

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA146/2023
[2023] NZCA 285**

BETWEEN	GOLDLINE PROPERTIES LIMITED Appellant
AND	MAREE DAWN MARSH Respondent

Hearing: 10 May 2023
Court: Mallon, Moore and Fitzgerald JJ
Counsel: D R Bigio KC and H P Short for Appellant
T D Rea for Respondent
Judgment: 7 July 2023 at 4 pm

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B Caveats 126191304.1, 12619253.1, 12619312.1 and 12619325.1 are deemed to have lapsed.**
- C Ms Marsh must pay Goldline’s costs for a standard appeal on a band A basis and usual disbursements.**
- D If an order for costs in the High Court was made in Ms Marsh’s favour, it is quashed and is to be reconsidered by that Court in light of this judgment.**
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REASONS OF THE COURT

(Given by Fitzgerald J)

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Introduction

[1] This appeal concerns the circumstances in which a vendor may cancel a contract to sell property when the real estate agent acting for the vendor is to acquire an interest in the property.

[2] Cancellation in these circumstances is governed by s 134 of the Real Estate Agents Act 2008 (the Act). The full text of s 134 is set out at [8] below. In broad terms, however, s 134(1) prohibits a real estate agent, without the consent of their client, from acquiring the land or business that the agent is commissioned to sell. Similarly, s 134(2) prohibits a real estate agent from carrying out or continuing to carry out any agency work in respect of a transaction if he or she knows that the transaction will result in a person related to the agent acquiring the land or business to which the transaction relates. Section 134(3) sets out certain steps to be taken by the agent before a client's consent for the purposes of s 134(1) will be effective. Section 134(4) provides that the client may cancel any contract "made" in contravention of subs (1) or "brought about" in contravention of subs (2). It is this last provision that is in issue in this case.

[3] By way of background, Goldline Properties Ltd (Goldline) agreed to sell four vacant lots to Ms Maree Marsh, by way of four separate contracts (the Contracts). Goldline's real estate agent acting on the transaction was Mr Ian Croft, the director of One Agency Counties Realty Ltd (Counties Realty). At the time Goldline and Ms Marsh entered into the Contracts, neither Counties Realty nor Mr Croft had acquired any interest in the properties. However, prior to settlement of the Contracts, Mr Croft entered into a joint venture agreement with Ms Marsh by which he would

acquire a 30 per cent interest in the properties at settlement.¹ There is a dispute about whether Mr Croft told Goldline of his arrangements with Ms Marsh, however there is no dispute that the requirements of s 134(3) were not met.

[4] Upon becoming aware of Mr Croft's joint venture with Ms Marsh, Goldline purported to cancel the Contracts pursuant to s 134(4) of the Act. Ms Marsh responded by lodging a caveat over each of the properties on the basis of her equitable interest as purchaser. Ms Marsh's ability to sustain her caveats turns on whether Goldline's cancellation of the Contracts was valid.

[5] In the High Court, Associate Judge Lester held that the right under s 134(4) of the Act to cancel a contract "made" in contravention of s 134(1) or "brought about" in contravention of s 134(2) does not arise when the agent acquires an interest in the property *after* the contract is entered into.² Noting that in such circumstances the client would still have a claim against the agent for breach of fiduciary duty, the Judge did not see any need to take what he considered to be an overly broad approach to the interpretation of s 134(4). He accordingly held that it was reasonably arguable that Goldline's cancellation of the Contracts was invalid and granted Ms Marsh's application to sustain the caveats.

[6] Goldline now appeals against the Judge's decision. The parties agree that the sole issue for determination is whether the High Court was correct in finding that a contract is "made" or "brought about" for the purposes of s 134(4) only when the contract is entered into.³

[7] Before going any further and in order to put what follows in context, it is helpful to first set out the text of the statutory provisions in issue, namely ss 134 and 135 of the Act.

¹ The joint venture agreement was amended at a later date to be between Ms Marsh and One Property & Co Ltd, another company associated with Mr Croft.

² *Marsh v Goldline Properties Ltd* [2023] NZHC 281, (2023) 23 NZCPR 893 [High Court judgment].

³ Agreed List of Issues dated 4 May 2023.

[8] Section 134 of the Act relevantly provides:

Contracts for acquisition by licensee or related person may be cancelled

- (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (3) The client's consent is effective only if—
 - (a) given in the prescribed form; and
 - (b) the client is provided with a valuation in accordance with section 135.
- (4) The client may cancel any contract—
 - (a) made in contravention of subsection (1); or
 - (b) brought about by agency work carried out in contravention of subsection (2).
- (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.

...

[9] Section 135 provides:

Client to be provided with valuation

- (1) For the purposes of section 134(3), the licensee must give the client a valuation made at the licensee's expense.
- (2) The valuation must have been made by—
 - (a) an independent registered valuer; or
 - (b) in the case of a business, by an independent qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013).
- (3) The licensee must give the client the valuation either—

- (a) before seeking the consent of the client; or
 - (b) with the agreement of the client, within 14 days after obtaining that consent.
- (4) Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.
- (5) Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—
- (a) the client gives his or her consent in accordance with subsection (3)(b); and
 - (b) the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.

Factual background

[10] The key factual background was summarised in the Judge’s decision, which we gratefully adopt:⁴

[2] Goldline had engaged a real estate agency called “Counties Realty Limited”, of which a Mr Ian Croft was the director and licensee. Ms Marsh intended to relocate houses on to the lots and on-sell the lots for a profit. However, within a relatively short period of time after entering into the contracts, Ms Marsh realised she would not be able to organise the finance to complete the project.

