

**IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE**

**CIV-2022-425-5
[2023] NZHC 1104**

BETWEEN ROSS HALDENBY JAMES and NONA
LEE JAMES
Appellants

AND LUXURY REAL ESTATE LIMITED
Respondent

Hearing: 20 September 2022

Appearances: D L Marriott for Appellants
M R Walker and B B Gresson for Respondent

Judgment: 10 May 2023

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 10 May 2023 at 4.30 pm pursuant to Rule 11.5
of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This appeal is from a judgment of the District Court by which Luxury Real Estate Ltd (Luxury RE) obtained judgment against Ross and Nona James for commission on a property sale (the Judgment).¹

[2] Mr and Mrs Ross owned a Queenstown property. The parties entered into a sole agency agreement (the agency agreement) in January 2017. The property was sold for \$3,150,000 under an agreement for sale and purchase (the sale contract) on 6 March 2017, within the period of the sole agency (which was to expire on 25 April 2017). Luxury RE issued an invoice to Mr and Mrs James on account of disbursements incurred on behalf of Mr and Mrs James. They did not pay the invoice.

[3] Luxury RE, upon becoming aware of the sale contract and that it had become unconditional, issued an invoice to Mr and Mrs James for \$125,787.50 on account of commission calculated in terms of the agency agreement. They did not pay that invoice.

The claim and counterclaims

[4] Luxury RE sued Mr and Mrs James in the District Court for breach of contract (that is, failure to pay commission), seeking judgment in the sum of \$128,325.05 plus interest.

[5] Mr and Mrs James both defended the claim, and counterclaimed.²

[6] Mr and Mrs James asserted Luxury RE was not entitled to payment because:

- (a) they had cancelled the agency agreement following a repudiation by Luxury RE;
- (b) Luxury RE was disentitled to commission because of:
 - (i) its breaches of fiduciary duty; and/or

¹ *Luxury Real Estate Ltd v James* [2022] NZDC 21909.

² The defendants' pleading at trial was contained in their second amended statement of defence and counterclaim.

- (ii) its breaches of s 9 Fair Trading Act 1986 through its misleading and/or deceitful behaviour;
- (c) (in relation to the rate of commission) the entitlement to commission was at 3 per cent (not 3.5 per cent), through a variation of the agency agreement; and
- (d) (in relation to disbursements) Luxury RE had failed, despite demand, to provide proof of the incurring of the claimed disbursements.

[7] Mr and Mrs James in turn counterclaimed for damages for breach of fiduciary duty and provisions of the Fair Trading Act 1986. They sought special damages of \$100,000, representing the difference between the sale price (\$3,150,000) and the sale price they assert could have been achieved but for Luxury RE's breaches.

[8] Mr and Mrs James additionally sought, on the fiduciary duty counterclaim, general damages of \$30,000 for stress and anxiety.

The District Court outcome and this appeal

[9] Judge Tuohy gave judgment for Luxury RE on its commission claim and dismissed Mr and Mrs James' claims in relation to both fiduciary duty and breach of the Fair Trading Act.

[10] Mr and Mrs James appeal against the commission judgment and the dismissal of their fiduciary duty counterclaim. They do not appeal in relation to their Fair Trading Act cause of action.

The principles on appeal

[11] The appeal is brought under s 124 District Court Act 2016, which provides parties to a civil proceeding in the District Court with a general right of appeal to this Court.

[12] In considering an appeal against a judgment of the District Court, this Court is required to form its own opinion as to matters of law and fact.³ The appellate court is entitled to give due weight to findings made in the lower court, particularly in relation to matters such as credibility witnesses when the lower court had the advantage of hearing the evidence of those witnesses.⁴

The facts

[13] The Judge heard evidence over three days.

[14] Luxury RE called its director, Terry Spice, the individual salesperson who dealt with Mr and Mrs James in relation to the sale.

[15] Mr and Mrs James each gave evidence.

[16] In the Judgment, Judge Tuohy referred to the witnesses by their first names (as they had used themselves during the trial), namely Terry, Ross and Nona respectively. The Judge referred to Luxury RE as “LRE” and to the agency agreement as the “SAA”. The Judge referred to the ultimate purchaser, Chivukula Bharadwaja, as “CV”.

[17] The Judge first set out his findings as to matters of factual background. He dealt with and made findings in relation to matters disputed by the witnesses, which I deal with later in this judgment. At this point I set out the Judge’s “Factual Background”, which represents common ground.

[3] LRE has two directors, one of whom is Terry Spice (Terry) who was the licensed real estate agent who primarily dealt with Mr and Mrs James. As its name suggests, LRE specialises in the top end of the Queenstown real estate market. Ross and Nona’s home fell into that category. They contacted LRE in late 2015 with a view to engaging it to market their property. Subsequently they entered into a sole agency agreement with LRE dated 22 March 2016.

[4] That agreement was on the same printed form as the later SAA. The clause which appointed LRE as sole agent was the same in both agreements:

Sole Agency Authority

³ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 [*Austin Nichols*].

⁴ At [13].

The Client(s) appoint the Agent as sole agent with exclusive selling rights for the sale of the Property. If the Property or any part of it is sold during the term of the agency the Client agrees to pay the Agent the fee set out in Clause 9, whether such sale is on the terms set out herein or on any other terms acceptable to the Client.

This agency shall commence on the Commencement Date (or upon the cancellation of any Existing Agencies) and shall continue until midnight on the Expiry Date unless cancelled by:

1. Either party to this agreement by written notice to the other any time after the expiry of the period of 90 days after the agreement being signed (in the case of the agency having a period of more than 90 days); or
2. The client(s) by written notice to the Agent by 5pm on the first working day after the day on which a copy of this agreement signed by or on behalf of the Agent is given to the Client in accordance with the Act. For the avoidance of doubt, a copy of the agreement can be given to the Client(s) by way of facsimile or email if such details are recorded.

Subject to any prior cancellation, after the Expiry Date the agency shall continue as a General Agency, unless renewed by written agreement between the parties.

[5] The provision relating to payment of commission was also in the same printed form in both agreements although there were blank spaces in which the commission percentage, the appraised value of the property and the estimated commission had to be inserted. The operative part of that clause is set out below:

9. Commission

9.1 In the event the Property or any part of it is sold:

- (a) By the Agent; or
- (b) Through the involvement of the Agent; or
- (c) If other than a General Agency, if at any time during the term of this agency; or
- (d) To any party materially introduced to the Property by the Agent during the term of this Agreement regardless of when the actual sale takes place; then

9.2 The Client will pay to the Agent its fees/commissions of % plus GST and any other agreed expenses as per the attached Marketing Schedule.

[6] The property was not sold during the period of the first sole agency which expired in late June 2016. The property was not actively marketed during the following months as Ross and Nona were of the view that summer was the better time to sell.

[7] In November 2016 discussions again commenced with a view to actively marketing the property. This resulted in the SAA. It provided for a sole agency on the terms set out above commencing on 24 January 2017 and expiring on 25 April 2017. The figures inserted in cl 9 were a commission percentage of 3.5% and an appraised value of the property of \$3,100,000 giving an estimated commission inclusive of GST of \$124,775.

[8] There were some other alterations to the printed form. Clause 2 relating to sale price had been amended in the first agreement to read and this remained in the SSA:

2. Sale Price

- 2.1 The sale price of the Property is 'By Negotiation' not be marketed as available for less than \$2,995 unless agreed in writing by client. The Agent is instructed to be mindful of this when marketing, inspecting and showing the Property. The Agent is instructed to obtain a maximum sale price, and through competitive bidding (where possible).
- 2.2 The identified price (being the Appraised Value of Property) was arrived at by Agent Appraisal & CMA (Comparative Market Analysis).

[9] The provision relating to marketing was cl 7 which is set out below and must be read in conjunction with the marketing schedule attached to the SAA. That schedule included a number of different marketing options with the cost of each set out. Some of the options were deleted by having a line drawn through them. The schedule provided for two marketing phases. The figure inserted for 'Total Cost (Phase One)' was \$1337 + GST.

7. Marketing Program

- 7.1 The Client acknowledges they have been advised how the Property will be marketed and advertised, including any additional expenses that such marketing and advertising will incur.
- 7.2 The Client confirms/~~declines~~ (strike one) the need for a marketing program to commence.
- 7.3 The Client agrees the Agent may incur disbursements on behalf of the Client to the maximum amount shown in the attached Marketing Schedule. Payment for those items of expenditure will be made by the Client to the Agent prior to that expenditure being incurred. Any amounts which have not been expended will be refunded to the Client once the property has sold.
- 7.4 The Client agrees to a marketing budget of \$1,337 + gst (Refer attached Market Schedule).

[10] On 16 February 2017, [Mr Bharadwaja], the ultimate purchaser, became aware of the property. [Mr Bharadwaja] was a resident of Singapore and a friend of Ross and Nona's neighbour Madhujet Chimni (known as MJ).

It was MJ who brought the property to his friend's attention. [Mr Bharadwaja] immediately booked a flight to Queenstown to view the property on 17 February (a Friday). Ross and Nona advised Terry of this development and requested him to attend the viewing. Terry had other commitments.

