Case Note

Breach of fiduciary duty: *Brickenden* lives on (*Premium Real Estate v Stevens*)

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Introduction

In *Premium Real Estate v Stevens*[1] an estate agent led clients to believe that a prospective buyer was finding his commute difficult and wanted to move his family closer to Auckland's North Shore. In fact the buyer was a property speculator who regularly bought properties and quickly resold them at a profit. This was known to the agent, who hoped to be instructed in the resale. Having found a breach of the fiduciary duty of loyalty, the Supreme Court of New Zealand unsurprisingly held that the agent must forfeit the commission. However, a majority of the court also found that the agent should pay compensation for the difference between the amount that the clients sold the house for and the amount that it was actually worth. This finding is interesting because there was evidence that the vendors, Mr and Mrs Stevens, would have been prepared to sell at a price lower than full market value. Even so, the majority held that this evidence could not reduce the liability of the defaulting agent. This result shows that New Zealand courts apply stricter rules in respect of compensation for breach of fiduciary duty than do courts in other jurisdictions.

Facts and history

Mr and Mrs Stevens wanted to sell their home at Castor Bay and on 9 February 2004 they employed Premium Real Estate Ltd as their estate agents.[2] The Stevens believed their property to be worth about $3m and were disappointed when the Premium agent valued it a lower amount. After a few weeks with no offers, the Stevens agreed to Premium's suggestion that the house be marketed as inviting 'offers over $2.7m'. An offer of $2.2m was received, which the Stevens rejected. They counter-offered at $2.8m but that counter-offer was also rejected. In April the Stevens agreed to buy another

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1 [2009] 2 NZLR 384. The report has *Premium Real Estate Ltd v Stevens*, but the neutral citation has the parties reversed: *Stevens v Premium Real Estate Ltd* [2009] NZSC 15. The case can also be found at (2009) 9 NZBLC 102,532.

2 In fact the Stevens were selling as trustees of a family trust and the purchaser Mr Larsen bought as trustee of the Mahoenui Valley Trust. For simplicity the parties will be referred to as Stevens and Larsen. There were also several different agents working for Premium Real Estate Ltd, but since there was no doubt that they were all acting on behalf of the company it is convenient to refer to the single agency.

property conditionally upon them selling the Castor Bay house for $3m or such lower price as they may accept. On 21 April the agent showed the Castor Bay house to a Mr Larsen for a second time and on 23 April he made an offer of $2.525m. Mr Larsen was known to Premium as a property speculator. He had instructed them on several previous occasions, and the daughter of one of the estate agents worked for him. Premium did not reveal what they knew about Mr Larsen to their clients, and in fact they misled the Stevens into thinking that Larsen intended to purchase the house as a family residence. The Stevens considered making a counter-offer to Mr Larsen of $2.8m but Premium told them that $2.575m was the most he would pay. On 26 April the Stevens agreed to sell their house to Mr Larsen for $2.575m and settlement occurred on 16 July. On 14 November, after making minor improvements and pitching the property at a different market, Mr Larsen resold the house for $3.555m. On discovering this, Mr and Mrs Stevens sued Premium Real Estate for breach of s 9 of the Fair Trading Act 1986 and for breach of fiduciary duty.[3]

At trial, Courtney J found Premium liable on both grounds for the same reason: the failure to disclose the relationship with Mr Larsen. The judge found that the true market value of the property was $3.25m, but her Honour also found that Premium had not been at fault in mistakenly valuing the property in the mid-high $2m range.[4] In respect of the breach of fiduciary duty Courtney J awarded $742,050, this amount being $675,000 as the difference between the $2.575m sale price and the $3.25m market value, and $67,050 forfeited commission.[5]

The Court of Appeal dismissed Premium's appeal against liability but reduced the award to $225,000 because it was found that the Stevens would have been prepared to sell for $2.8m. In fact there is little doubt about this: first, the Stevens offered the house at $2.8m to another prospective buyer before Mr Larsen had even made an offer; second, their evidence at trial was directed towards the point of whether the agent had discouraged them from making a $2.8m counter-offer that they wanted to make.[6] Even so, after finding a breach of Premium's fiduciary duty Courtney J had awarded equitable compensation based on the true market value of $3.25m, rather than the likely sale price of $2.8m. The Court of Appeal generally agreed with the findings of Courtney J, but disagreed on this point:

> We do not consider that the evidence shows that the Stevens would have retained the property had full disclosure been made. Rather, it shows that, apart from any breach of fiduciary duty by Premium, they were prepared to sell for $2.8m. In accordance with the applicable principles, their recoverable loss cannot extend to 'losses' that

3 Section 9 provides: 'No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

4 The property was close to a cliff, shared its access with three other houses, and was not on a freehold title. This meant there was a legitimate disagreement over how it should be valued.