[3] Ms Marsh explains in her affidavit that she had known Mr Croft for a number of years. Mr Croft had previously acted as Ms Marsh’s real estate agent on the sale of properties and she had previously purchased properties where Mr Croft had acted for the vendor. Ms Marsh explains she knew Mr Croft also had experience in property development. At the time Ms Marsh entered into the four contracts, she said she expected Mr Croft would have some involvement in her planned property development but only to the extent that he would advise her as a consultant on developing the properties and that he may well act for her when she came to re-sell the properties. If that was the case, Mr Croft would be paid by way of commission in the usual way.

[4] However, when Ms Marsh realised she was unable to arrange sufficient finance for the project, she contacted Mr Croft some weeks after the contracts were signed. From that contact, a joint venture agreement between them was entered, recorded in a one page document dated 29 July 2020.

[5] Ms Marsh is adamant that at the time of her purchase, there was no intention that Mr Croft or his company would have any legal or beneficial interest in the properties. She maintains that there had been no discussion *prior* to the contracts with Mr Croft about him being involved in the purchase.

⁴ High Court judgment, above n 2.

[6] I note here that the joint venture agreement, in its original form, is between Ms Marsh and Mr Croft, but that was later amended to refer to Mr Croft's company, One Property & Co Ltd. The amendment seems to have been initialled. Mr Croft's company was not incorporated until 30 March 2021. Neither counsel saw the amendment as being material to the present application.

[7] The issue of titles to the land took some time which resulted in settlement not being due in respect of the four properties until November 2022. Ms Marsh's solicitor called for settlement statements and repeated that call shortly after, but then received from Goldline's conveyancer, a notice purporting to cancel the four contracts for breach of s 134 of the Real Estate Agents Act 2008 (**the Act**). Ms Marsh had caveated the four titles and on 13 December 2022 Goldline applied to lapse the caveats. Ms Marsh's application to sustain the caveats was heard on 14 February 2023.

[8] While Ms Marsh purchased four properties, it seems the application to lapse the caveats only applied to the caveats over three of the properties. From an abundance of caution, the application to sustain the caveats was made in respect of all four properties. Neither counsel suggested that different results would apply to individual properties, with the issue for determination being a general one applying to all four properties.

[11] To the above summary, we would add the following.

[12] First, at the time the Contracts were entered into, each contract was subject to a number of conditions and did not become unconditional until after the joint venture agreement was entered into.

[13] Second, there is a factual dispute as to whether Mr Croft told Goldline's director, Mr Cooper, about the joint venture between himself and Ms Marsh prior to settlement. Mr Croft says in his affidavit that he made "full disclosure" to Mr Cooper about his intended involvement in the transaction, and that Mr Cooper encouraged that state of affairs. In his affidavit, Mr Cooper says that given his understanding that whether Mr Croft orally disclosed his interest in the properties to him cannot be determined in these proceedings, he has "not gone into detail in relation to that issue". Instead, he simply confirms that consent was not given in the prescribed form required by s 134(3) of the Act. As noted, that is not in dispute.

[14] Third, following the execution of the Contracts and Ms Marsh and Mr Croft entering into their joint venture agreement, Goldline and Ms Marsh agreed to several

variations to the Contracts (on 30 September 2020, 19 October 2020, and 24 September 2021 respectively). The variations included:

- (a) a deletion of the sunset clause in two of the Contracts;
- (b) an extension of the sunset clause in the other two Contracts;
- (c) a reduction of the purchase price in three of the Contracts (reflecting Goldline being relieved of its obligation to provide telephone and power services to the properties); and
- (d) the imposition of further obligations on Goldline to carry out and complete the subdivision and development of the properties.

[15] It is not in dispute that Mr Croft continued to act as Goldline's real estate agent throughout this period, and indeed some of the variation agreements are on Counties Realty's letterhead.

[16] Finally, Ms Marsh says that following entry into the Contracts and with Goldline's agreement, she made a number of improvements to the properties, including relocating houses onto two of the properties, carrying out fencing work at all of the properties, and some landscaping works. Ms Marsh estimates the value of the improvements to be approximately \$500,000. Mr Cooper does not dispute that Ms Marsh has undertaken work on the properties, but disputes that it will have improved their value by \$500,000, if at all. At the hearing in this Court, Mr Bigio KC, counsel for Goldline, confirmed that if Goldline's cancellation of the Contracts were held to be valid, there would need to be appropriate restitution from Goldline to Ms Marsh in respect of any improvements made by her to the properties.

The High Court decision

[17] Having set out the factual background and the relevant statutory provisions, the Judge first addressed what s 134 does *not* seek to achieve. With reference to this Court's decision in *Barfoot & Thompson Ltd v Real Estate Agents Authority*, the Judge noted that ss 134–137 of the Act are not a substitute for a real estate agent complying

with their fiduciary obligations to their vendor.⁵ The Judge noted that if s 134(4) applies, a vendor's right to cancel is not qualified, and is unaffected by whether an agent nevertheless made full disclosure to their principal if that does not satisfy s 134(3).⁶ Conversely, the Judge noted that conduct that does not involve a contravention of s 134 may nevertheless involve an agent breaching their fiduciary duty, which may give rise to a remedy of cancellation. In that context, the Judge said that the fact s 134 is not the only remedy available to a vendor when their agent has failed to disclose their involvement in the transaction is relevant to how s 134 should be interpreted.⁷

[18] The Judge then turned to the proper interpretation of s 134, noting that subs (4) entitles the client to cancel a contract if it was "made" in contravention of subs (1), or "brought about" by agency work carried out in contravention of subs (2). Having set out the competing approaches to s 134(4)'s interpretation, the Judge concluded that s 134(4)(a) did not provide a right of cancellation to Goldline, reasoning that:⁸

... "made" in s 134(4)(a) requires Mr Croft's involvement to be assessed at the time when the contracts were entered. If Mr Croft had an interest in the land at that time, s 134(4)(a) would apply. If he did not, then cancellation under s 134(4)(a) was not available.

