IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA484/2023
[2025] NZCA 469

BETWEEN	LEPIONKA & COMPANY INVESTMENTS LIMITED Appellant
AND	GIBSON SHEAT Respondent

Hearing:	27 November 2024
Court:	Mallon, Thomas and Campbell JJ
Counsel:	J G Miles KC and S J Leslie for Appellant D P H Jones KC, C L Bryant and G J Luen for Respondent
Judgment:	12 September 2025 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] The appellant, Lepionka & Company Investments Ltd (LCIL) says its former solicitors (Gibson Sheat) gave negligent advice in connection with a property purchase. It says an oral agreement reached with Gibson Sheat in full and final settlement of any claim for that negligent advice was unenforceable because it did not receive independent legal advice in respect of Gibson Sheat's conflict of interest. Further, it says that no binding settlement agreement was reached because independent legal advice was a legally essential matter to that agreement and because the parties did not intend to be bound until a formal written agreement was entered into.

[2] The High Court found against LCIL.[1] It now appeals. For the reasons we set out more fully below, we dismiss the appeal. In short, we consider that LCIL knew all the material information relevant to whether it should enter into the settlement with Gibson Sheat before it agreed to that settlement. Further, because LCIL had already been informed of that information, the oral agreement was not conditional on the receipt of further independent legal advice and both parties intended to be bound when they reached the oral agreement settling their dispute.

Background

[3] Stefan Lepionka is a successful businessman.[2] Greg Horton, a corporate lawyer who at the relevant time was a director of the law firm Harmos Horton Lusk,

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1 *Lepionka & Company Investments Ltd v Gibson Sheat* [2023] NZHC 1981 [judgment under appeal].

2 He and three other shareholders established Charlie's Group, a successful beverage company, and later sold the business in 2011.

was Mr Lepionka's solicitor from about 2008.[3] He was also a trustee of one of Mr Lepionka's trusts, the Lepionka Business Trust. Joe Duncan, a property and finance investor, and Mr Lepionka were the other trustees.

[4] In January 2014 Mr Lepionka's interests (the Lepionka purchasers) agreed to purchase lots in a proposed subdivision and development of land in Hawke's Bay at a price of $4.63 million. Mr Horton acted for the Lepionka purchasers on the purchase. He arranged for the payment of the deposit of $463,000. The deposit was not secured.

[5] The developer was Garth Paterson. His company, GLW Group Ltd (GLW), owned the land. GLW was in financial difficulty. It had incurred inconsistent obligations to the Lepionka purchasers and to others with an interest in the development, including Andrew Coltart. Mr Coltart had an option to purchase Lot 2 of the intended subdivision at a significant undervalue and which included a right to roam over the property. His rights were secured by caveats.

[6] GLW had a mortgage with Westpac New Zealand Ltd (Westpac). In January 2015 Westpac demanded repayment of its loan and issued a Property Law Act 2007 notice which expired on 5 March 2015. Mr Paterson told Mr Lepionka that a third party would acquire the mortgage. Mr Lepionka became concerned that this party would cancel the Lepionka purchasers' contracts and their deposit would be lost. It later became clear that the third party was AFI Management Pty Ltd (AFI) which registered a caveat giving notice of a second mortgage in respect of lending of over AUD 4 million to GLW.

[7] Mr Lepionka discussed the position with Mr Horton who said it might be an option to acquire the Westpac mortgage but specialist advice should be sought about this. Mr Lepionka then instructed David Wallace, a commercial partner at Gibson Sheat, and old school friend. Following some earlier communications

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[3] He acted for the shareholders of Charlie's Group on the sale.

between them, on 27 March 2015 Mr Wallace emailed Mr Lepionka, copied to Mr Horton, with his advice.[4]

[8] Acting on Mr Wallace's advice, on 1 April 2015 Mr Lepionka (through LCIL) purchased Westpac's mortgage, adopted GLW's agreements for sale and purchase with the Lepionka purchasers, and entered into a contract under which LCIL was to pay compensation of $500,000 to the Lepionka purchasers and refund their deposits if their contracts did not settle.[5] LCIL took possession of the property. It cancelled Mr Coltart's option to purchase Lot 2 and applied to the High Court to remove his caveats.

[9] Mr Coltart opposed the removal of his caveats and made a series of offers to purchase the whole of the property. The highest offer was made on 1 May 2015 and was for a purchase price of $6.93 million plus GST.[6] Mr Paterson and GLW agreed in principle with the offer. AFI also confirmed it was agreeable to the offer subject to various conditions including cancellation of the sales to the Lepionka purchasers. Gibson Sheat recommended that LCIL obtain advice from senior counsel.

[10] That recommended advice was obtained from John Greenwood of Greenwood Roche Chisnall on 25 May 2015. Mr Greenwood advised:

(a) There was no prohibition on a mortgagee selling a mortgaged property to a company in which the mortgagee is interested or which has common shareholders to the mortgagee. However, to be upheld by a Court, a mortgagee would need to prove that it had taken reasonable

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4 This followed a general discussion on 9 March 2015 and an email on 10 March 2015 with Mr Wallace's "thoughts" on how best to proceed. Formal instructions were given on 19 March 2015 and Gibson Sheat provided its terms of engagement on 24 March 2015. Amongst other things, Mr Wallace advised that GLW could require the mortgagee to transfer the mortgage to a third party nominated by GLW, and that Mr Lepionka could avoid this by obtaining the Westpac mortgage (as a first priority) and taking possession of the property (as a second priority).

5 There are references to the payment of a higher level of compensation but $500,000 is the sum referred to in the relevant agreement. LCIL was incorporated on 25 March 2015 to be the purchasing vehicle. Gibson Sheat provided new terms of engagement, addressed to LCIL, on 1 April 2015.

6 As later found by Fitzgerald J in *AFI Management Pty Ltd v Lepionka & Company Investments Ltd* [2017] NZHC 3116, this was well above market price.

precautions to obtain the best price reasonably available at the time of the sale.[7]

(b) In light of the principles established by the cases on this topic, while there were some factors that were in LCIL's favour, there was a "more than reasonable possibility" the Court would find LCIL had acted in its own self-interest because it had not tested the market by placing the property or the lots individually on the open market. Further, Mr Coltart's offer of $6.15 million suggested a greater price could have been obtained (assuming that offer was not tainted by a need to obtain Overseas Investment Office approval).[8]

[11] As a result of this advice, a potential conflict of interest arose. Mr Wallace appears not to have recognised this because he continued to provide his advice to Mr Lepionka on the matter. This first occurred when Mr Wallace commented on an earlier draft version of Mr Greenwood's advice. Once Mr Greenwood's advice was finalised, Mr Wallace advised Mr Lepionka, copied to Mr Horton, that the potential risk Mr Greenwood had identified meant Mr Lepionka could not be guaranteed success in court. Mr Wallace further advised that in his view the arguments in favour of LCIL were stronger but it was a Judge's view that would count.[9] He also considered Mr Lepionka to "still [be] very much in the driver's seat" and would be financially better off by having taken the steps he had.

[12] Following this, LCIL decided not to accept Mr Coltart's offer of $6.93 million. There were further negotiations over the following months but no agreement was reached.

[13] LCIL's application to remove Mr Coltart's caveats was to be heard in the High Court on 14 August 2015. On 7 August 2015, Edward Cox (a litigation partner

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7 Property Law Act 2007, s 176(1).

8 Mr Greenwood further advised that LCIL could continue to resist and wait and see what steps Mr Coltart took, leaving open the possibility of negotiating an outcome acceptable to both parties.

