IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA355/2021
[2023] NZCA 511

BETWEEN	LUCIA RENATE PFISTERER Appellant
AND	CLAIMS RESOLUTION SERVICE LIMITED First Respondent
	GRANT SHAND BARRISTERS AND SOLICITORS Second Respondent

Hearing:	7 September 2022
Court:	Cooper P and Katz J
Counsel:	M S Smith and J A Tocher for Appellant A R B Barker KC and G P Davis for First Respondent A B Darroch and B A Mathers for Second Respondent
Judgment:	20 October 2023 at 3:00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent its reasonable solicitor-client costs in this Court, together with any reasonable disbursements incurred. The first respondent is entitled to default interest under its contract with the appellant, calculated on the basis set out at [60] of [2021] NZHC 1943.

C The appellant must pay the second respondent costs on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Katz J)

Table of Contents

Introduction

[1] Lucia Pfisterer's home in Christchurch was significantly damaged in the Canterbury earthquakes of 2010–2011. In September 2013 she settled her claim against the Earthquake Commission | Toka Tū Ake (EQC), but negotiations with her insurer, Southern Response Earthquake Services Ltd (Southern Response), subsequently reached an impasse. To try and progress matters, Mrs Pfisterer entered into a "no win, no pay" contract with Claims Resolution Service Ltd (CRS). CRS is a company that offers to help homeowners resolve their claims against EQC and/or their insurers, in exchange for a commission payment once the matter has been resolved.

[2] When CRS's attempts to assist Mrs Pfisterer to reach a negotiated resolution failed, Grant Shand Barristers and Solicitors (Shand Solicitors) were engaged and proceedings were filed. The relationship between Mrs Pfisterer and Shand Solicitors subsequently broke down, however. CRS then issued proceedings against Mrs Pfisterer seeking to recover approximately $100,000 (largely comprising legal costs, expert witness fees and CRS's commission). Mrs Pfisterer raised various affirmative defences and counterclaims, including allegations of misleading and deceptive conduct, unconscionable bargain, breach of contract by CRS, and breach of fiduciary duty by both CRS and Shand Solicitors.

`

[3] Mrs Pfisterer's defences and counterclaims were largely unsuccessful in the High Court and Hinton J entered judgment in favour of CRS.[1] The Judge issued a separate judgment fixing costs and interest.[2] Mrs Pfisterer now appeals.[3]

Factual background

[4] Most of the Judge's factual findings have not been challenged on appeal. Our summary of the factual background is therefore based largely on the helpful summary set out in High Court judgment. We address any challenges to the Judge's factual findings, where necessary, in our discussion of the specific grounds of appeal.

[5] In 2012, Brian Staples, a former loss adjuster for EQC, set up a number of companies designed to help homeowners resolve their claims against EQC and/or their insurers. The relevant companies comprised:

(a) CRS and Earthquake Services Ltd (ESL), which were owned by Mr Staples. Mr Staples' evidence was that ESL and CRS "are more or less the same thing, and operate under the 'Earthquake Services' name". The company with whom the client contracted, however, was CRS. (Given that nothing turns on the distinction, we will generally refer to the entity that Mrs Pfisterer dealt with as CRS, unless the context requires otherwise.)

(b) 8D Project Management Ltd (8D), which was part owned by Mr Staples and Stephen Betts. One of the services 8D offered was preparing damage reports and cost assessments for clients of CRS.

---

1 *Claims Resolution Service Ltd v Pfisterer* [2021] NZHC 1088 [HC substantive judgment].
2 *Claims Resolution Service Ltd v Pfisterer* [2021] NZHC 1943 [HC costs judgment].
3 Senior Courts Act 2016, s 56(1)(a). This appeal was heard by a panel of three Judges, as required by s 49 of the Senior Courts Act. The third member of the panel, the Honourable Simon France, sadly passed away while this judgment was reserved. This judgment is delivered by the remaining two Judges, Cooper P and Katz J, under s 62 of the Act, they being satisfied the judgment should be completed and delivered by them in accordance with s 62(4).

`

[6] CRS advertised for clients on a "no win, no pay" basis. The Judge summarised its role as follows:[4]

> They would take on the prosecution of a claim including negotiation with EQC and/or the insurer down to drafting of a statement of claim if proceedings were necessary. They would organise all necessary reports and provide what they referred to as a "one-stop-shop". Where necessary the client would be referred to a lawyer who would file a statement of claim and see the matter through to its conclusion. The client would not incur any costs other than specified disbursements until they "won" their case at which point they would pay all legal and other costs incurred and pay a pre-agreed commission to [CRS].

[7] At the time of its interactions with Mrs Pfisterer, CRS referred most of its clients to Shand Solicitors if legal proceedings became necessary. Shand Solicitors rented office space from CRS. The Judge found that Shand Solicitors had an informal agreement with CRS that it would not invoice its fees until the matter was resolved. Instead, Shand Solicitors' legal fees would generally be paid from monies recovered from the insurer. Shand Solicitors would also sometimes not bill disbursements (such as expert witness fees) incurred by it until final resolution, although there was no agreement to this effect.[5]

[8] As noted above, Mrs Pfisterer's home was badly damaged during the Canterbury earthquakes. By late 2013, Mrs Pfisterer was very concerned about mould, which had spread throughout her home, and felt that she was not being listened to by Southern Response. She was feeling stressed, had limited funds, and did not know how to progress matters. Mrs Pfisterer's evidence was that sometime in November or December that year, she saw an advertising flyer that offered a "no win, no pay" insurance claims resolution service. In response, Mrs Pfisterer visited the CRS offices on 4 December 2013. She met with a CRS employee, Marie Hazledine-Barber, whose role was to meet with new clients and explain the services offered by CRS. Although Ms Hazledine-Barber remembered Mrs Pfisterer, she could not clearly recall all aspects of the initial meeting. She gave evidence, however, as to her standard approach and said that she was confident she would have followed this approach when she met with Mrs Pfisterer. Ms Hazledine-Barber said that Mrs Pfisterer seemed like

---

4 HC substantive judgment, above n 1, at [7].
5 At [10].

`

an intelligent person. She could not recall her being visibly upset or distressed at the time of their meeting.

[9] Ms Hazledine-Barber's standard practice was to provide clients with an information sheet at the initial meeting, which included a section explaining the services offered by CRS. The information sheet stated that CRS would take on the prosecution of a client's claim on a "No Win No Pay" basis for a percentage of the final settlement plus "all costs including, legal, quantity surveyor, independent reports and assessment costs". Ms Hazledine-Barber said that she would explain at the initial meeting that:

(a) CRS and ESL were set up by Mr Staples after he left EQC and that these companies were a one-stop shop for earthquake claims from initial assessment through to settlement.

(b) CRS offered a "no win, no pay" service which involved CRS facilitating resolution of the claim in exchange for a percentage of the settlement at the end.

(c) The first step in the process was to get an Initial Damage Assessment (IDA) of the person's property prepared, which would be done in-house. As part of the IDA, clients would receive a report by a quantity surveyor of the cost to repair or rebuild their house. That report would be prepared by Mr Betts of 8D, who Ms Hazledine-Barber said she would explain was CRS's in-house costing expert and was independent from EQC or the insurer.

(d) If litigation became necessary, Mr Shand of Shand Solicitors handled most of the claims on behalf of CRS clients as he was an expert insurance lawyer. Ms Hazledine-Barber stated that she "never told anyone that they had to use [Mr Shand] as their lawyer"; she explained to clients that CRS used Mr Shand and was "very good", but told them they could use their own lawyer if they preferred.

`

(e) Clients should discuss CRS's standard form contract (the CRS contract), a copy of which was provided to them at the initial meeting, with a lawyer or with family if they wished to before signing it.

[10] Ms Hazledine-Barber would then see whether the prospective client wanted to proceed with an IDA. In this case, Mrs Pfisterer did want to proceed with an IDA, and one was ordered.

[11] Mrs Pfisterer's evidence differed in a number of respects from that of Ms Hazledine-Barber. The Judge, however, made a credibility finding in favour of Ms Hazledine-Barber and, where the evidence conflicted, preferred her evidence to that of Mrs Pfisterer.[6]

[12] In the meantime, Southern Response continued processing Mrs Pfisterer's claim. On 8 December 2013, Arrow International, which was engaged by Southern Response to carry out an assessment of Mrs Pfisterer's property, estimated the cost of repairing Mrs Pfisterer's home at $321,869.67 and Southern Response advised Mrs Pfisterer of this. In cross-examination, Mrs Pfisterer confirmed that she would not have accepted this offer as she did not believe her house could be repaired for that sum.

[13] In early 2014, Mrs Pfisterer received the IDA and (several weeks later) the costings from Mr Betts. Mr Betts estimated the cost of rebuilding Mrs Pfisterer's property at $946,710.61. Mrs Pfisterer subsequently arranged a further meeting with CRS, to discuss her options. That meeting took place on 28 February 2014, when Mrs Pfisterer met with Cheryl McLeish and Patsy Murray, two CRS employees. Ms McLeish gave evidence about the meeting (she remembered dealing with Mrs Pfisterer on "a number of occasions" but stated she could "only recall a few specific details") and the process for signing up to a CRS contract generally. Ms Murray was unable to give evidence due to illness. Again, the Judge made a credibility finding in favour of Ms McLeish and preferred her evidence where it conflicted with Mrs Pfisterer.[7]

---

6 At [60].
7 At [60].

`

[14] Mrs Pfisterer learned on the morning of the 28 February meeting that the mould in her house was toxic black mould. She was advised to move out of the house, and that she could not take any of her clothes and belongings as these had been contaminated. Mrs Pfisterer's evidence was that at the time of the meeting she was "very distressed", and that she "had not slept properly for months as [she] was so upset, stressed and distressed about the state of [her] home, the mould, and [her] lack of money". She said that, after finding out about the black mould, her "anxiety levels were through the roof". Ms McLeish recalled Mrs Pfisterer appearing upset because she had to throw out her clothes, but said she was not particularly stressed or crying.