[11] On the afternoon of 17 February, [Mr Bharadwaja] arrived at the property with MJ. He was shown around it by Ross and Nona. He asked if he could return to view the property again the next day with another Queenstown real estate agent, David Penrose. Mr Penrose contacted Ross and Nona immediately after [Mr Bharadwaja] left. He advised that [Mr Bharadwaja] had asked him to come to the property and he suggested that he could assist in facilitating a sale and negotiating a price. He asked Ross and Nona to speak to LRE about sharing a commission.

[12] That information was conveyed to Terry. He was unhappy with any involvement of Mr Penrose. He was unable to attend at [Mr Bharadwaja's] second viewing of the property. In the event [Mr Bharadwaja] viewed the property again on 18 February without either Terry or Mr Penrose in attendance after which he returned to Singapore.

[13] Over the following days negotiations regarding price took place directly between [Mr Bharadwaja] and Ross. [Mr Bharadwaja] had made it clear that he did not want to deal through their real estate agent. Ross and Nona kept Terry informed regarding these negotiations and sought his advice on price. Ross had indicated to [Mr Bharadwaja] that a price of \$3,000,000 would not be acceptable. [Mr Bharadwaja] was seeking to ascertain what price Ross and Nona would accept.

[14] On 21 February 2017, Ross sent an email to [Mr Bharadwaja] advising him that they would accept an unconditional offer of \$3,330,000 which he told [Mr Bharadwaja] would net them a minimum \$3,200,000 after commission. The email indicated that further discussion could take place regarding a deferred settlement date or them taking a tenancy of the property following settlement. The email also indicated that they were aware that [Mr Bharadwaja's] Queenstown solicitor was in the course of preparing an agreement for sale and purchase and asked that a copy be sent to Terry so that he could advise other potential purchasers as soon as the property was sold. Nona in her evidence said that Terry had verbally agreed that morning to reduce LRE's commission as recorded in the SSA from 3.5% to 3% which Terry in his evidence flatly denied.

[15] Ross stated in his evidence that in a telephone conversation with [Mr Bharadwaja] later that day, they reached a position where [Mr Bharadwaja] was offering \$3,250,000 and the James had come down to \$3,300,000. Earlier that day, Terry had advised them not to name a price to [Mr Bharadwaja] below \$3,500,000 as if they did, they would lose the option of a multi-offer process. The conversation between Ross and [Mr Bharadwaja] was left on the basis that [Mr Bharadwaja] would send an offer through his solicitor the next day which Ross expected to be for \$3,250,000.

[16] [Mr Bharadwaja's] response was the presentation through his solicitor on 22 February of a signed unconditional agreement for sale and purchase at a price of \$3,000,000 which would lapse if not accepted within 72 hours. Ross and Nona were very disappointed and offended by this offer because it was

lower than a price which [Mr Bharadwaja] had verbally indicated in discussions. They thought they had been “played” by [Mr Bharadwaja]. In an email of 9.24 a.m. that day, they sought advice from Terry and instructed him to negotiate with [Mr Bharadwaja] from that point on as they did not want to deal with him directly. They informed Terry they were still prepared to accept an offer from him for \$3,300,000 but wanted to give preference to alternative offers. Terry responded at 11.14 am that he had received and noted those instructions.

[17] However, those instructions were quickly modified by an email to Terry from Nona timed at 12.44 pm which immediately followed a telephone conversation between them. After discussing perceived cultural factors affecting the approach to negotiating with [Mr Bharadwaja], the email continued:

Based on what I read, here’s what I suggest for our slightly revised approach. Still think the best approach is for you (as our 3rd party) to talk to Alan (Harper) (his 3rd party) so everyone can “save face” because we definitely need to signal our displeasure at this stage but don’t want to destroy the relationship that Ross has put in hours to build.

[18] Despite that, Ross continued that same night to communicate with [Mr Bharadwaja] through his neighbour MJ who made [Mr Bharadwaja] aware of the fact that the James were in a multi-bid situation and that he needed to make his best offer. However, this did not lead to any higher offer from [Mr Bharadwaja]. In fact, he communicated to MJ (and thus to the James) that he had not earlier verbally indicated a price of \$3,250,000 but the number was “more like 3.1 (million)”.

[19] Over the same period Terry was proposing to the James the initiation of a multi-offer process. He believed that there were at least two other potential purchasers apart from [Mr Bharadwaja] who were likely to make offers on the property and this process would be the best way of creating a competitive environment. One was an Australian solicitor named Linda Evans. His communications with Ms Evans led him to believe that she was about to make an offer for the property at a price of \$3,300,000. The other, Elgan Potter, was also an Australian, who intended to (and did) fly to Queenstown to view the property.

[20] It appears that this process was actioned on 25 February. Terry stated in his evidence that prior to that he had telephone communications with [Mr Bharadwaja’s] solicitor in which he was firmly advised that [Mr Bharadwaja] was not willing to pay more than the \$3,000,000 price contained in his written offer.

[21] In furtherance of this process, he sent multi-offer forms to Linda Evans, Elgan Potter and various other persons who he thought might possibly be interested in making an offer. The form amounted to an acknowledgement to be signed by the potential purchaser that there was more than one purchaser interested in purchasing the property; that the potential purchaser had been advised to put their highest and best offer in writing for presentation to the vendor; that the vendor had the right to accept or reject any offer and the right to counter-offer or negotiate with one prospective purchaser to the exclusion of others; and that a potential purchaser might not have the opportunity of

making a further or better offer. It also advised that any offer would be placed in a sealed envelope to be opened in the presence of the vendor and that all offers would be presented as near as possible at the same time to the vendor. Those who were sent the multi-offer form were advised that any offer was to be submitted by no later than Thursday, 2 March 2017 at 5.00 pm. He had previously sent a copy of this form to Ross and Nona.

[22] While he did not send a copy of the multi-offer form to [Mr Bharadwaja], he did send an email to his solicitor Alan Harper on 25 February advising that [Mr Bharadwaja] should submit his best offer by no later than 5 p.m. on 2 March and that he would be meeting the James that night to discuss all offers.

[23] Only Linda Evans returned a signed copy of the multi-offer form. Elgan Potter verbally advised Terry, probably on the evening of 1 March, although the evidence is not clear as to the time, that he would not be making an offer. Terry then contacted Nona to get Ross to contact [Mr Bharadwaja] to try to ensure he made a new offer. He did not then tell Nona that Elgan Potter had withdrawn from contention. Ross spoke to [Mr Bharadwaja] on the morning of 2 March and told him there were several offers coming in that evening. He was advised by [Mr Bharadwaja] that he would make a further offer at \$3,150,000.

[24] [Mr Bharadwaja's] solicitors presented an unconditional offer of \$3,150,000 by email at 3.22 pm on 2 March. It provided for settlement on 30 July 2017 or earlier by mutual agreement. It contained the same provision for lapse unless accepted within 72 hours. The box which, if completed with the name of a real estate agent, would entitle that agent to commission from the vendor recorded a sale by private treaty. However, on 2 March at 4.58 p.m. Linda Evans emailed Terry advising that she and her partner would not be submitting an offer. Terry rang her immediately to find out why and what had changed. She advised him that her mother had just been diagnosed with terminal cancer and that this had changed her priorities.

[25] Terry took the view that as there remained only one potential purchaser, [Mr Bharadwaja], he was ethically bound to advise that potential purchaser that he was no longer in a multi-offer situation, that is, that there were no longer other any other potential purchasers. He so advised [Mr Bharadwaja's] solicitors shortly after 5.00 pm on 2 March.

[26] Before doing that, he advised Ross and Nona by telephone of what had occurred and what he intended to do. They telephoned back to tell him that he should not take that course which they considered detrimental to their interests, only to find he had already done so. [Mr Bharadwaja] did not withdraw or vary his offer after receiving notice that his was the only offer.

[27] It had been arranged that Terry would call on Ross and Nona at their home after 5.00 pm on 2 March to consider the result of the multi-offer process. Terry arrived at 8.00 pm. It is plain that Ross and Nona were very upset at what had transpired and highly dissatisfied with Terry's performance of his duties before the meeting began. All three participants at the meeting attested that it became tense and eventually ended with angry recriminations. A more detailed analysis of the evidence relating to the meeting is provided in the section of this judgment dealing with Ross and Nona's assertion that the SSA was terminated then.

[28] The next day, 3 March, Ross and Nona through their solicitor made a counter-offer to [Mr Bharadwaja] at a price of \$3,250,000. This was rejected but the existing offer at \$3,150,000 was confirmed without the 72 hour lapse provision and with an agreement to provide 6 months rent free occupation after settlement to Ross and Nona. On the following Monday 6 March that offer was apparently withdrawn by [Mr Bharadwaja's] solicitor but was immediately renewed after direct communications between [Mr Bharadwaja] and Ross and accepted by Ross and Nona on the same date with a variation of the provision relating to post-settlement occupation. The final agreement provided for Ross and Nona to occupy the property as tenants for a fixed term of 12 months following the settlement date. No rental was payable for the term of the tenancy but they agreed to maintain the grounds to a high standard.

[29] Over the days following the meeting of 2 March, there had also been email communications between Terry and Ross which are further detailed in the section of this judgment relating to termination of the SSA. Terry continued to respond to enquiries about the property during this time.