9 He had expressed the same view a little more strongly in response to an earlier draft version of Mr Greenwood's advice.

at Gibson Sheat) was acting for LCIL on the matter. Mr Cox recognised the potential conflict. He emailed Mr Wallace saying:

> …
>
> Were the adoptions and or cancellations our devising, or done on our advice? If they were, I will have to consider [Conduct and Client Care Rule] 13.5.3 which prevents a lawyer appearing where the conduct or advice of a member of his firm is in issue before the court.
>
> No one is suing us for our advice, but if the application turns on the lawfulness of what [LCIL] has done, and if it acted entirely on [our] advice, then we may be defending our own advice and therefore breaching our obligations of independence to the client.
>
> …

[14] Mr Wallace responded confirming that Gibson Sheat had advised Mr Lepionka to adopt the contracts. Having sought and obtained advice from senior counsel (Ken Johnson KC) over the weekend about his obligations, Mr Cox continued to act for LCIL at the hearing before Associate Judge Smith on 14 August 2015.

[15] The Associate Judge delivered his judgment on 17 November 2015 granting LCIL's application to remove Mr Coltart's caveat. However, in doing so the Judge's reasons highlighted issues with the position LCIL had taken. Specifically, the Judge accepted it was arguable that: LCIL could not prefer the interests of the Lepionka purchasers over those of GLW and the second mortgagee;[10] and the decision to adopt the Lepionka purchasers' agreements was made without adequate regard to whether a better price might have been obtained.[11] The Judge also accepted that the compensation agreement between LCIL and the Lepionka purchasers raised questions over the bona fides of the adoption of the agreements.[12] However, as these were not duties owed to Mr Coltart, in the Judge's view LCIL's rights under the mortgage prevailed over Mr Coltart's unregistered interests.[13] Mr Coltart filed an appeal on 19 November 2015.

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10 *Lepionka & Company Investments Ltd v Coltart* [2015] NZHC 2849 at [120].
11 At [121].
12 At [121].
13 At [123]–[124].

[16] In the meantime, GLW and AFI were taking steps against LCIL:

(a) In September 2015, GLW issued proceedings against LCIL. That proceeding was stayed on 2 November 2015 when Mr Paterson was bankrupted in Australia. LCIL took steps to liquidate GLW and obtain summary judgment against Mr Paterson as guarantor. GLW applied to set aside LCIL's statutory demand. This was set down for hearing on 18 February 2016.

(b) On 9 October 2015 AFI notified LCIL it was preparing proceedings, but proposed a settlement involving a sale of the property to a company associated with a Mr McHardy for $6.5 million plus GST from which the Lepionka interests would receive $4.5 million.

[17] In respect of the latter, LCIL had concerns about the legitimacy of the offer. Justin Smith KC's advice was sought on the litigation risk. On 12 October 2015 he advised that, if an offer came along that made commercial sense, Mr Lepionka ought to consider it. There was then a meeting between Mr Wallace, Mr Cox and Mr Smith, following which Mr Wallace and Mr Cox informed Mr Lepionka that Mr Smith assessed AFI's claim against LCIL as about 70/30 in LCIL's favour.[14]

[18] Following this, Mr Horton and Mr Lepionka negotiated unsuccessfully with AFI and Mr McHardy and AFI issued its proceeding on 27 November 2015. Mr Smith was asked to review AFI's claim. He was provided with calculations showing the likely shortfall in AFI's recovery if LCIL proceeded with the subdivision compared with AFI's position under Mr McHardy's offer. Mr Smith provided his advice in draft on 9 December 2015. His cover email to Mr Cox and Mr Wallace said "[it] may not be what the client was wanting but, in my view, for the reasons stated, LCIL is at high risk of losing this case". The accompanying advice was that there was "considerable risk for LCIL" on liability in the litigation, and LCIL was at "significant risk in defending the proceeding which ought to be balanced against the available offer(s)". The letter set out in detail the reasons for Mr Smith's view.

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[14] This advice is recorded in the file note of a discussion between Mr Wallace, Mr Cox and Mr Smith on 12 October 2015.

[19] The email and letter were forwarded to Mr Lepionka and copied to Mr Horton. Mr Horton responded with "[h]oly crap!" to which Mr Lepionka responded, copied to Mr Cox and Mr Wallace, "I'm in total shock!" Mr Cox responded saying the advice was unexpected given previous advice, but he wanted to discuss it with Mr Smith to test and finalise it. Mr Lepionka's evidence, supported by a contemporaneous email from Mr Lepionka to Mr Horton on 11 December 2015 and accepted by Cooke J in the High Court,[15] was that Mr Wallace had called him that day saying that he and his partner, Nigel Moody, strongly disagreed with Mr Smith's opinion and Mr Smith had "simply got it wrong". Once again, in giving this advice Mr Wallace apparently failed to recognise that his impartiality was potentially compromised as a result of his earlier advice.

[20] On 13 December 2015 Mr Lepionka emailed Gibson Sheat and Mr Smith, copied to Mr Horton. He said from the beginning he had been guided by his legal team, acting on the premise the actions taken were legal and that they had the upper hand. He was "devastated" as a result of Mr Smith's latest opinion. He wanted to know whether he had been "wrongly advised from the outset to the overall actions that we embarked on since April 2015" and why Mr Smith's view had changed. He now was exposed to a "serious risk" of owing a "significant amount of money" in the litigation as well as having spent money on legal fees defending his position, now advised to have "serious flaws and weaknesses to it".

[21] On 14 December 2015 Mr Cox and Mr Wallace met with Mr Smith. Rule 5.11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (LCCC Rules) was discussed, specifically that Mr Lepionka had a potential claim against Gibson Sheat and they should notify their insurer, but there was not likely to be any loss because of an offer from Mr McHardy of $7 million and LCIL's offer to buy the AFI mortgage. As a result, Gibson Sheat formed the view that it did not need to inform Mr Lepionka to obtain independent legal advice and to stop acting.

[22] However, that view changed because on 15 December 2015 there was a conference call between Mr Lepionka, Mr Horton, Mr Cox, Mr Wallace and Mr Smith.

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15 Judgment under appeal, above n 1, at [14].

Mr Cox opened the call by seeking to explain the ground rules for the discussion because of the LCCC Rules and insurance. Mr Horton interrupted and said they only wanted to discuss what the legal position was. Mr Cox's evidence was that he insisted and said that if a claim was made then Gibson Sheat would need to stop work and refer LCIL for independent advice. Mr Cox described the conversation as heated and said Mr Horton aggressively said that Gibson Sheat should notify its insurers. Mr Horton and Mr Lepionka's evidence was that they did not recall this, but Mr Cox's evidence was broadly supported by his file note of the conversation.

[23] The meeting went on to discuss the advice and the options going forward. It was decided that LCIL would look to settle the property matter before the Christmas shutdown the following week. Mr Horton led the negotiations for the Lepionka entities. Mr McHardy made a settlement offer to Mr Coltart, AFI, GLW and LCIL and LCIL made a counteroffer but no agreement was reached that week.

[24] On 21 December 2015 Gibson Sheat notified its insurer. On the same day the Court of Appeal set a hearing date of 25 February 2016 for Mr Coltart's appeal from Associate Judge Smith's decision that had granted LCIL's application to remove his caveats.