5 Courtney J also awarded $337,500 under the Fair Trading Act. Given that the remedies were not cumulative, quantum was greater under the fiduciary duty analysis, and the factual basis for both was the same, the decisions of the Court of Appeal and Supreme Court focus on breach of fiduciary duty.

6 *Stevens v Premium Real Estate Ltd* (2006) 11 TCLR 854; [2006] NZHC 1521 at [69]–[73].

> they would have incurred in any event . . . . We consider, then, that as a matter of compensation, the loss which the Stevens suffered as a result of Premium's breach was the difference between the sale price of $2.575m and what they had indicated they were prepared to sell the property for, namely $2.8m. That difference is $225,000.[7]

The Stevens appealed to the Supreme Court of New Zealand, where a majority found that compensation should be assessed on the basis of the $3.25m market value rather than $2.8m. Although the result was substantially the same as the High Court decision, the majority's reasoning differed from that of Courtney J. Whereas Courtney J had found the proper relief to be 'equitable damages in an amount that would restore the Stevens to the position they occupied before Premium's breach',[8] the majority said that the difference between sale price and market value was the 'normal and natural measure of loss' in this situation, and that the agent had not adequately shown that this measure should not be applied.[9] Mr and Mrs Stevens were awarded $659,813 in respect of the house and $67,050 in forfeited commission.[10]

Breach of duty

Although the focus of this note is the quantification of the compensation payable to Mr and Mrs Stevens, it is also worth commenting on Premium's initial breach of duty. All three courts agreed that Premium had breached a fiduciary duty owed to the Stevens, but the judges did not characterise the nature of the breach in quite the same way.

Premium not only failed to tell the Stevens that Mr Larsen was known to them as a property speculator; it 'actively misled'[11] them into thinking that he was buying the property as a family home. Elias CJ based liability specifically on the provision of this misleading information,[12] and this is certainly the most straightforward ground. The deliberate provision to a client of misleading information about a potential buyer, in the knowledge that such misinformation might lead to the agent being instructed by the buyer in a future resale, is a clear breach of the no conflicts rule. By doing this, Premium preferred its own interests to those of the Stevens.

The majority of the Supreme Court took a slightly different approach and focused on the fact that Premium did not tell the Stevens that Larsen was a

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7 [2009] 1 NZLR 148; [2008] NZCA 82 at [93], [97].

8 (2006) 11 TCLR 854 at [137]. If that was the correct measure of damages then Courtney J's upper amount should have reflected the value on the date of judgment, not when the agency was first instructed or when the property was sold. This would have been greatly to the benefit of the Stevens, since the property market grew at a much faster rate than the 7% per annum interest awarded from the date of settlement to the date of judgment. It is submitted that such a calculation is in fact only available when the beneficiary of a custodial fiduciary relationship is seeking to enforce the trustee's primary duties through an order for account.

9 [2009] 2 NZLR 384 at [85]–[86] (Blanchard J, also for McGrath and Gault JJ, and with Tipping J agreeing).

10 $659,813 differs from the $675,000 awarded by Courtney J because the Supreme Court was unanimous in holding that loss should be calculated on the basis that commission would have been paid, even though the commission would itself be forfeited. The calculation was therefore ($3.25m – $82,237) less ($2.575m – $67,050) = $659,813.

11 [2009] 2 NZLR 384 at [69].

12 Ibid, at [4].

property speculator. That is, although Premium's active misleading of the Stevens was plainly enough to constitute a breach of duty, the majority found that the non-disclosure alone was also a breach. This is a much trickier basis of liability because the non-disclosure by Premium would need to be linked in some way to a conflict of interest before it could count as a breach of fiduciary duty.[13] Failure to disclose material information that a principal ought to know is always a breach of duty, but it is not always a breach of fiduciary duty;[14] and this point matters because the remedial response can be very different.[15] The following paragraph from Blanchard J's judgment illustrates the problem:

> Premium was engaged to act as the agent of the Stevens in the sale of their property. It is beyond doubt that in that capacity Premium was a fiduciary for the Stevens and owed them a duty of loyalty. It is responsible for any breach of that duty by any of its employees. To fail to disclose a material matter about the person being introduced as a prospective purchaser — a matter objectively likely to operate on the principal's judgment — is a breach of the duty of loyalty.[16]

It is important to remember the context of this passage because the fourth sentence will not always automatically follow the other three. In the next paragraph Blanchard J found, without any further discussion, that a breach of the fiduciary duty of loyalty had been made out specifically on the basis that Premium had not told the Stevens that Mr Larsen was a speculator.[17] His Honour then turned to the dependent issues of whether such disclosure would have required Premium to breach duties of confidentiality owed to Mr Larsen and whether there was an implied term in the agency contract that released Premium from the obligation to disclose such information.[18] Such an approach was appropriate on the facts of *Premium Real Estate v Stevens* because the prima facie conflict was quite obvious and so the relevant question before the

13 Indeed, in respect of fiduciary duties the classic position is that disclosure is simply something which, if done, will normally make available a defence of informed consent to an action for breach of the no conflict rule: see *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* [1998] FCA 564; BC9802104 (Lindgren J).

