

IN THE SUPREME COURT OF NEW ZEALAND

**SC 23/2008
[2009] NZSC 15**

BETWEEN MARK MONCRIEFF STEVENS AND
 OTHERS
 Appellants

AND PREMIUM REAL ESTATE LTD
 Respondent

Hearing: 13 November 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Gault JJ

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

Judgment: 6 March 2009

JUDGMENT OF THE COURT

- A The appellants' appeal is allowed.**
- B The respondent's appeal is dismissed.**
- C The respondent is ordered to pay the appellants damages of \$659,813 and to repay to them the commission of \$67,050.**
- D The judgment sums will bear interest at 7% per annum from 16 July 2004 (the date of settlement).**
- E The appellants are awarded costs in this Court of \$15,000 and costs in the Court of Appeal of \$6,000, together in each case with their reasonable disbursements as fixed by the respective Registrars if not otherwise agreed between the parties.**

REASONS

	Para No
Elias CJ	[1]
Blanchard, McGrath and Gault JJ	[54]
Tipping J	[97]

ELIAS CJ

[1] Premium Real Estate Limited acted as real estate agent for Mr and Mrs Stevens in the sale of their home. It introduced the purchaser, Mr Larsen, who acquired the property in May 2004 through Mahoenui Valley Trust for a price of \$2.575m. Premium has been found by the High Court¹ and, on appeal, by the Court of Appeal² to have failed to disclose information material to the sale. Such failure was held to be both misleading and deceptive conduct in trade, contrary to the provisions of the Fair Trading Act 1986, and in breach of the fiduciary obligations owed by Premium to Mr and Mrs Stevens. Two types of information were withheld (although, as the Court of Appeal noted, provision of the information as to the first would inevitably have disclosed the second, so the two are interrelated). First, Premium and its salesperson, Ms Riley, acted on a number of occasions for Mr Larsen in buying and selling properties and had some expectation of acting for him in the future, including in any subsequent re-listing of the Stevens' property, setting up what the Courts below have held to be a conflict of interest which should have been disclosed. Secondly, Mr Larsen was a trader in residential properties, a fact the Courts below considered was material to the decision made by Mr and Mrs Stevens to sell their property for \$2.575m.

[2] It was found in the Courts below that, had the relationship between Premium and Mr Larsen and in consequence the fact of his being a trader in residential properties been disclosed to Mr and Mrs Stevens, they would not have entered into the transaction. It was also found that, not only was disclosure relating to Mr Larsen not made by Premium, but Ms Riley actively promoted in Mr and Mrs Stevens the

¹ *Stevens v Premium Real Estate Ltd* (2006) 11 TCLR 854 (Courtney J).

² *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 (O'Regan, Arnold, Wilson JJ).

belief that Mr Larsen was acquiring the property as his own home, even though she acknowledged in evidence that she knew that giving that impression to vendors was a tactic he had used before when acquiring residential properties for resale at a profit. Premium later acted for Mahoenui Trust in the subsequent resale of the property five months later, when it obtained a price of \$3.555m. Despite finding that Premium had a conflict of interest because of its relationship with Mr Stevens, the High Court Judge found:³

There was 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.

[3] There are two appeals before this Court. Premium appeals against the findings that it was in breach of fiduciary duty and in breach of s 9 of the Fair Trading Act 1986. Mr and Mrs Stevens appeal against the quantum of compensation awarded to them in the Court of Appeal.

[4] For the reasons to be given, in agreement with the result reached by Blanchard J, I would dismiss Premium's appeal against the findings of liability. I would do so however on the basis, which Blanchard J treats as a distinct ground of liability in itself,⁴ that the breach of the fiduciary obligation of loyalty and the misleading and deceptive conduct in breach of the Fair Trading Act consisted in Premium's providing Mr and Mrs Stevens with misleading and incomplete information. The misleading and incomplete information gave Mr and Mrs Stevens the impression that Mr Larsen was buying the property as a home for himself and his partner, instead of for the purposes of resale at a profit. The extent to which real estate agents are under general duties to disclose material information and to avoid conflicts of interest of the type in issue here are questions of some difficulty. I express briefly some reservations about the scope of the duties of loyalty taken on by real estate agents and reserve my position on the view suggested by Blanchard J that they are the same as those expected of other agents.⁵ On the basis that I would find liability based on the information given (which was misleading without the further

³ At para [115].

⁴ At para [70].

⁵ At para [77].

disclosure that Mr Larsen traded in residential properties), it is unnecessary for me to deal with the argument that disclosure of information about Mr Larsen's methods would have put Premium in breach of obligations of confidence to him. I prefer not to express views on how any such conflict should be dealt with in a case where it arises. I agree with and adopt the short answer given by the Court of Appeal and by Blanchard J that the material information that Mr Larsen was a trader in residential property does not qualify as confidential information, so that the confidentiality issues in *Kelly v Cooper*⁶ do not arise.

[5] In respect of the appeal brought by Mr and Mrs Stevens, I would dismiss the appeal against the compensation awarded to them in the Court of Appeal, while varying the result to restore to them in addition the commission they paid to Premium. Both the High Court and the Court of Appeal proceeded on the basis that the appropriate remedy for Mr and Mrs Stevens was an award of compensation for their loss in the sale. In the High Court, Courtney J found the loss suffered by Mr and Mrs Stevens as a result of the breach of fiduciary duty to amount to the sum of the commission of \$67,050 they paid to Premium and the undervalue at which the property was sold. She put the undervalue at \$675,000, being the difference between the sale price and \$3.25m (estimated at trial by an experienced valuer to have been the market value of the property at the date of sale). This measure of loss was arrived at on the basis that the sale to Premium would not have proceeded had the information about Mr Larsen been disclosed and on the basis that Mr and Mrs Stevens would have retained their property. As the Court of Appeal later noted, the Judge's findings of fact on causation were "not entirely clear".⁷ She said that, if in possession of the information that Mr Larsen traded in residential properties, Mr and Mrs Stevens would have concluded that any offer made by him was likely to be below the market value of the property. This would have reinforced their own doubts about Premium's opinion that the property was worth less than \$3m and would have led them "to a nervous reconsideration ... of their position".⁸ On the basis that, if the transaction had not proceeded, "the Stevens may have chosen not to

⁶ [1993] AC 205 (PC).

⁷ At para [37].

⁸ At para [106].

sell”, Courtney J concluded that the measure of their loss in the transaction was that they would have retained an asset “worth \$3.25m”.⁹

[6] The Judge took a different approach to causation in the remedy provided under s 43 of the Fair Trading Act. She did not allow the claim for refund of the commission (on the basis that compensation to Mr and Mrs Stevens for loss on the sale meant there was “no justification for treating their position as if the property had not sold”¹⁰). And she discounted the loss on the sale by 50 per cent in recognition of her finding that a significant cause of the decision to sell at \$2.575m had been the view held by Mr and Mrs Stevens, based on advice from Premium that was not negligent, that the property was worth less than \$3m. The 50 per cent discount was applied by the Judge to reflect the “actual causative effect” of the non-disclosure.¹¹

[7] The Court of Appeal agreed that the sale to Mahoenui would not have proceeded if the material information had been disclosed. It dismissed the appeal by Premium that no loss was established because it rejected the argument that the sale would have proceeded in the absence of any other offers. But the Court of Appeal differed from the High Court in the assessment of loss. It considered that the reasoning in the High Court as to causation had been unclear and that the evidence had not supported the view, apparently acted on by the Judge in assessing loss, that Mr and Mrs Stevens would have retained the property. The Court of Appeal held, rather, that the undervalue at which the property was sold was properly measured by the difference in the purchase price and the price of \$2.8m at which Mr and Mrs Stevens had indicated that they were prepared to sell in response to an earlier untainted offer by another prospective purchaser. This analysis it considered applied equally to the Fair Trading Act cause of action. The Court of Appeal therefore set aside the awards of damages in the High Court and reduced the compensation awarded to \$225,000, being the difference between \$2.575m and \$2.8m. It also disallowed the award in respect of the commission paid to Premium on the basis that compensation for loss excluded such “account of profits” because, if the property had been sold for \$2.8m, Mr and Mrs Stevens would have paid commission.

⁹ At para [118].

¹⁰ At para [126].

¹¹ At para [125].

[8] Mr and Mrs Stevens appeal to this Court on the basis that the appropriate remedy was restoration of the profit made by Mahoenui on resale (the difference between \$2.575m and \$3.555m) or, alternatively, that the High Court measure should be reinstated. I agree with the reasons given by Blanchard J for rejecting on further appeal the claim for an account of the profit made by Mahoenui. Larsen was unrelated to Premium, which did not participate in the profit Mahoenui obtained. Nor was there evidence of collusion between Premium and Mr Larsen. Courtney J found explicitly that Premium had not preferred the interests of Mahoenui over the interests of Mr and Mrs Stevens. I do not wish to add to the reasons given by Blanchard J on this point.

[9] Mr and Mrs Stevens were entitled to compensation, both in equity and under s 43 of the Fair Trading Act, for any loss resulting from the non-disclosure which was both in breach of fiduciary duty and false and misleading conduct in trade. Making good the loss suffered through the breach of duty, which is the purpose of compensatory damages, is not the same thing as “restor[ing] the Stevens to the position they occupied before Premium’s breach”, the approach adopted by Courtney J.¹²

[10] On the assessment of loss I differ from the approach adopted by Blanchard J. I agree that the Courts below were right to conclude that the transaction would not have been entered into had proper disclosure been made. And I agree with Blanchard J that the Court of Appeal was right to take the view that the evidence does not indicate that the property would have been retained by the vendors (making the alienation of the property itself the occasion of loss, as Courtney J seems to have treated it). I agree that the evidence indicates that, if in possession of the material facts, Mr and Mrs Stevens would not have entered into the transaction but would have sought to obtain a higher price – whether from Mr Larsen or another purchaser. Whether loss was caused by the sale at \$2.575m depends however not only on whether Mr and Mrs Stevens would nevertheless have accepted the price if in possession of the material information, but also on whether they would have

¹² At para [137].

obtained a higher price.¹³ It is here that I depart from the approach taken by Blanchard J. I do not think that the principle in *Brickenden v London Loan and Savings Co*,¹⁴ even as modified as a reversal of the burden of proof rather than an irrebutable presumption,¹⁵ should be extended by analogy to quantification of the loss occasioned by the transaction. As in any loss-based claim, it is for the plaintiff to show loss causally linked to the wrong. In my view the Court of Appeal was right to hold that the evidence that Mr and Mrs Stevens were prepared to sell at \$2.8m is, in context, the best evidence of the higher price of which they were deprived by Premium's non-disclosure. Additional benefit they might, conceivably but speculatively, have obtained is not properly attributable to the breach of duty.

[11] In calculating the loss, the sale price and the higher price likely to have been obtained should be adjusted for the commission payable on each. I agree with Blanchard J that the calculation of loss should be the difference between the sale price of \$2.575m net of commission and the higher price likely to have been achieved (which I would put at \$2.8m), also net of commission.