[15] Ms McLeish noted that Ms Murray did "most of the talking" at the meeting. Ms McLeish attended because it was CRS's practice to have two employees conducting such meetings. Ms McLeish could not recall the specifics of Ms Murray's explanation to Mrs Pfisterer, but gave evidence as to what the explanation would have consisted of based on the standard practice she and other CRS employees followed. Ms McLeish stated that she followed the same standard routine with the hundreds of clients she saw while at CRS. People were given another copy of the CRS contract and reminded that they could get legal advice or have other people read it. Ms McLeish said that she was always very careful to ensure people understood the contract, including that they would be obliged to pay the lawyer's fees at settlement, in addition to CRS's commission. She also said she would advise clients that litigation was often required in order to settle claims. Mr Shand was recommended as a lawyer, and clients were told that he would charge CRS clients on a basis consistent with costs fixed on a 2B basis under the High Court Rules 2016. Clients were told, however, that they were welcome to use their own lawyer if they preferred. Mrs Pfisterer signed the CRS contract at the 28 February meeting.

[16] On 9 June 2014, Southern Response provided an estimate of the cost to rebuild Mrs Pfisterer's house that was significantly less than the estimate that had been provided by Mr Betts. As a result, proceedings were filed on 1 July 2014. The statement of claim attached the IDA and costings prepared by Mr Betts. From that point onwards, CRS had limited involvement with Mrs Pfisterer's claim, which was handled by Shand Solicitors.

`

[17] A four-day trial was allocated to commence on Tuesday 26 April 2016. Briefs of evidence were prepared and filed by both parties. On the evening of Sunday 24 April 2016, Southern Response made a settlement offer. Mr Ferguson, the solicitor at Shand Solicitors who had primary conduct of the file, advised Mrs Pfisterer to accept it. After reflecting on the matter for 25 minutes or so, Mrs Pfisterer agreed. Mr Ferguson conveyed her acceptance to Mr Shand, who in turn conveyed it to Southern Response. Mrs Pfisterer then had second thoughts. About 30 minutes after she had said she would accept the offer, Mrs Pfisterer sent Mr Shand and Mr Ferguson an email saying she had decided to not accept the offer. Mr Ferguson responded that he had already informed Southern Response that its settlement offer had been accepted.

[18] Mr Shand emailed the High Court on Monday 25 April 2016 (Anzac Day) advising that the dispute had been settled and requesting that the hearing be vacated. The settlement needed to be formally documented and Mr Shand and Mr Ferguson engaged in correspondence with Southern Response to facilitate this (despite knowing that Mrs Pfisterer no longer wished to settle). Mrs Pfisterer subsequently terminated her retainer with Shand Solicitors and instructed new lawyers. CRS then sent Mrs Pfisterer an invoice for its commission, Shand Solicitors' legal fees and expert witness disbursements. Mrs Pfisterer refused to pay that invoice and this proceeding ensued.

[19] Mrs Pfisterer's new law firm, GCA Lawyers, was unable to negotiate a better settlement with Southern Response. After incurring almost $60,000 in further legal fees and disbursements, Mrs Pfisterer settled with Southern Response just over one year later on almost exactly the same terms as those she had agreed to on 24 April 2016 before changing her mind.

The appeal

[20] On appeal, Mrs Pfisterer submitted that:

(a) The Judge erred in finding that the CRS contract was not an unconscionable bargain.

`

(b) The Judge erred in finding that CRS had not breached the terms of the CRS contract, and that such breaches, if established, would not have given rise to a right to cancel the contract.

(c) The Judge erred in finding that CRS had not engaged in misleading or deceptive conduct.

(d) The Judge erred in finding that CRS did not owe, or breach, a fiduciary duty to Mrs Pfisterer.

(e) The Judge erred in rejecting certain claims for breach of fiduciary duty by Shand Solicitors, and in declining to award relief for the breaches which she found proven.

(f) The Judge erred in declining to discount the costs award against Mrs Pfisterer.

First issue: was the CRS contract an unconscionable bargain?

[21] The Judge rejected Mrs Pfisterer's affirmative defence that the CRS contract was an unconscionable bargain.[8] Although no particulars of this defence are set out in Mrs Pfisterer's pleading, the High Court judgment records that the basis for the claim was articulated in closing as being that Mrs Pfisterer was at a special disadvantage when she entered the CRS contract due to her mental state and financial position.[9]

Legal principles

[22] The leading authority on unconscionable bargains is *Gustav & Co Ltd v Macfield Ltd*, where this Court set out the following non-exhaustive principles:[10]

> 1 Equity will intervene to relieve a party from the rigours of the common law in respect of an unconscionable bargain.

---

8 At [88]–[98].
9 At [82].
10 *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 [*Gustav & Co Ltd* (CA)] at [30], endorsed by the Supreme Court in *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [6].

`

2 This equitable jurisdiction is not intended to relieve parties from "hard" bargains or to save the foolish from their foolishness. Rather, the jurisdiction operates to protect those who enter into bargains when they are under a significant disability or disadvantage from exploitation.

3 A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.

4 If one party is under a qualifying disability or disadvantage (the weaker party), the focus shifts to the conduct of the other party (the stronger party). The essential question is whether in the particular circumstances it is unconscionable to permit the stronger party to take the benefit of the bargain.

5 Before a finding of unconscionability will be made, the stronger party must know of the weaker party's disability or disadvantage and must "take advantage of" that disability or disadvantage.

6 The requisite knowledge may be that of the principal or an agent, and may be actual or constructive. Factors associated with the substance of a transaction (for example, a marked imbalance in consideration) or the way in which a transaction was concluded (for example, the failure of one party to receive independent advice in relation to a significant transaction) may lead to a finding that the stronger party had constructive knowledge. So, in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage.

7 "Taking advantage of" (or victimisation) in this context encompasses both the active extraction and the passive acceptance of a benefit. Accordingly, as Tipping J said in [*Bowkett v Action Finance Ltd* [1992] 1 NZLR 449 (HC)] at 457, an unconscionable victimisation will occur where there are:

> … circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.

8 If these conditions are met, the burden falls on the stronger party to show that the transaction was a fair and reasonable one and should therefore be upheld.

[23] This Court further observed in *Gustav* that factors such as a "marked imbalance in consideration or procedural impropriety" are usually present in unconscionability cases, but neither is a prerequisite for relief. However, in cases where there is no significant imbalance in consideration, or if the weaker party received independent legal advice, it would be unlikely that any issue of unconscionability would arise.[11]

High Court decision

[24] The Judge found Mrs Pfisterer to be an intelligent, assertive and capable woman with a mind of her own.[12] Mrs Pfisterer was found to not be under a qualifying disadvantage at the time that she signed the CRS contract.[13] The Judge appeared to accept that Mrs Pfisterer was stressed to at least some degree, having just found out that her house had toxic black mould, although she also noted Ms McLeish's evidence that Mrs Pfisterer did not appear to be particularly stressed or crying at the meeting.[14] The Judge accepted that Mrs Pfisterer was not in a position to wholly fund proceedings herself. However, although Mrs Pfisterer's evidence was that her work as an ESOL teacher had dried up, the Judge noted that she had received a payment of $117,136.82 from EQC prior to entering into the CRS contract.[15] The Judge further noted that Mrs Pfisterer knew both that "her insurance claim had been undervalued by Southern Response and that the issue in her claim was what the quantification of her right to indemnification would be".[16] The Judge further noted that Mrs Pfisterer had discussions with CRS staff twice before signing the contract and had been advised to take legal advice on both occasions.[17]

[25] Overall, the Judge concluded that the evidence (including the evidence of Ms Hazledine-Barber and Ms McLeish, as summarised above) did not support a finding that Mrs Pfisterer was under a qualifying disadvantage at the time she entered into the CRS contract, either due to her mental state or her financial position.[18] The Judge observed that even if Mrs Pfisterer had been under a special disadvantage,

---

11 *Gustav & Co Ltd* (CA), above n 10, at [31].
12 HC substantive judgment, above n 1, at [60] and [86].
13 At [88].
14 At [85]–[86].
15 At [86].
16 At [87].
17 At [87].
18 At [88].

`

the unconscionable bargain claim would have failed in any event, because the evidence did not establish that (a) CRS had either actual or constructive knowledge of any special disadvantage; and (b) that CRS had unconscionably taken advantage of that disadvantage.[19]

Submissions on appeal

[26] On appeal, Mr Tocher (junior counsel for Mrs Pfisterer) submitted that Mrs Pfisterer was under a special disadvantage due to a combination of:

(a) her high levels of anxiety and depression;

(b) her inability to afford a lawyer; and

(c) her lack of understanding of the transaction.

Discussion

[27] Stress or anxiety was identified as a relevant factor in *Gustav*. Here, the evidence supports the conclusion that although Mrs Pfisterer was not under an extreme level of stress or anxiety at the time she entered into the CRS contract, she was suffering from at least some degree of stress. This appears to have been largely due to the ongoing issues with her home (including the discovery of black mould) and the delays in resolving her insurance claim. Stress of this type is no doubt experienced by many people whose homes are damaged by natural disasters, such as floods or earthquakes. Indeed, more generally, the need to pursue (and fund) litigation frequently arises due to the existence of highly stressful circumstances. Such stress will not automatically give rise to a finding of material disadvantage, but could be a contributing factor, depending on the overall circumstances of a particular case.

[28] The Judge acknowledged that that Mrs Pfisterer was not in a position to wholly fund proceedings against Southern Response herself. This was likely a further factor that contributed to Mrs Pfisterer's stress levels. We note, however, that Mrs Pfisterer was likely in a financial position to fund the more limited exercise of obtaining

---

19 At [89]–[98].

`

independent legal advice regarding the terms of the CRS contract, but elected not to do so. Nevertheless, the evidence does not, in our view, support the contention that Mrs Pfisterer did not understand the transaction she was entering into.

[29] Ultimately, the issue is whether the cumulative weight of the factors identified by counsel significantly diminished Mrs Pfisterer's ability to assess her own best interests. In our view, the Judge was correct to find that it did not.

[30] First, we note that the Judge's finding that Mrs Pfisterer was an intelligent, assertive and capable woman with a mind of her own[20] is well supported by the totality of the evidence (including in particular the evidence of Ms Hazledine-Barber and Ms McLeish). That finding is also supported by Mrs Pfisterer's evidence in court, including her responses to questioning by her own counsel, opposing counsel, and the Judge.