14 This was the unanimous view of the NZ Court of Appeal (including Blanchard, Gault and Tipping JJ, who later heard *Premium Real Estate v Stevens* in the Supreme Court) in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 680–1. On the difference between fiduciary and non-fiduciary duties generally see: M Conaglen, *Fiduciary Loyalty*, Hart Publishing, Oxford, 2010; cf J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' and J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary' both in S Degeling and J Edelman (Eds), *Equity in Commercial Law*, LawBook Co, Sydney, 2005.

15 See *Bristol & West Building Society v Mothew* [1998] Ch 1 at 16–18, and the authorities discussed therein (Millett LJ), and, extra judicially: Sir P Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214 at 226; cf *Youyang v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 500–1; 196 ALR 482; [2003] HCA 15; BC200301373.

16 [2009] 2 NZLR 384 at [68].

17 Ibid, at [69]: 'In our view, the courts below were quite correct in finding that a breach of that duty was committed by [Premium] when [it] failed to inform the Stevens that Mr Larsen was a person who frequently bought residential properties and shortly afterwards resold them at a profit.'

18 Ibid, at [70]–[77]. It was concluded that the information that Mr Larsen was a speculator was not confidential, and that even if it had been confidential it would have been Premium's fault for placing themselves in such a difficult position.

court was indeed whether the confidentiality issue could preclude or excuse a breach of duty. Nevertheless, it might now be worth saying a little more on the conflict point.

Putting any 'active misleading' element to one side, and speaking generally, what is the conflict of interest in such a case? It must be the possibility that the agent will be instructed on the resale. Yet, as counsel for Premium argued, estate agents make a living by being prepared to relist properties. The later reselling of a property by the same agent who handled the first sale, and who did so impeccably and without any particular reason to believe that they would then be reinstructed by the buyer, cannot retroactively mean that the first sale involved a breach of the no conflicts rule. So the question is whether the agent has reason to believe that they will (or might) be reinstructed on a resale, and this is why Courtney J and the Court of Appeal focused on disclosure of Premium's relationship with Mr Larsen rather than on disclosure of Mr Larsen's activities as a property speculator.[19] The two are clearly linked, but it is helpful to distinguish between them for the same reason that it is important to recognise the context in which paragraphs like the one quoted above operate: because otherwise there is a risk that a fiduciary's negligent non-disclosure of a material fact will be characterised as a breach of fiduciary duty even if there is no question of a conflict of interest.[20]

Brickenden v London Loan & Savings Co

To see why Premium was liable for compensation based on the market value rather than on the amount that the Stevens would have accepted, and why Premium did not adequately show that a different measure should be used, we must consider the case of *Brickenden v London Loan & Savings Co*.[21] That case concerned a solicitor, Mr Brickenden, who had failed to inform his clients, the loan company, that he would personally benefit from a loan that the clients were considering making to a Mr and Mrs Biggs. The case has many interesting features (for example there is a strong suspicion that Brickenden

19 Courtney J said that a conflict of interest existed which meant that Premium needed to disclose the extent of its relationship with Mr Larsen. Premium was 'not required to speculate as to his purpose in purchasing', but it should have provided sufficient information for the Stevens to decide whether Mr Larsen was someone they wanted to deal with: (2006) 11 TCLR 854 at [117]. The Court of Appeal also saw non-disclosure of the relationship with Mr Larsen as being the relevant breach of duty, although their Honours recognised that such disclosure would inevitably have meant that Larsen's property dealing business would have been disclosed: [2009] 1 NZLR 148 at [59].

20 This has already happened in Canada, where all the judges in *Canson Enterprises v Boughton* [1991] 3 SCR 534; 85 DLR (4th) 129; [1992] 1 WWR 245; 61 BCLR (2d) 1 referred to a solicitor breaching a 'fiduciary' duty to disclose when he failed to inform his clients that land they were buying was being 'flipped'. Yet the agreed facts assumed that the solicitor had not stood to gain personally by the flipping, there was no other relevant principal, and so there was no possibility of a conflict of interest that would affect the solicitor's loyalty. The answer is that the judges were talking about a prescriptive fiduciary duty to disclose, which might be better characterised as part of a solicitor's non-fiduciary duties of skill and care: see the sources cited above nn 14 and 15, and P D Finn, 'The Fiduciary Principle' in T G Youdan (Ed), *Equity, Fiduciaries and Trusts*, Carswell, Toronto, 1989, pp 25–6.

