newspaper. The four Franga Group members contributed equally to the cost of this ad. There is no independent evidence of any further sales-related activity by members of the Franga Group, including contact with potential purchasers, during the month of August 2011.

[29] On September 5 and 6, 2011, Neil Wong sent further emails to Kevin Hien regarding the higher density zoning potential for the Brentwood property. In his September 5th email, he stated that: “with the changes to allow higher density, perhaps another 10% or 15% will add 3-5 more storey(s)”. In his September 6th email he stated that “the City will give special incentives and higher density for this property when the application is made and according to the info in the plan up to 25 storys [sic]”. As was the case with the zoning information Neil Wong had sent to the other members of the Franga Group in July, none of this zoning information was provided to Jeong Lee.

Allen Liu is Introduced to the Properties

[30] Allen Liu is the president and owner of the Purchasers and of the defendants by counterclaim, Pacific Success Management & Consultants Inc., and Pacific Fortuna Management & Consultants Inc. (“Pacific Success” and “Pacific Fortuna”).

[31] Allen Liu had been involved in various business enterprises in China and in 2006, became the president of a real estate company headquartered in Dalian that had completed a large mixed residential and commercial multi-tower development in that city in 2009. He immigrated to Canada with his family in 2001 and began to invest in properties in British Columbia in or about 2008, first purchasing a strip mall on No. 3 Road in Richmond that year and then another strip mall on Alexandra Road in Richmond in 2010.

[32] The first recorded communication between Allen Liu and any person regarding the Brentwood and Maple Ridge properties occurred on September 13, 2011. On that day, Kevin Hien contacted Allen Liu by telephone and later sent him

an email attaching Chinese and English language versions of the marketing brochure for the Brentwood and Maple Ridge properties. Kevin Hien's email simply stated "... Mr. Liu: Hello, please find attached information in Chinese and English, one copy each, for your reference. Please feel free to call if you have any questions. Thanks."

[33] Kevin Hien testified that he was introduced to Allen Liu in the late summer of 2011 through one of Allen Liu's then employees, Audrey Zhao, at Liu's restaurant, the Rainflower Restaurant located on his No. 3 Road property in Richmond. According to Kevin Hien, he had been introduced to Audrey Zhao by his friend Candy Chen. Candy Chen is the owner of the defendant by counterclaim, Anken International Investment Corp. ("Anken"). Allen Liu also testified that he first met Kevin Hien at the Rainflower Restaurant. The timing of and manner in which Allen Liu first met Kevin Hien, including the date when negotiations for the purchase of the Brentwood property commenced, is disputed. I will deal with my findings of fact in this regard later in my reasons.

[34] On September 20 and 21, 2011, Neil Wong sent additional emails to Kevin Hien regarding the development potential for the Brentwood property, enclosing newspaper articles concerning using "s" zoning to obtain approval for higher density development in Burnaby and information he had obtained from the City of Burnaby website regarding RM5s zoning. Less than one day later on September 22, 2011, Kevin Hien sent an email to Allen Liu enclosing planning maps from the City of Burnaby planning department and information regarding RM5 zoning, advising that the density of a development on the Brentwood property could go up to 5.0 FAR. Again, this additional zoning information was not provided to Jeong Lee.

[35] On September 23, 2011, as a result of a previous inquiry made by Allen Liu or someone on his behalf, Allen Liu received an email from John Pan with Studio One Architects ("Studio One") providing zoning information for the Brentwood property and advising that the lot was (or had the potential to be) zoned RM5 in the

Brentwood area plans with a maximum development density of 5.0 FAR. John Pan's email also noted that "there is some land use limitation on the west side along the creek, but not a large proportion." This is the first documented communication between Allen Liu and Studio One, or anyone else except for Kevin Hien, regarding the Brentwood property and was the first reference to any concerns regarding the impact of a creek on its development potential.

The Purchase Agreements and Related Agreements

[36] On September 26, 2011, at a meeting at Brentwood Lanes, Kevin Hien submitted an offer to Jeong Lee, which had been signed by Allen Liu in his personal capacity and by his then potential partner Tie Shi Li, to purchase both the Maple Ridge and Brentwood properties for the combined price of \$32 million (the "September 2011 Offer"). Neil Wong was present at this meeting.

[37] At trial, Allen Liu and Kevin Hien testified that there had been an earlier negotiation in early September 2011 which resulted in Allen Liu making an offer to purchase the Brentwood property for \$38.8 million (the "Alleged First Offer") and that this was set out in a letter of intent (the "Letter of Intent"). The Vendors deny that the Alleged First Offer was ever made and deny the existence of the Letter of Intent. The Vendors say that the first offer to purchase both the Brentwood and Maple Ridge properties was the September 2011 Offer. I will deal with the evidence with respect to the Alleged First Offer and Letter of Intent later in my reasons.

[38] The September 2011 Offer had a proposed subject removal date of November 30, 2011, and a closing date of December 19, 2012. The offer included payment of an up-front deposit of \$50,000 and a further \$450,000 payable upon removal of subjects. It also provided that the seller could lease back the Brentwood property for a period of three years with annual rent equal to 5.5% of the purchase price for the property and lease back the Maple Ridge property for annual rent equal to 3.3% of the price attributed to that property. The offer showed Kevin Hien of Amex Sunrich Realty as the seller's agent and both Kevin Hien and another realtor, Lester

Lin of Multiple Realty, as buyer's agents. Lester Lin was a friend of Kevin Hien's and never acted as Allen Liu's real-estate agent. Allen Liu testified that he did not know Lester Lin and did not notice that the offer showed Lester Lin as his agent.

[39] Jeong Lee was prepared to accept virtually all of the terms of the September 2011 Offer and hand marked various proposed changes on the draft. He requested a reduction in the lease-back rate for the Brentwood property from 5.5% to 3% of the purchase price and for the Maple Ridge property, from 3.3% to 2% of the purchase price. As a result of this request, Kevin Hien drafted a separate schedule dated September 26, 2011, which included an option to reduce the lease-back rents to the amounts Jeong Lee had requested.

[40] The marked up version of the September 2011 Offer and the September 26, 2011 rent reduction schedule were signed by Jeong Lee on behalf of the Vendors on or about September 27, 2011. At some point afterwards, Jeong Lee's changes to the September 2011 Offer were initialled by Tie Shi Li but they were never initialled by Allen Liu and as a result, the September 2011 Offer was never finalized. At this time Allen Liu, Tie Shi Li and Jeong Lee also signed other real estate forms provided by Kevin Hien including Real Estate Board Limited Dual Agency Agreements and a Working with a Real Estate Agent form.

[41] In late September 2011, members of the Franga Group were still engaged in discussions regarding how to share any commissions payable to them on the sale of the Brentwood and Maple Ridge Properties. On September 28, 2011, Kevin Hien wrote to Neil Wong advising as follows:

"Multiple Realty has been pushing me for a commission agreement to secure their 2% commission. I can not give them any thing in writing now simply because I don't have anything with Mr. Lee yet; therefore the transfer of the listing need to happen the sooner the better. I worry if I don't have any thing for them in writing, the progress of the deal will be affected!"

[42] What Kevin Hien meant when he indicated that Multiple Realty was asking for a 2% commission is in dispute and will be addressed later in my reasons.

[43] On October 4, 2011, Neil Wong, who testified that at this time he believed that one-half of the commission on the sale of the Brentwood and Maple Ridge properties would now be paid to a buyers' agent, circulated a proposal to Kevin Hien regarding how the team members would allocate the Franga Group's 2% share of the total 4% commission. His proposal was that the largest share of the Franga Group commission would be paid to him and Kevin Hien, with Gary Chow and Stanley Chow receiving a smaller portion. Kevin Hien responded only that "it looks okay to me".

[44] On or about October 6, 2011, the April 2011 Authorization and Fee Agreement, which had been modified by the July 2011 Fee Addendum, was terminated and two separate exclusive listing contracts were concluded for the Brentwood and Maple Ridge properties showing Amex Sunrich Realty as the listing broker with a commission of 2% payable on the selling price for each property. The arrangements under which the Franga Group's share of the commission would be distributed remained outstanding at that time and would later become a source of conflict between the members of the Franga Group.

[45] In mid-October 2011 after Allen Liu had returned from a trip to China where he spoke with a potential investor Youyi China, he requested that the September 2011 Offer be divided into two separate agreements – one for the Brentwood property and one for the Maple Ridge property. According to Allen Liu, this request arose as Youyi China, who had now replaced Tie Shi Li as a potential partner, was only interested in the Brentwood property. As a result, two separate purchase and sale agreements dated October 6, 2011, were prepared by Kevin Hien and signed by Allen Liu – the Brentwood Agreement and the Maple Ridge Agreement. The Brentwood Agreement was made subject to an unconditional agreement to also purchase the Maple Ridge property. Jeong Lee accepted both offers and signed the relevant agreements on or about October 17, 2011. Lester Lin was not included as a buyer's agent on either agreement.

[46] The Brentwood Agreement provided that Allen Liu's company Pacific Success was to purchase the Brentwood property for \$28.8 million and the term of the lease-back to the seller was increased from three to four years. As had been done with the September 2011 Offer, an option to reduce lease-back rent from 5% to 3% of the purchase price, exercisable on three month's notice, was included in a separately page-numbered schedule (the "Rent Reduction Schedule").

[47] The Maple Ridge Agreement provided that Allen Liu's company Pacific Fortuna was to purchase that property for \$3.2 million. Annual rent payable as part of a three year lease-back arrangement was set at 10% of the purchase price.

[48] The allocation of the global \$32 million purchase price for the properties (\$28.8 million for Brentwood and \$3.2 million for Maple Ridge) was somewhat notional, having been determined by Jeong Lee based on a \$3.2 million offer he had received for the Maple Ridge property three years before.

[49] After the Purchase Agreements were signed, there were a number of amendments made in a series of schedules. For the Brentwood Agreement, those included the following:

- a) A schedule dated November 10, 2011, which, amongst other things, changed the name of the purchaser to Allen Liu's company, the newly incorporated Youyi Canada, and extended the subject removal date from November 30, 2011, to January 30, 2012;
- b) A schedule dated January 15, 2012, under which the vendor agreed to close on the sale earlier than December 2012 if the purchaser so requested and to provide vendor financing secured as a second mortgage on the Brentwood property of up to \$8 million and under which the purchaser provided a warranty to only seek to rezone the property to RM5 and not RM5s; and

- c) A schedule dated January 30, 2012, under which both parties confirmed that they were satisfied with their own due diligence regarding the property and its zoning and confirming removal of subjects by the purchaser.

[50] The schedules to Maple Ridge Agreement contained changes similar in theme to those described above including, amongst other things, changing the name of the purchaser first to Pacific Fortuna and eventually to DHI.

[51] Starting in early November 2011, the parties commenced negotiation of lease agreements for the Brentwood and Maple Ridge properties (the “Brentwood Lease” and the “Maple Ridge Lease”) which were signed on November 18, 2011, but were not to take effect until after closing on December 19, 2012. Annual rent for the Brentwood property was shown in the body of the Brentwood Lease as \$1.58 million and a separate schedule, again separately page numbered, was prepared showing the correct rent of \$1.008 million (the “Lease Addendum”).

[52] In addition, letters of commitment concerning the financing to be provided by the Vendors (the “Letters of Commitment”) were drafted and signed on or about November 16 and 18, 2011, under which Brentwood Lanes committed to provide a second mortgage to Youyi in the amount of \$4.5 million secured against the Brentwood property and Maple Ridge Lanes agreed to provide a second mortgage to Pacific Fortuna for \$500,000 secured against the Maple Ridge property.

The False Purchase and Sale Agreement

[53] In November 2011, at the request of Allen Liu, Kevin Hien asked Jeong Lee to sign a false purchase and sale agreement for the Brentwood property, dated September 6, 2011 (the “False Purchase and Sale Agreement”), along with a schedule dated October 5, 2011, purporting to terminate this agreement. Jeong Lee and Allen Liu signed both of these documents on the same day, around mid-November.

[54] Aside from the fact that it was backdated, the False Purchase and Sale Agreement differed from the Brentwood Agreement in that it showed a purchase price for the Brentwood property of \$38.8 million, \$10 million more than the price actually agreed upon, and stated that a \$10 million deposit had been paid.

[55] It was not disputed at trial that a purchase and sale agreement for the Brentwood property was not concluded on September 6, 2011. The False Purchase and Sale Agreement was a fabrication. Allen Liu and Kevin Hien testified that that this document was requested by Youyi China and was simply an attempt to memorialize the terms of the Letter of Intent, a copy of which they claimed had not been retained. Jeong Lee testified that there was no Letter of Intent and that he understood that Allen Liu intended to use the False Purchase and Sale Agreement to demonstrate his negotiating skills to Youyi China. The Vendors contend that the False Purchase and Sale Agreement was intended to be used and was used by Allen Liu or his agents to mislead potential lenders and joint venture partners or assignees. I will provide my findings of fact regarding the creation and use of the False Purchase and Sale Agreement later in my reasons.

Project Assessment Work Completed by the Purchasers

[56] Starting in October 2011, Allen Liu commissioned or directed Studio One to commission on his behalf a number of reports. These included a land survey, a geotechnical report, an order of magnitude development cost estimate, appraisals, a market study and a preliminary concept plan.

[57] The preliminary concept plan was prepared by Studio One and showed a three tower development on the Brentwood property (and therefore was premised upon receipt of RM5s zoning approval from the City of Burnaby). Allen Liu testified that he had not told Studio One to create a three tower concept plan and that he did not pay close attention to the concept plan after he received it.

[58] In December 2011, Studio One commissioned a consulting report from a property appraiser, Eric Pan of Burgess Cawley Consulting, setting out an overview of the high-rise condo market in Burnaby, development *pro forma* and sensitivity analysis based on the Studio One three-tower concept plan (the “December 2011 Profitability Report”). Later, in June 2012, Eric Pan completed two additional reports, a market study on a proposed multi-phased, mixed development of the Brentwood property (the “June 2012 Consulting Report”) and a further appraisal in which Eric Pan estimated the value of the Brentwood property to be \$38.8 million (the “June 2012 Appraisal”).

[59] In the December 2011 Profitability Report and the June 2012 Appraisal, Eric Pan referenced incorrect information regarding the purchase price for the property, stating that “the subject property has been placed under contract for \$38.8 million”. Eric Pan’s evidence is that first Studio One and later Allen Liu advised him that the purchase price for the Brentwood property was \$38.8 million. Allen Liu denies that he told Eric Pan that the purchase price was \$38.8 million. I will deal with this evidence later in my reasons. All three reports completed by Eric Pan were premised on the ability to develop the Brentwood property in accordance with the RM5s zoning provisions, with a total potential density of 5.0 FAR.

Jeong Lee Learns About the RM5s Zoning Potential for the Brentwood property

[60] On December 2, 2011, Jeong Lee received an unsolicited offer to purchase the Brentwood property for \$27.5 million. Given that this unsolicited offer was close to the \$28.8 million sale price for the property he had already accepted, he became concerned that the price he had agreed to was not well above market price as he says he had been led to believe by Kevin Hien. He contacted Kathryn Jones with Collingwood Appraisals, an appraiser he had worked with in the past, and asked her to prepare an appraisal for the property. Kathryn Jones advised Jeong Lee not to sell the property for \$28.8 million because its zoning had changed to RM5s and as a result, its value was much higher.

[61] The parties do not agree when Jeong Lee first became aware of the potential to rezone the Brentwood property. Kevin Hien and Gary Chow's evidence at trial was that Kevin Hien provided zoning information to Jeong Lee at their first meeting in May 2011. Jeong Lee denies that any such information was provided. I will deal with the conflicting evidence in this regard later in my reasons.

[62] After he first spoke with Kathryn Jones, Jeong Lee contacted Kevin Hien and informed him that he had learned that the zoning for the Brentwood property had changed. Jeong Lee asked Kevin Hien to find out what Allen Liu was planning on building on the Brentwood property and was later told that Allen Liu confirmed that he did not intend to rezone the property to RM5s and was satisfied building only two towers of the same size as those recently developed by another developer on an adjacent property – that is, that Liu did not intend to develop the Brentwood property to its full potential.

[63] Jeong Lee then asked Kevin Hien to request that Allen Liu commit to restrict a rezoning application to seek only RM5 and not RM5s zoning for the Brentwood property. Allen Liu agreed to this restriction which was set out in a January 15, 2012 schedule to the Brentwood Agreement (the "Zoning Warranty"). The Zoning Warranty did not bind subsequent, unrelated purchasers. In other words, if Allen Liu assigned the Brentwood Agreement or later sold the property to an arms-length third party, the Zoning Warranty would not apply.

[64] On January 20, 2012, Jeong Lee received a copy of Kathryn Jones' appraisal report valuing the Brentwood property at \$38 million. Despite his belief that he had sold the Brentwood property for approximately \$10 million less than it was worth, he did not make any efforts to get out of the deal at that time. On January 30, 2012, the Purchasers removed the final subject conditions on the Brentwood and Maple Ridge properties and paid the balance of the required deposits.

[65] On or about January 30, 2012, Jeong Lee was asked by Kevin Hien to sign and did sign, replacement referral agreements setting out referral fees payable by

Brentwood Lanes to Anken and the Franga Group and by Maple Ridge Lanes to Anken (the “January 2012 Referral Fee Agreements”). Those agreements made reference to an October 15, 2011 referral fee agreement with Allen Liu the nature and purpose of which is disputed. I will discuss the October 15, 2011 referral later in my reasons.

The Purchasers’ Financing Efforts

[66] The Purchasers’ efforts to obtain financing for the purchase of the Brentwood and Maple Ridge properties started in November 2011 when Allen Liu engaged Tina Mu, a licensed mortgage broker. On December 1, 2011, Tina Mu obtained a discussion letter from Canadian Western Bank (“CWB”) regarding \$14.4 million in potential financing for the purchase of the Brentwood property, based on a loan-to-value ratio of 50%. Tina Mu testified that she had been told that the purchase price of the Brentwood property was \$28.8 million, the correct price, and the CWB discussion letter referenced this price. Ultimately, the Purchasers did not proceed with a formal application for \$14.4 million in financing from CWB.

[67] Many months later, after the Purchasers had received the June 2012 Appraisal from Eric Pan estimating the market value of the Brentwood property to be \$38.8 million (the same price Eric Pan had been told the property had been sold for), Allen Liu asked Tina Mu to go back to CWB to seek more financing. He provided her with both a copy of the False Purchase and Sale Agreement, which he told her was a previously concluded agreement which had been cancelled, and Eric Pan’s appraisal. Allen Liu’s evidence, which is consistent with that of Tina Mu, is that he told her not to share the False Purchase and Sale Agreement with anyone. Tina Mu was not provided with a copy of the Rent Reduction Schedule or Lease Addendum for the Brentwood property and Allen Liu did not tell her that the leaseback rent for the property was only \$1.008 million. Despite Tina Mu’s efforts, CWB was not prepared to lend more than \$14.4 million.

[68] There is no evidence that the Purchasers took any further substantive steps towards obtaining purchase financing until approximately the fall of 2012. At that time, Tina Mu recommenced discussions with CWB and in November 2012 was successful in obtaining a commitment letter from them for \$1.6 million in financing for the purchase of the Maple Ridge property to be secured by a first mortgage. This financing from CWB was conditional upon Allen Liu demonstrating that he had \$12 million cash-on-hand. The circumstances under which Allen Liu sought to show that he in fact had \$12 million in cash will be discussed later in my reasons.

[69] In October 2012, Allen Liu engaged another mortgage broker, Paul Kang with Dominion Lending. On or about October 15, 2012, Paul Kang commenced discussions on behalf of the Purchasers with two private mortgage lenders, Realtech Capital ("Realtech") and Trez Capital ("Trez"). Discussions with both of those lenders continued through into November and early December 2012 but financing arrangements were not completed prior to termination of the Purchase Agreements by Jeong Lee on December 4, 2012.

[70] In addition to discussions with lenders, Allen Liu carried out further discussions with Jeong Lee regarding potential vendor financing of \$8 million. At a meeting in May 2012, Allen Liu proposed using either of his Richmond strip mall properties as security rather than granting second mortgages over the Brentwood and Maple Ridge properties as was contemplated in the Purchase Agreements and Letters of Commitment. This alternative financing arrangement was not finalized at that time as Jeong Lee advised he had to think about it.

[71] No further discussions between Allen Liu and Jeong Lee regarding vendor financing occurred until they met again in October 2012. Allen Liu testified that at this meeting, the parties agreed on an arrangement under which the Purchasers would pay a further \$8 million deposit which the Vendors would then loan back to the Purchasers to use towards the purchase of the Brentwood and Maple Ridge properties. Allen Liu again offered to provide security for this vendor financing

arrangement by granting the Vendors a second mortgage over his Richmond strip mall properties. I note that in closing submissions, Purchasers' counsel conceded that no agreement regarding this modified vendor financing arrangement was ever concluded but that this potential arrangement was only discussed.

[72] In November 2012, Kevin Hien, acting on instructions from Allen Liu, attempted to implement the modified vendor financing arrangement by carrying out a deposit payment scheme. In his email to Jeong Lee dated November 15, 2012, Kevin Hien explained how this scheme would work:

...

His [Allen Liu's] suggesting procedures are as follow:

1) say starting tomorrow Nov 16, he (Youyi Group) will issue a cheque of 3 mil to Brentwood (see if your wife or account can deposit the cheque on your behalf).

upon receiving the cheque, make the deposit right away, then you can sign him a receipt (sample attached as doc. 1) from Korea, OR your wife/accountant signs the receipt on Brendwood's behalf (Mr. Liu's bank needs to see the receipt).

two days later, say Nov 18, your wife/accountant will issue a cheque of 3mil back to Mr. Liu's company Pacific Success, at the same time Youyi will sign you the loan agreement stating that they have received the 3mil loan from you (sample attached as doc.2).

two days later, say Nov 20, Pacific Success will deposit your cheque, and repeat the same process for next amount of 5 mil.

By completing all the process, the bank will see the 8 mil has been paid to the Seller, it is actually a loan. Another way to look at this: The 8 mil is funded prior to the Date of Completion with Mr. Liu's own money; when the closing date comes on Dec 19, this amount will be adjusted by the lawyers (the actualy funding of the loan).

The time is running short, please let me know if his proposed plan works for you, so we can work on it right away in order to close the deal on time. Your timely reply will be greatly appreciated. Thanks.

Best Regards, Kevin

[73] Kevin Hien continued to correspond with Jeong Lee over the following week in an effort to have him participate in this scheme, which I will refer to going forward as the "False Deposit Scheme". In response to inquiries from Jeong Lee regarding

the False Deposit Scheme, Kevin Hien sent a further email on November 21, 2012, explaining as follows:

Hi Mr. Lee,

Because Mr. Liu's lender needs to see that he has the \$8 million before they give final approval on the mortgage, at this time we can not tell them that the 8 mil is actually coming from you as seller's loan. Wait till after the 1st mortgage actually funded on Dec 19, then we can register your loan as 2nd mortgage (that is the collateral!) ...

(Emphasis added.)

[74] Although Kevin Hien continued to make efforts to carry out the False Deposit Scheme, Jeong Lee refused to cooperate and the contemplated \$8 million "deposit" was never paid to Jeong Lee.

The Purchasers' Discussions with Joint Venture Partners or Assignees

[75] In October 2011, after Allen Liu had cut ties with his initial potential partner Mr. Tie Shi Li, Allen Liu's company, Youyi Canada, entered into a joint venture agreement with Youyi China for the purchase and development of the Brentwood property. Allen Liu's evidence is that he had a number of discussions with Youyi China regarding their participation in this project starting in early September 2011 and met with them and discussed the project during visits to China in October and December 2011 and early 2012. The Vendors dispute that Allen Liu met with Youyi China in early September 2011 and contend that he could not have started discussions with them until the second half of that month. I will provide my findings of fact in this respect later in my reasons.

[76] In June 2012, Youyi China representatives travelled to Vancouver and met with Allen Liu and Francis Zheng and various consultants including Jim Wong and John Pan with Studio One, the appraiser Eric Pan and law, accounting and construction firms to discuss a potential development of the Brentwood property. Despite their apparent initial interest in participating in the purchase of the Brentwood property, Youyi China sent a letter on July 28, 2012, terminating the joint

venture agreement citing “domestic policy and other reasons”. Other than this letter, no other records of communication between Youyi China and Allen Liu were presented at trial.