[31] In our view the Judge was correct to find that neither the stress Mrs Pfisterer was under, nor her financial situation, significantly diminished her ability to assess her own best interests at the time she entered into the CRS contract. On the contrary, the evidence supports the conclusion that Mrs Pfisterer (having elected not to obtain legal advice prior to entering into the contract) made a carefully considered decision that a "no win, no pay" arrangement would enable her to progress (and hopefully resolve) her insurance claim, while minimising her exposure to legal (and other) costs in the interim. Given Mrs Pfisterer's financial circumstances at the time there was a clear and rational basis for such a decision.

[32] Mrs Pfisterer's decision to enter into the CRS contract was not an impulsive one — the contract was entered into two and a half months after Mrs Pfisterer's initial meeting with CRS (at which she had been provided with a copy of the draft contract). Mrs Pfisterer was required to consider and choose between three alternative payment plans, of which she chose the plan with the lowest commission but highest upfront costs. On its face, this was an entirely rational decision for a person who had some financial resources, but insufficient resources to fully self-fund litigation (should that become necessary).

---

[20] At [60] and [86].

`

[33] As noted above, this Court observed in *Gustav* that factors such as a "marked imbalance in consideration or procedural impropriety" are usually present in unconscionability cases (although they are not essential). Of note, neither factor was present here.

[34] The Judge was therefore correct, in our view, to find that Mrs Pfisterer was not under a qualifying disadvantage at the time she entered into the CRS contract. Even if, however, Mrs Pfisterer was able to establish a qualifying disadvantage, we consider the Judge was also correct to find that the unconscionability defence would fail for the other reasons identified.[21] Specifically, the evidence does not support a finding that CRS had actual or constructive knowledge of any special disadvantage, or took advantage of it.

Second issue: did CRS breach the CRS contract, and if so did those breaches give rise to a right of cancellation?

[35] Mrs Pfisterer's next ground of appeal is that the Judge erred in rejecting her counterclaim that CRS had breached the CRS contract, and that those breaches gave rise to a right of cancellation under s 37 of the Contract and Commercial Law Act 2017 (CCLA).[22] Mrs Pfisterer alleges two breaches of contract by CRS: a breach of cl 1(e) of the CRS contract, which relates to the instruction of people to assist with assessments, reports and legal proceedings; and a breach of cl 1(g), which relates to the commencement of legal proceedings.

Did CRS breach a duty to Mrs Pfisterer under cl 1(e) of the CRS contract in respect of CRS's instruction of Shand Solicitors and Mr Betts?

[36] Mrs Pfisterer alleged that CRS had breached cl 1(e) of the CRS contract, which provides that:

> CRS will … [i]nstruct other people to help with assessment and reports, and/or legal proceedings including independent assessors, quantity surveyors, lawyers or service agents …

---

21 At [89]–[98].
22 At [106], [108]–[112] and [119].

`

[37] In the High Court, Mrs Pfisterer alleged that this clause was breached because neither Mr Betts nor Shand Solicitors were independent of CRS. The Judge rejected this claim for the following reasons:

> [102] I find, as Mr Barker [counsel for CRS] argues that in the context of the [CRS] contract, 'independent' meant independent of EQC and the insurance industry. It was clear from the evidence that independence from EQC and the insurance industry was important to homeowners who were burnt-out by, and suspicious of, those entities. There was no suggestion that Mr Betts or Mr Shand were other than independent of EQC and insurers, and on that basis alone, there was no breach.
>
> [103] In terms of Mr Betts, the contract cannot have meant independent of [CRS] because, as I have already found, before the contract was signed, it was made plain to Mrs Pfisterer by [CRS] staff that Mr Betts was in-house. I have accepted Ms Hazledine-Barber's evidence that she would have explained to Mrs Pfisterer (as she says she always did) that Mr Betts was in-house with [CRS] and was part of [CRS's] one-stop-shop for resolving earthquake claims. I reject Mrs Pfisterer's evidence that "Marie" never mentioned Mr Betts to her. I am quite satisfied that Mrs Pfisterer knew before signing the contract that Mr Betts was not independent of [CRS].
>
> [104] In any event Mr Betts' task was limited to completion of the IDA. After the claim was filed, an independent expert was engaged so that, even on Mrs Pfisterer's interpretation, clause 1(e) of the contract was satisfied.
>
> [105] In terms of Mr Shand, I consider that while he was clearly not wholly independent of [CRS] because he was someone to whom at that time they usually referred clients if litigation was required, he was nonetheless "independent" in the sense of his ability to represent Mrs Pfisterer …

[38] Although Mrs Pfisterer's evidence in the High Court was to the contrary, on appeal she does not challenge the Judge's factual findings that:

(a) She was aware of the relationship between ESL, CRS and 8D/Mr Betts.[23]

(b) She was aware that the initial remediation estimate (for the purposes of the IDA) would be prepared by 8D/Mr Betts.[24]

[39] On appeal, the primary argument advanced in relation to Mr Betts was that the use of his costings in the court proceedings, by annexing them to the statement of claim, breached cl 1(e).

---

[23] At [63] and [103].
[24] At [103].

`

[40] The quantum claimed in the statement of claim was based on the costings that Mr Betts prepared in early 2014 and updated in June that year (which, as we have noted, were annexed to the statement of claim). Mr Betts, however, did not provide an expert brief of evidence. Rather, in or about January 2015, Mrs Pfisterer engaged Ms Tammett of RedQS, a quantity surveying firm, to prepare independent expert evidence for trial. RedQS's initial estimate of the cost to rebuild the house was $969,429.00. Following the exchange of statements and briefs, Ms Tammett updated her estimate to $951,977.00. This revised figure included a 10 per cent contingency, and had been adjusted to reflect a reduction in the extent of the ground improvement required for the rebuild. This estimate was very close to Mr Betts' estimate ($946,710.61), and significantly higher than the estimate Southern Response had provided to Mrs Pfisterer ($354,676.54).

[41] The decision to rely on Mr Betts' costings when the claim was filed was addressed by Mr Child (a witness for Shand Solicitors) in his evidence. He said that there were significant problems in getting expert advice due to the limited availability of experts who did not have conflicts of interest arising from previous work, and who could complete reports quickly and in a cost-effective way. Using Mr Betts' costings enabled matters to be progressed, and the proceeding to be filed. The position could then be further reviewed once EQC and/or the insurer had been required to provide geotechnical and costing reports.

[42] Clause 1(e) of the CRS contract has been set out above at [36]. It provided that CRS would "[i]nstruct other people to help with assessment and reports, and/or legal proceedings *including* independent assessors, quantity surveyors, lawyers or service agents … ".[25] CRS did not agree to *exclusively* use independent people to undertake all assessments and reports. Indeed, to do so would have been contrary to its "one-stop shop" business model, which involved using people associated with ESL and 8D (as well as CRS employees) during the initial stages of the negotiation process with the insurer, in order to keep costs down. The Judge found that Mrs Pfisterer was aware that the initial costings would be prepared by 8D/Mr Betts,[26] and that finding has not been challenged on appeal.

---

[25] Emphasis added.

[26] HC substantive judgment, above n 1, at [63] and [103].

`

[43] The most important stage at which to obtain independent advice and expertise was when preparing expert evidence for trial. This was done. There is no suggestion that the expert witnesses who prepared witness briefs for trial (including RedQS) were not truly independent. The Judge was therefore correct to conclude that, even on Mrs Pfisterer's interpretation of cl 1(e), the clause was complied with.[27] It is therefore not necessary to consider the Judge's alternative interpretation of the term "independent".[28]

[44] The Judge was also correct, in our view, that cl 1(e) was not breached in relation to the engagement of Mr Shand, and that although he had an existing relationship with CRS, he was independent in terms of his ability to represent Mrs Pfisterer's best interests free of any conflicting interests or duties (as discussed further below, in relation to the fiduciary duty claim against Mr Shand).

Did CRS breach a duty to Mrs Pfisterer under cl 1(g) of the CRS contract by failing to seek informed instructions from Mrs Pfisterer to commence litigation?

[45] Mrs Pfisterer's second breach of contract claim was that CRS breached cl 1(g) of the CRS contract, which provides that:

> CRS will … [s]eek instruction from the client before any … proceedings are issued …

[46] In its statement of claim, CRS pleaded that in 2014 Mrs Pfisterer's file was passed by CRS, on instructions from Mrs Pfisterer, to Shand Solicitors for legal services and to issue proceedings. Mrs Pfisterer denied this pleading in her statement of defence and stated that she did not give instructions to CRS to engage Shand Solicitors but rather simply "became aware" on or around July/August 2014 that Shand Solicitors had filed proceedings in her name "and therefore she was obliged to co-operate in that process". Mrs Pfisterer claimed that she otherwise had no knowledge of the instructions from CRS to Shand Solicitors. Her evidence at trial was initially to similar effect, namely that no one had told her that CRS had engaged Shand Solicitors or that Shand Solicitors was going to file a statement of claim.

---

27 At [104].

28 At [102], accepting a submission by CRS that for the purposes of cl 1(e), "independent" meant "independent of EQC and the insurance industry".

`

When cross-examined on the contemporaneous documents that suggested otherwise, she asserted that she either did not recognise them, had not read them, or could not explain them. Ultimately she accepted that she had requested the documents be filed in court "ASAP" but said that she did not understand what it meant to file a claim in court.

[47] The Judge found as follows:

> [109] I find as a matter of fact that [CRS] did seek instruction from Mrs Pfisterer before proceedings were issued on 1 July 2014, contrary to Mrs Pfisterer's evidence. Mrs Pfisterer was advised in her initial meeting with Ms Hazledine-Barber that litigation was a possibility and Ms McLeish told her that proceedings would likely be necessary in order to get Southern Response to meaningfully engage with her claim. Materially, she was then further advised of the need for proceedings by Mr Gosset [an ESL employee] in his email of 23 April 2014. She was asked to pay a filing fee for the statement of claim by email of 6 June 2014 from Mr Davis [a CRS employee]. He attached the [Shand Solicitors] invoice. She responded to Mr Davis by email on 8 June 2014 asking that the documents be filed as quickly as possible.
>
> [110] Mrs Pfisterer also knew that Mr Shand was attending to filing of the claim as she paid the filing fee to [Shand Solicitors] and texted Mr Shand saying she had paid and asking him to confirm receipt.
>
> [111] In my view Mrs Pfisterer's email of 8 June alone, and certainly the evidence overall, is sufficient to amount to instructions to issue proceedings.
>
> [112] I note further that Mrs Pfisterer was sent a copy of the statement of claim on 10 July 2014 after the claim had been filed on 1 July 2014. Receipt of it did not provoke any comment from her. Based on my assessment of Mrs Pfisterer's evidence in the witness box, I have no doubt that if she had a comment that was negative or corrective, she would have made it at the time.