[19] The Judge did not consider that the joint venture agreement retrospectively meant the Contracts were "made" in contravention of s 134(1).⁹ He noted that whether the fact Mr Croft entered into the joint venture agreement amounted to a breach of fiduciary duty was an entirely separate matter on which he did not express a view.¹⁰

[20] The Judge reached a similar conclusion in relation to the right of cancellation under s 134(4)(b) of the Act. He held that s 134(4)(b)'s reference to a contract being "brought about" in contravention of s 134(2) was limited to a contravention that "led to that contract being made".¹¹ The Judge concluded that s 134(4)(b) could not be

⁵ At [13] citing *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2016] NZCA 105, [2016] NZAR 648 at [42]–[48].

⁶ High Court judgment, above n 2, at [13].

⁷ At [16].

⁸ At [25].

⁹ At [27].

¹⁰ At [27].

¹¹ At [38].

read as applying to a contract that was not in breach of s 134(2) when it was entered into, but where an agent acquired an interest in the land only *after* the contract was executed.¹² In support of that view, the Judge referred to observations of Eichelbaum J (as he then was) in *Were Real Estate Ltd v Keenan*, a case concerning s 134's predecessor under the Real Estate Agents Act 1976 (the 1976 Act).¹³ Eichelbaum J said:¹⁴

The mischief under consideration in ss 63 and 64, and the intent of the legislation, are I think clear enough. Real estate agents who seek to purchase property on their own account are to be prevented, as far as possible, from taking advantage (innocently or otherwise) of their own clients.

[21] The Judge reasoned on this basis that the risks inherent in real estate agents purchasing from their clients do not arise if the agent only acquires an interest in the property concerned after the contract is entered into, given the price and terms struck in the contract will have been negotiated and agreed on an arm's length basis by the vendor and original purchaser.

[22] The Judge also referred to Miller J's observations in *Maclennan Realty Ltd v Court*, in which Miller J said:¹⁵

It will be a rare case in which the acquisition of an interest on completion of the very transaction in respect of which the agent is taking a commission does not reflect a conflict of interest that existed at the time the contract was executed.

[23] Associate Judge Lester stated:¹⁶

[41] If Ms Marsh is correct, then at the time the contracts were brought about by Mr Croft, there was no prospect of him having an interest in the land at that time. If that is the case, then this may be one of the rare cases noted by Miller J.

¹² At [38].

¹³ At [39] referring to *Were Real Estate Ltd v Keenan* [1984] 2 NZLR 650 (HC).

¹⁴ *Were Real Estate Ltd v Keenan*, above n 13, at 652.

¹⁵ High Court judgment, above n 2, at [40] referring to *Maclennan Realty Ltd v Court* (2004) 5 NZCPR 256 (HC) at [25]. We discuss this decision later in this judgment at [51]–[55] below.

¹⁶ High Court judgment, above n 2.

[24] The Judge also considered his approach to be consistent with s 134(1) and (2) of the Act, which both prohibit an agent’s involvement in a “transaction”, and the narrower language employed in s 134(4) which permits cancellation of a “contract”.¹⁷

[25] Finally, the Judge acknowledged that the variations to the Contracts may well have been “brought about” by agency work carried out by Mr Croft in contravention of s 134(2). However, the Judge observed that to the extent the variations involved a breach of fiduciary duty by Mr Croft, Goldline retained its legal rights in relation to his involvement in them.¹⁸ The Judge also rejected Goldline’s submission that his interpretation of s 134(4) would leave a loophole with illogical results — for example, the inability of a vendor to cancel an agreement where a property was initially sold on favourable terms, the purchaser then deciding it was going to exit the agreement, the agent stepping in to obtain a hidden beneficial interest in the property, and the agent then persuading the vendor to further vary the agreement to the benefit of the “purchaser”.¹⁹ The Judge said that the suggested “loophole” was based on an incorrect assumption that the vendor’s only source of relief was under s 134 of the Act.

Submissions on the appeal

Appellant’s submissions

[26] Mr Bigio submits that the Judge took an unduly narrow approach to the interpretation of s 134(4), which is inconsistent with both the purpose and overall framework of the statutory provision, as well as earlier authorities concerning s 63 of the 1976 Act (the predecessor of s 134).

[27] Mr Bigio first emphasises what he describes as an intended “alignment” between s 134(1) and (2) on the one hand and s 134(4)(a) and (b) on the other. Mr Bigio notes that s 134(1) and (2) place an absolute prohibition on agents (or related persons) from “acquiring” an interest in the land or business the agent is commissioned to sell, being in the nature of strict liability. He submits that Parliament’s choice of the word “acquire” in both s 134(1) and (2) indicates a focus on the *outcome* of the

¹⁷ At [44].

¹⁸ At [46].

¹⁹ At [47]–[49].

transaction, not on the position that existed at the time the contract was entered into. This point was accepted by Miller J in *MacLennan Realty Ltd v Court*.²⁰ Mr Bigio submits that consistent with this approach to what will amount to a contravention of s 134(1) and (2), the right of cancellation under s 134(4)(a) and (b) must have been intended to respond to *all* contraventions of s 134(1) and (2), not only those where the agent acquired an interest in the land or business from the outset.

