IN THE SUPREME COURT OF NEW ZEALAND

SC 23/2008

BETWEEN **MARK MONCRIEFF STEVENS, DEBORAH RUTH STEVENS and MELVA BEATRICE WALKER (as Trustees)**

Appellants

AND **PREMIUM REAL ESTATE LIMITED**

Respondent

Hearing 13 November 2008

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Gault J

Counsel W Akel and N M Alley for Appellant
M A Gilbert SC and P J Napier for Respondent

CIVIL APPEAL

10.00am

Akel Yes may it please Your Honours I appear with Miss Natasha Alley for the appellants, Mr & Mrs Stevens.

Elias CJ Thank you Mr Akel, Miss Alley.

Gilbert Yes may it please Your Honours, I appear with Mr Napier for the respondent Premium.

Elias CJ Thank you Mr Gilbert, Mr Napier. Now Mr Gilbert are you going to start with your cross-appeal?

Gilbert Yes.

Elias CJ Logically comes first.

Gilbert Yes thank you. I thought it might be helpful rather than go through the submissions that Your Honours will probably have considered to endeavour to encapsulate the cross-appeal as succinctly as I can, and what I've done and propose to hand up if it's convenient to you, is a very succinct 5-page summary of the essence of the case for Premium on its cross-appeal. Now if that's likely to be helpful that's how I propose to advance it.

Elias CJ Yes that would be helpful thank you. I don't mean this as a criticism but it did occur to me that the submissions for both parties were really rather tediously prolix in repeating great chunks out of the judgments which of course we read and also the facts. The facts seemed to sort of go on and on in big statements, so a succinct statement would be appreciated thank you.

Gilbert Perhaps if I can say just in response to that criticism which I accept, the case has of course narrowed very considerably from the case that was presented in the High Court, and so perhaps it was thought on both sides there may have been some value in high-lighting perhaps in some detail just those

Elias CJ No criticism about high-lighting, it's the narrative.

Gilbert Where I've started with this is to deal with the fiduciary duty breaches allegation first and then to turn to the breach of the Fair Trading Act, and I start just by drawing attention to what I think are the relevant pleadings which we have in volume 1 at page 25, and it seemed to me that the relevant fiduciary duty breaches which have survived to this point, are those set out in para.51(b) and (c). So it's failing to disclose or fully disclose to the plaintiffs that the defendant had acted previously as the agent of Mr Brett Larsen and/or entities associated with him. Incidentally he's the person who I think engaged this Court in the *Rick Dees* matter, but probably won't be troubling you for it for a time because he's since been adjudged bankrupt. But that's the first. The second is that is failing to advise on and discuss with the plaintiffs that there was a potential conflict of interest in promoting the sale of the property to Mr Larsen as a result of the defendant having previously acted for him, so it was the historical nature of the relationship leading to this conflict in promoting the offer that was coming from that former client. So the High Court's judgment Your Honour dealt with this at 67 of the case, para.115

Elias CJ There's no pleading in relation to the fact that Mr Larsen was characterised as a speculator which was key to the judgments.

Gilbert Yes

Tipping J It's a bit late for fine points on the pleadings Mr Gilbert.

Gilbert It's not really a fine point on the pleading.

Elias CJ It's just curiosity. I'm not sort of suggesting anything more than that.

Tipping J I'm just wondering what you're taking us to these for. It's got nothing to do with what the Chief Justice has just put to you. Is this simply to say that what was found wasn't within the compass of the pleadings or something like that?

Gilbert No, it's just to focus attention on the specific breach that we're considering was this a breach or not of the allegation.

Tipping J Well we're considering surely the breaches as found rather than the breaches as pleaded.

Gilbert Well I was just coming right to that which is at page 67, 115. So Her Honour found that the relationship between Ms Riley and Mr Larsen, so this relationship created an actual conflict between the Stevens' interest and those of Premium and Mr Larsen. No evidence to suggest that Ms Riley did prefer Mr Larsen over the Stevens, or that she provided Mr Larsen with information which might have assisted him at the Stevens' expense, so no actual disloyalty, however the extent to which Ms Riley benefited from her relationship with Mr Larsen inevitably raises doubts over Premium's ability to give its undivided loyalty. So there was no disloyalty; there was no preferring; no breach of fiduciary duty in that sense, but there was a relationship which cast down on the ability of the agent to give that loyalty, or to serve with such loyalty.

Tipping J But wasn't there a finding of failure to disclose?

Gilbert Yes, but it came from the conflict of interest. That's the root that's followed. The finding was, and this is what I just wanted to take you to next is that because there was a conflict, there's a conflict of interest because you've previously acted, that triggers an obligation to disclose, and that's why I'm examining the conflict point.

Elias CJ Doesn't the obligation to disclose arise from the nature of the relationship of Land Agent and client?

Gilbert But it's not the way it has been dealt with in the Courts below. It was the conflict itself in both Courts, it was the conflict itself that was said to give rise to this duty to make disclosure.

Elias CJ Well it may have been treated like that but what's your position on the point of principle? Do you accept that an Agent has a direct obligation of loyalty to disclose material information?

Gilbert No.

Elias CJ You don't?

Gilbert No, well that's the *Kelly v Cooper* argument, so what I'm wanting to do is to start with a conflict if I can

Elias CJ Right.

Gilbert And then the next section of this deals with the duty to disclose. In the Courts below it was dealt with on the basis you have a conflict because you've previously acted. That triggers an obligation to disclose. I take issue with that. In my submission there was no conflict, no actual conflict here. There was no breach of the obligation of loyalty, and that was the finding. And so you then examine the question does an agent have a duty to disclose when a counter-party emerges in a sale process for whom the agent has previously acted, and has learned something about through acting for that counter-party. Does the agent then have a duty to disclose the information it has learned about that counter-party through previously acting? In my submission the answer is no. Why is that? Because the Agent, just like a lawyer, stock-broker – there are many examples of fiduciaries – who learn things in confidence through acting for their clients. They may not disclose those matters to other clients. There is no conflict because they have not put themselves in a position where at the same time they are serving client A over here and client B here. That's where the solicitor or the agent would run into trouble if they put themselves in the position where they accept conflicting duties to two principles, they will be in trouble, but here Premium only acted for the Stevens and they did so without breaching their duty of fidelity. They acted with undivided loyalty in the best interest of the Stevens was the finding, and so they're marketing this property generally in the market-place; they've agreed to serve the Stevens and no one else in the course of this engagement for the term of this listing; the mere fact that somebody turns up showing an interest in the property for whom the Agent has acted a few times before and knows something about, does not trigger an obligation to pass that information on. On the contrary the Agent is required to keep it secret. And I can give you a parallel example involving solicitors.

Gault J But if it is material the requirement to keep it secret must constitute a conflict of interest. On the one hand you've got the duty to keep it confidential to one person. On the other hand you've got a duty of loyalty to inform fully the other client – is that not a conflict of interest?

Gilbert Well that's where in my submission the *Kelly v Cooper* reasoning engages.

Gault J Well that might hinge on whether it's perceived as material information.

Gilbert Well the information in *Kelly v Cooper* of course was highly material and was not found to be that the Agent had no obligation to disclose that highly material information. So let us suppose you've got a law firm acting for a party on the sale of a forest - let's take that as an example – and so the law firm accepts an engagement from let's say Carter Holt Harvey, to act on it's intended sale of a forest, and a number of overseas bidders emerge for whom the law firm has never acted previously, there is no problem. Then along comes let's say Fletcher Challenge, for whom the law firm has previously acted on numerous occasions and may know secrets about. In my submission the lawyers in those circumstances are not obligated to relinquish the instruction. They've accepted an obligation to serve the seller with undivided loyalty. They have not put themselves in a position of conflict by acting for the purchaser, and they are not entitled to disclose what they know through having previously acted for Fletcher Challenge, to Carter Holt Harvey.

Elias CJ That's really not a helpful analogy is it, because you're dealing here with Land Agents who are advising on value and whether a property should be sold. Surely if they have previous knowledge which bears on what is an appropriate value for sale of the property, they're bound by their duty of loyalty to advise of it. I mean for example, they might have had a previous valuation that they know about. It's information surely that is material and which they must disclose.

Gilbert But in my example, on that reasoning, the lawyers acting for Carter Holt, the intending seller of the forest, would be obliged to pass on the material information that they have learned

Elias CJ But if they had material information, they have to either say we're not going to act for you because we know things bearing on this, or they accept a conflict and take the consequences.

Gilbert Well that would mean that lawyers would frequently having accepted an instruction to serve this client with undivided loyalty in relation to this transaction and declining to act for any other party that has a conflicting interest or any other role in that transaction, which is what lawyers are required to do. The moment a counter-party emerges with whom they've had a previous dealing and about whom they may have learned confidential information

Elias CJ But it's only if it's material.

Gilbert Well it would be material.

Elias CJ It's only material to the function that they're fulfilling in the transaction for the client.

Gilbert That's right. Well I'm assuming that's the case that suppose you've learned about Fletcher Challenge that it has a particular strategy from doing other work that would make this particular forest of great strategic importance to it. So you know that information and you are obligated to Fletcher Challenge to maintain confidentiality in relation to that. Does this mean that the lawyer then has to say I'm sorry, we've promised to serve you throughout this bid process, and in breach of our commitment to you to do that, we're now forced to withdraw?

McGrath J What if the information is not confidential, the firm of solicitors then have an obligation to disclose material it may have learnt during the prior relationship, but which is in the public domain?

Gilbert Yes, the *Hilton* case is on point there. The *Hilton* case being different from our situation where the solicitors unwisely accepted an obligation to two clients. They acted for two parties in the transaction and the mere fact that the information they had learned about one person, namely that he had been convicted and was an undischarged bankrupt, or what it was, that information was in the public domain, but it nonetheless was incumbent on the solicitors not to make disclosure of that information. It didn't make any difference that it was in the public domain.

McGrath J Even though it had no quality of confidence though.

Gilbert Yes, exactly, in the sense that anybody could have pieced together the information because it was publicly available, did not permit or create a licence for the lawyer to share that sort of information that they know about their clients.

McGrath J Thank you.

Gilbert But if the information was material and there was no obligation on the agent to keep it confidential, then I would agree that the fiduciary does have an obligation to make that disclosure.

Gault J How does that affect the situation or position of conflict of interest? The conflict, if there is an obligation to disclose, is there if it is not disclosed. Whether it's confidential or not confidential there is still a conflict of interest.

Gilbert Well in my submission there is here no conflict of interest. The agent has taken on the role of doing its best for the Stevens in serving them only in relation to the promotion with a view to sale of their property, and the learned Judge found no breach of that obligation.

Tipping J Does that mean Mr Gilbert that the duty to disclose is a duty to disclose information which is not confidential, but no duty to disclose confidential information?

Gilbert Yes that's the reason

Tipping J That's the nub of it isn't it? That sounds a rather startling proposition to me. I mean how can you serve two masters? In that sense you've got to keep the information confidential vis a vis client X, but vis a vis client Y, for whom this information might be highly material, you're not allowed to tell. You mustn't tell them. That sounds like a really tricky end result.

Gilbert Yes, and as Your Honour has articulated that I would agree with you because the premise of your proposition was you've got client A and client B. The fiduciary cannot put him or herself in the position where they have taken on conflicting obligations to two clients in the same transaction.

Tipping J Say there's some information about Mr Larsen, that he wouldn't like bruited abroad, to observe confidence to him, even though he's not a client, surely is an exactly the same case, it's a reason for not telling your primary person if you like, something that they really ought to know, assuming it's material.

Gilbert Yes that's right

Tipping J I think that's getting us into a terrible position. You've either got to get consent or you've got to bail out haven't you?

Gilbert Well if you go back to my example about the law firm acting on the sale of the forest. It knows something material through having previously acted for the bidder who's come out of the woodwork. The law firm is not acting for that bidder in relation to this transaction, but it knows things about that former client

Elias CJ I don't see how it can act.

Gilbert Well in my submission it can act because exactly on the reasoning of Lord Browne Wilkinson in the *Kelly v Cooper* case, you go to a Real Estate agent knowing that they act for multiple principals, accepting listings from all sorts of people wanting to sell their properties in this district. In a sense those vendors are all competing for the same pool of prospective buyers, so there is a conflict of interest right off, but you nonetheless go to them for the very reason the more clients they have the more former relationships they have with people with whom they've sold houses; assisted them to purchase houses – the more of that they've done probably the more valuable that agent is going to be. That's the very reason you engage them, and you go to them knowing that they will be trying to sell other people's houses, acting for other principals in circumstances of that sort of conflict, and you also go knowing that in the case of the law firm example I have given you in my submission, you go to the law firm knowing that Bell Gully acts for numerous banks. When the ANZ Bank goes to see Bell Gully about a

problem, it knows that it's not entitled to receive information held by Bell Gully about the ASB. It might have material information that the ANZ would dearly like to know about the ASB, but it's not able to pass that on and it's not a breach of the law firm's obligation

Tipping J Well that's a case of implied consent really isn't it?

Gilbert Exactly, which is Lord Browne Wilkinson's answer to this dilemma.

Tipping J Yes, well I can see that if you can reasonably imply consent to non-disclosure then that's a different matter, but I don't see how that situation in *Kelly* can be translated into the rather different circumstances of the present case where you had concurrent vendors didn't you? You had the agency firm acting for different vendors?

Gilbert In our case.

Tipping J No, no, in *Kelly's*, which is a rather different proposition to what we've got here.

Gilbert In *Kelly* the conflict was far more acute in my submission, because you had the same agent acting for the vendors of these two adjourning properties, and having concluded the engagement for vendor No. 1 to Ross Perot's interest then did not disclose the highly material fact that he purchased that property and he was the same person interested in acquiring the adjourning property which of course would have made it much more valuable to him to secure both pieces of adjourning land.

Gault J Well I must say I think the agents were rather lucky in *Kelly's* case. It's a long step from acknowledging that Real Estate Agents are selling properties which theoretically are competing on the Island from an estate agent who is involved in adjoining properties in the particular circumstances that prevailed in that case, and I think the agents were a bit lucky there personally.

Gilbert Well most certainly there can be no doubt that the information there was much more material. It's hard to imagine anything more material that emerged that the agent learned, and so it very much brought into focus what was the duty on the agent in that circumstance?

Tipping J Well I'll put it to you directly. I agree with Justice Gault. I think they failed to make a distinction between the general and the specific, and I speak with great respect of Their Lordships. They carried the general and implied that to a specific state of conflict, and I would need a lot of persuasion to follow it. I can understand the general because there's an implied consent to that general scenario, but as to the specific, of course there wouldn't be an implied consent.

Gilbert Well come back to my sale analogy which I hope

Blanchard J Well why not stick with the present facts. The vendor goes to an agent and says would you please act as my agent to sell my property for me. The vendor is entitled to expect loyalty. The agent then comes to the front door with a person and the agent makes no disclosure of the fact that there's been any previous dealing with that person, assuming that the disclosure would have been material in the circumstances. Now that's patent disloyalty.