[25] In November and December 2015 Gibson Sheat was continuing to send fee invoices to LCIL. By the end of December 2015 the invoices totalled close to $180,000 inclusive of Mr Smith's fee. Mr Lepionka, who had paid invoices on time prior to Mr Smith's advice, was in no hurry to pay them and could not believe they were even being sent given the situation.

[26] In the new year, Mr Wallace followed up the payment of the outstanding invoices:

(a) On 27 January 2016 he emailed Mr Lepionka saying that if there was an issue about paying the fees, it needed to be cleared up because there was work coming up for the Court of Appeal hearing.

(b) The following day there was a heated telephone call between them because Mr Lepionka was very angry about the position he was in as a result of Gibson Sheat's advice.

(c) Mr Wallace then sent three emails on that day:

(i) In the first of these, he said that there was a lot of urgent work coming up with the Court of Appeal hearing, they could have a discussion about the November and December invoices, but they needed confirmation that their attendances from 1 January 2016 would be paid.

(ii) In the second email, Mr Wallace said the Court of Appeal had advised submissions needed to be filed by Monday (1 February 2016). Mr Lepionka responded that he was not happy at being put under pressure about this with Mr Horton overseas and not online.[16] He said he would have thought that Gibson Sheat would keep up the appearances required until they could chat through the issues.

(iii) In the third email, Mr Wallace said he was not trying to pressure Mr Lepionka but Mr Wallace's partners would not accept the firm putting in more resource and cost without knowing if they would be paid. Mr Wallace sought confirmation that, pending an agreement on the costs issues, in the interim Mr Lepionka would pay the court fees and disbursements (including Mr Smith's invoice) and Gibson Sheat could then keep working and file the Court of Appeal submissions on time. He also said:[17]

> I understand this is a dispute over 2 invoices. If you are talking about making a claim against our firm we

[16] As Mr Wallace knew, Mr Lepionka and Mr Horton were both dealing with stressful family or personal circumstances. Mr Horton was overseas and not contactable because of his personal circumstances.

[17] Emphasis added.

> will need to act within our law society rules, which would immediately prevent us taking any steps until you and we have complied with the rules (*informed consent and independent legal advice*).

[27] Mr Lepionka confirmed later on 28 January 2016 that he would agree to the interim solution of paying the court fees and disbursements.

[28] A telephone conference call involving Mr Lepionka, Mr Horton, Mr Wallace and Mr Cox took place on 3 February 2016. Gibson Sheat's file note of that call recorded that:

(a) Mr Horton said that LCIL was on a path based on Gibson Sheat's advice that appeared to be wrong given Mr Smith's advice; it was not talking about legal claims against Gibson Sheat and they did not need to inform their insurers; and it wanted an adjustment on the fees to date and adjustment of the Gibson Sheat rates.

(b) Mr Wallace responded that Gibson Sheat would have to discuss it with the insurers because Mr Horton had previously indicated Gibson Sheat should do this.

(c) The parties agreed to "park" the "issue" and discuss the other matters (AFI, Mr Paterson etc) including the Coltart hearing which was "crucial" both to Mr Coltart and AFI.

[29] On 10 February 2016, Gibson Sheat provided a fee proposal. This was to reduce its outstanding fees by $70,000 plus GST and to reduce its hourly rates going forward. Gibson Sheat's letter went on to say:[18]

> We do not accept there is any proper basis to question or criticise our advice. However, having raised this matter we are required by Chapter 5.11 and 5.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (attached) to *advise you to seek independent advice* and that we may not act further until you have received that independent advice and the matters in dispute between us are resolved. Accordingly, to continue our engagement *it will be necessary for Greg [Horton] to confirm that you have taken independent legal advice* and that any claim you may consider you have

[18] Emphasis added in italics.

> against our firm is fully and finally settled and resolved. In that event we may resume taking instructions to continue to act for you in this matter.

[30] The letter resulted in an exchange of emails over 10 and 11 February 2016 between Mr Horton and Mr Cox as follows in which they disagreed whether Gibson Sheat could continue to act:

(a) Mr Horton first replied that he would discuss the proposal with Mr Lepionka but "[i]n terms of Rule 5.11(b), the Lepionka entities give their informed consent to [Gibson Sheat] continuing to act, so please proceed" and asked Mr Cox to confirm that Gibson Sheat was proceeding with the "imminent" filings and work.

(b) Mr Cox responded saying that the requirement and effect of r 5.11 was that it could not act which meant that LCIL was no longer a "current" client, and that r 5.12 enabled a lawyer to "resume acting for a former client where the matter in dispute has been resolved".

(c) Mr Horton responded saying he "disagree[d]" and Gibson Sheat was "obliged to get on with the instructions". He said they had their client's "informed consent" and "that is all you require at this juncture". He went on to say there was:

> … no current claim against you, you have a request from a client for a fee concession based on a QC having a vastly different view from you on the law.

(d) Mr Cox responded that he disagreed with Mr Horton's interpretation of the effect of rr 5.11 and 5.12. He enclosed a decision of the Legal Complaints Review Officer which he said confirmed his view that the firm was obliged to cease acting and noted it was consistent with a Law Society practice briefing on the topic. He said:[19]

> Accordingly, please take urgent instructions as to LCIL's position. *If having taken independent legal advice from you*, LCIL confirms that any claim it considers it … may have had against our firm is fully and finally settled and resolved then

[19] Emphasis added.

> we can resume taking instructions to continue to act for it in this matter. We would welcome resuming work for Stefan in those circumstances. …

(e) Mr Horton responded in these terms:

> So let's be really clear here Ed [Cox], are you saying you are not and will not progress the appeal unless your client acquiesces to your terms?
>
> Be really clear Ed.

(f) Mr Cox replied reiterating that the firm could not act until a claim or potential claim was resolved, Gibson Sheat would not breach those rules and it was not a case of having LCIL's acquiescence. He explained:[20]

> You will have explained to Stefan [Lepionka], as the company's director, that the purpose of the rule is to protect clients by preventing solicitors' obligations to their client being compromised through the solicitors' conflict of interest. The conflict arises between the obligation to give independent advice to the client and the anticipated temptation to give advice in the firm's interest of defending itself against the client's claim. While we would like to think we would still give independent advice, the rules proactively protect clients.
>
> There is a way past this, as the rules themselves provide. That is, LCIL *is independently advised by you* and is in a position to resolve now the issues it has raised giving rise to this claim or potential claim. Alternatively it must accept we cannot act further. In other words, it can either attempt to resolve that with us now or it must accept we cannot act further.
>
> In the absence of resolution, we will, of course, comply with our professional obligations to assist LCIL to instruct new solicitors and [in] time to allow it to defend the upcoming appeal.

(g) Mr Horton replied saying that Mr Cox was "quite wrong – it is a choice". He said Gibson Sheat could choose to continue to act in the dispute and there was "no claim against you (and any suggestion of a claim at this time is withdrawn)". He said his view had been confirmed by the Law Society "on a no names basis" and by his firm's insurers. He suggested Gibson Sheat complete the appeal and GLW liquidation

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[20] Emphasis added.

action and withdraw after that if they wished to do so. He said if Gibson Sheat chose to withdraw now it would "materially prejudice" its client.

[31] Mr Wallace telephoned Mr Lepionka over the weekend and told him that to get matters back on track LCIL needed to make an offer to Gibson Sheat. Mr Lepionka discussed this with Mr Horton. Mr Lepionka sent a counteroffer to Gibson Sheat on 14 February 2016. This proposed that Gibson Sheat write off all its fees for November to February, that estimates be provided for all future litigation based on the hourly rates proposed by Gibson Sheat in its 10 February letter and that:

> 4. We will [withdraw] litigation threat on [Gibson Sheat], and accept your full and final terms in your letter
>
> 5. We want a quick and clean legal resolution so that all parties can bring closure to this situation we all find ourselves in.