[30] On 10 March, Ross and Nona's lawyer wrote to Terry by email requesting LRE's invoice for marketing already completed together with the list of potential buyers that LRE considered it had introduced to the property. The lawyer expressed Ross and Nona's concerns about how LRE had carried out its duties under the agency agreement, giving as an example Terry's alleged behaviour at the meeting of 2 March. The email ended: "Based on the information I have to date, it appears that you ended LRE's agency agreement on 2 March. The James do not wish to resume a relationship with LRE". Terry replied on 11 March disputing the portrayal of his behaviour at the meeting and stating that on the lawyer's instructions he had arranged for the listing be taken down from all web portals. Later an invoice for the commission and marketing expenses was sent which remains unpaid.

Appeal issue 1: cancellation of the agency agreement

The affirmative defence

[18] Through their solicitor, Mr Marriott, Mr and Mrs James invoked the cancellation remedies under sub-part 3 of Pt 2 of the Contracts and Commercial Law Act 2017, and in particular ss 36 and 41, which provide:

36 Party may cancel contract if another party repudiates it

- (1) A party to a contract may cancel the contract if, by words or conduct, another party (B) repudiates the contract by making it clear that B does not intend to—
 - (a) perform B's obligations under the contract; or
 - (b) complete the performance of B's obligations under the contract.
- (2) This section is subject to the rest of this subpart.

...

41 When cancellation may take effect

- (1) The cancellation of a contract by a party does not take effect—
 - (a) before the time at which the cancellation is made known to the other party; or
 - (b) before the time at which the party cancelling the contract shows, by some clear means that is reasonable in the circumstances, an intention to cancel the contract, if—
 - (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or
 - (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that other party's conduct in relation to the contract.
- (2) The cancellation may be made known by words or by conduct showing an intention to cancel, or both. It is not necessary to use any particular form of words, so long as the intention to cancel is made known.

[19] It was unclear on the defendants' pleadings whether the events of 2 March 2017 were relied upon as terminating the contract through a justified cancellation or by mutual discharge. It was however confirmed by Mr Marriott at trial that Mr and Mrs James relied upon cancellation upon repudiation.⁵ The particular conduct of Mr Spice relied upon by the defendants as repudiatory was (all at the 2 March meeting):

- (a) shouting that he was "*walking away*";
- (b) swearing at Mr and Mrs James and behaving aggressively towards them; and
- (c) saying he could no longer work with them, including refusing to communicate any further with Mrs James.

The Judge's findings

[20] The evidence the Judge considered was the trial evidence of the three participants and the correspondence between the parties immediately after the event.

⁵ Judgment, above n 1, at [32].

[21] The Judge concluded that there had been neither an unequivocal repudiation by Mr Spice of the agency agreement⁶ nor a cancellation of the contract by Mr and Mrs James⁷ nor, in terms of the cancellation provisions in the agency agreement, the required notice in writing of cancellation.⁸

[22] To reach those conclusions the Judge analysed the evidence in the following way:

[61] I do not consider that swearing or using aggressive language of itself indicates a repudiation of the agency contract. While I am in no doubt that Terry did swear (as he acknowledged) and spoke in an aggressive manner during the discussions, I am not satisfied that he swore at Ross and Nona. The evidence that Terry shouted “*fuck [Mr Bharadwaja], he is just complicating things ... You are too fucking invested in [Mr Bharadwaja] ... You need to forget about [Mr Bharadwaja]*” has the proverbial ring of truth. However, the swear word “*fucking*” is commonly used for emphasis in modern New Zealand, if not in politest society, and there is a significant difference between saying “*fuck [Mr Bharadwaja]*” and “*fuck you*”. I am not satisfied that Terry used the latter expression.

[62] I am also satisfied that when things got heated Terry stated words to the effect that he could not work with Nona. However, I do not think that indicates clearly that he was not prepared to continue with the agency contract. From one point of view, it may indicate the reverse in that he was making a distinction between dealing with Nona and dealing with Ross. It was Ross alone with whom Terry spoke outside the house for some minutes before getting into his car and driving home. It is quite feasible for an agency contract relating to the sale of a couple’s home to continue on the basis that the agent deals directly with only one of the couple. For different reasons, the James communicated with their purchaser [Mr Bharadwaja] via Ross alone.

[63] Much emphasis was also placed on Terry’s statement at around the time he left the property that he was “*walking away*” as the expression of an intention to abandon the agency contract. While not denying using the phrase, Terry’s evidence was that what he was intending to convey was that he was walking away from the meeting because it had been going around in circles and he felt that everyone needed to cool off. This is a quite plausible explanation in the circumstances. To interpret the phrase without more as an abandonment of the agency contract is not objectively justifiable.

[64] The subsequent email exchange does not indicate a clear understanding on either side that Terry or LRE had abandoned the performance of the agency contract. Ross’s 3 March email expresses ambivalence about the state of the relationship following the meeting of the night before. At the beginning Ross asked, “*How do you propose we move forward after you stated you’d be happy to walk away from us?*” Further on he stated that (this) “*came across to us as a **threat** (my emphasis) to walk away*

⁶ At [68].

⁷ Judgment, above n 1, at [69].

⁸ At [70].

from the contract, which as we understand is a breach of your responsibilities under the contract". This was followed by a paragraph: "Clearly it is not feasible for us to continue to work with you when we are concerned that the outcome of a reasonable request from us may well be being yelled at". The last line of the email was "Ideas for a resolution?"

[65] None of those expressions convey an understanding on Ross's part that the agency contract had been repudiated by Terry the night before. If that had been the case and that repudiation had been met immediately with the cancellation of the agency contract by Ross and Nona as they now allege, there would have been no need to ask how the parties should move forward nor what ideas Terry had for a resolution. Indeed, the characterisation by both of them of Terry's language as being a threat to walk away amounts in effect to an acknowledgment that it was no more than that.

[66] The subsequent emails on 4 March between Terry and Ross in which Terry requested and received an update on negotiations with [Mr Bharadwaja] do not indicate that the agency contract had been repudiated by Terry or cancelled by Ross and Nona. They are more consistent with the agency remaining on foot. On 5 March, Terry informed Ross by email that he was still responding to enquiries about the property and conveyed a tentative understanding that it could be sold by him if [Mr Bharadwaja] was not willing to meet Ross and Nona's price expectation of \$3,300,000.

[67] There was no evidence of any further communication between the parties prior to the sale to [Mr Bharadwaja]. However, in a subsequent email to [Mr Bharadwaja] in which he was trying to establish whether [Mr Bharadwaja] was still interested in buying the property, Ross advised him, "*We can't continue to avoid our realtor who is pushing us for instructions this morning as to how he should respond to the additional enquiries he has received*". This amounted to a representation that the agency still existed. (Emphasis as included in the Judgment)

Appellants' submissions

[23] In Mr Marriott's submission, the Judge erred in the conclusion that Mr Spice's words and conduct at the 2 March meeting did not amount to an unequivocal repudiation of the agency agreement. He submitted the words and conduct relied upon by Mr and Mrs James (above at [17]) did unequivocally amount to Mr Spice renouncing his agency authority.

[24] Mr Marriott noted that Mrs James understood Mr Spice's words and conduct to amount to a renunciation of his agency because, as she said in her evidence, she responded to Mr Spice:

You better have meant that because you have just ended it!

It's a divorce! There is no going back once you break the trust the other person has in your commitment to a relationship.

Respondent's submissions

[25] Mr Walker, for Luxury RE, referred to the detail of the Judge's reasoning as to why Mr Spice's words and conduct did not amount to repudiation, that is words or conduct that made it clear that Mr Spice did not intend to continue to perform the agency agreement. He also observed that Mr Spice, in his evidence, disputed Mrs James' evidence as to "You have just ended it" and "It's a divorce".

Discussion — repudiation

[26] For Mr Spice's alleged repudiatory conduct, it is necessary to first focus on his conduct and words, as the Judge did. The Judge, with the benefit of having seen and heard all three witnesses, carefully worked through the evidence as to Mr Spice's words and conduct. The Judge focused on aspects most particularly relied on for Mr and Mrs James, such as Mr Spice's aggressive manner and swearing, his statements as to not being able to work with Mrs James and as to "walking away".

[27] Each of the assessments made by the Judge was reasonably open to him on the evidence.

[28] The Judge was entitled to conclude that Mr Spice's words and conduct did not amount to a repudiation by making it clear that Mr Spice would not be performing the agency agreement further.

[29] The Judge was equally entitled, as he did, to find from the subsequent exchanges between the parties there was not a clear understanding on either side that Luxury RE had repudiated the agency agreement.

[30] Mr Marriott has correctly noted the Judgment does not refer in this context to the evidence Mrs James gave as to her responses to Mr Spice's words and conduct during the 2 March meeting. When the issue under consideration is whether Mr Spice repudiated the agency agreement, the primary focus must be on the conduct and words of Mr Spice himself. It is only if that conduct and language was clearly repudiatory

that Mr and Mrs James' entitlement to cancel arose. What Mrs James said in response was therefore more relevant to the cancellation issue than to the repudiation issue. As importantly, Mrs James' initial responses on the evening of 2 March had to be viewed in the light of the more measured responses through email in the following days, which the Judge carefully reviewed and took into account.