[28] Mr Bigio further submits that a broad interpretation of s 134(4) is also supported by Parliament's use of the words "carrying out or continuing to carry out" agency work in s 134(2). He argues that there would be no logical reason why Parliament would prohibit an agent from "continuing" to carry out real estate agent work if the client's corresponding right to cancel "disappeared" on the signing of the contract. Mr Bigio says that the narrow interpretation adopted by the Judge also draws an artificial distinction between the words "contract" and "transaction".

[29] Mr Bigio submits that the Judge's approach to the interpretation of s 134(4) is also inconsistent with its statutory purpose as set out in s 3(1) of the Act, namely consumer protection. He argues that it would be inconsistent with that purpose if the summary right of cancellation under s 134(4) arose in response to some contraventions of s 134(1) and/or (2) but not others. Mr Bigio gave a number of examples that he submits, on the Judge's interpretation, would fall outside the scope of s 134(4). These include:

- (a) a real estate agent forming the intention to acquire a legal or beneficial interest in the relevant land prior to the contract being signed, but only becoming interested in the land after the contract was entered into;
- (b) an agent acquiring an interest in the land the day after the contract was entered into; and
- (c) an agent acquiring an undisclosed interest in the land after the contract was entered into, but then continuing to carry out real estate agency

²⁰ *MacLennan Realty Ltd v Court*, above n 15.

work to substantively vary the contract — the scenario said to exist in the present case.

[30] Mr Bigio submits that in all these examples the risk of the agent taking advantage of their client is obvious, despite the agent not becoming interested in the purchase until after the contract was entered into.

[31] Mr Bigio also places some reliance on the reference to “nominee” in s 134(1), given a named purchaser to a sale and purchase agreement will only nominate another party as “nominee” purchaser at some point *after* the contract has been entered into. Mr Bigio therefore says that s 134 envisages an agent, through a nominee, acquiring an interest in the property concerned after the contract was entered into, and there being no logical reason why this scenario ought not to trigger the s 134(4) cancellation right.

[32] Finally, Mr Bigio submits that Goldline’s approach to the interpretation of s 134 is consistent with case law on the interpretation of s 63(3) of the 1976 Act. Section 63 provided:

63 Purchase or lease by agent voidable

- (1) No real estate agent shall, without the consent on the prescribed form of his or her principal, directly or indirectly and whether by himself or herself or by any partner or sub-agent,—
 - (a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which he or she is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or
 - (b) Sell or lease to his or her spouse, civil union partner, de facto partner, or child any such land or business.
- (2) No partner or employee of a real estate agent and no officer of a company that is a real estate agent shall, without the consent on the prescribed form of the principal of the real estate agent, directly or indirectly,—
 - (a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which the real estate agent of whom he or she is a partner or by whom he or she is employed, or of

which he or she is an officer, is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or

- (b) Sell or lease to his or her spouse, civil union partner, de facto partner, or child any such land or business.
- (3) Any *contract made* in contravention of this section shall be voidable at the option of the principal. No commission shall be payable in respect of any such contract, whether the principal has avoided it or not; and any commission paid in respect of the contract shall be repayable by the real estate agent to his or her principal and shall be recoverable by the principal as a debt.

(Emphasis added)

[33] Noting that the language of s 63(3) is very similar to s 134(4), Mr Bigio refers to Eichelbaum J's observation in *Were*, that "[u]nless certain prerequisites are fulfilled such a *transaction* is voidable at the option of the vendor ...".²¹ Mr Bigio also referred us to Miller J's decision in *Maclennan*,²² and to this Court's decisions in *Gathergood v Blundell & Brown Ltd*²³ and *Gu v Du*,²⁴ submitting that each is consistent with the interpretation of s 134 advocated for by Goldline.

Respondent's submissions

[34] Mr Rea, counsel for Ms Marsh, supports the Judge's reasoning and conclusion on the interpretation of s 134(4). In particular, he submits that the text and purpose of the statutory provision support the Judge's approach.

[35] Turning first to the text of s 134(4), Mr Rea says that the plain and ordinary meaning of a contract "made in" or "brought about by" a contravention of s 134(1) or (2) relates only to the point at which the contract was entered into. If the agent's interest in the property arises *after* the contract was entered into, then that contract will not have been "made" or "brought about" in contravention of the statutory provisions.

[36] Turning to s 134's purpose of consumer protection, Mr Rea submits that Ms Marsh is also a consumer of real estate agency services, and therefore purchasers' interests must also be reflected in s 134(4)'s interpretation. To support this submission,

²¹ *Were Real Estate Ltd v Keenan*, above n 13, at 652 (emphasis added).

²² *Maclennan Realty Ltd v Court*, above n 15.

²³ *Gathergood v Blundell & Brown Ltd* [1991] 1 NZLR 405 (CA).

²⁴ *Gu v Du* [2011] NZCA 577.

Mr Rea refers to a number of provisions of the Act which are for the benefit of both vendors and purchasers. He emphasises Ms Marsh's evidence that there was no intention at the outset of the transactions that Mr Croft would acquire an interest in the properties, such that the Contracts were freely negotiated between her and Goldline on an arm's length basis. Mr Rea argues that if Goldline is permitted to cancel the Contracts in those circumstances, Ms Marsh, as an "innocent purchaser" would be unfairly prejudiced, particularly when Mr Croft has arguably failed her and was at the time acting as an agent of Goldline. Conversely, if the s 134(4) cancellation right does not extend to the current circumstances, Ms Marsh's position is preserved, and Goldline also remains fully protected given its ability to bring a claim against Mr Croft for breach of fiduciary duty. In this way, Mr Rea submits that limiting the absolute right of cancellation provided by s 134(4) to contraventions of s 134(1) and/or (2) that existed at the time the contract was entered into strikes the appropriate balance between the interests of vendors and innocent purchasers.