[32] While working on the submissions over the weekend, Mr Cox became concerned that, in responding to Mr Coltart's submissions, he would be defending the advice of Gibson Sheat in breach of his duty to the Court under r 13.5 of the LCCC Rules.[21] Having taken external advice, Mr Cox responded on 15 February 2016 advising that Gibson Sheat could not act for LCIL on the appeal and would assist in handing over the file to new counsel.

[33] Mike Colson, then a partner at Bell Gully (now a King's Counsel), was instructed and represented LCIL at the appeal hearing on 25 February 2015. Mr Colson reported to Mr Lepionka and Mr Horton later that day. He said the hearing "went well" but had "swung around a bit" and so it was "hard to be too confident". He put the prospect of success at 70 per cent or so.

[34] On the day of the hearing, an offer to purchase Mr Coltart's lot at market price (and potentially a further lot) was made by Mr McHardy. That evening and the following morning there were email communications between Mr Lepionka and Mr Colson about whether Bell Gully could assist going forward. It is apparent that

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[21] Rule 13.5.3 provides: "A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court."

Mr Lepionka understood the potential for liability in the GLW or AFI proceedings arising from Mr Wallace's earlier advice. He explained this to Mr Colson as follows:

> Talking to Greg [Horton] it actually does feel like a straight line from here, (now that Coltart have [laid] down their guns), with the real exposure then being GLW/Garth Paterson and 2nd Mortgage for potential damages hence the need for a course champion to guide the work flow from this offer onwards.
>
> David Wallace of [Gibson Sheat] being the architect of this plan - I'm sure he would help in the transfer/ongoing piece if required but would need someone to oversee the higher strategic issues and advise us on the pros/cons of such deployment.

[35] Shortly after this, Mr Wallace telephoned Mr Lepionka. That conversation was referred to in an email Mr Lepionka sent to his trustees, Mr Horton and Mr Duncan, which said:

> Funny how the universe works sometimes, David Wallace has just called me out of the blue, their risk has now gone as the Court of appeal nullified this risk yesterday which was around our agreement put in place by David for the sub division agreement and how this was seen as a potential weakness for [Gibson Sheat] as it could [have given] Coltart the rights to adopt his contracts.
>
> Apparently this was knocked out yesterday by the [Court of Appeal] so their [Gibson Sheat] risk has now gone, he [feels] extremely gutted with the sequence of events to date that had [led] them to drop pens, are desperate to jump back on the tools and finish this off!
>
> He's going to counter offer our last proposal on fees now with the hope we can land an agreement on past invoices and a go forward plan to keep representing us to complete what's in [front] of us.

[36] Mr Wallace's evidence was that he would not have said the risk was gone, but Cooke J accepted Mr Lepionka's evidence that he had done so, as he found Mr Lepionka to be a truthful witness and his evidence was consistent with his contemporaneous email.[22] Mr Horton's response to Mr Lepionka and Mr Duncan was to say that it "[f]eels to me like they remain pretty worried about their risk, and want to target a full and final … which is okay on the right fee deal".[23] In context, "their risk" can only have referred to the risk that Mr Wallace's advice in March 2015 was wrong and Mr Horton was open to a full and final settlement with Gibson Sheat.

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22 Judgment under appeal, above n 1, at [24].

23 Ellipsis in original.

[37] In the afternoon of 26 February 2016 Mr Wallace sent a "draft" letter. This draft letter confirmed the discussion that "the Coltart appeal hearing went well and hopefully the judgment will reflect that". It also contained the following proposal:

> 2. If you are in agreement that LCIL has no claim now or to be brought in future in relation to Gibson Sheat's advice, including in relation to LCIL's acquisition of Westpac's mortgage and the adoption of the Lepionka purchase agreements, entry into the related agreement to complete the subdivision, the ensuing conduct of litigation and completion of LCIL's instructions generally up to disengagement, we could (and would like to) recommence acting for you.
>
> 3. On that basis we could continue to work on your behalf in relation to conveyancing and the outstanding litigation involving GLW and AFI subject only to our obligations under the LCCC Rules. The Coltart matter would remain with Bell Gully while it runs its course.
>
> 4. If we are able to reach that agreement the only remaining issue is our outstanding fees. In that regard, we propose to deduct $100k from our outstanding invoices. Please note this is not a concession that at any time our advice has been incorrect or wanting, and simply reflects your concerns and our discussions over the level of fees. That would be the complete fee arrangement with you.
>
> 5. We hope we can work through these issues. The subdivision is ready to go and, subject to the release of the Court of Appeal judgment in Coltart, the agreements should be able to be put together quickly.

[38] In a covering email, Mr Wallace explained that the letter was draft:

> … because it is subject to partnership approval and advice which we cannot receive until Monday but I am sending it to you so you can see the nature of what we are proposing.
>
> I hope this is a basis for going forward and we will be able to finalise it with you once we have received our advice.

[39] Mr Lepionka, copied to Mr Horton and Mr Duncan, replied by email on 29 February 2016 with a counteroffer:

> 1. Your $100k offer is not accepted. Wewcould only accept a reduction of $131,651.00+GST.
>
> 2. Fee proposal/estimate required on all future commercial actions excluding litigation (apart from GLW Liquidation) based on rates set out in your letter of offer. Regular fee updates and prior approval to exceed estimate by 10% or more.

> 3. All costs outside of that basis of Estimated Fee to be run through Greg [Horton] and I for sign off. We don't want the clock on without our knowing.
>
> 4. We will withdrawal [sic] litigation threat on [Gibson Sheat], and accept your full and final terms in your letter.
>
> 5. Main litigation services conducted by [Bell Gully]. GLW liquidation to be provided by [Gibson Sheat] in conjunction with [Bell Gully] overall litigation strategy and services thereafter will be based on merits and on a case by case basis.
>
> Please advise by close of play today or earlier if [Gibson Sheat] is in/out so we can proceed accordingly either way.

[40] Mr Wallace replied later that day saying that the proposal was with his partners so he would advise what they decided. He sought clarification on the work they would be doing going forward as "on the face of it, we are not really doing much going forward but are being asked to give up a large amount of fees based on a claim we don't think would succeed or is warranted". Mr Lepionka, again copied to Mr Horton and Mr Duncan, confirmed the work Gibson Sheat would be carrying out, and noted that it had paid substantial fees and it was Gibson Sheat that had "pulled up stumps on the litigation piece, not us". Mr Wallace responded soon after proposing a fee reduction of $100,000 given they would not be involved in that much work with the "rest of the terms … as agreed below and in earlier correspondence".[24] Mr Wallace said this would mean they could move on and get the job done and "each party avoids the unpleasant prospect of litigation between us".

[41] At around 4.25 pm Mr Wallace called Mr Lepionka to reach a deal and "to get back on the tools". Mr Wallace made a handwritten note of the call. This note was consistent with the email Mr Wallace sent around half an hour later which said:

> As per our discussion I confirm you and I have agreed Gibson Sheat will reduce our outstanding invoices by $105,000 plus gst on the terms 2-5 outlined in your email below and in paragraph 2 and 4 of our draft letter of 26/2/[16] (copy attached). We will prepare a simple deed recording this.
>
> On a personal note I am relieved to have sorted this out on terms acceptable to both parties.
>
> Please let us have your instructions on what is required workwise so we can provide the estimates required.