[77] After Youyi China backed out of the deal in July 2012, Allen Liu began to work with Susan Wu, a real estate agent, to investigate the potential assignment of the Brentwood Agreement or a joint venture development arrangement. On August 1, 2012, Susan Wu made contact with Brett Aura, an agent with Cushman & Wakefield Ltd. who was acting for the large developer Ledingham McCallister (“LedMac”), regarding a potential assignment. She was also engaged in parallel discussions with another potential purchaser through its agent Peter Balomenos.

[78] The documentary evidence establishes that LedMac and Peter Balomenos’ client were interested in taking an assignment of the Brentwood Agreement and that the Purchasers were considering assigning the property – although Allen Liu testified that he was primarily interested in finding a joint-venture partner. Peter Balomenos’ client submitted a non-binding letter of intent from his client to purchase an assignment of the Brentwood Agreement in mid-September and LedMac submitted its own offer in early October 2012.

[79] LedMac, had been provided with the False Purchase and Sale Agreement by Susan Wu and believed until approximately November 2012 that the Purchasers had an agreement to purchase the Brentwood property for \$38.8 million and had paid a \$10 million deposit.

[80] The Purchasers engaged a Vancouver law firm, Fasken, who wrote to both LedMac and Peter Balomenos’ client in mid-October 2012 expressing a preference to joint venture but also provided a draft assignment agreement to each of those parties. The draft assignment agreements proposed payment of a substantial assignment fee to the Purchasers, which in the case of Balomenos’ client was \$10 million and in the case of LedMac \$10.8 million.

[81] Ultimately the Purchasers did not proceed with discussions regarding an assignment of the right to purchase the Brentwood property with either party. They did continue with discussions with LedMac into early December 2012 regarding a possible joint venture which culminated in a proposal from the Purchasers under which Youyi Canada would contribute the Brentwood property with a contributed land value of \$45 million, but a joint venture arrangement was not concluded.

The Defendants Rescind the Purchase Agreements

[82] On or about November 15, 2012, Jeong Lee was contacted by Neil Wong with respect to what had deteriorated into a dispute over how the Franga Group members would share commissions from the sale of the Brentwood and Maple Ridge properties. Neil Wong sought Jeong Lee's assistance in protecting his share of the Franga Group commission.

[83] Neil Wong told Jeong Lee that he believed the agreed upon \$32 million sale price for the Maple Ridge and Brentwood properties was disappointingly low. He also told Jeong Lee that he had provided information on the RM5s zoning potential for the Brentwood property to Kevin Hien the year before, well before the Purchase Agreements were signed in October 2011. Jeong Lee was not impressed. It appears that he began to suspect that Kevin Hien had intentionally withheld information regarding the Brentwood property's RM5s zoning potential from him.

[84] On November 17, 2012, Jeong Lee wrote to Neil Wong asking him if he had any information to support Jeong Lee's suspicion that Kevin Hien had an under-the-table commission agreement with Allen Liu which would explain Kevin Hien's support for what Jeong Lee now considered to be a low sale price for the Brentwood property and would justify Jeong Lee getting out of the deal. Neil Wong responded advising that he did not have any such information.

[85] On December 4, 2012, the Vendors' then counsel sent a letter to counsel for the Purchasers and to Kevin Hien advising that the Vendors were entitled to

rescission of the Brentwood and Maple Ridge Agreements and would not be proceeding with the sale of the properties (the "Termination Letter"). In the Termination Letter, the Vendors asserted that the Purchasers and Kevin Hien were engaged in a scheme to defraud the Purchasers' lenders, that the Purchasers and Kevin Hien had colluded to deceive the Vendors with respect to the true value of the Brentwood property and that Kevin Hien had counselled the Vendors to enter into improvident contracts.

[86] On December 7, 2012, the Purchasers responded rejecting what they considered to be wrongful repudiation of the Purchase Agreements by the Vendors and commenced this action on December 18, 2012.

Preliminary Comments on Credibility

[87] Before I proceed further with my reasons, I consider it appropriate to make some general comments with respect to credibility, which as I have already said is a central issue in this case. Credibility issues arose as a result of changes in witnesses' evidence before and during trial, the nature of responses to questioning at trial including the witnesses' demeanour, the overall plausibility or logic of the witnesses' testimony and the conflicts in evidence of both the party witnesses and the evidence of independent witnesses and the documentary evidence.

[88] I am conscious of the principles set out in the leading authorities concerning how the court should deal with credibility and reliability questions. Those include *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.), *R. v. H.C.*, 2009 ONCA 56, *Bradshaw v. Stenner*, 2010 BCSC 1398, *Pacheco v. Antunovich*, 2015 BCCA 100, and the cases referenced therein.

[89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.

[90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.

[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.

[94] The Purchasers rely heavily on the testimony of Allen Liu and Kevin Hien. They also rely on the testimony of Allen Liu's right hand man, Francis Zheng, and Kevin Hien's friend Candy Chen. The Hien parties, Anken and Franga Holdings rely on the testimony of Kevin Hien and his friends, Gary Chow and Candy Chen. Jeong

Lee was the only party witness for the Vendors. In my view, none of these witnesses can be described as independent as each of them has a stake in these proceedings.

[95] I do not find Allen Liu to have been a credible witness. There were a number of occasions where his testimony at trial was inconsistent with his earlier sworn evidence. In addition, some of his direct examination evidence at trial was internally inconsistent and at times his direct examination evidence changed during cross-examination. He did not answer many questions in a manner that allowed me to feel confident that he was telling the truth. For example, although he seemed to have excellent recollection of dates and times of meeting or contents of discussions during direct examination, his recollection diminished significantly during cross-examination. There were a number of occasions when Allen Liu simply neglected to answer the questions put to him or provided long-winded and unresponsive answers. Some of his evidence defied business logic including, in particular, his evidence regarding the circumstances that lead up to and the reason for drafting of the False Purchase and Sale Agreement. As a result of my serious concerns regarding the reliability of Allen Liu's evidence, I must and do consider it in light of its general plausibility and its consistency with the evidence of independent witnesses and proven documents.

[96] I also find that Kevin Hien was not a credible witness. His evidence suffered from many of the same credibility frailties as Allen Liu's. He offered no explanation why he, as a realtor, would have prepared the False Purchase and Sale Agreement which, even on his evidence that it was prepared to memorialize the terms of an earlier offer and not an agreement, was a fraudulent document. He was caught in one blatant lie at trial concerning his friendship with Candy Chen which he only recanted after he was confronted with incontrovertible video evidence. Although, as I have already said, demeanour should be considered carefully in assessing credibility, especially demeanor during a heavy cross-examination, I found that Kevin Hien was excessively argumentative and evasive.

[97] My impression of Francis Zheng is that he tailored his evidence in an attempt to make it consistent with that of his ex-boss, Allen Liu. Like Allen Liu and Kevin Hien, he had a far better memory during direct examination than he did during cross-examination. In a few cases, his evidence was directly contradicted by independent witnesses or seemed far fetched. I was not required to rely on much if any of the evidence of Francis Zheng to make findings on the significant disputed facts of this.

[98] In my view, Candy Chen sought to tailor her evidence during her examination for discovery and at trial to make it consistent with that of Kevin Hien. When questioned at trial on the same video evidence used to impeach Kevin Hien's testimony regarding her relationship with him, she provided what I consider to be a made-up excuse. In addition, Candy Chen's evidence regarding her negotiation of a large referral fee agreement with Gary Chow lacks plausibility and does not accord with business logic. In general, I find that she was not a credible witness.

[99] Gary Chow was called to essentially bolster the evidence of Kevin Hien. His testimony on the alleged discussion with Jeong Lee in May 2011 regarding RM5s zoning potential for the Brentwood property was internally inconsistent and was completely at odds with his earlier evidence at discovery. With respect to his demeanour and, in particular, his argumentativeness, his testimony made Kevin Hien look serene by comparison. This hostility he showed in answering the questions of Vendors' counsel did not assist him in my overall assessment of his credibility. Some of Gary Chow's evidence is simply implausible, including his explanation for the \$332,000 referral fee agreement made with Candy Chen. Unless his evidence is supported by the evidence of other independent witnesses, I give Gary Chow's evidence little weight.

[100] As I said earlier, the Vendors rely primarily on the evidence of Jeong Lee to respond to that of the witnesses listed above. There were no serious challenges made to his testimony at trial and I find that he was a credible witness. In addition, the Vendors rely on the evidence of Neil Wong. Neil Wong's evidence suffered from

some reliability deficits. However, these deficits do not arise as a result of a finding that Neil Wong was being untruthful, but rather because I am not confident that he was able to clearly recall the sequence of events that occurred in 2011 and 2012. As will be seen from my reasons, it was not necessary for me to rely on much of Neil Wong's evidence except where there is a supporting document.

[101] Various judgments have, with undisguised scorn, referred to repeated witness untruthfulness during trials as a "festival of mendacity", that is, a festival of deceitfulness. I find that this description is appropriate in this case and in particular with respect to much of the evidence of Allen Liu, Kevin Hien, Gary Chow and Candy Chen. It is tempting to dispense with all of their evidence on the basis that they were entirely unreliable witnesses, but justice demands that I spill more ink. Borrowing the words of Madame Justice Allen, I must "attempt to ascertain the truth despite the unreliability of the evidence of the parties": *Sangha v. Reliance Investment Group Ltd.*, 2011 BCSC 1324 at para. 199.

Adverse Inferences

[102] The Vendors ask this Court to draw a number of adverse inferences which they contend arise as a result of the Purchasers' and Hien parties' failure to call witnesses or produce documents.

[103] The Vendors criticize the Purchasers for not calling witnesses including: John Pan, previously with Studio One; Mr. Du, president of Youyi China; Allen Liu's ex-employee Audrey Zhao; and two of the Purchasers' lawyers who worked on the transaction. As well, the Vendors criticize the Hien parties for failing to call Lester Lin, the agent with Multiple Realty whose name appeared on the September 2011 Offer.

[104] The discretion to draw an adverse inference remains with the trial judge and the exercise of this discretion includes consideration of factors such as the nature of the adverse inference sought, the level of control of the party against whom the

adverse interest is sought in respect of a witness or documents, and whether the witness was readily available to both parties.

[105] I agree with the comments in a number of recent decisions that the modern rules of discovery provide an opportunity to the parties to investigate in depth the strengths and weaknesses of the other side's case and that this may militate against making an adverse inference finding: see *Taiga Building Products Ltd. v. Deloitte & Touché, LLP*, 2014 BCSC 1083 at para. 132. That is mostly what occurred in this case. This action was commenced in 2012 and extensive discovery has been carried out. The parties have had ample opportunity to determine what witnesses were required to make their respective cases. In my view, there was not much if any surprise testimony at trial which would justify significant adverse inferences being drawn.

[106] I do not consider it appropriate or necessary to make any blanket adverse inference findings at this point. Where I have drawn an adverse inference, I will explain my rationale for doing so at the appropriate place in my analysis.

Summary of Issues

[107] In this action, the Purchasers seek an order for specific performance of the Purchase Agreements or, alternatively, seek an award of damages for breach of the Purchase Agreements.

[108] The Vendors seek an order dismissing the Purchasers' claims on the basis that the Purchase Agreements are not enforceable for the following reasons:

- a) by reason of a conspiracy between the Purchasers and Kevin Hien to suppress RM5s zoning information;
- b) alternatively, as a result of the Purchasers providing knowing assistance to the Hien parties to breach their fiduciary duties to the Vendors by not providing this information to them;

- c) in the further alternative, as a result of various breaches by the Hien defendants of their obligations to the Vendors for which the Purchasers are vicariously liable; and
- d) in the further alternative, because the Purchase Agreements are part of an unlawful transaction tainted by illegality.

[109] The Vendors' counterclaim against the Hien parties seeking an award of damages for conspiracy, breach of fiduciary duty, breach of contract and misrepresentation. The Vendors also seek an award of aggravated and punitive damages against the Hien parties, the Liu parties, Anken and Franga Holdings.

[110] The Hien parties and the Liu parties deny all claims against them and seek dismissal of the Vendors' counterclaim. Anken and Franga Holdings have not filed defences to the Vendors' counterclaims.

[111] The first question to be answered is whether, for the reasons pled by the Vendors, the Purchase Agreements are unenforceable. If they are unenforceable, no further analysis is required concerning the Purchasers' claims. Accordingly, in the reasons which follow, I will first consider the following issues:

- a) Are the Purchase Agreements unenforceable as a result of:
 - (1) a conspiracy between the Purchasers and Kevin Hien?
 - (2) the Purchasers providing knowing assistance to the Kevin Hien in breaching the Hien parties' fiduciary duty to the Vendors?
 - (3) unlawful conduct on the part of Kevin Hien for which the Purchasers are vicariously liable?
- b) Alternatively, should this Court decline to enforce the Purchase Agreements for public policy reasons because they are part of an unlawful transaction or otherwise tainted by illegality?

[112] Only if the Purchase Agreements are found to be enforceable will it be necessary for this Court to consider the other contractual defences and whether the Purchasers are entitled to the remedy of specific performance or damages.

[113] Even if the Purchasers' claims are dismissed, it is still necessary to determine whether the conduct of the Hien and Liu parties constituted illegal conduct justifying an award to the Vendors of aggravated and punitive damages.

Unenforceability of the Purchase Agreements Due to Conspiracy

[114] The Vendors contend that Allen Liu and Kevin Hien conspired together to keep information from Jeong Lee regarding the rezoning potential of the Brentwood property and thereby prevent him from realizing the true value of the property to his detriment. The Vendors say that in exchange for Kevin Hien's assistance in doing this, Allen Liu cooperated in enabling Kevin Hien to divert to himself as much of the commissions or referral fees payable on the sale the Brentwood and Maple Ridge properties as possible.

[115] The Plaintiffs and Kevin Hien contend that there is no direct evidence of such a conspiracy and further contend that the Defendants have not established proof by compelling evidence to justify this Court drawing an inference in this regard.

The Law of Civil Conspiracy

[116] As set out in the leading case in this area, *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 471-472 [*Cement LaFarge*], the tort of civil conspiracy arises in two possible situations which can be referred to as predominant purpose conspiracy and unlawful means conspiracy:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff, or

(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[117] The British Columbia Court of Appeal acknowledged at para. 49 of its decision in *XY, LLC v. Zhu*, 2013 BCCA 352, that there is not a great deal of case law in Canada on the meaning of “unlawful means” or “unlawful act” in the context of civil conspiracy. The Court of Appeal referenced the decision of the Ontario Court of Appeal in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 38, which included the following remarks:

What is required, therefore, to meet the “unlawful conduct” element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable in private law or not. ...

[118] In either of the two situations outlined in *Canada Cement*, the party alleging a civil conspiracy must be able to demonstrate actual damage resulting from the wrong-doers conduct: *Cement LaFarge* at 472.

[119] The evidentiary burden to prove civil conspiracy is high and requires proof by compelling evidence. Compelling evidence is required either directly or by inference that there was an agreement between two or more parties which was implemented with resulting harm to the plaintiff. Proof must be plainly established and where a party seeks to prove conspiracy inferentially the facts must be such that they cannot fairly admit of any other inference being drawn from them: *Golden Capital Securities Limited v. Rempel et al*, 2004 BCCA 565 at paras. 46-47, referring to, in part, *Sweeney v. Coote*, [1907] A.C. 221 at 222; *Bronson v. Hewitt*, 2013 BCCA 367 at para. 98.

[120] It is often the case that there is no direct evidence of a conspiracy as the conspirators often make extensive efforts to cover their tracks. In these cases, it becomes necessary for conspiracy to be established by inference from the totality of the evidence, which may include a consideration of several isolated incidents:

Canadian Community Reading Plan Inc. v. Quality Service Programs Inc., 10 B. L.R. (3d) 45 (Ont. C.A.), at para. 25, citing *R. v. Paradis* (1933), [1934] S.C.R. 165 (S.C.C.) at para. 168.

[121] In their submissions, the Vendors did not specify whether they are alleging predominant purpose conspiracy or unlawful means conspiracy, the two classes of conspiracy set out in *Cement LaFarge*. In my view, predominant purpose conspiracy applies and requires an evaluation of whether a defendant used lawful or unlawful means, the predominant purpose of which was to cause injury to a plaintiff.

[122] The question to be answered in this case is whether the defendant has shown, directly or by inference, that there was an agreement between Allen Liu and Kevin Hien to withhold information concerning the RM5s zoning potential for the Brentwood property from Jeong Lee, that the agreement was implemented and that this resulted in Jeong Lee's decision to sell the property for less than it was worth.

Analysis on Conspiracy

[123] The Vendors concede that there is no direct evidence of an agreement between Allen Liu and Kevin Hien to withhold RM5s zoning information from Jeong Lee. The Vendors ask this Court to infer that such an agreement was made by considering of a number of isolated pieces of evidence. This includes evidence of the following:

- a) The failure of Kevin Hien to advise Jeong Lee of the RM5s zoning potential for the Brentwood property;
- b) Collusion between Allen Liu and Kevin Hien to improperly funnel commission on the sale of the Brentwood and Maple Ridge properties to Kevin Hien;

- c) Collusion between Allen Liu and Kevin Hien in the creation of various documents and agreements which were designed to deceive both investors and lenders;
- d) Collusion between Allen Liu and Kevin Hien with respect to various clauses in or schedules to the Brentwood Agreement which were designed to mask their efforts to deceive Jeong Lee with respect to RM5s zoning; and
- e) Collusion between Allen Liu and Kevin Hien and others, to present false evidence prior to and at trial.

[124] The Purchasers, whose position is adopted by the Hien parties, contend that the Vendors' submissions mischaracterize and understate the evidence required to establish a conspiracy claim. Further, the Purchasers and the Hien parties contend that none of the facts relied upon by the Defendants come close to establishing the necessary foundation required at law to prove conspiracy. In particular, they contend that the Vendors have not plainly established proof by compelling evidence to support an inference that there was an agreement between Allen Liu and Kevin Hien to deceive Jeong Lee about the RM5s zoning potential for the Brentwood property. The Purchasers say that the inferences sought by the Vendors are just as consistent with no conspiracy at all.

[125] I will first set out my reasons with respect to the various isolated events which the Vendors say support an inference of collusion and will provide my conclusion on this defence at the end of this section.

Was Jeong Lee told about the RM5s zoning potential for the Brentwood property before the Purchase Agreements were signed?

[126] Kevin Hien's evidence, which is supported by the Purchasers, is that he told Jeong Lee about the potential for the Brentwood property to be zoned RM5s, or at least that he discussed the high density zoning potential for the property, during their

first meeting in May 2011. Jeong Lee's evidence is that Kevin Hien never provided him with any zoning information and that he only became aware of the relatively new RM5s zoning potential for the Brentwood property in December 2011, well after the Purchase Agreements were signed, when he was prompted to obtain an appraisal from Kathryn Jones for the Brentwood property.

[127] I find that Kevin Hien first told Allen Liu about the Brentwood property's RM5s zoning potential when he emailed him relevant information on September 22, 2011. This finding is consistent with the timing of Allen Liu's receipt of information regarding the Brentwood property, including zoning information, from John Pan with Studio One Architects on September 23, 2011.

[128] In his September 23 email, John Pan advised Allen Liu that the lot was set as RM5s in the Brentwood area plans with a maximum FAR of 5. It is noteworthy that John Pan's September 23 email does not reference any previous discussions with Allen Liu with respect to the Brentwood property.

[129] John Pan was not called as a witness at trial. The evidence of John Pan's colleague at Studio One, Jim Wong, who did testify at trial, was that it is possible that John Pan could have obtained information regarding the zoning potential for the Brentwood property within a day of a request for such information being made by Allen Liu. I accept Jim Wong's evidence in this respect and, accordingly, no adverse inference needs to be drawn with respect to the Purchaser's failure to call John Pan to provide this evidence.

[130] Allen Liu testified that he first consulted with John Pan regarding the Brentwood property in early or mid-September 2011. There is no documentary evidence of any such communication between Allen Liu and anyone at Studio One prior to the September 23 email.

[131] Given the lack of corroborating evidence supporting Allen Liu's testimony that he contacted anyone at Studio One in mid-September 2011 regarding the

Brentwood property and the timing of Kevin Hien's September 22 email to Allen Liu regarding zoning, I do not find Allen Liu's evidence to be credible. I find that Allen Liu first contacted Studio One after he learned of the RM5s zoning potential for the Brentwood property from Kevin Hien on September 22, 2011. This also suggests strongly that Kevin Hien did not appreciate the RM5s zoning potential for the Brentwood property prior to receiving an email from Neil Wong on September 22, 2011 – or he would have provided this important information to Allen Liu earlier – and therefore does not support his contention that he told Jeong Lee that the Brentwood property could be zoned RM5s in May 2011. There is no evidence independent evidence confirming that Kevin Hien told Allen Liu about the Brentwood property's RM5s zoning potential prior to September 22.

[132] Kevin Hien admitted that he did not send the RM5s zoning information that sent to Allen Liu on September 22 to Jeong Lee. His explanation is that he did not need to do so because he had already provided relevant zoning information to him in May 2011 when he and other members of the Franga Group first met with Jeong Lee. Kevin Hien's evidence with respect to what he told Jeong Lee and what documents he shared with him during their meeting in May 2011 changed over time and is not consistent with the evidence of others at the first meeting, including Jeong Lee and Neil Wong. Gary Chow's evidence on this point was frankly, all over the map. I will deal with Gary Chow's evidence later in my reasons.

[133] At his examination for discovery, Kevin Hien testified that he provided documents to Jeong Lee during the May 2011 meeting including a "zoning map" and other information regarding RM5s zoning – although he said that they did not specifically discuss RM5s zoning but only briefly discussed the higher density zoning potential for the Brentwood property. He also testified at discovery that he knew at that time that the Brentwood property had the potential to be rezoned to RM5s.

[134] At trial, Kevin Hien's evidence with respect to what was discussed at the May 2011 meeting changed somewhat from his evidence at discovery. On direct

examination, he testified that at the May 2011 meeting he went through the zoning bylaw for the Brentwood property and specifically, albeit quickly, discussed the potential to obtain RM5s zoning which would allow development up to a density of FAR 5.0. He testified that he left an envelope of documents with Jeong Lee which included, amongst other things, the zoning bylaw and a Brentwood "Land use Map". He did not mention the zoning map as he had during his discovery.

[135] On cross-examination, Kevin Hien repeated the evidence that he provided on direct examination that he provided Jeong Lee with a land use map but, contrary to his discovery evidence, denied that he had provided the zoning map included with the documents he produced in the litigation. He testified that the zoning map included in his documents was obtained by him after January 2012 when Jeong Lee asked him to get zoning information from the City of Burnaby.

[136] This is relevant to Kevin Hien's credibility on this point as the zoning map contained within Kevin Hien's documents is dated May 19, 2011, which is after the meeting with members of the Franga Group and Jeong Lee earlier in May. That is, he could not have reviewed this document with Jeong Lee in early May 2011 because it did not yet exist. This suggests, as the Vendors contend, that he changed his evidence from discovery at trial when he realized that the zoning map post-dated the May meeting, which occurred earlier in the month.

[137] Jeong Lee's evidence at trial was that there was no discussion at the May 2011 meeting regarding the true zoning potential for Brentwood property and that no package of documents was left with him by Kevin Hien. His evidence is consistent with that of Neil Wong.

[138] Gary Chow's evidence regarding discussions concerning RM5s zoning during the meeting in May 2011 changed dramatically during this litigation. During his examination for discovery, he testified that there were no discussions regarding zoning and that no zoning documents were presented at this meeting. Similarly, when cross-examined at trial by the Vendors as an adverse witness, he repeated his

evidence that Kevin Hien never discussed zoning, high density zoning potential or FAR at any meeting that he attended. Gary Chow changed his evidence completely when cross-examined by counsel for the Hien parties later the same day, stating that at the May 2011 meeting with Jeong Lee, Kevin Hien brought a package of information about the Brentwood property which included zoning information.

[139] I consider the changes to Gary Chow's evidence at discovery and at trial regarding zoning discussions to be troubling, and I find his evidence in this respect unreliable as a result. As I said above, in my view Gary Chow was not a credible witness in general and I have difficulty believing any of his evidence where it conflicts with that of others.

[140] I find that Kevin Hien lied during his examination for discovery regarding the provision of a zoning map to Jeong Lee in May 2011. I find that it is likely that when he realized after his discovery that the date on the zoning map in his materials was after the date of the Franga Group's first meeting with Jeong Lee, he sought to modify his evidence at trial.