[12] The refund of the commission paid to Premium is a stand-alone remedy for the breach of fiduciary duty, one that is available irrespective of compensation for any loss. I therefore agree with Blanchard J that Premium must pay \$67,050 to Mr and Mrs Stevens in refund of the commission paid. The forfeiture of commission by a disloyal fiduciary does not fit comfortably into the mutually exclusive remedies of account for profits or compensation for loss. I do not think it is properly characterised, as Courtney J suggests, as "unauthorised profit".¹⁶ Nor is it loss consequential on the breach of fiduciary duty. Commission is a contractual obligation, payment of which a disloyal fiduciary cannot enforce and, conversely, which a disloyal fiduciary can be compelled to restore because of the disloyalty and irrespective of any additional loss caused.

¹³ As discussed below at para [43], *Kelly v Cooper* is authority for the need to establish that a higher price would be obtained.

¹⁴ [1934] 3 DLR 465 at p 469 per Lord Thankerton for the Court (PC).

¹⁵ *Everist v McEvedy* [1996] 3 NZLR 348 at p 355 per Tipping J (HC); *Gilbert v Shanahan* [1998] 3 NZLR 528 at p 535 per Tipping J for the Court (CA).

¹⁶ At para [129].

The history of the sale

[13] When Mr and Mrs Stevens engaged Premium to act in the sale, they were of the impression that their house was worth about \$3m. They formed that view by comparison with a sale price of \$3.2m recently obtained for a neighbouring but larger property. (The sale price of this same neighbouring property was subsequently a principal factor in the opinions of the valuers who gave evidence at the trial of the market value of the Stevens' property at April 2004). Mr Guy, a principal in Premium, made it clear to Mr and Mrs Stevens from the outset that, while a price of \$3m might be achieved, he thought that the neighbouring property was more appealing and valuable and that the Stevens property was likely to achieve a price in the mid- to late \$2m range. He advised that the property be advertised on the basis of "offers over \$2.7m". That advice was not immediately accepted by Mr and Mrs Stevens. Instead, the property was advertised from 24 February 2004 as for sale "by negotiation". The Judge found that Premium advised prospective buyers that the asking price was "around \$3 million", "over \$2.8 million", and "\$2.8 million plus". In early March 2004, after no offers had been received, Mrs Stevens agreed to the property being advertised for "offers over \$2.7 million". It was advertised on that basis during March and April.

[14] On 5 April Mr and Mrs Stevens entered into a conditional agreement to purchase a property in Parnell. The condition, for their benefit, was the sale of their existing home by 30 June 2004 for \$3m or such lesser sum as they might accept. Although this agreement did not oblige Mr and Mrs Stevens to sell their existing property if it failed to reach the price specified in the condition, the agreement is significant because it indicates that Mr and Mrs Stevens were motivated sellers by early April despite the fact that their property had not attracted any offers in the period of over a month it had been on the market. I do not think it is properly to be inferred from the condition in the agreement for the Parnell property that they expected to achieve \$3m on the sale of their existing home. By 5 April it had been advertised for some weeks with their agreement on the basis of "offers over \$2.7m". As a matter of commonsense a condition such as that inserted in the agreement on

the Parnell purchase will be set at a higher rather than a lower level, to provide purchasers with some leeway, at their option. The freedom to accept a lower price means that some care needs to be taken in relying on the figure as representing an expectation of the price to be obtained for the Stevens' house. In the present case the objective evidence does not suggest that by April the vendors could have believed their property would achieve \$3m.

[15] That is confirmed by their reaction to the only other offer made for the property. In mid-April an offer of \$2.2m was received. Mr and Mrs Stevens counter-offered at \$2.8m, but that counter-offer was rejected. As the Court of Appeal pointed out, the counter-offer was untainted by any breach of duty on the part of Premium. In so far as it was based on advice as to value provided by Premium, such advice was not negligent. Although Courtney J treated the opinion as to value acted on by Mr and Mrs Stevens in their counter-offer to be mistaken, on the basis of Mr Mahoney's opinion at trial, she held it to have been arrived at without negligence on the part of Premium. And, as the Court of Appeal said of any notion of higher value at the time, "the market was, on the face of it, telling them otherwise".¹⁷

[16] In mid-April, as Courtney J described:¹⁸

Mrs Stevens and Mr Guy, a principal of Premium, discussed how to bring some finality to the sales process. They settled on a tender process with a closing date of 12 May 2004.

The need to "bring some finality to the sales process" and the adoption of a tender closing in mid-May is further indication that Mr and Mrs Stevens were motivated vendors who were working by then against the 30 June deadline if they were to be in a position to make the Parnell purchase unconditional.

[17] It was in late April, while the tender process was underway, that an offer of \$2.525m was received from Mahoenui. The property by then had been on the market for 11 weeks. Courtney J found that, while Mr Guy had portrayed the offer

¹⁷ At para [42].

¹⁸ At para [50].

as worth considering, neither he or Ms Riley actively advised Mr and Mrs Stevens to sign the agreement:¹⁹

That decision was theirs and there was nothing that could possibly be regarded as actual advice or encouragement.

Nor did the Judge find that Premium was negligent in not advising against signing the agreement. The price was “the best possible price at that stage”.²⁰ Courtney J found that Mr and Mrs Stevens raised with Ms Riley their wish to make a counter-offer at \$2.8m but were deterred by her advice that Mr Larsen would not go as high. Instead, Ms Riley procured from Mr Larsen an amended offer at \$2.575m after Mrs Stevens had indicated that price would be accepted if offered. A condition of finance was fulfilled in mid-May.

[18] In the meantime, the tender process had continued. It closed on 19 May, with no offers received.

[19] As already indicated, Premium’s advice that the property would sell at less than \$3m was held by Courtney J not to have been negligent and to have been honestly held. She dismissed causes of action based on negligence and deceptive and misleading conduct in the advice as to price and in the marketing strategy adopted. Nevertheless, Courtney J was of the view that Premium and Mr and Mrs Stevens were mistaken in their view of the value of the property. She held that it had a market value of \$3.25m at the time of sale in April 2004. That conclusion adopted opinion evidence as to value as at that date given by a registered valuer, Mr Mahoney. The Judge accepted his valuation in preference to the opinions of other valuers who attempted the same exercise of valuing the property as at April 2004. She rejected criticism of the marketing campaign because it had been appropriate for one directed at prospective purchasers who were interested in properties worth less than \$3m; the problem was “the property was worth more than \$3m”.²¹ Similarly, in connection with the sale price, the Judge took the view that the “best possible price was unknown to both Premium and the Stevens”:²²

¹⁹ At para [91].

²⁰ At para [95]

²¹ At para [60].

²² At para [95].

Since there were no other offers, [the offer of \$2.575m] did represent the best possible price at that stage, following the marketing strategy that had been adopted. The root of the problem was that Mr Guy had wrongly assessed the value of the property so that the Stevens were not in a position of make an informed decision as to whether the offer was worth accepting.

[20] In arriving at her conclusion as to the market value of the Stevens' property as at April 2004, Courtney J treats the decision required of her as entailing preference for one of the opinions of valuation provided in evidence. I do not think such an approach, which starts and ends with the opinion evidence, is adequate here. Opinion evidence of market value is a proxy for the market. Very often it is the only evidence available. Such opinions, particularly those reconstructed after the event, inevitably turn on judgments and impressions which legitimately vary. (And indeed the Judge, while preferring Mr Mahoney's opinion, expressed the view that the different opinion of another valuer was reasonably held.) Often such opinions cannot be tested. But here, the opinions can be tested against the experience with the market.

[21] The property was on the market for 11 weeks, attracting two bids only of \$2.2m and \$2.575m. The tender process yielded no bids at all. The window of opportunity for advantageous sale was limited if Mr and Mrs Stevens wished to purchase the Parnell property. Mr Guy of Premium had held the opinion, without negligence as the Judge held, that the property was worth in the mid- to high \$2m range. Why this contemporary evidence bearing on value was not taken into account is not explained beyond the suggestion (question-begging because itself based on the Mahoney retrospective opinion of value) that the property was marketed to the wrong market segment (buyers under \$3m rather than buyers over \$3m).

[22] Because of the view I take below, in agreement with the Court of Appeal, that any loss over \$2.8m is not shown to have been caused by the breach of duty, assessing the value of the property as if it had been differently marketed is not critical. That is because the question for determination is, rather, the higher price that would have been realised if the disclosure had been made. If the loss is only that attributable to the breach of duty, an untainted but mistaken view of value which would limit the higher price sought makes the opinion of higher value irrelevant

(save perhaps in relation to the likelihood of achieving the price sought).²³ But in any event I do not accept that a determination of market value in circumstances where a property has been taken to the market can ignore that history. In some cases, any bids received may indeed be the best evidence of market value, as Mr Gilbert suggested was the case here. In other cases, absence of higher bids may be able to be explained. Courtney J preferred Mr Mahoney's opinion to that of the other valuers by analysing the way they reached their views on the basis of sales of comparable properties, principally the neighbouring property Mr and Mrs Stevens had originally used as a comparator. The evidence of the experience in marketing the Stevens' property should also in my view have been taken into account in her assessment of market value. If undertaken, it would I think have led to some discount of the opinion evidence accepted, as the Judge considered was necessary in arriving at the level of compensation under s 43 of the Fair Trading Act.²⁴

The fiduciary duties of real estate agents

[23] Real estate agents, like other canvassing agents, introduce purchasers and vendors who contract directly rather than by the agent. Such canvassing agents are said by the editors of *Bowstead & Reynolds on Agency* to be "on the fringe of the central agency principles used by the common law".²⁵ A real estate agent's relationship with the principal is shaped by contract. Although subject to fiduciary obligations towards the principal, the scope of the obligations depends on the scope of the duties he is asked to undertake. Typically, real estate agents do not act exclusively for a single principal. It is usual for them to act for vendors competing in the same market and, if they were not able to do so, it would impede their function.²⁶ The ability to handle multiple listings of similar properties is of general advantage to vendors in the introduction of buyers. So too are the relationships that

²³ See below at para [47].

²⁴ The Judge's reasons on this point are discussed below at para [50].

²⁵ (18th ed, 2006), para [1-019].

²⁶ In *Kelly v Cooper* at p 214 Lord Browne-Wilkinson said of real estate agents "it is their business to act for numerous principals:"

[W]here properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function.

real estate agents maintain with potential purchasers and vendors, including those who are more active in the property market and who can therefore be expected to re-list properties purchased through the agent's introduction. These realities affect the extent of the fiduciary obligations to be expected of real estate agents.

[24] A canvassing agent must act in good faith in what he does and may not obtain a benefit for himself or another without the informed consent of the principal.²⁷ Those core responsibilities have not been found to be breached by Premium. Rather, it has been held that Premium was obliged to disclose a conflict of interest arising out of the previous and potential dealings it had with Mr Larsen and to disclose any information which was material to Mr and Mrs Stevens in entering into the transaction with Mahoenui. I have reservations about the generality with which both obligations are expressed.