Gilbert Well

Blanchard J At the very least you would expect the agent to say I'm now introducing Mr X. I have to tell you that I have dealt with Mr X before - he's known to me. However I believe I have certain obligations of confidence in relation to Mr X and so therefore I'm not going to tell you anything about that relationship. At least then the vendor is alert to the fact that there's some kind of previous relationship and can decide whether to continue to employ the agent.

Gilbert Well here there was disclosure that the agent had dealt a few times before with Mr Larsen, so that disclosure was made and it was taken no further.

Gault J It was also a certain misleading disclosure

Blanchard J Yes, it's the misleading things that occurred later that concern me more.

Gilbert Yes, but if you look at what underpins the judgments of the Courts below, it is step 1, there was an actual conflict of interest

Blanchard J I'm not really interested in that analysis. I'm interested in the analysis that we will apply.

Gilbert Okay, so I need say no more about this conflict of interest point?

Blanchard J Well I think there is a conflict of interest. Well I don't know whether you approach it through conflict of interest or approach it through the obligation of loyalty. It's perhaps clearer to approach it through the obligation of loyalty, when you see whether a conflict arises.

Elias CJ And surely the really critical issue on the cross-appeal is the materiality of the non-disclosure.

Gilbert Yes.

Blanchard J Yes.

Tipping J I would approach it if this is of any help through the duty to disclose to make full disclosure and not to make misleading disclosure. I think conflict of interest as a sort of starting point is a bit of a red herring.

Gilbert Right. Perhaps if I can just show you how that just before leaving it altogether, if you look in volume 1 at 98, para.80, you have the Court of Appeal's analysis on this point. The Court accepted that Mr Larsen's method of working may have been confidential information, although that may depend on his attitude to it and he didn't give evidence at trial, but as we've said, failure to disclose was not the basis on which the Judge concluded that there was a breach of fiduciary duty, what the Judge focused on was Premium's ongoing commercial relationship with Mr Larsen. It was the existence of that relationship that put Premium in a position where its commercial interest conflicted with its fiduciary obligation of utmost loyalty to the Stevens.

Tipping J When they say in 81 we agree with the Judge that Premium's failure to disclose its relationship etc, that must mean fully and accurately to disclose mustn't it, because as you pointed out there was some disclosure.

Gilbert Yes, they said we've acted for him a few times before and the matter wasn't taken any further.

Tipping J So you have to read into that really, I think what they must be deemed to be saying is failure fully and accurately to disclose.

Gilbert To disclose all the dealings, yes.

Tipping J Yes.

Gilbert I mean, in the High Court the finding was it was the modus operandi that needed to be disclosed. The Court of Appeal stepped back from that and said oh no that might be confidential but you still had to disclose that relationship.

McGrath J The word 'ongoing', is that of concern to you in relation to the historic emphasis in the pleadings?

Gilbert Yes.

Elias CJ I'm sorry, can you just tell me which paragraph again.

Gilbert I'm sorry, we're in 98, para.80

Elias CJ Of the Court of Appeal?

Gilbert Yes this is the Court of Appeal.

Elias CJ Yes, thank you.

Gilbert 80 and 81.

McGrath J I'm sorry, I don't know if you want to elaborate on that. I would find that quite helpful I think.

Gilbert Yes that was the point that I think Justice Tipping wasn't terribly keen on me making, but it was drawing attention to the fact that

Tipping J Oh no, no, please feel free to make any points you wish Mr Gilbert.

Gilbert I'm not wanting to make fine details, but the pleading was as I indicated that it did focus on the fact that they previously acted and that hadn't been disclosed or fully disclosed, so that was the complaint.

McGrath J Is ongoing an ambiguous term in this context? Does it indicate a prospective future relationship or does it indicate that a prospective relationship is already in existence?

Gilbert In fact it's both.

McGrath J Yes.

Gilbert So I think to be fair what is suggested here is you've acted in the past as a result you do have a good relationship with this person and you might expect to have future engagements from that particular purchaser.

McGrath J If this transaction ends up in a sale you'd expect to get at least a share of the listing of it.

Gilbert I'm sure Real Estate Agents hope that that happens on most sales they make. I mean they commonly do act for people more often than once. That is not an uncommon situation and if the legal response is that if you've acted for this person two, three, how many times before, suddenly you've got an obligation to make disclosure of all of that to the vendor, and in my submission you don't. (A) it's not material, but (B) there is no such obligation, there is no conflict of interest. I mean in the sense that Real Estate Agents make their living out of selling people's properties and will of course want to re-list this property or any other property, that is understood. It doesn't create a conflict of interest. That's my submission.

McGrath J You're talking about the general situation at which at some probably distant time in the future there may be another relationship.

Gilbert Yes.

McGrath J But ongoing denotes a sort of an expectation that it's Mr Larsen so that the new relationship may be stitched up immediately they've got a sale to him.

Gilbert Yes, that's right. I wonder if I could show you one other document just to show you what the position actually was in terms of the prior relationship.

Elias CJ What are you showing us here? What is it?

Gilbert This is a schedule just capturing as at the date of sale to the Mahoenui Trust on the 26th April 2004, what earlier transactions had there been

Elias CJ What's it sourced from?

Gilbert I'm sorry.

Elias CJ Have you given us the references to the evidence?

Gilbert Yes, if you look at this précis at item 4 on page 1

Elias CJ Of your submissions.

Gilbert Of those submissions. You see volume 2, 126 to 134.

Elias CJ And that's what this schedule's derived from?

Gilbert That's right.

Elias CJ Thank you, I just wanted to make sure we weren't taking in evidence.

Gilbert Oh no, no, no. So it's all collected there, but what this shows is that these are the eight transactions that were referred to and I've just shown the date of the purchase and resale and who the entity involved was, because it's not Mr Larsen, it's an entity associated with him

Elias CJ So is Alaska Trustee associated with Larsen?

Gilbert Yes.

Elias CJ And this was where Premium acted in both purchase and resale?

Gilbert Correct. And so, well you see that of the eight, 2 to 5 were actually purchases by the same purchaser from the same vendor on the same day, 8th April 2002, of adjoining units in the Spencer on Byron Development in Takapuna. So if you treated those as one, which may not be appropriate, but if you did, you've got the situation where you've got three properties that have been purchased and on-sold and you've got two others that have been purchased but not yet re-sold. So that's the picture that the agents confronted, and the question is therefore well if an agent is in that sort of situation, does that trigger or engage an obligation when this particular purchaser emerges as a prospective buyer, does the agent then have a duty to go to the vendor and say I have acted in these matters. Here the agent said we've acted

a few times. Was it a breach, a material breach not to go further and explain the detail or a greater extent of the prior dealing? Because my submission is that when you look at that schedule that's not a very uncommon sort of situation that you would expect larger Real Estate Agencies to confront on a regular basis whether through acting for property speculators or people who actually frequently buy and sell properties.

Tipping J But the Judge at trial found that Ms Riley accepted that she had not disclosed the real nature and extent of her association with Mr Larsen. Her explanation was she never had the opportunity. I do not accept that explanation. Never mind the explanation point, but it's quite a solid finding against you.

Gilbert Well I'm just showing you what the evidence was in terms of the actual history of dealings and the purpose of that is to show that is what the judgment is based on, but also to just draw attention from a practical point of view for Real Estate Agents what does this mean? If a Real Estate Agent has acted for a person who often buys properties, perhaps every 18 months or something like my brother-in-law does, does that mean to say that there's a conflict of interest because they would like to get the re-listing of the property if he is the purchaser. Well it would be a breach of obligation if the agent in that circumstance promoted the sale which was the allegation in the pleading in the sense of encouraging the vendor to accept that offer rather than another

Tipping J Isn't it material to a vendor to know that the purchaser or the intending purchaser is purchasing for re-sale rather than for family occupation and there was associated with that wasn't there a finding that there was some actual misleading about the family occupation dimension? I would have thought that was a material feature for a vendor to know when assessing the whole compass of whether to accept the offer or counter-offer, and if so at what level and all that sort of thing.

Gilbert Yes. Well it comes down to whether you accept that that is material. I mean any purchaser, whether they're putting in a low price because they haven't got much money or because they always want to get the best price they can anyway. I mean it would be a rare purchaser who didn't seek to purchase at the least possible price.

Tipping J But if one were told as a vendor two things. One, this man's an experienced property developer. Pretty sharp at picking up good buys as opposed to oh this man's coming in to buy the place for himself and his family. If I was a vendor I would have thought that was highly material when it comes to the question of assessing your whole position. I find difficulty concluding that one could say it's not material at all.

Gilbert Well it might affect your view of the price being offered which is what the Judge found. It would have affected their view of the offer. Now

as I said in the submissions, the evidence, the prepared evidence did not have anything in it at all about what the Stevens would have done differently if they had been given this information, so what we were left with at the trial was that in re-examination the question was put 'well what would you have done differently if you had heard about this information', and the answer was 'I would have extended the sale period'. Is it helpful if I take you to that evidence?

Elias CJ That's really a different point because unlike Justice Tipping I am still thinking about, well bothered about the question of materiality, but you seem to concede it. You say it might have affected the view of the purchase price.

Blanchard J I'm sure it would have. I'm like Justice Tipping, I'm sure it would have, because you would know that the potential re-seller was trying to get a price which was below market in order to be able to make a profit by re-selling.

Gilbert But any purchaser is likely to want to buy it as cheaply as possible.

Blanchard J Well the person who is buying for occupation and is not thinking about re-selling the property in the immediate future will not be nearly as concerned as a speculator will be to get a below market price.

Gilbert It might be a purchaser that doesn't have much money and so

Blanchard J It could be but it still a fact that I as a vendor would want to know about.

McGrath J It's the knowledge of property that the speculator has, knowledge of the property market. It's the person who has opinions that are built on some experience operating in the property market that I think would give rise to the concern.

Gilbert Yes but here Mrs Stevens' evidence was, and it was supported by Mr Stevens, they were not in any way misled by this offer that came in at $2.575 million into thinking that that's all their property was worth.

Elias CJ But that's the consequence. I'm still, and I think you're being asked about the materiality and we're obviously at different points of persuasion on that. I am still bothered about the materiality, but you seem to accept that it might have affected their view of the price at which the offer was made. Now that seems to me to be a concession of materiality, supportive of the view that's being put to you by Justices Blanchard and Tipping.

Gilbert I most certainly don't concede that this was material information. The offer was what the offer was. It was clear.

Elias CJ But if it would have affected their view of the price, it's material.

Gilbert Well it can't have affected their view of the price. They formed their own view of the value of the property and this did not conform to their view of the property.

Elias CJ But it didn't inform them in coming to their own view

Blanchard J It couldn't affect their view of the price because they didn't know about it.

Gault J Mr Gilbert, surely there is a distinction that you're not drawing. Whether there is the necessary relationship giving rise to duty and whether there was materiality, seems to me must be determined separate from what they subsequently said. Now if it is material, it is material, but they didn't understand its materiality doesn't affect whether or not it's material.

Elias CJ Yes.

Gault J There might be good reason they didn't understand the materiality of it having regard to the whole build up of circumstances.

Gilbert Well in my submission it is not material to any vendor to understand what the process has been to arrive at the offer. The offer is what it is and it is not material to know that it is coming from this type of prospective purchaser or another. That is immaterial

Blanchard J Well that conflicts with my experience with the Real Estate market I'm afraid.

Elias CJ I don't have any. I'm a keeper. It's a joke that I never sell.

Tipping J Well it's a bold submission that it's not material to a vendor to know what the purchaser has in mind for the property that I noted.

Gilbert Then the Judge said well it would have affected the view of the Stevens about this offer, and in my submission the evidence shows that it didn't because Mrs Stevens herself said that even confronted with this offer she still strongly believed that it was well below the market value of this property, so that was her reaction to it. She was not misled by this offer into thinking that it was an offer at market value. So not in fact misled and in that sense not material.

Tipping J That's equivalent to a submission that they would have sold at that price in any event isn't it, under the *Gilbert* line of authority. That's the effect of that submission isn't it?

Gilbert Yes, but not misled by the presentation of this offer without more namely an explanation that it's coming from this type of a prospective purchaser.

Tipping J But the consequence of accepting that submission is that they would have sold at that price even if they had been told everything accurately.

Gilbert Yes.

Blanchard J But didn't she say they would have extended the sale period?

Gilbert Yes. Can I just show you quite quickly on this what the evidence was, so that you can

Tipping J Was there any request to re-open – you made some complaint about how this came up only in re-examination. I take it that presumably there was no request to further cross-examine on that point?

Gilbert There was further cross-examination.

Tipping J There was further cross-examination, right, thank you.

Gilbert Yes there was. That was permitted.

Elias CJ But really it just doesn't seem to me to matter because it is an objective assessment that has to be made.

Gilbert Yes, that's right.

Tipping J But if they would have accepted on the spot in any event, then I think Mr Gilbert might be laying a foundation for the escape from causation if you like.

Elias CJ Oh yes, I understand that, yes.

Gilbert Can I just show you - there are just a few paragraphs in the evidence that might help on this. If I could ask you look at volume 2 at 116. So this is 23rd April when the offer is first presented and it was finally accepted with an increase of $50,000 on the 26th, so there was a period of some days of deliberating, and at 46 Mrs Stevens said she was disappointed with the offer as she still strongly believed that the property was worth a lot more than that.

Tipping J Isn't it open to the view that if she had been told on one hypothesis what she should have been told, that would have so reinforced that view, that she might have acted differently.

Gilbert Reinforced the existing view. Well she strongly believed that the property was worth a lot more than that so she's looking at an offer that in her view is well below what this property is worth.

Blanchard J Yes, but if you've had your property on the market for a while, and you get an offer from somebody who is wanting to buy it to live in, you

might well think I think the property is worth more than that, but I'm not going to get more than that so I had better accept the offer that's on the table rather than lose it. It's a very different proposition if you know that the person who's making that low offer is a person who specialises in re-selling at a profit, because then you'd say well I think I'm going to have to be very cautious about accepting this offer because that person wouldn't be making it if they thought they couldn't then achieve more for the property in the near future. It's a vastly different psychological effect on the vendor.

Gilbert Well he was a risk-taker who's gone bankrupt.

Elias CJ Who was betting on a rising market too. They may not have been prepared to bet on a rising market.

Gilbert And he was also prepared to engage in a very aggressive campaign, a misleading campaign, to re-sell properties. I mean he went to specified valuers, the person Freeborne wasn't even a valuer,

Blanchard J Well they didn't know about that of course.

Gilbert They didn't know about that, but in terms of determining whether there's something wrong with this sale, or actually the problem is the subsequent sale, in my submission that's a very big issue here.

Tipping J That's a quantum issue, it's not a liability issue surely.

Gilbert Well he was a risk-taker. All I'm saying he was a risk-taker but he was also an aggressive person who was prepared perhaps to engage in suspect conduct in order to achieve what he hoped to achieve.

Tipping J But they didn't know that.

Gilbert They didn't know that, but what they did know what that he was making an offer and whatever the reason was, whether it was because these people just couldn't bring themselves to pay market value

Tipping J He might have been the most lilly-white speculator in the world.