[141] On the whole, I find the testimony of Kevin Hien and Gary Chow regarding discussions with Jeong Lee in May 2011 about the RM5s zoning potential for the Brentwood property to be completely false. It is likely their evidence at trial was concocted after the fact when they realized the implications of not having provided the RM5s zoning information to Jeong Lee before he signed the Brentwood Agreement in October 2011.

[142] The Vendors contend that aside from the unreliability of the evidence of Kevin Hien and Gary Chow at trial on this issue, the documentary evidence is inconsistent with Kevin Hien's evidence that he knew about the potential for RM5s zoning and provided zoning documents to Jeong Lee in May 2011. In particular, they point to the following:

- a) None of the marketing brochures prepared by Neil Wong and Kevin Hien after May 2011 reference the potential to develop the Brentwood property to density of FAR 5.0 but only refer to far lower densities of between 2.2 and 2.96;
- b) That when Jeong Lee contacted Kevin Hien in January 2012 to ask him if he know about the RM5s zoning potential for the Brentwood property, he denied knowing about this and offered to research it with the City of Burnaby; and
- c) When Kevin Hien became aware in November 2012 that Jeong Lee was upset when he learned from Neil Wong that Kevin Hien may have known about the RM5s zoning potential well before execution of the Brentwood Agreement, he did not claim that he had already provided this information.

[143] With respect to the first point, regarding the understated potential densities listed in the marketing brochures, the Vendors contend that Kevin Hien's evidence at trial that he did not include a reference to the property's full zoning potential because he was taught to be conservative when marketing real estate should not be believed. This argument has merit. It would be surprising indeed for a realtor not to include such positive zoning information in marketing materials. RM5s zoning had the potential to almost double the density for a development on the Brentwood property.

[144] With respect to second and third points, regarding the failure of Kevin Hien to defend himself from criticism that he did not provide RM5s zoning information to Jeong Lee, I also consider that this argument has merit. There is no evidence that after he was contacted by Jeong Lee in or about January 2012, which is shortly after Jeong Lee says he first became aware of RM5s zoning, that Kevin Hien attempted to remind him that he had already provided him this information. In my view, given the significance of potential RM5s zoning, if Kevin Hien had provided such information to Jeong Lee in May 2011, it would seem abundantly logical that he

would have reminded him of this when Jeong Lee asked questions about zoning in January 2012 or later in November 2012 when the issue arose again.

[145] The content of the Franga Group's email exchanges in July through September 2011 regarding the Brentwood property's zoning potential is also noteworthy. In his July 13, 2011 email to members of the Franga Group, Neil Wong states that "The past 2 days I went to both city halls [Maple Ridge and Burnaby] to inquire the zoning & SFR of these two properties ... The two city's planning department advised me that there are density changes, with a higher ratio than is zoned" and "from these information today, the \$39,999,000 price is very reasonable ... The true value of these two properties now is more." Neil Wong did not reference any earlier discussions regarding zoning and his email suggests that the potential enhanced zoning was new to him and he considered that it had a significant impact on the value of the Brentwood property.

[146] In response to Neil Wong's September 5, 2011 email attaching further information on zoning for the Brentwood property, Kevin Hien only responded "well received, thx." He did not indicate that this information had already been obtained by him and provided to Jeong Lee.

[147] Finally, on September 20 and 21, 2011, Neil Wong wrote to Kevin Hien forwarding an article which appeared in the Burnaby Now paper regarding the potential to obtain "s" zoning to obtain a higher density development and RM5s zoning information including in his message a note "I hope this will help". The last email from Neil Wong was sent at 5:15 pm on September 21, 2011. Kevin Hien did not respond to Neil Wong but, less than 24 hours later on September 22, 2011, at 12:08 pm, he forwarded the zoning information to Allen Liu.

[148] Jeong Lee's evidence is that the receipt of an unsolicited offer to sell the Brentwood property for \$27.5 million on December 2, 2011, prompted him to reach out to an appraiser he had worked with in the past, Kathryn Jones. His evidence is that he first learned of the new zoning potential from Kathryn Jones at that time.

[149] Jeong Lee's evidence is supported by that of Kathryn Jones, who testified that she advised him in mid-December 2011 that the allowable density for the Brentwood property had been changed and that the property could be worth more than the \$28.8 million offer he told Katherine Jones he had received. This is also consistent with the timing of the drafting of the Zoning Warranty, in that, if Jeong Lee had known about the RM5s zoning potential for Brentwood earlier, why did the Zoning Warranty discussion only start in January 2012?

[150] In my view, the evidence supports a finding that Kevin Hien and other members of the Franga Group first became aware of the potential for the Brentwood property to be zoned RM5s prior to July 2011 but did not appreciate the significance of RM5s zoning until mid to late September. Further, there is no evidence that any member of the Franga Group communicated such information to Jeong Lee prior to him signing the Purchase Agreements in October 2011.

[151] I do not accept the evidence of Kevin Hien and Gary Chow that Kevin Hien discussed the RM5s zoning potential for the Brentwood property or had any discussions regarding the property's zoning potential during the May 2011 meeting with Jeong Lee. I accept Jeong Lee's evidence that only he became aware of the potential for the Brentwood property to be zoned RM5s after he spoke with Kathryn Jones in December 2011.

[152] I am conscious of the fact that Jeong Lee's friend, Neil Wong, did not provide the RM5s zoning information to him. The Purchasers and Hien defendants contend that this is unlikely, given their relationship (Neil Wong's daughter was married to Jeong Lee's Vice President). The reason why Neil Wong did not provide this information to Jeong Lee is not known. One possibility is that Neil Wong was focussed more on inducing a buyer to submit an offer rather than ensuring that Jeong Lee received the best possible price for the Brentwood property.

Was there a scheme to improperly funnel commissions to Kevin Hien?

[153] The Vendors contend that in exchange for a Kevin Hien's agreement with Allen Liu to suppress positive zoning information regarding the Brentwood property, Allen Liu agreed to participate in or otherwise facilitated a scheme to improperly funnel commissions on the sale of the Burnaby and Maple Ridge properties to Kevin Hien.

[154] In this respect, the Vendors rely upon four main pieces of evidence: the inclusion of Lester Lin's name as a buyer's agent on the September 2011 Offer; the subsequent referral fee agreement dated October 15, 2011 (the "October 2011 Referral Fee Agreement") which they allege was in favour of Allen Liu; that Allen Liu's document production includes the January 2012 Referral Fee Agreements which they allege proves that he was aware of the commission scheme; and, finally, the involvement of Kevin Hien's friend Candy Chen as a recipient of a portion of the Franga Group referral fee.

Lester Lin as a "Straw Man"

[155] Kevin Hien's friend Lester Lin was recorded as a buyer's agent along with Kevin Hien on the September 2011 Offer but he was not listed as a buyer's agent on the Purchase Agreements.

[156] Allen Liu testified that he never noticed that Lester Lin's was inserted as his agent on the September 2011 Offer although he admitted during cross-examination that other documents had been translated for him by Kevin Hien.

[157] As set out in background facts, on September 28, 2011, Kevin Hien wrote to Neil Wong advising that Multiple Realty had been "pushing for an agreement to secure their 2% commission" and "I worry if I don't have anything for them in writing, the progress of the deal will be affected!". Kevin Hien did not include this email in his list of documents provided in this litigation and it was obtained by the Vendors from Neil Wong.

[158] During his examination for discovery, before his September 28, 2011 email to Neil Wong was put to him, Kevin Hien denied that he ever told Neil Wong that there was an agent from Multiple Realty that required a 2% commission and that the deal might collapse if Multiple Realty didn't get paid. Kevin Hien's testimony during his direct examination at trial, in response to a question from his counsel regarding why he had sent this email to Neil Wong, was that he had planned to travel to China in the fall of 2011 and had asked Lester Lin to assist with the paperwork on the deal while he was out of town. He also testified that the 2% he mentioned in his email to Neil Wong was really 2% of his 2% share of the commission. He testified that there was an agreement signed between him and Lester Lin regarding this arrangement but as he didn't ultimately need Lester Lin's help he didn't keep a copy.

[159] In response to a question from the Court why he would have looked to Lester Lin to help finalize the Brentwood and Maple Ridge property sales, Kevin Hien testified that he didn't trust an agent from his own agency to handle matters for him while he was away and did not tell anyone from his agency that he was preparing to leave the closing arrangements on this major deal to another agent in another agency.

[160] Neil Wong's evidence was that on September 25 or 26, Kevin Hien asked him to replace the April 2011 Authorization and Fee Agreement, as amended in July 2011, with a listing agreement in the name of Amex Sunrich Realty and that Hien told him that they had to pay half of the commission to a buyer's realtor.

[161] In his examination for discovery, Kevin Hien's evidence was that Lester Lin was to be paid a flat \$20,000 in the event that he was out of Canada and needed Lin's assistance. During cross-examination at trial, Kevin Hien provided a confused response to questions regarding the discrepancies between his discovery evidence and his testimony at trial.

[162] The Defendants contend that Kevin Hien's evidence with respect to why Lester Lin was included as a buyer's agent is wildly contradictory and not supported

by a single document or any evidence from Mr. Lin, who was not called as a witness at trial. I agree.

[163] Kevin Hien's evidence on this issue, before and during trial, was inconsistent and this inconsistency calls his credibility into question. With respect to his testimony at trial regarding the remarks he made in his September 28, 2011 email to Neil Wong that Multiple Realty was pushing for a 2% commission, I find his assertion that this meant Mr. Lin would receive a 2% of his 2% commission to be completely unbelievable. The words of his email to Neil Wong speak for themselves.

[164] I find it difficult to believe that Kevin Hien would entrust the final stages of this lucrative real estate transaction to a friend. I also consider it convenient that Kevin Hien did not retain a copy of his alleged commission sharing agreement with Lester Lin and find it appropriate to draw an adverse inference from Kevin Hien's failure to produce this alleged agreement or to call Lester Lin as a witness at trial.

[165] I also find there is compelling evidence that on August 22, 2017, just before this trial commenced, Kevin Hien deleted documents in a folder titled "Lester" from an electronic document production system maintained by or for the Canadian Real Estate Association ("CREA"), called WEBForms. Kevin Hien provided no explanation for this deletion. I consider it appropriate to draw an inference that the documents he deleted would not be helpful to the Hien parties' defence.

[166] On the whole of the evidence before me on this issue, I disbelieve all of the evidence of Kevin Hien and prefer the evidence of Jeong Lee and Neil Wong. Although I find Allen Liu's evidence that he was not aware that Lester Lin was listed as his agent on the September 2011 Offer to be suspicious, I am unable to conclude whether this was the case.

[167] I find that the only plausible explanation for including Lester Lin's name as a buyer's agent on the September 2011 Offer was to enable an attempt by Kevin Hien to funnel half of the commission on the sale of the Brentwood and Maple Ridge

properties away from his fellow Franga Group members. I am unable to conclude whether he was doing so in order to funnel the commission to himself or possibly, to Allen Liu.

The October 2011 Referral Fee Agreement

[168] The Vendors contend that at or around the same time that the Purchase Agreements were signed in early October, the October 2011 Referral Fee Agreement under which Allen Liu would receive half of the 4% commission paid by Jeong Lee on the sale of the properties was also signed— essentially, a kickback.

[169] During his direct examination, Jeong Lee testified that Kevin Hien told him that Allen Liu wanted to take one half of the commission payable as a referral fee. Jeong Lee testified that although he wasn't happy with the arrangement to provide Allen Liu with a kickback, Kevin Hien convinced him that if he didn't agree to sign a referral fee agreement, Liu would simply bring a buyer's agent back into the deal and Lee would have to pay that amount of commission anyway. Jeong Lee also considered that Allen Liu had done a good job locating a property for his potential Chinese investors. Jeong Lee's evidence was that he either did not keep a copy of the October 2011 Referral Fee Agreement or that he had lost his copy. Allen Liu and Kevin Hien also claim they did not keep a copy of this agreement.

[170] Kevin Hien corroborated Jeong Lee's evidence in three respects: first, he confirmed that the document had existed; second, he admitted the he had prepared it; and third, he admitted that he provided the document to Allen Liu to sign. Kevin Hien testified that the document did not provide for payment of a commission to Allen Liu but rather contained a proposal, agreed upon by the Franga Group team members, to ask Allen Liu to pay half of the 4% commission that Jeong Lee had already agreed to pay.

[171] Allen Liu's evidence was not consistent with any one else's. He denied any knowledge of the alleged October 2011 Referral Fee Agreement or that he had

requested a kickback. He also denied that he had been asked to pay a portion of the referral fee. His testimony at trial was that an agreement to pay him a kickback would not make sense as there would be no reason to pay him a commission, as the parties could have simply reduced the purchase price by 2%. In my view Allen Liu's evidence would make sense if he was the only person contributing towards the purchase price for the Brentwood property. That is, if he had a partner who was paying the purchase price or had assigned the Purchase Agreements to someone else, he would have received a kickback. The evidence establishes that in October 2011, Allen Liu was pursuing Youyi China as an investment partner.

[172] As stated above, on or about January 30, 2012, Jeong Lee was asked by Kevin Hien to sign and did sign the January 2012 Referral Fee Agreements, which set out commissions payable by Brentwood Lanes to Anken and the Franga Group and by Maple Ridge Lanes to Anken. These agreements were drafted by Kevin Hien and they all included the statement: "Note. Referral fee agreement previously signed with Mr. Xiao Dong Liu October 15, 2011, will be replaced with this agreement." Jeong Lee's evidence at trial was that he was not sure who the payees in the January 2012 Referral Fee Agreements were (although he must have known who Franga was) but was satisfied that he was not going to be paying a commission of more than 4% in total, as he had expected to do, and as a result signed the agreements.

[173] On cross-examination, Kevin Hien agreed that the note at the bottom of the January 2012 Referral Fee Agreements suggested that an October 2011 Referral Fee Agreement with Allen Liu had been signed. He could not explain why he included this note, which referred to a document that he claimed in direct examination had not been signed.

[174] Gary Chow's evidence at his examination for discovery when he was taken to the note on the January 2012 Referral Fee Agreements, was that he hadn't seen the

October 2011 Referral Fee Agreement but knew there was such an agreement and had been told by Kevin Hien that it had been signed by Allen Liu.

[175] I do not accept Kevin Hien's or Allen Liu's evidence with respect to the existence or nature of the October 2011 Referral Fee Agreement. I find it troubling that Kevin Hien did not keep a copy of this document, which he says he prepared. This is not the first document related to this transaction that Kevin Hien did not keep or does not have any record of preparing.

[176] Kevin Hien's explanation respecting why he included a reference to an unsigned October 2011 Referral Fee Agreement in the January 2012 Referral Fee Agreements defies logic. With respect to his evidence that he was referring to a proposal made to Allen Liu under which Allen Liu would pay a referral fee, there is no reliable corroborating evidence in this respect. I find it exceedingly unlikely that the Franga Group had in fact proposed, in the midst of finalizing a negotiation with Allen Liu for purchase of the Brentwood and Maple Ridge properties, that Allen Liu, the purchaser, would pay half of a sales commission.

[177] I accept Jeong Lee's evidence, which is consistent with the evidence of Gary Chow and the note included on the January 2012 Referral Fee Agreements, that he and Allen Liu signed such an October 2011 Referral Fee Agreement. I reject Allen Liu's evidence that he was not aware of this agreement.

[178] I have already found that the initial plan was to use Lester Lin to divert 2% of the available 4% commission to either Kevin Hien or Allen Liu. I infer that as of October 15, 2011, the plan had changed somewhat as a result of the removal of Lester Lin as a buyer's agent and was now to divert 2% of the commission directly to Allen Liu in the first instance. I am not sure if the intention was that Allen Liu would keep the kick-back amount or if he intended to pass it on to Kevin Hien.

[179] The Vendors contend that the fact that the Purchasers had listed the January 2012 Referral Fee Agreements in their list of documents in this litigation demonstrates that Allen Liu must have had them in his files because they had previously been given to him by Kevin Hien. Accordingly, they say he was lying when he testified at trial that he hadn't seen these documents. They contend that if their assertion is accepted this demonstrates that Allen Liu was a participant in the scheme to improperly funnel a share of the Franga Group's referral fee to Kevin Hien through Anken.

[180] As I outlined above, Allen Liu denied that he had any knowledge of the alleged October 2011 Referral Fee Agreement but I did not find his evidence credible. Allen Liu also denied that he had any knowledge of the January 2012 Referral Fee Agreements with Anken and Franga and claimed that those documents had nothing to do with him but concerned payment of commissions by Jeong Lee.

[181] During cross-examination by counsel for the Vendors, Kevin Hien testified that he had no idea how the January 2012 Referral Fee Agreements came to be in Allen Liu's possession. During a later cross-examination by counsel for the Purchasers several months later, Kevin Hien changed his story and provided a detailed explanation of how these agreements ended up in Allen Liu's document production. He testified that upon receipt of the Vendors' letter repudiating the Brentwood Agreement, he met with the Purchasers' counsel before any litigation was commenced and provided him with documents relating to the sale of the Brentwood property, which included the January 2012 Referral Fee Agreements. The Purchasers contend that there are other documents in Allen Liu's original list of documents which must have been provided to him by Kevin Hien.

[182] I find that Kevin Hien was not being truthful in his evidence regarding how the January 2012 Referral Fee Agreements ended up in Allen Liu's document production. His evidence changed substantially during his cross-examination and in my view is not credible. I find that Kevin Hien probably provided these documents to

Allen Liu because the arrangement to direct half of the sale commission directly to Allen Liu, as was agreed to in the October 2011 Referral Fee Agreement, had changed.

[183] Although I have made this finding, I agree with the Plaintiffs that there is no evidentiary basis to make the inferential leap that because Allen Liu had been provided with copies of the January 2012 Referral Fee Agreements by Kevin Hien, this can only mean that Allen Liu had conspired with Kevin Hien to keep information regarding the RM5s zoning potential for the Brentwood property from Jeong Lee.

The Role of Candy Chen and Anken

[184] The Purchasers, the Hien parties, Gary Chow and Candy Chen, the owner of the defendant by counterclaim Anken, contend that it was as a result of Candy Chen's introduction of Kevin Hien to Audrey Zhao, an employee of Allen Liu, that Allen Liu began to investigate a purchase of the Brentwood and Maple Ridge properties. Kevin Hien and Candy Chen testified that this introduction justified the arrangements made in January 2012 to pay Anken a substantial referral fee of close to \$332,000.

[185] Audrey Zhao, who I expect could corroborate the evidence of Allen Liu, Kevin Hien, and Candy Chen regarding the circumstances of the first meeting between Kevin Hien and Allen Liu, was not called as a witness at trial by any party.

[186] The Vendors contend that the evidence of Kevin Hien and Candy Chen regarding her role in introducing Allen Liu to the Brentwood and Maple Ridge properties, which is supported in part by Allen Liu's evidence, is a complete fiction. They also contend that Allen Liu's evidence with respect to when and how he first learned about the Brentwood property is not truthful. They say that Allen Liu first became aware of the properties on or around September 13, 2011, the date when he received a phone call and email from Kevin Hien.

[187] The Vendors submit that Candy Chen was brought in by Kevin Hien in January 2012 simply to divert even more of the remaining 2% commission payable to the Franga Group to him through Candy Chen's newly formed company, Anken.

[188] Kevin Hien and Candy Chen testified that Hien was introduced to Audrey Zhao at Allen Liu's Rainflower Restaurant in Richmond. Candy Chen stated that she told Kevin Hien that Audrey Zhao's boss, Allen Liu, was interested in real estate and it was decided that he would go the Rainflower in the hopes of meeting Allen Liu. Candy Chen could not say precisely when the alleged introduction of Kevin Hien to Audrey Zhao took place. At one point in her evidence, she testified that she believed the meeting occurred in July or August 2011 when kids were out of school, but later testified that she was uncertain about the date of this first meeting.

[189] Kevin Hien's evidence regarding the date of the first meeting has changed over time. In an affidavit sworn on December 10, 2013, in support of Allen Liu's response to the Vendors' application to set aside the CPL registered on the Brentwood property, he swore as follows with respect to timing and nature of his first meetings with Allen Liu:

- He first met with Audrey Zhao in early August 2011 at the Rainflower restaurant and she told him that Allen Liu was interested in purchasing a development site in British Columbia;
- At this meeting he asked Audrey Zhao to arrange for a meeting between him and Allen Liu which took place later in August at a Tim Hortons café.
- He later met with Allen Liu in early September at the Rainflower restaurant and at that meeting Allen Liu instructed him to prepare an offer to purchase the Brentwood property for \$38.8 million.

[190] At trial Kevin Hien's testimony was that he first met with Allen Liu at the Rainflower Restaurant in July or August, gave him his business card and told him he had a commercial project he might be interested in. He also testified that he met with

Allen Liu three of four times in early September, before the alleged \$38.8 million offer was made on September 6, 2011. Under heavy cross-examination when it was put to him that there was not a shred of documentary evidence indicating that he was engaged with Allen Liu prior to September 13, 2011, Kevin Hien said that he could not recall when he first met Allen Liu.

[191] With respect to what was discussed at this alleged first meeting, Kevin Hien testified that they did not discuss business until a later meeting a few days later at a Tim Hortons in Richmond when he provided the marketing brochure and zoning information to Allen Liu. Candy Chen's evidence on discovery was that the first meeting at the Rainflower Restaurant only involved her, Kevin Hien and Audrey Zhao. At trial, she initially changed her discovery evidence stating that Kevin Hien met with Allen Liu that day, but on cross-examination was uncertain.

[192] Allen Liu's evidence is slightly different than Kevin Hien's. He testified that he first learned about the Brentwood property when he was introduced to Kevin Hien by Audrey Zhao at the Rainflower Restaurant in early September 2011. His recollection of their discussion at the first meeting was not clear but believed that they spoke briefly and it was only in later meetings that Kevin Hien introduced the Brentwood property to him.

[193] Interestingly, the December 7, 2012 letter from Purchasers' legal counsel to counsel for the Vendors, rejecting the Vendors' notice to terminate set out in the Termination Letter, tells yet another story regarding how Allen Liu became introduced to the Brentwood property. This letter states that "Youyi was introduced to this opportunity by business acquaintances, who saw the properties advertised for sale by your client's agent, Mr. Hien, in a Chinese newspaper." The information must have come from someone – perhaps Allen Liu or Francis Zheng.

[194] Kevin Hien testified that he and Candy Chen did not discuss her entitlement to a referral fee during their meeting at the Rainflower Restaurant with Audrey Zhao but that Candy Chen asked for a referral fee later on. Candy Chen's evidence at her

examination for discovery and at trial was that in around October 2011, she received a call from Kevin Hien and was surprised to learn that she would be receiving a referral fee.

[195] Candy Chen, Kevin Hien and Gary Chow testified that between October 2011 and January 2012, Candy Chen and Gary Chow negotiated payment to her of a \$332,000 referral fee, approximately 40% of the total commission to be paid by the Vendors, for simply introducing Kevin Hien to Allen Liu. Candy Chen admitted that she had no experience in real estate and had no experience with referral fees and that the \$332,000 referral fee was more than she had ever earned in one year before in her life.

[196] Gary Chow's evidence is that he and the other members of the Franga Group agreed to provide Candy Chen with this portion of their referral fee. Neil Wong and Stanley Chow disavow any knowledge of Candy Chen before the January 2012 Referral Fees Agreements were signed and Neil Wong knew nothing of the alleged Anken referral fee negotiations until just before trial.

[197] There are no documents evidencing a referral fee negotiation between Gary Chow and Candy Chen between October 2011 and January 2012 and there are no documents showing any discussion between Neil Wong, Stanley Chow and Gary Chow regarding the payment of a substantial portion of Franga's referral fee to Candy Chen. Candy Chen's evidence is that she incorporated Anken as she wanted to learn about investing but she did not explain how incorporating this company would assist her in this respect. The name Anken International Investment Corp. was only reserved on January 26, 2012 – four days before the Anken referral fee agreement was presented to Jeong Lee for signature.

[198] The credibility of Candy Chen and Kevin Hien was seriously impacted as a result of false evidence at discovery and at trial regarding when they had last seen each other. At trial, the Vendors sought to prove that they were in fact involved in a romantic relationship.

[199] During his examination for discovery, Kevin Hien claimed that he had no contact with Candy Chen after the deal for the sale of the Brentwood and Maple Ridge properties collapsed in December 2012 other than a chance meeting at a religious event some time later. He appeared to deny that he even knew Candy Chen's home address.

[200] Candy Chen's evidence during her examination for discovery closely tracked with that of Kevin Hien. She deposed that the last time she saw Kevin Hien was after the deal collapsed in 2012 at a random meeting at a Chinese New Year celebration and that he had not discussed this litigation with him.