21 [1934] 3 DLR 465 (PC Can) (*Brickenden*).

and the vice-president of the loan company were in cahoots)[22] but it has become famous for its rule to the effect that a defaulting fiduciary may not argue in his defence that his principal would have gone ahead with the transaction regardless of the fiduciary's breach. Lord Thankerton said, in a paragraph which was reproduced as the headnote in the Dominion Law Reports:

> Where a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor. Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.[23]

Brickenden provided for a complete ban on counterfactual evidence, but no jurisdiction applies this rule strictly anymore. Instead *Brickenden* has been reinterpreted as placing the burden of proof on the defendant to show that the loss would have been suffered in any event.[24] However, *Premium Real Estate v Stevens* demonstrates that the jurisdictions still differ slightly as to how they treat this issue. Although apparently possible, it is evidently much harder for defaulting fiduciaries in New Zealand to persuade a court that their breach of duty made no difference to their principal's actions. In short, *Premium Real Estate v Stevens* would probably have been decided differently in Canada, England or Australia.

Other jurisdictions

Brickenden was a Canadian appeal, but Lord Thankerton's dictum no longer represents the law there.[25] In Canada a fiduciary may show, although the onus is upon him to do so, that his principal would have suffered the loss in any event. In *Hodgkinson v Simms*, LaForest J called this a long-standing equitable principle. Interestingly, his Honour also said that such evidence must be

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22 Both Brickenden and the company's vice-president, Mr McCormick, were charged with fraud and conspiracy in respect of the advances made to Biggs. The loan funds mysteriously appeared before the company's board had made the final decision to approve the loan, and it does not seem that Brickenden attempted to defend himself on the breach of duty point: [1933] 3 DLR 161 at 165–8.

23 [1934] 3 DLR 465 at 469.

24 Discussed in the following two sections.

25 See generally J Berryman, 'Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 *Alberta L Rev* 95. There is a recent decision of the Alberta Court of Appeal which states that 'where a fiduciary is in breach of duty, he or she may not avoid liability by demonstrating that the loss would have occurred in any event . . . . Inevitability of loss is irrelevant in determining liability for a breach of fiduciary duty': *Finch v Ross, Todd & Company* [2006] ABCA 98 at [23]. However, the only authorities cited are a 1985 case from the British Columbia Supreme Court (*Island Realty Investments Ltd v Douglas* (1985) 19 ETR 56) and a 1914 decision of the Manitoba Court of King's Bench (*British America Elevator Co v Bank of British North America* [1914] 20 DLR 944), and this case must be regarded as an anomaly. An earlier decision of the Ontario Court of Appeal, *Raso v Dionigi* (1993) 12 OR (3d) 580 at [23] restated strict Brickenden, but the case must now be viewed as having been overtaken on this point by *Hodgkinson v Simms* [1994] 3 SCR 377; 117 DLR (4th) 161; [1994] 9 WWR 609.

'concrete'.[26] However, although a concrete evidence requirement might be thought to alter the standard of proof required of a defendant, this is not borne out by the cases that follow. I can only find two cases that refer to the 'concrete' requirement, and in neither of those was the point of any relevance.[27] Admittedly, a few years before *Hodgkinson v Simms*, McKinlay JA had said in another case that 'proof in such a situation would undoubtedly be difficult, and "speculation" would not suffice';[28] but two paragraphs later her Honour referred to the defendant's need to establish proof on the balance of probabilities.

English courts will also examine the question of whether a plaintiff would still have carried on with the transaction notwithstanding the defendant's non-disclosure. Moreover, there do not appear to be any hints to the effect that it will be an unusually heavy burden for the defendant to satisfy. Heydon J has commented that *Brickenden* suffered decades of forensic oblivion,[29] and it does not seem to have been relied on by any English court until *Bristol and West Building Society v May May & Merrimans (No 1)* in 1996.[30] In that case Chadwick J discussed whether the strict Brickenden rule could survive the analysis in *Target Holdings v Redferns*,[31] and concluded—perhaps with some reluctance — that it could not.[32] In 1997 *Brickenden* was considered by the Court of Appeal in *Swindle v Harrison*, but although the three judges agreed on the result of that case they did so for rather different reasons.[33] The best that can probably be taken from the case is a recognition that each judge emphasised that the plaintiff would have gone ahead regardless of the

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26 [1994] 3 SCR 377 at [76]. LaForest J cited *Brickenden* in support of this position. LaForest J also delivered the reasons of L'Heureux-Dubé and Gonthier JJ, and Iacobucci J agreed on this point.

27 *Prenor Trust Co of Canada v Nunn* [1998] CanLII 18150 (Alta QB) at [17]; *Reid v Graybriar Industries Ltd* [2006] ABQB 519 at [143].

28 *Commerce Capital Trust Co v Berk* (1989) 57 DLR (4th) 759 (Ont CA) at [13]–[15].