Gilbert He might have been. But whether this offer was coming at well below market, which was the Stevens' perceptions because the purchasers couldn't afford to pay more or because it was coming from somebody who hoped to trade it quickly at a profit, or whether it was coming from somebody who just always wants a bargain and wants a low price, it doesn't really matter what the explanation was, the important thing is what is your response to that offer. Well it's an offer at that price. The Stevens consider it's well below the market value and they make their choice. Do they take what they think is a price well below market value, or do they hold on and hope for something better. That is precisely the choice they made.

Tipping J Was Mrs Stevens the sort of spokesman for the pair?

Gilbert Yes, she was.

Tipping J So one can reasonably infer

Elias CJ It's the businessman though, it's a bit odd. Does he not give evidence?

Gilbert He did give evidence.

Tipping J His attitude was the same was it?

Gilbert Yes, she was the one running the campaign

Elias CJ She was the one aggrieved anyway.

Gilbert That's right and then she spoke to her husband about it. They go this offer on the 23rd; they thought about it long and hard; they examined their choices; and they decided well do we want to take this offer that we believe is well below what this property's worth, or do we do something else, namely hold out, because they still had this tender process running. Do we wait and see whether we get something better in the tender process.

Tipping J What did the Judge at trial find as to the probabilities of what they would have done had they been fully and accurately informed. I rather recall that she said they would have held on.

Gilbert The Judge said that this information would have led to a nervous reconsideration of their position.

Tipping J And she said no more than that?

Gilbert That's right, but the

Gault J With the subsequent cross examination and re-examination was really what the Judge relied on rather than the passage you refer to.

Gilbert I was going to take you to the other passages as well. That's what I'm saying though, that was what Mrs Stevens said in her prepared statement 'what did I think of this offer – I still thought it was well below what this property was worth, and

Elias CJ Because the case was developed on all of these alternative grounds which have fallen away and the main gravamen initially seems to have been the huge price secured on resale and any sort of linkage really with that went.

Blanchard J Before you leave that page there's the passage at para.47.

Gilbert Yes I was going to just draw attention to that, which is contrary to what was said in the Court of Appeal that this question was asked because Mrs Stevens actually kept a log book of everybody who turned up to the property and she noted that Mr Larsen had arrived in February early in the marketing campaign and had stayed for only about 10 minutes, then he didn't return for another few months, again on his own, and stayed only about 10 minutes. So she'd noted that because of the care she was taking and here at 47 she said she asked about that and was told that Mrs Larsen was not interested in the property as she liked horses.

Blanchard J That's highly misleading.

Gilbert Not interested in the property, that's why she hasn't even come to see it.

Blanchard J Highly misleading, as she liked horses and he preferred the sea. Anyone would take that to be an indication that the property was not being looked at just as an investment or for re-sale, but for occupation.

Gilbert Being told she's not interested in the property. Why hasn't she even come to see it?

Blanchard J And she liked horses, what's that got to do with it.

Elias CJ I don't know about property but I know about horses.

Tipping J Well I think the horses are the key to this whole thing. Like my brother Blanchard, I think this was a cunning little wrought, to let them think that he was in the market

Blanchard J I think this case is just absolutely damning.

Gilbert Well you're a vendor; somebody has come and looked at this two months apart for ten minutes. Your wife hasn't even come to the property and you ask the question why hasn't

Blanchard J And obviously the vendor was a bit suspicious about that, but this form of answer, and I gather the agent hasn't denied that this was said, this would have given the vendor the distinct impression that the interest in the property was as a residence.

Gilbert Well if

Blanchard J And I read your attempts in your written submissions to explain it away and I found it completely unconvincing I'm afraid, very well put though it was. On a first reading I thought gosh, and then I thought about it.

Gilbert A unit title.

Elias CJ Well you can't take your horses to the North Shore and if the couple hasn't worked out whether the horses are going to come first, it doesn't to me read as if they have made any determination as to the use they are putting upon.

Tipping J But then when he came back wasn't there a reinforcement of the view that it was family, wasn't it the concept of family

Blanchard J Well there was all the business about travelling.

Elias CJ But that's a different point.

Blanchard J No, no, it's the same point, it too would have indicated to a vendor that this was to be a residence.

Elias CJ Well we're into inferences from fact and there may be different inferences to be drawn, but I don't know that asserting conclusions, I think we might take different views of that.

Blanchard J But the travelling time that was being spoken of was pretty clearly travelling time from home to office and back again, that's why I see it as a clear point

Tipping J Could we just take time to rule off a point that was troubling me a little just go to the Judge's finding on page 69 of volume 1 at para.120 where she seems to have said quite firmly, that Premium hadn't discharged the onus to show that they would have gone ahead

Gilbert With the sale.

Tipping J Yes, this particular

Gilbert With this particular sale. Yes, that's what the Judge read.

Tipping J So I don't see how you can get behind that Mr Gilbert.

Gilbert Well that's based on these facts and my submission is what did she think of the offer. She strongly believed it was well below market. That's what she thought of the offer. What the explanation for that was in my submission is immaterial. She strongly believed it was well below the market

Tipping J Well it can only lead to the any event proposition which the Judge here has found against you.

McGrath J Mr Gilbert can I just say that I don't think it's only the fact that she may have been aware or was aware that it was a low price, Justice Blanchard referred to a psychological dimension, and it's the

psychological dimension's relevance it seems to me is she would realise there was a risk she may suddenly find out it was a low price by seeing the property re-sold at a better price by this person who was very experienced in property acquisition and disposal, and it seems to me that that's a factor that might well have prompted, I mean the money would obviously be part of it, but that further dimension might well have prompted her into doing something like talking to someone independent if you like. A solicitor and ultimately a valuer.

Gilbert Yes, but it's clear from the evidence that the consideration was, okay we've got this offer, it's a low offer, we think it's a lot less than our property is worth, so do we take that, do we think we can get more money from that particular purchaser, and we're told there might be a bit more money but not much, and there's no suggestion that that was wrong, and indeed another $50,000 was paid which was the amount that the Stevens suggested. So that's one choice. The other choice is to wait and see if something better emerges from the tender process which has not yet concluded.

McGrath J Extend the period, yes.

Gilbert Yes, and that's indeed exactly the consideration that they went through and their decision was to take that offer knowing that it was in their judgment well below the market price.

McGrath J Yes I'm just saying they didn't have the opportunity to learn though of something else that they could look big fools over this.

Gilbert Yes.

Elias CJ It's so speculative really, it depends on what your motivation is. These were vendors who had purchased.

Gilbert Correct.

Elias CJ It was a conditional purchase. They might have been interested in moving on rather than whether they'd look fools in six months time I suppose.

Gilbert Yes, and they'd marketed this property for nearly three months. It had been a high profile campaign. There had been a lot more advertising in high profile publications and they had received only one offer other than this for $2.2 million. They countered at $2.8, but that had drawn no response at all, and then this offer emerged. They looked at it from the 23rd April to the 26th April, and it's very clear from the evidence that they said well do we take that knowing that it's a long way below what we think this property is worth - that's one choice for use, and we move on, or do we wait and see if we can find something better by waiting? That was the choice.

Gault J Well you've said that about four times now Mr Gilbert, but isn't the point that in making that choice would that have been effected by the information they did not receive?

Gilbert Well in my submission, no, because it would simply have confirmed their view

Gault J Because you've got a couple of findings against there.

Gilbert Yes, well Her Honour said at page 65, para.106, it would have led to a nervous reconsideration by the Stevens of their position.

Gault J Yes, yes, but it might have got in independent advice. They might have ended up getting a valuation and unless you can carry the Court to the point that's saying even with the information it would have made absolutely no difference, it's not open to you to speculate.

Gilbert No.

Gault J It's the finding directly against you.

Tipping J I'm particularly interested in some of the propositions that I'm sorry I've been having a sneak preview at the failure to disclose section of your hand-up, and I must confess I would like some help with the proposition in paras.21 and 22 which seems to say that you are under a duty to disclose unless you're under a duty to someone else not to disclose.

Gilbert Yes, but that comes back to the point doesn't it that if you're a fiduciary and you've accepted instructions to act in a transaction for parties whose interest conflict, and the fact that you've got conflicting duties is of no answer at all, your problem is the fiduciary and the fact that you are under an obligation to principle A to maintain confidentiality

Elias CJ But there's no suggestion of that here.

Gilbert That's not the situation, no.

Elias CJ I don't really know why you're going into this.

Gilbert Well because in my submission absent that sort of dual role

Elias CJ Oh absent that, yes I understand.

Gilbert There isn't in a situation as here this obligation to make that disclosure.

Tipping J But that means there's a crucial distinction between a case where you are actually acting for the counter-party or just have knowledge of the counter-party's affairs.

Gilbert Correct.

Tipping J Now that point totally hinges on that doesn't it?

Gilbert Yes it does, although it needs to be developed in this way that it's knowledge of the counter-party's affairs through having previously acted for that counter-party, so that if you come back to *Kelly v Cooper*, that was the point that you go to the Real Estate Agent; you know that they act for multiple principals, just like the lawyer, and you know that the Real Estate Agent is obliged in terms of his or her fiduciary obligations and the Code here to maintain confidentiality in relation to information they gain through acting for that principal. So the reasoning in *Kelly v Cooper* is therefore that there is an implied consent to the agent maintaining confidentiality in relation to that information.

Tipping J Well I think that's in a different context. I have real trouble with the view that you may have some duty of confidence to someone else, never mind how arising, which prevents you from fully discharging your duty to your present client. That's where I have difficulty.

Elias CJ Yes I do too.

Gilbert Well that's where the solicitor in the bid process would have to relinquish the engagement.

Tipping J Well maybe so.

Blanchard J Or go to the owner of the forest and say now a bidder has come forward for whom we have acted previously in other matters. You understand that we have confidential information there. If we are to continue to act for you we can't reveal to you that information.

Tipping J Yes, fully informed consent.

Gilbert Yes, so you'd need to make disclosure, sufficient disclosure, to obtain fully informed consent.

Blanchard J Yes.

Elias CJ What's confidential about the fact that this fellow speculated in property?

Gilbert Well it comes back to the point that I discussed with Justice McGrath before. It may not be confidential that a person is bankrupt or has got convictions for dishonesty

Elias CJ But it's the obligation to disclose. But surely the only test for that is materiality, and so we're back to whether it was material or not.

Tipping J I don't think we could countenance a situation where you are allowed to withhold material information, absent fully informed consent, if you are a fiduciary.

Blanchard J Yes, we couldn't be too tough on that though. If it's confidential you can't reveal it for the purposes of getting an approval to act.

Tipping J Yes quite.

Blanchard J So it couldn't be more than an obligation to reveal that there was something that was confidential that you don't want to reveal.

Tipping J Yes I agree with that. Once we start watering down the idea that you are allowed to withhold information from your present client without their fully informed consent, I am nervous as to where that might lead Mr Gilbert. Now that's putting the cards very much face up on the table. You may be able to persuade me, but

Gilbert Well *Kelly v Cooper* is probably the best I can do on this.

Tipping J Yes.

Gilbert And as I say, if you look at the

Tipping J That's implied consent.

Gilbert It is

Tipping J In my respectful view that is the only rational explanation, but you couldn't possibly rely on implied consent in the present case could you?

Gilbert Yes because agents do have an obligation to keep confidential. Whether it's confidential in the sense that it's not in the public domain doesn't matter. They have an obligation, as do solicitors, to maintain confidentiality in relation to information that they acquire through acting for principals, that's the position. But when you go to a Real Estate Agent you know because they act for multiple principals that they may not reveal the confidential information or the information that they are required to keep confidential in the course of working for you, and in my submission it's the same as they say in *Kelly v Cooper*, the case of stockbrokers, it would equally apply in my submission to the scenario of the solicitors acting on the bid process. You know that they can't disclose the information about the other client and you've engaged them with that knowledge and implied consenting to that scenario.

Tipping J Do they know really, because we're dealing with people who might engage in only one of these transactions in their lifetime? I mean the

consequence of taking a stricter view would be that presumably an express clause would be put into the terms of engagement of the agent which would put it all up front, but I just query whether the general conditions with the implied terms to exist really are so in this sort of consumer vendor market. We're not dealing with business people here.

Blanchard J There's something that troubles me about *Kelly v Cooper*. I can't see why the information was confidential. It was no skin off the nose of the neighbour who had already sold the property. The agency was for the neighbour. What the agent was doing in *Kelly v Cooper* was keeping confidential something about the purchaser.

Tipping J Sort of treating the purchaser as another client.

Blanchard J Yes. I've got real doubts about *Kelly v Cooper*.

Gilbert But that point aside, the proposition is one that I would urge you to consider as having application in this sort of situation where you are engaging people knowing that they are acting for these multiple principals.

Tipping J So your submission essentially is that if we find it material, we should find that there was implied consent to its non-disclosure

Gilbert Yes, yes.

Tipping J Well conceptually it's as simple as that.

Gilbert It is.

Tipping J Yes.

Elias CJ Is there anything more you want to tell us about materiality before you deal with damages?

Gilbert I probably wouldn't

Elias CJ But he's got damages in his note.

Gilbert Well yes but I've put everything in this note.

Elias CJ Oh you've put everything in this note, oh that's alright, sorry, yes. If there is nothing more you want to tell us about materiality then we'll hear Mr Akel on the cross-appeal, or anything else, because I think we've given it a fair going over.

Gilbert It or me?

Tipping J No, you've put it very well Mr Gilbert, it's just that you may not quite have the horsepower behind you.

Elias CJ It does seem to me that really the issue is one of materiality which is a question of judgement, and that the problem you've got is it's just a factual finding and you've got concurrent findings which are adverse to you. That's the problem. But I mean you've sought to get around those by pointing to the terms of the findings and we will have to consider that.

Gilbert Yes, and perhaps just before I leave, I would invite you to give thought to the practicalities of this for Real Estate Agents, because of course perhaps the larger estate agents these are actually sought out for the very fact they have built up over the years a lot of connections with people buying and selling properties in a particular area, and that's the situation with Premium Real Estate which has a particular reputation in the North Shore area with higher value properties, so you go to them for the very reason that they have these relationships or have formerly acted, and it would be expected that there will be a great many prospective buyers out there who will emerge only of course during the currency of the listing, so it can't be anticipated at the outset, so the agent takes on the responsibility, yes I will act for you for a period of three months; I will serve you to the best of my ability and I will

Blanchard J Loyally.

Gilbert And I will not be disloyal to you, so that I will do my utmost to secure the best possible price for your property. And then somebody emerges as a buyer - this will be a common place situation. It could be when you look at the schedule it's not really a particularly unusual sort of scenario and so the agent then has to think, what do I do? Do I have this obligation to disclose these dealings, or am I obliged because I've learned this through acting for that person to keep it confidential? The code says I have to keep it confidential. Whether it's in the public domain or not doesn't matter, I've learned it through acting for that principal and I must keep it confidential, so what do I do. I have two choices. I can cease acting. I'm actually not entitled to, I've contracted to do this for this period. It's very inconvenient that this person that I've met before has emerged from the sales process

Blanchard J You don't have to cease acting completely.

Gilbert Well you either cease acting as a way of getting out of the conflict in breach of your retainer, and that wouldn't be really

Blanchard J But you don't have to cease acting.