[25] Ms Riley had acknowledged to Mrs Stevens acting for Mr Larsen in the past when passing on the information that, although he looked "scruffy", he had the means to pay. It seems to be the extent of the relationship and the consequent hope of further work in any re-listing that led the High Court to conclude that disclosure was required. The evidence established that Mr Larsen used a number of real estate agents. I would not want to be taken to agree with the view that the fact that as at April 2004 Ms Riley had acted in the past or was currently acting for Mr Larsen in eight property transactions and could reasonably hope for further work from him set up a necessary conflict of interest whenever she introduced him to a vendor. It is not necessary to decide the point because of the view I take that liability here arises out of the misleading information provided. It seems to me however that it may be unrealistic to expect real estate agents to make formal disclosure routinely in this way. The judgment whether prior dealings are such as to set up a conflict may be fine. Real estate agents need to deal with those in the market if they are to fulfil their function. That they will maintain and foster relationships with purchasers who invest in property is to be expected if they are to make sales. Such agents are under a fiduciary duty not to prefer the interests of themselves or another over those of the vendor for whom they act. But in this case, the Judge found that there was no such

²⁷ *Regier v Campbell-Stuart* [1939] Ch 766; *Jackson v Packham Real Estate Ltd* (1980) 109 DLR (3d) 277 (Ont HCJ).

preference. It is questionable whether a canvassing agent is subject to an additional obligation of disclosure for a presumed conflict arising solely out of past and prospective dealings with the purchaser.

[26] Under general agency principles, an agent must keep his principal informed about matters of concern to him.²⁸ It may be queried whether a general obligation of this nature is realistically expected of canvassing agents such as real estate agents. There seems little authority on the point. In the United States it has been held by the New York Court of Appeals that a finder employed by a company to introduce a purchaser for the company does not owe a fiduciary duty to disclose “adverse reputational information” about him.²⁹ In *Kelly v Cooper*, the Privy Council held that a land agent was not obliged to disclose to the vendor the material information that the prospective purchaser had bought an adjoining property. The information had come to the knowledge of the agent because he had also acted as agent for the vendor of the adjoining property, and much of the judgment is concerned with the disclosure of confidential information acquired in those circumstances. But Lord Browne-Wilkinson, who delivered the judgment, made the more general point that:³⁰

It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract.

[27] It seems to me arguable that there is no general rule that real estate agents who introduce purchasers to deal directly with a vendor breach fiduciary obligations imposed within the scope of their contract if they fail to communicate information about the purchaser which might be material. It depends on the context. Real estate agents are obliged to pass on offers to vendors, because such obligation is squarely within the scope of what they are engaged to do.³¹ If the non-disclosed information

²⁸ *Bowstead & Reynolds on Agency*, para [6-019].

²⁹ *Northeast General Corporation v Wellington Advertising Inc* 624 NE 2d 129 at p 130 per Bellacosa J (NY, 1993). In this case, the information was that the purchaser was an asset stripper.

³⁰ At p 214. A similar point that the duties of fiduciaries are restricted to the work they are instructed to carry out, but in a case involving solicitors rather than real estate agents, was made by the Privy Council in *Clark Boyce v Mouat* [1993] 3 NZLR 641 at p 648.

³¹ *Keppel v Wheeler* [1927] 1 KB 577 (CA); *Regier v Campbell-Stuart*; *Jackson v Packham Real Estate Ltd*; and see *Bowstead & Reynolds on Agency*, para [6-037].

affects advice given by the agent (such as advice as to price or terms³²), non-disclosure may well breach the obligation of loyalty. There will be breach of the obligation of loyalty if non-disclosure amounts to the preference of the interests of the agent or another party³³ (as may be the case, for example, if a risk associated with the purchaser material to the sale is not disclosed in order to complete a sale and obtain commission). I have reservations however whether a more general duty to provide material information, such as it is appropriate to impose upon agents who have power to bind their principals, applies in all cases. It may set the standard to be required of a canvassing agent too high.

[28] It is unnecessary to resolve these hesitations in the present case, however, because the partial picture given to the vendor here by Ms Riley was misleading without further information. In those circumstances, non-disclosure amounted to concealment of the material information that the purchaser was a dealer in residential property. As the Court of Appeal put it:³⁴

The effect of Ms Riley's non-disclosure (or partial disclosure) was to facilitate Mr Larsen's purchasing strategy. The Stevens were left with the impression that Mr Larsen was interested in the property as his personal home whereas the reality was that he was interested in it for the purposes of deriving a quick profit from a rapid resale.

[29] Concealment of material information, thereby perpetuating a misleading impression given by the agent, was a breach of the obligation of loyalty. I would dismiss the Premium appeal against liability.

The claim for the commission of \$67,050 paid to Premium

[30] Commission was payable to Premium under the terms of its contract with Mr and Mrs Stevens. An agent in breach of fundamental duties of loyalty imputed by equity cannot sue to recover commission to which he would otherwise have been

³² As seems to have been the case in *Kelly v Cooper*, although this aspect is not developed in the judgment of the Privy Council, a point noted in *Bowstead & Reynolds on Agency*, para [6-054], fn 94.

³³ As was the position in *ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani and Another* [1999] 1 SLR 190 (Sing HC), a case where it must be said the result is not easy to understand.

³⁴ At para [32].

entitled.³⁵ The converse, that an agent cannot retain commission in circumstances where he is in breach of such duties, also follows.³⁶ In *Keppel v Wheeler* Atkin LJ expressed the view that it was “well-established” that “in practically every case” such agent would “forfeit any right to remuneration at all”. He allowed, however, that breaches which “do not go to the whole contract”, by an agent acting in good faith (as through honest mistake), would not result in such forfeiture.³⁷ A similar exception to the forfeiture of commission where breach of duty was not “dishonest” was acknowledged in *Kelly v Cooper*.³⁸

[31] Courtney J treated the commission as an “unauthorised profit” but she also included it in the losses for which Mr and Mrs Stevens were entitled to compensation in equity (although holding that it was not recoverable as loss under s 43 of the Fair Trading Act, because “[i]f the Stevens are fairly compensated for their loss on the sale there is no justification for treating their position as if the property had not sold”³⁹). As already indicated, I am of the view that the claim for refund of the commission is a distinct claim which arises on breach of the fiduciary duty of loyalty, which is a wrong in itself irrespective of loss on the transaction. While honest mistake may not disentitle the fiduciary from obtaining commission or other remuneration, Ms Riley’s misleading of Mr and Mrs Stevens cannot be so characterised. Nor is there an inconsistency between providing remedy for loss arising from breach of duty of loyalty and providing forfeiture of commission for disloyalty: one compensates for loss caused by the breach of duty; the other repays a benefit that has not been earned.

³⁵ *Andrews v Ramsay* [1903] 2 KB 635; *Rhodes v Macalister* (1923) 29 Com Cas 19 (CA); *CM Barnett and Son v Boyle Brothers* [1932] NZLR 1087 (SC); *Imageview Management Ltd v Jack* [2009] EWCA Civ 63; and see *Bowstead & Reynolds on Agency*, para [7-049].

³⁶ *Andrews v Ramsay* at p 638 per Wills J; *Imageview Management Ltd v Jack* at paras [49] – [51] per Jacob LJ.

³⁷ [1927] 1 KB 577 at p 592 (CA).

³⁸ At p 216 per Lord Browne-Wilkinson.

³⁹ At para [126].

Causation of loss

[32] The equitable remedy of account renders to the beneficiary or principal any profit made with his property. Normal principles of causation applied in loss-based claims are irrelevant in remedy by way of account (although, as *Warman International Ltd v Dwyer*⁴⁰ and *Chirnside v Fay*⁴¹ illustrate, profit may in some cases be only partly to the account of the beneficiary because of the application of other property or effort in obtaining it). The remedy of account does not seek to make good a loss measured against the position as it would have been if the breach had not occurred, as compensation does. Instead, it strips gain attributable to the trust property or properly to the account of the principal. The remedy of equitable compensation (by which defaulting trustees can be compelled to make good any loss to the trust fund) is different. It has been applied to losses caused by breach of fiduciary duty since *Nocton v Lord Ashburton*.⁴² The remedy of compensation for breach of fiduciary duty makes good losses resulting from the breach of duty. It must be causally connected with the breach and no more than is necessary to make good the loss, or its effect will be as penalty rather than compensation.

[33] In *Day v Mead*, Cooke P observed that the traditional characterisation of compensation in equity as aiming at restoration or restitution and common law damages as compensation for harm done was, in many cases, “a difference without a distinction”.⁴³ And in *Aquaculture Corp v New Zealand Green Mussel Co Limited*, speaking of the line of judgments in the Court of Appeal accepting that “monetary compensation (which can be labelled damages)” can be awarded for breach of duties derived from equity, he expressed the view that:⁴⁴

For all purposes now material, equity and common law are mingled or merged.

⁴⁰ (1995) 182 CLR 544.

⁴¹ [2007] 1 NZLR 433 (SC).

⁴² [1914] AC 932.

⁴³ [1987] 2 NZLR 443 at p 451 (CA).

⁴⁴ [1990] 3 NZLR 299 at p 301 (CA).

[34] That is not to say that the principles upon which losses are to be assessed fall to be applied in identical circumstances when the loss-causing breach arises out of a relationship giving rise to fiduciary duties. The open question of foreseeability in common law claims is effectively overtaken by the relationships out of which fiduciary duties arise. And different policy considerations may affect remoteness of damage in cases of breach of fiduciary duty than in common law claims. But the necessity of demonstrating that a loss was caused by the claimed breach of fiduciary duty follows from the compensatory justification for the remedy. And since the loss is the basis of claim, it is generally for the plaintiff to show such loss as part of his case.

[35] That is the approach taken by McLachlin J in her concurring opinion in the Supreme Court of Canada in *Canson Enterprises Limited v Boughton and Co*:⁴⁵

In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

[36] McLachlin J's views in this passage were approved by Lord Browne-Wilkinson in *Target Holdings Limited v Redfern*.⁴⁶ I do not think that *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*⁴⁷ (which was not concerned with breach of duties of loyalty) supports departure from the view that proof of causation is an element of any claim for equitable compensation (whether based on breach of duties of care or breach of duties of loyalty), as it is for compensatory damages in law. As Mummery LJ remarked in *Swindle v Harrison*:⁴⁸

There is no equitable by-pass of the need to establish causation.

⁴⁵ [1991] 3 SCR 535 at p 556.

⁴⁶ [1996] AC 421 at p 439.

⁴⁷ [1999] 1 NZLR 664 (CA).

⁴⁸ [1997] 4 All ER 705 at p 733 (CA).

[37] Some cases and commentators suggest a distinction in the approach to causation when assessing loss resulting from breach of duties of care and skill and those arising from breach of duties of loyalty (at least in circumstances of fraud or impropriety). Causation of loss attributable to breach of duties of care and skill on this approach is assessed on common law principles, but loss attributable to breach of duties of loyalty is assessed on the basis of a more “stringent” approach to causation.⁴⁹ Such refinement seems to retreat from the position reached in *Aquaculture*. The purpose of compensation is the same in law and equity. As Lord Browne-Wilkinson put it when delivering the judgment of the House of Lords in *Target Holdings Limited v Redferns*:⁵⁰

Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong.

[38] The application of a reverse onus of proof where the defendant asserts that the loss shown by the plaintiff would have occurred in any event (suggested as an irrebutable presumption in *Brickenden v London Loan & Savings*⁵¹ but modified by New Zealand case-law to a shift in the onus of proof⁵²) does not affect the need for the plaintiff to show loss caused by the breach of duty. It is an evidential rule which arises when the plaintiff has demonstrated loss caused by the breach but the defendant seeks to attribute the loss in whole or in part to another cause in circumstances where proof is difficult and shifting the onus meets the justice of the case. *Brickenden*, and the cases which have developed from it, identify one such occasion for shifting the onus as the effect of non-disclosure by a fiduciary of information material to a transaction undertaken by the principal. Once materiality is shown, it is for the defendant to show that the transaction would nevertheless have been entered into by the principal for another reason.