[31] Accordingly, the appellants have not demonstrated an error in the Judge's analysis and conclusion in relation to the repudiation issue.

Discussion — cancellation

[32] Absent an error in the Judgment relating to the appellants' not having established that Luxury RE had repudiated the agency agreement, any error in the factual conclusion that the evidence did not establish that there had been a valid cancellation of the contract is moot.

[33] That said, the Judge was also entitled on a review of the email exchanges on 3, 4 and 5 March to conclude that Mr and Mrs James had not clearly conveyed any cancellation of the agency agreement and to observe, to the contrary, that the exchanges implied the continued existence of a contractual relationship.

Appeal issue 2: breach of fiduciary duty

Mr and Mrs James' claim

[34] It was and remains common ground that Luxury RE, as Mr and Mrs James' real estate agent, had fiduciary duties.

[35] By their pleading, Mr and Mrs James made a wide range of complaints about Mr Spice's performance of his duties, categorising all of them as breaches of fiduciary duty.

The Judge's overall findings

[36] The Judge, under a heading "Breach of Fiduciary Duty" undertook an extensive review of a number of the complaints as to Mr Spice's conduct on the basis

that those particular allegations engaged, or might engage, the fiduciary duties of Luxury RE. The matters then discussed were:

- (a) disclosure of information to Mr Bharadwaja;⁹
- (b) deliberate misleading of or lying to Mr and Mrs James;¹⁰
- (c) withholding information as to potential outcomes;¹¹
- (d) aggressive, swearing behaviour;¹² and
- (e) false assertions as to need for agency agreement.¹³

[37] Following his consideration of those complaints, the Judge then turned to other complaints he categorised as complaints of breach of contractual duty.¹⁴

[38] On this appeal, Mr and Mrs James assert the Judge erred in his conclusions in relation to all heads of complaint.

Applicable legal principles

[39] Real estate agents, as with other canvassing agents, are subject to fiduciary obligations towards their principal.¹⁵

[40] The distinguishing obligation of a fiduciary duty is the obligation of loyalty, as explained by Millet LJ in *Bristol and Western Building Society v Mothew*:¹⁶

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

⁹ Judgment, above n 1, at [76]–[85].

¹⁰ Judgment, above n 1, at [86]–[101].

¹¹ At [102]–[108].

¹² At [109]–[110].

¹³ At [111]–[114].

¹⁴ At [116]–[137].

¹⁵ *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [23] per Elias CJ, per Blanchard, McGrath and Gault JJ at [68], per Tipping J at [97].

¹⁶ *Bristol and Western Building Society v Mothew* [1998] Ch 1 at p18, adopted in *Premium Real Estate Ltd v Stevens*, above n 15, at [67] per Blanchard, McGrath and Gault JJ.

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.

[41] The scope of a real estate agent's duties depends on the scope of duties the agent is asked to undertake.¹⁷

[42] As indicated by the passage cited above (at [40]), an agent's duties may be modified by an informed agreement or consent on the part of a principal to the agent's acting with a potential conflict of interest.¹⁸

[43] The breach of a duty of care imposed by contract or in tort will render a fiduciary liable for contractual breach and/or in negligence but does not amount to a breach qua fiduciary, notwithstanding the fulfilment of the role of a fiduciary is the setting for the negligent act or omission.¹⁹

[44] These established principles were identified by Judge Tuohy in introducing his discussion on the plaintiffs' fiduciary duty claims.²⁰

Aspect 1 — disclosure of confidential information

[45] It was common ground at trial that Mr Spice had advised Mr Bharadwaja that Mr Bharadwaja was no longer in a multi-offer situation (as reflected in the Judge's factual background at [25] (above at [13])). Although Mr and Mrs James had pleaded that Mr Spice had so communicated with Mr Bharadwaja without advising Mr and Mrs James that he was doing so, the evidence at trial was that Mr Spice had told Mr and Mrs James what he intended to do (as reflected in the Judgment at [26], above at [13]). While the evidence at trial was that Mr Spice had told Mr and Mrs James of his intention, there was no evidence indicating Mr Spice had sought at the time of his discussion with Mr and Mrs James their consent to Mr Spice's making such a disclosure.

¹⁷ *Premium Real Estate Ltd v Stevens*, above n 15, at [23] per Elias CJ.

¹⁸ *Bristol and Western Building Society v Mothew*, above n 16, at p18; *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 (CA) at [35]. (Adopted in *Premium Real Estate Ltd v Stevens*, above n 15, at [67], [72] per Blanchard, McGrath and Gault JJ.)

¹⁹ *S v Attorney-General* [2003] 3 NZLR 450 per Blanchard, McGrath, Anderson and Glazebrook JJ at [77]–[78], adopting *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 681 and 687–688.

²⁰ Judgment, above n 1, at [72]–[75].

[46] Mr and Mrs James pleaded Mr Spice had failed to act in their best interests, by disclosing confidential information to Mr Bharadwaja without advising Mr and Mrs James he was doing so or seeking their permission to make such disclosure.

[47] The Judge found Mr Spice's disclosure of confidential information had not breached his fiduciary duty because Mr and Mrs James had provided their informed consent. In reaching that conclusion, the Judge referred to the following matters:

- (a) by cl 5.3 of the agency agreement Mr and Mrs James had consented to Luxury RE providing information to purchasers and potential purchasers in the following terms:²¹

5.3 The Client consents to the Agent providing the purchaser or potential purchaser of the Property with information that the Agent becomes aware of at any time prior to the Expiry Date of this agreement. Such information;

- (a) relating to any actual, or in the Agent's opinion likely, defects, hazards, requisitions or notices from any council or other territorial local authority relating to the Property, including those defects, hazards or requisitions disclosed in the Property Description & Listing Details Sheet; or
 - (b) that should by law or in the Agent's opinion in fairness be provided.
- (b) cl 5.3(b) (information that by law or in fairness should be provided) encompasses information that an agent has ethical duties to disclose to third parties;
- (c) the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the "Rules"),²² which governed Luxury RE and Mr Spice, include r 6, which recognises both the agent's fiduciary obligations to their client and the agent's duty to deal fairly with all parties engaged in the transaction, provided:²³

6. Standards of professional conduct

²¹ Judgment, above n 1, at [84].

²² Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, cl 12.1.

²³ At [80].

- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- ...
- 6.4 A licensee must not mislead a customer or client, or provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

(d) the application of the Rules to multi-offers is the subject of an online Guidance Brochure published by the Real Estate Authority for the assistance of real estate professionals.²⁴ The online Guidance, at the end of a section headed "Dealing with all parties fairly" states:²⁵

Equally, if a buyer pulls out of a multi-offer leaving one interested buyer left to make an offer, that remaining buyer should be informed in case they want to review their offer before it is presented to the vendor.

- (e) in more recent times, the obligations to potential purchasers encapsulated in the Rules have been recognised through statutory requirements such as those contained in the Fair Trading Act 1986, which create a potential conflict between an agent's fiduciary duty of loyalty and their duty of fairness to a potential purchaser;²⁶
- (f) the email exchanges between Mrs James and Mr Spice before the execution of the agency agreement indicate that Mrs James at least had fully and carefully read the agency agreement;²⁷ and
- (g) Mr and Mrs James had also obtained legal advice when entering the first sole agency agreement in the same form.²⁸

²⁴ Real Estate Authority "The Sales Process and General Guidance" <https://www.rea.govt.nz/real-estate-professionals/the-sales-process-and-general-guidance/multi-offers>.

²⁵ Judgment, above n 1, at [81].

²⁶ At [82].

²⁷ At [85].

²⁸ At [85].

[48] For Mr and Mrs James, Mr Marriott submitted that for a number of reasons the Judge’s conclusion that the disclosure to Mr Bharadwaja had not breached Mr Spice’s fiduciary duty was in error.

[49] As I am satisfied that the determination was in error through a lack of informed consent, I will only briefly refer to the other aspects of Mr Marriott’s argument on this aspect.

[50] Mr Marriott referred to the fiduciary duty of loyalty as “absolute” and not subject to ethical obligations owed to any other person. The Judge in fact made his finding by reference to the terms of the agency agreement (which through cl 5.3 incorporates other obligations).²⁹ The Judge’s reference to fiduciary duties being “measured in the context of the ethical rules” may strictly be viewed as obiter, but in any event is immediately followed by the discussion of the provisions of the agency agreement itself.³⁰ The decision ultimately turned on the finding that Mr and Mrs James had given their informed consent to disclosure.

[51] Mr Marriott alternatively submitted Mr Spice had not been under an ethical obligation to make disclosure to Mr Bharadwaja. This submission turned partly on the proposition there was not a valid multi-offer process in place and Mr Spice had misrepresented aspects of the process to Mr Bharadwaja and/or Mr and Mrs James. I do not accept this submission, which relies on a somewhat formalistic approach to whether a multi-offer process is in play. The agent’s ethical obligations involved turn on matters of fairness (and fair trading). The evidence established that Mr Bharadwaja had been given to understand that the agent was expecting to receive multi-offers. The agent was obliged to inform Mr Bharadwaja that he was the only “bidder”.