[201] Kevin Hien initially repeated at trial that he had no contact with Candy Chen and flatly denied that he had provided false evidence at his examination for discovery. He denied that Candy Chen was being set up as "straw-man" to enable the funnelling of commission from the Franga Group to him.

[202] During his cross-examination, Kevin Hien was confronted with video evidence obtained by the Vendors which showed him attending at the home of Candy Chen on a number of occasions in 2016 and 2017, using keys to access her home, carrying items to and from her home, and picking her up after she was examined for discovery in these proceedings. He admitted that he had lied at discovery and at trial but initially did not explain why. He did not recall if he and Candy Chen had spoken in advance of their examinations for discovery and whether they had decided to conceal their relationship and did not believe he discussed her evidence with her after her discovery.

[203] During his subsequent direct examination at trial, which occurred several months after his cross-examination (he had been cross-examined first as an adverse witness), Kevin Hien testified that he had provided false evidence regarding his contact with Candy Chen because she had asked him to lie as she didn't want evidence to come out regarding her mental health and family conflict issues, which Hien had been helping her with. Candy Chen also admitted to providing false

evidence regarding her contact with Kevin Hien and testified that she had asked Kevin Hien to lie.

[204] I do not accept the explanation of Candy Chen and Kevin Hien with respect to why they lied on discovery and why Kevin Hien lied to this Court regarding their contact after December 2012. I find that Kevin Hien and Candy Chen conspired to provide false evidence during their examinations for discovery and at trial regarding their friendship and pre-trial contact. I do not accept their explanation that they did so because of Candy Chen's concern about having to share information regarding her family and mental health issues, which I find is not believable.

[205] In my view, Kevin Hien and Candy Chen at discovery and Kevin Hien later at trial, provided false testimony in an attempt to hide the fact that they were friends, likely in an effort to avoid the suggestion that the referral fee arrangement with Anken was a sham.

[206] Although the Vendors initially argued that Hien and Chen were in fact romantic partners, it is not necessary for me to decide whether that was the case. No matter what their motive was in providing false evidence regarding their friendship, the fact that they concocted and then executed a plan to repeatedly lie under oath regarding the nature of their friendship has an irreparable impact on their credibility.

[207] I do not accept the evidence of Kevin Hien, Candy Chen or Gary Chow regarding the discussions and negotiation leading to the January 2012 Referral Fee Agreements with Anken. I find it unbelievable that any of them thought it was necessary or reasonable for Candy Chen to be provided with a \$332,000 fee for simply introducing Kevin Hien to Allen Liu's employee Audrey Zhao.

[208] I find that the January 2012 Referral Fee Agreements with Anken was a sham and that the logical inference is that it was created to funnel a portion of the Franga

Group's share of a referral fee on the sale of the Brentwood and Maple Ridge properties away from Neil Wong and, perhaps, Stanley Chow.

Were the Brentwood Agreement and Zoning Warranty designed to mask collusion between Allen Liu and Kevin Hien?

[209] The Vendors contend that Allen Liu and Kevin Hien, as part of their conspiracy to suppress information regarding the Brentwood property's RM5s zoning potential, colluded in including various clauses in and schedules of the Brentwood Agreement which were designed to disguise their efforts to deceive Jeong Lee with respect to zoning. Those include the following: a post-closing appraisal clause; a high deposit paid directly to the vendor Brentwood Lanes; and the Zoning Warranty.

The Post-Closing Appraisal Clause

[210] The September 2011 Offer and the Brentwood Agreement contained a clause requiring Brentwood Lanes to provide an appraisal report for the Brentwood property within three months of the date on which the sale of this property completed.

[211] The Vendors contend that this clause does not make sense, given that the transaction would have already completed, and must have been included to prevent Jeong Lee from carrying out an appraisal earlier and therefore from learning about the Brentwood's property's true value arising from the RM5s zoning potential.

[212] Kevin Hien testified that the post-closing appraisal clause was put in at Allen Liu's request. On cross-examination, he agreed that normally an appraisal would be completed before a contract was entered into. Allen Liu denied requesting that the post-closing appraisal clause be included in the September 2011 Offer.

[213] Although the post-closing appraisal clause may have been unusual, I fail to see how the insertion of this clause in the Brentwood Agreement prevented Jeong Lee from carrying out his own appraisal prior to entering into the Brentwood Agreement. It may have influenced his decision not to complete an appraisal but only after he had already agreed to sell the Brentwood property for \$28.8 million.

The post-closing appraisal clause did not prevent Jeong Lee from obtaining his own appraisal – and he did so in in January 2012.

[214] In addition, with respect to the inference that the Vendors seek, that the only reason Allen Liu would want the appraisal to be completed post-closing was to attempt to hide the RM5s zoning potential for the Brentwood property from Jeong Lee, I make two comments. First, why would Allen Liu have included this clause if he was trying to hide the zoning potential from Jeong Lee? It would seem that if this was his intention, he would not have mentioned an appraisal at all and paid for one by himself, if he needed one, after the sale had completed. Second, I do not consider that the only inference that can be made is the nefarious one suggested by the Vendors. It may have been that Allen Liu wanted a post-closing appraisal simply because he wanted a market valuation completed after closing for the purposes of attracting potential joint venture partners or assignees.

The Substantial Deposit

[215] The Vendors contend that the deposit clause included in the September 2011 Offer and the Brentwood Agreement, under which a \$405,000 non-refundable deposit would be paid directly to Brentwood Lanes, was intended to deceive Jeong Lee. They submit that this is a logical inference given the amount of the non-refundable deposit and the fact that it was paid directly to Jeong Lee as they allege Allen Liu believed that Lee was desperate for cash.

[216] The Vendors also contend that Allen Liu and Kevin Hien colluded to give false evidence, being that the deposit clause arose as a result of a request from Jeong Lee. Jeong Lee's evidence is that he did not request a large non-refundable deposit.

[217] Even if it was Allen Liu's idea to provide a large non-refundable deposit, I do not consider that this is sufficient evidence to justify the inference that the Vendors seek. The Vendors concede that there is nothing wrong with a buyer including a large deposit clause to induce a seller to accept an offer. Also, with respect to the

fact that the deposit was non-refundable, this non-refundability would only arise after removal of subjects by Allen Liu. That is, he could have asked for his deposit back if he decided not to remove subjects and, therefore, it was not as lucrative of an offer as suggested by the Vendors. Finally, I am not satisfied and was not taken to objective evidence that the amount of the deposit was inordinate, given the sale price for the Brentwood property. The deposit paid is less than 1.5% of the \$28.8 purchase price.

[218] I am not prepared to find that the \$405,000 non-refundable deposit paid for the Brentwood property was intended to deceive Jeong Lee or somehow mask a conspiracy between Allen Liu and Kevin Hien to suppress the RM5s zoning information.

The Zoning Warranty

[219] I have already concluded that Jeong Lee learned about the RM5s zoning potential for the Brentwood property some time around December 2011 after consulting with an appraiser, Katherine Jones. This resulted in Jeong Lee asking Kevin Hien if he knew about the new zoning. According to Jeong Lee, Hien responded that he did not or that nothing had changed.

[220] The next thing that happened was that Kevin Hien consulted with Allen Liu at Jeong Lee's request and asked him about his development plans. Kevin Hien later met with Jeong Lee at Brentwood Lanes, in January 2012, and advised him that Allen Liu was not planning on developing the Brentwood property beyond what would be allowed under RM5 zoning and only wanted to build two towers comparable in size to those already built by another developer on nearby lands. This would have resulted in Allen Liu only developing to a density of approximately half of the potential density that could be developed under RM5s zoning. As a result, Jeong Lee asked Kevin Hien to get Allen Liu to commit to this restriction in writing, which resulted in the drafting of the Zoning Warranty.

[221] According to Jeong Lee, when he met with Kevin Hien in January 2012, Hien pulled out a diary or a notebook in which he had made some notes in Chinese and included drawings of what Allen Liu intended to build on the Brentwood property. Although Kevin Hien initially denied carrying a diary or notebook during cross-examination, which I find to be very surprising for a realtor, he later admitted that it had been his practice since at least 2011 to do so and to make notes in it after being confronted with video evidence of him coming and going from Candy Chen's home carrying his notebook. Kevin Hien has not produced any copies of the contents of his notebook in this litigation.

[222] I believe that it is more likely than not that Kevin Hien carried a notebook and used his notebook for various purposes including recording information relevant to the sale of the Brentwood and Maple Ridge properties. I accept Jeong Lee's evidence that Kevin Hien showed him drawings of Allen Liu's plans for development of the Brentwood property. The source of those drawings would likely have been Allen Liu. Kevin Hien's failure to produce his notebook is yet another failure of Kevin Hien to produce relevant documents and negatively impacts his credibility.

[223] During cross-examination, Allen Liu testified that he did not recall having any discussions with Kevin Hien regarding his development plans for the Brentwood property. He also testified that the Zoning Warranty was Jeong Lee's idea and not his. I do not accept Allen Liu's evidence that he did not discuss his plans for development of the Brentwood property with Kevin Hien while they were working to complete the Zoning Warranty. The portion of the warranty clause which made it clear that the warranty did not apply to subsequent purchasers must, logically, have come from Allen Liu.

[224] The Vendors contend that the Zoning Warranty was an attempt by Allen Liu and Kevin Hien acting in concert to assuage Jeong Lee's concerns about not having been informed about the RM5s zoning potential for the Brentwood Property. In addition, the Vendors contend that the evidence regarding various steps Allen Liu

took before and after the Purchase Agreements were signed establishes that Allen Liu never intended to comply with the Zoning Warranty. The latter point, in my view, is not relevant to a determination of whether Allen Liu and Kevin Hien conspired to suppress the zoning potential of the Brentwood Property.

[225] The connection between the Zoning Warranty and the alleged conspiracy to suppress information regarding the RM5s zoning potential for the Brentwood Property is not clear to me. The Vendors appear to seek to convince this Court that the Zoning Warranty was so improvident – that is, that no reasonable developer would agree to it – that the only logical reason that Allen Liu would have done so in January 2012, after the Purchase Agreements had already been signed, was to prevent Jeong Lee from digging deeper and discovering that both he and Kevin Hien previously knew about the potential for and significance of RM5s zoning. The Vendors submit that Allen Liu and Kevin Hien must have been afraid that Jeong Lee would seek to back out of the deal on that basis. To make this inferential leap, I would have to find that there was no other reason for Allen Liu to agree to the zoning restriction.

[226] I am not prepared to make this inferential leap. In my view, Allen Liu may have had other reasons for agreeing to the Zoning Warranty. Those include the following: first, that he was being truthful when he said that he never intended to develop the Brentwood Property to the maximum density potentially allowable under RM5s zoning (although the evidence does not suggest that this was the case); second, that he never intended on complying with the Zoning Warranty; third, that his plan all along was to assign the Brentwood Agreement to an arms-length third party, in which case the Zoning Warranty would not apply.

[227] In the circumstances, I do not feel that it is appropriate for me to make the inferences that the Vendor seeks concerning the Zoning Warranty in support of their argument regarding a conspiracy to keep RM5s zoning information from Jeong Lee.

Did Allen Liu and Kevin Hien Conspire to Falsify or Co-ordinate Evidence?

[228] In addition, the Vendors contend that Allen Liu and Kevin Hien conspired to falsify and coordinate their evidence with respect to the reason for preparation of the False Purchase and Sale Agreement. They contend that this supports an inference that Liu and Hien had previously conspired to deceive Jeong Lee into accepting a low price for the Brentwood property. They also contend that Allen Liu and Kevin Hien acted in concert to destroy documents related to this false agreement.

[229] I fail to see how the evidence regarding the False Purchase and Sale Agreement, which was not drafted until November 2011, supports the Vendors' argument with respect to a conspiracy agreed to in September 2011 to mislead Jeong Lee with respect to the Brentwood property's RM5s zoning potential.

[230] The reasons for the preparation of the False Purchase and Sale Agreement is relevant to the defence of illegality of contract/unlawful purposes. I will deal with my findings of fact and findings with respect to this issue later in my reasons.

Alleged Fraud Against Neil Wong

[231] The Vendors contend that Kevin Hien and Gary Chow made numerous efforts to exclude Neil Wong or to minimize any commission payable to him. However, this contention is not relevant to the question of whether Allen Liu and Kevin Hien conspired to keep zoning information regarding the Brentwood property from Jeong Lee. This case does not concern any claims Neil Wong may have against Kevin Hien and Gary Chow with respect to an alleged effort on their part to steal a portion of his share of the Franga Group commission. Accordingly, I do not intend to address the Vendors' arguments in this respect in these reasons.

Conclusion with Respect to Conspiracy

[232] I do not find that the Vendors have established by compelling evidence that there was an agreement between Kevin Hien and Allen Liu to deceive Jeong Lee or

to otherwise wrongfully keep information from him about the RM5s zoning potential for the Brentwood property and thereby prevent him from learning about the property's true value before he agreed to sell it for \$28.8 million.

[233] The Vendors agree there is no direct evidence of such a conspiracy between Allen Liu and Kevin Hien. For example, there is no evidence that Allen Liu ever communicated with Kevin Hien about Jeong Lee's knowledge or lack of knowledge, of the RM5s zoning potential for the Brentwood property nor is there any suggestion that Allen Liu ever communicated with Jeong Lee about this zoning potential. Accordingly, in this case, findings of fact necessary to establish a conspiracy claim require the Court to draw a number of inferences. The law is clear that an inference regarding a conspiracy should only be drawn when there are no other inferences which can reasonably be made.

[234] I infer that the use of Lester Lin as a "straw man", followed by the preparation of the October 2011 Referral Fee Agreement providing in favour of Allen Liu and ending with the sham January 2012 Referral Fee Agreements with Anken (Candy Chen), that Kevin Hien, Gary Chow and Allen Liu colluded to redirect a portion of the Franga Group's commission away, but I am unable to conclude whether the intention was for the proceeds to go to Allen Liu or Kevin Hien.

[235] As I am unable to determine whether the beneficiary of the commission scheme was Allen Liu or Kevin Hien, I am also unable to determine conclusively whether or not Kevin Hien would have received any consideration for the alleged agreement to withhold RM5s zoning information from Jeong Lee.

[236] Some of the facts which the Defendants say lead to an inference of a conspiracy themselves require inferences to be drawn to make the relevant finding of fact. These include drawing inferences regarding the reasons for the drafting of the post-closing appraisal clause and deposit clauses in the Brentwood Agreement and the creation of the Zoning Warranty. I have already found that there are other potential explanations why those contract clauses and the Zoning Warranty were

created. Accordingly, I am unable to conclude those contract clauses must have been part of the alleged conspiracy to withhold RM5s zoning information.

[237] This does not mean that I have found that information regarding the Brentwood property's RM5s zoning potential was not improperly withheld from Jeong Lee by members of the Franga Group, including by the only real estate agent in the group – Kevin Hien. In my view the members of the Franga Group appeared to be largely interested in finding a buyer and facilitating a quick sale of the Brentwood property and earning a large commission and were not nearly as focused as they should have been on obtaining the highest possible sale price for the Vendors.

[238] Neil Wong sent an email on July 7, 2011, to Gary Chow and Kevin Hien in which he appeared to be encouraging his Franga Group partners to find a buyer for the Brentwood and Maple Ridge properties before Jeong Lee increased the price. I also note that during the September 25, 2011 meeting attended by Neil Wong, when Kevin Hien presented Allen Liu's offer to purchase the Brentwood and Maple Ridge properties for \$32 million, that despite Neil Wong's earlier belief that the Brentwood and Maple Ridge properties were worth more than \$39.9 million, neither he or Kevin Hien told Jeong Lee not to sell the properties for \$32 million and did not tell him about the RM5s zoning potential for the Brentwood property which they had learned about several months before.

[239] In my view, this suggests an alternate inference which could be drawn from the failure of Kevin Hien, Neil Wong and the other members of the Franga Group to advise Jeong Lee about the RM5s zoning potential for the Brentwood property. It may have been that some or all of the members of the Franga Group decided to keep this information from him in an effort to facilitate a quick sale of the Brentwood property so that they could obtain a substantial commission. That is, it was their own self-interest that caused them to keep this information from Jeong Lee and not as a result of a conspiracy between Allen Liu and Kevin Hien. Another possibility is that

they were simply ignorant of their obligations to provide this information to Jeong Lee.

Unenforceability of the Purchase Agreements Due to Breach of Fiduciary Duty and Knowing Assistance

[240] The Vendors contend that even if a conspiracy between Allen Liu and Kevin Hien is not found, the Purchase Agreements should still not be enforced because the Purchasers are jointly and severally liable for knowingly assisting Kevin Hien in breaching his fiduciary duty to the Vendors.

[241] The Vendors also contend that Kevin Hien, as their realtor, had a fiduciary duty to share the RM5s zoning information with them when he first learned of this information, that he breached this duty when he failed to do so and that Allen Liu knowingly assisted him in this breach.

Did Kevin Hien have a fiduciary duty to the Vendors which he breached?

[242] The Vendors submit that Kevin Hien had a fiduciary duty to them as early as April 2011 when the April 2011 Authorization and Fee Agreement was entered into between the Franga Group, of which Hien was a member, and Jeong Lee. They say that this fiduciary duty included sharing RM5s zoning information regarding the Brentwood property and that Kevin Hien failed to do so. They also say that Kevin Hien breached his fiduciary duty by advising Jeong Lee that the Purchasers' offer for the Brentwood and Maple Ridge Properties was well above their market value.

[243] The Purchasers do not challenge the Vendors' contention that Kevin Hien owed a fiduciary duty to Jeong Lee. The Hien parties contend that although a relationship between a realtor and his client creates a "*per se*" fiduciary relationship, this presumption is rebutted in this case.

[244] The Hien parties refer to the decision of Sopinka J. writing for the majority in the Supreme Court of Canada case *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, which was later affirmed in *Hodgkinson v*

Simms, [1994] 3 S.C.R. 377, for the proposition that there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Examples of a fiduciary relationship where a rebuttable presumption may arise include trustee-beneficiary and agent-principal relationships (see *Hodgkinson* at 417-418). The relationship between a realtor and client falls under an agent-principal relationship.

[245] In *Mulligan v Stephenson*, 2016 BCSC 1941, the court held that in order to successfully rebut the presumption that a realtor-client relationship gives rise to a *per se* fiduciary relationship, the defendant must show on the basis of cogent evidence that the relationship was not one of reliance, trust, nor confidence.

[246] The Hien parties contend that the evidence rebuts the presumption that Jeong Lee was a fiduciary. In particular, they contend that the following supports this proposition:

- a) Jeong Lee was a highly educated and seasoned businessman who understands and is experienced in commercial real estate and has completed real estate transactions in the past without the assistance of a realtor;
- b) Jeong Lee admitted that he did not pay attention to, nor did it matter to him, that Kevin Hien did not have any experience selling commercial real estate; and
- c) That Jeong Lee did not rely on Kevin Hien to investigate zoning information for the Brentwood property

[247] The Hien parties rely upon the decision of this Court in *Barker v. 100 Mile Realty Ltd.*, 2000 BCSC 322. In *Barker*, the vendor alleged that his realtor had breached his obligation to disclose the fact that the land in question had merchantable timber. The realtor had advised the vendor to obtain a timber cruise of the property, which would have informed her of its profitability and that he was not

an expert with respect to timber valuation. The court found that the realtor had rebutted the presumption that it was in a *per se* fiduciary relationship with the plaintiff vendor on the basis of a lack of reliance. The vendor had sufficient knowledge from her own experience to recognize that services to assess the timber on the land were available, but she had elected to not make that inquiry.

[248] *Barker* is clearly distinguishable. There is no satisfactory evidence that Kevin Hien advised Jeong Lee to obtain information on the zoning potential for the Brentwood property, or as was the case in *Barker*, that Jeong Lee had any expertise in zoning. Jeong Lee was aware that the Brentwood property was suitable for high density development but the evidence establishes he did not know about the potential to obtain RM5s zoning and approval of a development with a 5.0 FAR. Kevin Hien had received information regarding the RM5s zoning potential for the property but failed to provide it to Jeong Lee – or to even ask if Jeong Lee was aware of this information before Jeong Lee signed the Brentwood Agreement.

[249] I accept Jeong Lee's evidence that he relied upon Kevin Hien for advice throughout the entire transaction and did not consider Hien to be a mere errand boy as was suggested to him during cross-examination.

[250] The fact that Jeong Lee is a highly educated individual with some experience in real estate transactions does not amount to cogent evidence that he was not relying on, trusting and placing confidence in Kevin Hien. A professional person selling a valuable piece of property is able to expect that a real estate agent will act in accordance with their professional obligations.

[251] I also note the expert opinion of the Hien Parties' expert Jim Stewart tendered in this trial which is that, regardless of whether the RM5s zoning information for the Brentwood property was publically available, Kevin Hien had an obligation to provide this information to both of his clients – Allen Liu and Jeong Lee. The opinion of the Vendors' expert Tom Garvey, also tendered in this trial, is the same. Tom Garvey's opinion was that under British Columbia real estate practice, Kevin Hien had a duty

to provide zoning information to both Jeong Lee and Allen Liu promptly after receiving it. He testified on cross-examination that even if Kevin Hien had been made aware that Jeong Lee was not relying on him to obtain zoning information (which I have not found as a fact in this case) that Kevin Hien should have provided the RM5s zoning information he received from Neil Wong in July 2011 and September 2011.

[252] Although I have referred to the expert opinions of Tom Garvey and Jim Steward in these reasons, I would have come to the same conclusion that they did concerning the duty of the Hien parties to Jeong Lee had their expert evidence not been provided at trial.

[253] The Limited Dual Agency Agreement and Working with a Realtor Brochure presented by Kevin Hien to Jeong Lee do not assist to the Hien Parties. These documents expressly state that Kevin Hien had a duty of full disclosure to both the Vendors and Purchasers limited only by the express exceptions set out in those documents.

[254] The Working with a Realtor brochure states under the subheading “Undivided Loyalty” that the brokerage must protect the principal’s negotiating position at all times and disclose all known facts which may affect or influence the principal’s decision. Under the heading “Dual Agency”, the brochure states that the brokerage has a duty of disclosure to both a buyer and seller except under certain circumstances, none of which apply in this case. The Limited Dual Agency Agreement for the Brentwood property signed by Kevin Hien, Jeong Lee and Allen Liu repeats the duty of disclosure language included in the brochure.

[255] The Hien Parties have not rebutted the presumption of a *per se* fiduciary relationship between Jeong Lee and Kevin Hien with cogent evidence. In my view, there is no doubt that the Hien parties had a fiduciary duty and a contractual obligation to the Vendors, the latter pursuant to the express terms of the Limited Dual Agency Agreement, to provide Jeong Lee with the same RM5s zoning

information that had been provided to Allen Liu. The Hien parties failed to do so and, accordingly, breached both their fiduciary duty and contractual obligations to the Vendors.

Did the Purchasers knowingly assist Kevin Hien in breaching his fiduciary duty to the Vendors?

[256] The Vendors contend that the Purchasers knowingly assisted Kevin Hien in breaching his fiduciary duty to the Vendors to provide them with the RM5s zoning information by participating in a chain of events “which led to or constituted” the breach. In summary, the Vendors submit that the Purchasers did so by:

- assisting in the commission scam against members of the Franga group;
- convincing Kevin Hien to, in turn, convince Jeong Lee to assist in Allen Liu’s efforts to defraud lenders or investors through the preparation of the False Purchase and Sale Agreement and deceptive lease documents; and
- convincing Kevin Hien to include misleading clauses in, or schedules to, the Brentwood Agreement.

[257] The Vendors rely on the decision of the Supreme Court of Canada in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, in support of their argument with respect to knowing assistance. *Air Canada* concerned an alleged breach of trust by a travel agency to hold money collected from the sale of Air Canada tickets and to pay Air Canada twice a month. Monies were not paid over to Air Canada by the travel agency and Air Canada sued in breach of trust and were successful against the travel agency at trial. On appeal, two officers of the travel agency were found to be liable on the basis that they were parties to the conversion of trust funds.

[258] The Supreme Court of Canada in *Air Canada* considered, amongst other issues on appeal, whether liability could be imposed upon one of the officers of the travel agency who was a stranger to the trust, as a constructive trustee. The

Supreme Court ultimately found that liability could be so imposed only if the officer knowingly assisted in a dishonest and fraudulent design on the part of the trustees.