⁴⁹ *Swindle v Harrison* at pp 713 – 718 per Evans LJ; *BNZ v NZ Guardian Trust* at pp 681 – 682 per Gault J; Butler (ed), *Equity and Trusts in New Zealand* (2003), pp 834 – 836.

⁵⁰ At p 432.

⁵¹ At p 469.

⁵² *BNZ v NZ Guardian Trust* at p 687 per Tipping J; *Amaltal Corporation v Maruha Corporation* [2007] 3 NZLR 192 (SC) at para [30] per Blanchard J for the Court.

[39] I do not think this evidential shift (which responds to difficulties in proof where loss entails the hypothetical of what a principal would have done if properly informed) amounts to a rule in equity that a fiduciary in breach is entitled only to a “narrow escape route”,⁵³ to be policed with “rigour”.⁵⁴ Like any civil onus, it is discharged by the defendant on the balance of probabilities if the fact asserted is found to be more likely than not. The application of a reverse onus to overcome evidential difficulty is a general device. In the Supreme Court of Canada, Sopinka J has suggested a similar reversal of onus for policy reasons in cases of misrepresentation where it is suggested the plaintiff would nevertheless have suffered the same loss even if there had been no misrepresentation. Such reversal of onus was, he thought, appropriate because the defendant “asks a court to find a transaction whose terms are hypothetical and speculative”, displacing the plaintiff’s “assertion of the *status quo ante*”, that the transaction would not have been entered into if the representation had not been made.⁵⁵

[40] The *Brickenden* approach was correctly applied in the present case to the submission on behalf of Premium that, even if in possession of the information that Mr Larsen dealt in property, Mr and Mrs Stevens would still have entered into the transaction with him. Premium was asking the court to accept the hypothetical proposition that Mr and Mrs Stevens would have gone ahead with the transaction. The Courts below, rightly in my view, did not accept on the evidence that the proposition had been established. (*Swindle v Harrison* is an example where the Court came to a different conclusion on the evidence in that case.)

[41] The approach in *Brickenden* in addressing the difficulties of proof of hypothetical facts should not be extended to be generally applicable to quantification of loss attributable to breach of fiduciary duty. Proof of loss is a necessary element in the claim for compensation which must be established by the claimant on the evidence to the satisfaction of the Court. I do not accept in this assessment there is room for presumptive measures of loss which it is for the defendant fiduciary to disprove. Application of such presumptions seems to me to amount to “equitable

⁵³ *BNZ v NZ Guardian Trust* at p 687 per Tipping J.

⁵⁴ Compare Blanchard J at para [86].

⁵⁵ *Rainbow Industrial Caterers Ltd v Canadian National Railway Co* [1991] 3 SCR 3 at pp 15 – 16.

by-pass of the need to establish causation”. It is the case, as McLachlin J suggests, that causation of loss must be assessed on a “common sense” basis. But that does not obviate the need for the Court to come to a conscientious determination on all the evidence.

What was the loss caused by the breach of duty?

[42] Mr and Mrs Stevens were vendors of their property. What they lost in the sale to Mr Larsen was the opportunity, if in possession of the material information, to obtain a higher price. That is the loss identified in comparable cases. In *Kelly v Cooper* the Privy Council considered the loss of the vendor attributable to non-disclosure of material information would have been the loss of the chance to obtain a higher price if in possession of the information. In *Mahesan s/o Thambiah v Malaysia Government Officers’ Co-operative Housing Society Ltd*,⁵⁶ the profit made by an intermediate purchaser, due to the fraud of the agent, was awarded as compensation on the basis that the principal had lost the opportunity to purchase at the lower price. In *Canson Enterprises Limited v Boughton & Co*, too, the principal lost the opportunity to purchase property at the lower price obtained by an undisclosed second principal for whom the solicitor had acted. The difference between the first price and the price paid by the principal established the measure of the principal’s loss.

[43] In both *Canson* and *Maheson s/o Thambiah* the intermediate purchases established the price at which the principal could have purchased and therefore proved his loss on the opportunity missed through the breach of duty by the agent. In *Kelly*, where the value of the opportunity was not so captured, the Privy Council made it clear that loss would not be established unless the plaintiff showed not only that he would not have sold at the price obtained but that he would have obtained a higher price. The judgment of the Privy Council suggests that evidence as to the attitude the vendor would have taken if in possession of the facts would be important. So too would have been the attitude of the purchaser in that case, if asked for a higher price. The Privy Council did not have to attempt the exercise of

⁵⁶ [1979] AC 374 (PC).

assessing the value of the opportunity lost, because of its conclusion that there had been no breach of duty.

[44] In the present case valuation of the opportunity lost is the measure of loss. The evidence upon which assessment of the chance of sale at a higher price could be made consisted of the attitude of the vendors, the history of the sale (which is evidence of the market and relevant as well to the attitude of the vendors), the opinion evidence of Mr Mahoney and other valuers, and potentially the resale price. The opinion evidence of valuation was the only evidence taken into account by Courtney J in assessing the loss. In part that may have been because of her view, not accepted in the Court of Appeal or in this Court, that Mr and Mrs Stevens would have remained owners of the property. On that basis the Judge concluded that the measure of their loss in the transaction was that, if disclosure had been made, they would have retained an asset “worth \$3.25m”. If, rather, the loss resulting from the breach is measured by the lost opportunity to sell at a higher price, as I consider to be the right approach and consistent with the authorities, then critical evidence of what is likely to have been achieved (the standard of probability the plaintiff needs to meet to establish loss) is the evidence of vendor and purchaser attitudes, as the Privy Council suggested in *Kelly v Cooper*.

[45] The attitude of the vendors which was untainted by the breach unmistakably indicated their preparedness to sell the property for \$2.8m. The Court of Appeal was in my view right to take the view on the evidence as a whole that the likelihood was that they would have sold for \$2.8m. If so, that amount represents the high point of any loss. In summary (and as is more fully described above):

- Mr and Mrs Stevens initially thought their property was worth about \$3m;
- The property was marketed, with their agreement, from 24 February with indications of a price “over \$2.8m” and then advertised from early March on the basis of “offers over \$2.7m”;
- The conditional agreement for the Parnell property entered into on 5 April, obliged Mr and Mrs Stevens to sell if a price of \$3m could be achieved by

30 June, demonstrating no expectation that a higher price could be obtained and indicating in my view, for the reasons given above, that less was expected;

- Mr and Mrs Stevens counter-offered in mid-April for sale at \$2.8m in an unrelated prospective transaction, untainted by breach of fiduciary duty on the part of Premium;
- Mr and Mrs Stevens were prepared, as the Judge found, to counter-offer to Mr Larsen at \$2.8m;
- The conditional agreement to purchase in Parnell and the lack of interest being shown by the market meant that, although not obliged to sell, Mr and Mrs Stevens were motivated to conclude a sale, as is indicated also by the tender initiative.

[46] This evidence of attitude on the part of the vendors is matched by the absence of bids from purchasers which provides the best evidence of market against which to assess the likelihood of sale at a higher price. Again, I summarise from the more extensive history set out above:

- Although the property was on the market for 11 weeks before sale, it attracted only two bids: of \$2.2m and the sale bid of \$2.575m (after an initial offer of \$2.525m);
- The tender, undertaken in an attempt to meet the market, produced no bids by the time it closed in mid-May.

[47] It could not be said in the present case that the resale price achieved by Mahoenui was reliable evidence of the price which could have been obtained for the property, had the material information not been wrongfully withheld. The purchaser on-sold the property six months later in a rising property market and after

undertaking some work on the property.⁵⁷ The sale followed an aggressive international sales campaign which resulted in sale to an overseas buyer (although other offers received were also over \$3m). On the other hand, I think the price obtained by Mr Larsen in November is some evidence supportive of the conclusion (necessary to establish loss) that, on the balance of probabilities, Mr and Mrs Stevens would have achieved the price of \$2.8m they were seeking.

[48] In some cases, opinion evidence of market value may be the only evidence of opportunity lost by sale with incomplete information. That is not the case here. Nor do I think it can be said that the opinion evidence, against the evidence of vendor attitude and market conditions, was the best evidence of the lost opportunity to sell at a higher price properly attributable to the breach of duty. In the absence of any such breach of duty, Mr and Mrs Stevens had been prepared to sell for \$2.8m and, on the face of things (as the Court of Appeal said), the market was telling them that even that price was too steep. Courtney J herself considered that Mahoenui's bid was the best possible price at the time and Premium was not negligent in failing to advise against it. In those circumstances, I am unable to agree with the Judge's assessment that the view that the property was worth less than \$3.25m was nevertheless mistaken.

[49] I agree with the Court of Appeal that it is likely that Mr and Mrs Stevens would have sold at \$2.8m. That amount marks off the outer extent of the loss attributable to the breach of duty. As already indicated, I doubt that the opinion evidence as to market value in the present case was properly relied on without taking into account the market response in the 11 weeks the property was advertised for sale. But, once it is appreciated that the inquiry for the Court was lost opportunity to obtain a higher price, the principal focus should have been the attitude of the vendors and the objective indications of what the market was likely to produce.

[50] While Courtney J held that the loss on the sale was \$675,000 on the basis of her view that Mr and Mrs Stevens would have retained the property worth (on the basis of the opinion evidence given at trial) \$3.25m, she came to a different

⁵⁷ Evidence accepted by Courtney J was that between the sale and resale the market for similar properties rose at a rate of 15% – 16% per annum.

conclusion in relation to compensation under the Fair Trading Act. There, she discounted the compensation of \$675,000 by 50 per cent to reflect the “actual causative effect of the conduct”. She considered that a major contributing cause of the sale being at undervalue was the view, held without negligence by Premium and accepted by Mr and Mrs Stevens, that the property was worth less than \$3m. Courtney J made no similar allowance to that made in the Fair Trading Act claim for the “actual causative effect” of the non-disclosure when determining compensation for breach of fiduciary duty. She held simply that Premium’s failure to show that Mr and Mrs Stevens would have proceeded with the transaction in any event made Premium “therefore” liable for the \$675,000 as “the extent of the under-value at which the property was sold”.⁵⁸ The very different result between the causes of action under the Fair Trading Act and for compensation in equity is not explained. It seems wrong in principle for such different results when both claims are concerned to make good loss caused by the same wrongful conduct.

[51] I am of the view that the Court of Appeal was right to accept that the best evidence of loss was the price at which the vendors had been prepared to sell through their counter-offer to the only other prospective purchaser. That measure of loss entails acceptance that the price could have been achieved. Despite the fact that the property had failed to attract any bid above \$2.575m, I am of the view that the opinion evidence of value and the hindsight evidence available of the escalation of property prices (which, on the approach adopted by McLachlin J in *Canson* distinguishes equitable compensation from the foreseeability required of common law damages), supported by the sale price achieved by Mahoenui, provides sufficient evidential basis for a conclusion on the balance of probabilities that such price could have been achieved. I would accordingly confirm the approach adopted by the Court of Appeal, while varying its award to assess the loss on a basis net of commission.