29 J D Heydon, 'Causal relationships between a fiduciary's default and the principal's loss' (1994) 110 *LQR* 328 at 331. See further at 332:

> [T]he test is propounded in curious terms — in the first sentence using the language of estoppels ('he cannot be heard to maintain'), which will prevent the calling of evidence, while in the second sentence warning against speculation, a danger which would be averted if evidence were called. Another danger capable of being averted by evidence is the danger of injustice in extreme cases.

30 [1996] 2 All ER 801.

31 [1996] AC 421.

32 Chadwick J did seek to distinguish between 'normal' non-disclosure cases (to which *Brickenden* does not apply) and 'misleading' non-disclosure cases (to which it does), but this distinction does not appear to have been followed in later cases: [1996] 2 All ER 801 at 827. Certainly this point was not taken up in *Premium Real Estate v Stevens*, where it might have allowed Elias CJ to agree with the rest of the Supreme Court on the quantification issue.

33 [1997] 4 All ER 705. Evans LJ drew a distinction between fraudulent and non-fraudulent breaches; Hobhouse LJ thought that *Brickenden* was not relevant to a claim for compensation; Mummery LJ held that *Brickenden* was relevant to the question of breach of duty (ie, a fiduciary cannot excuse non-disclosure on the grounds that the principal would have acted in the same way), but his Lordship did not consider it relevant to the question of causation. See further M Conaglen, 'Remedial ramifications of conflicts between a fiduciary's duties' (2010) 126 *LQR* 72 at 82.

breach,[34] and obviously this would only be worth emphasising if the plaintiff's counterfactual conduct was relevant. *Swindle v Harrison* therefore appears to be inconsistent with *Brickenden*. The Court of Appeal again discussed *Brickenden* in *Gwembe Valley Development Company v Koshy* in 2003, but it concluded that 'the court is not precluded by authority or by principle from considering what would have happened if the material facts had been disclosed'.[35]

The High Court of Australia has not decided the *Brickenden* issue, but it seems that defaulting fiduciaries there may also establish that their principals would have carried on in any event.[36] The majority in *Maguire v Makaronis* found that the entitlement to rescission in that case arose immediately on the breach of fiduciary duty, and so there was no reason to consider any further causal issue.[37] In *Beach Petroleum v Kennedy*, the NSW Court of Appeal concluded that *Brickenden* was not authority for the general proposition that a court was precluded from considering what would have happened if the duty had been performed.[38] In 2002 the same court found that *Brickenden* was not applicable at all in cases involving a fiduciary duty/duty conflict, although this position must be regarded as doubtful.[39] In a recent duty/duty case in the

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34 This was the conclusion reached by Blackburne J in *Nationwide Building Society v Various Solicitors (No 3)* [1999] PNLR 606 at 671.

35 [2003] EWCA Civ 1048 at [143]–[147].

36 *Brickenden* was applied in *Commonwealth Bank v Smith* (1991) 42 FCR 390 at 394; 102 ALR 453; ATPR (Digest) 46-077; BC9103389; *Wan v McDonald* (1992) 33 FCR 491 at 520-1; 105 ALR 473; ATPR (Digest) 46-088; BC9203291; *Gemstone Corporation v Grasso* (1994) 62 SASR 239 at 243, 252; 177 LSJS 274; 13 ACSR 695; BC9405572. Spigelman CJ explicitly left the point open in *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 276; 29 ACSR 148; 12 ACLC 1705; BC9805299, but was one of the judges who distinguished *Brickenden* in *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1; 33 ACSR 1; [1999] NSWCA 408; BC9907249 at [444]. Since then the treatment of Brickenden has become progressively less favourable: see *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; 241 ALR 705; [2007] FCA 963; BC200704944 at [366]; *Short v Crawley (No 30)* [2007] NSWSC 1322; BC200711857 at [407]–[428]; *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524; 255 ALR 367; [2009] QCA 080; BC200902311 at [89]–[111]. Indeed, Pembroke J has recently said that 'taken literally, [the *Brickenden* rule] does not represent the law of New South Wales': *Thomas v SMP (International) Pty Ltd (No 4)* [2010] NSWSC 984; BC201006996 at [75].

37 *Maguire & Tansey v Makaronis* (1997) 188 CLR 449; 144 ALR 729; 71 ALJR 781; BC9702653. The court might have hinted at support for *Brickenden* at CLR 474:

> It may be that concern with respect to the apparent rigour of the reasoning in Brickenden reflects what has been seen as a tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. Whilst that be so, it is not self-evident that the response should rest in a general denial of the applicability of the reasoning in Brickenden to delinquent fiduciaries, particularly solicitors and other professional advisers.