Gilbert But that's one response isn't it - the primary response? I've now got a conflict, I cease acting. That's one thing you can do. The other thing you can do

Blanchard J You can say to the purchaser look I'm not prepared to introduce you to this vendor without disclosing certain things to the vendor because I have an obligation of loyalty to the vendor.

Gilbert But it would be a breach of the obligation of loyalty to the vendor to decline to introduce the prospective purchaser.

Blanchard J You're not declining to introduce the prospective purchaser, you're telling the purchaser that you can't proceed with the introduction without certain things being put on the table.

Gilbert And if the prospective purchaser says no, then the vendor misses out on receiving whatever offer may have emerged.

Elias CJ But I don't see that we're in this area of disloyalty to the purchaser at all because if it's material, what was the impediment to the agent simply saying to the vendor this fellow is a property speculator. That's the only issue that the Courts below have honed in on. The failure to disclose that.

Gilbert Well the Court of Appeal. The High Court went further and talked about the modus operandi if you like.

Elias CJ Well but it perhaps is fairly tied in with that because that's what property speculators do.

Laughter

Elias CJ I don't have any experience of that, so that's the only issue. I don't see that there's any issue of conflicting loyalty in making that disclosure. For me the only issue is was that material, and I do accept the submission you make that materiality also has to be assessed in a realistic way in the context of what Land Agents do, but is the cross-appeal more complicated in the end than that?

Gilbert Probably not.

Tipping J I think what Mr Gilbert is saying really is that it wasn't material when looked at in the round but if it was it should be treated as implied consent.

Gilbert Yes, yes.

Elias CJ But implied consent though to what?

Tipping J To non-disclosure.

Gilbert To non-disclosure of things learned through acting previously for other principals. And Justice Blanchard's point was well you hold the prospective purchaser back until you've sorted it out in some way, but

in my submission that might not be satisfactory because you've actually got a positive duty to the vendor.

Blanchard J Well you can easily deal with that. If the purchaser says no way you can't reveal information about me, you go to the vendor and say well we have got someone with whom we've had previous dealings. We know things about that person that they won't agree to being revealed, do you want to still meet with them? It's not that difficult.

Gilbert No.

Elias CJ There might be steps 1, 2 and 3 in this.

Blanchard J Real Estate Agents have far trickier things than that to sort out.

Tipping J There's a titillating communication that would be.

Akel May it please Your Honours. Well it is difficult for the agents because that means that they run the risk of foregoing the commission, and as we said in our submission, that of course along with the listing is the life-blood of their profession. I am in the very unusual position of feeling with great respect that all the arguments that I have been putting forward have already been put forward from Your Honours, but I was going to make a submission that in my view *Kelly v Cooper* is plainly wrong. Well there's a very good analysis of it by Dr Brown in the article that's in our casebook, and the point that Justice Gault made at the very outset of the discussion with my friend is there seems to be an assumption in that case that the information was confidential. That the owner of the other property, Vertigo, selling to Ross Perot, there was some sort of confidentiality there. Now Dr Brown in the article that is in the casebook makes the point that there's absolutely no analysis in *Kelly v Cooper* of either was the information confidential, or secondly the law with regard to implied terms, and can it be said just looking at the *BP Refinery* test, if the five well-known factors are taken into account, the first question is, is the implied term reasonable and equitable – in my submission the implied term doesn't even get past that point if we're looking at an implied term in a context of a fiduciary relationship. Is it so obvious that it goes without saying? Well again in my submission it just can't be the case that it's so obvious that this implied term goes without saying, so without the implied term the analysis of my friend must fall away because that was his case in the Court of Appeal.

Tipping J There might have been an implied term that general consent would be given, in other words to the fact that the agents act for many principals, but when it came down to the specifics of what occurred I find it with respect very hard to see that there would be an implied term allowing that to be concealed or not disclosed.

Akel Well that must be the case Sir because we're going to see Premium Real Estate signs all over the place on the North Shore which will have agent Pam Riley, I mean that must be.

Blanchard J And then they're competing.

Akel Well they're competing to a certain extent but only because

Blanchard J Well everyone knows if they go to a Real Estate Agent that the agent is trying to sell more than one property at a time and so you're in competition with another vendor. That's a given.

Akel It's a given, and so that is an implied term which no one would have any difficulty with, but in this case to say that it's an implied term that you don't tell your vendor what you know not about a competing vendor along the road with a Premium sign on it, but about this purchaser

Tipping J Who's just bought next door.

Akel Who's just bought next door, that's right, and as the Privy Council says in *Kelly v Cooper*, again it goes without saying that that would have been a material factor to Mr Kelly that he'd known that Vertigo, the property next door, had been sold to Ross Perot, and I'm

Blanchard J That would have given you vertigo.

Akel Yes it would have and I suffer a bit from vertigo as it is so it would have exasperated the situation, but in my submission Justice Gault is quite correct. The agent was very lucky in that decision and it's significant that the following year the Privy Council considered *Mouat v Clark, Boyce* and in the context of a legal situation, a legal fiduciary duty and really said yes you can act in a conflict situation but as long as there is informed consent. And so one could turn around and say well is that a bit of a retreat from *Kelly v Cooper*. I don't know whether that is the case or not, but I would submit

Blanchard J Was *Kelly v Cooper* cited?

Akel Now I will check on that, and I'm sorry to say I was going to do that this morning Sir but I didn't get around to doing so, but the situation must be that in this particular case that we're concerned about, it would have been so easy for Ms Riley to have said to Mrs Stevens, who incidentally was the person who drove the sale. Mr Stevens was very much in the background. He did give evidence. He was cross-examined. There was extensive cross-examination of both Mr and Mrs Stevens, and Her Honour said they were inexperienced in buying and selling property. Now there was some suggestion that Mr Stevens was a businessman because of his association with the Stevens family living and the Stevens business of some sort, but she saw Mr Stevens in

evidence. Mr Gilbert didn't see Mr Stevens give evidence, and I don't think Mr Napier would characterise Mr Stevens

Tipping J I think you're trespassing into slightly

Akel I was but any suggestion from the bar that these were experienced people is refuted. Her Honour found otherwise, and my submission is that Her Honour's finding is not impeachable on that point. Now with regard to would Mr and Mrs Stevens have acted in any way differently, I invite Your Honours to go page 176 of volume 2

Tipping J Do you need anything more than the strong finding in para.120 of the trial judgment.

Akel I don't need anything more, but I was going to ram it home because Mrs Stevens actually says that if she'd known about it

Tipping J Well sorry, page?

Akel Page 176

Elias CJ Of Volume?

Akel Volume 2. I mean she makes the obvious point that really is what Justice Blanchard was saying at line 15 'well I think if I had been told that Mr Larsen was a trader and an investor in property I probably wouldn't have signed, well I know I wouldn't have signed the agreement and I suppose if I had signed the agreement and found out I would have called my lawyer. It would kind of ring alarm bells I think if I knew the guy was such an expert I suppose, yes. Would you have considered taking any other steps with regard to the offer he put forward etc? I probably would have been scared off personally because I wouldn't have been anywhere near his experience. That's kind of again why you have an agent I suppose and helps and negotiates for you and you're not the best negotiator and I would probably have been frightened'. Now that's Mrs Stevens' evidence. Later on she says at line 33 'If I had known Mr Larsen was a dealer in property and investor I probably wouldn't have entered. Yet why? Because my impression of a property investor is being savvy with the market, does it for a life job, has more knowledge than some Real Estate Agents. I would just have questioned why he was purchasing my home. He was an investor. For him to purchase my home I would think that he was purchasing it more reasonably than a normal transaction. That would be my thought'. And so she goes on. Now again in my submissions that's how the average person who was confronted with, or who had been told, that Mr Larsen is a trader. He often buys and sells property at a profit, and that's acknowledged by Ms Riley in evidence, and the chart itself, a chart was produced at the High Court hearing to show the profits that he made over a very short period, and that is referred to by Her Honour in the evidence. Then in

those situations in my submission, any person would have been scared off as Mrs Stevens says she was, they wouldn't have sold. Now Her Honour also made the finding that Mr and Mrs Stevens were in no hurry to sell. That was an express finding and Mrs Stevens said in evidence with regard to the Parnell property, page 116, para.47, that's volume 2, bearing in mind that that agreement was subject to the sale of their own property. Oh no sorry, with regard to para.47, I was simply going to note there on top of 47 that the evidence also was given by Mrs Stevens which is referred to in our submissions that everything led her to believe that they were buying the property as a home and not as an investment, and indeed Mr Stevens left a note at hand-over for Mr Larsen saying I hope you love it as a home and enjoy it as much as we have. And that again is referred to in our submission. But what Ms Riley said about the Coatesville property led Mrs Stevens to believe because Ms Riley had said don't worry about his scruffy nature, they've got the money, the natural supposition was well this was going to be a home by the sea and they would also have the property at Coatesville for Mrs Larsen's horses, after all they have the property

Blanchard J Where's that in the evidence?

Tipping J It's in the same paragraph at 47 isn't it, the evidence of Mrs Stevens?

Akel Yes.

Blanchard J Yes, but Mr Akel appeared to be elaborating on it

Akel No, sorry that was in my submission that we were saying well the natural inference from saying you know we've got the property at Coatesville - she wants the horses. Because she had been told don't worry

Blanchard J So that's your submission, that's not evidence?

Tipping J But he preferred the sea.

Akel Yes, but he preferred the sea.

Elias CJ Well that looks like a couple at loggerheads to me, but it's just a question

Akel What over horses and the sea?

Elias CJ Yes.

Akel To the average vendor they would think he is buying it for his home because of the stunning views that this property has got.

Blanchard J And he's going to take the risk on whether his wife will stick with the horses, is that it Mr Akel?

Akel Well that's exactly it, well I won't go there.

Tipping J Well could we come to materiality after the morning adjournment?

Elias CJ Yes morning adjournment. Let's take the morning adjournment, thank you.

Akel Yes, but I was just going to say there's not really a lot more that I was going to say with regard to the liability issue unless

McGrath J Mr Akel are you going to take us to a passage of the evidence as to what presumably was the loose nature of the contract for purchase they had I think at Parnell wasn't it, there was

Akel Yes that's right.

McGrath J Can you take us to that after morning tea?

Akel Yes, thank you.

Elias CJ Thank you.

11.32am Court Adjourned
11.53am Court Resumed

Akel With regard to the Parnell property, Justice McGrath's question with regard to that, at page 109, volume 2, para.11, Mrs Stevens gave evidence 'as a result of my discussion with Errol', that was a Mr Errol Officer who was the previous owner of 27 Beach Road, 'and other inquiries, Mark and I agreed that we wanted to sell the property for at least $3 million. However, we weren't in any rush to sell the property. After all it wasn't like we needed to sell it – we didn't need the money. Mark and our son could still travel to their jobs and we hadn't purchased another property anywhere else'.

Elias CJ That's in February is it?

Akel That's in February, yes.

Elias CJ Yes.

Akel And then with regard to the Parnell property purchase, the best evidence as my friend Mr Napier cross-examined Mrs Stevens at page 155

Elias CJ So there's nothing in her brief about purchasing?

Akel Yes there is, yes.

Elias CJ Where?

Akel 33, page 113. 'In the meantime Mark and I had been looking around to try and find a new home for us to purchase. On 5th April we made an offer on a property at Domain Drive, Parnell of $2.375 million. The offer was accepted, with the agreement being conditional on us selling our property from $2 million or such lesser amount as the purchaser shall accept by 30th June. Settlement was to take place on 2 July 2004". And then Mrs Stevens was cross-examined at page 155. At line 19 'In April your motivation to sell the property increased didn't it? From the beginning, no. You entered into a conditional agreement to purchase a property in Parnell? That's correct. And presumably you entered into that agreement because you wanted to live in that property was that fair? I needed a place to live, that is correct. Are you saying that you did not particularly want to live in the property that you were purchasing in Parnell for in excess of $2 million? The property that we wanted to live in was 23 Beach Road, that is a dream property. Parnell was a necessity for our family unit so it wasn't my dream property. It was a place to go to if we sold', and so on.

Blanchard J They would have had to have gone ahead with Parnell if they'd got a sale at $3 million.

Akel Yes, because if the vendor had wished to enforce that agreement

Blanchard J Well one assumes the vendor would.

Tipping J Well that's extremely good external evidence of their belief that it was worth around about that figure.

Akel About $3 million dollars?

Tipping J Yes.

Akel Yes, and this is the point that I'll come to in a moment with regard to damages, and in particular the Court of Appeal reducing the High Court judgment, but if I can just

Tipping J Well leave it until then.

Akel Yes. At line 5 'as I said before didn't increase and I will tell you why it didn't increase is that we had purchased 23 Beach Road before we sold Brown's Bay – that was a previous home. And if you think a move is stressful, that turned out to be probably the most stressful time in mine and Mark's relationship because we had to sell our home before settlement of 23 Beach Road, so when we purchased Parnell on

the conditional offer years before that we had sworn that we would never be pressured like that again so we made it very clear with no pressure to get out of the agreement' and so on. And then at para.23 of Her Honour's judgment which is at page 45, volume 1, there's the express finding which we have referred to a number of times in the submission. In early 2004 the Stevens decided to sell though they were not in a rush to do so. And Mrs Stevens was aware that the neighbouring property at 27 Beach Road had sold in September 2003 for $3.2 million despite it's larger section and tennis court, she thought that the view were not as good as 23D, that's her property. On that basis the Stevens decide that they wanted to achieve at least $3 million for that property.

Elias CJ Mr Akel, I don't know whether you've finished the Parnell references, but if you have I'd like to be taken to the evidence about commuting times. It was suggested to be another reason why the impression was given that the house was sold to Mr Larsen for personal use.

Akel Yes, alright.

Gault J Volume 2, para.26.

Akel Yes, para.27, and this is the evidence of Mrs Riley's. 'I also told her that Mr Larsen and his partner lived in Karaka and he was finding the travelling too much so he was looking for a place closer to his office

Elias CJ Sorry, which paragraph was that?

Akel Paragraph 26 Your Honour. Thank you Sir.

Blanchard J So that's clearly he was looking for a place to live in.

Elias CJ Karaka's not Coatesville.

Akel No, Karaka's down the Southern Motorway part and Coatesville's up

Elias CJ Where does Coatesville come into this?

Akel That's going in from

Elias CJ Yes I know where it is. What I mean is well I just don't understand the evidence on it. It's probably not necessary that I understand it.

Akel Yes, but the clear implication from that evidence is that, and she's saying so 'I also told her that Mr Larsen and his partner lived in Karaka and he was finding the travelling too much so he was looking for a place closer to his office'. Well that's clearly a home under those circumstances there.

Elias CJ Yes.

Tipping J Well either she honestly believed that at the time, although that doesn't matter I don't think.

Akel Well yes Sir, but in my submission the comment that is made by

Tipping J I don't think it matters what her state was, the fact is she said it, from her own lips she said it.

Akel From her own lips, but also she knew that he often said that when he was buying properties and she repeats it and that's why

Elias CJ She knows

Akel She knew that his modus operandi was

Tipping J Where's that? Where did you get that from, that this was a sort of standard spiel?