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[24] Mr Lepionka's counteroffer, above at [39], was included in the email chain below Mr Wallace's reply.

[42] Mr Wallace was asked in cross-examination if he understood when he put down the phone he had a "binding deal". His answer was "[o]ne hundred percent". He said he did not include paragraph three from his letter of 26 February 2016 (at [37] above) because "that problem went away" because Mr Lepionka had said that Gibson Sheat would not be acting in the AFI or GLW proceedings (as Bell Gully would act on those matters).

[43] At 8.47 pm that evening, Mr Lepionka replied to Mr Wallace, copied to Mr Horton, Mr Duncan and Mr Lepionka's accountant, setting out immediate workloads for Gibson Sheat to provide fee estimates for. Mr Lepionka also set out some issues that were about "trying to reduce the potential damages liability", balancing what could be done in accordance with the law and "the overall risks of litigation from AFI/GLW/Paterson".[25] Mr Lepionka outlined three scenarios and their impact on the proceeds that would be available to AFI and GLW.

[44] On 1 and 2 March 2016 Mr Wallace and Mr Lepionka exchanged emails about the risks with each scenario. Mr Wallace thought scenario three carried the least litigation risk, but there was a risk that the compensation paid to the Lepionka purchasers by the mortgagee was outside the mortgagee's powers. Mr Lepionka's evidence was that he was "extremely concerned and very annoyed" by this advice and felt like Mr Wallace was "walking back in a major way from what he had said the week before". He replied suggesting Gibson Sheat was "running scared" of its previous advice. Mr Wallace said he was not, as he did not think the argument would succeed. Mr Horton and Mr Duncan were copied on these email exchanges. Mr Lepionka's evidence was that it felt like being on a rollercoaster with Mr Wallace's advice which he felt was inconsistent as to the risks for LCIL.

[45] At 6.30 pm on 2 March 2016 Mr Wallace also forwarded a draft settlement agreement to Mr Lepionka, Mr Horton and Mr Duncan. The draft reflected the agreement recorded in Mr Wallace's letter to Mr Lepionka on 29 February 2016 (at [41] above) with two differences. The first was to add Mr Lepionka as a party (in

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[25] This included a note that if they won in the Court of Appeal and received a costs award, it had been confirmed with Mr Coltart that the costs would be paid.

addition to LCIL). The second, and potentially more significant, addition was to include the words:[26]

> LCIL and Stefan acknowledge they have been told to take, and have taken, independent legal advice about any claims they consider they may have had against [Gibson Sheat].

[46] This had not been part of the discussion between Mr Wallace or Mr Lepionka on 29 February 2016 nor any of the correspondence between 26 and 29 February 2016.

[47] Prior to sending the draft agreement to Mr Lepionka, Mr Wallace had forwarded it to Mr Cox and Mike Gould (Gibson Sheat's "risk" partner) in case he had "missed something". Mr Cox had inserted this acknowledgment following advice from Brett Morley, a Hesketh Henry lawyer appointed by Gibson Sheat's insurers.

[48] Mr Cox's evidence in the High Court was that it was always his understanding that it was a necessary element before LCIL could resume work. It was put to him that it was necessary before LCIL settled with Gibson Sheat. Mr Cox responded:

> Yes, yes. … sorry, let me clarify my thinking on that. The client can do whatever it likes, … the client can enter into any agreement they want with us, and we were quite clear that [if] we entered into an agreement with them, we have to comply with the rules and that's what … that was aimed at recording.

[49] He said the acknowledgment in the agreement recorded what he understood to have occurred. It was put to him that neither Mr Lepionka nor Mr Horton had told him that independent legal advice had been given to LCIL. He said:

> No one wrote to me or said that, but it was implicit in our dealings that them, I mean we had been very clear that that's what had to happen and that there were then the series of offers and counteroffers and the matter was resolved.

[50] Mr Lepionka did not respond to the draft agreement that day. His evidence was that, if he had not been angry about what he saw as Mr Wallace's change in advice about the risks, he would have gone through his usual practice which was to review documents of this kind with his trustees, Mr Horton and Mr Duncan, and respond to

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[26] This had been added at the start of the clause to reflect the acknowledgement that LCIL and Gibson Sheat no longer had a claim against Gibson Sheat for their advice (as per para 2 of the draft 26 February 2016 letter, above at [37]).

Mr Wallace with any points for negotiation. He remembered seeing that the draft agreement said he had to get independent advice before signing the deed and he had not received this. He decided not to progress the draft settlement agreement, nor discuss the draft agreement with Mr Horton, Mr Duncan, Mr Wallace or Bell Gully. There were more urgent and important things to focus on.

[51] The next day, 3 March 2016, Mr Wallace sent through a cost estimate for the completion of the subdivision of Lot 2 for Mr Lepionka's approval. Mr Lepionka approved the estimate the same day (as always copying Mr Horton). Mr Lepionka and Mr Wallace had daily telephone and email contact over the next month and the draft settlement agreement was not mentioned. For his part, Mr Wallace's evidence was that he did not think anything of the absence of any response from Mr Lepionka because they were in the middle of a proposed settlement with Mr Coltart and Mr McHardy.

[52] On 18 March 2016 Mr Lepionka received the fee credit of $105,000 agreed on 29 February 2016. Mr Lepionka's evidence was that he did not recall either requesting this or looking at it as he was at hospital focussed on a family health matter. He said the context was that Gibson Sheat needed a mortgage statement until the end of February 2016 for a court hearing involving GLW. He realised he had received the fee credit and discounted rates they had negotiated. He saw no issue with this because of the amount he would need to spend "getting us out of the mess Gibson Sheat had created", the same way he had felt in 2015.

[53] At around 4 pm on 6 April 2016, the Court of Appeal emailed Bell Gully and Gibson Sheat to say its judgment would be delivered at 3.30 pm the following day. The next morning, 7 April 2016, Mr Cox asked Mr Wallace's secretary, Melissa Taylor, about whether they had received the signed settlement deed from Mr Lepionka. Ms Taylor forwarded this to Mr Wallace and at 10.49 am Mr Wallace resent to Mr Lepionka his earlier email to him of 2 March 2016 with the draft settlement agreement. Mr Wallace's email was marked "high" importance and simply stated: "Hi Stefan, Please see email below. Regards". Mr Lepionka did not reply to this email and Mr Wallace did not follow this up with him at any stage.

[54] The Court of Appeal's judgment was delivered in the afternoon of 7 April 2016. Contrary to expectations, Mr Coltart was successful with the Court finding that his caveats could be sustained on the basis that LCIL had arguably breached its duties as mortgagee. Mr Lepionka's evidence was that this "was it for me". He had no further discussion with Mr Wallace or anyone else at Gibson Sheat about the dispute or agreement after this.

[55] Sometime in April 2016 Gibson Sheat's insurers asked for a copy of the signed agreement with LCIL. Mr Cox sent an email to Mr Morley, copied to Mr Gould. This email included the following:[27]

> David [Wallace] is preparing another email to Lepionka recording that both sides have performed their obligations but we wish to have the agreement signed. We will see what response we get.

[56] However, in the event that foreshadowed email was not sent to Mr Lepionka. Mr Wallace could not remember why that was, but it seems it was because he had decided against it. When it was again discussed by Mr Cox, Mr Wallace and Mr Gould in June 2016, Gibson Sheat thought that Mr Lepionka might try to say there was no settlement because he had not signed and returned the agreement. They decided it was better not to follow it up with Mr Lepionka, because all it would do was record an agreement that had already been entered into and implemented.