[259] With respect to the knowledge requirement of a knowing assistance claim, the Supreme Court confirmed that this means actual knowledge of both the existence of a trust and of the improper breach of trust. Although recklessness or willful blindness with respect to these factors may result in an imputation of knowledge, constructive knowledge is insufficient to give rise to personal liability: *Air Canada* at 811-812 referencing the decision of Sachs L.J. in *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)* (1968), [1969] 2 All E.R. 367 (C.A.) at 379. The Supreme Court also confirmed that if a stranger received a benefit as a result of a breach of trust, this may ground an inference that the stranger knew of the breach: *Air Canada* at 812.

[260] I adopt the following four requirements for a finding of liability for knowing assistance, summarized by Burke J. at para. 250 of *Imperial Parking Canada Corp. v Anderson*, 2015 BCSC 2221:

- (a) There must be a fiduciary duty;
- (b) The fiduciary must have breached that duty fraudulently and dishonestly;
- (c) The stranger to the fiduciary relationship must have had knowledge of both the fiduciary relationship and the fiduciary's dishonest conduct; and
- (d) The stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

[261] I have already found that the Hien defendants had a fiduciary duty to share the RM5s zoning information with the Vendors and that they breached this duty. I also find that the Purchasers must have been aware, in part as a result of their signature on the Limited Dual Agent form, that the Hien parties had a fiduciary relationship with both them and the Vendors. I am unable to determine on the evidence before me whether the failure of the Hien parties to provide the RM5s

zoning information arose as a result of fraud or dishonest conduct. Although I have already found that their failure to provide this information constituted a breach of their fiduciary duty to the Vendors, this breach does not in and of itself constitute fraud.

[262] In my view, there is an insufficient nexus between the “chain of events” listed by the Vendors and the Hien defendants’ breach of their fiduciary duty to the Vendors to justify a finding that the breach was fraudulent or dishonest. The events concerning the commission scam do not constitute a fraud or dishonest conduct by the Hien parties against the Vendors. The evidence establishes that Jeong Lee expected to pay a 4% commission on the sale of the Brentwood and Maple Ridge properties. The involvement of Allen Liu in assisting Kevin Hien in an effort to improperly funnel a portion of the referral fee away from members of the Franga Group to either him or to Kevin Hien is a matter between those parties and does not result in harm to Jeong Lee. The same reasoning applies with respect to allegations that Allen Liu coopted Kevin Hien to assist him in defrauding his lenders or investors.

[263] I have already found that there is insufficient evidence to establish that there was a conspiracy between Allen Liu and Kevin Hien to withhold the RM5s zoning information from Jeong Lee. Part of the basis of this finding was that there is insufficient evidence to allow me to find that Allen Liu was aware that Jeong Lee did not know about the RM5s zoning potential for the property at the time that the Brentwood Agreement was signed. I also do not consider that there is sufficient evidence to find that Allen Liu was reckless or willfully blind with respect whether or not Kevin Hien told Jeong Lee about the RM5s zoning potential for the Brentwood property. In my view it is not unreasonable for Allen Liu to have assumed that Jeong Lee would have known about the zoning potential for his own property.

[264] In the result, I do not find that the Vendors’ claim in respect of knowing assistance on the part of the Purchasers has been made out.

Unenforceability of the Purchase Agreements Due to Vicarious Liability

[265] The Vendors contend that even if the Purchasers did not conspire with Kevin Hien to deceive Jeong Lee concerning the RM5s zoning potential for the Brentwood property or did not provide knowing assistance in breach of a fiduciary duty to provide this information, they should nevertheless be held vicariously liable for the Hien parties' breaches of their common law and contractual duties to disclose this information.

[266] Kevin Hien was a limited dual agent acting for both the Vendors and Purchasers in the sale of the Brentwood and Maple Ridge properties. The Purchasers contend that they did not have a duty to provide zoning information to the Vendors regarding the Vendors' own property. On this basis, they say that even if Kevin Hien failed to provide zoning information to Jeong Lee, this failure did not arise in the context of his role as their real estate agent.

[267] In support of their argument concerning vicarious liability, the Vendors rely upon the decision of *Thompson v. Aiken* (1977), 2 B.C.L.R. 23, citing to 1977 CarswellBC 9 (S.C.) at paras. 21-29, for the proposition that a seller is vicariously liable for damages suffered by a buyer, which result from misrepresentations made by his realtor where the misrepresentations occurred within the scope of the realtor's authority. The Vendors contend that the reasoning in *Thompson* also extends to cases of material non-disclosure by limited dual agents, disentitling the principal from enforcing a contract even where the non-disclosure results from mere negligence.

[268] The Vendors also rely on *Goldstein v. Davison*, 1994 CarswellOnt 710 (Ct. J. (Gen. Div.)). In that case, a vendor was held vicariously liable for a dual agent's failure to disclose material information to a buyer relating to the nature of the property. Both the vendor and the dual agent were aware that the relevant municipality had recommended that the property be converted to a heritage site. However, the dual agent failed to disclose this to the buyer, who had no way of

knowing about the impending heritage designation. The court in *Goldstein* found that the vendor was responsible for the dual agent's failure to advise the buyer that a heritage designation for the property was underway.

[269] The Vendors further rely on *Bond v. Richardson*, 2007 NBQB 264, *Rankin v. Menzies*, 2002 CarswellOnt 50 (Sup. Ct. J.) and *1505986 Ontario Inc. v. Surma*, 2010 ONSC 3907.

[270] In *Bond*, the real estate agent, a limited dual agent, was found to have breached a duty of care to the buyer by not disclosing the existence of a deferred tax obligation and the agent's realty company, as the employer, was found vicariously liable for the dual agent's negligence.

[271] In *Rankin*, the seller was a realtor and was the principal of the realty company which represented the buyer. The seller and his realty company were found to have had a fiduciary duty to the buyer, which was breached in failing to disclose a \$23,000 encumbrance for a local improvement charge on the seller's property.

[272] In *1505986 Ontario Inc.*, the buyer had purchased a motel relying on certain representations by the seller and discussions with the dual agent. Shortly after taking possession, the buyer discovered revenues were far lower than represented and the value of the motel had been grossly overstated. The seller was found liable in fraudulent misrepresentation for knowingly misrepresenting the motel's gross revenues. The real estate agents were found liable for breach of fiduciary duty in circumstances where they knew that relevant financial statements were unaudited and in conflict with what the seller had told them. They failed to advise the buyer of this or to recommend that the buyer verify the revenues and expenses of the motel before proceeding with the purchase. Their realty company, Sutton Group, was found to be vicariously liable for the actions of the realtors.

[273] In each of the cases mentioned above, the failure to disclose involved a failure on the part of limited dual agents to disclose important information concerning

a property to the buyer. The vendors were found liable for these failures. Additionally, the real estate companies that the dual agents worked for were found vicariously liable for failures of their agents in some of the cases. In none of those decisions was a purchaser found to be vicariously liable for a breach of a dual agent's duty to provide information regarding the vendor's property to the vendor.

[274] In my view, the Hien parties' obligation to disclose RM5s zoning information to the Vendors did not arise from their role as the Purchasers' agent but rather resulted from their duty to the Vendors as their agent. The Purchasers had no obligation to disclose RM5s zoning information to the Vendors regarding the Vendors' own property. Accordingly, I find that the Purchasers are not vicariously liable for the Hien parties' failure to provide this information to the Vendors.

Unenforceability of the Purchase Agreements For Public Policy Reasons

[275] The Vendors contend that the Purchase Agreements are part of an unlawful transaction tainted with illegality and therefore, for reasons of public policy, should not be enforced by this Court. They contend that the transaction at issue is not only comprised of the agreements for purchase and sale of real properties set out in the Purchase Agreements but includes related agreements and actions.

[276] In particular, the Vendors contend that the Brentwood Agreement, which is clearly part of the transaction, was drafted in a way intended to allow the Purchasers to mislead potential lenders into believing that the Purchasers would earn approximately \$500,000 more per year in lease-back rent for the Brentwood property than was actually agreed upon, in order to induce lenders to provide financing.

[277] The Vendors also contend that the transaction included other related agreements or documents purposefully created to mislead lenders, investors and potential assignees. Those include the Brentwood Lease and Lease Addendum, which they contend were also designed to deceive potential lenders with respect to the amount of lease-back rent to be earned from the Brentwood property and the False Purchase and Sale Agreement, which was designed to deceive a variety of

parties with respect to the deposit paid and the purchase price to be paid for the Brentwood property.

[278] The Vendors contend that a number of related other actions carried out by the Purchasers were intended to deceive potential lenders and joint-venture partners or assignees and that such actions taint the entire transaction. These related actions include: using sham documents to inflate the Purchasers' earnings; providing false or misleading documents with respect to cash-on-hand; and seeking to conclude a scheme to mislead lenders regarding the amount of the deposit paid for the Brentwood property. Finally, the Vendors say that the Purchasers sought to conceal the Zoning Warranty from both lenders and joint-venture partners or assignees to maximize the perceived value of the Brentwood property.

[279] The Purchasers say that this contractual defence, which they describe as a defence of illegality of contract, only applies where a plaintiff must rely on an illegal contract to establish its claim and the Purchasers are not relying on any such illegal contract in this case. They contend that the Vendors improperly seek to extend the definition of "transaction" to include ancillary agreements or events and say that the agreements on which they rely, the Purchase Agreements, are not themselves illegal. They say that the related agreements or events are collateral to the Purchase Agreements. For these reasons, the Purchasers say that the defence of illegality of contract must fail.

Summary of the Relevant Law on "Unlawful Purposes"

[280] As Lord Mansfield stated in *Holman v. Johnson* (1775), 1 Cowp. 341 at 343: "no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." In this case, there is no suggestion that when viewed in isolation the Purchase Agreements are immoral or illegal. Viewed in isolation, there is nothing immoral or illegal about the Vendors agreeing to sell the Brentwood and Maple Ridge properties to the Purchasers.

[281] The Vendors argue that it is incorrect to only focus on the Purchase Agreements and that what is to be evaluated is the lawfulness of a transaction which includes a property sale. This engages the defence of unlawful purposes, which in my view is a sub-set of the defence of illegality of contract. The defence of unlawful purposes is a public policy defence under which a court is asked to refuse to enforce a transaction on the basis that if the court did so, it would be harmful to the integrity of the legal system: see *Patel v. Mirza*, [2016] UKSC 42 at paras. 56-61.

[282] The Vendors' argument with respect to the defence of unlawful purposes relies heavily upon the decision of the Supreme Court of Canada in *Letkeman v. Zimmerman*, [1978] 1 S.C.R. 1097 [*Letkeman*]. The reasoning in *Letkeman* and the principles set out therein are directly applicable to the case before me.

[283] In *Letkeman*, there were essentially two contracts for purchase and sale of an apartment block. The purchase agreement itself showed a falsely inflated price and a side agreement between the parties, executed at the same time, modified the purchase price. The purchaser had intended to use only the purchase agreement in order to obtain more financing from his lenders. Although the vendor was aware of this plan, he ultimately decided he did not want to go through with the sale and purported to rescind the contract. The purchaser refused to accept the vendor's repudiation and brought a claim for specific performance.

[284] In dismissing the action at first instance, the trial judge applied the reasoning of the English Court of Appeal in *Alexander v. Rayson* (1935), [1936] 1 K.B. 169 (C.A.), which dealt with the unenforceability of an unlawful contract. The trial judge dismissed the purchaser's claim finding that the intended use of the purchase agreement to obtain financing through unlawful means tainted the entire transaction and rendered the purchase agreement and the side agreement illegal and unenforceable. The decision of the trial judge was overturned on appeal and the matter proceeded to the Supreme Court.

[285] At page 1101 of *Letkeman*, the Supreme Court summarized the facts in *Alexander* as follows:

The plaintiff agreed to let a service flat to the defendant at an annual rent of £1,200. This transaction was expressed in two documents, one a lease of the premises at a rent of £450 a year, the other an agreement by the plaintiff to render certain specified services for an annual sum of £750. It was alleged that his object was to produce only the lease to the Westminster Assessment Committee, and by persuading this body that the premises were worth only £450 a year, to obtain a reduction of their rateable value. The defendant was ignorant of this alleged purpose. The plaintiff ultimately failed to accomplish his fraudulent object. He sued the defendant for the recovery of £300, being a quarter's instalment due under both documents.

[286] The Supreme Court then set out some of the findings of the English Court of Appeal in *Alexander* at pages 1101-1102 of that judgment, including the following:

The Court of Appeal held that, if the documents were to be used for this fraudulent purpose, the plaintiff was not entitled to the assistance of the law in enforcing either the lease or the agreement. Romer L.J., who wrote the reasons of the court, said at p. 182:

It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy. The most common instance of this is an agreement for the sale or letting of an object, where the agreement is unobjectionable on the face of it, but where the intention of both or one of the parties is that the object shall be used by the purchaser or hirer for an unlawful purpose. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the Court will not lend its help to such a plaintiff. Many instances of this are to be found in the books.

...

At p. 187, he added this:

...

... Now, in the cases to which we have been referred, there was an intention to use the subject-matter of the agreement for an unlawful purpose. In the present case, on the other hand, the plaintiff's intention was merely to make use of the lease and agreement, that is the documents themselves, for an unlawful purpose. Does that make

any difference? In our opinion it does not. It seems to us, and it is here that we respectfully disagree with Parcq J. that the principles applicable to the two cases are identical.

[287] Ultimately, the Supreme Court overturned the decision of the majority of the Court of Appeal in *Letkeman* and applied the reasons of the dissenting judge, Bayda J.A., ruling that the trial judge correctly applied the principle stated in *Alexander*.

[288] At paragraph 25 of his dissenting reasons (*Letkeman v. Zimmerman*, [1977] 1 W.W.R. 408, 1976 CarswellSask 99 [*Letkeman C.A.*]) Bayda J.A. referred to the principle in *Alexander* as it was expressed by Viscount Simonds in *Mason v. Clarke*, [1955] A.C. 778, [1955] 1 All E.R. 914 at 920 as follows:

In *Alexander v. Rayson* it was treated as settled law – and it could not be otherwise – that a plaintiff having intention to use the subject-matter of an agreement for an unlawful purpose cannot sue on it, and the only relevant question was whether a plaintiff, having a similar intention in regard to the documents evidencing an agreement, is similarly debarred. And it was held, I do not doubt correctly, that he was.

[289] In addition, where one of the parties to an agreement is asked to and agrees to make a false representation of fact with respect to the nature of the agreement, the making of the representation forms part of the consideration for the agreement and taints the agreement. This is made clear at paragraph 34 of the reasons of Bayda J.A. in *Letkeman C.A.* where he stated as follows:

... There was an exchange of promises between the plaintiff and the defendant. The defendant promised to transfer to the plaintiff the apartment block in question and the plaintiff in turn promised to pay the defendant a certain sum of money. However, before the plaintiff agreed to carry out his promise he asked the defendant, and the defendant acceded, to make a false representation of fact. The act of making that representation forms part of the consideration supporting the transaction. It must therefore be said that part of the consideration supporting the agreement for sale which the plaintiff now seeks to enforce is unlawful. The effect of that circumstance was to make the entire agreement for sale unlawful and unenforceable the moment it was entered into.

[290] In *Alexander*, Romer L.J. was clearly focused on the transaction as a whole as opposed to evaluating the two individual contracts constituting the transaction.

The two contracts in *Alexander* included the lease for the flat which provided for payment of a portion of the total rent and a separate agreement under which an additional amount would be paid by the tenant for services. Notwithstanding that these individual agreements did not have an illegal object on their face, Romer L.J. found that they were intended to be used together to defraud the government of tax revenue and the transaction itself was not enforceable. Romer L.J. said at page 188:

... So in the present case, it was the formulation of the transaction in a particular way by means of the lease and agreement, and not the subject-matter of the transaction, of which an illegal use was to be made. In one sense, no doubt, it may be said that the plaintiff intended to use only the lease for an unlawful purpose, and not to use, but to conceal, the agreement. In reality there was only one transaction between the parties. The splitting of it up into two documents was a device essential for the success of the plaintiff's fraud and both documents must be regarded as equally fraudulent in purpose.

And at page 189:

... In the present case, however, the documents themselves were dangerous in the sense that they could be and were intended to be used for a fraudulent purpose, without alteration, and the splitting of the transaction into the two documents was an overt step in carrying out the fraud. We cannot think that the plaintiff is entitled to bring these documents into a court of justice and ask the Court to assist him in carrying them into effect...

[291] The Saskatchewan Court of Appeal decision in *Thompson v. Biensch*, [1980] 6 W.W.R. 143 (Sask. C.A.), dealt with a situation involving three interrelated agreements concerning the purchase of cattle: an agreement to purchase, a chattel mortgage and a promissory note. In the course of obtaining bank financing, both the vendor and purchaser made fraudulent misrepresentations in a loan application to the lender regarding the purchase price, breed of the cattle and the amount of a down payment. The agreement to purchase and chattel mortgage both incorrectly stated purchase price and breed of the cattle in order to aid in the deception.

[292] The Saskatchewan Court of Appeal in *Thompson* refused to assist the vendor who was seeking to enforce just the promissory note, which he had purchased from the lender, and rejected the argument of the plaintiff that the promissory note was a complete instrument which stood on itself and bore no taint of illegality and that the

plaintiff was not seeking to rely upon any part of the transaction which bore the taint of illegality. The Saskatchewan Court of Appeal found that all three agreements were interrelated. At paras. 13-14, the court states:

I have considered the authorities referenced by the Purchasers which they say stand for the proposition that absent reliance on an illegal contract the defence of illegal contract/unlawful purposes does not apply. The authorities I find worthy of comment include *Este v. Esteghamat-Ardakani*, 2017 BCSC 878, aff'd 2018 BCCA 290; *Asfordby Storage and Haulage Ltd. v. Bauer*, [1989] O.J. No. 2614 (QL); *Fraguna v. Storoz*, (unreported, October 15, 1993) No. C910604 (BCSC); *Kirzinger v. Kalthoff* (1964), 45 D.L.R. (2d) 144 (Sask. Q.B.); and *Insta-Matic Finance Ltd. V. Domansky and Domansky*, [1982] M.J. No. 421.

The overall agreement is constituted by the purchase contract, the chattel mortgage and the promissory note. These instruments are interrelated, and each is an integral part of the overall agreement. The reference in the chattel mortgage to the promissory note is but one indication of this interrelationship. It follows that each such instrument is tainted with the same illegality and the same quality of unenforceability as the overall agreement itself. There is no legal justification for excepting the promissory note from this blanket condemnation. The result is that the principle in *Alexander v. Rayson*, supra, debars Mr. Thompson from maintaining an action to enforce payment on the promissory note.

[293] *Este v. Esteghamat-Ardakani*, 2017 BCSC 878, concerned an appeal from a decision of the trial judge dismissing the plaintiff's claim on the basis it constituted an abuse of process. The plaintiff in *Este* had disavowed beneficial ownership of the assets in an earlier divorce action on the basis that she held the assets in trust for her mother. Later she sued in a separate action asserting beneficial ownership in a separate action. The Court of Appeal upheld the decision of the trial judge and found that it did not need to discuss the decision of the trial judge with respect to the enforceability of illegal bargains. Leave to appeal to the Supreme Court was recently refused.

[294] In *Este*, Justice Funt referred to, *inter alia*, the decision of the House of Lords in *Tinsley v. Milligan*, [1993] W.L.R. 126 (H.L.) at 153, where the court stated as follows:

... In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is

entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

...

In my judgment the court is only entitled and bound to dismiss a claim on the basis that it is founded on an illegality in those cases where the illegality is of a kind which would have provided a good defence if raised by the defendant. In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the plaintiff's case.

[295] In my view, the decision in *Este* was founded on a finding of abuse of process and the referenced reasoning in *Tinsley* does not assist. I note as well that it does not appear that Justice Funt was taken to the decision which I consider is applicable to the case before me – *Letkeman*.

[296] In *Asfordby Storage and Haulage Ltd. v. Bauer*, [1989] O.J. No. 2614 (QL) (H. Ct. J.), the plaintiff sought to enforce a contract for consignment sale of heavy equipment shipped from the UK to Canada. Both parties later engaged in illegal activity including understating the value of equipment brought into Canada to save on import duties and rolling back mileage and hours of service. In rejecting the defence of illegality, the Court found that the “illegality of the misrepresented fair market value or of the rollback occurred in a collateral mechanism or activity engaged in by both parties subsequent to the making of the contract and is not a part of the contract” (emphasis added).

[297] Reading the decision in *Asfordby* in its entirety, it is clear that the court was heavily influenced by the fact that the plaintiff, although it had participated in unlawful conduct, was not as culpable as the defendant who had sought to defraud the plaintiff in numerous ways. In addition, as set out in the above excerpt, the court found that the illegal activity in question was not facilitated by, or a component of, the contract sought to be upheld. I do not consider that the decision in *Asfordby* assists the Purchasers.

[298] In *Faraguna v. Storoz*, [1993] B.C.J. No. 2114, the petitioners sought to recover the balance owing on an agreement for sale of real property. The dispute centered around a claim for funds held in trust in Court after a subsequent sale of a home. Two interim agreements existed including one for a price of \$285,000. Sometime after the execution of that first agreement, the respondent asked the petitioners to change the price to \$199,000 to reduce the tax payable on the transfer and a backdated document to this effect was created and signed. The Court concluded that the parties intended the transfer documents to mislead the tax authorities. The Court refused to enforce the balance of the petitioners' loan that was founded on the false purchase price of \$199,000, the price in the sham transaction. However, the Court concluded that the situation was different with the agreement for sale.

[299] The trial judge in *Faraguna* at para. 28 cited the decision in *Letkeman* for a limited purpose finding that "the court generally refuses to interfere as between two dishonest persons". The decision in *Faraguna* does not displace a finding that a party cannot seek to enforce a transaction which is tainted by illegality.

[300] In *Kirzinger v. Kalthoff* (1964), 45 D.L.R. (2d) 144 (Sask. Q.B.), Saskatchewan Court of the Queen's Bench found that a series share purchases that occurred three years earlier which violated securities legislation did not form part of the transaction for a loan agreement. Likewise, in *Insta-Matic Finance Ltd. v. Domansky and Domansky*, [1982] M.J. No. 421, there were two separate transactions: one between the purchasers and vendor and one between the purchasers and a bank. The purchaser and vendor had misstated that a down payment was in cash rather than in the form of a promissory note. The court held that the loan agreement between the purchasers and the bank formed a separate transaction and did not taint the contract to pay money back under the promissory note to the vendor. In both of those cases, the court found that the impugned agreements did not form part of the transaction sought to be enforced on the facts.

[301] In my view, the reasoning in *Letkeman* and the decision on which that reasoning is founded, *Alexander*, apply to this case. Some relevant principles set out in those decisions to be considered in applying an unlawful purposes defence, include the following:

- a) An agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void.
- b) An unlawful act or purpose can be against anyone, including non-parties to the original contract or transaction.
- c) Where the agreement is unobjectionable on the face of it but where the intention of both or one of the parties is that the object shall be used for an unlawful purpose, any party to the agreement who had the unlawful intention is precluded from suing upon it.
- d) In determining unlawful purpose, it is appropriate to look at a transaction as a whole rather than focusing on the legality of individual component contracts which give effect to the transaction. That is, individual contracts which on their own do not demonstrate an unlawful purpose may be unenforceable if they are designed to be used together for purposes of carrying out an unlawful act.
- e) Where part of the consideration supporting the agreement sought to be enforced is unlawful, the effect of that circumstance will make the entire agreement unlawful and unenforceable from the moment it was entered into.
- f) It does not matter that the unlawful act is frustrated or has failed before being carried out.

Analysis on Unlawful Purposes

[302] I will first review each of elements which the Vendors contend comprise the transaction at issue in this case and provide my findings with respect to whether they were designed, as is alleged, for an unlawful purpose.

The Rent Reduction Schedule

[303] The Vendors contend that the Purchasers intentionally drafted the Brentwood Agreement with the separate Rent Reduction Schedule to enable a deception of potential lenders that the lease-back revenue the Purchasers would earn from the Vendors after closing was more than it actually was, in order to support their applications for financing. That is, the Rent Reduction Schedule could simply be removed from the Brentwood Agreement creating the false impression that the Purchasers would be earning approximately \$500,000 more per year from the Vendors in lease-back revenue than was actually provided for in the agreement.