[52] It is no answer to say that Premium contributed to what the Judge thought was the mistaken view of the price the property would achieve. Premium’s opinion was held by the Judge to have been without negligence and therefore non-actionable. That conclusion is undermined if Premium’s non-negligent opinion results in augmentation of the compensation payable to Mr and Mrs Stevens. Without proper

⁵⁸ At para [138].

foundation for liability on this basis, the additional compensation imposes a penalty rather than making good an actionable loss.

Conclusion

[53] For these reasons, I concur with the conclusion of Blanchard J that the commission of \$67,050 must be repaid to Mr and Mrs Stevens by Premium. In addition, they are entitled to compensation for loss on the sale. I agree that the loss on the sale attributable to the conduct of Premium (both in breach of fiduciary duty and contrary to s 9 of the Fair Trading Act) is not measured by the gain achieved by Mahoenui. Mr and Mrs Stevens lost the opportunity to sell their property for a higher price which did not exceed the \$2.8m at which they were prepared to sell. Since I consider that it is likely they would have achieved a sale at that price, I would award them compensation amounting to the difference between the sale price of \$2.575m net of commission and \$2.8m net of commission.

BLANCHARD, McGRATH and GAULT JJ

(Given by Blanchard J)

[54] This appeal concerns liability and quantum of monetary relief for the conduct of a real estate agent employed by the respondent, Premium Real Estate Ltd, who did not tell the vendors of a valuable residential property that the purchaser she was introducing to them, and to whom they sold, was a property speculator with whom Premium had an ongoing business relationship. Only a matter of months later the purchaser resold the property at very considerable profit. The vendors, the appellants Mr and Mrs Stevens, have successfully claimed damages for breach of fiduciary duty.⁵⁹ The primary focus of these reasons for judgment is the level of damages payable by Premium but it is first necessary to address Premium's appeal against the finding that it acted in breach of its fiduciary duty to Mr and Mrs Stevens and also the latter's claim that Premium must "disgorge" the profit made, not by it

⁵⁹ There was also a finding below of breach of s 9 of the Fair Trading Act 1986. The damages concurrently awarded for that breach were at a lesser level.

(in the form of commission), but by the purchaser, against whom no proceedings have or, it seems, could have been brought.

Facts

[55] All the relevant events occurred in 2004. On 9 February Mr and Mrs Stevens granted Premium a sole agency until 30 April for the sale of their cliff-top residence at 23D Beach Road, Castor Bay, on Auckland's North Shore. Mr and Mrs Stevens believed at that time that their home was worth \$3m. Mr Guy of Premium was of the opinion that it was not worth that much. A few weeks later, when no offers had been received, he suggested marketing the property at "\$2.7m or over" and it was advertised accordingly. An offer of \$2.2m was made. The Stevens counter-offered at \$2.8m but the prospective buyer withdrew.

[56] In April the Stevens agreed to buy a house in Parnell, conditional upon selling Beach Road for \$3m or such lesser price as they might accept. The Stevens then decided to put their property up for tender with a closing date of 12 May.

[57] A Mr Larsen had been shown the property by Ms Riley of Premium on 14 February, shortly after it had been listed. At that time he had not expressed interest in making an offer. On 21 April she showed him through the property again and on 23 April she presented to the Stevens an offer at \$2.525m from the Mahoenui Valley Trust or its nominee. That trust was a vehicle of Mr Larsen.

[58] There are findings below, not challenged, that Ms Riley, whose daughter worked for Mr Larsen as his personal assistant, knew that he often purchased properties and then resold them within a short period at a substantial profit. Ms Riley's evidence was that typically Mr Larsen would buy properties on the basis that they would be his family home for his partner and himself. By this she clearly meant that there would be a pretence to that effect. Mr Larsen would then get a valuation report from a valuer of his choice (seemingly a "friendly" valuer) and, after a short period and sometimes after having made some alterations to the property, would re-list it for sale. Premium had been involved previously in a number of these transactions, both on the sale and the resale.

[59] Mrs Stevens, who it will be remembered had been told by Premium that the property was not worth \$3m, was minded to counter-offer to Mr Larsen at \$2.8m. Ms Riley told her that \$2.575m (another \$50,000 over Mr Larsen's offer) was the most Mr Larsen would pay.⁶⁰ On that or an earlier occasion Mrs Stevens asked Ms Riley what she knew about Mr Larsen. The agent replied that although he looked scruffy he had the means to buy. She did not mention that Mr Larsen had a history of trading in properties. Very significantly, there was evidence from Ms Riley herself that she told Mrs Stevens on 21 April that Mr Larsen and his partner lived in Karaka (in South Auckland) and "he was finding the travelling too much, so he was looking for a place closer to his office in Takapuna."⁶¹ It was Mrs Stevens' evidence, which was not challenged, that when she asked Pam (Ms Riley) if she knew anything about Mr Larsen and why his wife had not been to look at the property:

Pam told me that his wife was not interested in the property as she liked horses – apparently they had bought a property at Coatesville for her horses, but he preferred the sea.

[60] On 26 April, having pondered what to do, the Stevens decided to enter into an agreement to sell their property to the trust for \$2.575m conditional on the purchaser obtaining finance. They believed at that time that it was to become Mr Larsen's home. Indeed, they were still of that understanding when settlement took place, at which time they left him a note plainly written in that belief.

[61] Within three days of the signing of the agreement a valuer instructed on behalf of Mr Larsen inspected the property and shortly afterwards produced a report valuing it at \$3.57m.⁶²

[62] The finance condition was satisfied on 17 May and the transaction became unconditional. As it happened, the tender process had been continuing but no tenders had been received. Settlement occurred on 16 July. Before that time

⁶⁰ *Stevens v Premium Real Estate Ltd* (2006) 11 TCLR 854 at para [73] (HC).

⁶¹ *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 at para [21] (CA).

⁶² High Court judgment at para [18].

Mr Larsen had re-listed the property through Premium. It was advertised on his instructions with a “price guide” of \$3.8m to \$4.8m.⁶³

[63] Some work was done on the property. In October or November an offer was made at \$3.2m which Mr Larsen rejected. It was resold on 14 November 2004 for \$3.55m. The offer which was accepted was made just ahead of another offer received by the agents at \$3.3m which was accordingly never presented. Premium shared in the commission on the re-sale (another agency was also involved).

[64] It was the finding of the trial Judge, based on her assessment of the evidence of several valuers, that at the time of the sale by the Stevens to Mr Larsen’s trust the property had a value of \$3.25m.

The judgments below

[65] In the High Court,⁶⁴ Courtney J found that there had been no breach of the Fair Trading Act 1986 or negligence by Premium in relation to its assessment of value, its marketing campaign or its conduct of the negotiations with the purchaser. However, the Judge concluded that Premium’s failure to disclose its relationship with Mr Larsen was both misleading and deceptive conduct and a breach of fiduciary duty. In relation to the latter, Premium had failed to show that the Stevens would have proceeded with a sale in any event. Courtney J held Premium liable to pay damages of \$675,000 (the value of \$3.25m which she attributed to the property on the basis of the evidence, less the sale price of \$2.575m) and to disgorge the commission on the sale of \$67,050. (No claim had been advanced for the commission on the re-sale.)

[66] The Court of Appeal⁶⁵ dismissed Premium’s appeal against liability but reduced the monetary award to \$225,000 (the difference between \$2.8m and the

⁶³ At para [58].

⁶⁴ *Stevens v Premium Real Estate Ltd* (2006) 11 TCLR 854 (HC).

⁶⁵ *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 (CA), (O’Regan, Arnold and Wilson JJ; reasons given by Arnold J).

price paid by Mr Larsen's trust). It agreed with Courtney J that Premium had not established that the Stevens would have gone ahead with the transaction in any event and so did not suffer loss. It also concluded that the Stevens could not require Premium to account for profits received "by an unrelated party who has not participated in the fiduciary's breach in an unconscionable way".⁶⁶ The proper measure was compensation for loss rather than disgorgement of profit. The evidence did not show that the Stevens would have retained the property. They were prepared to sell for \$2.8m. When they received an offer at \$2.2m they had counter-offered at \$2.8m. And they intended to counter-offer to the trust at that figure before Ms Riley convinced them that Mr Larsen would not offer anything above \$2.575m. Had the Stevens "known the full facts", the Court said, they would have reconsidered their position and would probably have rejected the offer from Mr Larsen and extended the sale period. "But the likelihood is that they would ultimately have been prepared to accept \$2.8m".⁶⁷ If they had sold their property at that price they would have paid commission. Premium should not therefore be required to account for the commission it had received.

Liability

[67] In *Bristol and West Building Society v Mothew*⁶⁸ Millet LJ said that the distinguishing obligation of a fiduciary is the obligation of loyalty:

The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

[68] Premium was engaged to act as the agent of the Stevens in the sale of their property. It is beyond doubt that in that capacity Premium was a fiduciary for the Stevens and owed them a duty of loyalty. It is responsible for any breach of that duty by any of its employees. To fail to disclose a material matter about the person

⁶⁶ At para [89].

⁶⁷ At para [96].

⁶⁸ [1998] Ch 1 at p 18.

being introduced as a prospective purchaser – a matter objectively likely to operate on the principal’s judgment – is a breach of the duty of loyalty.

[69] In our view, the Courts below were quite correct in finding that a breach of that duty was committed by Ms Riley when she failed to inform the Stevens that Mr Larsen was a person who frequently bought residential properties and shortly afterwards resold them at a profit. That information was very likely to have affected the Stevens’ attitude towards his offer and the response they would make. It would have alerted them to the fact that he might well be intent on buying and reselling their property within a relatively short period of time and that, if so, he probably considered it was worth significantly more than he was offering. That was a matter very material to their consideration of his offer and of the possibility of their property attracting a better offer from someone who was not a dealer but wanted the house as a family home. Ms Riley had good reason to believe Mr Larsen intended to re-sell the property. Not only did she conceal her knowledge that Mr Larsen was a property dealer but she actively misled the Stevens when she spoke of Mr Larsen’s wish to reduce the travelling time between his work place and his home and then reinforced the misleading impression given by that statement by deflecting Mrs Stevens’ inquiry about the absence of any inspection by Mr Larsen’s partner, saying that a property had been acquired at Coatesville for the horses, but that Mr Larsen liked the sea. Someone hearing these statements, and expecting loyalty from the speaker, would naturally think that Ms Riley was confirming that Mr Larsen was intent on finding himself a home to live in. As Ms Riley well knew, it was part of Mr Larsen’s modus operandi to give that impression. She helped him do so.

[70] The element of active misleading of the Stevens was in itself a sufficient basis for the High Court’s determination that a breach of the fiduciary duty of loyalty was committed. But an answer should also be given to Premium’s argument that the fact that Mr Larsen operated as a property speculator was information gained by Premium when acting previously for him and that it was bound to keep that information confidential. If that were really so, Premium had a conflict between, on the one hand, its duty of loyalty to the Stevens which it accepted when it undertook the agency and, on the other, a pre-existing duty of confidentiality to Mr Larsen.