[57] The AFI and GLW proceedings were consolidated and set down for trial in July 2017. By now Mark O'Brien KC was instructed for LCIL. Mr Lepionka told Mr Wallace that Mr O'Brien's advice was that LCIL was likely to lose the case and that it should consider a claim against Gibson Sheat. In late June 2017 Gibson Sheat was formally advised that a claim against them was being considered.

[58] On 14 December 2017 the High Court issued a judgment in the AFI and GLW proceedings.[28] The Court held that LCIL had breached its duty as mortgagee by acting for a collateral purpose when adopting the Lepionka purchase contracts but declined to set aside the transactions.[29] The Court was unable to determine if LCIL had

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27 Privilege is claimed over the rest of the content of the email.
28 *AFI Management Pty Ltd v Lepionka & Company Investments Ltd*, above n 6.
29 At [322] and [351].

breached its duty to obtain the best price reasonably obtainable at the time of the adoption as that would depend on further evidence and should be determined after the subdivision was completed. The Court assessed the market value of the unsubdivided property in April 2015 at $4.3 million and damages would only be payable if AFI/GLW were ultimately in a worse position.[30]

[59] After this AFI sold its mortgage to a Lepionka entity for $1.5 million (less than the price offered by LCIL in December 2016). GLW was liquidated and LCIL settled with the liquidator for $100,000. LCIL retained all of the proceeds from the subdivision which exceeded the settlements and the Westpac mortgage. Mr Lepionka's trust acquired a lot in the development and sold the other lots for a significant profit. However, LCIL incurred substantial litigation costs, including because Mr Paterson had become a persistent litigant to the extent that he was ultimately restrained by an order under s 166 of the Senior Courts Act 2016.

[60] A claim in negligence was brought against Gibson Sheat in May 2021. The litigation costs incurred by LCIL comprise most of the claim. Gibson Sheat pleaded, amongst other things, that the claim had been settled by Mr Wallace's email to Mr Lepionka sent at 4.58 pm on 29 February 2016. LCIL replied denying this defence and relying on the content of the emails and draft agreement as if pleaded in full. The issue of whether the claim was settled was heard as a preliminary question before Cooke J in the High Court.

High Court decision

[61] In the High Court LCIL argued there was no binding agreement with Gibson Sheat as a result of the discussion between Mr Lepionka and Mr Wallace on 29 February 2016 and the immediately following email exchange. This was because the parties had left key matters to be finalised in a written document and it was the kind of agreement where it would be expected to be reduced to writing. And even if this was not so, the agreement could only be binding if independent legal advice was obtained.[31]

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30 At [494].
31 Judgment under appeal, above n 1, at [41].

[62] The Judge applied this Court's test in *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* as to the prerequisites for the formation of a contract.[32] He considered the parties had an intention to be bound and that they had agreed to the essential terms of that agreement.[33] The draft written agreement purported to add Mr Lepionka as a party but this was not controversial. It also purported to add an acknowledgement that LCIL and Mr Lepionka had been independently advised. But this was not part of the oral agreement and it purported to record what had already occurred rather than to impose any obligation on either party. The Judge also considered it was not intended that the agreement reached was conditional on the execution of a formal written agreement.[34]

[63] The Judge considered LCIL's argument on the requirement for independent legal advice to be unclear. It was not clearly pleaded, appeared to have changed and was put on the basis of an implied term.[35] The Judge accepted that the professional, ethical and fiduciary obligations of lawyers might be implied into contracts between a lawyer and client in some circumstances.[36] However, the Judge said more conventionally the argument would be that the agreement was unenforceable because it was entered into in breach of Gibson Sheat's fiduciary obligations.[37]

[64] The Judge considered that, although at the time the parties reached their oral agreement Gibson Sheat had withdrawn from acting, Gibson Sheat nevertheless owed "residual" continuing fiduciary duties.[38] This meant it could only enter into the oral agreement under which it obtained a personal advantage if it had ensured that LCIL was fully informed of all the facts and circumstances and it freely consented to the

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32 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA).

33 Judgment under appeal, above n 1, at [45].

34 At [60].

35 At [62] and [64].

36 At [65].

37 At [67]. The Judge considered it was not appropriate to dismiss LCIL's claim on a technical pleading point when the substantive argument was squarely raised. We note that Gibson Sheat does not take a technical point on appeal either because Gibson Sheat accepts it has not been unfairly prejudiced by the way the argument developed in the High Court.

38 At [71]–[72]. The Judge noted that Gibson Sheat continued to be involved in the handover to Bell Gully for the Court of Appeal hearing and Mr Wallace had received a copy of Mr Colson's advice on the likelihood of success after the hearing.

agreement.[39] In some circumstances this meant ensuring the client was independently advised.[40]

[65] The Judge concluded that Gibson Sheat had met its responsibilities in the circumstances that arose because:

(a) Gibson Sheat had repeatedly stated that it could not act for LCIL until the claim against it was resolved and that LCIL needed to take independent advice. Although it did not reiterate this after the Court of Appeal hearing, by then it had withdrawn as counsel for LCIL.[41]

(b) LCIL was a reasonably sophisticated commercial operator rather than a vulnerable client. The immediate pressure of the upcoming Court of Appeal hearing had resolved with Mr Colson having been instructed. Gibson Sheat could properly proceed on the basis that Mr Horton, an experienced commercial solicitor, was able to give the necessary advice and that other lawyers were available to LCIL if it wished to have more extensive advice.[42]

(c) LCIL was fully informed. It knew that Gibson Sheat may have failed to give adequate advice because Mr Greenwood and Mr Smith had both given advice that the strategy embarked upon may have been wrong. LCIL also knew the implications of the potentially erroneous advice because it was facing litigation because of that strategy, it was aware of the implications of that litigation, and it knew it was abandoning any claim it had against Gibson Sheat beyond compensation by way of a substantial fee credit and reduced billing rates going forward. It was not necessary that LCIL and Mr Horton understand the kind of damages that Gibson Sheat might be liable for (which were not obvious and there

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39 At [74] and [76].
40 At [74], relying on the reasons of Richardson J in *Witten-Hannah v Davis* [1995] 2 NZLR 141 (CA) at 149.
41 At [78].
42 At [79]–[83].

might not be any). If LCIL and Mr Horton had wished to investigate this further they could have done so.[43]

[66] The Judge also made the point that the agreement reached should not be evaluated with hindsight. All settlements involve an element of risk and the fact that events did not transpire as hoped did not mean the settlement was not a good one, nor that LCIL did not enter the agreement with eyes open.[44] Further, criticisms could be made of Gibson Sheat being slow in advising of its conflict of interest, and of Mr Wallace in telling Mr Lepionka that Mr Smith's advice was wrong and also in saying that the risks were now "gone" after Mr Colson's report of the Court of Appeal hearing. But this did not mean that Gibson Sheat breached its obligations in entering into the agreement. Whether viewed as a claim for breach of a fiduciary duty or an implied term of the agreement, the agreement was enforceable.[45]

Assessment

Was independent advice required?

[67] LCIL's principal argument on appeal is that independent legal advice is essential to a client giving informed consent to a settlement of a dispute between a lawyer and a client. It says that, even if that is not always the case, it was required in the circumstances of this case.