[304] As set out in the background facts, the initial version of the Rent Reduction Schedule was drafted as a separately numbered schedule to the September 2011 Offer, dated September 26, 2011. It was drafted by Kevin Hien as a result of Jeong Lee's request for a reduction in the rent proposed in the offer, from 5.5% to 3.5% for the Brentwood property and 3.3% to 2% for the Maple Ridge Property. The September 26, 2011 rent reduction schedule granted Jeong Lee an option to reduce rents for these properties on giving three months notice in writing.

[305] After Allen Liu requested that the purchase of the Brentwood and Maple Ridge properties be divided into two agreements, this rent reduction option was carried through into the Brentwood Agreement – again as the separate schedule of the same date (i.e. the Rent Reduction Schedule). The Maple Ridge Agreement simply included the agreed upon rent for that property which was fixed at 10% of the purchase price.

[306] In my view, the granting of an option to reduce the lease-back rent for the Brentwood property on three month's notice is an odd construct. The obvious question is, why would any tenant not take this option up? In addition, why was the option to reduce rent maintained in a separate schedule given that the parties had already agreed that Jeong Lee could reduce it?

[307] Allen Liu sought to provide an explanation at trial. During his direct examination, he testified that the notice requirement was inserted as he was still in discussions with Jeong Lee regarding vendor financing. I take his evidence to mean that he might have backed out of the deal if Jeong Lee had exercised the rent reduction option before the subject removal date (originally set for November 2011 and later extended to January 2012) and vendor financing arrangements for an amount satisfactory to him had not been finalized.

[308] Allen Liu initially testified that the three month notice requirement was Jeong Lee's idea. On cross-examination, he admitted that the notice period might have been his idea but maintained that it was part of a negotiation between him and Jeong Lee.

[309] Kevin Hien's evidence was that there were no discussions regarding vendor financing between Allen Liu and Jeong Lee until November 2011, which was after the Brentwood Agreement and Rent Reduction Schedule were signed. The documentary evidence is consistent with this evidence and shows that discussions regarding vendor financing did not start until around November 3, 2011. Jeong Lee was not questioned about any discussions occurring in September or early October 2011 regarding vendor financing.

[310] In my view, Allen Liu's explanation regarding why the agreement allowing Jeong Lee to pay less rent for the Brentwood property was included as a separate schedule to the Brentwood Agreement and as an option is not credible. There is no evidence establishing that the reason why this agreement was styled as a rent reduction option was because Allen Liu was negotiating with Jeong Lee regarding

vendor financing in September or early October 2011. The evidence establishes that negotiations did not commence until November 2011.

[311] I have not been provided with a satisfactory explanation as to why the rent reduction option was not incorporated into the main body of the Brentwood Agreement rather than being created as a separately page numbered, stand-alone document. In closing argument, the Purchasers suggested that this was simply a “muddle” resulting from inexperience on the part of Kevin Hien, who simply repeated the same format that has been used in the September 25 offer. I give little weight to this argument. In my view, it would have been simpler to incorporate the reduced rent provision into the main body of the Brentwood Agreement rather than draft a separate schedule.

[312] Allen Liu’s explanation regarding on-going discussions with Jeong Lee regarding vendor financing does not make sense – even if I was to accept that these discussions had occurred before the Brentwood Agreement was signed in mid-October 2011. If Allen Liu had genuinely felt that the actual leaseback rent for the Brentwood Property could impact the amount of vendor financing he would require from Jeong Lee at the time that the Brentwood Agreement was signed, why did he not simply make successful negotiation of the leaseback rent and vendor financing amount as one of his subject conditions?

[313] I find that the only logical conclusion is that the Rent Reduction Schedule was prepared as a separate document to allow Allen Liu to conceal it and thereby artificially inflate the revenue for the Brentwood property in the minds of lenders. The evidence establishes that this is precisely what Allen Liu did. I will deal with that evidence later in my reasons.

[314] The Brentwood Agreement with the separate Rent Reduction Schedule was not therefore a benign document. It was purposefully designed in a way that it could be used to mislead. This design was repeated in the Brentwood Lease and Lease Addendum finalized just a few weeks later.

The Lease Addendum

[315] The evidence establishes that Allen Liu was motivated to conclude the lease agreements for the Brentwood and Maple Ridge properties shortly after the Purchase Agreements were signed. This is demonstrated by Kevin Hien's email of November 14, 2011, in which he, seemingly under some pressure to complete the leases, emailed Jeong Lee and advised him that Allen Liu's bank had asked to see the leasing contracts so that they could finalize and submit his financing application package to their head office. Allen Liu was clearly asking for the lease documentation to be completed quickly so that he could use it to arrange for, or at least investigate, financing. There was no other reason to finalize leases at this time given that the closing was not set to take place until December 19, 2012, over one year later.

[316] Kevin Hien initially sent a draft lease which showed annual rent for the Brentwood property of \$1.58 million – which was equivalent to the 5.5% lease-back rate which Jeong Lee had already rejected. Jeong Lee, seemingly in an effort to ensure that he was not committing to pay the higher rent, suggested that the parties execute two leases: one showing the \$1.58 million amount and a separate lease showing the reduced "option rent" of \$1.008 million. Kevin Hien advised Jeong Lee that it did not make sense to have two leases for different values. Instead of revising the draft lease that he had provided to incorporate the rent reduction the parties has previously agreed to, Kevin Hien prepared the separate Lease Addendum modifying the rent clause in the main body of the Brentwood Lease by reducing the rent to \$1.008 million. Both the Brentwood Lease and Lease Addendum were signed on the same day, November 18, 2011.

[317] At trial, Allen Liu denied having any input into the way that the Brentwood Lease and Lease Addendum were structured. I find it hard to believe that Allen Liu had no role in deciding how these documents were drafted. The leases for the Brentwood and Maple Ridge properties were worth millions of dollars over their terms and the value of those leases would clearly have been a factor for lenders

considering providing financing to Allen Liu. Allen Liu's evidence that he did not pay attention to how the leases were drafted is not in accord with business common sense.

[318] Similar to my findings regarding the Rent Reduction Schedule to the Brentwood Agreement, I see no innocent explanation for why Kevin Hien drafted the Lease Addendum rather than as I have already suggested he could have done, modifying the version of the draft of the Brentwood Lease that he had already prepared to incorporate the lower rent option.

[319] I also note, as was the case with the Rent Reduction Schedule, that the Lease Addendum was separately page numbered. This was the third time that a conveniently separate, standalone document dealing with a rent for the Brentwood property was prepared – first, the rent reduction schedule attached to the September 2011 Offer and then the Rent Reduction Schedule attached to the Brentwood Agreement and, finally, the Lease Addendum.

[320] Again, the only logical conclusion is that the Lease Addendum was prepared as a separate document to allow Allen Liu to mislead lenders. In my view, it was prepared as a separately numbered document so that it could be removed from any materials Allen Liu sent to lenders regarding the Brentwood lease-back arrangements. Again, there is evidence that Allen Liu, his employees or agents used the lease documents in this manner.

The False Purchase and Sale Agreement

[321] A significant amount of time at trial was spent dealing with evidence regarding the creation of the False Purchase and Sale Agreement. This agreement was referred to by Allen Liu in a number of different ways at trial, including "first offer", "recreated contract", "nullified contract", or "letter of intent". The intended and actual use of the False Purchase and Sale Agreement is a key element in the Vendors' argument with respect to unlawful purposes.

[322] The Purchasers sought to prove the following at trial: there was an initial offer made to purchase the Brentwood property for \$38.8 million made in early September 2011 (i.e. the Alleged First Offer) which was encapsulated within the Letter of Intent; a copy of the Letter of Intent was not retained; the False Purchase and Sale Agreement was prepared to respond to a request made by Youyi China for the original offer/agreement; Allen Liu did not misrepresent the price for the Brentwood property but told Youyi China that the agreed upon purchase price had been negotiated down from \$38.8 million to \$28.8 million; and that Allen Liu had no part in a reference to a \$10 million deposit being included in the False Purchase and Sale Agreement.

[323] The Vendors contend that the False Purchase and Sale Agreement was prepared solely for the purpose of inducing Youyi China to contribute towards the cost of purchasing the Brentwood property based on an inflated purchase price of \$38.8 million and a deposit of \$10 million having been made by Allen Liu.

[324] I will first review the evidence and make necessary findings of fact with respect to the Alleged First Offer and Letter of Intent and then the evidence concerning the drafting and purpose of the False Purchase Agreement.

Was there a \$38.8 million first offer to purchase the Brentwood property set out in a Letter of Intent?

[325] Jeong Lee denies that he ever received the Alleged First Offer – being an offer to purchase the Brentwood property on its own for \$38.8 million. He says that the first offer made by the Purchasers was the offer to purchase both the Maple Ridge and Brentwood properties for \$32 million presented by Neil Wong and Kevin Hien on September 25, 2011, the September 2011 Offer.

[326] I find the evidence of Allen Liu and Kevin Hien with respect to the Alleged First Offer to purchase the Brentwood property for \$38.8 million and the preparation of a Letter of Intent to be false. As I will expand on below, the evidence leads me to conclude that the Alleged First Offer and Letter of Intent never existed and evidence

in this respect was fabricated by Allen Liu and Kevin Hien to mask Allen Liu's attempts to mislead Youyi China and perhaps other investors.

No Corroborating Documents

[327] There are no documents to corroborate the testimony of Allen Liu and Kevin Hien that there was an initial offer to purchase the Brentwood property for \$38.8 million documented in a Letter of Intent prepared in early September 2011. That is, there are no relevant notes, emails, letters, telephone or cell phone records, draft agreements or other such documents between Kevin Hien and the Purchasers or the Vendors or between Kevin Hien and other members of the Franga Group.

[328] The only documentary evidence I was taken to showing any engagement between Kevin Hien or any other member of the Franga Group and any potential purchase of the Brentwood and Maple Ridge properties in early September is an email dated September 8, 2011 from Kevin Hien to Neil Wong. In this email, Kevin Hien attached the marketing brochure for the Brentwood and Maple Ridge properties. His email indicated that the document was for a Mr. Tai. During cross-examination, Kevin Hien testified that he couldn't recall who Mr. Tai was but that he may have been a potential purchaser.

[329] The first documented communication between Allen Liu and Kevin Hien is Kevin Hien's September 13, 2011 email attaching zoning information and marketing brochures for the Brentwood and Maple Ridge Properties. Telephone records produced at trial indicate that their first telephone communication was also on this date. The first documented communication between Allen Liu and any of his other advisors regarding the Brentwood property is the September 23, 2011 email from John Pan with Studio One Architects providing preliminary zoning and other information.

[330] Kevin Hien testified that he met with Allen Liu and handwrote the Letter of Intent on a blank form which he carried in his briefcase. Despite the fact that this was the biggest property transaction he had ever worked on, Kevin Hien did not go

back to his office after he had met with Allen Liu and write up the offer using the on-line WEBForms document platform maintained by the Canadian Real Estate Association (CREA) and did not make copies of the hand written document he claims was created.

[331] Kevin Hien's evidence at trial was inconsistent with his examination for discovery evidence with respect whether an electronic version of the Letter of Intent existed. When he was asked at his examination for discovery what specific efforts he had taken to locate the Letter of Intent, he said that he had looked through his computer "to see if anything I sent through email and from the web form". When asked if there was a typewritten date on the original \$38.8 million offer, Kevin Hien said "I can't recall". On cross-examination, Kevin Hien agreed that he would never have looked in his WEBForms account if the document had been handwritten.

[332] The Vendors called Jean-François Thivièrge with CREA to provide evidence with respect to activity in Kevin Hien's WEBForms account. The evidence of Mr. Thivièrge establishes that no documents relevant to the sale of the Maple Ridge and Brentwood properties were created in Kevin Hien's WEBForms account prior to September 25, 2011. There were a number of documents created on September 25 including a Listing Agreements signed by Jeong Lee, a Limited Dual Agency Agreement signed by Jeong Lee and Allen Liu and a signed Working with a Realtor form. This evidence is consistent with the first offer being the September 2011 Offer.

[333] Kevin Hien and Allen Liu testified that there were substantial negotiations back and forth related to the Letter of Intent. Hien says that changes were marked on the Letter of Intent and initialed. Again, there are no notes, emails, draft documents or records of telephone calls corroborating this back and forth. I find it completely unbelievable that Kevin Hien, an experienced real estate agent, would not have kept a copy of drafts, notes or any other documentary evidence concerning the negotiation leading to the Alleged First Offer and preparation of the Letter of Intent.

[334] I have already found that Kevin Hien carried a notebook in which he recorded information related to this property transaction. He did not produce his notebook at trial and I conclude that the reason he did not do so was because the information it contained would not be helpful to his case – and in particular because it did not contain notes with respect to the Alleged First Offer or Letter of Intent.

[335] In addition, no documents created between early September and September 25, 2011, were produced corroborating Allen Liu's evidence with respect the alleged due diligence he carried out on the Brentwood property. This includes a lack of evidence regarding his alleged conversation with John Pan with Studio One Architects regarding the Brentwood property prior to September 23, 2011. I have already found that Allen Liu first contacted Studio One after he received Kevin Hien's September 22, 2011 email forwarding zoning information for the Brentwood property and a marketing brochure.

[336] Despite Allen Liu's evidence that he had been in contact with Youyi China regarding the Brentwood property purchase opportunity in early September 2011, he did not produce copies of any correspondence with them during this period or call any witnesses from this company. Although Allen Liu provided a vague explanation at trial that he did not keep copies of correspondence exchanged on his phone, which I assume would include text messages or emails, I do not consider this explanation to be credible.

[337] At trial, Allen Liu provided a surprising explanation regarding why he did not keep a copy of the Letter of Intent. He claimed that it was not his practice to keep "nullified" agreements. This is quite startling evidence given the obvious importance of keeping an earlier, cancelled offer to purchase the Brentwood property for \$10 million more than the price ultimately agreed upon. Allen Liu had kept documents regarding at least one other unsuccessful property acquisition relating to an earlier effort to purchase a property located at 5695 Lougheed Highway.

***Inconsistencies and Inaccuracies in Evidence Concerning the
Alleged First Offer/Letter of Intent***

[338] The evidence of Allen Liu and Kevin Hien with respect to the nature of an alleged early September 2011 Offer changed over time and was not consistent with the pleadings they filed in this matter.

[339] The pleadings of the Purchasers and the Hien defendants, filed in response to the Vendors' counterclaim filed in June 2013, both state that a \$38.8 million contract to purchase the Brentwood property had been accepted by Jeong Lee but was later cancelled after Allen Liu had conducted some due diligence on the Brentwood property. The Purchasers' and Hien defendants' pleadings do not refer to a draft agreement or Letter of Intent.

[340] Allen Liu maintained his position that an agreement to purchase the Brentwood property for \$38.8 million had been concluded in his affidavit sworn December 10, 2013, which was filed in opposition to the Vendors' application to remove the CPL registered against the Brentwood property. He swore as follows:

- In early September, he asked Kevin Hien to present Jeong Lee with an offer, which was defined in his affidavit as a "Prior Contract", to purchase the Brentwood property for the full price that it was being marketed for sale, which was \$38.8 million, through his company Pacific Success.
- That during his due diligence on the Brentwood property he learned "that the Brentwood Property had been listed for sale for a year" and that the best offers Jeong Lee had received were between \$24 and \$26 million.
- That "Mr. Lee and I, through our companies, entered into the Prior Contract for the purchase of the Brentwood Property for \$38.8 Million. While the Prior Contract had been in place, I had discussions with potential partners in China about investing in the development of the property. I had explained to these potential investors that I had the Brentwood Property under contract for \$38.8 Million."
- With respect to what Jeong Lee had alleged in his affidavit was a "false contract" that the document prepared was not a false contract but was prepared to document the "fact that we had previously entered into an agreement to purchase the Brentwood Property for \$38.8 Million".

(Emphasis added.)

[341] Allen Liu's affidavit evidence was false in several respects. His affidavit evidence that the Brentwood property had previously been marketed for over a year and that Jeong Lee had only received offers of between \$24 and \$26 million was false. There was no evidence adduced at trial demonstrating that the Brentwood property had been listed previously and there is no evidence of previous offers. Jeong Lee denied that the Brentwood property had previously been marketed for sale and that any other offers had been made. In addition, Allen Liu's affidavit evidence that Pacific Success had made an offer to purchase the Brentwood property in early September was false. This company was not incorporated until September 27, 2011.

[342] Again, there is no independent evidence establishing that Allen Liu had conversations with Youyi China or any other Chinese investors with respect to the Alleged First Offer between early September and September 25, 2011, when the \$32 million offer to purchase both the Brentwood and Maple Ridge properties (that is, the September 2011 Offer) was made. I do not believe that any such conversations took place during this time.

[343] In Kevin Hien's December 10, 2013 affidavit, he was very specific about an Alleged First Offer, which he described as an "Initial Offer", and the subsequent cancellation of this offer. He swore as follows:

- That he presented the alleged Initial Offer in early September 2011 and that Jeong Lee agreed to the terms of the Initial Offer and signed it.
- That in or about the middle of September 2011, Allen Liu told him that there were some problems that could impact the development potential of the Brentwood property including peat, silt, and a Class A fish bearing stream.
- That he prepared an addendum to the Initial Offer in mid-September 2011, which both parties signed, cancelling the Initial Offer.

[344] By the time of their examinations for discovery, the affidavit evidence of both Allen Liu and Kevin Hien regarding whether a \$38.8 million offer had been accepted had changed. Their evidence at discovery, which they repeated at trial, was that the

parties had been negotiating the terms of the \$38.8 million purchase but these negotiations were not finalized. It was only during his examination for discovery that Allen Liu began to refer to what he had previously described in his December 2013 affidavit as a “prior contract”, as a “letter of intent”.

[345] With respect to Kevin Hien’s affidavit evidence that Allen Liu told him that there were issues related to soil conditions and a stream on the Brentwood property, I find this evidence to be false. I have already found that Allen Liu did not engage in discussions with Studio One Architects concerning the Brentwood property until on or just prior to September 23, 2011. John Pan’s email of that date is the first document in evidence referring to any land use issues related to the presence of a creek. Eventually, during his testimony at trial, Allen Liu admitted that he did not learn about the creek until on or about September 23, 2011.

[346] With respect to Kevin Hien’s affidavit evidence that he drafted an addendum cancelling what he referred to as the original offer, he recanted that evidence at trial during cross-examination and was forced to acknowledge that this evidence was not true. His explanation was that “[t]he original September 6th offer was cancelled, and I don’t think that there was a document, like something like this, to cancel that offer because it was an offer. It was not a contract.”

[347] I pause to address the submissions of Purchasers that the inconsistencies between Allen Liu’s affidavit and subsequent discovery and trial evidence result from language issues. The Purchasers submit that the language in Allen Liu’s affidavit, referring to a “prior contract” or “agreement”, should be viewed in light of his cultural background and unfamiliarity with the English language. The Purchasers contend that when Allen Liu used the words “prior contract” and “agreement” in his affidavit, he really meant a non-binding letter of intent or offer. I do not consider that this argument has merit. Allen Liu is a sophisticated business person who is familiar with real estate matters and I believe he knows the difference between an offer and an agreement. He was represented by experienced counsel when he swore his affidavit

and I expect that they would have, or at least should have, carefully reviewed his affidavit with him before he signed it.

***Kevin Hien's Account of Submitting the Alleged First Offer to
Jeong Lee***

[348] During direct examination, Kevin Hien testified that within a few days of finalizing the hand written Letter of Intent which was signed by Allen Liu, he went to see Jeong Lee at Brentwood Lanes to present the offer. Even though he had just received a \$38.8 million for the Brentwood property (recall that the Brentwood and Maple Ridge Properties were being marketed together for a total price of \$39.9 million), he did not immediately call or email Jeong Lee to tell them this startling good news.

[349] Kevin Hien testified that he did not mention the existence of the Alleged First Offer or Letter of Intent to any of his Franga teammates, including his old friend Gary Chow. His explanation was that he was concerned that they might try to find an alternate buyer. Despite this alleged earlier concern, Kevin Hien did bring Neil Wong with him on September 26 when he presented the September 2011 Offer to purchase both the Brentwood and Maple Ridge properties for a combined price of \$32 million. Kevin Hien's explanation for bringing Neil Wong along when this alleged second offer was made was that he thought that Jeong Lee would be unhappy about a \$10 million reduction in the offered price and that Neil Wong's presence would help soften the blow. The evidence of Kevin Hien and Neil Wong indicates that there was no discussion at the meeting with Jeong Lee about the Alleged First Offer. As I have already stated, Jeong Lee denies that a \$38.8 million offer was ever made.

[350] Kevin Hien also testified during his direct examination that he brought Working with a Realtor, Limited Dual Agency and Listing Agreement forms to the meeting with Jeong Lee when the Alleged First Offer was made. After he was recalled as a witness by counsel for the Vendors, which was after Mr. Thivièrge was called as a witness and provided evidence suggesting that Kevin Hien had not accessed these forms from his CREA WEBForms account, Kevin Hien changed his

evidence claiming that he left only a blank Working with a Realtor form with Jeong Lee but did not get a copy back. There is no evidence that Kevin Hien ever sought Jeong Lee's signature on a Working with a Realtor form or Listing Agreement after the Alleged First Offer was made.

Allen Liu's Evidence Regarding Withdrawal of the Alleged \$38.8 million offer/Letter of Intent

[351] Allen Liu's evidence is that he moved from an offer to purchase only the Brentwood property, made in early September 2011, to an offer to purchase both the Brentwood and Maple Ridge properties, made on September 26, because Jeong Lee suddenly insisted on selling the properties as a package. This testimony is not supported the evidence adduced at trial.

[352] The testimony of Jeong Lee, members of the Franga Group and the documentary evidence establishes that starting in May 2011, the Franga Group was authorized to market all four of the Lee's bowling centers for \$45 million. It was only in or around July 2011 that Jeong Lee was convinced to consider selling the Maple Ridge and Brentwood properties separately, which he insisted had to be sold a package, and the Franga Group began to market both the properties for a combined price of \$39.9 million. There is no evidence that Jeong Lee ever considered selling the Brentwood property on its own.

[353] As well, Allen Liu did not satisfactorily explain at trial why he would have made an offer to purchase the Brentwood property alone for \$38.8 million when he admitted that he knew both of the properties were being marketed for a combined price of \$39.9 million. His explanation was that the Alleged First Offer set out in the Letter of Intent was never intended to be binding but was really just the start of his investigation into the property. This does not explain why the Alleged First Offer for the Brentwood property was so high, relative to the asking price for both the Brentwood and Maple Ridge properties. Allen Liu's explanation at trial, which is that he made a \$38.8 offer because it was a lucky number, is not credible.

***Alleged Use of the Letter of Intent in Preparing the September
2011 Offer***

[354] Kevin Hien's evidence during his direct examination at trial was that he used the Letter of Intent as a template or precedent in preparing the September 2011 Offer. He testified that during a meeting with Allen Liu he went through the terms of the Letter of Intent that Allen Liu wanted to incorporate into the September 2011 Offer. At trial, his counsel took him to a number of terms in the September 2011 Offer one by one and he confirmed which of those terms he recalled were also in the alleged Letter of Intent.

[355] When taken to the typed clause in the September 2011 Offer dealing with a sellers warranty regarding zoning for both the Brentwood and Maple Ridge Properties, Kevin Hien testified that that the typed terms were taken from the "initial offer". There were other clauses which referred to both the Brentwood and Maple Ridge properties that Kevin Hien says were taken from the initial offer and inserted into the September 2011 Offer. Even on Kevin Hien and Allen Liu's evidence, this could not have been the case. The alleged Letter of Intent only concerned the purchase of the Brentwood property.

[356] Kevin Hien testified that after meeting with Allen Liu on September 25, 2011 he went away and typed up the September 2011 Offer using an electronic form on his WEBForms account. If this were true, he would have to have taken the one and only copy of the alleged Letter of Intent from Allen Liu to use in transferring the numerous clauses he testified were included in it over to the new agreement. Given Kevin Hien's evidence that he did not retain a copy of the Letter of Intent, he must have returned the original to Allen Liu – again, without making a copy for his files. I find this sequence of events difficult to believe.

Summary of Findings Regarding the Alleged First Offer and Letter of Intent

[357] I accept the evidence of Jeong Lee that the first offer he received from Allen Liu was the September 2011 Offer delivered by Kevin Hien on Allen Liu's behalf on September 26, 2011.