But compare at 468, referring to the need, in equitable compensation cases, to specify criteria for a sufficient connection between the breach of duty and the loss sustained. Kirby J at 493 supported the rule, subject to an interpretation of the word 'material': 'Facts will not be "material" if the relevant loss would have happened if there had been no breach.'. As Conaglen points out, this circular approach to materiality renders *Brickenden* meaningless: above n 33, at n 77.

38 *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1 at [444].

39 *White v Illawarra Mutual Building Society Ltd* [2002] NSWCA 164; BC200203988 at [138] per Powell JA, [145] per Hodgson JA. Hamilton J agreed with both other judgments. See

Supreme Court of Victoria it was said that once the plaintiff had shown loss they were entitled to recover unless the fiduciary could show that the loss would have occurred in any event.[40] Again, there is no suggestion that the defendant will have to prove that fact on anything other than the balance of probabilities.[41]

Brickenden in New Zealand

For a time *Brickenden* was applied strictly in New Zealand,[42] but it has now been said that the 'absoluteness' of the rule has gone.[43] In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, Tipping J said that the law adopts a very plaintiff-friendly approach, but there is a small causal get-out:

> Questions of foreseeability and remoteness do not arise in this kind of case either. Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.[44]

Taken at face value, this passage could say nothing more than that the onus is on the defendant to prove that the principal would have suffered the same loss regardless of the fiduciary's breach. Like the Canadian reference to concrete evidence, the 'narrow escape route' would then be little more than rhetoric vaguely intended to deter. However, *Premium Real Estate v Stevens* shows that there is real content in the reference to the narrow escape route: it shows that the standard of proof that the defendant must satisfy in New Zealand is higher than proof on the balance of probabilities. This is not (or does not appear to be) the case in other jurisdictions. After quoting the 'narrow escape route' passage from the *Guardian Trust Co* case given above, Blanchard J said:

> The same general approach should be taken when the matter in issue is restricted to the quantum of the loss. The same policy applies to both . . . . It would be artificial, and inconsistent with that policy, to distinguish between causation and quantum

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Nationwide Building Society v Various Solicitors (No 3) [1999] PNLR 606 at 663 where Blackburne J rejected a submission that *Brickenden* should be confined to duty/interest conflicts.

40 *Watson v Ebsworth & Ebsworth (a firm)* [2008] VSC 510; BC200810306 at [136] per Beach J, citing Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 687. The comment was obiter because the judge found for the defendants on the initial liability point, but the point was closely examined.

41 In *Cassis v Kalfus (No 2)* [2004] NSWCA 315; BC200406210 at [98] Hodgson JA (with whom Handley JA agreed) referred to the 'general approach suggested by *Brickenden*' and concluded 'on the balance of probabilities' that the plaintiff would not have gone ahead with the transaction.

42 *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 93; *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 at 545–6; [1992] ANZ ConvR 391.

43 *Everist v McEvedy* [1996] 3 NZLR 348 at 356 per Tipping J; [1997] ANZ ConvR 610. Tipping J has made similar comments extrajudicially: see 'Causation at Law and in Equity — Do we have fusion?' (2000) 7 *Canterbury L Rev* 443.

44 [1999] 1 NZLR 664 at 687. Tipping J was giving separate reasons in the *Guardian Trust Co*, but his Honour's comments were approved by the Supreme Court in *Amaltal Corp Ltd v Maruha Corp* [2007] 3 NZLR 192; (2007) 8 NZBLC 101,996; [2007] NZSC 40 at [30]. The defendant in *Gilbert v Shanahan* [1998] 3 NZLR 528 made use of the escape route, but the defendant in *Taylor v Schofield Peterson* [1999] 3 NZLR 434 was not so lucky.

> issues. Where there is a normal or prima facie measure of loss, the fiduciary must positively show that it is not an appropriate measure. The normal and natural measure of loss, when a fiduciary breach has affected the price at which property is sold, is the difference between the sale price and market value. Policy dictates that the onus should be on the fiduciary to demonstrate that the plaintiff's loss was actually less (or non-existent). If there is any doubt about that, the doubt should be resolved against the fiduciary.[45]

This paragraph might simply say that it was for Premium to prove that the Stevens would have sold for less than full market value. That position would be uncontroversial. But in the next paragraph Blanchard J appeared to say that Premium must prove that point to a higher-than-normal standard:

> In this instance we consider the Court of Appeal ... too readily reached the conclusion that the Stevens would likely have sold the property for $2.8m. The evidence they relied on for their conclusion all was directed to the time before the failure by Premium to make the disclosure the Stevens should have received. The court appears to have overlooked in its assessment that the Stevens still believed that their property was worth $3m (the figure which appeared in the condition in the Parnell agreement) and were not especially concerned to acquire the Parnell property. In our opinion Courtney J was right to think that the Stevens, who were, as she found, not in a rush to sell, would have reappraised the situation if told that Mr Larsen was a speculator. The possibility that they may have sought other valuation advice cannot be disregarded. It is also likely, indeed probable, that they would have extended the sale period, and if they did so, it was quite possible that they would have achieved a sale at what the Judge has determined to have been the current market value of $3.25m. An orthodox measurement of their loss was therefore to use this figure. To depart from it, and to say as the Court of Appeal did that the Stevens were likely to have sold it at $2.8m, too easily permits the errant fiduciary to find the 'narrow escape route'. In this case, it also allows Premium some advantage from the influence of its own mistaken (though not negligent) assessment of market value. The Court of Appeal's use of the word 'likelihood' with reference to a possible sale at $2.8m indicates that it was not applying the reverse onus which Premium had to discharge with enough rigour.[46]

Unless *Brickenden* is still to be applied 'absolutely', the question is simply whether or not the Stevens family would have sold for $2.8m. Courtney J did not explicitly address this point, although given that her Honour assessed compensation in respect of the $3.25m market value the implication is that the Stevens would have kept the property. That said, at one point Courtney J indicated that only the decision to accept the $2.575m offer would have been reconsidered.[47] Furthermore, as the Court of Appeal noted,[48] Mrs Stevens actually said that she would have extended the sale period if she had known the truth about Mr Larsen. That is, if disclosure had been made, the Stevens would not have sold the house to Mr Larsen but would still have been prepared to sell it to others. Indeed, the Stevens had made a counter-offer of $2.8m to another prospective purchaser before Mr Larsen had shown any interest in making an offer of his own.

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45 [2009] 2 NZLR 384 at [85]. At the end of the paragraph, Blanchard J made reference to the work of Dr Butler: see the discussion below, n 60.

46 Ibid, at [86].

47 (2006) 11 TCLR 854 at [109].

48 [2009] 1 NZLR 148 at [41].

Of course the Stevens *might* have reversed their decision to sell at all, or someone *might* have come along and offered $3.25m.[49] To this extent there is some doubt about whether a sale for $2.8m would have actually occurred, but it seems quite clear from the evidence that the Stevens would have sold to the first person to offer $2.8m. It is true that part of the reason they would have accepted $2.8m is that the agent mistakenly undervalued their property, but this is why it is important that Courtney J found the appraisal to have been made in good faith and non-negligently. Given that it is always possible that a hypothetical purchaser will offer more money than a seller would have been prepared to accept, it is difficult to see how Premium could ever have discharged their burden of proof.

Elias CJ disagreed with the majority and would have awarded compensation on the basis of the price that the Stevens would have accepted. Her Honour thought that the agent should simply be required to prove on the balance of probabilities that the plaintiffs would have accepted a lower price, an analysis that is consistent with the approach taken in other jurisdictions:

> I do not think this evidential shift (which responds to difficulties in proof where loss entails the hypothetical of what a principal would have done if properly informed) amounts to a rule in equity that a fiduciary in breach is entitled only to a 'narrow escape route', to be policed with 'rigour'. Like any civil onus, it is discharged by the defendant on the balance of probabilities if the fact asserted is found to be more likely than not.
>
> [. . .]
>
> I agree with the Court of Appeal that it is likely that Mr and Mrs Stevens would have sold at $2.8m. That amount marks off the outer extent of the loss attributable to the breach of duty.[50]

Premium's commission(s)

The Supreme Court was unanimous in holding that Premium should forfeit their commission from the sale of the Stevens property. The Court of Appeal thought such a forfeit would amount to an account of profits that could not be awarded in addition to equitable compensation,[51] but Elias CJ simply said that refund of the commission was a stand-alone remedy for the breach of fiduciary duty and was available irrespective of compensation for loss.[52] Blanchard J took the same view, commenting that remuneration for services is not a profit but is something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty.[53] Both judges allowed that honest

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49 To develop the point: there is a further difference between showing that the Stevens would have been *willing* to sell for $2.8m and showing that they would *actually* have sold for $2.8m. Indeed, no offers had been received other than Mr Larsen's and the rejected $2.2m offer. But it would be incredibly harsh to decide at the same time (i) that a lack of offers meant that the Stevens would not actually have sold at $2.8m, and (ii) that the true market value was $3.25m. That no other offers were received clearly troubled Elias CJ on the valuation point: [2009] 2 NZLR 384 at [20]–[22].

50 [2009] 2 NZLR 384 at [39], [49] (references omitted).

51 [2009] 1 NZLR 148 at [98].

52 [2009] 2 NZLR 384 at [12], [30].