[37] Mr Rea also refers to the standard form consent notice which, pursuant to s 134(3) of the Act, must be used by an agent when seeking his or her client's consent to the agent acquiring an interest in the property. Mr Rea relies in particular on the following extract from the form:²⁵

The licensee must give you this form **before** you agree to grant, sell, or otherwise dispose of your land or business, or an interest in your land or business, to the licensee or related person. If the licensee gives you this form **after** that, do not sign it.

[38] Mr Rea says this is consistent with the Judge's interpretation of s 134(4), in that the form only reflects the scenario in which an agent, or a related person of the agent, acquires an interest in the property at the time the contract is entered into.

[39] Mr Rea further submits that the obligations in ss 134(3) and 135 of the Act for the agent to provide his or her client with a registered valuation is also consistent with the Judge's interpretation. Mr Rea says that it is logical that a valuation is provided *before* the client enters into the relevant contract so the client is able to consider whether they are being disadvantaged by agreeing to enter into a contract that will

²⁵ Real Estate Agents (Duties of Licensees) Regulations 2009, Form 2 of the Schedule (emphasis in original).

result in their agent, or a person related to the agent, acquiring an interest in the property. Mr Rea submits that it makes sense that a contract in those circumstances should be able to be cancelled where the agent fails to comply with s 134. Mr Rea argues that conversely, it does not make sense for a vendor to be able to cancel a contract where the failure to give a valuation arises at a later stage, when the market may have shifted since the contract was entered into, and despite the client having agreed to sell at a price determined by an arm's length negotiation.

[40] Mr Rea also says that s 134(2) supports the interpretation adopted by the Judge. Mr Rea says that this section also focuses on the agent's state of knowledge *before* the contract was entered into. He submits that the prohibition in s 134(2) of an agent "continuing to carry out" real estate agency work is most important before a contract has been executed.

[41] Finally, Mr Rea says that the authorities relied on by Goldline do not add materially to the analysis and, if anything, they support the approach adopted by the Judge given their focus on the circumstances existing at the time the relevant contracts were entered into. Mr Rea accepts that a right of cancellation would have arisen if, at the time Goldline entered into the Contracts with Ms Marsh, Mr Croft intended or knew that he would later enter into an arrangement by which he would acquire an interest in the properties at settlement, being an "indirect" acquisition in contravention of s 134(1).²⁶ Mr Rea says that this addresses the first two examples given by Mr Bigio and set out at [29] above. In relation to the third example, Mr Rea reiterates that the vendor retains its right to claim against the agent for breach of fiduciary duty.

Analysis

[42] Before turning to our discussion of s 134(4), it is helpful to first address the authorities to which we have been referred, and whether they shed any light on the interpretation issue arising for determination.

²⁶ *Christie v Harcourt & Co* [1973] 2 NZLR 139 (SC) at 142; a decision under s 78 of the Real Estate Agents Act 1963. See [46]–[47] below.

[43] The earliest decision is that of the (then) Supreme Court in 1973 in *Christie v Harcourt & Co.*²⁷ In that case, the appellant had commissioned Mr Reeves to sell a property on his behalf. Mr Reeves arranged for Mr Hellyer to purchase the property from the appellant. Mr Reeves was aware at the time Mr Hellyer's offer was made and accepted by the appellant that Mr Reeve's daughter was engaged to marry Mr Hellyer within a few months' time.

[44] After the contract between the appellant and Mr Hellyer had been entered into, Ms Reeves agreed to contribute to the purchase price and, on her solicitor's advice, was added to the contract as a named purchaser. It appears the appellant was unhappy about the relationship but elected to complete the transaction. On settlement, however, he sought a refund of the commission on the sale pursuant to s 78(3) of the Real Estate Agents Act 1963 (the 1963 Act). That relevantly provided:²⁸

- (3) Any contract *made in* contravention of the provisions of this section shall be voidable at the option of the principal. No commission shall be payable in respect of any such contract, whether the principal has avoided it or not; and any commission paid in respect thereof shall be repayable by the real estate agent to his principal and be recoverable by the principal as a debt.

(Emphasis added)

[45] Section 78(1)(b) of the 1963 Act prohibited a real estate agent from "directly or indirectly" selling a property they were commissioned to sell to their spouse or child.

[46] The issue for determination in *Christie* was whether Mr Reeves had contravened s 78(1)(b) by "indirectly" selling the property to his daughter. White J framed the key factual issue as being "[w]hat were the circumstances at the time the offer was signed by Mr Hellyer?".²⁹ The Judge found that Mr Reeves was aware before any offer was signed that Mr Hellyer was likely to marry his daughter, and that his daughter had a "fiancee's interest" in the purchase of the property as a matrimonial

²⁷ Above.

²⁸ The judgment considered the version of s 78 as amended by s 26 of the Real Estate Agents Amendment Act 1968 which is reproduced here.

²⁹ At 142.

home.³⁰ In those circumstances, the Judge concluded that there was a contravention of s 78(1) of the 1963 Act and that commission was not payable as a result.