[52] Mr Marriott further submitted the Judge had erred in viewing the permitted disclosure under cl 5.3(b) of the agency agreement as extending to matters beyond the subject matter of property listing details. The heading of cl 5 is “Property Description and Indemnity”. As reflected in cl 5.3(a), there is a focus running through the subclauses of cl 5 information contained in a document to be attached to the agency

²⁹ Judgment, above n 1, at [85].

³⁰ At [83].

agreement called the “Property Description & Listing Details”. In short, clients signing the agreement would reasonably have thought they were providing consent to the disclosure of information on the grounds of “fairness” in relation to matters of “Property Description & Listing Details”. In the context of the informed consent required to modify a fiduciary duty, I recognise the strength of Mr Marriott’s submission on this point. That said, counsel did not identify for me any previous judicial discussion of a clause in the nature of cl 5. As I am in any event upholding (on other grounds) that aspect of the appeal that relates to a lack of informed consent, I refrain from determining whether cl 5.3(b) of the agency agreement is properly to be given the confined meaning identified by Mr Marriott.

[53] That brings me then to the aspect of Mr Marriott’s submissions on this point which I uphold.

[54] The requirement upon Luxury RE and Mr Spice, if they were to depart from the duty of loyalty, was to obtain from Mr and Mrs James their informed consent.³¹ The Judge’s conclusion of informed consent appears to have arisen from two facts, namely:

- (a) Mr and Mrs James had fully and carefully read the terms of the agency agreement; and
- (b) Mr and Mrs James had obtained legal advice in relation to the agreement.³²

[55] Those conclusions, however relate only to the *obtaining* of consent. They did not address the requirement that Mr and Mrs James’ consent be informed. The case for Luxury RE in relation to informed consent is in essence that Mr and Mrs James gave their consent to the disclosure that subsequently occurred to Mr Bharadwaja through their general consent of disclosure required for “fairness” reasons in cl 5.3(b) of the terms of the agency agreement. But Luxury RE cannot suggest on the evidence that Mr and Mrs James, in agreeing to the terms of the agency agreement, should

³¹ Above at [36]–[38], fn 14.

³² See Judgment, above n 1, at [85].

reasonably have understood in any way that by having their agent arrange a multi-offer process the agent would thereby have their authority to disclose to the potential purchasers involved information that the agent would otherwise, because of the duty of loyalty, have to not disclose. This was not a situation in which it is suggested for Luxury RE that explanation was provided to the clients as to how their information might have to be passed on to others such as by illustrative situations in which the duty of disclosure would arise outside those specifically identified (by the expression “Property Description & Listing Details”) in cl 5 of the agency agreement.

[56] I accordingly conclude the Judge erred in finding Mr and Mrs James gave their informed consent to the disclosure to Mr Bharadwaja either by agreeing to the terms of the agency agreement or obtaining legal advice on it (or both).

Aspect 2 — disobedience

[57] Mr and Mrs James invoked that aspect of fiduciary duty that required Luxury RE to act in accordance with their instructions, that is to not be disobedient.

[58] In their pleading, Mr and Mrs James asserted that Luxury RE had failed to follow their instructions when they requested Mr Spice to make contact with Mr Bharadwaja and/or his solicitor and enter into negotiations for him to increase his (\$3 million) offer to \$3.3 million.

[59] The evidence as to exchanges between Mr Spice and Mr and Mrs James on 22 February 2017 was summarised in the Judgment at [16]–[17] (reproduced above at [17]). The summarised evidence was supported by the documentary record.

[60] In his evidence Mr Spice referred to those exchanges. He said he also had a number of telephone conversations with Alan Harper (Mr Bharadwaja’s solicitor), that they discussed the offer of \$3 million, and that Mr Harper confirmed that Mr Bharadwaja was not willing to pay more at that stage. For his part, Mr James gave evidence that Mr Spice never spoke to Mr and Mrs James about having actioned their instructions until, when queried on the night of 24 February, Mr Spice told them that he was “absolutely positive that Mr Bharadwaja was not willing to increase his offer at all”. Mrs James gave similar evidence.

[61] The Judge made a factual finding that Mr Spice had not failed to follow instructions to negotiate with Mr Bharadwaja and his solicitor.³³ That was a finding clearly open to the Judge on the evidence, and reflected in the Judge's observation that:³⁴

[o]nce the solicitor had confirmed to Terry [Mr Bharadwaja's] unwillingness to increase his offer, the appropriate means of negotiation with Mr Bharadwaja was, in Terry's strongly held view, to create a competitive environment with other purchasers.

[62] While Mr Marriott submitted the Judge ought to have found Mr Spice had disobeyed Mr and Mrs James' written instructions, the Judge was entitled on the evidence to reach the factual conclusion he did. Acceptance of Mr Spice's evidence as to his (unsuccessful) telephone conversations with Mr Harper was reasonably open to the Judge.

[63] This aspect of the appeal grounds fails at the level of the alleged breach, without consideration of the difficulties the appellants would have in identifying any loss arising from such alleged breach.

Aspect 3 — misleading and/or dishonest conduct

[64] By their pleadings, Mr and Mrs James had alleged that Mr Spice breached his fiduciary duty by misleading or lying to them on a number of occasions in relation to a number of matters. I will now deal with them under three sub-headings.

Aspect 3A — 24 February 2017: contact with Mr Harper/Mr Spice's statement

[65] Mr and Mrs James alleged Mr Spice misled them by stating he had negotiated with the purchaser as instructed and the purchaser was not willing to increase his offer above \$3 million. This allegation relates to the instructions which are the subject of my discussion under Aspect 2 above ([57]–[63]).

³³ Judgment, above n 1, at [136].

³⁴ At [136].

[66] It was common ground in the evidence that Mr Spice had advised Mr and Mrs James in conversations around 24 February 2017 that he had contacted Mr Harper, who had confirmed that Mr Bharadwaja was not willing to pay more than \$3 million.

[67] The Judge referred to the evidence relating to this pleading:

[88] The most direct accusation of dishonesty on Terry's part is that he lied about having contacted Alan Harper prior to 24 February to ascertain whether [Mr Bharadwaja] would increase his initial offer. Mr Harper was not called to give evidence by either party. In his evidence, Terry was adamant in both the written briefs which constituted his evidence-in-chief and in cross-examination that he had had conversations with Mr Harper by telephone and had been advised by him that [Mr Bharadwaja] would not increase his offer. There was no note or other written record of such contact, although there was an email of 22 February from Terry to Ross into which was pasted an advice from Mr Harper that he would call Terry.

(footnote omitted)

[68] The Judge summarised Mr Marriott's submissions as to why the Court should find that Mr Spice had lied when saying he had been in contact with Mr Harper. The eight points identified by Mr Marriott in relation to Mr Spice's statement had been:³⁵

- (a) He only made that allegation to the James in the context of a phone call in response to their email saying that unless he contacted them urgently they were about to counter-offer [Mr Bharadwaja].
- (b) He had not told the James any such thing prior to 24 February despite having allegedly contacted Alan Harper two days earlier as instructed (and despite having communicated with the James many times in the interim).
- (c) [Mr Bharadwaja] did place an offer of \$3.15 million one week later on 1 March, immediately Ross James contacted him to say that he needed to place an offer (at any level) in order to be considered alongside the offers that Ross James had been led to believe were forthcoming.
- (d) Terry Spice told Ross James to ask [Mr Bharadwaja] to make an offer on 1 March after Elgan Potter withdrew (though Terry Spice hadn't told Mr James about the withdrawal), rather than communicating through the channel he had allegedly created with Alan Harper.
- (e) Terry Spice was acknowledging that [Mr Bharadwaja] could be expected to bid higher by telling Ross James to get him to place another offer.

³⁵ Judgment, above n 1, at [89].

- (f) It became apparent when Ross James contacted [Mr Bharadwaja] that [Mr Bharadwaja] had never received any response to his \$3 million offer.
- (g) [Mr Bharadwaja's] solicitor referred to the fact that the parties were communicating directly, in the email accompanying the 2 March offer.
- (h) Terry Spice told the James to counter-offer [Mr Bharadwaja] on 2 March, once all other potentials had disclosed that they were no longer interested and after he had told [Mr Bharadwaja's] solicitor that there were no competing bids, clearly indicating that he himself thought there was still a prospect of him offering more.

[69] Mr Spice was cross-examined for one-and-a-half days, including in detail in relation to his communications with Mr and Mrs James and Mr Harper. Mr Spice maintained he had discussions with Mr Harper in which the latter indicated Mr Bharadwaja was not prepared to increase his \$3 million offer. Mr Spice referred to that being a "very firm discussion with Alan Harper". Mr and Mrs James did not call Mr Harper (or Mr Bharadwaja) as a witness to contradict this evidence.

[70] The Judge returned to Mr Marriott's criticism of Mr Spice's evidence (above at [68]) but found Mr Spice had been told by Mr Harper that Mr Bharadwaja would not increase his offer above \$3 million. The Judge recorded:

[90] These points do not persuade me to reject Terry's repeated evidence on oath that he did speak to Mr Harper prior to his discussions of 24 February and was clearly advised by him that [Mr Bharadwaja] would not increase his offer of \$3,000,000. The fact that there was a telephone discussion between them is to some extent corroborated by [an email of 22 February 2017 in which it was recorded that Mr Harper would call Mr Spice]. While I do consider that Mr Marriott's cross-examination of Terry raised doubts about the number of times Terry spoke to Mr Harper about [Mr Bharadwaja's] offer over the whole period 22 February to 2 March, I do accept his evidence that he spoke with him in the period between 22 and 24 February and received the clear message he related to the James on the latter date.