[71] As the House of Lords forcefully pointed out in *Hilton v Barker Booth & Eastwood (a firm)*,⁶⁹ if someone puts himself in a position of having two irreconcilable duties, it is his own fault. He cannot prefer one principal to another. The fact that he has chosen to put himself in an impossible position does not exonerate him from liability and he cannot use his discomfiture as a reason why his duty to either principal should be taken to have been modified.

[72] Of course a duty of this kind can be modified by an informed agreement or consent on the part of the principal. In this case, assuming for the moment that Ms Riley's knowledge that Mr Larsen was a property dealer was indeed confidential information, she could have sought permission from him to tell the Stevens and, if he declined, she could have advised the Stevens that she had information about Mr Larsen that she was unable to reveal to them.⁷⁰ The Stevens could, in the latter case, have decided whether they were prepared to receive Mr Larsen's offer without being told what their agent knew – effectively releasing Premium from its obligation of loyalty to that extent only. We should not be taken to be suggesting, however, that a solution along these lines is always open. Whether a disclosure has been sufficient in the circumstances must depend upon the facts of each case. The requirement is for the principal's informed consent to the agent's acting with a potential conflict of interest.⁷¹ An informed consent is one which is given in the knowledge that there is a conflict of interest between the parties.⁷² The burden of proof of adequate disclosure is on the agent. The vendor/principal would need to have been told enough to appreciate that a real conflict of some kind existed for the agent. Indeed, some information about a would-be purchaser may be so fundamental that an agent could not remain loyal to the vendor and still let the vendor contract with the purchaser knowing there was some kind of conflict but in ignorance of its nature, for example, if the agent was aware that the purchaser was acting as a "front" for someone to whom the agent knew the vendor would never agree to sell.

⁶⁹ [2005] 1 WLR 567 at para [44] (HL).

⁷⁰ In fact, in her evidence she claimed she would have told the Stevens what she knew about Mr Larsen if they had asked her.

⁷¹ *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 at para [35] (CA).

⁷² *Clark Boyce v Mouat* [1994] 1 AC 428 at p 435 (PC).

[73] In this case the unrevealed information was not of that character and, if it had been confidential, a solution along the lines we have described would appear to have been open to Premium at the point when it introduced Mr Larsen. In fact, it is plain that the information was not confidential at all. Mr Larsen's property dealings were not only a matter of public record but must have been well known to other agents, and indeed would have been known to Premium even if it had not been involved in them, as obviously agents must monitor property transactions if they are to keep themselves adequately informed about property market conditions. It would have sufficed if Ms Riley had told the Stevens that Mr Larsen was a dealer in residential properties.

[74] For Premium, Mr Gilbert SC placed some reliance on the controversial decision of the Privy Council in *Kelly v Cooper*.⁷³ That case concerned two adjacent coastal properties in Bermuda owned by separate vendors. The defendant real estate agents were independently instructed by both vendors. The agents introduced a wealthy American, Mr Ross Perot, to both properties. His offer to buy one property (Vertigo) was accepted, subject to contract. He then offered to buy the other (Caliban). The agents did not tell the vendor of Caliban, the plaintiff, that Mr Perot had already agreed to buy Vertigo. The plaintiff did not discover this until after the transaction had been completed. He refused to pay the agents' commission on the sale of his property.

[75] The Privy Council, in reasons given by Lord Browne-Wilkinson, held that the commission was payable. Their Lordships said that it is the business of estate agents to act for numerous principals and that where properties are of a similar description, there will be a conflict of interest between the principals, each of whom will be concerned to attract potential purchasers to their property rather than that of another. Despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their functions. In the course of acting for each of their principals, the Board said, estate agents will acquire

⁷³ [1993] AC 205.

information confidential to that principal. It could not be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals.

[76] To this point, we respectfully agree with the Privy Council's reasoning. Anyone who lists a property with a real estate agent must be taken to accept that the agent will simultaneously be offering competing properties for sale. An agent who did not have numerous offerings would be unlikely to attract many buyers. It is therefore distinctly to the advantage of any prospective vendor that the agent has many listings, even though some will be competing with that vendor's property for the attention of people interested in acquiring property and the agent will, if successful in selling a competing property, receive a commission on that sale. A prospective vendor engaging an agent would also understand that other vendors will have imparted some information to the agent which the agent may not be at liberty to pass on. It will, however, be only rarely that information about one property is both confidential and might be material to another vendor.

[77] The Privy Council concluded that the agents committed no breach of duty because the fact that Mr Perot was "interested in buying" Vertigo (under an offer still subject to contract) was information confidential to its vendor and so could not be revealed by the agents. No doubt that was true but, arguably, it does not follow that the agents were free to introduce Mr Perot to the owner of Caliban without anything being said about his interest in Vertigo or, perhaps, a warning that the agents had a conflict of interest which had reference to Mr Perot. If *Kelly v Cooper* were to be followed in a like case in New Zealand, a matter which it is unnecessary to resolve in the present case, it would require of real estate agents in this country a lesser standard than is required of other agents. As the editors of *Bowstead & Reynolds on Agency* say, the implication of a term excluding fiduciary duties, or particular duties, is not easy to justify.⁷⁴ It seems to us that in circumstances of this kind an agent

⁷⁴ (18th ed, 2006), para [6-044].

should decline to continue to act for the vendor of the second property as regards to the particular purchaser unless released by the vendor of the first property from the obligation of confidentiality as to the fact of the first sale to that person, or unless an adequate disclosure of the existence of a conflict of interest relating to the purchaser has been made and the vendor of the second property has confirmed that he or she nevertheless wishes to receive the offer. The difficulty that a stricter requirement may occasionally produce for agents would not seem to be a sufficient reason for dispensing in their case with the obligation of total loyalty or, as it is sometimes put in this context, the utmost good faith.

[78] In any event, the facts of *Kelly v Cooper* are far away from those in the present case and it can provide no assistance to Premium.

Quantum

[79] The attempt by the Stevens to claim from Premium the profit made by Mr Larsen is equally forlorn. Mr Akel referred to what he described as a close relationship between Premium and Mr Larsen and said that Premium had facilitated the latter's profit. But Premium did not share in the profit in relation to which the claim is made. (We repeat that no claim has been directed to Premium's commission on the resale.) This was certainly not a case like *Warman International Ltd v Dwyer*⁷⁵ or *CMS Dolphin Ltd v Simonet*⁷⁶ or *Baillie v Charman*⁷⁷ where the fiduciary took its profit through another vehicle and was accountable for the profit made by that vehicle. In *Warman*, for example, the companies which profited from Mr Dwyer's breach had knowingly and actively participated in it. Mr Akel was unable to point to any case which recognised even the possibility of a claim for disgorgement made against someone who did not directly or indirectly make the profit in question. There was also no evidence of any collusion between Ms Riley and Mr Larsen concerning what she would say to the Stevens about him.

⁷⁵ (1995) 182 CLR 544.

⁷⁶ [2001] 2 BCLC 704 (Ch D).

⁷⁷ (1993) 107 DLR (4th) 577 (BCCA).

[80] In so far as the claim was based on the Fair Trading Act, it is enough to say that that Act provides for orders directing payment of the amount of “loss or damage”⁷⁸ but it does not contemplate any order for the disgorgement of profit made by someone who has not breached the Act.

[81] We mean no disrespect to Mr Akel when we say that his articulation in oral argument of this claim for profit came more and more to resemble a claim for damages measured by reference to the profit which Mr Larsen made. In this form, however, it faced the difficulty that the re-sale was some seven months after Premium’s breach at a time when prices had been rising rapidly⁷⁹ and occurred after Mr Larsen had carried out some improvements to the property⁸⁰ and had marketed it aggressively in a campaign of his own devising using other agents as well as Premium. Mr Larsen thereby achieved a realisation well above the market value of \$3.25m as found by the Judge which, on an orthodox approach, would provide the upper limit for the measurement of loss suffered by the Stevens.

[82] Mr Akel was on firmer ground when he moved to an argument that the Court of Appeal had been wrong to reduce the trial Judge’s award of damages measured by comparing the market value of the property at the time of the agent’s breach with the price paid by Mr Larsen’s trust. Courtney J considered that it was for the Stevens to demonstrate that they had suffered a loss arising from Premium’s breach of duty. She was satisfied that, had Ms Riley disclosed what she knew about Mr Larsen, Mrs Stevens, who had been the vendor with whom Ms Riley dealt, would have thought that any offer Mr Larsen made was likely to be below market value and that “the likely impact of such knowledge would have been to reinforce Mrs Stevens’ unhappiness about Premium’s appraisal of the property”. This would have led to a “nervous reconsideration” by the Stevens of their position.⁸¹ The Judge considered that the Stevens may have chosen not to sell “thereby retaining their asset worth

⁷⁸ Section 43(2)(d).

⁷⁹ Prices in the area were rising about 1.25% per month: High Court judgment at para [6].

⁸⁰ The evidence of Ms Riley was that the changes to the property were minor “but had the effect of making it look like a different property internally”.

⁸¹ At para [106].

\$3.25m”.⁸² The proper relief, the Judge said, was equitable damages in an amount that would restore the Stevens to the position they occupied before Premium’s breach. That figure was \$675,000, being the difference between the market value of the property and the price paid by Mr Larsen.

[83] It will be remembered that the Court of Appeal, in contrast, took the view that the Stevens would probably have rejected the Larsen offer and extended the sale period. But that Court considered that the likelihood was that the Stevens would ultimately have been prepared to accept \$2.8m.

[84] We agree with the Court of Appeal that the evidence does not go as far as to lead to the conclusion that, if the fiduciary breach had not occurred, the Stevens would have kept the property. They were obligated by their conditional purchase agreement on the Parnell property to keep Beach Road on the market until 30 June and to accept any offer of \$3m or more made on or before that date. But in our opinion the Court of Appeal nevertheless approached the quantum of loss arising from the fiduciary breach in the wrong way and arrived at the wrong figure.

[85] It was once the strict rule that when a fiduciary committed a breach of duty by non-disclosure of material facts which the party to whom the duty was owed was entitled to know in connection with the transaction, the fiduciary could not be heard to maintain that the disclosure would not have altered the decision to proceed with the transaction; once the court had determined that the undisclosed facts were material, speculation as to what course the beneficiary, on disclosure, would have taken was not regarded as relevant.⁸³ The strict rule could sometimes lead to unfair results⁸⁴ and has been modified in this country by an approach which affords the fiduciary a limited opportunity of showing that all or some of the loss would have occurred even if disclosure had been made. The matter was put in the following way

⁸² At para [118].

⁸³ *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 at p 469 (PC).

⁸⁴ “[I]t is one thing to strip a fiduciary of profit without much inquiry: it is another to hold him accountable for all loss without inquiry into relative causes”: J D Heydon, *Causal Relationships Between a Fiduciary’s default and the Principal’s loss* (1994) 110 LQR 328, p 332.

in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*⁸⁵ in a passage approved by this Court in *Amaltal Corporation v Maruha Corporation*:⁸⁶

[O]nce the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part . . . Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.