Elias CJ Yes.

Akel Paragraph 11 this is what Miss Riley says.

Blanchard J Where?

Akel Paragraph 11 at page 301, volume 2, just a few pages earlier. 'Over time I became familiar with his approach to the property market. Typically he would buy properties on the basis that they would be his family home for his partner, Lisa and himself. Mr Larsen was an astute buyer and was quite demanding. I would show him many properties before he would put an offer in and usually if his offer on a property was accepted he would get a valuation report for the property. He sometimes asked me to organise a valuation but he always directed which valuer to use

Blanchard J That's a bit ambiguous. What does he mean by on the basis that they would be his family home? Is it on the basis that's what he was saying, or on the basis that it would actually be his family home?

Akel Well my submission is that if he's buying and selling the properties, that's what he's saying it is.

Blanchard J Was Miss Riley cross-examined about that.

Elias CJ Because it could mean he's moving in and he applies a lick of paint and does it up and moves on as a lot of developers do.

Akel Well with great respect Your Honour that's a bit unrealistic. I mean one of the properties that – I did say with the greatest respect – but he

buys three apartments. The chart that has been put in by my friend Mr Gilbert, he buys three apartments

Blanchard J Yes but we don't know that such a statement was made in connection with those properties.

Akel No, but in answer to Her Honour, I'm saying well property speculators don't buy a home and move the whole family in and then move out.

Elias CJ Well he's only got a partner and horses.

Tipping J I think the clue to this is the last sentence in 11. Para.11, 301 where she says 'usually after a short period', so the implication is that this was just a spiel.

Akel It's a spiel and Her Honour in my submission is rather kind to Miss Riley and the comment that's made in the *Rea* judgment by Justice Thomas where Judges often make findings in moderate ways not to upset parties to the proceedings, but Her Honour got the fill of all the witnesses in this case over quite a lengthy trial. I think it went for about what was it, 8 or 9 days I think it went. It was quite extensive.

Gault J No wonder litigation is so expensive.

Akel Well

Tipping J Anyway

Akel I'm surprised in my submission that this case ever ended up in Court but there we go.

Gault J It seems that para.12 is perhaps relevant having regard to the list that Mr Gilbert produced, her knowledge was far wider than simply those previous transactions. She knew he dealt with these other agents as well.

Akel And to the question that you know is this information material, my submission is this that it goes without saying that if any vendor knew that the purchaser was a property speculator for want of a better term, that any vendor would be on guard because the modus operandi of a property speculator is to get a bargain and so therefore the person would turn around and say well maybe I should be getting a valuation to see exactly what the property is worth, and on top of this, you know, a submission's being made that the Freeborn valuation was suspect. You know that part of his modus operandi was to get a suspect valuation and that would sort of justify how we approached the market after that, but Ms Riley

Elias CJ It might have helped with finance too.

Akel Yes helped with finance, but Ms Riley and Premium were donkey deep in that because they then used the valuation as part of the marketing package.

Elias CJ That's later.

Akel On the on-sale of the property, how the Stevens found out about what was going on was that their previous next door neighbour rang them up and said your property's on the market and by the way it's been marketed with a valuation as at the date you sold your property, saying that the property's were $3.6 million dollars. Now as both Mr and Mrs Stevens said when they found out about that there words were 'we felt sick' and I certainly would say that the average vendor would suddenly feel very sick, and then of course

Tipping J There aren't 12 of us up here Mr Akel.

McGrath J Are you making a point about the timing of what you call the suspect valuation?

Akel What's that Sir?

McGrath J Are you making a point about the timing? You said it was as at the date of the sale.

Akel The valuation that Mr Larsen obtained was as at the date of the sale.

McGrath J But what was it

Akel What was it sorry?

McGrath J What was the date of it?

Akel The date of it is in the evidence. It's only about a week after the week of sale Sir.

McGrath J It's just after the date of sale.

Akel Yes it's obtained after the date of sale – 5th May.

Elias CJ Anyway you're indicating that it shouldn't be dismissed as not having a bearing on valuation, but it really on the point that we're looking at here it's not relevant because the Judge didn't make findings of negligence or that the agent should have known or that they knew about this valuation, so we can probably move on

Akel Without having the final say on it or necessarily be seen to have the final say on it, but Ms Riley knew that his modus operandi was to get that false valuation

Elias CJ No we've understood that.

Akel And

Tipping J I think this is relevant to relief frankly if it's relevant to anything.

Gault J You don't need it on the question of liability at all. You've got the findings that you seem quite comfortable in defending. You don't need to try and get them wider or more savage.

Akel Oh I was just trying to add a bit of colour to the proceedings.

Elias CJ Well you don't need to add any more colour. Is there anything more you want to say on the cross-appeal

Akel No there's not

Elias CJ We'll just hear Mr Gilbert if he has anything to say in reply.

Gilbert No I don't thank you Your Honour.

Elias CJ No, thank you Mr Gilbert. Yes Mr Akel then we'll hear you on your appeal.

Akel There are two issues in the appeal. First of all the question with regard to should the vendors, Mr and Mrs Stevens, be entitled to damages representing what was made by Mr Larsen on the re-sale. Now the distinguishing factor in this case that in my view takes it out of the ordinary is that Premium facilitated the ability of Mr Larsen to make that profit, and that really follows on to the point that I was just saying before the cut-off. They had acted for him on some seven previous occasions. They knew his modus operandi. They then take the sole agency to sell the property prior to the

Gault J Can I stop you there Mr Akel, because it seems to me that the duties and obligations of fiduciary can't be any higher than those of a Trustee, and before the obligation of a party other than the Trustee is drawn into obligations or liability for breach of trust there must be dishonest assistance or there must be dishonest aiding, and it seems to me that you've got findings against you as to dishonesty and so you're seeking to say there is an involvement in a breach of fiduciary duty in such a way that would take it far beyond the obligations to assist in a breach of trust. Now that just doesn't seem to me to be on as an argument.

Akel Well if we look at the principal remedies that we have in equity. We've got recission, account of profits and His Honour Justice Tipping in *Chirnside* refers in some respects to an account of profits as part of equitable

Tipping J I think it was damages measured as if it were an account of profits.

Akel That's right, measured as if it were an account of profits.

Tipping J But it's still damages.

Blanchard J That was an unusual case though, where the Courts really had to measure damages through the profits, but it was not a true accounting of profit case.

Akel What we say in our submission is it's not necessarily seeking an account of profits, although it was originally framed as such. In other words seeking to have the fiduciary account to the beneficiary for the profits made by a third party, and it was said the reason why that should be the case is because of this close commercial relationship between the fiduciary and the party who makes the profit and the facilitation of that making of that profit by the fiduciary. Now another way of looking at it could be just to say perhaps clutching at what His Honour Justice Tipping said in *Chirnside*, is this just another way of measuring the damages, bearing in mind the broad discretionary approach the equity takes to the measure of damages in a particular situation. I mean

Elias CJ Well it has to be the measure of loss is the difference between the measure of loss which is the damages amount in account of profits, but here you haven't got the agent profiting, so you're driven to damages for the loss suffered by the vendor.

Akel The agent doesn't profit to the full extent of the gain by Mr Larsen, but the agent profits because of the ongoing relationship with Mr Larsen, and the ability to make it

Elias CJ Well you have to then measure that gain.

Akel Well how are you ever going to measure that gain?

Blanchard J You've never claimed it.

Akel No.

Blanchard J You've never claimed as I understand it the profits that Premium made from commissions on subsequent deals with Larsen which you would argue if you put the argument up, was the rationale for the behaviour.

Akel No, but it was coincidental that the sale price and the gain made by Mr Larsen was the value of the property. Now when it came to the argument in the High Court, certainly it was put forward as seeking an account of profits that had been made by

Blanchard J You never sought it in accounting for the commission?

Akel Not for the commission.

Blanchard J No, well that might possibly have been tenable.

Akel It was sought in account of the commission on this particular sale but not a commission

Blanchard J On the re-sale.

Akel Not on the re-sale.

Blanchard J Yes.

Akel No, yes I accept that, but I've never sought an accounting of the ongoing commission that Premium makes, sorry, as a result of their ongoing relationship with Mr Larsen. I accept that the argument is novel, and I'm not going to waste this Court's time on it, but it's the point of the close relationship between Premium and Mr Larsen

Tipping J But how close. I mean if we are going to set down some sort of principle Mr Akel, what would you wish us to say it was – close relationship, dishonest assistance by analogy with the case that Justice Gault's referred to? What is the submission precisely?

Akel It is a close commercial relationship in the nature of the ability to obtain further permission from that relationship and the potential for more listings of property regardless whether any commission is made

Tipping J Part of your difficulty is this that you're tending to merge stripping gain and compensating for loss. Equity will do both, possibly both in the same circumstances provided there's no double counting, but surely in order to strip a gain that has not been made by the literal party in breach, other than where the gain has been made by a vehicle for that party like some of the cases you have referred to, there has to be something in the nature of I agree with Justice Gault, dishonest assistance, conspiracy, you know, fraud, but the only hope you've got in my view is, because there's no suggestion of that and no findings?

Akel No.

Tipping J No. The only hope you've got is through the loss route which you tended to be flirting with and saying well the loss, the prima facie measure in common law is the difference between market price and sale price.

Akel Right.

Tipping J Right, but you would have to argue wouldn't you that in equity the prima facie measure was what was actually gained as opposed to market price less any appropriate deductions for improvements and

changes in the market and that sort of thing. Now that would be a very very elusive principle to

Akel Yes, I'm obliged to Your Honour for putting it that way, but it's not necessarily elusive on the facts of this case.

Elias CJ But we've got valuations in this case which contradict using that, because they make it clear that there was escalation in value of properties between the time when the agreement was entered into and the resale.

Akel Not to the extent of the $1million dollars between $2.575 and the on-sale of the

Tipping J No, it's the difference between $3.2 and $3.5

Akel Yes.

Tipping J It's the uplift.

Akel Well yes but the market didn't uplift it all that much.

Tipping J I'm saying it subject to the argument about the $2.8.

Akel Yes.

Tipping J You have the prima facie common law measure in your favour of $3.2 - $2.5. What you have to argue is that in equity as I see it, the loss shouldn't be prima facie measured that way but what he actually got less you'd have to have some adjustments for improvements for example.

Akel Yes, and the point

Tipping J And uplift in the market.

Akel But the point that is made in the submission Sir is that if we look at so much at what the gain is by Mr Larsen, that's the wrong way of looking at it from equity's point of view. It is the loss that has been suffered by the Stevens.

Tipping J But if on the probabilities they wouldn't have made $3.5, how does it become their loss?

Akel Well their loss is that shortly after Mr Larsen had the property he had offers on it at $3.3

Blanchard J So you're not arguing it as an accounting for profits at all. It's just another measure of loss, so we can forget about accounting for profit.

Akel Yes, and I accept that it's been put in the Courts below on an accounting of profits but in this submission that we say, it is not strictly speaking an account of profits. It is another way of measuring the damages.

Tipping J Granted that conceptual shift which I think is sensible, because I think accounting for non-existent profits other than when there's conspiracy or vehicle is extremely, but how do you say your clients have lost a figure starting from $3.5. You haven't lost a million dollars. You may well have lost $3.2, which is your alternative argument, but let's assume for a moment that that is the right figure, $3.2, how do you get the extra $300 that you've lost?

Akel Because the emphasis is not on what happened to them, it's the gain made by the

Blanchard J You've suddenly jumped back to a different concept. You can't keep leaping between accounting for profit and damages like this.

Akel Can I just go right back to

Blanchard J This is hopeless.

Akel Well I'll try not to be hopeless Sir.

Tipping J Well I'm not un-attracted to the idea that in equity you might have a different starting point, but what I can't see in this case how you can possibly justify $3.5 because if for no other reason the adjustments that must be made, and we've go no evidence to say those adjustments might well take you back to close to $3.2 for all I know. I just don't understand how you can do it. It's all very fine in theory, even if we bought the theory, but how can you show that you've lost the whole lot. When the market changed he improved it; he had his own expertise in the marketing campaign; he had another agent in the marketing campaign. Heaven help us, speculation is a capital S in this.

Akel Well it is and at the risk of being seen as totally hopeless by Justice Blanchard, equity has never focused on the loss made by the beneficiary. It is the gain that has been made at the fiduciary's expense.

Tipping J Oh dear, oh dear, you're merging different concepts Mr Akel.

Akel Well maybe that's the difficulty of the argument

Tipping J It's the witch's brew that you're serving up to us.

Elias CJ Anyway you're not asserting that. You're simply saying this is evidence from which the loss could be measured by something other

than the measure used by the Judge or the Court of Appeal or the $3.2 valuation.

Akel Yes.

Elias CJ Yes.

Akel And I accept responsibility for characterising that idea as getting an account of profits from a you know sheeting home to the fiduciary the profit or gain or whatever that has been made by the third party.

Tipping J Can we get rid of the word 'gain' and just concentrate on the word 'loss'? Because a loss is not measured by a gain. If you're not seeking an account. It's never measured by a gain. They may coincide but the two are completely different kinds. Loss, now how do you get to the loss of $1 million dollars.

Akel Well the loss that I would be looking at is from the sale price of $2.5. That they have lost a property that at some stage was worth on the open market $1 million dollars more and sold at that particular

Blanchard J In a different market, after work had been done on it, and after a different marketing campaign involving as my brother says, another agent.

Akel Well let's answer the last two points first of all. The work done on the property was minor. Ms Riley acknowledged that. He painted some rooms. He took down one wall and he hired in some, what she considered not very good furniture, so it was not a lot. That was never in dispute that it was only minor work. The second point is

Blanchard J But you can get minor work which does the trick

Akel But it's not as though we're looking at work done by a party that was an expensive exercise from his point of view. The second point is

Blanchard J What evidence do we have about this so-called minor work?

Akel Well I cross-examined Ms Riley on that and she acknowledged it was minor, and the points that I have referred to

Elias CJ But don't you have to convince us and I'm sorry to break in, but don't you have to convince us that the measure adopted by the Court of Appeal was wrong? Don't we have to start there?

Blanchard J You're starting at the top and coming down.

Akel Yes, Your Honour's right, but this argument was put before the Court of Appeal and did get short shift and it appears as though it's going to

suffer the same fate in this Court, hopefully not with a pejorative statement that it was clearly hopeless, but

Elias CJ Well except you've shifted your position, because there you did run it I think you just said on a basis of an account of profits. You recognise the error of that way. You're advancing it now on the basis that it's measure of loss that you're after. Right, if it's measure of loss, there's no error in principle in the way the Court of Appeal approached matters, so you have to indicate to us why the measure that they arrived at is wrong.

Akel Yes, can I just finish this point in answer to Justice Blanchard's point about the extra marketing campaign; different agents, that is not entirely correct. First of all the Stevens spent something like about $20,000 or whatever it was on their marketing campaign. Mr Larsen's campaign was not markedly more in cost. The next point is

Blanchard J Well that doesn't really prove anything. I mean the fact that he did a different campaign doesn't mean that it wasn't very effective even if it cost about the same amount. It may just mean that he spent his money better.