[48] On appeal, Mrs Pfisterer does not deny that she had the various interactions regarding the filing of the statement of claim summarised by the Judge. Rather, her argument is that these interactions were insufficient to meet CRS's contractual obligation under cl 1(g) to "[s]eek instruction from the client before any … proceedings are issued". Specifically, Mr Tocher took issue with the following passage of the judgment under appeal:

> [108] I interpret clause 1(g) as referring only to instruction as to the issue of proceedings, not instruction as to the content of the statement of claim. In the latter regard in any event I consider Mrs Pfisterer knew the material details of her claim, having been provided with the IDA and cost assessment on which it was based.

`

[49] Mr Tocher submitted that Mrs Pfisterer's agreement that the statement of claim be filed was not sufficiently informed to constitute an instruction to issue proceedings. He pointed to the lack of evidence that Mrs Pfisterer saw the statement of claim before it was filed, or that Mrs Pfisterer was otherwise advised about the potential risks and benefits of commencing litigation.

[50] We reject this submission. As the Judge observed, Mrs Pfisterer was aware from her initial meeting with Ms Hazledine-Barber that litigation was a possibility. Ms McLeish subsequently told her that proceedings would likely be necessary in order to get Southern Response to meaningfully engage with her claim. The content of her claim was based on the IDA and the costs assessment prepared by Mr Betts, both of which had previously been provided to her. It is therefore not surprising that, when Mrs Pfisterer was subsequently provided with a copy of the statement of claim (after it had been filed) she expressed no concerns as to its contents.

[51] As we have noted, the Judge found Mrs Pfisterer to be an intelligent, capable, and assertive woman — a finding that is well supported by the evidence.[29] Mrs Pfisterer was keen for her proceeding to be filed as soon as possible, as confirmed by the email she sent to Mr Davis of Shand Solicitors, requesting that the claim be filed "ASAP". She also promptly paid the invoice for the filing fee, and texted Mr Shand to confirm payment, further reinforcing that she was keen to have the claim filed. The Judge was correct, in our view, to conclude that the evidence established that CRS had met its contractual obligation to "seek instruction" from Mrs Pfisterer prior to issuing any proceedings. This ground of appeal must accordingly fail. For completeness, we note that although CRS did not breach its contractual obligation to Mrs Pfisterer in relation to the filing of proceedings, Shand Solicitors had additional professional obligations in relation to this issue, which we address further below.

[52] Given that we have found that neither alleged breach of contract has been established, it is not necessary for us to address what (if any) relief would have been appropriate if CRS had breached its contractual obligations to Mrs Pfisterer.

---

[29] At [60] and [86].

`

Third issue: did CRS engage in misleading and deceptive conduct?

[53] Mrs Pfisterer's next ground of appeal is that the Judge erred in rejecting her claim that CRS had engaged in misleading and deceptive conduct. Mrs Pfisterer argued that CRS's conduct was in breach of the Fair Trading Act 1986, and in breach of fiduciary duties which Mrs Pfisterer claimed CRS owed to her. We focus in this section on the claim of misleading and deceptive conduct under the Fair Trading Act. We address whether CRS owed fiduciary duties to Mrs Pfisterer later in this judgment.

The alleged misrepresentation

[54] At trial, Mrs Pfisterer sought an order declaring the contract void, based on an alleged misrepresentation by CRS. The Judge summarised the alleged misrepresentation as follows:

> [70] … that [CRS] represented it would be providing advocacy services that included ongoing funding of her claim which would include timely payment by [CRS] of all costs as they arose for payment. That was said to be a misrepresentation because, although ultimately liable to pay [Shand Solicitors'] fees and disbursements, [CRS] was not paying these costs "in a timely manner".

[55] Mrs Pfisterer does not assert that there is a specific CRS document that includes the above representation. Nor is the alleged misrepresentation based on statements said to have been made verbally by CRS employees. Rather, the alleged misrepresentation is said to arise by inference from CRS's promotional material, including the following statement contained in a CRS information sheet:

> We take on the prosecution of your claim on a **No Win No Pay** basis for a percentage of the Final Settlement plus all costs including, legal, quantity surveyor, independent reports and assessment costs.

We will refer to this as the "no win, no pay" statement.

High Court decision

[56] The Judge rejected Mrs Pfisterer's submission that CRS's promotional material included an implied representation regarding the *timing* of any payments CRS might

`

make to third parties who were engaged to assist with the resolution of Mrs Pfisterer's claim. Rather, in the Judge's view:

> [75] … [CRS] agreed to provide its services on the basis that, with the exception of specific agreed payments to be made by Mrs Pfisterer, there would be no cost to her unless and until she won. The written contract failed to even expressly state that [CRS] would ultimately bear the cost of legal fees and disbursements if Mrs Pfisterer "lost" but that was necessarily implicit and was accepted by all parties to be the case. However, in my view it was not represented or implicit that [CRS] would be paying all legal fees and expenses "in a timely manner". In particular I do not consider that much can be read into the statement in the information sheet relied on by Mr Smith.
>
> [76] I also agree with Mr Barker QC for [CRS] that it would not have been reasonable for Mrs Pfisterer to interpret the sentence in the way alleged or to rely on an unclear statement in the information sheet alone when she had two in-person meetings with [CRS] representatives and signed a written contract. As noted already, it is not pleaded that the [CRS] employees made any such representation.

[57] The Judge accordingly concluded that there was no representation regarding the timing of any payments (namely that payments would be made as expenses arose).[30] This was sufficient to dispose of the Fair Trading Act claim, although the Judge went on to explain that the claim would also have failed for other reasons, including that even if there had been a representation that payments would be made by CRS as matters proceeded, such a statement was probably correct at the time of the contract;[31] the alleged representation had not induced Mrs Pfisterer to enter into the CRS contract;[32] and Mrs Pfisterer had not suffered any loss as a result of the alleged misrepresentation.[33]

Submissions on appeal

[58] In this Court, Mr Tocher submitted that the "no win, no pay" statement is misleading because it was a "half-truth" or was otherwise misleading by

---

30 At [75]–[78]
31 At [77].
32 At [80].
33 At [81].

`

omission. The learned authors of *Burrows, Finn and Todd on the Law of Contract in New Zealand* summarise the relevant legal principles as follows:[34]

> As a general rule, mere silence cannot amount to a misrepresentation. If silence distorts a positive representation, however, then this may amount to misrepresentation for the purposes of s 35 [of the CCLA]. A party to a contract may be legally justified in remaining silent about some material fact, but if he or she ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said false. A half-truth may in fact create a misleading impression because of what it leaves unsaid. Thus, in an older case in England, a vendor of a farm who stated that the farm was let could not omit the further fact that the tenants had given notice to quit. And in a recent example, an insurance company was found to have misrepresented the amount that could be claimed by a policy holder by deliberately failing to disclose matters which might have shown a larger sum was due.

[59] On the issue of statements that are misleading by omission, Mr Tocher referred to the following passage in *Des Forges v Wright*:[35]

> Conduct may be misleading or deceptive within the meaning of s 9 of the Fair Trading Act 1986 by an omission to provide information even if no obligation to provide such information exists as a matter of general law, outside the standards of conduct required by the Fair Trading Act. The question whether conduct is misleading or deceptive is substantially a question of fact and degree … Whether conduct is to be so characterised does not turn on any intention to mislead or deceive … It is to be objectively assessed … It is necessary, however, that the conduct is deceptive or misleading or is "likely" to mislead or deceive …

[60] In essence, the argument advanced by Mr Tocher was that it was implicit from the "no win, no pay" statement that part of the consideration for CRS's commission was that it took on the financial risk of acting as a litigation funder. CRS did not in fact do so, however, as payments to Shand Solicitors and others were not made in a "timely" manner. CRS should have disclosed its unwritten funding arrangements with Shand Solicitors to Mrs Pfisterer, as they impacted on the extent of the financial risk CRS was bearing and therefore the basis on which CRS charged its commission. Due to the failure to disclose this, Mrs Pfisterer was misled by omission.

---

[34] Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [11.2.1(g)] (footnotes omitted).

[35] *Des Forges v Wright* [1996] 2 NZLR 758 (HC) at 764 (citations omitted).

`

Discussion

[61] We do not accept that the "no win, no pay" statement is misleading by omission. Nor does it constitute a "half-truth". The Judge was correct to find that the statement does not include an implied representation as to what CRS's funding arrangements were, let alone a representation as to the timing of any payments to third party service providers. On the contrary, the statement means exactly what it says. Mrs Pfisterer would not have to meet the costs of pursuing either a negotiated resolution of her claim, or court proceedings, unless and until her claim was successfully resolved.

[62] Presumably, to most users of CRS's services, the issue of precisely how CRS was able to fund the services it provided was simply not relevant. From a client's perspective, the key point was simply that they would not be required to pay, unless and until their claim was resolved. The "no win, no pay" statement is a representation to that effect. It does not include either an express or implied representation as to the precise funding mechanism that underpinned CRS's ability to make such an offer to prospective clients.

[63] The Judge was correct to conclude that Mrs Pfisterer had failed to prove the alleged misrepresentation. There is no merit in this ground of appeal.

Fourth issue: did CRS owe a fiduciary duty to Mrs Pfisterer, and if so did it breach its fiduciary obligations to Mrs Pfisterer?

[64] In addition to alleging breaches of contract by CRS, Mrs Pfisterer pleaded that the relationship between her and CRS was fiduciary. CRS is said to have breached its fiduciary duty of loyalty by not disclosing to Mrs Pfisterer conflicts of interest that arose as a result of its close relationship with Shand Solicitors.

[65] The Judge found that the relationship between CRS and Mrs Pfisterer was not fiduciary in nature. In the event that she was wrong on that issue, the Judge's view was that no breach of fiduciary duty had been established, in any event.