[68] We start with the nature of the fiduciary relationship between a lawyer and their client. Because a client places trust and confidence in the lawyer in relation to matters within the scope of the retainer, the law imposes on the lawyer fiduciary duties owed to the client.[46] A central fiduciary duty is one of loyalty. One aspect of that duty is that the lawyer cannot place themselves in a position where there is or may be a conflict between the lawyer's duty to the client and the lawyer's personal interest.[47]

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43 At [84]–[86].
44 At [87].
45 At [88]–[89].
46 G E Dal Pont *Lawyers' Professional Responsibility* (8th ed, Lawbook Co, Sydney, 2025) at [3.20] and [3.190]. For setting out these long-established principles that have emerged from the cases, which are not in dispute, we have referred to Dal Pont although they can be found in many other textbooks and other secondary sources.
47 At [4.40] and [4.50].

The duty is "so strict" that the lawyer is not absolved even if the lawyer's personal interest does not actually impede the loyal performance of the lawyer's duty of trust and confidence.[48] A dealing effected in breach of a fiduciary duty may be set aside even if the client suffers no loss.[49]

[69] An important qualification to the fiduciary duty of loyalty is consent to what would otherwise be a breach of that duty.[50] This consent must be an informed one. It is what this requires, and in particular whether in the present circumstances it required that the client receive independent legal advice before their consent could be "informed", that is at issue here.

[70] Dal Pont explains the point in this way. The client must have a "full understanding of the nature and implications of the conflict" and so consent "at the very least rests on the lawyer making full disclosure of the conflict".[51] As to why that is and what it involves:[52]

> [6.25] … Disclosure is directed at placing the client in a position to determine whether or not to (continue to) retain the lawyer in the matter. Lacking knowledge of the existence, scope or implications of the conflict, a client cannot be said to give informed consent to the (continuing) representation. … The lawyer carries this onus because she or he is better positioned than the client to appreciate both the existence of a conflict and its likely scope and implications, a point that loses little in force where the client is sophisticated, experienced or well-resourced.

[71] To similar effect, *Snell's Equity* says:[53]

> In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts". ...
>
> The materiality of information to be disclosed is determined not by whether it would have been decisive … but rather by whether it may have affected the principal's consent … Further, consistent with equity's focus on substance

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48 At [4.55].
49 At [6.35].
50 At [4.60].
51 At [4.60].
52 Footnotes omitted.
53 Steven Elliott (ed) *Snell's Equity* (35th ed, Sweet & Maxwell, London, 2025) at [7-019] (footnotes omitted). See also Mark Cannon, Hugh L Evans and Roger Stewart (eds) *Jackson & Powell on Professional Liability* (9th ed, Sweet & Maxwell, London, 2022) at [2-210]; and Charles Hollander and Simon Salzedo *Conflicts of Interest* (6th ed, Sweet & Maxwell, London, 2016) at [4-016].

> rather than form, disclosure is treated in a functional, rather than a formalistic, way, so that the sufficiency of the disclosure depends on the sophistication and intelligence of the person to whom the disclosure is required to be made.

[72] The last sentence in each of the Dal Pont and *Snell's* quotations may seem inconsistent. However, we do not think they are. Rather Dal Pont makes the point that the lawyer must make disclosure even though the client is sophisticated, experienced or well-resourced. *Snell's* makes the point that what constitutes the information that must be disclosed depends on the sophistication and intelligence of the person to whom the disclosure is made.

[73] As to why independent legal advice may be necessary, Dal Pont explains:[54]

> [6.30] In making the above disclosure, a conflicted lawyer lacks distance from the conflict, which may mean that even with the best of intentions the disclosure may not properly avoid bias. Also, clients may place trust in the superior legal knowledge of their lawyer and be willing to accept the lawyer's assurances simply because it is the lawyer who has given them. A prudent lawyer will, therefore, insist that the client receive independent legal advice on the matter if there is any inclination to continue the representation. Such advice serves to reduce the scope for the lawyer's own influence in a client's decision to continue conflicted representation, and has the benefit of being supplied by a person with no conflicting interest in the matter.

[74] Consistent with these principles, in *Sims v Craig Bell & Bond* Richardson J explained:[55]

> A client must be able to place complete reliance on the professional advice of the solicitor and is entitled to expect that the solicitor will serve and protect the client's interests at all times. Wherever there is potential for conflict of interest there is a risk that the advice of the solicitor may be influenced insidiously or even unconsciously by the prospect of benefit (other than professional remuneration) to the solicitor from the transaction which the solicitor is retained to carry through. If the client is to be in a position to make an informed decision about the proposed transaction he or she must be fully informed by the solicitor of the transaction and of all the implications for the client of entering into it. In short the client must be made aware of every circumstance relevant to his or decision.

[75] The case involved a conflict between a lawyer's personal interests and the lawyer's professional duty to their client. Richardson J did not comment upon whether or when independent legal advice was necessary for informed consent. It was clear

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54 Dal Pont, above n 46 (footnote omitted).

55 *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 (CA) at 544.

on the facts that an informed decision had not been made by the client in entering into the transaction from which the solicitor stood to gain personally, because the solicitor had made no attempt to disclose the risks associated with the transaction.

[76] Hardie Boys and Thorp JJ agreed with the judgment of Richardson J with Hardie Boys J commenting on why independent legal advice might be necessary as follows:[56]

> It may be very difficult indeed for the solicitor to avoid such a conflict without requiring the client to take independent advice. For the client is entitled to disinterested advice, including full disclosure of what is involved and what the consequences may be. A solicitor who is himself to benefit financially from the transaction may be hard put to show that he himself has been able to give advice of that kind …

[77] *Witten-Hannah v Davis* was also a case where the lawyer's professional obligations were in conflict with his personal interests.[57] In the circumstances of that case this Court considered that independent advice was necessary for there to be informed consent to the transaction entered into. The facts involved a lawyer who had been in a personal relationship with his client for several years. The client became pregnant with twins. By the time the twins were born, the lawyer was in another relationship. The client was anxious to purchase a house and sought assistance from the lawyer. The client put complete trust in the lawyer who made no attempt to ensure she had impartial professional advice. An arrangement was entered into that was an "extraordinarily uneven one" in the lawyer's favour.[58] As Richardson J explained:[59]

> In terms of the solicitor client relationship it was his duty to ensure that the respondent's interests were paramount. To avoid any conflict of loyalties in a situation where he would or could be personally financially engaged, it was his duty to ensure that she was fully and properly advised and agreed. It is accepted by the [lawyer] that in the circumstances [the client] should have been independently advised. It is common ground that he breached his fiduciary duties in that respect.

[78] Another "paradigm" case of a potential conflict between a lawyer's own interests and their professional duties to their client is where there is a significant risk

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56 At 546. See also to similar effect *Maguire v Makaronis* (1997) 188 CLR 449 at 466–467.

57 *Witten-Hannah v Davis*, above n 40.

58 At 146.

59 At 147. See also the reasons of McKay J at 154. Casey J agreed with the judgments of Richardson and McKay JJ.

that the lawyer has been negligent in earlier advice on a matter on which the lawyer continues to advise the client.[60] In this kind of case it is likely to be very difficult for the lawyer to make full disclosure of the material information relating to the conflict of interest because the lawyer is unlikely to be able to do so impartially. Mr Cox correctly identified this as the issue in his exchanges with Mr Horton on 10 and 11 February 2016.[61]

[79] Rule 5.11 of the LCCC Rules reflects the inability of the lawyer to make full disclosure for the purposes of informed consent in this kind of case. The professional standards require that, in a case where a lawyer becomes aware that a client may have a claim against them, the lawyer must not only advise the client to seek independent advice, but also advise that they cannot continue to act unless, after receiving independent advice, the client gives informed consent. Rule 1.2 defines "informed consent" consistently with the long-established legal position as follows:

> … consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved[.]