[47] It will be apparent that *Christie* does not directly address the interpretation issue arising in this case. We accept Mr Rea's submission that White J's focus was on the circumstances existing at the time the contract was entered into — at least when determining whether there had been a contravention of s 78(1). As we shall come to later, this is a different approach to that taken more recently by Miller J in *Maclennan*.³¹ For present purposes, however, *Christie* does not suggest that events that occurred after the relevant contract was entered could *not* give rise to a contravention of the statutory provisions; nor does it address the circumstances in which the right of cancellation arises. We are not bound by that decision in any event.

[48] In *Were*, a decision under the 1976 Act, the agent, Mr Kent (employed by the appellant), was commissioned to sell a property on behalf of the respondents.³² Mr Kent and one of his colleagues decided they wanted to purchase the property themselves, and approached the respondents with the requisite standard form in order to obtain their consent, which the respondents duly provided. The issue in that case was whether Mr Kent had complied with the obligation to provide the respondents with a valuation. The decision is not relevant to the issue arising in this case.

[49] This Court briefly addressed the statutory provisions in *Gathergood*,³³ however, that decision is also not relevant for present purposes. The issue in *Gathergood* was whether the agent, who had purchased the property from the respondent, remained under a fiduciary duty to the respondent when he on-sold the property to a third party at a considerable profit. This Court held that Mr Gathergood continued to owe a fiduciary duty to the respondent and upheld the High Court's decision that required Mr Gathergood to account to the respondent for the profit from the on-sale.

³⁰ At 142.

³¹ *Maclennan Realty Ltd v Court*, above n 15. See [51]–[55] below.

³² *Were Real Estate Ltd v Keenan*, above n 13.

³³ *Gathergood v Blundell & Brown Ltd*, above n 23, at 407.

[50] This Court also considered the relevant statutory provisions in *Gu*,³⁴ but again the decision is not relevant to the interpretation issue in this case. The issue for determination in *Gu* was whether the listing agreement between the respondent's employer and the appellant remained in place at the time the appellant and respondent entered into a joint venture agreement by which the respondent was granted an option to acquire a 50 per cent interest in the property. It was not in dispute that s 63 of the 1976 Act (set out at [32] above) would have been contravened in those circumstances.

[51] The only decision of any real relevance to the present appeal is that of Miller J in *Maclennan*, in which the Judge addressed the proper interpretation of s 63 of the 1976 Act.³⁵ Mr Maclennan acted as the agent for the respondents in selling three townhouses to a couple who were his longstanding friends. He did not disclose his friendship with the purchasers to the respondents. After the contracts became unconditional but prior to settlement, the purchasers formed a family trust and appointed Mr Maclennan as one of its trustees. They then nominated the trustees as the purchasers of the townhouses. Upon becoming aware of these developments, the respondents elected to complete the sale, but challenged the appellant's right to recover his commission. Mr Maclennan's right to commission turned on whether the events, which had occurred *after* the contract had been entered into, meant s 63(2) of the 1976 Act had been contravened.

[52] The appellant submitted that in order to determine whether there was a contravention of s 63(2), the Court should look only at the factual position existing at the time the contract was entered into or, at the latest, at the time the contract became unconditional. Miller J rejected that submission, stating:

[22] I consider that the prohibition on being in any way interested in the purchase of a legal interest in the property contemplates the outcome of the transaction, in the sense that it looks forward to the identity of the person who will take the legal interest. ...

³⁴ *Gu v Du*, above n 24.

³⁵ *Maclennan Realty Ltd v Court*, above n 15.

[53] Miller J considered this approach to be consistent with the policy of the section, stating:

[25] Undisclosed conflicts pose a significant risk to the client. It is appropriate that the agent, who is best placed to identify and avoid conflicts, should take the risk that s 63 will be breached unless conflicts that may lead to the agent taking an interest in the property are disclosed at the outset. It will be a rare case in which the acquisition of an interest on completion of the very transaction in which the agent is taking a commission does not reflect a conflict of interest that existed at the time the contract was executed.

[54] Miller J nevertheless accepted that the possibility of Mr Maclellan acquiring an interest in the property did not arise until *after* the contract had become unconditional.³⁶ This did not, however, absolve him from contravening s 63(2). Miller J stated that it had been open to Mr Maclellan to avoid a breach of s 63 by declining to act as a trustee, and further observed that the fact he was asked to become a trustee suggested his friendship with the original purchasers was sufficiently close to raise a conflict of interest from the outset in any event.³⁷

[55] Miller J's judgment did not focus on s 63's equivalent of s 134(4), and the proper interpretation of a contract being "made" in contravention of the statutory provision. However, it is implicit in his judgment that the respondent's right under s 63(3) to avoid the contract of sale was triggered, given s 63(3) also provided that no commission was payable in respect of any contract "made in" contravention of s 63. We nevertheless accept Mr Rea's submission that the decision in *Maclellan* did not directly consider the issue arising in this case and, even if it had, we would not have been bound by it in any event.

[56] We therefore turn to determine the proper interpretation of s 134(4) of the Act.

[57] We accept that the plain and ordinary meaning of a contract "made" in contravention of s 134(1) or "brought about" by a contravention of s 134(2) arguably supports the interpretation adopted by the Judge. However, for the following reasons, we do not consider that the overall scheme of s 134, or its purpose, limits the right of cancellation (or the prohibition on recovery of commission) to circumstances in which

³⁶ At [26].

³⁷ At [26].

a real estate agent either acquired or intended to acquire an interest in the land or business concerned at the time the contract was entered into.