`

Legal principles

[66] In broad terms, a fiduciary relationship is a relationship of trust and confidence in which one person, the principal, is entitled to rely on another, the fiduciary.[36] The distinguishing obligation of a fiduciary relationship is an obligation of loyalty by the fiduciary to the principal:[37]

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

[67] A relationship will give rise to fiduciary duties in two situations, namely where:[38]

(a) The relationship is inherently fiduciary (such as between solicitor and client, trustee and beneficiary, or principal and agent).

(b) The relationship is not inherently fiduciary, but there are particular aspects of the relationship that nevertheless justify it being classified as fiduciary.

High Court decision

[68] The Judge found that the relationship between CRS and Mrs Pfisterer was not inherently fiduciary; rather, the relationship was contractual. The Judge acknowledged that a fiduciary duty can arise in the context of a contractual relationship, but noted the statement of the Privy Council in *Clark Boyce v Mouat* that

---

36 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [80] per Blanchard and Tipping JJ.

37 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18 per Millett LJ, cited in *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [67] per Blanchard, McGrath and Gault JJ. See also *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC) at 4–6.

38 *Chirnside v Fay*, above n 36, at [73]–[75] and [80] per Blanchard and Tipping JJ.

`

a fiduciary duty "cannot be prayed in aid to enlarge the scope of contractual duties".[39] The Judge found that:[40]

> … there is no requirement here to supplement the contractual duties owed by [CRS] to Mrs Pfisterer with fiduciary duties. There are express clauses in the contract that require [CRS] to protect Mrs Pfisterer's interests such as those that require CRS to engage independent experts, to obtain her instructions before instructing third parties, to perform their services with all reasonable skills. Therefore while Mrs Pfisterer was entitled to repose trust and confidence in [CRS], this was no more trust and confidence than that which was specifically contemplated under the [CRS] contract.

[69] The Judge went on, however, to briefly consider the alleged breaches of fiduciary duty, in the event that she was wrong in her view that the relationship was not fiduciary. She concluded that no breach of fiduciary duty had been established.

Submissions on appeal

[70] On appeal Mr Smith (senior counsel for Mrs Pfisterer) submitted that the Judge erred in finding that the relationship was not fiduciary, and further erred in concluding that no breaches of fiduciary duty had been established. He argued that the relationship here was inherently fiduciary insofar as CRS acted as an agent, but also included further elements of an "ad hoc" fiduciary relationship, drawing by analogy on lawyer–client and partnership relationships. Clients are said to have reposed trust and confidence in CRS to instruct lawyers and experts and issue proceedings on their behalf, and to carry out tasks of a legal nature (such as drafting statements of claim). In addition, CRS presented itself as a partner who would work together with clients to resolve their insurance claims and, Mr Smith submitted, the CRS contract imposed "partnership-like obligations on both parties". In addition, Mrs Pfisterer was said to have been financially and emotionally vulnerable at the time that she entered into the CRS contract due to the stress associated with the earthquake damage to her home, the subsequent discovery of black mould, and her financial position.

---

39 HC substantive judgment, above n 1, at [161], citing *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648.

40 At [163].

`

Discussion

[71] The reasons why the relationship between CRS and Mrs Pfisterer is said to be one of agency were not developed in either the written or oral submissions advanced on behalf of Mrs Pfisterer. We understand, however, based on the High Court judgment that the argument is that the relationship was one of principal and agent (or akin to that) because "the [CRS] contract empowered [CRS] to instruct third parties on Mrs Pfisterer's behalf".[41] This submission overlooks, however, that CRS was contractually required to seek instructions from Mrs Pfisterer before engaging any third party. The contract between CRS and Mrs Pfisterer, in our view, does not support the submission that their relationship was one of principal and agent (or akin to that).

[72] Mr Smith's submission that the relationship was a partnership was similarly misplaced. It appears to have been based largely (or possibly entirely) on the fact that of the three different fee structure options, Mrs Pfisterer chose the one referred to as the "Partnership Program". This had the highest level of upfront fees payable by a client, and the lowest commission rate payable to CRS. This fee arrangement does not, however, reflect that the underlying legal relationship between CRS and Mrs Pfisterer was a partnership.

[73] Ultimately, when considering whether a fiduciary relationship exists, it is necessary to consider the nature of the legal relationship in each case. Where, as here, the essential legal relationship between the parties is contractual, primacy is generally given to the contract.[42] As Blanchard J explained in *Paper Reclaim*:[43]

> When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the Court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require cooperation.

---

41 HC substantive judgment, above n 1, at [162].
42 *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [56].
43 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31].

`

[74] The focus on the precise terms of a contractual relationship reflects the fact that, as the Privy Council stated in *New Zealand Netherlands Society "Oranje" Inc v Kuys*, a person may be a fiduciary in respect of some of their activities, but not all.[44] Further, fiduciary duties cannot be "prayed in aid to enlarge the scope of contractual duties", as the Privy Council explained in *Clark Boyce v Mouat* in the context of a solicitor-client relationship. The Privy Council stated:[45]

> A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party who has such an interest. It cannot be prayed in aid to enlarge the scope of contractual duties. Thus, there being no contractual duty on [the solicitor] to advise [the client] on the wisdom of entering into the transaction, she cannot claim that he nevertheless owed her a fiduciary duty to give that advice. Furthermore any duty of disclosure can only extend to the solicitor's knowledge of facts and not to his lack of knowledge thereof.

[75] As noted above, amongst other things, Mr Smith submitted that a fiduciary overlay arises here due to the stress Mrs Pfisterer was under at the time she entered into the CRS contract. A similar submission was advanced in support of the claim that the CRS contract was an unconscionable bargain. We rejected that submission for the reasons outlined at [30] to [33] above. That reasoning applies equally here. Nor do the terms of the contract support the argument that the relationship was an agency, a partnership, or some other type of fiduciary relationship. The contract did, however, require that CRS perform its services "competently and with reasonable care and skill and comply with all relevant laws and regulations". The Judge was correct in our view that the nature of the relationship did not require the imposition of additional obligations, of a fiduciary nature, on CRS.

[76] We also endorse the Judge's conclusion that even if the relationship was a fiduciary one (contrary to the Judge's view), CRS did not breach a fiduciary duty of loyalty by not disclosing to Mrs Pfisterer conflicts of interest that arose as a result of its close relationship with Shand Solicitors. For reasons we discuss in the next section (which addresses the claims against Shand Solicitors for breach of fiduciary duty) it is

---

44 *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166.
45 *Clark Boyce v Mouat*, above n 39, at 648.

`

our view that the relationship between Shand Solicitors and CRS did not give rise to conflicts of interest that required disclosure.

Fifth issue: did Shand Solicitors breach fiduciary duties it owed to Mrs Pfisterer?

[77] We now turn to consider Mrs Pfisterer's grounds of appeal in relation to her counterclaim against Shand Solicitors for breaches of fiduciary duty.

[78] The Judge summarised the five breaches of duty that were alleged by Mrs Pfisterer at trial as being: failure to obtain informed consent to act with conflicts of interest; failure to advise on fee information and funding arrangements; failure to advise on commencement of litigation; failure to obtain and follow informed instructions on settlement; and disclosure of confidential client information.[46]

[79] The Judge found the last two breaches proven,[47] and dismissed the other three claims.[48] On appeal, Mrs Pfisterer says that those three claims should not have been dismissed. We consider those claims below. The two claims which the Judge found proven are discussed in the next section of this judgment.

Legal principles

[80] It was not in dispute at trial, or on appeal, that the relationship between solicitor and client is inherently fiduciary. Fiduciary relationships are marked by the entitlement of one party to place trust and confidence in the other.[49] Two aspects of the paramount obligation of loyalty owed by a lawyer to their client are relevant in this case:[50]

(a) the fiduciary responsibility of a lawyer not to act in circumstances where they have a personal interest in a transaction; and

---

46 HC substantive judgment, above n 1, at [121]. The summary at [121] was based on counsel's closing arguments.

47 At [156] and [158].

48 At [140]–[141], [144], [148]–[149] and [151]–[152].

49 *Chirnside v Fay*, above n 36, at [80] per Blanchard and Tipping JJ.

50 See HC substantive judgment, above n 1, at [126]. See *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA) at 89–90; *Witten-Hannah v Davis* [1995] 2 NZLR 141 (CA) at 147 and 149; and *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 (CA) at 543–544.

`

(b) the fiduciary responsibility of a lawyer not "to serve two masters at the same time in the same transaction", by acting (without fully informed consent) in circumstances where there is a conflict between their duty to their client and their duty to another party (normally another client).

[81] A personal interest will arise where a lawyer stands to receive, either directly or indirectly, some benefit as a result of a transaction, outside the usual remuneration for their professional services.[51] This may arise, for example, where a lawyer makes a loan to their client and earns a secret profit on the interest rate and arrangement fee without the client's knowledge,[52] or where a lawyer has shares or a financial interest in a company connected to a transaction on which they are acting. If a lawyer has a personal interest in a matter, it must be disclosed to the client; if it is not, the transaction may be set aside at the instance of the client, even if it is favourable to the client.[53] While a personal advantage may be present or prospective, the conflict must be "real" rather than merely "theoretical or rhetorical".[54]

Did Shand Solicitors owe, and breach, a fiduciary duty to obtain informed consent from Mrs Pfisterer to act for her, due to any conflict of interest arising from Shand Solicitors' pre-existing relationship with CRS?

[82] Mr Smith identified the central issue in this appeal as being whether the Judge erred in finding that neither Shand Solicitors nor CRS had fiduciary obligations to disclose to Mrs Pfisterer and seek her informed consent "to the full suite of undisclosed arrangements" between CRS and Shand Solicitors. Mr Smith submitted for Mrs Pfisterer that Shand Solicitors' interest in obtaining further referral work from CRS was a "personal interest" that conflicted with Mrs Pfisterer's interests, contrary to the Judge's findings. As a result, Shand Solicitors was required to give full disclosure of its relationship with CRS to Mrs Pfisterer to obtain her informed consent to act.

---

51 *Farrington v Rowe McBride & Partners*, above n 50, at 89.
52 *Swindle v Harrison* [1997] 4 All ER 705 (CA).
53 *Clark Boyce v Mouat*, above n 39, at 648.
54 *Farrington v Rowe McBride & Partners*, above n 50, at 89–90, citing *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 (CA) at 638 per Upjohn LJ.