Akel Well he still sold to people who had a home here in New Zealand. The same market was in essence reached or should have been reached as was on behalf of the Stevens. And if I can just cut off one further factual point, it was not sold entirely through a different agent, through Bayleys. The commission was a shared commission.

Tipping J I didn't say it was. I said another agent came in as part of the team.

Akel It was primarily Ms Riley who was the agent who was involved.

Tipping J But I'm with the Chief Justice. First of all you've got to persuade us that the Court of Appeal's measure was wrong. Now I think you could argue that in equity the starting point should be the price actually realised, but then you'd have to bring in the adjustments. Now whether you want to argue that or whether you accept that the market value thing was correct in principle I don' know, but it would be interesting if you told us.

Akel Yes, well are we merging then into the second question with regard to the

Tipping J No, all I want to know is what is your submission that when there's a breach of an equitable duty, are we inexorably tied as you are in common law to market value or should the Courts be able to at least consider as a starting point the price actually realised?

Akel The latter proposition.

Tipping J Yes I thought you might say that.

Elias CJ But if it's directed at ascertaining what the loss was at the date of the transaction, then the question that's being addressed is what was the market value of the property, or what was the value of the property at that date?

Akel Well the finding of the High Court Judge was the $3.275.

Elias CJ Yes, on the basis of

Akel And that is the factual finding by Her Honour. Now my submission is that that shouldn't necessarily be the measure of loss where there has been a breach of duty like there has here, that equity does have a discretion to say well

Gault J Why does the breach of fiduciary duty increase that loss?

Elias CJ It's loss we're looking at.

Gault J Loss is loss however it is caused, and whether it's caused by a breach of contract or a breach of fiduciary duty, if you're measuring loss you measure loss. I can't see why the loss has increased simply because it's a fiduciary obligation.

Akel Well we do get back to the point that obviously Justice Blanchard doesn't accept, when I say that equity has traditionally looked at what has happened as a result of the gain

Gault J The fact is that the gain is Mr Larsen's gain, not Premium's gain

Akel Yes I accept that.

Gault J And you've tried to dress it up as damage but your written submissions clearly say that is to be the measure of the gain and I just think it doesn't fly. I just can't see it as an acceptable argument.

Blanchard J We know that certain differences occurred after the fiduciary breach. We also know that Mr Mahoney, whose valuation was accepted, put in the $3.275 figure. I don't think there'd be any justification in those circumstances for going above the Mahoney figure if you're looking at what was likely to have happened.

Elias CJ The resale was simply perhaps prima facie evidence from which a valuation could be inferred, but that's been exploded by the valuations, and the valuation which the trial Judge accepted. Really the argument here Mr Akel is between the High Court Judge's determination and the Court of Appeal's it seems to me, and we really should cut to that.

Akel Alright I will cut to that right away if I can make one final submission for the basis of this – it will be short Sir. The basis of this submission is simply that that gain that was made by Mr Larsen was facilitated by Premium, and as a result of

Blanchard J This is not a claim against Mr Larsen.

Akel I accept that.

Blanchard J If it were a claim against Mr Larsen, and if it was otherwise established, you'd take that profit off him in its entirety.

Akel Yes.

Blanchard J But you'd take it off him as profit, not as the loss to the plaintiff.

Akel The argument hinges on the close relationship between the two, but I'm not going to waste the Court's time any further because it appears to me that the argument is not going to be accepted by the Court. I still think it is a

Tipping J Damage is always a question of fact. There are no absolutely firm rules. There are prima facie rules and I was interested in the Chief Justice's proposition that prima facie it might have had some value as a measure what the actual sale price, but its value in this case is immediately exploded by the changes subsequent to the breach. I wouldn't knock the concept firmly on the head but it doesn't seem to me to fly in this case.

Akel Well at least hopefully I've established the possibility of a concept, but I can't add anything more to what I've said on my feet and in the submission, so without conceding the argument, I will move on to the second point and that is the difference between the High Court and the Court of Appeal, and in our submission Her Honour took the correct starting point, that is what was the true value of the property as at the date of the sale to Mr Larsen. That figure in essence she made a finding on the facts that because the Stevens would not have necessarily sold the property but have held onto it, she said 'therefore their loss at that point in time is the difference between the sale price to Mr Larsen and the true market value of the property', and as an add-on to that she says they would not have paid commission on that sale so therefore they should be refunded the commission. The Court of Appeal's approach is that because there was a previous offer which was called the 'Wendy Wang Offer' at $2.8 million dollars, sorry

Elias CJ Counter offer at $2.8 million dollars.

Akel I was going to say $2.2 million to which the Stevens counter-offered at $2.8 million dollars, the Court of Appeal inferred that they would have yes held on to the property but would have still sold at $2.8 million

dollars. Now there are two answers to that in my submission. First of all although the original valuation or opinion evidence of

Elias CJ Sorry what date was that counter-offer, I can't remember?

Akel 16th of April, and that's a few days about three or four days before – 23rd April was his offer.

Elias CJ Yes thank you.

Akel Now Her Honour said in her judgment that the root problem in the whole case was the initial valuation that was put on the property by Mr Lewis Guy, when he believed that the property was worth less than what the Stevens wanted for the property, which was at least $3 million dollars. Her Honour did not find that he had breached the Fair Trading Act or he was negligent in his advice that it was worth – Mr Guy's belief was that it was worth between mid to 2.7 million dollars worth because that was his opinion evidence, but thereafter his whole marketing campaign was on the basis that it was only worth in that particular range. Now the best evidence of that was that after the property had been on the market for some time, he suggested to the Stevens that they should advertise the property at, buyers should be interested at, $2.7 plus million dollars, and an expert witness called on behalf of the plaintiffs Mr Denley

Elias CJ Why is this relevant

Akel Because it sets

Elias CJ I mean we've read that but where are you driving to?

Akel Because this is the answer to the $2.8 million dollars what the Court of Appeal said with the Wendy Wang offer, the counter-offer at $2.8, they said it was an untainted offer. The Court of Appeal said we're not going to take into account the $2.8 million dollar counter-offer made on the Larsen offer because that's tainted, but prior to that the Stevens had said that they were prepared by their counter offer to accept $2.8 million dollars, so therefore the Court of Appeal said yes we accept that the Stevens would have held on to their property as found by the High Court Judge, but then they go on to say in one sentence without any consideration of the evidence, they then turn around and say but we believe that they would have eventually sold the property for $2.8 million dollars.

Elias CJ There's a point of principle here on which you can argue that the Court of Appeal was wrong. That they rejected the valuation evidence which was the best evidence and they entered upon a speculation. Why do we need to go into this information about Mr Guy and all of that, because nobody's relying on that, it's a difference in approach that you should be addressing it seems to me.

Akel Well we do say Your Honour in our submission that's exactly what I say in the submission

Elias CJ I know, but why are we now spending time on Mr Guy and how he marketed it and the expert evidence that it wasn't very well marketed?

Akel Because the Court of Appeal was saying that $2.8 offer, that was the evidence that told us that they would have definitely sold for $2.8 million dollars so therefore

Gault J Mr Akel isn't your answer to that more straightforward that all of this proceeds on the basis that you succeed on liability for breach of fiduciary duty so that the indications that they might have accepted $2.8 pre-dated the information they should have had and in which event a different situation suddenly emerged and the fact that earlier they might have been prepared to accept $2.8 seems to me to be superseded.

Akel Well yes and thank you again Sir, and the other point I was going to make is that there was no reason to say well they might have held on to the property and likewise the offers of the Midgeley's and the Taits in the correct price range at $3.3 and $3.2 may well have come along. Now why I'm labouring the point is that this arose for the first time during the Court of Appeal hearing. It was not signalled as a ground by my friends in their argument in the Court of Appeal. All three Judges of the Court of Appeal were very definitely strongly of the view that this argument that they would accept the $2.8 was the answer to everything. I was the one that spent most of the time in the hearing saying why that was not the case.

Tipping J Mr Akel can I suggest to you another issue that needs to be put on the table? We have here a fiduciary breach. We have a prima facie measure at $3.275. The onus I would have thought was on the Premium side to demonstrate in order to displace the prima facie value measure that they would undoubtedly have sold at $2.8, and I don't think arguably for the moment because we haven't heard Mr Gilbert, that that was shown at that level. My way of looking at it is conceptually as simple as that, subject to whatever may be said against it.

Akel Well that was the submission Sir that I put before the Court of Appeal

Tipping J Well why did they

Akel There's nothing in their judgment about it. When I explained to them exactly what I am saying now It was not accepted by all three members of the Court.

Tipping J It involves translating the equitable approach to causation – *Everist v McEvedy and Gilbert v Shanahan* into the damages or relief arena, but I can see no difficulty conceptually with that, and if that is the right principle, Mr Gilbert's side had the onus and at a high level, and it is arguable that that onus was not satisfied.

Akel Well again that is a submission that is in our written submission and that is the submission I made to the Court of Appeal

Tipping J Well it's got far more relevance to it than the machinations of Mr Guy.

Akel No, but it was because that offer so featured in the Court of Appeal judgment

Tipping J Well never mind the Court of Appeal

Elias CJ Mr Akel I wonder whether, oh sorry did you have a question?

McGrath J I was just going to say what you're really saying is that the counter-offer of $2.8 million on the 15th April may well have not been acceptable had the information which your clients should have got concerning the history of the purchaser, been available to them, and really what the Court of Appeal overlooked was that the situation as Justice Gault puts it in relation to the $2.8 million figure could well have been very considerably changed if they'd known a speculator was going to come in at $2.25 million.

Akel No, because what the Court of Appeal is relying on is not the offer made by Mr Larsen. It's the offer the previous few days

Elias CJ We understand that, it's the counter-offer that was made, but really Mr Akel Justice Gault has put really a very strong argument to you. Justice Tipping has also indicated a different basis upon which the Judge was entirely justified, in the Court of Appeal hasn't been demonstrated to be in error. Isn't really your task at this point done and we really need to hear from Mr Gilbert on why those aren't complete answers?

Akel I will sit down.

Elias CJ You might have an uphill task in reply.

Akel Well I am getting that feeling.

Elias CJ Yes I'm sorry Mr Akel we choked you off. Sorry Mr Gilbert.

Akel I was putting up my hands, I was surrendering.

Tipping J What I would like to know, and it's not an easy point, is if you measure the loss by the market value on the basis of a hypothetical sale at that

market value, you would have to spend commission in order to achieve the sale, therefore the loss is the difference, minus the commission. You strip the gain from them by way of commission but how can you measure the loss without taking account of the commission?

Akel Yes Her Honour approached it on the basis not of the hypothetical sale but that they would have retained the property at that figure of $3.275 and therefore there would have been no sale and therefore commission would not have been paid, and that's the

Tipping J But they were going to sell the place sooner or later weren't they?

Blanchard J And they had an obligation to the Parnell vendor which went through to the 30th June.

Akel Yes.

Blanchard J And if they got an offer at $3 million or above they had to accept it.

Akel Yes.

Tipping J And they would notionally have got an offer at $3 million or above if you take the figure at $3.275 and they have to spend commission to fulfil it, strip the gain, but how do you measure the loss?

Akel Well Your Honour is quite correct if there is a notional sale. Her Honour approached it on the basis that they would not have made a notional sale. They would have held on to the property worth $3.275 whatever it was.

Tipping J Isn't that a bit artificial? I mean the whole object was to sell it. They were minded to sell it.

Akel Well I wouldn't like to concede it's artificial Sir, but I can see clearly the logic and rationale for that approach, but that's how Her Honour approached it and as we say in the submission, it's not a novel approach

Tipping J But if you're going to get $3.275 as your base point, I would see the correct approach here as stripping the gain and then measuring the loss on the basis of a sale.

Akel The only other response I would say is that there is authority again referred to in our submission that if an agent has breached the fiduciary obligations they may not be entitled to commission. Even regardless

Tipping J Deny them the commission by all means, but then measure the loss on the hypothesis that the loss implies the spending of a commission.

Akel Yes.

Tipping J I'm not saying I've got a clear view about this but this is the argument you've got to meet in my view.

Akel Yes, well the only argument I can put up is two-fold. First of all Her Honour said they wouldn't necessarily have sold the property

Gault J That just overlooks the Parnell contract doesn't it?

Akel Yes, and the second thing is that there's authority that we do refer to that says if an agent does breach the duties that are due, the agent might not necessarily be entitled to commission and there's a Court of Appeal decision of

Gault J The Privy Council says there should be dishonesty

Akel Yes I've avoided that dishonesty. What is dishonesty in this particular circumstance? Is it lack of probity, it is unconscionable behaviour

Gault J The Privy Council saw it was something worse than breach of fiduciary duty.

Tipping J I with great respect again query that. I think you can strip a gain short of dishonesty in this context, but you've then got to measure the loss accurately.

Akel Yes. Well your

Elias CJ The loss here that you're putting forward is realised value. To realise the value you have to incur the commission.

Akel Yes, I accept that, but again I'm just repeating myself. What Her Honour said is you wouldn't necessarily sell the property at that figure.

Elias CJ We're beyond all of that. We're at the stage of trying to calculate what the loss was, and the loss was the value realised to the purchaser.

Tipping J It's realised value, not

Akel Not un-realised value. I can't answer anymore than that.

Elias CJ Thank you Mr Akel. Yes Mr Gilbert, do you want to get underway?

Gilbert Yes. In my submission the difference between the approaches in the High Court and the Court of Appeal on this issue of the assessment of loss was that whereas in the High Court although Her Honour did not make any express finding – she said it would have led to a nervous reconsideration of the position – the judgment implicitly proceeds on the basis that they would not have sold at all, not just to Larsen, wouldn't have sold at all and therefore would have kept the property

worth $3.25 million on her finding and was therefore to be compensated for the difference between that figure and the amount actually received from the Larsen sale. So that was the approach. The Court of Appeal, examining the same evidence, said well the evidence doesn't go that far. The evidence doesn't support a conclusion that the Stevens would have retained this property. They were obligated to make efforts to sell as His Honour Justice Blanchard has observed, that is of course what they were setting out to do, and you can see from the evidence that their consideration was do we take this below market offer or do we wait to see if we can get a better offer from the market. So with respect in my submission the Court of Appeal was right to approach this on the basis not that the Stevens would have ended up retaining that property and not paying any commission and look at it instead on the basis of the evidence that they would have sold it and then the question is what would they have sold it for. The valuation evidence, which is where this whole case started in terms of the analysis, proceeded on the assumption that there was something wrong with the marketing, with the assessment of value etc, etc, and so by starting there before considering whether there were any errors in the sale process, a flawed approach in my submission was followed. Because the valuers can only offer a proxy for how the market would respond at a given time, they all ignored the evidence of this sale on the assumption that it was the product of a negligent marketing campaign on the basis of a negligent appraisal

Tipping J So when you said the evidence of this sale, you mean the $2.5.

Gilbert Yes the $2.5.

Tipping J Are you challenging the figure of $3.275?

Gilbert I'm supporting the Court of Appeal's approach of the $2.8.

Tipping J Well yes

Gilbert I think it's $3.25.

