IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-706
[2021] NZHC 3564

BETWEEN		ZHENLIN (ROBERT) LUO First Plaintiff
		KC BROTHERS LIMITED Second Plaintiff
		ANG YIP Third Plaintiff
		MANFEI COMPANY LIMITED Fourth Plaintiff
AND		XIAOLING (ANNIE) SHIU First Defendant
		R & G PHOENIX LIMITED Second Defendant
		CSR POKENO LIMITED Third Defendant

Hearing:	16-18 August, 27 September and 1 October 2021 Further submissions 18 and 21 October 2021
Counsel:	SRG Judd and Z Chen for Plaintiffs D Bigio QC and Y Mortimer-Wang for Defendants
Judgment:	21 December 2021

JUDGMENT OF WHATA J

This judgment was delivered by me on 21 December 2021at 5.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:	Righteous Law, Auckland Pidgeon Judd, Auckland

Introduction

[1] Zhenlin (Robert) Luo provided funds to Xiaoling (Annie) Shiu for the purchase of properties at 133, 87–89 and 119 Helenslee Road in Pōkeno. Separately from Mr Luo, Ang (Anny) Yip also provided funds to Ms Shiu to buy a property at 145C Helenslee Road. Mr Luo and Ms Yip both now claim that Ms Shiu deceived them into contracting with her and into providing those funds. They claim she fraudulently misrepresented to each of them that:[1]

(a) they would be partners together in the development of a wider area of land (the Pōkeno West Development) and would share in the profits of the whole of this development when she did not intend that this would occur (the Pōkeno West representation); and

(b) they had to pay real estate agent commission fees (the commission fee representation).

[2] Mr Luo and Ms Yip claim[2] that but for these representations, they would not have agreed to fund the purchase of the affected properties at the prices then agreed for them. They seek the following relief, on the alternative bases of contractual misrepresentation under the Contract and Commercial Law Act 2017 (CCLA)[3] and misleading conduct under the Fair Trading Act 1986 (FTA):[4]

---

1 A third misrepresentation that Ms Shiu deceived them about the true value of the properties was abandoned at the hearing.

2 Together with the second plaintiff company, KC Brothers Limited, an investment company wholly owned by Mr Luo; and the fourth defendant company, Manfei Company Limited (Manfei Company), also a property investment company, owned by Ms Yip and her business partner, Chofei Lam, as to a 50 per cent share each. For ease, in this judgment I primarily refer to Mr Luo's and Ms Yip's respective interests and claims as plaintiffs, and not expressly their associated interests through the second and fourth plaintiff companies, except where relevant.

3 The plaintiffs seek relief under s 35 of the CCLA. The CCLA came into force on 1 September 2017 after Ms Shiu had made several of the alleged misrepresentations (see s 2). However, s 6 of the CRA is identical in its effect: see sch 1, cl 17 of the CCLA. For simple ease of reference and continuity with the way counsel argued it, I refer to s 35 of the CCLA in this judgment as it is not material to the outcome. Comparable relief is available under s 6 of the Contractual Remedies Act 1979.

4 Ms Yip's pleaded claims include expectation losses arising from the Pōkeno West representation. This head of relief was not pursed at the conclusion of the hearing. Mr Luo also claimed, in the alternative, dissolution of the partnership but this was not pursued.

(a) Mr Luo seeks his money back on both transactions plus interest from the date he paid the funds to buy the affected properties;[5] and

(b) Ms Yip seeks to recover the difference between the "true" value of 145C Helenslee Road and the full sale and purchase price.

[3] Mr Luo also claims, in the alternative, dissolution of the contended partnership, and restitution of his monies together with interest.

[4] Ms Shiu admits the commission fee representation. On 27 January 2021 she was convicted in the Papakura District Court on two charges of obtaining by deception.[6] Ms Shiu nevertheless maintains that the commission fee representation did not induce the plaintiffs to contract with her; that she never made the Pōkeno West representation; and, in any event, the representations did not cause them any loss other than the commission fees which have been refunded.