[358] As I have already stated, I find the evidence of Kevin Hien and Allen Liu with respect to the making of the Alleged First Offer incorporated into the Letter of Intent in early September 2011 to be a complete fabrication. A summary of my reasons for making this finding are as follows:

- a) There are no documents to corroborate their story that there was an initial offer to purchase the Brentwood property for \$38.8 million made in early September 2011 or at all.
- b) Kevin Hien's evidence that the Letter of Intent was hand written belies logic. In addition, his evidence from his examination for discovery that he searched for copies of the Letter of Intent on his computer when Allen Liu asked for one in October 2011 is inconsistent with his evidence at trial that the document was hand-written and that he didn't keep a copy. It is possible that the hand-written Letter of Intent story was concocted after Kevin Hien realized, shortly before trial, that his CREA WEBForms account did not contain any record of an electronic version of the Letter of Intent.
- c) Kevin Hien's testimony that after receiving a signed copy of the Letter of Intent from Allen Liu he waited a couple days before he went to present the offer to Jeong Lee and did not call or email him before they met to tell him about this startling good news, is not believable.
- d) Kevin Hien's testimony that he never told any of his Franga Group partners about the alleged \$38.8 million offer for the Brentwood property

because he was concerned that they might try to, in effect, scoop the sale is not is not believable.

- e) Kevin Hien's evidence that after some back and forth with Jeong Lee, which resulted in Jeong Lee marking up the Letter of Intent, he provided the one and only copy of the marked up version of the Letter of Intent to Allen Liu and did not bother to keep a copy is not believable. I do not accept that an experienced realtor working on the largest deal of his life would not make and retain copies of such an important document and preserve notes regarding any negotiations.
- f) Kevin Hien's evidence regarding the use of the one and only copy of the Letter of Intent as a precedent in drafting the September 2011 Offer and then returning it to Allen Liu without making a copy is not credible.
- g) Allen Liu's evidence that he disposed of the Letter of Intent some time between September 28 and early November 2011 is not believable given the obvious significance of the alleged \$38.8 million offer. I find that his testimony that it was not his practice to keep "nullified agreements" to be completely contrary to any reasonable business practice and therefore not credible.
- h) Kevin Hien failure to produce copies of extracts from his notebook for the relevant period of time, September 2011, leads to an inference that such evidence would not assist in proving that there was a negotiation leading to a \$38.8 million offer for the Brentwood property or a renegotiation of that offer-price down to \$28.8 million.
- i) There is no credible evidence explaining why Allen Liu would have initially offered to purchase the Brentwood property only for \$38.8 million in early September 2011 when the evidence establishes that both the Brentwood

and Maple Ridge properties were being marketed together for a combined price of \$39.9 million.

- j) There are no documents or independent evidence supporting Allen Liu's testimony that he started due diligence on the Brentwood property or that he had discussed purchase of the property with Youyi China, in early September 2011. The first communication between Allen Liu and anyone regarding the Brentwood property (other than receiving property information from Kevin Hien on September 13 and 22, 2011) is the email from John Pan with Studio One Architects dated September 23, 2011 – two days before the September 2011 Offer was drafted.
- k) The logical reason for Allen Liu's communication with Studio One on September 23, 2011, is that he first became genuinely interested in the Brentwood property after he received the RM5s zoning information from Kevin Hien on September 22, 2011.
- l) Given my finding that Allen Liu did not communicate with Studio One until September 23, 2011, Allen Liu and Kevin Hien's explanation that Liu abandoned the \$38.8 million offer some time earlier (in early September) because of concerns about a creek on the Brentwood Property is not credible. I consider that this evidence was manufactured after the fact. I do not believe that Allen Liu was aware of any issues regarding a creek on the Brentwood property until at the earliest, September 23, 2011.
- m) There is no credible explanation for Kevin Hien's and Allen Liu's change of the position taken in their pleadings and affidavits, which was that there was a "Prior Contract" made in early September 2011 to purchase the Brentwood property that was subsequently cancelled and renegotiated, to their evidence at discovery and trial, that there was only a \$38.8 million offer and an inchoate letter of intent. In my view, it is likely that this change resulted from their realization (after Jeong Lee swore an affidavit in 2013)

that the False Purchase and Sale Agreement had been drafted on a form which did not exist until November 2011.

- n) There is no documentation of any sort supporting the evidence of Kevin Hien and Allen Liu that there were negotiations back and forth regarding the Letter of Intent prior to the September 2011 Offer being made.
- o) Given that the timing of Allen Liu's first meeting with Kevin Hien, the timing of when he asked Studio One to conduct due diligence regarding the Brentwood property is directly relevant to the question of when the alleged \$38.8 million offer was made. Allen Liu's failure to call John Pan and Audrey Zhao as witnesses at trial justifies an adverse inference that evidence from those two persons would not support his evidence regarding the \$38.8 million offer.
- p) Similarly, with respect to Allen Liu's evidence that he had told Youyi China that he had the Brentwood property under contract in early September, his failure to call any representative from that company, including his friend Mr. Du, also justifies an adverse inference that Mr. Du's evidence would not support this evidence.

[359] With respect to a motive for Allen Liu and Kevin Hien to fabricate evidence with respect to a \$38.8 million offer, although it is not necessary for a motive to be established in order for me to find that they lied about this offer, I will make some comments in this respect.

[360] I believe that Allen Liu fabricated this fantastic story in an effort to justify the creation of the False Purchase and Sale Agreement – which was clearly designed to mislead lenders, investors or assignees. Kevin Hien supported the fabrication because he had to explain why he, as a realtor who should have known better, was intimately involved in the creation of this fraudulent document.

***Summary of Findings Regarding the False Purchase and Sale
Agreement***

[361] As set out in the background section, the False Purchase and Sale Agreement and termination schedule were prepared by Kevin Hien in November 2011 at the request of Allen Liu. The False Purchase and Sale Agreement showed a purchase price for the Brentwood property of \$38.8 million and stated that a \$10 million deposit had been paid.

[362] I make the following findings with respect to the evidence of Allen Liu, Kevin Hien and Jeong Lee on this issue:

- a) Allen Liu's affidavit evidence, sworn in December 2013, that he asked Kevin Hien for a copy of the "Prior Contract" so that he could show Youyi China that he had been successful in negotiating a lower price for the Brentwood Property was false.
- b) Allen Liu's later examination for discovery evidence that the False Purchase and Sale Agreement had been created solely because "the other party [Youyi China] wanted me to provide a \$40 million contract" was false.
- c) Allen Liu's testimony at trial that during a visit to China in early October 2011, Youyi China asked for a copy of "the \$38.8 million contract" was false.
- d) Kevin Hien's testimony at trial that the False Purchase and Sale Agreement was prepared because Allen Liu wanted to demonstrate that he was a good negotiator and, in particular, to show that he had negotiated the price for the Brentwood property down from \$38.8 million to \$28 million was false – at least to the extent that an offer of \$38.8 million was ever actually made.

- e) Allen Liu's evidence that he contacted Kevin Hien from China some time prior to his return to Canada on October 13, 2011, to ask if he could prepare a recreation of the earlier agreement was false. I find that Kevin Hien did not start drafting the False Purchase and Sale Agreement until November 2011 – which is the month printed on the bottom of the form he used to prepare this document.
- f) I find that Allen Liu did provide a copy of the False Purchase and Sale Agreement to Youyi China in late December 2011 and that he probably told Youyi China that the purchase price for the Brentwood property was \$38.8 million.
- g) I find that Allen Liu did not provide Youyi China with a copy of the document purporting to terminate the False Purchase and Sale Agreement. His evidence at trial was that he did not remember if he had done so.
- h) I reject Allen Liu's evidence that he told his friend Shan Jing Du, the CEO of Youyi China, that the actual purchase price for the Brentwood property was \$28.8 million. Again, Allen Liu did not call Mr. Du or any witness from Youyi China to corroborate this evidence. I can only conclude that Purchasers did not do so because their evidence would not support Allen Liu's testimony that they had requested a copy a \$38.8 million offer and that he had told Mr. Du that the actual purchase price for the Brentwood property was \$28.8 million. Allen Liu's credibility has been so badly shaken that I simply can not believe any of his evidence regarding discussions with Youyi China.
- i) I accept Jeong Lee's evidence that he was told that Allen Liu wanted the False Purchase and Sale Agreement to try to demonstrate that he was a good negotiator. I consider it likely that Jeong Lee knew that Allen Liu

intended to use the False Purchase and Sale Agreement to mislead Youyi China.

[363] The alleged *raison d'être* for the preparation of the False Purchase and Sale Agreement is really a house of cards. The foundation of this house of cards has already been eliminated as a result of my finding that the Alleged First Offer and Letter of Intent to purchase the Brentwood property for \$38.8 million never existed.

[364] The explanation of Allen Liu that the False Purchase and Sale Agreement was simply an attempt to memorialize the terms of an earlier offer is clearly false. The upper floors of the house of cards also falls.

[365] Even if an offer to purchase the Brentwood property for \$38.8 million had been made, which I have found is not the case, there is no credible explanation why the False Purchase and Sale Agreement was drafted as a concluded agreement (including being signed and back-dated) or why the fiction was continued with the creation of an equally false termination schedule.

Conclusion Regarding the Intended Unlawful Purposes of the False Purchase and Sale Agreement

[366] The False Purchase and Sale Agreement was intentionally misleading in two material respects. First, it showed a price of \$38.8 million for the Brentwood property, which was \$10 million more than the price set out in the Brentwood Agreement. It also showed that a \$10 million deposit had been made, which was not true.

[367] With respect to the \$10 million deposit, Allen Liu testified at trial that he had no idea why the False Purchase and Sale Agreement contained a reference to a \$10 million deposit. He admitted that even the alleged lost Letter of Intent did not include a deposit for that amount. He suggested that he had not noticed the \$10 million deposit clause in the False Purchase and Sale Agreement, stating only that “I didn’t look at all the specific terms in that document” and “[a]nything before the completion

date had nothing to do with my cooperation with the Chinese side”. He also sought to shift responsibility for the insertion of the misleading \$10 million deposit clause to Kevin Hien. Kevin Hien denied that he was responsible for the \$10 million deposit clause. I do not believe Allen Liu’s evidence with respect to the \$10 million deposit reference in the False Purchase and Sale Agreement and find that he must have instructed Kevin Hien to insert this deposit amount.

[368] The Purchasers contend that the False Purchase and Sale Agreement is a collateral matter unrelated to the enforceability of the Brentwood Agreement. In support of that contention, the Purchasers submit that that Allen Liu did not require a financial contribution from Youyi China in order to close and, therefore, a finding that the False Purchase and Sale Agreement was designed to commit a fraud on Youyi China is not supportable.

[369] The issue of whether Allen Liu expected Youyi China to contribute towards the purchase price for the Brentwood property in the fall of 2011 is relevant to the question of whether the False Purchase and Sale Agreement was intended to be used for an unlawful purpose – being to wrongfully induce Youyi China to contribute more money than was warranted to purchase an interest in the Brentwood property.

[370] Allen Liu’s evidence regarding whether he was counting on Youyi China to contribute towards the purchase price of the Brentwood property changed from the start of this litigation through trial. In his December 2013 affidavit, he swore that after the alleged early September “Prior Contract” had been entered into, he had discussions with a potential Chinese investor about investing in the development of the property. During his examination for discovery, he stated that he intended to use funds from Youyi China to close.

[371] Allen Liu’s testimony at trial, suggesting that he was not relying on a contribution from Youyi China, is not supported by other evidence. In particular, I note the following:

- a) in or about October 2011, Allen Liu incorporated Youyi in Canada, a company with the same name as the potential investor Youyi China;
- b) Allen Liu had a number of meetings with Youyi China in the latter part of 2011 and first half of 2012 with respect to the Brentwood property;
- c) representatives of Youyi China came to British Columbia in June 2012 specifically for the purpose of evaluating an investment in this property and it was only in July 2012 that they formally terminated a joint venture agreement with Allen Liu's company;
- d) Kevin Hien wrote Allen Liu on October 26, 2012, inquiring about his consideration of changing the name of Youyi given that there was "no longer any cooperation with the China Youyi Group"; and
- e) the Purchasers' efforts to obtain the financing necessary to close on the purchase of the Brentwood and Maple Ridge Properties did not start in earnest until August 2012 – after the joint venture agreement with Youyi China was terminated.

[372] I reject Allen Liu's evidence and find that Allen Liu was seeking to secure a contribution towards the purchase price of the Brentwood property from Youyi China until at least July 2012 and perhaps as late as October 2012.

[373] In my view, the logical conclusion to be made is that the False Purchase and Sale Agreement was prepared in order to induce Youyi China to contribute towards the purchase of the Brentwood property based on false information with respect to the purchase price and the amount of the deposit paid by the Purchasers for this property. Accordingly, I find that the False Purchase and Sale Agreement was prepared for an unlawful purpose – being to defraud Youyi China.

[374] I pause to note that there is another possible reason for the preparation of the False Purchase and Sale Agreement which I have considered. It is possible that

Youyi China's Mr. Du was informed that the actual purchase price for the Brentwood property was \$28.8 million and not \$38.8 million and that he requested the preparation of the False Purchase and Sale Agreement to somehow facilitate the movement of more funds than were required out of China to Canada. If this was the case, it would make no difference as the False Purchase and Sale Agreement would still have been prepared for an unlawful purpose – being to evade the currency control laws of China. Again, Mr. Du or another representative of Youyi China who could have provided relevant evidence were not called to testify at trial and accordingly, it is not possible to determine if this was the reason that the False Purchase and Sale Agreement was created.

Were the Purchase Agreements or Agreements or Documents Related to the Purchase Agreements Used to Mislead lenders, appraisers, investors and potential assignees?

[375] The Vendors submit that the evidence establishes that the Brentwood Agreement and ancillary documents and the False Purchase and Sale Agreement were not simply designed to be used by the Purchasers to mislead a number of other parties including appraisers, lenders and joint venture partners or assignees, but that they were actually used for this purpose. They submit that this constitutes unlawful conduct which taints the transaction and further justifies a finding that the Purchase Agreements are not enforceable. I agree.

Incorrect Purchase Price Information Used to Mislead Appraisers

[376] The Vendors contend that Eric Pan, who prepared both the December 2011 Profitability Report and the June 2012 Appraisal, was provided with an incorrect \$38.8 million purchase price by Allen Liu's architect, Jim Wong with Studio One, in December 2011 and that Allen Liu repeated this misinformation during a meeting with representatives from Youyi China at Studio One's offices in June 2012.

[377] It is not contested that in December 2011 Eric Pan was told by Jim Wong with Studio One that the Brentwood property had been purchased for \$38.8 million.

[378] Allen Liu denied that he confirmed to Eric Pan that the purchase price for the Brentwood property was \$38.8 million during the June 2012 meeting at Studio One's offices. He testified that he could not recall if he had even been at the June 2012 meeting. I find it hard to believe that Allen Liu would not have been at this meeting, and would have sent only his employee Francis Zheng, given that his friend Mr. Du was in Vancouver specifically to investigate participating in what would be a very expensive development of the Brentwood property. I accept Eric Pan's evidence that Allen Liu was at this meeting and that at the meeting he falsely confirmed that the purchase price for the Brentwood property was \$38.8 million.

[379] During his direct examination at trial, Francis Zheng testified that after the Purchasers had received Eric Pan's June 2012 Appraisal (which referred to the incorrect purchase price of \$38.8 million), he called Eric Pan at Allen Liu's request to let him know that the actual purchase price was lower and that Eric Pan was shocked. Eric Pan denied that this conversation ever took place. I do not accept Francis Zheng's evidence that he called Eric Pan sometime after June 2012 and told him that the purchase price for the Brentwood property was not \$38.8 million.

[380] The evidence establishes that Eric Pan first became aware that the purchase price for the Brentwood property was not \$38.8 million after he received a telephone call from the president of Realtech in November 2012 advising him that the price was actually \$28.8 million. Eric Pan testified that he did not understand why he and Realtech had been provided with different pricing information and that this resulted in further inquiries. Within a few days, Allen Liu's mortgage broker Paul Kang called and advised him that the price for the Brentwood property had been negotiated down from \$38.8 million to \$28.8 million. This was, of course, not true. The evidence establishes that Paul Kang was provided this false story regarding a renegotiated purchase price by Francis Zheng.

[381] Eric Pan relied, at least in part, on incorrect information provided to him regarding a \$38.8 million purchase price for Brentwood property in completing the

December 2011 Profitability Report and the June 2011 Appraisal. Accordingly, the basis for his profitability assessment and appraisal was incorrect. Eric Pan was also not provided with a copy of the Zoning Warranty, which may also have influenced his estimate of the market value of the Brentwood property.

[382] I find that Allen Liu or his employee Francis Zheng either knew or should have known that Eric Pan was either misinformed or had not been provided with complete information regarding the sale price and development restriction on the Brentwood property and therefore knew that the Pan reports were flawed. Nonetheless, Allen Liu or his agents used these reports in its efforts to obtain financing and to attract potential partners, investors or assignees.

Documents Used to Mislead Potential Lenders

[383] The Vendors submit that Allen Liu intentionally failed to provide a number of parties (including Tina Mu who was assisting him with financing arrangements from Canadian Western Bank and Paul Kang who was engaged to assist with obtaining financing from Trez and Realtech) with the Rent Reduction Schedule or the Lease Addendum because he did not want lenders to know that the lease-back rent was approximately \$500,000 lower than was shown on the main pages of the Brentwood Agreement and the Brentwood Lease.

[384] The evidence establishes that Tina Mu was not provided with a copy of the Rent Reduction Schedule or the Lease Addendum and was never told about the actual rent for the Brentwood property. I do not believe that the Rent Reduction Schedule or Lease Addendum were ever provided to CWB or Realtech. Trez was not provided with a copy of the Lease Addendum from the Purchasers until December 6, 2012, which was two days after the Purchasers' solicitors had received the Termination Letter accusing the Purchasers of mortgage fraud.

[385] At trial, Allen Liu denied that the Lease Addendum was only provided to Trez Capital on December 6 after he became aware that the Vendors had alleged

mortgage fraud as a basis for terminating the Purchase Agreements and denied that this was done in an effort to, in my words, sanitize the inappropriate withholding of complete information regarding the lease-back rent to be earned from the Brentwood property. I do not find Allen Liu's evidence in this respect to be credible.

[386] I conclude that the Rent Reduction Schedule and Lease Addendum were intentionally withheld by Allen Liu or his employee Frances Zheng from the Purchasers' mortgage brokers Tina Mu and Paul Kang and as a result from potential lenders. I conclude that this was done to create the impression that the lease-back rent the Purchasers were to receive from the Vendors for the Brentwood property was higher than it was. It was only after the Purchasers became aware that they were being accused of misleading lenders by the Vendors on December 4, 2012, that they provided Trez with the correct information regarding the lease-back rent for the Brentwood property.

Documents Used to Mislead Potential Partners and Assignees

[387] I have already found that Allen Liu provided the False Purchase and Sale Agreement to Youyi China to mislead them with respect to the true purchase price of and deposit made for, the Brentwood property. I also find that the Purchasers provided false or misleading information to their agents – who in turn passed this information on to potential partners or assignees.

[388] The evidence establishes that Susan Wu, a realtor, was working with Allen Liu regarding a potential assignment of the Brentwood Agreement or a joint venture arrangement. In September 2012, Allen Liu authorized Susan Wu to provide a copy of the False Purchase and Sale Agreement to a potential assignee/joint venture partner and did not advise her at any time that the actual purchase price for the Brentwood property was \$28.8 million and not \$38.8 million. His explanation at trial that he only provided the False Purchase and Sale Agreement to allow Susan Wu to extract certain property information does not ring true. Why did he not simply provide her with the Brentwood Agreement?

[389] I do not accept Allen Liu's evidence that Susan Wu was aware that the False Purchase and Sale Agreement had been terminated or "nullified" or was told the actual purchase price for the Brentwood property was \$28.8 million. I accept Ms. Wu's evidence that she only became aware that the purchase price for Brentwood was \$28.8 million, at or shortly before trial.

[390] The evidence establishes that Allen Liu did not advise that the purchase price for the Brentwood property was not \$38.8 million during any meetings with potential assignees or joint venture partners. Only one of the potential assignees/joint venture partners, LedMac, was notified through correspondence from the Purchasers' counsel sent November 15, 2012, that the true purchase price for this property was \$28.8 million after they had repeatedly asked the Purchasers to provide a copy of the Brentwood Agreement.

[391] Allen Liu's evidence at trial was that he never seriously considered assigning the Brentwood agreement and that Susan Wu was acting on her own initiative to bring him assignment proposals. I do not accept Allen Liu's evidence in this respect which I find is inconsistent with both the evidence of Susan Wu and with the documentary evidence. As set out in the background facts, the Purchasers were clearly engaged in assignment discussions with both Peter Balomenos' client and with LedMac through Susan Wu.

[392] The Vendors submit that it is not clear whether Allen Liu ever had a genuine intention to assign the Brentwood Agreement or to enter into a joint venture agreement prior to the closing of the Brentwood property sale. They concede that he could not have expected to conclude a deal with LedMac based on the assignment offer made by LedMac in October 2012, as that offer was based on incorrect pricing and rental revenue information, which LedMac would have certainly discovered.

[393] I agree with the submissions of the Vendors that Allen Liu was likely trying to keep "all his balls in the air" in that he was pursuing a number of options simultaneously, especially after Youyi China withdrew its interest in the Brentwood

property some time around July 2012. These options included obtaining traditional financing from banks, secondary financing through Trez or Realtech, seeking contribution from a joint venture partner or potentially a straight-out assignment.

[394] Allen Liu's evidence that he was not considering an assignment but only wanted to find a joint venture partner was false and may have been provided to mislead the court with respect to some of the facts relevant to the Purchasers' claim in this proceeding for specific performance. In my view, it is more likely than not that Allen Liu sought to distance himself from his efforts to investigate an assignment as this conflicted with his evidence at trial regarding his interest in developing the Brentwood property.

Related Illegal Actions

[395] The Vendors contend that the Purchasers carried out a number of related actions designed to deceive lenders with respect to their earnings, assets and the amount of the deposit paid on the Brentwood property – all of which was designed to assist in their efforts to obtain financing for the purchase of the Brentwood and Maple Ridge properties. In addition, the Vendors contend that the Purchasers intentionally withheld the Zoning Warranty from potential lenders, joint venture partners or assignees to mislead them with respect to the development potential of the Brentwood property and, therefore, its value.

[396] The Purchasers contend that these issues are collateral attacks on the character and credibility of the witnesses that are not relevant to the matters which must be legally proved for the determination of this case. They submit, relying on the decision of the British Columbia Court of Appeal in *Dahl v. South Coast British Columbia Transportation Authority*, 2018 BCCA 184, that it would be a legal error to consider evidence with respect to the other actions. In *Dahl* at para. 15, the Court of Appeal found that it was an error to admit evidence regarding collateral facts solely for the purpose of impugning credibility and that to be admissible collateral facts must be relevant to a substantive or material issue in the case.

[397] In my view, some of the evidence concerning these related actions is relevant to the material issue of whether the transaction was intended to be used for an unlawful purpose when viewed as a whole. The material issues in this case are not so narrow as to constrain the evidence to only that related to the Purchase Agreements themselves. Accordingly, I consider that the evidence presented regarding the related illegal actions does not offend the collateral fact rule described in *Dahl*.

[398] I also agree with the Vendors that as the admissibility of the relevant evidence was not raised by the purchasers during the trial, it would be unfairly prejudicial to exclude this evidence now as the Vendors may have pursued different lines of questioning or sought to adduce different evidence if an objection had been raised.

Deception regarding Rainflower Restaurant lease and restaurant management company share sale

[399] The Vendors contend that the Purchasers deliberately provided false information to potential lenders, including Trez and Realtech, regarding the rental revenue earned by Allen Liu's company DHI from leasing its No. 3 Road property, which is the location of the Rainflower Restaurant. They say that this was accomplished through a sham share sale transaction in November 6, 2012, and a sham lease agreement dated November 15, 2012.

[400] The Vendors say that the purpose of these sham agreements was to give the false impression that, first, Allen Liu had sold the Rainflower Restaurant business to an arms-length third party and, second, that this company had entered a lease with Allen Liu's company for the No. 3 Road property under which they would pay annual rent of \$480,000 per year. The Vendors say that these alleged arrangements, including rental income of \$480,000 per year, were a fiction.

[401] I find on the evidence, that the Vendors' theory is probably correct. Nonetheless, in my view these deceptions are collateral to the transaction at issue in this litigation. Although they involve steps taken by the Purchasers to obtain

necessary funds to purchase the Brentwood property, they do not involve the use of or reliance on the Purchase Agreements or related agreements. Accordingly, I do not find that they taints the Purchase Agreements in a way that it makes those agreements unenforceable.