[71] The Judge identified six particular reasons for this conclusion.³⁶

- (a) It does not follow from the fact that he did not immediately advise the James of the result of his conversation that it did not take place. In effect nothing changed. There would be more reason to advise them immediately if the offer had been or might be increased.
- (b) The fact that [Mr Bharadwaja] increased his offer when told that others would or might make offers does not mean that he would have

³⁶ Judgment, above n 1, at [91].

done so earlier if asked. The email of 23 February from [Madhujet Chimni] confirms that [Mr Bharadwaja] had been told then that he was in a multi-bid situation and that he needed to make his best offer but none was made until 2 March.

- (c) The fact that Terry asked Ross rather than Mr Harper to ask [Mr Bharadwaja] to make his best offer on 1 March does not mean he had not previously spoken to Mr Harper. Terry knew that Ross was in direct communication with [Mr Bharadwaja].
- (d) Terry had no way of knowing whether or not the prospect of other offers might cause [Mr Bharadwaja] to increase his offer but it was obviously possible that it might. That is what Terry was hoping might happen.
- (e) There was no evidence from [Mr Bharadwaja] as to what he was told by Mr Harper or indeed what his instructions to Mr Harper were.
- (f) The fact that Terry told the James to counter-offer [Mr Bharadwaja] on 2 March does not mean he thought there was much prospect of him offering more. Although unlikely at that point it was possible and there was nothing to lose.

(footnote omitted)

[72] On this appeal, Mr Marriott raised no new basis by way of attack on the credibility of Mr Spice's evidence as to what Mr Harper had said to him.

[73] There is no basis to disturb the Judge's factual finding which was supported by the matters he identified (at [71] above). The Judge had the benefit of hearing an extended cross-examination of Mr Spice specifically in relation to what was said by Mr Harper.

Issue 3B — 24 February 2017: representations as to interested parties

[74] Mr and Mrs James alleged that Mr Spice misled them by misrepresenting the number of people (other than Mr Bharadwaja) who were interested in the property.

[75] By their pleadings, Mr and Mrs James alleged that Mr Spice misrepresented the level of interest in the property by leading Mr and Mrs James to believe there existed (in addition to Mr Bharadwaja's interest) at least two further offers (and possibly more), creating a multi-offer situation. Mr and Mrs James alleged that in fact there were no offers other than Mr Bharadwaja's.

[76] The Judge summarised the evidence of Mr Spice in relation to two other potential purchasers.³⁷ That evidence was accepted by the Judge as the basis upon which Mr Spice genuinely believed there were certainly two persons (apart from Mr Bharadwaja) interested enough in the property to make an offer.³⁸ The Judge summarised Mr Spice's evidence:

[19] Over the same period Terry was proposing to the James the initiation of a multi-offer process. He believed that there were at least two other potential purchasers apart from [Mr Bharadwaja] who were likely to make offers on the property and this process would be the best way of creating a competitive environment. One was an Australian solicitor named Linda Evans. His communications with Ms Evans led him to believe that she was about to make an offer for the property at a price of \$3,300,000. The other, Elgan Potter, was also an Australian, who intended to (and did) fly to Queenstown to view the property.

[77] The Judge, in rejecting the allegation that Luxury RE had breached its fiduciary duty by misrepresenting the level of interest, explained:

[92] The allegation that Terry deliberately misled the James about the level of potential interest in the property and therefore the suitability of a multi-offer process as opposed to a counter-offer to [Mr Bharadwaja] need to be considered in the surrounding context. After hearing the evidence of all three witnesses and reviewing the email communications with potential purchasers, it is clear to me that on 24 February, Terry genuinely believed that there were certainly two persons apart from [Mr Bharadwaja] and possibly more who were interested enough in the property to make an offer and that a multi-offer process was the best way to achieve the highest price possible. It has to be remembered that his personal interest was the same as the James': to achieve a sale at the best possible price so that LRE could earn a commission and at the highest rate. It is illogical to think that his preference for the multi-offer process was motivated by anything other than the mutual interest of his clients and his company.

[78] On this appeal, Mr Marriott submitted the evidence contradicted Mr Spice's statements as to the interest of Ms Evans and Mr Potter in the property. In particular, Mr Marriott referred in relation to:

- (a) Ms Evans — to an email of 21 February 2017 in which Ms Evans stated she was “not in a position to put in an offer at the moment”; and

³⁷ Judgment, above n 1, at [19].

³⁸ At [92].

- (b) Mr Potter — to evidence that as at 22 February 2017 he had not viewed the property and was not at that point a likely bidder (in fact subsequently withdrawing his interest on 1 March 2017 after conducting further research).

[79] The way in which Mr and Mrs James alleged Mr Spice had discarded Mr Potter’s interest in the property was reflected in the following exchange when Mr Marriott was cross-examining Mr Spice:

- Q: And you also told [Mrs James] that you had a new prospect you were working with, an Elgan Potter.
- A: That’s correct.
- Q: So, on that basis, you thought that there was an opportunity as I said for a multi-offer process.
- A: Correct.

[80] As the Judge observed,³⁹ the discussions Mr Spice had with Mr and Mrs James in relation to the level of potential interest in the property had to be viewed in their surrounding context. Relevantly, the Judge in considering the email communications (referred to at [92] of the Judgment) had to consider the full content of the communications rather than particular passages emphasised in submissions for Mr and Mrs James.

[81] The full email sent by Ms Evans to Mr Spice on 21 February 2017 spoke of an inability to put an offer “at the moment”, the email reading:

Hi Terry

Thanks for your call yesterday. We remain very interested in the property. The bank is expediting its processes and I will be speaking with a law firm today. However, we are not in a position to put in an offer at the moment. We would be grateful if you could continue to keep us updated as we are actively pursuing things at our end.

Kind regards

Linda

³⁹ Judgment, above n 1, at [92].

[82] Mr Spice was justified in understanding Ms Evans, as a potential purchaser who was expressly stating she remained “very interested in the property”, as definitely interested in purchasing the property and as a person who, under the time limits of a multi-offer process, might make an offer.

[83] In the case of Mr Potter, the fact that he had come forward only recently and was yet to view the property were matters known to Mr and Mrs James at the time Mr Spice was discussing with them the level of interest in the property and the prospect of entering a multi-offer process. Mr Potter’s subsequent withdrawal of his interest on 1 March 2017 (after he had conducted further research) occurred after the relevant time and is not evidence that what Mr Spice said in February was inaccurate.

Aspect 3C — 1 March 2017: disclosing unlikelihood of offers

[84] Mr and Mrs James alleged that Mr Spice had also breached his fiduciary duty by misleading or failing to disclose information essential to them, while offers were expiring, in particular information about the probability of offers and conditions.

[85] The Judge explained this particular allegation:

[87] The second occasion on which it is alleged that he deliberately misled the James on a critical matter is on 1 March 2017 when he contacted Nona to get Ross to contact [Mr Bharadwaja] to make a further offer urgently. It is alleged that he deliberately concealed from Nona, and therefore Ross as well, matters which indicated that there were unlikely to be any other acceptable offers from the multi-offer process. It is alleged that this caused Ross to unwittingly convey to [Mr Bharadwaja] that he ought to submit a low offer as a start point for negotiations.

[86] In discussing this alleged breach (by omission) the Judge noted Mr and Mrs James had pleaded three “deliberately deceptive omissions”, namely:⁴⁰

At the time of making that request:

- (a) Terry Spice had concealed the fact that only one person had ever signed a multi-offer form, from the James’
- (b) Terry Spice was already aware that Elgan Potter would not be making any offer;

⁴⁰ Judgment, above n 1, at [102].

- (c) Terry Spice knew that no offer had been received from Linda Evans and that even if she were to make an offer it would be conditional.

[87] The Judge rejected particular (a) as irrelevant — the fact only one person had signed the multi-offer form did not mean only one person would participate — Mr Bharadwaja for example did not sign the form but participated.⁴¹

[88] The Judge, in relation to particular (b), identified Mr Spice was aware (by 1 March 2017) that Mr Potter would not be making an offer and should have told Mrs James of that. But the Judge found it most likely that Mr Spice was not dishonest or deliberately deceptive in that, instead acting with an intention not to cause Mr and Mrs James more stress and believing that Ms Evans would make an offer that could create competition with Mr Bharadwaja.⁴²

[89] The Judge rejected particular (c) as irrelevant, as any offer from Ms Evans would not have been expected until a short time before closing time.⁴³

[90] The Judge, in reaching the conclusion that Mr Spice had not breached the fiduciary duty by concealment of information on 1 March 2017, rejected Mr and Mrs James' allegation that there had been a breach of the duty to act in good faith and honestly. The Judge found on the evidence that Mr Spice had acted honestly (and implicitly in good faith).