`

[83] The Judge described the relationship between Shand Solicitors and CRS as follows:

> [130] Clearly Mr Shand and Mr Staples were, at least at the relevant time, in a close working relationship. [CRS] referred most of its clients to Mr Shand and there was some cross-over in their work, for example [CRS] prepared the initial draft of a statement of claim using Mr Shand's template. They had an agreement as to the basis on which Mr Shand would charge fees, namely on a 2B scale. There was an agreement that Mr Shand would not bill fees until conclusion (but no agreement that he would carry disbursements). Mr Shand rented office space from [CRS]. Mr Shand even contributed to Mr Staples' advertising costs although this did not start until after Mrs Pfisterer's contract was signed. However there was no profit sharing nor anything similar. There was no obligation on the part of [CRS] to refer clients to Mr Shand nor any obligation on him to take any individual client. There is no suggestion that either was in any position of influence over the other. [CRS] directed clients to other lawyers as well as Mr Shand; and Mr Shand did not rely solely on Mr Staples to provide his firm with work. Ultimately this was a close referral relationship, closer than, but not dissimilar, to many. It could not fairly be described in my view as a "business relationship".

[84] The Judge found that this "close referral relationship" did not result in Shand Solicitors having a personal interest. The Judge was not persuaded that retaining, or having the prospect of obtaining, "bulk referral of work" amounted to a personal interest; bulk referral did not "go far beyond the usual expectations of remuneration for professional services". No personal interest arose from the fact that Shand Solicitors rented premises from CRS, or had made payments towards CRS's advertising (albeit apparently only after the CRS contract was entered into).[55] Nor was this a case of divided loyalties.[56] Mr Shand could not be said to owe CRS "a fiduciary duty or any obligation in particular other than, on acceptance of the referral of Mrs Pfisterer, to charge her on a scale 2B basis and to not bill the file until conclusion".[57] Mr Shand's relationship was part of his legal practice; it was not "a business or professional activity" which might compromise the discharge of his professional obligations within the meaning of r 5.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.[58] Further, although divided loyalties might arise in some cases involving litigation funders, here all parties had a

---

55 High Court substantive judgment, above n 1, at [133].
56 At [140].
57 At [134].
58 At [135].

`

"common interest of securing a 'win'".[59] It followed, on the Judge's analysis, that no conflict of interest arose.[60]

[85] In any event, the Judge found that Mrs Pfisterer *was* aware of the key aspects of the relationship between CRS and Shand Solicitors including, before Mr Shand was engaged, that Mr Shand did most of CRS's legal work.[61] Mrs Pfisterer was not aware, however, of the details of the funding arrangements between CRS and Shand Solicitors (the most significant aspect of which was their agreement that CRS could defer payment of Shand Solicitors' fees until the matter had been concluded).

[86] On appeal, Mr Smith submitted that the relationship between Mr Shand and CRS went beyond a normal referral relationship, as Mr Shand played an instrumental part in CRS's large-volume operation. Shand Solicitors rented office space from CRS and contributed to its operating costs, as well as its marketing costs. At times Shand Solicitors would "loan" solicitors to CRS to help CRS deal with its workload. Mr Smith accepted, however, that the only financial reward Shand Solicitors received arising out of its relationship with CRS was the legal fees it received from clients who were referred to it by CRS.

[87] Mr Smith referred to the recent report of the Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding*.[62] In that report, the Commission observed that:[63]

> In funded proceedings, there is a tripartite relationship between the funder, the plaintiff and the lawyer. In many instances the interests of all three will align. However, in some circumstances their interests may diverge and conflict.

[88] Mr Smith submitted that, in this case, the interests of Shand Solicitors, CRS and Mrs Pfisterer, particularly in relation to settlement, were not aligned.

---

59 At [138].
60 At [141].
61 At [139].
62 Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding* (NZLC R147, 2022).
63 At [16.2] (footnote omitted).

`

[89] The Law Commission referred in its report to various circumstances where potential conflicts of interest may arise in funded litigation, such as where:

(a) the lawyer owes duties to both the funder under the funding agreement and the client (which the Law Commission noted is not limited to, but is more likely to arise in, class actions);[64]

(b) the funder exerts control over the litigation (which the Law Commission noted is not limited to, but is more likely to arise in, class actions);[65]

(c) the lawyer has a financial stake in the outcome (submitters noted that this could arise where, for example, the lawyers' fees are proportionally tied to the success of the outcome; or the lawyer has a financial interest in the funder);[66] or

(d) the lawyer has an ongoing relationship or hopes to secure future work from a funder.[67]

[90] Here, Shand Solicitors did not owe any contractual duties to CRS under a funding agreement (or otherwise) that conflicted with its duties to Mrs Pfisterer. Nor did CRS have any right to exert control over the conduct of the litigation — that was entirely a matter for Mrs Pfisterer. Mr Staples' evidence (which is consistent with the contemporaneous documents) was that:

> From the point that external lawyers are instructed, CRS takes a 'back seat' role in the progression of the claim. The client relationship is between the lawyer and the client. We expected that relationship to be managed in the same way that any lawyer and client relationship was managed.
>
> Our services after lawyers were engaged were limited mainly to helping with funding if required, mainly in respect of experts. We will occasionally provide support during the process when a client or the lawyer requests it. However, none of our team are involved with the actual management of a claim once it has moved to an external law firm. That is the responsibility of the lawyers who advise the clients directly.

---

64 At [16.4] and [16.24].
65 At [16.4] and [16.24].
66 At [16.4], [16.31], [16.35] and [16.37].
67 At [16.4] and [16.6].

`

[91] Mr Shand's evidence was that:

> The relationship [with CRS] did not change or influence our approach which was to achieve the best outcome possible for each client. This was the approach which I required of all of our lawyers.

[92] Mr Ferguson, the solicitor at Shand Solicitors with primary responsibility for the conduct of Mrs Pfisterer's case, said that he did not know about the specific arrangements between Mr Shand and CRS but "… whatever was in place did not affect the advice I provided to clients and my dealings with them".

[93] Nor is this a case where the legal fees were proportionally tied to the success of the outcome. Rather, Shand Solicitors would simply receive 2B scale costs for the actual work undertaken. Shand Solicitors did not have a financial interest in CRS or its related companies. Nor did Shand Solicitors receive any money from CRS other than payment of invoices for legal work.

[94] The Judge was therefore correct, in our view, to identify the only potentially relevant personal interest here as being the prospect of future referral work from CRS. The key issue therefore is whether a conflict or significant possibility of conflict existed between Shand Solicitors' duties to Mrs Pfisterer and its personal interest in maintaining its ongoing referral relationship with CRS.

[95] Mr Smith identified the key potential conflict as being that an early settlement would be in CRS's interests, as it would enable it to receive payment of its commission sooner. Shand Solicitors was therefore potentially incentivised to push for early settlement to protect its ongoing relationship with CRS, even if that was not in the best interests of Mrs Pfisterer.

[96] We do not accept that submission. There is nothing to suggest that, at the time Shand Solicitors was engaged (or indeed subsequently) there was a material risk that the interests of CRS and Mrs Pfisterer in relation to settlement would be in conflict. Rather, their interests appear to have been aligned. CRS's commission was an agreed percentage of any settlement sum or damages awarded to Mrs Pfisterer. Further, due to the deferred payment arrangement between CRS and Shand Solicitors, CRS was not carrying the costs of the litigation pending settlement. It was not therefore under

any financial pressure that would favour an early settlement. Indeed, the financial risk of proceeding to trial was significantly greater for Mrs Pfisterer than CRS, as she was ultimately responsible for Shand Solicitors' legal costs (and potentially also the legal costs of Southern Response). Further, liability was not in issue. The only issue was quantum. There was accordingly no risk that CRS would fail to make any recovery if Mrs Pfisterer declined a pre-trial settlement offer. As for Shand Solicitors, although it would get paid sooner if a matter settled, it would be paid significantly more if the matter proceeded to trial. The financial incentives did not, therefore, clearly favour either early or delayed settlement.

[97] Nor do we accept that the ongoing referral relationship between CRS and Shand Solicitors incentivised Shand Solicitors to provide erroneous or incomplete advice to Mrs Pfisterer regarding the CRS contract or litigation strategy (such as whether to rely on the 8D costings when filing the statement of claim).

[98] In relation to the CRS contract, Mrs Pfisterer signed it on 28 February 2014, having elected not to obtain independent legal advice regarding its terms. Mr Shand was subsequently engaged in June 2014. It was therefore not part of his role to provide advice to Mrs Pfisterer as to whether she should enter into the CRS contract, as she had already done so. Mr Shand could, however, have explained the terms of the CRS contract to Mrs Pfisterer, to make sure she understood it (and in the Judge's view, he should have done so). The CRS contract, however, is a relatively straightforward document. Its terms and conditions are only two pages long. It is difficult to see how Mr Shand's referral relationship with CRS (which Mrs Pfisterer was aware of, although she did not know of the deferred payment arrangement) could incentivise him to give anything other than a fair and accurate explanation of the document to Mrs Pfisterer.

[99] The Judge was therefore correct, in our view, to find that Shand Solicitors did not have a competing personal interest arising out of its relationship with CRS. Shand Solicitors did not therefore owe (or breach) a duty to provide Mrs Pfisterer with full disclosure of all the details of its relationship with CRS.

`

[100] The Judge was also correct to find that this was not a case of conflicting duties or divided loyalties. Mrs Pfisterer had sole control over the litigation. The settlement discussions on the eve of trial were prompted by a final, and improved, settlement offer made by Southern Response. Shand Solicitors was obliged to convey that offer to Mrs Pfisterer and advise her on its merits, which Mr Ferguson did. Shand Solicitors had no obligation to seek CRS's view on any settlement proposals, and there is no suggestion that it did so prior to Mrs Pfisterer accepting Southern Response's improved offer.

Did Shand Solicitors owe, and breach, a fiduciary duty to provide advice to Mrs Pfisterer on the CRS contract and funding arrangements?

[101] In her counterclaim against Shand Solicitors, Mrs Pfisterer pleaded that Shand Solicitors owed, and breached, a fiduciary duty to inform her of:

> … other funding arrangements that were available to her, including the possibility for Shand Solicitors to work for Mrs Pfisterer outside of the agreement and without CRS having any involvement or potential to claim any costs or commission.