Deception Regarding Cash-on-Hand

[402] The Vendors submit that the Purchasers deliberately misrepresented the amount of cash they had on hand in order to induce CWB to provide financing. In particular, the Vendors submit that in November 2012, the Purchasers essentially “kited” funds between different accounts to create the false impression that Allen Liu had approximately \$12 million in cash-on-hand. CWB had agreed to lend \$1.6 million for purchase of the Maple Ridge Property but required that Allen Liu (or the Purchasers) demonstrate that he had \$12 million in cash as a condition of financing.

[403] I find that in a bold and frankly amateurish scheme, Allen Liu or agents acting on his behalf, transferred funds between bank accounts for the purpose of misleading CWB into believing that Allen Liu had over \$12 million deposited in Canadian banks when he did not.

[404] I do not believe Allen Liu’s testimony that he was unaware that his assistant Frances Zheng had been providing misleading bank balance information to the Purchasers’ mortgage broker Tina Mu. Francis Zheng did not have the authority to carry out the inter-bank transfers necessary to complete this scheme which I do not believe could have been done without Allen Liu’s direct involvement.

[405] Although this scheme is reprehensible in my view, I find that it is collateral to the lawfulness of the transaction at issue. Accordingly, I do not find that it taints the Purchase Agreements in a way that it makes those agreements unenforceable.

False Deposit Scheme

[406] The Vendors contend that in the remarkably brazen False Deposit Scheme, in which Kevin Hien was intimately involved, the Purchasers planned to mislead lenders and others with respect to the amount of equity that they were able to contribute towards the purchase of the Brentwood property. In particular the Vendors say that Purchasers attempted to carry out steps to create the false impression that Allen Liu had paid an additional \$8 million deposit toward the purchase price for this property in an effort to support their applications for financing.

[407] Earlier in my reasons, I referenced relevant email correspondence from Kevin Hien to Jeong Lee dated November 15 and 21, 2012, setting out the procedure and rationale for the False Deposit Scheme (see paragraph 72 of these reasons).

[408] Allen Liu's evidence regarding the reason for False Deposit Scheme has changed over time. In correspondence from his counsel dated December 7, 2012, sent in response to the Termination Letter, Purchasers' counsel stated that the \$8 million deposit had nothing to do with financing and resulted from an attempt by Kevin Hien to increase the deposits paid by the Purchasers to firm up the deal. In their Response to Counterclaim, the Purchasers plead that in or about October 2012, Jeong Lee requested an increase in the deposits paid for the Maple Ridge and Brentwood properties. In his December 2013 affidavit, Allen Liu swore that he and Jeong Lee had come to an agreement regarding a modified VTB arrangement under which the \$8 million would be paid by Allen Liu and loaned back to him by Jeong Lee and that they had toasted to this structure at a dinner meeting at the Rainflower restaurant in Richmond. None of this was true. At trial, the Purchasers conceded that there was no agreement with respect to a modified VTB arrangement involving an \$8 million deposit and vendor loan but rather this was something that the parties had simply discussed.

[409] I find that the Purchasers had concocted the False Deposit Scheme in or about November 2012, which was intended to work as follows: the Purchasers would provide a \$4 million payment to the Vendors; the Vendors would provide a

“receipt” for \$4 million and then return the \$4 million amount to the Purchasers; using the funds they had just received back, the Purchasers would pay the Vendors another \$4 million in exchange for another \$4 million receipt; the Vendors would again return the \$4 million back to the Purchasers; and, after the Purchasers obtained financing to purchase of the Brentwood property by relying in part on the fictitious additional \$8 million in equity, the Vendor would be provided with \$8 million in mortgage security over other properties owned by Allen Liu or his companies.

[410] The November 15 and 21, 2012 emails of Kevin Hien make it clear that Allen Liu intended to carry out the False Deposit Scheme in order to mislead lenders into believing that he had contributed \$8 million more in equity towards the purchase of the Brentwood property than he in fact had. In total, it would have allowed the Purchasers to represent that they had contributed a total of \$12 million in equity toward the purchase of the Brentwood and Maple Ridge properties, when they had not done so in fact. This scheme was never put into effect only because Jeong Lee refused to go along with it and ultimately sought to terminate the Purchase Agreements.

[411] In addition, although the False Deposit Scheme was not carried out, the evidence establishes that other parties were provided incorrect information regarding the payment of an \$8 million deposit for the Brentwood Property by Francis Zheng, which I consider must have been done on the instructions of Allen Liu. On November 15, 2012, Purchasers’ legal counsel advised the potential joint-venture partner/assignee LedMac that an \$8 million deposit had been paid in respect of the Brentwood property. Allen Liu’s mortgage broker, Paul Kang, was told and advised the potential lender Realtech that an \$8 million deposit had been paid.

[412] Unlike the efforts to mislead lenders by providing false information regarding the No. 3 Road Lease and the amount of cash Allen Liu had on hand, I consider that the False Deposit Scheme arose from or is connected to the contractual obligations between the Purchasers and Vendors in the Brentwood Agreement. It was an

attempt by the Purchasers to have Jeong Lee participate in this scheme, ostensibly in satisfaction of the Vendors' commitment to provide vendor financing (as set out in the Brentwood Agreement and Letters of Commitment concerning vendor financing) and therefore forms part of the transaction at issue. As is clearly set out in Kevin Hien's emails, this scheme was designed to hide the fact that the Purchasers planned to obtain \$8 million in vendor financing and to mask the fact that they were providing second mortgages on some of their other properties to the Vendors – which if known, may have impacted their ability to obtain financing. The scheme was unlawful and taints the entire transaction.

[413] Even if I am wrong and the False Deposit Scheme does not give rise to a defence of unlawful purposes, Allen Liu's evidence on the scheme has an impact on my overall assessment of his credibility. My additional findings with respect to some of Allen Liu's evidence on the false deposit scheme are as follows:

- a) I do not accept Allen Liu's evidence that he did not provide Kevin Hien with the information set out in Hien's emails dated November 15 and 21, 2012 setting out the intended deception of Allen Liu's lenders or did not discuss his financing arrangements with Hien (as Allen Liu alleged). It is simply not credible that Kevin Hien would have concocted the detailed rationale for the False Deposit Scheme on his own, as was suggested by Allen Liu at trial. The documentary evidence establishes that Kevin Hien was in discussions with Allen Liu regarding the deposit scheme during this time. I find that Allen Liu was seeking to deflect criticism for what was clearly a scheme designed to deceive lenders.
- b) Allen Liu's evidence in his affidavit sworn December 10, 2013, that he had provided two deposit cheques (totalling \$8 million) to Kevin Hien to be provided one at a time to Jeong Lee was false. The only documentary evidence at trial is that one bank draft for \$4 million was prepared by the Purchasers' bank, which was never accepted by Jeong Lee. As well, the

\$4 million bank draft is dated November 19, 2012, which was four days after Allen Liu's solicitors informed LedMac that an \$8 million deposit had been paid. Allen Liu's evidence initially suggesting that he had written two cheques, which he later changed to having provided authorizations to his staff to issue deposit cheques to Jeong Lee, was false. I simply do not believe any of Allen Liu's evidence with respect to the preparation of deposit cheques. I find that the only "cheque" prepared was actually the \$4 million draft provided by Allen Liu's bank.

- c) Allen Liu's justification regarding the advice provided either by him or through his employee Francis Zheng to his solicitors and Paul Kang, that an \$8 million deposit had been paid for the Brentwood property (which resulted in incorrect information being provided to LedMac and Realtech) is simply not believable. His testimony that he had authorized the payment of \$8 million and therefore, from his perspective, considered that amount had been paid, is not credible. I find that Allen Liu and Francis Zheng knew that an \$8 million deposit had not been paid and intentionally provided false advice to their solicitors and mortgage broker. This was likely done in an effort to obtain a higher assignment price for the Brentwood property from LedMac or in an effort to secure financing from Paul Kang.

Concealment of RM5s Zoning

[414] The Vendors submit that the Purchasers deliberately concealed the Zoning Warranty by not including it in copies of the Brentwood Contract provided to mortgage brokers and realtors in an effort to keep the existence of the Zoning Warranty from potential lenders, assignees and joint venture partners. The Vendors submit that the reason this was done was to maintain, in the eyes of those parties, a valuation for the Brentwood property based on development to the full 5.0 FAR potential under RM5s zoning.

[415] The evidence establishes that the mortgage broker Tina Mu was not provided with the Zoning Warranty and therefore did not pass it on to CWB. Similarly, the realtor Susan Wu was not provided with this document and did not pass it on to LedMac or the client of Peter Balomenos. The evidence of representatives of LedMac, Trez and Realtech confirms that those companies were never told about the Zoning Warranty.

[416] Although I accept that the Zoning Warranty was likely intentionally withheld by the Purchasers from parties who would clearly have had an interest in seeing it, in my view, this is collateral to the enforceability of the Purchase Agreements. Unlike the Rent Reduction Schedule and the Lease Addendum for which there is no logical reason for their preparation as separate schedules to the Brentwood Agreement, this is not the case with the Zoning Warranty. It was prepared in January 2012 at Jeong Lee's request after he discovered the Brentwood property's RM5s zoning potential. Accordingly, its concealment from third parties does not by itself taint the Purchase Agreements.

Conclusion on Unlawful Purposes Defence

[417] The Purchasers had a plan to secure the necessary lender financing and equity contributions required to purchase the Brentwood and Maple Ridge properties. This included providing misleading information concerning the lease-back revenue to be obtained from the Vendors and the equity contribution made by the Purchasers towards the purchase price for the Brentwood property in order to secure as much financing as possible from lenders. It also included providing misleading information to potential joint venture partners or assignees with respect to the purchase price and deposit for the Brentwood property in an effort to obtain their commitment to contribute more towards the purchase price of the property or to pay more for an assignment of the Brentwood Agreement than was warranted.

[418] The plan to deceive lenders regarding the lease-back revenue to be earned from the Brentwood property was carried out through the purposeful drafting of the

Rent Reduction Schedule to the Brentwood Agreement and the Lease Addendum to the Brentwood Lease which allowed the Purchasers to create the impression that more rent was to be earned from the leasing of that property than was the case. The False Deposit Scheme was an attempt to create the false impression that the Purchasers had contributed \$8 million more in equity than they actually had and to mask their plan to place second mortgages on their other properties from lenders. The False Purchase and Sale Agreement was used to deceive a number of parties, including appraisers, mortgage brokers, lenders and potential joint venture partners, with respect to the value of the Brentwood Property and the amount of the deposit paid on it by the Purchasers.

[419] As I have already said, it is appropriate to look at a transaction as a whole rather than focusing on the legality of individual component contracts. In this case, the Brentwood and Maple Ridge Agreements are part of a transaction which includes both the sale of the Brentwood and Maple Ridge properties to the Purchasers and the lease of those properties back to the Vendors. Accordingly, there is no doubt that transaction includes not only the Brentwood Agreement and Rent Reduction Schedule and the Maple Ridge Agreement, but also the Brentwood and Maple Ridge Leases and the Lease Addendum. All of these agreements are interrelated and each of them is an essential part of the overall transaction.

[420] I have already found that the Rent Reduction Schedule and the Lease Addendum were intentionally drafted as separate documents in order to mislead the Purchasers' lenders with respect to the lease-back rent to be paid for the Brentwood Property in order to obtain more financing for the purchase of the Brentwood property than what might otherwise have been provided had the truth been known. I find that this constitutes an unlawful purpose, being an intention to commit the tort of deceit, which taints the transaction.

[421] The False Deposit Scheme is either part of the transaction as a planned execution of the Vendors' commitment in the Purchase Agreements to provide

vendor financing or, alternatively, forms part of the consideration for the transaction. Either way, this scheme was created to deceive lenders, which constitutes an unlawful purpose and taints the transaction. This also makes the Purchase Agreements unenforceable. It does not matter that this scheme was never put into effect.

[422] With respect to the False Purchase and Sale Agreement, it was not an agreement at all. It was a fraudulent document designed to deceive a number of parties, including appraisers, mortgage brokers and potential lenders and joint venture partners and assignees. With Kevin Hien's assistance, Allen Liu asked Jeong Lee, and Jeong Lee agreed, to make the false representations of fact set out in the False Purchase and Sale Agreement. Those false representations included misstating that the purchase price for the Brentwood property was \$38.8 million, \$10 million higher than it actually was, and misstating that deposit of \$10 million dollars had been paid for the property.

[423] The request in the fall of 2011 that Jeong Lee sign the False Purchase and Sale Agreement was made prior to removal of the Purchasers' conditions which included a very broad right for the Purchasers to walk away from the deal if they did not obtain satisfactory financing. Jeong Lee may have been concerned that if he did not sign this fraudulent document that Allen Liu would walk away from the deal. In any case, I am satisfied that Jeong Lee at least knew that the False Purchase and Sale Agreement was intended to be used by Allen Liu to mislead a potential Chinese investor, Youyi China, with respect to the negotiations leading to the conclusion of the Brentwood Agreement. He likely knew or should have known that Allen Liu intended to misrepresent that the purchase price agreed upon for the Brentwood property was \$38.8 million and that a \$10 million deposit had been paid – when no such agreement or deposit ever existed – in order to assist Allen Liu in inducing Youyi China to invest in the deal.

[424] Although Jeong Lee may not have been a completely innocent participant in this intended fraud, the authorities, including the decision in *Letkeman*, make it clear that his participation in this scheme does not prevent the Vendors from relying on the unlawful purposes defense.

[425] The False Purchase and Sale Agreement was part of the scaffolding supporting the transaction as a whole and therefore part of the transaction's structure. That is, the act of making the false representations set out in the False Purchase and Sale Agreement forms part of the consideration supporting the transaction and therefore makes the Purchase Agreements unenforceable. Alternatively, even I did not find that the False Purchase and Sale Agreement is part of the transaction itself, it was a part of a brazen effort to use the transaction for an unlawful purpose and therefore taints the transaction.

[426] For the reasons set out above, I find that the Purchase Agreements were part of a transaction intended to be used for unlawful purposes or otherwise tainted by illegality and therefore for reasons of public policy decline to enforce them as against the Vendors. In my view, enforcing these agreements would be harmful to the integrity of the legal system.

Breach of the Duty of Honest Performance by the Purchasers

[427] Given my finding that the Purchase Agreements are not enforceable, it is not necessary nor do I consider it appropriate that I provide reasons with respect to whether the Purchasers breached a duty of honest performance owing to the Vendors.

The Purchasers' Claim for Specific Performance

[428] The remedy of specific performance only arises if the underlying contracts are themselves enforceable. Given my decision not to enforce the Purchase Agreements, it is not necessary nor do I consider it appropriate that I provide reasons in this respect.

The Defendants' Counterclaims

[429] The Vendors claim against the Hien parties for conspiracy, breach of fiduciary duty, breach of contract and misrepresentation. In addition, the Vendors seek punitive damages against the Hien parties for what they contend was their high handed conduct consisting of: an utter disregard for the interests of the Vendors; their active participation in devising contractual provisions intended to deceive the Vendors regarding the Brentwood property's RM5s zoning potential; and falsification of evidence.

[430] The Vendors contend that the Liu parties (that is Allen Liu, Pacific Fortuna and Pacific Success) as co-conspirators of Kevin Hien in the breach of his fiduciary duty to the Vendors, are jointly and severally liable for any award of aggravated and punitive damages awarded against the Hien parties. As well, the Vendors claim that Franga Holdings and Anken should be required to pay punitive damages as a result of their participation in a scheme with Kevin Hien to steal commissions as part of the overall conspiracy to harm the Vendors.

[431] I have already dismissed the Vendors' claim with respect to the alleged conspiracy between Kevin Hien and the Purchasers to wrongfully withhold information from the Vendors about the RM5s zoning potential for the Brentwood property and thereby prevent the Vendors from learning about the property's true value before they agreed to sell it for \$28.8 million. With respect to the alleged scheme to divert commissions away from members of the Franga Group, as I have already said, I am unable to determine whether the scheme was intended to result in commissions being diverted to Allen Liu or to Kevin Hien. In any event, no commissions have been paid and none will be paid as a result of my finding that the Purchase Agreements are not enforceable. This dispenses with the claims for damages and aggravated damages against the Liu parties, Anken and Franga Holdings and against the Hien parties for conspiracy.

[432] What remains to be decided are the Vendors' claims against the Hien parties for breach of fiduciary duty and breach of contract, misrepresentation and the additional claim for aggravated and punitive damages.

Counterclaims Against Kevin Hien and Amex Sunrich Realty

[433] I have already found that the Hien parties had a fiduciary duty and a contractual obligation to the Vendors, the latter pursuant to the express terms of the Limited Dual Agency Agreement requiring the Hien parties to provide the Vendors with the same RM5s zoning information provided to the Purchasers, both of which were breached.

[434] The Hien parties do not dispute that a failure to provide material information in breach of an established duty can amount to negligent misrepresentation. Information regarding the Brentwood property's RM5s zoning potential was material and this information was not provided to the Vendors. This is not sufficient on its own to ground a claim in negligent misrepresentation. As set out by the Supreme Court of Canada in *Queens v. Cognos*, [1993] 1 S.C.R. 87 at 110, it is necessary to prove negligent misrepresentation by also demonstrating that the representee reasonably relied upon the statement (or omission) of the representor and that the representee sustained damage as a result.

[435] The Vendors also appear to be arguing, although it is not entirely clear from their submissions, that Kevin Hien misrepresented that the September 2011 Offer to purchase the Brentwood and Maple Ridge properties for \$32 million (\$28.8 million for the Brentwood property) was for a "good price" and above market value, when in fact it was not. Based on subsequent events, including the December 2011 unsolicited offer to purchase for \$27.5 million, Vanessa Fenton's retrospective appraisal of \$30 million, Katherine Jones' \$38 million appraisal completed in January 2012, the Eric Pan appraisal in June 2012 of \$38.8 million and the various assignment offers received by Allen Liu of between \$35 and \$39.6 million in mid to

late 2012, it appears that the fair market value of the Brentwood property was more than \$28.8 million in October 2011.

[436] No one, including Jeong Lee, Kevin Hien or other members of the Franga Group, undertook a market value assessment of the Brentwood property in the fall of 2011. There is little evidence establishing what Kevin Hien and other members of the Franga Group thought the Brentwood property was worth at that time. The only evidence I am aware of is the July 2011 email from Neil Wong in which he provided zoning information for the property to his Franga Group colleagues and suggested that the Brentwood and Maple Ridge properties might be worth more than \$39.9 million.

[437] Although I accept that Kevin Hien told Jeong Lee that \$28.8 million was a good price for the Brentwood property, I am not satisfied that Kevin Hien knew or should have known that the property was worth more. Therefore, I am unable to conclude that his advice to Jeong Lee that \$28.8 million was a good price constitutes a fraudulent or negligent misrepresentation.

[438] Even if I am wrong with respect to whether Kevin Hien fraudulently or negligently misrepresented the market value of the Brentwood property to Jeong Lee, given my finding that the Purchase Agreements are not enforceable (which will result in the Brentwood property remaining with the Vendors) and the evidence that as of July 2017, the market value of the property had increased to approximately \$76 million, I do not find that the Vendors have suffered a loss. The same conclusion arises in respect of the negligent misrepresentation regarding RM5s zoning. In fact, the Vendors will likely benefit significantly as a result of the dramatic increase in the value of the Brentwood property since September of 2011.

[439] I was provided with no evidence or argument that the Vendors would somehow be in a better financial position now, had they known about the RM5s zoning potential in October 2011, and sought to sell the Brentwood property for more than \$28.8 million at that time.

[440] In the circumstances, I find that it is appropriate to award nominal damages to the Vendors for the Hien parties' breaches of their fiduciary duty and contractual obligations to them – which I assess at \$1. This does not include an award for aggravated or punitive damages, which I will address below.

Aggravated and Punitive Damages

[441] The Vendors rely upon the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, including the following principles set out in that decision:

- Punitive damages are awarded against a defendant in exceptional cases for malicious, oppressive and high handed conduct that offends the court's sense of decency;
- The general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (the means by which the jury or judge expresses its outrage at the egregious conduct);
- The primary vehicle for punishment is the criminal law and punitive damages should be exceptional;
- If punishment has been imposed by a criminal court, the judge or jury is to treat that as another fact, albeit an important one;
- A court should relate the facts of a particular case to the underlying purpose of punitive damages and ask itself how, in particular, an award would further one or more of the objectives of the law;
- It is rational for a court to use punitive damages to relieve profits;
- Formulaic approaches such as ratios or caps are not helpful; and
- If and only if all other damages are insufficient to meet the objectives, shall punitive damages be awarded.

[442] In further reliance on the factors to be considered in determining level of blameworthiness set out in *Whiten*, the Vendors contend that the following conduct of the Hien parties gives rise to an award of punitive damages:

- their conduct was oppressive and high handed that offends the courts sense of decency;

- their conduct was planned and deliberate and was motivated by greed with no regard to the interests of the Vendors;
- their conduct persisted over a long period of time; that Kevin Hien tried to conceal his misconduct; and
- that Kevin Hien was fully aware of his misconduct.

[443] Given my reasons above with respect to conspiracy, the focus of my assessment is whether the Hien parties' failure to provide the RM5s zoning information to the Vendors is sufficiently egregious to justify an award of punitive damages.

[444] Punitive damages are awarded in only exceptional cases and there must be some evidentiary basis for determining that the wrongdoer acted maliciously or oppressively. A power differential or other circumstances under which the claimant was more easily victimized may assist in determining whether the wrongdoer's conduct was high-handed. Although deterrence of bad behaviour is a factor to be considered in determining an award of punitive damages, another important consideration is the principle of proportionality – which includes an assessment of the advantage wrongfully gained by the wrongdoer.

[445] I am not satisfied that there is sufficient evidence to allow me to determine that the Hien defendants acted maliciously by failing to disclose the RM5s zoning potential to the Vendors. Other words are more appropriate to describe their conduct including that they acted selfishly, foolishly and negligently. I do not consider that their conduct qualifies as oppressive or high handed. Although Kevin Hien did not tell Jeong Lee after Lee reached out to him in December 2011 that he knew about the RM5s zoning potential for the Brentwood property prior to the execution of the Purchase Agreements, I do not find that he sought to cover up his failure. His silence and even the negotiation of the Zoning Warranty does not, in my view, constitute a cover-up.

[446] It is not appropriate to include a consideration of Kevin Hien's conduct after commencement of this litigation in an evaluation of blameworthy conduct giving rise to an award of punitive damages. Kevin Hien's conduct after the litigation commenced is certainly blameworthy in some respects, but the Vendors' remedy for such conduct is an increased cost award.

[447] I expect that Kevin Hien's reputation as a realtor is likely already in tatters as a result of the events leading up to and during this litigation. I do not consider that the objectives set out in *Whiten* require a punitive damages award against the Hien defendants. Kevin Hien, other members of the Franga Group and Candy Chen will receive no fees or commissions from the sale of the Brentwood and Maple Ridge properties to the Purchasers given my finding that the Purchase Agreements are not enforceable. In my view, that is punishment enough.

Conclusion and Summary

[448] As a result of my finding that the Brentwood and the Maple Ridge Agreements are part of a transaction intended to be used for unlawful purposes or are otherwise tainted by illegality and are not enforceable for reasons of public policy, the Purchasers' claim for specific performance of the Brentwood and the Maple Ridge Agreements or for damages in lieu of specific performance is dismissed.

[449] The issue of whether the deposits paid by the Purchasers to the Vendors pursuant to the Brentwood and Maple Ridge Agreements should be forfeited to the Vendors was not argued at trial. If any party wishes to speak to this issue they are at liberty to seek a further hearing before me, to be set for no more than one-half of one day.

[450] The Vendors' counterclaim against the Hien parties for breach of fiduciary duty and breach of contract is allowed and I award damages to the Vendors in the amount of \$1. The Vendors' claim against the Hien parties for misrepresentation is dismissed.

[451] The Vendors' counterclaim against the Hien parties, the Liu parties, Franga Holdings Ltd. and Anken International Investment Corp. for damages for conspiracy and for aggravated and punitive damages is dismissed.

[452] The Vendors are awarded their costs in respect of the claims advanced by the Purchasers. Additionally, I award the Vendors costs in respect of their counterclaim against the Hien parties. I decline to order costs to any party in respect of the balance of the Vendors' counterclaims.

[453] The parties entitled to and liable for costs are at liberty to speak to them at a date to be scheduled upon the request of the parties.

"Mayer J."