Tipping J Oh $3.25. Oh you're not challenging $3.25 per se? You're just saying that in the circumstances they would probably have sold at $2.8.

Gilbert Yes well I'm challenging it because how did you get, where did we get the $3.25 from?

Blanchard J Well you got it from a valuer's report.

Gilbert We got it from a valuer's report

Blanchard J And did the valuer actually base that report on the idea that there had been negligent marketing?

Gilbert Necessarily so, that was the whole basis

Elias CJ Well why.

Blanchard J Well how do you say necessarily so? Can you point us to anything in Mr Mahoney's valuation report which I haven't seen

Elias CJ I haven't either.

Blanchard J Or in the evidence where Mr Mahoney accepts that he based it on the fact that there'd been negligent marketing?

Gilbert No, but the whole point of the valuation of course was – let's disregard this sale because it is the product of a process involving breach of obligation by the agent. I mean the starting point is has the agent breached any obligation? Only if that is so, resulting in a sale that is an abhorrent sale and should not be considered, can you then disregard it because otherwise of course it would be valuable evidence as to what the market was actually saying this property was worth at the relevant time. So to

Blanchard J Well that's challenging Mr Mahoney's valuation.

Tipping J Yes it is.

Gilbert But it's not so much that as the approach in my submission that of course I'm not criticising Mr Mahoney or any of the valuers because their evidence was only ever going to be relevant if it was first established that the price that was achieved through that process was an abherant non-market, couldn't be taken into account at all in the consideration of value because it was the product of this negligent campaign, that's my point.

Tipping J But hasn't it been common ground, well at least there are concurrent findings that the true value of this property was $3.25?

Gilbert Well the value of the property is what would the willing vendor exchange it to a willing purchaser. The Court of Appeal says well how can you possibly say that you as a willing vendor, prepared to accept $2.8, that that's not relevant evidence of value.

Elias CJ On defective information.

Gilbert Well no, and that's what the Court of Appeal said. If you look at the $2.2 million offer that came in before Mr Larsen's position was known at all. Before he had presented any offer

Elias CJ Yes.

Gilbert So you've got vendors there and there's been absolutely no error committed by the agents. The vendors are willing vendors and nothing has gone wrong to this point. They've been marketing the property for a lengthy period. They've had a lot of people through. They have not had any offers at all and they're wanting to bring this process to a close.

Tipping J Did the Court of Appeal disagree with the trial Judge that the true market value was $3.25?

Gilbert Yes because the Court of Appeal were saying what would have happened when the offer of

Elias CJ It's a different approach though isn't it? It's trying to ascertain what the vendor would have sold for.

Gilbert I agree, I agree.

Elias CJ Whereas the measure adopted by the High Court Judge was what was the value of the property, and I wonder whether, I'll just scroll down here, it's not quite in the *Amory v Delamirie* category, but I would have thought in cases of breach of fiduciary duty you can't be too nice about these things and that is a defensible position, and the other requires you to speculate and that it's not wrong in principle to prefer the position that favours the beneficiary who's been wrongly treated.

Gilbert Yes, well I agree that on this aspect of it if I lose on the fiduciary duty breach and its material etc, then I'm in the position that Premium as the found errant fiduciary has the onus of showing that that transaction would have proceeded in any event and has lost on that point. So the position is on the basis of the Court's findings below, Premium has failed to discharge the onus on it that the sale to Larsen would have proceeded anyway, so that's the starting point. But that's where the fiduciary doesn't get nice treatment. The fiduciary has the onus of coming forward with quite convincing evidence that that transaction would have gone ahead anyway. My point is different. My point is, and as I understand it, the Court of Appeal's point is, this transaction not having gone ahead, what would have happened, what was the loss? The High Court's approach is the Stevens would have kept this property. They would have a property which Her Honour assessed as being worth $3.25 million dollars. They wouldn't have paid any commission. They wouldn't be in Parnell but no account is taken of that, that's the position they would have been in. That's the analysis or the basis of the High Court judgment. The Court of Appeal approached it differently and said you haven't discharged your onus to show that that deal wasn't going to go ahead, what would have happened on the evidence. The only evidence, because there was nothing in the evidence in chief that came out in this re-examination, it's the only evidence and it's at 2/177.

Elias CJ Do you want to take the adjournment now and take us back to that.

Tipping J I think this is one of the more difficult points in the case so I would like to give you time to

Gilbert See if I can do better with it.

Elias CJ Alright then we'll take the adjournment and resume at 2.15pm thank you.

1.01pm Court Adjourned
2.17pm Court Resumed

Elias CJ Yes thank you Mr Gilbert.

Gilbert Thank you Your Honour. Can I start with the High Court judgment on the damages for breach of fiduciary duty which we see at 73 of volume at 137. So it's dismissing my learned friend's argument that there should be an accounting for Mahoenui's profit, but then going on to address that fact that Premium itself had not made a profit except for the commission but that the Stevens had certainly suffered a loss and they are entitled to seek compensatory damages in equity. No problem with that. The proper relief is equitable damages in an amount that would restore the Stevens to the position they would have occupied before Premium's breach. So what would have happened? And the loss is then assessed as being $675,000 which is the difference between what Her Honour determined was the value, the $3.25 and the sale price. So if you look then at 128(d) it records that Premium had failed to show that the transaction with the trust would have proceeded in any event and is therefore liable for the loss on the transaction being that $675,000 and the $67,000 commission on the sale at $2.575 of $67,000. So this approach, what would have happened, put the Stevens back in the position they would have been if there hadn't been a breach, would see the Stevens not in Parnell but back in Beach Road, not having paid a commission and still owning an asset assessed to be worth $3.25 million. So that's the approach and the High Court would have hung on to the property. The Court of Appeal disagreed with that approach and their treatment of this starts at 101, para.92. They say we agree that Premium failed to discharge that onus that the errant fiduciary has to show that the transaction with the trust would have gone ahead at any event. However we disagree with the Judge as to the amount of the loss suffered. And essentially the difference in approach is that the Court of Appeal says well on the basis of the evidence the Stevens wouldn't have stayed there and would not have retained this property. They would have gone ahead and sold it and so what does the evidence tell us about how much they would have sold it for. And they point to the fact that the Stevens themselves, before there had been any breach of obligation on the part of Premium, had as willing

vendors, proposed to sell the property for $2.8 million. So that was before any offer emerged from Mr Larsen. And so they say on that basis if you're looking to see what the willing vendor and the willing purchaser would have done, these willing vendors were plainly prepared to sell for $2.8. Their agreement on Parnell records the $3 million dollar figure, so it's not $3.25 – they were willing clearly without any breach to sell at $2.8, and so they don't approach it on the non-transaction basis that there would have been no transaction at all. The Court of Appeal rejects that and says no they wouldn't be still sitting there in Beach Road, they would have sold it, they were willing to sell it for $2.8 million. They would have sold it at that by extending the sale period which is the evidence. The only evidence that was given about this was that evidence that I think I was about to take you to just before lunch which is Mrs Stevens evidence that – it's at 177, volume 2. Sorry to take you back to that re-examination again, but she says there at about line 13 'there was so much information I didn't know that I feel I would have done better extending my sale period if I had known that as he did in every transaction. I would have done what he did on every transaction, like I would have extended my sale period', so there was evidence, in fact this was the only evidence because there was nothing in the prepared briefs about this at all, this was the evidence that came in, in this fairly unsatisfactory way

Tipping J Mr Gilbert can I just detain you? At the end of para.93, they talk about – this is the Court of Appeal – the in any event principle. See that in the very last sentence, 'losses that would in any event been incurred', and then at the bottom of the same page, 96, they talk about likelihood.

Gilbert Yes.

Tipping J Isn't that a mixture of concepts?

Gilbert Well they're starting by saying this particular transaction would not have proceeded.

Elias CJ One is value and one is loss.

Gilbert That's right, so what would have happened on the evidence? What is the fair inference from the evidence as to what would have happened? The High Court's approach is no sale, no commission, still keep my asset

Tipping J But it's the standard to which you have to satisfy the Court with your reverse onus of what would have happened but for the breach, and they seem to be adopting losses in any event incurred and then they're talking about likelihood.

Elias CJ The first is a reference to type of loss; the second is a measure of loss.

Tipping J I'm not sure that I myself would read it that way, but I understand the distinction.

Gilbert But isn't the point, the starting point here in terms of the onus on the fiduciary to show this wouldn't have mattered, the impugned transaction would have proceeded in any event, that's the sale to the Mahoenui Trust, and if we get to this point we accept that Premium has failed to establish

Tipping J Well that's the causation point. What I'm toying with is you take the same approach to loss.

Gilbert Well you say okay, that transaction doesn't happen, what on the evidence was the loss? What would have happened which inevitably is a matter of inference from the evidence? The High Court approach is to say it's implicit, not explicit, but it's implicit in the remedy given that the Stevens would have retained their asset worth $3.25 million.

Tipping J Well forget about retaining. We're on the hypothesis that they were going to sell. The point I'm addressing is the finding that they would likely have accepted $2.8 rather than they would in any event have accepted $2.8. You see the difference in standard?

Gilbert Yes, although as I understand it in terms of the standard of proof – are we talking about the onus on the fiduciary?

Tipping J Yes.

Gilbert It applies to whether or not that transaction would have gone ahead.

Tipping J Yes, I agree with you that the authorities

Gilbert So we'll put that transaction to one side, and then you say well what would have happened on the evidence? That's a matter for inference on the basis of evidence that they would have sold. At what price would they have sold? Well they themselves, before there was any breach, bearing in mind they were asking $2.7

Tipping J I understand all that, I'm just simply saying is there a case for applying the same strict onus that applies to causation to departing from what appears to be the prima facie measure?

Gilbert Namely market value.

Tipping J Yes, that's the premise I'm putting this to you.

Gilbert In my submission one of the difficulties we have here in this case is that we started looking at value before we considered whether there was any breach. So the valuers disregard the sale. They also disregard the fact that these informed vendors themselves were prepared to

accept $2.8 million in arriving at their assessment of the value. All of that is disregarded on the assumption that it's all been wrong-footed and the produce of negligent advice or breach of duty on the part of the agent.

Blanchard J But even if it's a product of incorrect advice, and it isn't negligent. Why should your people get any advantage from that when it's their onus of proof to a higher standard?

Gilbert Well in my submission the onus applies to this issue about whether or not the impugned transaction infected by the breach or procured or arising out of the breach of fiduciary would have gone ahead or not, and the fiduciary carries that onus but that's as far as the onus goes, so if the fiduciary fails to discharge that onus and the conclusion is that transaction would not have gone ahead, then the fiduciary is in the position of having to pay compensation based on what would have happened had there not been that breach of fiduciary duty. It's the normal assessment.

Blanchard J But any decision by the vendors to accept $2.8 million was surely at least in part conditioned by the advice that had been given by Premium that the property was worth less than $3 million. Now that advice was not given negligently, but it doesn't accord with the valuation evidence.

Gilbert Which itself disregards, I mean it's all a bit circular isn't it?

Blanchard J Well a valuation is a valuation. Mr Mahoney is a very reputable valuer. That's his assessment.

Gilbert It was, but of course in coming to his assessment he was obviously disregarding what these willing vendors themselves were prepared to accept for the property, and that is if there is no breach, that is the best evidence. The valuation evidence is only ever a proxy for what the market is going to do and so we've got by starting in that position and assuming that it was all wrong-footed, in my submission a flawed approach has been followed, added to which in my submission we've got a judgment that implicitly assumes they stay there, and so in my submission the way the Court of Appeal approached it was perfectly conventional and should not be disturbed. They took the position that the onus hadn't been discharged. You therefore look to see on the evidence what would have happened and based on the evidence they say contrary to what was decided in the High Court that there would have been no sale, that there would have been a sale. At what price. They themselves were willing to accept $2.8 million without having been misled in any way or any breach of duty, and therefore how could it be that they in asking $2.7 and above and being willing themselves to take $2.8 and being bound to sell at $3, would have actually sold at $3.25.

McGrath J Did the Court of Appeal however really take into account that if it had been on this hypothesis no breach of fiduciary duty, that the vendors would have been alerted to the existence to the facts that the price was a property traders price and that there might have been consequences. I mean it seems to me that their reasoning rather glosses over that likelihood?

Gilbert Yes, but the point there was that the original suggestion of $2.8 was their own suggestion before Mr Larsen entered the picture.

McGrath J I do appreciate that, but had there been no breach, Mr Larsen still would have entered the picture

Gilbert Yes.

McGrath J And if there had been no breach they would have been told he was a property trader

Gilbert Yes.

McGrath J And that could have changed the position.

Gilbert That would have reinforced the view that the Stevens strongly held that his offer at $2.525 then increased to $2.575 was well below market.

McGrath J We're back to that aren't we,

Gilbert We are.

McGrath J But as the Chief Justice said, we are then speculating as to what would have happened and one speculation would be, and I think there was some evidence on this that Mr Akel put to us that the Stevens could have gone to their solicitor to see what they should do and could have ended up with a valuation themselves, and any of those scenarios would tell against the conclusion the Court of Appeal ultimately reached.

Gilbert Yes, but at the level of principle my submission is that the onus we're talking about is was the breach material to the impugned transaction because if you are in the fiduciary duty context, that's the only question you ask.

McGrath J Yes.

Gilbert Was the breach of material to it? If so then the fiduciary is liable. It's a much more harsh or for a plaintiff, easy route to recovery. The fiduciary carries the onus with convincing evidence to satisfy the Court. It would have happened anyway in which case there's no problem. We've fallen short on there but having got there the onus doesn't apply anymore, it's the normal situation where the Court

assesses what the loss was and that's a matter of drawing inferences in the usual way from the evidence about what would have happened and in my submission

McGrath J And not speculating, yes.

Elias CJ No, no, you want speculation.

Gilbert There inevitably has to be speculation because a transaction has occurred and the finding is that it wouldn't have, it was material, so in establishing equitable compensation in loss, you inevitably are in the position of considering what better position the Stevens would have been in had there been no such breach.

Elias CJ Don't you have to look at the reality. The reality was they were willing sellers at a fair price over $3 million dollars and the best evidence of that is the Parnell agreement. So it's a question of what was a fair price and why isn't the valuation the best evidence of that?

Gilbert I think my only rejoinder to that can be that it itself proceeds, ignoring what would normally be the very best evidence of value, namely what these willing vendors themselves were prepared to accept for the property.

Blanchard J Is the valuation report in the evidence?

Gilbert It isn't, no.

Blanchard J So how do we know the basis on which it proceeded?

Gilbert Oh I'm sure my learned friend can confirm what I say, that it does not take into account the $2.8 million dollar offer that was made before it was unaffected by any breach.

Elias CJ It's a straight exercise, reasoning, you know by comparison with other properties, that sort of thing.