[102] The Judge rejected this claim, stating that:

> [149] … while a cautious lawyer might provide fuller advice, I do not consider [Shand Solicitors] had a duty to advise Mrs Pfisterer on alternatives to the [CRS] contract unless the contract was clearly unfavourable to her. On the evidence available I would be unable to say it was. I also do not agree that Mr Shand was required or had a duty to offer Mrs Pfisterer a deferred fee arrangement or other favourable terms. The fact that a lawyer is prepared to offer concessionary terms to some clients, does not create an obligation to offer them to others. The reality is there was no evidence of any alternative funding arrangement for Mrs Pfisterer.

[103] In the course of her analysis of this claim, the Judge commented that she agreed with counsel for Mrs Pfisterer that Shand Solicitors should have explained the terms of the CRS contract to Mrs Pfisterer, even though that contract had already been signed, to make sure that she understood it. However, the Judge said, while this may have been a breach of duty, she did not consider it to be a breach of fiduciary duty.[68]

---

[68] HC substantive judgment, above n 1, at [143] and [148].

`

[104] Mrs Pfisterer has not appealed the Judge's dismissal of the pleaded fiduciary duty set out at [101] above. Rather, counsel essentially seeks to advance a new (and unpleaded) breach of fiduciary duty, based on the Judge's comment that Shand Solicitors should have explained the terms of the CRS contract to Mrs Pfisterer, even though it had already been signed. On appeal, Mr Smith submitted that the failure to explain the terms of the CRS contract to Mrs Pfisterer was not only a breach of duty (which the Judge commented it may have been), but a breach of fiduciary duty.

[105] The pleaded breach, however, is that Shand Solicitors owed Mrs Pfisterer a fiduciary duty to inform her of other funding arrangements that might be available to her. The Judge found there to be no such duty.[69] There was no evidence that there were any other alternative funding arrangements available. Further, and significantly, Mrs Pfisterer had already entered into a legally binding contract with CRS. The Judge's finding that Shand Solicitors did not have a fiduciary duty to advise Mrs Pfisterer on alternatives to the CRS contract is therefore clearly sound, and has not been seriously challenged on appeal.

[106] Even if we were to allow Mrs Pfisterer to, in effect, advance a new alleged breach of fiduciary duty on appeal, such an argument would fail on its merits. We find no error in the Judge's observation that any failure by Shand Solicitors to explain the terms of the CRS contract to Mrs Pfisterer was not a breach of fiduciary duty. As the Judge observed, even where a relationship is fiduciary, not all obligations that arise in such a relationship will be of a fiduciary nature. Not all breaches of duty by a fiduciary are breaches of his or her fiduciary duty.[70] Here, any failures to explain the terms of the CRS contract were not breaches of a fiduciary nature.

[107] Lawyers may fall short in the standard of service they provide to their clients for many reasons, including error, oversight, incompetence, lack of expertise in a particular area of law, taking on too much work, and so on. This may at times give rise to claims for breach of contract, tortious claims, or complaints to regulatory bodies. However, claims for breaches of fiduciary duty generally only arise where

---

69 At [149].

70 At [143]; *Chirnside v Fay*, above n 36, at [15] per Elias CJ and [72] per Blanchard and Tipping JJ; and *S v Attorney General* [2003] 3 NZLR 450 (CA) at [77]–[78] per Blanchard, McGrath, Anderson and Glazebrook JJ.

`

such conduct is prompted or contributed to by a lack of loyalty due, for example, to a lawyer having a competing personal interest or conflicting duty.[71] That is not the case here.

Did Shand Solicitors owe, and breach, a fiduciary duty to provide advice to Mrs Pfisterer on the filing of the proceedings?

[108] In her counterclaim against Shand Solicitors, Mrs Pfisterer pleaded that Shand Solicitors owed a fiduciary duty to:

> … seek informed instructions from Mrs Pfisterer, prior to filing any proceeding, on the factual and legal case that was to be advanced in the proceeding. This duty was breached by Shand Solicitors not seeking any instructions from Mrs Pfisterer prior to Shand Solicitors, without Mrs Pfisterer's knowledge or any instructions from her to do so, filing the proceeding (also breaching [r 13.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules)]).

[109] In addressing this claim, the Judge noted that she had already found that Mrs Pfisterer had given instructions to CRS to file the statement of claim and, further, that Mrs Pfisterer knew the nature of the claim being filed, having received the IDA on which it was based. Mr Shand corrected the statement of claim before filing and was aware that Mrs Pfisterer wanted it filed.[72] The Judge went on to state:[73]

> Nonetheless I agree that [Shand Solicitors] did not comply with rule 13.3 of the [Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules)] which requires a lawyer to obtain their client's instructions on significant decisions. But … this was not a breach of fiduciary duty. There was no conflict or loyalty issue at stake.

[110] Mr Smith submitted that the Judge erred in this finding, because "[a]cting without informed instructions on significant matters *is* a loyalty issue."[74]

[111] We reject that submission and find no error in the Judge's reasoning. Shand Solicitors failed to comply with their obligations under the Conduct and Client Care Rules, but this did not constitute a breach of fiduciary duty. Shand Solicitors'

---

71 See for example Ian Millard "Fiduciary Duties of Lawyers" in Matthew SR Palmer (ed) *Professional Responsibility in New Zealand* (LexisNexis, Wellington, 2020) 333 at [17.1], [17.1.3] and [17.6.1].

72 HC substantive judgment, above n 1, at [151].

73 At [151].

74 Emphasis in original.

`

failure to speak to Mrs Pfisterer before filing the statement of claim was a significant oversight, but it was not due to any conflict of interest or lack of loyalty to Mrs Pfisterer.

Sixth issue: did the Judge err in not awarding any relief in respect of Shand Solicitors' proven breaches of fiduciary duty?

[112] The Judge found two breaches of fiduciary duty to be proven but declined to award any relief in respect of those breaches. Mrs Pfisterer appeals on the basis that the Judge erred in not granting relief.

High Court decision

[113] The Judge rejected Mrs Pfisterer's allegation that Shand Solicitors had placed undue and/or unnecessary pressure on her to accept Southern Response's offer to settle her insurance claim. The Judge was satisfied that Shand Solicitors had obtained and followed informed instructions from Mrs Pfisterer before confirming settlement with Southern Response.[75] Mrs Pfisterer had not been pressured into settlement. Nor had she received inadequate advice about the settlement proposal. The Judge elaborated that:[76]

> I consider that Mrs Pfisterer was provided with sufficient information and advice for some time beforehand, to anticipate the likely scope of a settlement. While it would have been preferable for Mr Ferguson to allow Mrs Pfisterer more time, it is very common that time is short when a fixture is pending and very common for insurers to negotiate at the last minute. I do not consider that [Shand Solicitors] was in breach of duty in this regard.

[114] The Judge found, however, that two of the alleged breaches of fiduciary duty by Shand Solicitors (summarised at [78] above) had been established. Specifically, Shand Solicitors had breached its fiduciary duty of loyalty and good faith to Mrs Pfisterer:

(a) by continuing to negotiate the terms of settlement with Southern Response without instructions (and in fact contrary to

---

75 HC substantive judgment, above n 1, at [154].
76 At [154].

`

instructions) after Mrs Pfisterer had advised that she no longer wished to settle; and

(b) by breaching solicitor-client confidence by filing a memorandum in the High Court on 7 June 2016 regarding settlement, without instructions.[77]

[115] The circumstances relating to the latter breach were that on 7 June 2016 Mrs Pfisterer advised the High Court that she had not agreed to settle her claim. In response, the Court issued a minute directing Mr Shand to file a memorandum explaining the position.[78] Mr Shand then filed a memorandum stating that Mrs Pfisterer had instructed Shand Solicitors to accept the offer from Southern Response but "[Mrs] Pfisterer then apparently wanted to reconsider and refused to co-operate with finalizing the settlement."

[116] The Judge found that these two proven breaches of fiduciary duty were not causative of any loss, however, given that Southern Response had agreed not to seek to enforce the settlement that had been reached. As a result, the Judge declined to award any relief.[79]

[117] Mr Smith submitted that relief should have been granted in respect of these two proven breaches of fiduciary duty, namely:

(a) an award of damages to compensate Mrs Pfisterer for the legal fees she had to incur in hiring new lawyers to progress her claim against Southern Response;

(b) forfeiture by Shand Solicitors of any right to remuneration; and

(c) declarations that Shand Solicitors had breached its fiduciary duties in the relevant respects.

---

77 At [156] and [158].

78 *Pfisterer v Southern Response Earthquake Services Ltd* HC Christchurch CIV-2014-409-426, 7 June 2016 (Minute of Associate Judge Matthews).

79 HC substantive judgment, above n 1, at [156] and [158].

`

Claim for damages

[118] Establishing loss is a requirement for a claim for damages for breach of fiduciary duty.[80] Mr Smith submitted that Shand Solicitors' breaches of fiduciary duty were causative of loss in two respects. His first submission was that Southern Response relied upon the conduct of Shand Solicitors in support of an accord and satisfaction defence. As a result, Mrs Pfisterer had to incur unnecessary legal fees responding to that defence, and it made the ultimate settlement more difficult, and likely lower.

[119] We do not accept this submission. The reason that a defence of accord and satisfaction was available to Southern Response was because Mr Shand had communicated acceptance of Southern Response's settlement offer, on instructions from Mrs Pfisterer. The legal fees incurred in responding to Southern Response's "accord and satisfaction" defence were accordingly not attributable to Shand Solicitors' breaches of fiduciary duty.

[120] The second causation argument advanced by Mr Smith was that Shand Solicitors' conduct in continuing to negotiate the terms of settlement without instructions irretrievably undermined the trust and confidence necessary to the solicitor-client relationship. As a result, Mrs Pfisterer had no option but to instruct new lawyers, and incur the costs associated with that.

[121] The relevant background, as summarised by the Judge, is that:

> [49] Thirty minutes after accepting [Southern Response's settlement offer], Mrs Pfisterer sent Mr Ferguson an email saying she had decided to not accept the offer and expressed displeasure at being placed under time pressure. Mr Ferguson emailed back saying he had already communicated acceptance of Southern Response's settlement offer. Mr Shand sent Mrs Pfisterer an email the following day, 25 April 2016, explaining the merits of settlement and how, in his view, it worked to her benefit. In the email Mr Shand said "if you want to now say that you did not communicate acceptance to Andrew

---

80 *Everist v McEvedy* [1996] 3 NZLR 348 (HC) at 355, applied in *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 535–536; and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 687 per Tipping J, applied in *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192 at [30] and *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815 at [61].