53 Ibid, at [90].

mistakes which did not go to the whole of the contract may not result in forfeiture, but found that this was not such a case.[54] Tipping J approached the question from a more theoretical perspective and discussed the terminology of monetary relief.[55] His Honour concluded that awarding 'both compensatory and restorative damages' was appropriate in this case.[56]

It is certainly correct that the commission the Stevens paid should have been forfeited. However, the Stevens missed an opportunity to claim Premium's commission on the resale, given that Premium was only in a position to earn this second commission because of its initial breach of duty.[57] The Stevens unsuccessfully tried to claim from Premium the profit made by Mr Larsen on the resale (approximately $3.555m–$2.575m),[58] but they did not attack the resale commission.[59]

Conclusion

Premium Real Estate v Stevens might be a simple example of judges differing on whether or not a particular fact has been proved. It might be that the majority of the Supreme Court thought that Premium had not demonstrated on the balance of probabilities that the Stevens family would have sold at $2.8m, whereas the Court of Appeal and Elias CJ thought that this fact had indeed been established. The relevant paragraphs of the majority judgment, given above, might admit of such an interpretation, and it must also be remembered that Courtney J assessed compensation on the basis that the Stevens would have kept the property. If this amounts to a factual finding that the Stevens would have reversed their decision to sell the house at all then it certainly provides support for the majority's view that Premium had not proved that the house would have been sold. Of course, if this is the correct view then the case

54 Both Elias CJ and Blanchard J relied on, inter alia, *Keppel v Wheeler* [1927] 1 KB 577 at 592; [1926] All ER Rep 207; *Kelly v Cooper* [1993] AC 205 at 216; [1993] 3 WLR 936; ANZ ConvR 138; *Imageview Management Ltd v Jack* [2009] EWHC Civ 63 at [49]–[51].

55 [2009] 2 NZLR 384 at [98] n 94:

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

(And further, in the main paragraph of the judgment)

> For the purpose of addressing those questions, and indeed generally, I regard it as helpful to treat monetary relief as a species of damages in all cases other than claims for debt and under statute.

Tipping J then acknowledged J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property*, Hart Publishing, Oxford, 2002.

56 Ibid, at [110], [112].

57 Premium shared the commission with a second agency also instructed on the resale. Blanchard J was evidently surprised that no claim had been directed towards the resale commission: ibid, at [65], [79].

58 The claim against Premium for restoration of Mr Larsen's profit was quickly rejected at each level for the simple reason that Mr Larsen and not Premium had made it.

59 It should also be noted that there was no evidence of any collusion that might have exposed Mr Larsen to recipient liability under the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244. Of course, this would assume that recipient liability applies at all when what is received is not actually trust property: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [113].

can be easily explained. However, it seems that the judges actually held different views on the standard of proof that the defendant needed to satisfy—and certainly Elias CJ thought there was disagreement on this point. If this view is right then the case demonstrates that, unlike in other jurisdictions, *Brickenden* still has currency in New Zealand.

It is difficult to feel sorry for Premium. It committed a clear breach of fiduciary duty, it caused (albeit non-negligently) the Stevens to think that $2.8m was an acceptable price for their property, and it got to keep its share of the resale commission. Nevertheless, it is submitted that the decision of the Chief Justice is to be preferred. Dr Butler has argued in a similar context that the proper approach is to presume against the fiduciary that the principal would have made the most profitable (though reasonable) use of the property.[60] Absent other evidence it would naturally be fair to presume that the Stevens would have obtained full market value for their house, but the point here is that such a presumption must be capable of rebuttal. As was noted above, given that the Stevens themselves were saying that they would have extended the sale period if they had known the truth about Mr Larsen, and given that they counter-offered with $2.8m to another prospective buyer before Mr Larsen even entered the picture, it is difficult to see how else Premium could have shown that the Stevens would actually have sold for that price. The escape route must be very narrow indeed.

60 A S Butler (Ed), *Equity and Trusts in New Zealand*, Brookers, Wellington, 2003, at [14.6.6], cited with approval by Blanchard J in *Premium Real Estate v Stevens* [2009] 2 NZLR 384 at [85]. Butler was discussing *Kelly v Cooper* [1993] AC 205 at 216, where the Privy Council held that there had not been a breach of fiduciary duty but commented that, if there had been, 'the correct measure of damage . . . was the loss to the plaintiff of the chance of negotiating an increased price if he had the information'. (Now see the second edition of Butler, Thomson Reuters, Wellington 2009, at [17.6.5].) In fact this presumption of most advantageous use is not always applied: see, eg, *McNally v Harris (No 3)* [2008] NSWSC 861; BC200807649 and *Talacko v Talacko* [2009] VSC 533; BC200910513, two cases where the value of assets had fallen between breach and judgment but compensation was assessed with reference to the value at the later date. In McNally, White J said that it would not automatically be presumed that the assets would have been sold in the meantime, although the plaintiffs could use evidence to show that this would have happened, and a presumption might be applied if there was a duty to realise the investment: [2008] NSWSC 861 at [25], [44]. The presumption appears to be more popular in Canada, and indeed was determinative in *Cash v Georgia Pacific Securities Corp* [1990] CanLII 1052 (BCSC).