[58] First, we agree with Miller J's conclusion in *Maclennan* that conduct that occurs *after* the relevant contract has been entered into can give rise to a contravention of s 134(1) or (2). There is nothing on the face of s 134(1) or (2) to limit those provisions to conflicts that exist prior to or at the time the contract is entered into. Rather, the concept of "acquiring" an interest in the land or business the agent is commissioned to sell plainly looks forward to the outcome of the transaction and the identity of the person or persons who will take a legal or beneficial interest in the land or business at settlement. Indeed, the use of the term "acquire" in s 134, rather than the term "purchase" in s 63 of the 1976 Act, arguably makes that conclusion more compelling.³⁸ The text of s 134(2) of the Act further supports this conclusion, given it also looks to the outcome of the transaction, rather than only the circumstances existing at the time the contract is entered into. There is nothing to suggest a materially different approach was intended as between s 134(1) and (2), in terms of the timing of the events giving rise to a contravention.

[59] We also agree with Miller J that this approach is consistent with the section's statutory purpose of consumer protection. The risk of a conflict of interest between a real estate agent and his or her client when the agent is to take an interest in the land or business they are commissioned to sell is no less real when the arrangements by which the agent will acquire that interest come about after the contract has been entered into. This is particularly so given the prospect of substantive variations later being made to the contract's terms and conditions, which occurred in the present case. It is also relevant that the Act's statutory purpose extends beyond consumer protection, and also includes promoting "public confidence in the performance of real estate agency work".³⁹ It would be inconsistent with this purpose if s 134(1) did not prohibit

³⁸ There is nothing in the legislative history commenting on the particular form of words adopted in s 134 compared to s 63 of the 1976 Act. The Ministry of Justice *Real Estate Agents Bill: Departmental Report Part One* (14 April 2008) at 290 simply observed that "this clause carries over, in redrafted form, section 63 of the 1976 Act. Its effect is that if a licensee (or any partner, sub-agent or nominee) wishes to purchase the land or business of a client for whom they are acting, the seller must consent to the licensee purchasing the land or business". The Justice and Electoral Committee did not comment on s 134 (then s 132) when recommending the Real Estate Agents Bill 2008 (185-2) be passed.

³⁹ Real Estate Agents Act, s 3(1).

real estate agents, without their clients' informed consent, from entering into undisclosed arrangements by which they will acquire a legal or beneficial interest in the land or business to be sold, simply because those arrangements came about after the contract was entered into.

[60] Second, in the Court below, the argument and therefore the Judge's focus was on the words of s 134(4). However, those words must be read in the context of the section as a whole and in light of its purpose.⁴⁰ The structure of s 134 is that subs (1) and (2) set out what is prohibited without consent. In other words, they set out the scope of the section. Subsection (3) sets out how consent is obtained to avoid falling within the prohibition. Subsection (4) sets one of the consequences of acting in contravention of the prohibition. Subsection (5) sets out the other consequence. Subsections (6) and (7) are ancillary provisions.

[61] The sole purpose of s 134(4), in light of the section's purpose of consumer protection, is to respond in a summary way to contraventions of s 134(1) and (2) (at the client's option), with the clear aim of deterring real estate agents from engaging in conduct that puts their interests and their client's interests in conflict. It would be an odd result if the cancellation rights arising under s 134(4), or for that matter s 135(5)'s prohibition on recovery of commission, responded to *some* contraventions of s 134(1) and (2) but not others.

[62] Section 134(1) and (2) are broadly framed and there is no doubt that Mr Croft has contravened them. He was carrying out real estate agency work in respect of the transaction (the sale of Goldline's properties to Ms Marsh). He directly or indirectly acquired an interest in the properties that were the subject of the transaction. He did not obtain the consent of Ms Marsh in the manner required by subs (3). Interpreting s 134(4) in light of its purpose and the section as a whole, "contract made in contravention of s 134(1)" must mean the contract in respect of which the real estate agent has acquired or will acquire an interest contrary to the prohibition in s 134(1). In other words, Goldline may cancel the contract (for the sale of the property to Ms Marsh under which Mr Croft will acquire an interest) because it was made in

⁴⁰ Legislation Act 2019, s 10(1).

contravention of s 134(1). The “made” in this context refers to a concluded contract that Goldline would otherwise be bound by.

[63] Third, we consider that for much of the same reasons discussed in relation to s 134(1) and (2), interpreting s 134(4) as also applying to circumstances arising after the contract is entered into is consistent with the section’s statutory purpose. While we accept Mr Rea’s submission that if the agent acquires an interest in the land or business after the contract is entered into, the contract is not necessarily “tainted” by the agent’s subsequent conduct, we agree with Miller J’s observation in *Maclennan* that it would be relatively rare that the acquisition of an interest on completion of the transaction did not reflect a conflict of interest that existed at the time the contract was executed.⁴¹

[64] Further, and in any event, and as touched on earlier in relation s 134(1) and (2) of the Act, in circumstances where the agent acquires his or her interest in the land or business after execution of the contract, the agent may continue to be engaged in real estate agent work up until the contract settles — as occurred in this case. In those circumstances the agent may be involved in or assisting with the negotiation of variations to the contract, such as changes to the sale price, settlement dates and the conditions of sale. The mischief to which the prohibitions in s 134(1) and (2) are directed is no less apparent and of concern in that scenario than when an agent acquires an interest in the land or business from the outset. We do not ascribe to Parliament an intention that a materially different and ultimately lesser remedy is available to the client in the former case. We also do not consider it instructive to look at the nature of the variations involved, which party first proposed them, or whether they were for the benefit of the agent’s client or otherwise, as Mr Rea urged us to do. The relevant point is that the contractual terms are being negotiated and altered in circumstances where the agent continues to provide real estate agency services to their client, yet at the same time has an undisclosed interest in the land or business being sold.