The same general approach should be taken when the matter in issue is restricted to the quantum of the loss. The same policy applies to both. That policy is designed to deter fiduciary breaches by limiting the circumstances in which fiduciaries in breach can escape or reduce their liability for the consequences of the breach. It would be artificial, and inconsistent with that policy, to distinguish between causation and quantum issues. Where there is a normal or prima facie measure of loss, the fiduciary must positively show that it is not an appropriate measure. The normal and natural measure of loss, when a fiduciary breach has affected the price at which property is sold, is the difference between the sale price and market value. Policy dictates that the onus should be on the fiduciary to demonstrate that the plaintiff's loss was actually less (or non-existent). If there is any doubt about that, the doubt should be resolved against the fiduciary.⁸⁷

[86] In this instance we consider the Court of Appeal failed to bear this latter point in mind and too readily reached the conclusion that the Stevens would likely have sold the property for \$2.8m. The evidence they relied on for their conclusion all was directed to the time before the failure by Premium to make the disclosure the Stevens should have received. The Court appears to have overlooked in its assessment that the Stevens still believed that their property was worth \$3m (the figure which appeared in the condition in the Parnell agreement) and were not especially concerned to acquire the Parnell property. In our opinion Courtney J was right to think that the Stevens, who were, as she found, not in a rush to sell, would have

⁸⁵ [1999] 1 NZLR 664 at p 687 per Tipping J.

⁸⁶ [2007] 3 NZLR 192 at para [30].

⁸⁷ Andrew Butler in his chapter on Fiduciary Law in *Equity and Trusts in New Zealand* (2003), para [14.6.6] remarks that the proper approach in a case such as *Kelly v Cooper* is to presume against the fiduciary that the most profitable (though reasonable) use of the information would have been made and to fix the loss accordingly.

reappraised the situation if told that Mr Larsen was a speculator. The possibility that they may have sought other valuation advice cannot be disregarded. It is also likely, indeed probable, that they would have extended the sale period, and if they did so, it was quite possible that they would have achieved a sale at what the Judge has determined to have been the current market value of \$3.25m. An orthodox measurement of their loss was therefore to use this figure. To depart from it, and to say as the Court of Appeal did that the Stevens were likely to have sold it at \$2.8m, too easily permits the errant fiduciary to find the “narrow escape route”. In this case, it also allows Premium some advantage from the influence of its own mistaken (though not negligent) assessment of market value. The Court of Appeal’s use of the word “likelihood” with reference to a possible sale at \$2.8m indicates that it was not applying the reverse onus which Premium had to discharge with enough rigour.

[87] Mr Gilbert also complained that the Judge had been wrong to find that the market value was \$3.25m. He said that Mr Mahoney, whose valuation report the Judge preferred, had failed to give any weight to the fact that even before the breach of duty the Stevens had been prepared to counter-offer at \$2.8m and so must have been “willing vendors” at this figure. It can, on the contrary, be said that they were willing only because they were misinformed about value by Premium. This Court is at a disadvantage because counsel chose not to put the various valuation reports before it. But it is entirely possible that Mr Mahoney’s attitude was influenced by his perception that, on the basis of other valuation material from sales of comparable properties, the advice about value which led the Stevens to make the counter-offer was poor advice. We are not persuaded that Courtney J was wrong to accept the opinion of Mr Mahoney, a well-respected senior valuer.

[88] In one minor respect only the damages award made by Courtney J should, however, be varied. Because, on the approach we take, the assessment assumes a sale at \$3.25m for the purpose of comparison and on a sale at that figure the commission would be a higher amount, the more appropriate comparison is of the two prices both net of commission. Counsel have advised that the commission on the higher sale price would have been \$82,237. Therefore the damages payable should be $(\$3.25\text{m} - \$82,237)$ less $(\$2.575\text{m} - \$67,050) = \$659,813$.

The commission

[89] The final matter is whether, as Courtney J ordered, Premium should also forfeit its commission of \$67,050 by reason of its breach of fiduciary duty. In this respect the law remains as it was stated in 1926 by Atkin LJ in *Keppel v Wheeler*:⁸⁸

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.

In that case the real estate agents believed, erroneously, that their duty to their principal ceased when they had procured an offer to purchase which the principal had accepted subject to contract (and therefore, unlike the normal position in this country, still leaving the vendor in a position to withdraw). In that belief, and therefore acting mistakenly but innocently, committing only what the Privy Council in *Kelly v Cooper*⁸⁹ called an honest breach, the agents failed to inform the vendor of a higher offer. They were found liable for breach of duty and ordered to pay damages measured by the difference between the two offers. But, as indicated in the passage from Atkin LJ, the Court of Appeal allowed the agents' claim for commission on the sale at the lower figure, which had proceeded. It is, however, quite clear that if the agents had not acted in good faith they would have been denied their commission, or been required to disgorge it if already received, notwithstanding that the plaintiff was being "made whole" by the award of damages. That would have left the plaintiff better off than if the transaction had proceeded without any breach of fiduciary duty, but the double sanction of damages and forfeiture of moneys received or receivable by way of remuneration is equity's method of deterring disloyal behaviour by fiduciaries, as Jacob LJ has very recently confirmed in *Imageview Management Ltd v Jack*:⁹⁰

The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the

⁸⁸ [1927] 1 KB 577 at p 592 (CA).

⁸⁹ At p 216.

⁹⁰ [2009] EWCA Civ 63 at para [50].

remedy should be when the agent has betrayed the trust reposed in him – notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the strict rule is there as a real deterrent to betrayal.

[90] The remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction.⁹¹ There is no inconsistency in awarding the principal both damages and the refund of the commission, as there would be, for instance, if a court were to order a defendant fiduciary both to pay damages and to account for profits made by the use of the principal's asset.⁹² Remuneration for services is not a profit of this kind. It is something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty save in the circumstances described by Atkin LJ. The agent has no right to be paid or to retain any commission and must also compensate the principal for any loss which the agent has caused. The principal is advantaged because the property has been sold without commission being payable but the agent should not receive a credit against the damages for the fact that the commission is not payable because that would effectively allow the agent the benefit of the forfeitable remuneration.

[91] The question then is whether Ms Riley can be said to have acted in good faith, committing only an honest breach. The evidential burden of showing that must be discharged by the defaulting fiduciary.

[92] Courtney J found that Ms Riley's conduct was, in terms of the Fair Trading Act, deceptive or misleading, but of course conduct deserving of that description under that Act need not have been advertent. Courtney J qualified her finding of a conflict of interest by saying that there was no evidence to suggest that Ms Riley did

⁹¹ "A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission": *Imageview* at para [18].

⁹² *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514.

prefer Mr Larsen over the Stevens. But this remark appears to have been directed more to the allegation of non-disclosure than to the misleading element in Ms Riley's conduct. It was, in any event, extremely generous to Ms Riley.

[93] The Judge did not in this context refer to the question of good faith or honesty, and seemingly did not direct herself in accordance with that test, in deciding that the commission should be forfeited. She simply described it as an unauthorised profit which should be disgorged. The Court of Appeal did not discuss this question and so made no finding of fact on it.

[94] It seems to us inescapable that Ms Riley deliberately misled the Stevens about Mr Larsen's purpose in acquiring their property. It is impossible to believe that her statements about his travelling time between work and home and about his interest in a seaside property, with his partner having a place for her horses, were made with any purpose other than to reassure Mrs Stevens that Mr Larsen was looking for a personal residence. She has admitted she was aware that it was his habit to try to give that impression. She appears to have believed that he was following his usual pattern. Her words seem to have been carefully chosen and in our view cannot be characterised as something done or said in good faith. The commission should be forfeited. Furthermore, in circumstances like the present, it would not be appropriate to award the dishonest fiduciary any allowance or recompense for its efforts in achieving the sale at an undervalue, especially when Premium was seemingly motivated in part by a desire to obtain a commission upon a re-sale by Mr Larsen's trust.⁹³

Result

[95] We would allow the appellants' appeal, dismiss the respondent's appeal, restore the High Court's order for repayment to the appellants of the commission of \$67,050 and order the respondent also to pay damages of \$659,813. The judgment

⁹³ Compare *Chirnside v Fay* [2007] 1 NZLR 433 at para [122] (SC).

sums should bear interest at 7% per annum from the date of settlement of the sale by the Stevens to Mr Larsen's trust.

[96] The appellants should be awarded costs in this Court of \$15,000 and costs in the Court of Appeal of \$6,000, together in each case with their reasonable disbursements as fixed by the respective Registrars if not otherwise agreed between the parties.

TIPPING J

[97] I agree with the orders which Blanchard J has proposed, for the reasons he has given. There is nothing I wish to add to these reasons so far as they relate to breach of fiduciary duty and the amount of the loss for which Premium should compensate the Stevens. They coincide exactly with my own. I do, however, wish to add some further reasons why Premium should be required to refund the commission as well as compensate the Stevens for their loss. On one view, this has an appearance of double-counting because the damages representing the loss are calculated net of commission. My purpose is to put the issue in a wider context.

[98] There are two dimensions to the question which require consideration. The first is that this approach could be seen as penal on account of the double-counting aspect. The second is that it might be thought necessary to reconcile the approach with the rule that a plaintiff must elect between inconsistent remedies for the same wrong.⁹⁴ For the purpose of addressing those questions, and indeed generally, I regard it as helpful to treat monetary relief as a species of damages in all cases other than claims for debt and under statute. I should acknowledge at the outset that my thinking has been influenced by Edelman's work entitled *Gain-Based Damages*.⁹⁵ When I speak hereafter of awarding monetary relief I will not repeat that I am

⁹⁴ In the present case the wrong was the failure to disclose that Mr Larsen was a trader in land. That was a breach of fiduciary duty and a breach of contract. It would be artificial, however, to take the view that there were therefore two different wrongs. In substance it was the same wrong which was actionable under two separate legal heads.

⁹⁵ *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002).

referring to all forms of monetary relief for civil wrongs,⁹⁶ other than claims for debt and sums payable pursuant to statute.

[99] It is well established that for certain types of civil wrong the Courts may award monetary relief based either on the loss caused to the plaintiff, or on the gain made by the defendant as a result of the wrong.⁹⁷ Indeed, as Edelman points out, the speeches in the House of Lords in the important early case of *Livingstone v Rawyards Coal Company*⁹⁸ demonstrate that the concept of damages is not tied exclusively to compensation for loss. Gain-based remedies such as account of profits, whatever their historical origin, can conveniently be regarded as a species of damages.⁹⁹ So too can financial remedies designed to restore to the plaintiff the monetary value of what the plaintiff has transferred to the defendant when, in the circumstances, the law requires restoration of that value. My immediate purpose in proposing this approach is to enable the Courts to identify more readily whether and when monetary remedies are necessarily inconsistent, so as to bring into play the need for election between them.

[100] I should add that I am forecasting here a possible objection to ordering Premium both to compensate for loss and to refund the commission on the basis that the Stevens should be entitled to whichever of those remedies suits them best (obviously compensation for loss), but not both. In *Personal Representatives of Tang Man Sit v Capacious Investments Ltd*¹⁰⁰ the Privy Council was required to consider when election was necessary between remedies. Their Lordships, in a judgment delivered by Lord Nicholls, drew a distinction between remedies which are truly alternative and remedies which can properly be regarded as cumulative. In the

⁹⁶ For present purposes I include claims of a restitutionary kind, albeit they may not involve a “wrong” in the traditional sense; it would, however, be possible to regard them as involving wrongs in the looser sense of a breach of a duty to repay or restore. I exclude money sums paid in the implementation of a constructive trust. In that situation the trust is the primary remedy and the money payment is simply a way of fulfilling the trust obligation.