[91] Mr Marriott submitted that for there to have been a breach of fiduciary duty, it was sufficient that Mr Spice misled or deceived Mr and Mrs James, regardless of whether that was deliberate. A key passage in Mr Marriott's written submission explained:

By failing to answer the James' questions and/or answering them in a manner that suited his interests as opposed to the James', Mr Spice was deliberately misrepresenting the true state of affairs and thus acting in bad faith or failing to act in good faith.

⁴¹ Judgment, above n 1, at [103].

⁴² At [104].

⁴³ At [105].

[92] For this approach to the good faith duty of a fiduciary duty, Mr Marriott referred to *Maketu Estates Ltd v Robb*.⁴⁴ As described by Woolford J in that case:⁴⁵

Good faith is sometimes equated with candour, or the honesty with which one holds a belief. Although honesty is an important element, the obligation is to act in good faith — in other words, to act with the right motive.⁴⁶

[93] Faced with the Judge’s finding of fact that Mr Spice had acted in good faith and therefore not in breach of his fiduciary duty, Mr Marriott submitted that the decision in *Maketu* confirms that a failure to act in good faith may be unconscious on the part of the fiduciary. As I understood that submission, it turned on a passage in the judgment in *Maketu* where Woolford J was considering the consequences of the agent in that case (a Mr Robb) acting with a subconscious bias in favour of the eventual purchaser (a Mr Jones). But the passage in which Woolford J found Mr Robb’s conduct to have breached his fiduciary duty related not to a duty in relation to honesty (in communications) but rather in relation to undivided loyalty.⁴⁷ Woolford J went on to reject an allegation of bad faith.⁴⁸

[94] In this case, the Judge’s justified factual finding that the plaintiffs had not established bad faith on the part of Mr Spice correctly led the Judge to also conclude the plaintiffs had not established a breach of fiduciary duty in relation to the non-disclosure on 1 March 2017.

Aspect 4 — failure to act with care and skill

[95] Mr and Mrs James pleaded that Luxury RE breached its fiduciary duty by failing to act with care and skill. In particular, they pleaded Mr Spice failed to advise them of the risks of a multi-offer situation, despite being fully aware from them of the negotiations that had taken place between them and Mr Bharadwaja.

⁴⁴ *Maketu Estates Ltd v Robb* [2014] NZHC 2664 at [64]–[65].

⁴⁵ *Maketu Estates Ltd v Robb*, above n 44, at [64].

⁴⁶ Lionel Smith “The Motive, Not the Deed” in Joshua Getzler (ed) *Rationalizing Property, Equity and Trusts* (LexisNexis UK, London, 2003) 53 at 103.

⁴⁷ *Maketu Estates Ltd v Robb*, above n 44, at [67].

⁴⁸ At [68].

[96] The Judge identified this as an allegation of breach of contractual duties and dealt with it under a discrete heading.⁴⁹ That was not because Mr and Mrs James had sued for breach of ordinary contractual duties. They had not. Their claim was for breach of fiduciary duties, of which “failure to act with care and skill” was one allegation.

[97] Notwithstanding the particular pleading in relation to breach of the duty to act with care and skill focused on the omission referred to at [95] above, the Judge at this point of the Judgment considered the range of alleged breaches referred to in Mr and Mrs James’ pleading including those identified only in relation to the alleged breaches of the duties of obedience and loyalty (including good faith).

[98] The Judge first noted not all duties owed by a fiduciary duty are necessarily fiduciary in nature.⁵⁰ The Judge observed:⁵¹

It is important to recognise the distinction between the fiduciary duties owed by an agent to their principal and merely contractual duties, as the consequences of breach may be different. In particular, a breach of fiduciary duty will almost always disentitle an agent to their commission, but that consequence may not necessarily follow from the breach of a mere contractual duty.

[99] The Judge recorded the primary contractual duties are to act within the authority given to the agent and to comply with their instructions and to exercise due care, skill and diligence in the performance of their duties.⁵²

[100] The Judge next identified that Mr and Mrs James made a number of complaints relating to the way in which Mr Spice performed his duties, namely:⁵³

- (a) failing to keep Mr and Mrs James informed regarding prospective purchasers;

⁴⁹ Judgment, above n 1, at [116]–[137].

⁵⁰ At [72], [116].

⁵¹ At [72].

⁵² At [116].

⁵³ At [117].

- (b) failing to follow Mr and Mrs James' express instructions to negotiate with Mr Bharadwaja and his solicitor;
- (c) failing to advise Mr and Mrs James of the risks of a multi-offer situation; and
- (d) failing to communicate information which Mr Spice knew was material in a timely manner.

[101] Because the Judge concluded the evidence did not establish that any financial loss accrued to Mr and Mrs James from the alleged breaches, in the Judgment he first set out his conclusions in relation to Mr and Mrs James' failure to prove that any damage accrued from such alleged breaches.⁵⁴ It was after that, in the Judgment, that he set out conclusions in relation to the alleged failure of Mr Spice to deliver service to the required contractual standard. In that regard, the Judge found there were two breaches of the contractual duty in relation to exercising due care, skill and diligence. Those two breaches lay in:

- (a) failing to provide information to Mr and Mrs James as to Mr Spice's communications with Ms Evans and Mr Potter, and failing to do so in a timely way;⁵⁵ and
- (b) failing to advise Mr and Mrs James what would have to (and did) happen if the multi-offer process produced only one offer.⁵⁶

[102] The Judge found that the evidence did not establish that Mr Spice had failed to follow instructions in relation to negotiating with Mr Bharadwaja and his solicitor.⁵⁷

[103] On this appeal, Mr and Mrs James asserted that the Judge erred in finding that Luxury RE's failure to exercise care and skill in the performance of its duties was not

⁵⁴ Judgment, above n 1, at [118]–[128].

⁵⁵ At [134]–[135].

⁵⁶ At [137].

⁵⁷ At [136].

fiduciary in nature and also that Mr and Mrs James had failed to establish a loss flowing from breaches of such duty.

[104] Mr Gresson, for Luxury RE, submitted the Judge's findings in relation to the contractual duties alleged to have been breached were correct in each regard. Luxury RE did not cross-appeal in relation to the Judge's findings that Luxury RE had breached its duty to exercise due care, skill and diligence in the communications concerning Ms Evans and Mr Potter in relation to the consequences of entering a multi-offer process. On the other hand, Mr Gresson submitted that the Judge correctly drew a distinction between breaches of fiduciary duty and other breaches of contractual duty (before finding no loss had been established in any event).

[105] I do not find the Judgment to contain any error in relation to what Mr and Mrs James alleged to have been breaches of Luxury RE's duty to exercise due care, skill and diligence in the performance of its duties.

[106] First, by reason of the nature of a fiduciary duty, it is well settled as the Judge recognised (above at [98]) that not all breaches of duty by a fiduciary are breaches of their fiduciary duty. In the decision in *Maketu* already cited, Woolford J stated precisely that, citing Court of Appeal authority.⁵⁸ Here, because of Judge Tuohy's factual findings which I uphold, none of the alleged failures to exercise due care, skill and diligence engages the element of infidelity or disloyalty that in turn engages a fiduciary's conscience.⁵⁹

[107] That leaves the Judge's finding that Mr and Mrs James have not established that the proven breaches of the duty to exercise due care, skill and diligence had caused Mr and Mrs James the loss for which they claimed damages or compensation.

[108] Mr and Mrs James had pleaded that the alleged breaches had caused them loss and, in particular, the ability to conclude a sale price with Mr Bharadwaja of at least \$3.25 million.

⁵⁸ *Maketu Estates Ltd v Robb*, above n 44, at [13], citing *S v Attorney-General* [2003] 3 NZLR 450 (CA) at [77].

⁵⁹ See *Maketu Estates Ltd v Robb*, above n 44, at [13]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 687.

[109] As identified in the “Factual Background” in the Judgment (above at [17]), the sequence of offers or counter-offers between Mr and Mrs James and Mr Bharadwaja was as follows:

- (a) Mr James notified Mr Bharadwaja that he would accept an unconditional offer for \$3,330,000 (21 February 2017);
- (b) Mr Bharadwaja orally counter-offered at \$3,250,000 (according to Mr James in his evidence) (21 February 2017); and
- (c) However, Mr Bharadwaja counter-offered in a written offer at \$3,000,000 (22 February 2017);
- (d) Mr Bharadwaja communicated through Mr Chimni that he had not orally offered \$3,250,000 but the number was more like “3.1 (million)” (22 February 2017);
- (e) Mr Harper advised that Mr Bharadwaja was not willing to pay more than the \$3,000,000 referred to in the written offer (according to Mr Spice in his evidence) (25 February 2017);
- (f) Mr Bharadwaja made a written offer of \$3,150,000 (2 March 2017);
- (g) Mr and Mrs James made a written counter-offer at \$3,250,000 (3 March 2017);
- (h) Mr Bharadwaja renewed his existing offer of \$3,150,000 (6 March 2017); and
- (i) the sale and purchase was agreed to by signed agreement at \$3,150,000 (7 March 2017).

[110] With this set of events, it was Mr and Mrs James' claim that breaches of duty on the part of Luxury RE had caused them to lose the opportunity to obtain a higher price from Mr Bharadwaja.⁶⁰ As Mrs James put it in her evidence:

The best and only option we had left was to accept [Mr Bharadwaja's] offer of \$3.15 million even though that was \$100,000 less than we knew he had been prepared to pay.