Gilbert Yes. As a matter of fact there was an appeal that the Judge actually misinterpreted the valuation evidence in arriving at the $3.25 million. The Court of Appeal didn't deal with it and didn't need to because it approached it in this way. They would have gone ahead and sold given that they were willing vendors at that level. $2.8 million dollars is the appropriate sale price that they would have accepted and they would have paid a commission on it, so that's how they assessed the damages. And so they didn't get to address the separate issue about whether there was an error and misperception by the Judge about the valuation evidence that led her wrongly to the $3.25. That hasn't been dealt with. But the other short point about the Judge's conclusion is that it assumes no commission is paid and in my submission you either have the account of profits being the profit that Premium made through the

commission, or you get equitable compensation for loss. The latter is the better remedy which is clearly what's been elected and that must allow a commission and the commission of course would be on the sale at $3.25 or $2.8 million, not on the $2.575 million, so that hasn't been factored in at all. Either the discrepancy in the value and therefore the commission, or the fact of the commission itself

Blanchard J Have you looked at the case of *Keppel v Wheeler*?

Elias CJ Not recently.

Gilbert Thank you.

Blanchard J Referred to in *Kelly v Cooper*. I don't know if it gives a full account of it there but in that case there was a breach of fiduciary duty by Real Estate Agents which was accepted as being an innocent breach. They did wrong but they didn't realise they were doing wrong. They had to pay damages for the difference in value in the property and then the Court quite briefly, but it is Lord Justice Atkin, looked at whether the commission should also be forfeited. So they didn't think there was any need for an election, and they didn't on the facts forfeit the commission, but what Lord Justice Atkin said was this, "Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand there may well be breaches of duty which do not go to the whole contract and which would not prevent the agent from recovering his remuneration, and as in this case it is found that the agents acted in good faith and as the transaction was completed, and the appellant has had the benefit of it, he must pay the commission." So the agents got the commission there because they acted in good faith and were entirely innocent.

Elias CJ And the transaction was completed.

Tipping J And loss was compensated for.

Blanchard J Loss was compensated for. So if it had been found that the agents had not acted in good faith they would have got no commission and they would still have to pay the damages.

Gilbert The claim here is for the loss sustained by the Stevens, and in assessing the Steven's loss in my submission, if we're approaching it on the basis that this wouldn't have been a no transaction case, there would have been a sale, then in carrying out that calculation what position would they have been in, that one wouldn't have gone ahead, so there would be no commission on that sale, but another sale would have occurred and there would be commission payable on that.

Blanchard J Well I can follow that argument. All I can say at the moment is that it doesn't appear that the English Court of Appeal factored that in.

Gilbert Yes.

Tipping J The claim was for both $995,000 and $67,050.

Gilbert Yes.

Tipping J At least that's what I'm just looking at on page 27 of the case.

Gilbert That's right, but if you look at 52

Tipping J 52?

Gilbert Well para.52

Elias CJ Of what?

Gilbert Oh sorry you weren't looking

Tipping J I'm looking at the statement of claim.

Gilbert Statement of claim, yes page 26 of the case.

Tipping J Page 26,27, yes.

Gilbert So page 26, para.52.

Tipping J Well that they claim the sum of $995,000 and the sum of $67,050.

Gilbert Yes but it is nonetheless put on the basis that these losses, well the claim is for loss

Tipping J I wouldn't put this statement of claim in a precedent book, but on the other hand it's pretty clear that they're claiming both isn't it?

Gilbert Yes, but you can understand that in this way that if they say put me in the position I would have been in if there's been no breach, well I wouldn't have signed the agreement with the Trust; I wouldn't have paid you commission on that sale. Undo all of that. But what would have happened? I wouldn't have been sitting on the asset worth $3.25 million which is the Judge's approach. I would have instead sold it, which is the Court of Appeal's approach, and in selling it I would have paid a commission, so I agree the commission goes back because you're undoing the consequence of the wrong. It's not an accounting of profit, it's just a compensation for loss.

Elias CJ It's not just a claim for loss though, it's a stand-alone claim.

Tipping J It's based on some hypothesis that's not immediately apparent.

Gilbert No, from the pleading.

Tipping J From the pleading.

Elias CJ Well I don't know. It might be quite accurately pleaded because it's pleaded that the plaintiffs paid this commission and then the commission then surfaces in a stand-alone claim for recovery as well as the claim for the loss.

Gilbert It goes back anyway because if the plaintiff succeeds then the plaintiff would not have gone ahead; wouldn't have received the money; wouldn't have paid the commission. That all gets undone.

Elias CJ Goes to measure of loss.

Gilbert Correct. The agent has to hand it back, but what is the loss? Would I have retained the property? The only way that the Stevens can escape not paying a commission in terms of what is their loss would be if on the Judge's' hypothesis they'd have simply stayed there, but if they're selling they were always going to have to pay that commission and that has to be taken into account

Tipping J Well wouldn't they at least there's a possibility, if not a probability, they go on to a different agent?

Gilbert Sure.

Tipping J So they'll have to pay that commission.

Gilbert That's fine.

Tipping J They've then got no value from the commission they paid the

Gilbert Yes it has to go back. I'm agreeing, it has to go back. It goes back because in assessing the numbers, the amount of money that Premium has got to pay, you've got to say well

Tipping J It goes back on a different premise though doesn't it? It goes back on account of not being allowed to profit.

Blanchard J Don't you have to compare the two net figures?

Gilbert Well Premium has to pay the commission back because the sale shouldn't have gone ahead, so it's got to disgorge that commission if you want to put it in those sorts of terms, but it's part of the analysis of compensating the Stevens. So Premium does pay the commission back. The Stevens notionally give credit on the claim for the amount they did get from the Trust that they wouldn't have got if there had

been no breach, and they then get the benefit of the notional improved sale price – we say $2.8, otherwise $3.25, but in getting that price they pay a commission. You just take it into account the calculation in that way it seems in my submission.

Tipping J So they get the commission back and their loss is measured by the difference minus the commission.

Gilbert Correct.

Tipping J So in effect they're ending up whichever way you look at it, they're ending up at the gross figure of the difference, in effect. It's given back to them and then it's taken out again.

Gilbert Sort of yes. Let's say there's a new agent on the new sale, so Premium pays this commission back

Tipping J Yes.

Gilbert They give credit for what they've received – you know the sale price the Stevens have received. They then sell it through somebody else at $2.8 or $3.25 and they pay the other agent the commission in order to achieve that. That has to be taken into account in the assessment and the commission will be on that higher sale price.

Tipping J Yes well that's a subtlety that I haven't factored in, but yes that seems fair and logical.

McGrath J Mr Gilbert just one thing. In getting rid of all the netting in the process of getting there, are you saying that your liability would be on this hypothesis was $2.8 or $3.25 million less the commission calculated on that basis?

Gilbert Correct.

McGrath J That would be the net position you would end up at?

Gilbert Yes, so that the change you make to the High Court judgment if you agree with her approach is to take off commission on a sale of $3.25.

McGrath J Yes I understand that, thank you.

Blanchard J We'll need to be given some hypothetical commission figures based on $2.8 and $3.25.

Gilbert I'm sure we can agree that.

Tipping J Well at that level it's a straight line presumably, a percentage straight line.

Gilbert Sometimes they are staggered.

McGrath J The only way that the High Court Judge's ultimate position could be supported, and I'm not suggesting she did support on this basis, was for a policy reason related to equity, that even after full compensation for loss has been given, the gain should still be stripped in addition. That would be the only basis on which her position could be sustained.

Blanchard J This is what Justice Atkin says. He talks about forfeiting a right to remuneration. So you make the plaintiff whole again and then you forfeit the profit that the agent has made. Now I don't know whether this is still good law but it was certainly being cited in the *Kelly* case.

Tipping J I'm probably being a bit obtuse having sort of made the running on this initially. I just want to make sure I'm absolutely clear as to where you stand Mr Gilbert. Let's say the prima facie loss is $300,000, and then the commission's $50,000, so you take the commission back – that's step one, to have to pay the commission back – step two, the damages are that $300,000 minus the $50,000, so they end up paying altogether $50,000 plus that $300 minus the $50, so they end up altogether paying $300. I just want to be absolutely clear as to whether that's your position.

Gilbert I think that's right, but the only change I made to

Tipping J Oh is it the commission amount?

Gilbert Correct.

Tipping J Yes.

Gilbert Yes, well there's the commission amount, and if you're looking at the High Court judgment the only thing if you deduct commission on the resale.

McGrath J I'm now back in difficulty. I mean I had initially thought that all that would have to be paid on this hypothesis was the appropriate price less the commission, but the reality would be of what I think what you just said would it not that you would have earlier paid back the commission as well.

Gilbert Yes because you're considering a before and after position and so to take this problem, you know to correct the problem Premium it's determined, would not have received its commission and should not retain it, so that goes back, but on the other hand the Stevens wouldn't have received what they did receive for the property, so that's taken into account. They would have sold it at this figure but in doing so they would have paid a commission.

McGrath J And I would have thought that they got credit for the stripped commission as well.

Gilbert Well

McGrath J I mean that has to be done doesn't it for you to end up paying overall the $2.8 or $3.25 million less one commission, which I gather would be your aim on this hypothesis.

Blanchard J Which is why you started with that.

McGrath J Yes.

Gilbert Yes, I'm going to say yes.

Elias CJ Well it just depends doesn't it if there is an additional penalty that equity extracts in requiring recoupment in addition of the fee paid.

Blanchard J We may need some written submissions on this point which really hasn't been addressed.

Tipping J If it was a claim simply in contract the loss would be very simple. It would be the difference minus the commission on the resale. The twist in this tale is that you've got the fiduciary bridge which inclines you to the view that they should disgorge the commission, which in a sense is a double whammy as my brother McGrath has endeavoured to steer you towards.

Gilbert Well we've had enough double whammies today.

Blanchard J All I can say is that in *Keppel* the Court of Appeal seemed to contemplate a double whammy but said because the agents had acted in good faith, and it was a completed transaction, the commission had to be paid. The other factor, and I don't want to complicate things. There has been a tendency in recent cases of breach of fiduciary duty to make some allowance for the value of work done, and I don't know whether the other Judges agree that we should seek written submissions from you on this question of the commission.

Elias CJ I think you would be assisted by it.

Tipping J I think I would because I think this is quite an important conceptual area as well as being of some relatively minor practical importance in this case.

Blanchard J Well it could be quite important in other cases. But I think one angle that should be addressed is whether in any event the agent should receive something by way of remuneration, even if it's not commission, and by putting it that way I'm not signalling that my mind is at all made up on this point.

Gilbert So perhaps just in closing, unless Your Honours have any questions of me

Elias CJ A quantum merrit it.

Tipping J Yes, merrit it against a breach of fiduciary duty

Gilbert Well Her Honour did make that finding that Premium did not misuse any information it had gained or deploy it to advantage or

Blanchard J Hands might not have been quite as clean as the hands of the agents in *Keppel v Wheeler*.

Gilbert Possibly not.

Gault J And you've got some quite helpful findings from the Judge in that respect haven't you?

Gilbert Yes.

Gault J I would have thought that you'd be saying that you should come within the situation in *Keppel v Wheeler*, even if under other circumstances it might have to be disgorged.

Gilbert Yes.

Elias CJ Perhaps the sensible thing to do is that we'll get the Registrar, or we'll put out a minute if we would be assisted by further submissions and we'll give you an indication of what we would like you to address.

Gilbert Thank you Your Honour. So just in closing, in my submission the Court of Appeal was right to depart from the Judge in finding that there would have been a sale and the approach that they have adopted is perfectly conventional and in my submission should not be disturbed.

Tipping J I'm inclined to agree that they were right in saying there would have been a sale, but the much more difficult issue is whether it would have been a sale at $2.8.

Gilbert They're asking $2.7 and over; they've had it on the market for three months; they themselves were willing to take that.

Tipping J I understand that.

Gilbert Those are my submissions.

Elias CJ Yes, thank you. Yes Mr Akel.

Akel With respect I feel I've said everything I need to say on this issue unless there is some point that needs to be raised. With regard to *Keppel v Wheeler*, in our submissions in the High Court, the written submissions, we said where a Real Estate Agent has breached its duty of undivided loyalty to the principal then the Court has the discretion to award damages to the principal which represents the difference in the sale price if the fiduciary duty had not been breached. We quoted *Keppel v Wheeler* there at 587 and then we went on to say turning now to commission, where an agent has breached a fiduciary duty owed to the principal, then the agent will not be entitled to retain his commission, and again cited *Culley v Wheeler* there. Now I can't

Blanchard J *Keppel v Wheeler*.

Akel *Keppel v Wheeler*, sorry, so I can't really say whether we expanded on that submission. I just can't remember what was said and that seems to have been lost in the ether as its progressed through, because the Court of Appeal didn't even consider this whole issue of the refund.

Tipping J Mr Akel can I just ask you one thing? Let's assume you get back the commission by whatever route.

Akel Yes.

Tipping J Do you accept that your loss must be measured taking into account the commission on a notional resale?

Akel Yes. I think that's fair and that would be common sense. But subject to what the Courts says in saying *Keppel v Wheeler*, if the Court was to say no in a circumstance like this, and *Keppel v Wheeler* is authority, and we agree with that decision that there shouldn't be any remuneration to the agent if there has been a breach, then that would fall

Tipping J But you can't have it both ways can you?

Akel Well what I'm saying is that it makes sense if you're saying it's got to be a notional sale situation.

Tipping J Well it seems to me with great respect to the trial Judge, she was living in a vacuum

Akel Yes.

Tipping J The extreme likelihood was that sooner or later it was going to be sold, therefore the net result of that exercise was the difference minus the commission, that is the loss.

Akel Yes, but then the caveat which meant no was well if, and I just can't recall in *Keppel v Wheeler* what exactly it says. If that was authorative

to the extent of saying if there has been a breach of fiduciary duty and the Court has a discretion in certain facts not to award commission, then I would obviously wish to put that before the Court and any submission, and I'm sorry I just can't recall precisely

Blanchard J Well I read pretty much the whole passage. That's about it in the case.

Gault J Justice Blanchard read out the passage which seems to indicate that because there was no finding of bad faith and because the transaction went ahead, there would not be an order to disgorge the commission. Now how does your situation here differ from that?

Akel Well I suppose Sir it doesn't really differ from that but why I've been guarded is that I cannot recall the facts of *Keppel v Wheeler*, and I haven't read it for two or three years.

Blanchard J Do you want me to remind you? The agents got it into their heads that once they got a conditional contract signed up they didn't have any ongoing duty to convey higher offers that came in later and I think it was one of these situations where the vendor could have got out of the contract and accepted the higher offer. They were held to have acted quite innocently but to have been in innocent breach of fiduciary duty. They had to pay damages for the difference between the two prices, but the vendor didn't succeed in claiming the commission.

Akel Alright, I think then I'm back to alternate one**.** Sorry I thought there was bad faith involved in the decision Sir.

Blanchard J No.

Akel The only other point I was going to make is we did look at *Mouat v Clark, Boyce*. *Kelly v Cooper* is not referred to in the decision. Justice Gault of course was upheld by the Privy Council in the decision.

Gault J Quite right too.

Akel But I think I've made the points that I wished to make previously.

Elias CJ Yes, thank you Mr Akel. Well thank you counsel, we'll take time to consider our decision in this matter and if we need additional submissions we'll put out a minute.

Akel As the Court pleases.

2.59pm Court Adjourned