⁴¹ In the present case, Ms Marsh accepts that at the time she entered into the Contracts with Goldline, she expected and intended that Mr Croft would assist her, on a consultancy basis, in developing the properties, and would act as her agent on their later sale. (Mr Croft agreed with the contents of Ms Marsh’s affidavit.) It is not necessary for us to form a view on whether those circumstances gave rise to a conflict between Mr Croft and Goldline from the outset.

[65] Fourth, while we accept that if s 134(4) is interpreted in the manner adopted by the Judge, the agent's client retains the ability to bring a claim against the agent for breach of fiduciary duty, we do not see that as controlling the statutory interpretation exercise. The client's ability to claim against their agent for breach of fiduciary duty also exists when the agent's acquisition of an interest in the land or business being sold came about at the time the contract was entered into, yet Parliament nevertheless chose to confer on the client a statutory right of cancellation, as well as prohibiting the agent recovering commission on the sale. There is no logical reason why those *additional* statutory remedies should be unavailable simply because of a happenstance of timing.

[66] Fifth, we note the terms of the prescribed form for obtaining a client's consent for the purposes of s 134(3) of the Act.⁴² This was not a matter raised before the High Court and accordingly the Judge did not address it. We do not accept Mr Rea's submission that the terms of the form⁴³ support the interpretation that s 134(4) responds only to the scenario where the agent acquires an interest before or at the time an agreement for sale and purchase is entered into. That form refers to the form being given "before" the client agrees to grant, sell or otherwise dispose of their land or business, or an interest in their land or business "to the licensee or related person". In other words, it pre-supposes that the client is informed that the real estate agent is the intended grantee or purchaser or a person obtaining the interest in the land or business and has been given the form before the grant, sale or interest has occurred. If that has not occurred, and the real estate agent is asking the client to sign the form, the client is advised "not" to sign it. In this case, Mr Croft did not give the form to Goldline "before" it agreed to give Mr Croft an interest because Goldline did not know of Mr Croft's interest. The advice therefore did not apply. Goldline was entitled to cancel the contract and was relieved of paying the commission as a result.

[67] Finally, we acknowledge that "innocent purchasers" may on some occasions be adversely affected by the interpretation of s 134(4) we adopt, when the agent's client elects to cancel the contract of sale. However, as noted, Miller J in *Maclennan* was of the view that it would be a rare case where that agent's later acquisition of an interest in the land or business does not involve some form of conflict arising at the

⁴² Real Estate Agents (Duties of Licensees) Regulations, reg 5; and Form 2 of the Schedule.

⁴³ See [37] above.

outset of the transaction.⁴⁴ We agree that is the most likely scenario. In this case, although the interest was not acquired at the outset of the transaction, it nevertheless gave rise to a potential conflict when Mr Croft was involved in the three variations that were agreed after he had entered into the joint venture with Ms Marsh.⁴⁵

[68] Further, in practice the client/vendor will not always take steps to cancel the contract. Rather, an alternative outcome is that the client elects to complete the transaction but will resist the agent's claim for commission. That was the case in *Christie, Were* and *Maclennan*. The statutory directive that commission is not payable in respect of any contract made or brought about in contravention of s 134(1) or (2) of the Act has no adverse impact on the named purchaser.

[69] In a rare case where an agent's later acquisition of an interest in the land or business being sold does not also involve a conflict at the outset of the transaction, we consider that it is appropriate that the "burden" of the conflict arising, and the resulting ability of the vendor to cancel the contract, falls on an innocent purchaser rather than an innocent vendor. For the agent to be in contravention of s 134(1) or (2) of the Act in the first place, the named purchaser must have been involved in some way in the agent acquiring an interest in the land or business after the contract was entered into. The innocent purchaser is accordingly closer to and more involved in the agent's contravention than the innocent vendor. In this case, Ms Marsh was not able to complete her intended development of the properties without Mr Croft becoming involved. Further, and as Mr Bigio accepted, a cancelling client/vendor may be required to make restitution to the purchaser for any benefits conferred on the vendor by the purchaser prior to the contract's cancellation.

[70] For these reasons, we are of the view that a contract "made" in or "brought about" by a contravention of s 134(1) and (2) refers to the *outcome* of the transaction in question, and thus covers the period from entry into the contract to its completion.

⁴⁴ *Maclennan Realty Ltd v Court*, above n 15, at [25].

⁴⁵ See also n 41.

[71] On this basis, given it is not in dispute that Mr Croft would acquire a beneficial interest in the properties on settlement of the Contracts, and that the requirements of s 134(3) were not met, Goldline was entitled to cancel the Contracts.

[72] The appeal will therefore be allowed.

[73] Associate Judge Lester made an order that unless submissions on costs were filed within five working days of his judgment, Ms Marsh was entitled to costs in the High Court on a scale 2B basis, plus disbursements as fixed. We are not aware if costs submissions were filed in the timeframe directed by the Judge, or whether the Judge's costs order took effect. To the extent that it did, it will need to be set aside and costs in the High Court reviewed in accordance with this judgment.

Result

[74] The appeal is allowed.

[75] Caveats 126191304.1, 12619253.1, 12619312.1 and 12619325.1 are deemed to have lapsed.

[76] Ms Marsh must pay Goldline's costs for a standard appeal on a band A basis and usual disbursements.

[77] If an order for costs in the High Court was made in Ms Marsh's favour, it is quashed and is to be reconsidered by that Court in light of this judgment.

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