[111] As I have previously noted, neither Mr Bharadwaja nor his solicitor, Mr Harper, was called to give evidence — there was accordingly no evidence from them as to what Mr Bharadwaja was in fact prepared to pay.

[112] The Judge considered what Mrs James said in her evidence as to what Mr Bharadwaja would have paid against the other evidence.⁶¹ The Judge concluded Mr and Mrs James had been right to think that Mr Bharadwaja had “played” them with his “dangled figures” in discussions with Mr James in particular.⁶² The Judge noted there was no evidence that Mr Bharadwaja would have in fact increased his offer at all if he thought he was the only purchaser.⁶³ To the contrary, the Judge considered the reasonable inference was that it was only because of the multi-offer process that Mr Bharadwaja increased his offer from \$3,000,000 to \$3,150,000.⁶⁴ The Judge found the only reliable indicator of what Mr Bharadwaja was prepared to pay was the price he inserted in a written, signed offer.⁶⁵

[113] As a result, the Judge concluded Mr and Mrs James had not suffered any loss arising from Mr Spice's performance. To the contrary, the Judge was satisfied on the evidence they obtained the best price possible in the circumstances and one representing the true market value of the property as far as that could be established on the evidence.⁶⁶

[114] Of some significance, evidence had been given (as referred to in the Judgment at [28], above at [17]) that, through the negotiations that occurred on 3 March 2017,

⁶⁰ Judgment, above n 1, at [118].

⁶¹ At [121]–[126].

⁶² At [121].

⁶³ At [123].

⁶⁴ At [123].

⁶⁵ At [124].

⁶⁶ At [127].

Mr and Mrs James were able to secure an agreement to have a rent-free tenancy of the property for 12 months following the settlement date (that is, until 28 April 2018). Although the Judge did not expressly refer to the “free rent” condition after identifying it in the factual background, it was clearly a matter relevant to any assessment of loss.

[115] On appeal, Mr Marriott noted the normal measure of loss for a breach of fiduciary duty is the difference between the sale price and the market value.⁶⁷ Mr Marriott in his written submissions on this appeal recorded that Mr and Mrs James “say that the true market value of the property by all accounts was \$3.3m”. For this proposition, he referred to three matters:

- (a) Mr Spice had conceded in his evidence \$3.3m Mr and Mrs James expected to achieve on the open market was an achievable price for the property;
- (b) Mr Spice believed that Ms Evans would make an offer of \$3.3m; and
- (c) Mr Spice gave repeated assurances to Mr and Mrs James that a sale price of \$3.3m (netting them \$3.2m after commission) was achievable.

[116] None of the matters relied upon by Mr Marriott indicates an error in the Judge’s factual determinations.

[117] Mr and Mrs James’ pleaded basis for claiming damages lay in an assertion that Mr Bharadwaja would have paid at least \$3.25 million for the property. Given Mr and Mrs James called neither Mr Bharadwaja nor his solicitor, and given the Judge’s justifiable factual conclusions relating to Mr Bharadwaja’s negotiating style, the reasoning deployed by the Judge when rejecting the pleaded basis of claiming damages is unassailable. What is more, on this appeal Mr Marriott’s submissions were focused on the different (unpleaded) proposition that the Judge erred in not finding \$3.3 million represented the “true market value”.

⁶⁷ *Premium Real Estate Ltd v Stevens*, above n 15, at [85]; *Maketu Estates Ltd v Robb*, above n 44, at [69].

[118] There was no expert evidence of market valuation (presumably because Mr and Mrs James' pleadings referred not to market valuation but rather to what Mr Bharadwaja would have been prepared to pay). Mr Spice was not qualified as an expert on valuation and any opinion expressed in his evidence was not admissible in relation to matters of valuation. The other matters referred to by Mr Marriott in relation to Mr Spice's expectations and discussions take matters no further — they represent Mr Spice's expectation at the time and are not a substitute for qualified expert opinion as to market value.

[119] The Judge was accordingly correct in determining that Mr and Mrs James had not established a loss by reference to what Mr Bharadwaja would have paid. Equally, Mr and Mrs James could not succeed on a damages claim calculated by reference to an unestablished market value.

Appeal issue 3: commission entitlement

Mr and Mrs James' defence

[120] Mr and Mrs James pleaded Luxury RE was disentitled to commission (whether or not the agency agreement had been cancelled) by reason of the pleaded breaches of fiduciary duty.

The Judgment

[121] The Judge gave judgment for Luxury RE on the commission claim because the agency agreement had not been cancelled and Luxury RE had not breached its fiduciary duties.

[122] Now I have found (contrary to the Judgment) that Luxury RE breached its fiduciary duty in one regard (disclosure of confidential information), the effect of that on Luxury RE's entitlement to commission falls for reconsideration.

Appellants' submissions

[123] Mr Marriott submitted it is well-settled that a fiduciary in breach of their fiduciary duties is not entitled to remuneration because the remuneration will not have

been earned by good faith performance. The entitlement to commission is lost whether or not the principal also recovers any damage for losses caused by their agent's breach.

[124] Mr Marriott referred in particular to discussion of the law of Blanchard J (speaking for the plurality) in the Supreme Court decision in *Premium Real Estate Ltd v Stevens*.⁶⁸ Blanchard J noted that, while the general rule is that any right to remuneration will be lost by breach of fiduciary duty, that may not apply in exceptional cases where the agent is found to have acted in good faith and the transaction has been completed to the benefit of the principal. His Honour explained:

[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*:⁶⁹

“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*⁷⁰ 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*:⁷¹

⁶⁸ *Premium Real Estate Ltd v Stevens*, above n 15 (the plurality being Blanchard, McGrath and Gault JJ).

⁶⁹ *Keppel v Wheeler* [1927] 1 KB 577 at p 592 (CA).

⁷⁰ *Kelly v Cooper* [1993] AC 205 (PC).

⁷¹ *Imageview Management Ltd v Jack* [2009] EWCA Civ 63 at para [50].

“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 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.⁷² 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.⁷³ 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.

[125] In *Stevens*, Tipping J (concurring with Blanchard J) explained why the Court in *Keppel v Wheeler* had refused to order both compensatory damages and the repayment of the agent’s remuneration:⁷⁴

The reason for not ordering both rested essentially on the proposition that the agent had acted in good faith and his breach did not go “to the whole contract”.⁷⁵ 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.

[126] In *Stevens* the Supreme Court found the agent, in committing the breach of fiduciary duty, had deliberately misled the principal about a material matter concerning a purchaser. The agent’s conduct could not be characterised as something

⁷² “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].

⁷³ *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514.

⁷⁴ At [108].

⁷⁵ *Keppel v Wheeler*, above n 69, at p 592, per Atkin LJ.

done or said in good faith. As a result, the commission was forfeited.⁷⁶ As described by Tipping J “Premium’s conduct represented the anthesis of loyalty and good faith”.⁷⁷

[127] As identified by Tipping J in *Stevens*, once the Court has established there has been such a breach of the duty of the breach of loyalty and good faith as to disentitle the agent to commission, there remains in the Court a discretion to allow the agent to keep all or part of the commission.⁷⁸ But on the facts of *Stevens* Premium did not receive the benefit of the exercise of such a discretion because, in the words of Tipping J:⁷⁹

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.

[128] The facts of this case are well removed from those in *Stevens*. As identified by Tipping J, Premium’s conduct in *Stevens* had been the anthesis of loyalty and good faith.

[129] In this case, the Judge’s careful review of the evidence led to the rejection of Mr and Mrs James’ allegations that Mr Spice had been dishonest or deliberately deceptive. The Judge specifically rejected the suggestion that Mr Spice had promoted the multi-offer strategy in a dishonest way.

[130] The breach which I have found to have been established here — failing to obtain Mr and Mrs James’ *informed* consent to the possible disclosure that would be required under the multi-offer process — was not contributed to by a dishonest motivation or bad faith. Rather, it occurred because Mr Spice did not undertake a discussion with Mr and Mrs James of the sort of disclosures that he might be required to make to potential buyers depending on the outcome of the multi-offer process.

⁷⁶ *Premium Real Estate Ltd v Stevens*, above n 15, at [94] per Blanchard, McGrath and Gault JJ: at [109] per Tipping J.

⁷⁷ At [109].

⁷⁸ At [110].

⁷⁹ At [110].

[131] Mr and Mrs James obtained within the agreed period of agency the sale of the property. By virtue of the terms of the agency agreement Luxury RE was to be entitled to commission in that event.

[132] In these circumstances Luxury RE's claim to commission falls squarely within the exception (as recognised by the Supreme Court in *Stevens*) to what is otherwise a general rule that breach of fiduciary duty leads to the forfeiture of any right to remuneration at all.

[133] For this reason, although I have found (contrary to the Judgment) that Luxury RE committed a breach of its fiduciary duty in one regard, I uphold the finding in the judgment that Luxury RE was entitled to the commission.

Outcome

[134] The appeal is dismissed.

[135] The appellants are to pay to the respondent the costs of the appeal fixed on a 2B basis together with disbursements to be fixed by the Registrar.

Osborne J

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