[80] We agree with Cooke J in the High Court that when the 29 February 2016 agreement was entered into Gibson Sheat was looking to obtain a personal advantage from their client (a settlement of any claim against them so they could resume acting) and so they continued to owe a fiduciary duty in respect of the advice they had given. While Gibson Sheat had ceased to act in the litigation in which their advice was in issue, that did not necessarily mean the trust and confidence relationship between Mr Lepionka and Mr Wallace was at an end. LCIL had substantial unpaid invoices in respect of that advice. Mr Wallace was also looking to be instructed to resume acting for LCIL at least on the commercial and conveyancing matters relating to the subdivision and on the AFI litigation. This work was not entirely divorced from LCIL's litigation risks as the exchange between Mr Lepionka and Mr Wallace on 1 and 2 March 2016 on strategy illustrated.

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60 *Cutlers Holdings Ltd v Shepherd and Wedderburn LLP* [2023] EWHC 720 (Ch) at [252]. In that case the lawyers continued to act in litigation despite being on notice that there was a significant risk that their earlier advice was wrong without informing their client of the possibility of a conflict of interest and that it should seek independent advice: see at [291].

61 See above at [30(f)].

[81] It was therefore necessary that LCIL was fully informed in respect of the matter that had given rise to the conflict and that was to be settled. In this case the material information was the risk that Mr Wallace's advice in March 2015 on the strategy that Mr Lepionka (through LCIL) adopted was wrong, and that it would therefore lose the case against Mr Coltart and the cases brought by GLW and AFI because of this, and suffer losses as a result. While Mr Wallace continued to give advice about those risks which was not impartial, Mr Lepionka had in fact received independent advice about those risks from Mr Greenwood and Mr Smith, both highly experienced, respected and senior lawyers. Mr Lepionka was very alive to this risk.[62] And with knowledge of that advice Mr Horton was insisting that the Lepionka entities were giving their informed consent to Gibson Sheat continuing to act for them.[63]

[82] Mr Lepionka had also instructed Bell Gully on the litigation in which their advice was in issue. The advice from Mr Colson in relation to the issue with Mr Coltart was that the Court of Appeal was (around 70 per cent) likely to find in LCIL's favour. Mr Lepionka was also closely advised by Mr Horton, an experienced commercial solicitor on whom Mr Lepionka heavily relied. Mr Horton, who was aware of the independent advice from Mr Greenwood and Mr Smith as well as Mr Colson's assessment of the Coltart matter, supported negotiating a deal with Gibson Sheat in full and final settlement if the "right fee deal" was struck. There was also the prospect that negotiations with Mr Coltart and others might resolve matters (as eventually happened).

[83] This meant that Mr Lepionka, who we would describe based on the communications we have reviewed as an intelligent and sophisticated commercial operator, had knowledge of the matters that were material to the decision to negotiate that deal. We agree with Cooke J that it was not necessary that Mr Lepionka (or Mr Horton) be aware of the damages that might be recoverable if Mr Wallace's advice was found to be negligent and to have caused LCIL loss. When the strategy based on that advice was embarked upon, LCIL's deposits were already at risk. Gibson Sheat did not initially raise the potential conflict because in discussion with Mr Smith it did not appear that there would be any loss if the advice was negligent. In the AFI/GLW

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62 See above at [20], [34] and (subsequently) [43].
63 See above at [30].

litigation, the High Court concluded that it was unclear if any loss had occurred. If an assessment of the likely damages in the event that Mr Wallace's advice was found to be negligent was thought by Mr Horton to be material to whether they did a deal with Gibson Sheat settling the claim in exchange for a reduction in fees, he was aware that he could have sought advice about this (from Bell Gully for example). Instead, the decision was made to take advantage of Gibson Sheat's concerns about their risk to negotiate a favourable fee deal.

[84] We conclude that LCIL was fully informed of all material information in relation to Gibson Sheat's conflict of interest when the 29 February 2016 agreement was negotiated. This distinguishes the case from *Naro Investments Pty Ltd v Benjamin & Khoury Pty Ltd* relied on by LCIL here.[64] In this case, Gibson Sheat had made it clear that LCIL should obtain legal advice. LCIL had earlier obtained independent advice from Mr Greenwood and Mr Smith and so understood the risk that Mr Wallace's advice was wrong and could give rise to loss. Because LCIL was fully informed, the agreement was not entered into in breach of Gibson Sheat's fiduciary obligations to Mr Lepionka and LCIL.[65] It was not unenforceable on this basis.

Was a formal written agreement required?

[85] In *Fletcher Challenge Energy Ltd* this Court held the pre-requisites to a legally binding agreement were:[66]

> (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
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> (b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which:
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> (i) was legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain.

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64 *Naro Investments Pty Ltd v Benjamin & Khoury Pty Ltd* [2021] NSWSC 262.

65 For completeness we also note the agreement was not entered into in breach of Gibson Sheat's professional obligations under rr 5.11 and 5.12 of the LCCC Rules for the same reason.

66 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 32, at [53].

> A term is to be regarded by the parties as essential if one party maintains the position that there must be agreement upon it and manifests accordingly to the other party.

[86] LCIL submits the agreement reached on 29 February 2016 was not legally binding because it was a legally essential term that it receive independent legal advice. It follows from our conclusion above that LCIL had received independent legal advice on the information material to its decision to enter the agreement. This submission must therefore fail. As Cooke J found, the later attempt to include the acknowledgement of independent legal advice more properly was the background against which the agreement was reached and, if it was to be included in the formal written agreement, more correctly would be included in the recitals.[67]

[87] Lastly, LCIL submits the parties did not intend to be bound until a formal agreement was entered into. It is the case that Mr Lepionka and Mr Wallace agreed that a written agreement would be prepared. It does not follow that that the agreement was not legally effective unless and until the written agreement was signed. As Gibson Sheat submits, this was not a complex settlement. It is not unusual for litigation claims to be settled by an exchange of correspondence and for a written agreement then to be executed so that there is a formal record of the agreement. Here the terms of the agreement were set in the exchanges of correspondence. In the last of these, Mr Wallace referred to a simple deed "recording" this.[68] He did not say the agreement was subject to this occurring.

[88] Here the record of the agreement, as set out in the draft written agreement did not contain any additional terms to that agreed. The addition of Mr Lepionka was immaterial and the acknowledgement of independent legal advice was just that. The inclusion in the draft of matters that were not actually discussed when the agreement was reached on 29 February 2016 does not mean that the parties were still to agree essential terms. Importantly, both parties conducted themselves as though they had reached agreement on the essential terms and intended to be legally bound by them. It was clear to both parties that Mr Wallace could only get "back on the tools" if they had settled the claim. He was instructed by Mr Lepionka immediately following the

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67 Judgment under appeal, above n 1, at [45(b)].
68 At [42] above.

deal they had struck. The work Gibson Sheat carried out for Mr Lepionka reflected the new charge out rates and Mr Lepionka received and retained the fee credit.

[89] We conclude that the parties intended to be legally bound when they reached their agreement on 29 February 2016 and they had agreed to the terms they regarded to be essential.

Result

[90] The appeal is dismissed.

[91] The appellant is to pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

Solicitors:
Luke Cunningham Clere, Wellington for Appellant
Hesketh Henry, Auckland for Respondent