⁹⁷ The word damages does not necessarily imply compensation for damage in the sense of loss. A simple example of this is punitive or exemplary damages.

⁹⁸ (1880) 5 App Cas 25.

⁹⁹ As Lord Nicholls said in *Attorney-General v Blake* [2001] 1 AC 268, when awarding damages the law does not adhere slavishly to the concept of compensation for loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer (at p 285).

¹⁰⁰ [1996] 1 AC 514. At p 520 Lord Nicholls regarded it as convenient to describe equitable compensation as damages.

first case, the plaintiff must choose between the alternative remedies; in the second, the plaintiff can generally have both. In *Tang Man Sit* the remedies sought by the plaintiff included both an account of profits and compensatory damages. The Privy Council affirmed the general rule that the plaintiff cannot have both these remedies together for the same wrong, save in the unlikely event that in the particular case the remedies are to some extent not inconsistent.¹⁰¹

[101] The general rule was based historically on two concurrent reasons. First, courts of law awarded damages and courts of equity generally did not; it was they that developed the remedy of account whereby gain was disgorged. Secondly, the early cases proceeded on the premise that if, as was then usual, the plaintiff and the defendant operated in the same market, the defendant's profit was the obverse of the plaintiff's loss. Hence, to award both remedies would be to award substantially the same remedy twice. Election was therefore required, originally as between courts, and later as between remedies.¹⁰²

[102] Against that background I return to the terminology of damages. I leave aside nominal damages and exemplary damages which have their own particular features.¹⁰³ On that basis the three types of monetary relief with which the Courts are concerned as a response to civil wrongs can be described as compensatory damages, disgorgement damages and restorative damages.¹⁰⁴ Compensatory damages are loss based. Disgorgement damages¹⁰⁵ are based on giving up a gain.

¹⁰¹ See also *Ministry of Defence v Ashman* [1993] 2 EGLR 102 at p 105 per Hoffmann LJ (CA).

¹⁰² For the history, see Watterson, "An Account of Profits or Damages? The History of Orthodoxy", (2004) 24 OJLS 471 and "Restitutionary Damages – the Unnecessary Remedy" by Doyle and Wright [2001] 1 MULR 1, albeit I disagree with these authors' thesis that the terminology and concept of restitutionary (restorative) damages should be abandoned.

¹⁰³ The concept of aggravated damages does not represent a separate category of damages. Aggravated damages are no more than compensatory damages, the quantum of which reflects the aggravating circumstances in which the wrong was committed: see *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 at paras [59] – [60] (CA); and Todd (ed), *The Law of Torts in New Zealand*, (4th ed, 2005), para [26.3.03] referring to and approving *Attorney General v Niania* [1994] 3 NZLR 106 at p 111 (HC).

¹⁰⁴ Edelman uses the terminology of restitutionary damages. I prefer to use the word restorative. It more directly denotes the idea of restoration of value transferred, and avoids the difficulties that are inherent in the causes of action generally referred to as restitution. Cane used the expression "restorative damages" in his chapter "Exceptional Measures of Damages: A Search for Principles", in Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996), p 325.

¹⁰⁵ Cane also uses the terminology of disgorgement damages in respect of gain-based damages in his *Anatomy of Tort Law* (1997). In his speech in *Sempra Metals Ltd v IRC* [2008] 1 AC 561 at para [230] Lord Mance distinguished between disgorgement damages and restorative damages as I have done, albeit he employed the terminology of restitutionary damages for the latter.

Restorative damages are based on restoring to the plaintiff value transferred. As the Privy Council affirmed in *Tang Man Sit*, compensatory and disgorgement damages are generally, indeed almost always, inconsistent. An election is required between them. Compensatory and restorative damages are not necessarily inconsistent. Conceptually they are capable of being cumulative, even if they arise from the same wrong.¹⁰⁶

[103] For example, the defendant may have to compensate for loss suffered and also restore to the plaintiff any value transferred when the rationale for the transfer has failed because of the wrong. There may, however, be circumstances in this latter situation where it would not be appropriate to require the defendant to pay compensation for loss and also restore value transferred. Put another way, there may be circumstances where the plaintiff should have to account for any restoration made or to be made by the defendant, when the loss is being calculated. A wholly innocent fiduciary breach, that is a breach in good faith, might well represent such a case.

[104] I consider there is, in this respect, some analogy between the circumstances which arise in the present case and the general approach which the Courts take to allowing some reward or remuneration to errant fiduciaries, as endorsed by this Court in *Chirnside v Fay*.¹⁰⁷ There is, of course, a difference between a case in which the errant fiduciary's skill and effort has generated the profit which is the subject of the disgorgement damages, and a case like the present (refund of commission) in which the damages in question are of a restorative kind. Nevertheless the concept of reward is present in both cases. When the damages represent disgorgement of profit, the errant fiduciary may be allowed some reward for generating the profit. When the damages represent the forfeiture or refund of remuneration not fully earned because of the commission of the wrong, the fiduciary may have expended time, effort and money for which some reward is nevertheless appropriate. In the same way as an allowance for skill, effort and expenditure is available on a discretionary basis in the disgorgement context, so too should it be

¹⁰⁶ In his *Principles of the Law of Restitution*, (2nd ed, 2006), pp 461 – 463, Virgo acknowledges that sometimes the plaintiff may be able to claim a restorative remedy as well as a compensatory one for the same wrong.

¹⁰⁷ [2007] 1 NZLR 433 at paras [103] – [154].

permissible to make an allowance, sometimes for what would have been the full contractual entitlement had there been no default, when the context is restorative damages. Much will turn in each case on the seriousness of the wrong which has been committed, the degree of moral turpitude attending the commission of the wrong and whether the plaintiff has received any ultimate value from the defendant's efforts.

[105] It is appropriate at this point to mention another decision of the Privy Council which has some conceptual similarity with the present case. The decision is *T Mahesan s/o Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd.*¹⁰⁸ The housing society had employed an agent to buy land on its behalf. The agent dishonestly agreed with one M that M would buy land which was available at a good price and sell it on to the housing society at a profit, thereby denying the housing society the opportunity of buying the land at the original price. The agent did not advise the housing society that the land had been for sale earlier, nor what M had paid for it. M made a profit of \$443,000 on the resale to the society. M had paid the agent a bribe of \$122,000 for his connivance in the transaction. The society sued the agent for damages. The trial Judge awarded the amount of the bribe. The Federal Court, on appeal, awarded both the amount of the profit made by M and the amount of the bribe received by the agent. The Privy Council held that the society could not have both and awarded as damages against the agent the profit made by M, holding that the society was bound to elect between the two amounts.

[106] This was a case in which the agent was as dishonest as one could get. He cheated his principal in return for a bribe. Nevertheless the Privy Council required election between damages for fraud and recovery of the bribe and would not permit the society to have both. The society was taken to have elected the higher sum representing the loss it had suffered by reason of its agent's fraud. The two amounts bore different characters. The sum of \$443,000 was the loss suffered by the society. In other words, it represented conventional compensatory damages. The bribe was in the nature of a gain or a profit made by the agent from the wrong he had

¹⁰⁸ [1979] AC 374 (PC).

committed. While not adopting this reasoning, the Privy Council, in effect, treated the case as representing compensatory and disgorgement damages between which an election was required. The case does not therefore involve the dichotomy between compensatory and restorative damages. The bribe did not represent value transferred by the society to its agent, restoration of which was appropriate.

[107] That, however, is the character of the commission which the Stevens paid to Premium. They paid the commission¹⁰⁹ on the premise that Premium had faithfully performed its contractual and fiduciary duties. Premium had not done so. Whether the commission should be refunded as restorative damages in addition to compensatory damages does not, on the analysis I have proposed, involve any question of election. To the extent the Court allows both forms of damages the remedies are cumulative, not alternative. Whether the Court should allow both remedies depends to a significant extent on the policy which lies behind the granting of each. The policy which lies behind compensatory damages is simple. It is to compensate for loss caused by civil wrongs. The policy behind restorative damages is more complex. In present circumstances it includes the importance, in appropriate cases, of reinforcing fiduciary obligations by removing from the defaulting fiduciary a sum paid pursuant to a contract which has not been faithfully performed. The primary purpose, in the present context, of restorative damages, when awarded in addition to compensatory damages, is to deter fiduciary breaches and to express the Court's disapproval, by requiring the defaulting fiduciary to restore the value transferred but not earned, as well as compensating for the loss caused.

[108] This is an appropriate time to refer to *Keppel v Wheeler*¹¹⁰ which Blanchard J has discussed in his reasons. The approach of the Court of Appeal in that case was not, of course, along the lines I have adopted, but I consider the reasoning is consistent with my approach. The Court declined to order both compensatory damages and restorative damages. The reason for not ordering both rested essentially on the proposition that the agent had acted in good faith and his breach

¹⁰⁹ In fact, of course, Premium deducted the commission from the deposit paid by Mr Larsen, but this cannot logically make any difference.

¹¹⁰ [1927] 1 KB 577 (CA).

did not go “to the whole contract”.¹¹¹ By that Atkin LJ meant that the breach did not undermine the whole fiduciary underpinning of the contractual relationship, nor was it such that the agent had disentitled himself to commission.

[109] The position in the present case is quite different. Premium, through Ms Riley, deliberately misled the Stevens into thinking that Mr Larsen was buying their property for occupation by himself and his family. This was a deliberate breach of fiduciary duty. Indeed Ms Riley, knowing that Mr Larsen’s general approach, when buying properties, was to induce vendors to think he was buying for personal occupation, dishonestly assisted him in that deception. The fiduciary breach for which Premium is responsible is therefore far from innocent. Premium’s conduct represented the antithesis of loyalty and good faith.

[110] It is just such a case as this that demonstrates the desirability of the courts being able to award both compensatory and restorative damages. Premium should be required to compensate for the Stevens’ loss and pay back the commission which it did not earn. There is no basis upon which Premium should, as a matter of discretion, be allowed to keep all or part of the commission. There is a need to deter those in Premium’s shoes from breaching their fiduciary duties in this deliberate way. To the extent that requiring the refund of the commission as well as paying compensation for the loss caused may be seen as having a punitive effect, it is appropriate that this be so. While it is not a case in which exemplary damages are being awarded, it is a case in which, by its conduct, Premium has disqualified itself from receiving or retaining its commission by committing a serious breach of fiduciary duty involving substantial moral turpitude.

[111] I close by saying that I have throughout these reasons used the single unqualified word “damages” without reference to the historical source of the cause of action upon which they are based. I do not regard it as necessary or appropriate to speak any more of common law damages, equitable damages or, indeed, equitable compensation. An understanding of the historical source of the cause of action will often be helpful for substantive purposes but, when monetary relief is being referred

¹¹¹ At p 592, per Atkin LJ.

to, the single word “damages” can be used, with the descriptor confined to the nature of the damages rather than their historical origin.¹¹²

[112] For the reasons I have endeavoured to express, I agree that Premium should be ordered to pay both compensatory and restorative damages.

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¹¹² In saying this I recognise that historically damages at law were as of right but in equity compensation was discretionary, albeit in a practical sense the discretionary element was more theoretical than real once this form of remedy was found to be appropriate.