`

> then we cannot act for you." Mrs Pfisterer says she took that as meaning [Shand Solicitors] was no longer acting for her. It seems she did not respond.
>
> [50] Mr Shand emailed the High Court on 25 April 2016 saying the dispute was settled and asking them to vacate the hearing. Mr Shand and Mr Ferguson continued to negotiate the settlement agreement with Southern Response. In the first draft agreement sent by Southern Response there was no clause providing for payment of foundations. On 4 May 2016, Mrs Pfisterer sent an email to Mr Shand and Mr Ferguson asking "where is the deal you cancelled my trial for?"
>
> [51] Mr Shand sent Mrs Pfisterer an amended draft of the settlement agreement on 16 May 2016. Mrs Pfisterer informed him that she had terminated her retainer with [Shand Solicitors] and had instructed other lawyers. On 19 May 2016, Mrs Pfisterer's new lawyer, Alistair Bowers emailed [Shand Solicitors] asking that they take no further steps on her claim.

[122] The Judge found that Shand Solicitors should not have continued to engage in correspondence with Southern Response to document the settlement agreement, and that doing so breached its fiduciary duty of loyalty to Mrs Pfisterer.[81] We do not accept, however, that there was any realistic prospect that the relationship between Shand Solicitors and Mrs Pfisterer would have continued if Shand Solicitors had not done this. The practical reality is that any ongoing relationship between Mrs Pfisterer and Shand Solicitors became untenable once it was apparent that Mrs Pfisterer's position was that she had either not agreed to Southern Response's settlement offer or, if she had, it was only due to undue pressure and "bullying" by Shand Solicitors (as Mrs Pfisterer suggested in an email to Shand Solicitors). Although Shand Solicitors could have remained silent on the topic, it could not responsibly or ethically claim to either the Court or Southern Response's solicitors that Mrs Pfisterer had not accepted Southern Response's settlement offer, knowing or believing that to be untrue.

[123] The Judge was therefore correct to find that Shand Solicitors' breaches of fiduciary duty did not cause Mrs Pfisterer to suffer loss due to her having to instruct new solicitors.

[124] For completeness, we note that even if there had been a causative link, the assumption that all the costs Mrs Pfisterer incurred with the new solicitors would be recoverable is incorrect. Given Mrs Pfisterer's decision not to settle in April 2016, it was inevitable that she would need to incur further legal costs in order to resolve her

---

81 HC substantive judgment, above n 1, at [156].

`

claim (either at trial or through further settlement negotiations), regardless of who her solicitors were.

Claim for forfeiture of remuneration

[125] In addition to seeking damages, Mrs Pfisterer sought an order that Shand Solicitors forfeit its own remuneration. There is no requirement to prove loss in order to seek forfeiture of a fiduciary's remuneration. In *Premium Real Estate Ltd v Stevens* Blanchard J (writing for himself, McGrath and Gault JJ) stated that the law remained as it was stated in 1926 by Atkin LJ in *Keppel v Wheeler*.[82] In that case, Atkin LJ set out the law as follows:[83]

> Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission.

[126] Blanchard J in *Premium Real Estate* went on to explain that remuneration:[84]

> … is something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty save in the circumstances described by Atkin LJ. The agent has no right to be paid or to retain any commission and must also compensate the principal for any loss which the agent has caused. The principal is advantaged because the property has been sold without commission being payable but the agent should not receive a credit against the damages for the fact that the commission is not payable because that would effectively allow the agent the benefit of the forfeitable remuneration.

[127] In his concurring judgment, Tipping J characterised the return of commission as being a type of restorative damages that could be awarded in addition to

---

82 *Premium Real Estate Ltd v Stevens*, above n 37, at [89] per Blanchard, McGrath and Gault JJ, citing *Keppel v Wheeler* [1927] 1 KB 577 (CA) at 592 per Atkin LJ.

83 *Keppel v Wheeler*, above n 82, at 592 per Atkin LJ.

84 *Premium Real Estate Ltd v Stevens*, above n 37, at [90] per Blanchard, McGrath and Gault JJ.

`

compensatory damages.[85] He further observed, however, that an allowance for skill, effort and expenditure could be made in spite of the forfeiture:[86]

> When the damages represent the forfeiture or refund of remuneration not fully earned because of the commission of the wrong, the fiduciary may have expended time, effort and money for which some reward is nevertheless appropriate. In the same way as an allowance for skill, effort and expenditure is available on a discretionary basis in the disgorgement context, so too should it be permissible to make an allowance, sometimes for what would have been the full contractual entitlement had there been no default, when the context is restorative damages. Much will turn in each case on the seriousness of the wrong which has been committed, the degree of moral turpitude attending the commission of the wrong and whether the plaintiff has received any ultimate value from the defendant's efforts.

[128] The timing of the breaches and the services for which fees are claimed are relevant. For example, in *Chirnside v Fay*, which concerned disgorgement of profits, the factors which justified a significant allowance being made included that most of the relevant work was done prior to the breach and the interests of fiduciary and beneficiary were not relevantly in conflict.[87] In the circumstances of that case, making an allowance could not "sensibly be regarded" as having the effect of encouraging fiduciaries to act in breach of duty.[88]

[129] The overall circumstances will, of course, be relevant and in some cases fiduciaries have been permitted to retain some of their remuneration. For example, in *Baxter v Coleman*, the errant fiduciary was permitted to retain some of his commission to recognise the significant time and effort expended. However, where circumstances were more suggestive of "active dishonesty", the commission was disallowed.[89] Thomas J commented:[90]

> In most cases where there is one impugned transaction (for example in the case of errant real estate agents), the fiduciary will generally be considered undeserving of reward. Where there is a wider relationship between the parties, and the breaches of duty are minor in nature (or do not feature in respect of all of the transactions between the parties) there is a stronger argument for either not clawing back all of the commissions received by the fiduciary, or allowing the errant fiduciary to receive payments for other work completed.

---

85 At [102] and [104] per Tipping J.
86 At [104] per Tipping J.
87 *Chirnside v Fay*, above n 36, at [126], [139] and [143]–[144] per Blanchard and Tipping JJ.
88 At [139] per Blanchard and Tipping JJ.
89 *Baxter v Coleman* [2016] NZHC 2693 at [250]–[252].
90 At [250].

`

[130] In this case, we would have had no hesitation in ordering the forfeiture of any remuneration claimed by Shand Solicitors for settlement-related attendances in the period following their breaches of fiduciary duty. Shand Solicitors have not, however, charged any fees in relation to the negotiation of the settlement agreement or the correspondence with the Court regarding it. The fees claimed relate to the commencement of the claim, case management, discovery, and preparation for the hearing, all of which pre-date the breaches of fiduciary duty. The fees claimed for that work are relatively modest for the work undertaken, given that they have been charged on a 2B scale basis.

[131] Shand Solicitors' breaches of fiduciary duty in relation to settlement reflect a lack of loyalty and professionalism, and poor judgement. As noted above, however, they were not causative of any loss (although that is not a requirement in this context). Nor were they motivated by self-interest or lack of honesty. There is no moral turpitude involved. No fees have been charged for attendances that post-dated the breaches of fiduciary duty. Taking these various matters into account, the High Court was correct, in our view, to decline to order forfeiture of Shand Solicitors' (modest) remuneration for the period preceding its breaches of fiduciary duty.

Claim for a declaration

[132] In addition to seeking damages and forfeiture of remuneration, Mrs Pfisterer sought a declaration in her statement of claim that Shand Solicitors had acted in breach of fiduciary duty. On appeal, Mr Smith asserted in his written submissions that, having found two breaches of fiduciary duty, the Judge should have made a declaration accordingly. However, he did not mention this issue in oral argument and given the conclusion we have reached about the damages claim we think it is sufficient that we have upheld the findings of breach set out above.

Seventh issue: should the costs award in favour of Shand Solicitors have been discounted?

[133] In the High Court, Mrs Pfisterer sought a global costs discount of "at least 30 per cent to reflect [her] partial success", based on the Judge's finding that

`

Shand Solicitors had committed two breaches of fiduciary duty.[91] Shand Solicitors opposed any global discount for partial success on the basis that Mrs Pfisterer had only succeeded on peripheral issues.[92] The Judge accepted that submission and declined to discount the costs award in favour of Shand Solicitors.[93]

[134] On appeal, Mr Smith submitted that the Judge had erred in failing to discount the costs award, and that some discount is appropriate to reflect the claims of breach of fiduciary duty that were upheld.

[135] The claims Mrs Pfisterer made against Shand Solicitors in the High Court were wide-ranging and required extensive evidence to address. Significant credibility findings were made against Mrs Pfisterer.[94] The two breaches of fiduciary duty that were established were minor relative to other allegations that were made, involved minimal evidence, and were not causative of loss. It is our view that the Judge did not err by declining to discount the costs award in favour of Shand Solicitors in the circumstances.

Costs

[136] In relation to CRS, as all of the appeal grounds have been unsuccessful CRS is entitled to recover its reasonable solicitor-client costs in accordance with cl 6 of the CRS contract, including default interest of 2 per cent per month up to the time of payment, assessed on a simple basis.

[137] In relation to Shand Solicitors, Mrs Pfisterer's appeal has also been unsuccessful. As the successful party, Shand Solicitors is entitled to an award of costs.

Result

[138] The appeal is dismissed.

---

91 HC costs judgment, above n 2, at [46].
92 At [48(c)].
93 At [52].
94 HC substantive judgment, above n 1, at [60]–[64].

`

[139] CRS is entitled to recover its reasonable solicitor-client costs in this Court, together with any reasonable disbursements incurred, pursuant to cl 6 of the CRS contract. CRS is also entitled to default interest pursuant to the CRS contract, calculated on the basis set out at [60] of the High Court costs judgment. If there is any dispute as to the quantum of interest payable, counsel are to refer the matter to the High Court for resolution.

[140] Costs are awarded to Shand Solicitors on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
GCA Lawyers, Christchurch for Appellant
Canterbury Legal, Christchurch for First Respondent
Darroch Forrest Lawyers, Wellington for Second Respondent

`