[5] The third defendant is CSR Pokeno Limited (CSR Pokeno), a company owned by Ms Shiu, her husband, Dr Andrew Shiu,[7] and their interests, and of which Ms Shiu was a director from its incorporation on 4 May 2017 to 11 February 2021.[8] CSR Pokeno also denies any liability for the alleged representations made by Ms Shiu.

---

5 During the hearing a potential settlement was mooted based on the payment of $2.5 m. After the hearing counsel advised that agreement to this had been confirmed and only interest remained in issue. Counsel have confirmed Mr Luo received this sum in settlement on 17 November 2021: see below at [87]. I have decided to issue judgment as it was not clear that a judgment was not needed.

6 *R v Xiaoling Chen* [2020] NZDC 25807. As Judge Rollo noted, at [1], Ms Shiu also goes by her maiden name, Ms Chen. However, I adopt the name used by the parties in this proceeding: Ms Shiu.

7 I note Dr Shiu is referred to inconsistently across the evidence as Ms Shiu's husband and Ms Shiu's former husband. As I note below, neither Ms Shiu nor Dr Shiu gave evidence. Therefore, I simply refer to Dr Shiu as Ms Shiu's husband, as he is described in the plaintiffs' third amended statement of claim dated 27 August 2021, and which is admitted in the first defendant's statement of defence dated 24 September 2021.

8 CSR Pokeno now owns 70 per cent of the shares in Pokeno West Limited, which owns 53 Munro Road, Pōkeno. CSR Pokeno, as third defendant, admits this description—as provided in the plaintiffs' third amended statement of claim dated 27 August 2021—in its statement of defence dated 24 September 2021.

Issues

[6] Accordingly, the central issues I must resolve are:

(a) Did the commission fee representation induce the plaintiffs to contract with Ms Shiu?

(b) Did Ms Shiu make the Pōkeno West representation?

(c) Did the representations cause the plaintiffs loss?

(d) If so, what is the relief?

(e) Is CSR Pokeno liable for Ms Shiu's representations?

Background

[7] The present claims revolve around the acquisition of properties located at 87–89, 119, 133 and 145C Helenslee Road, Pōkeno. It is helpful to provide a summary of the dealings between the parties on each of the properties and Ms Shiu's purchase of another property at 53 Munro Road.

Mr Luo and 133 Helenslee Road

[8] The key facts in relation to Ms Shiu's dealings with Mr Luo are as follows. Ms Shiu and Mr Luo discussed the acquisition of properties in Pōkeno for development over dinner on Christmas Day in 2016. Shortly after that discussion, Mr Luo, Ms Shiu and her uncle, Mr Guoyi Zhong, entered into an agreement to fund the purchase of 133 Helenslee Road. Its key terms were subsequently varied, as described below.

[9] On 30 December 2016, Ms Shiu then entered into an agreement for the sale and purchase of 133 Helenslee Road. The terms of the sale and purchase agreement included, relevantly:

(a) a purchase price of $3.1 m;

(b) a deposit of $1 m, to be paid on completion of due diligence; and

(c) the balance of the purchase price to be paid 40 calendar months after the date of the agreement.

[10] On 11 January 2017, Ms Shiu signed a variation to the sale and purchase agreement, under which the agreement was declared unconditional on the payment of the deposit; the deposit amount was changed to $1.1 m payable on 12 January 2017; and settlement was set at 48 months from the date of the sale and purchase agreement.[9]

[11] On 12 January 2017, the funding agreement between Mr Luo, Ms Shiu and Mr Zhong[10] was varied. The varied agreement states Mr Luo "lent" $1.7 m for the purchase of 133 Helenslee Road. The agreement records this sum was needed "at the first stage of the land investment project" and that it "will bear annual interest of 6%". It records the principal and interest will be "paid back" to Mr Luo "when 30% of the land or houses are sold out." The agreement also records that further negotiation will be required if the project requires additional funding to progress, and the parties will consider "whether the land is to be sold as a whole or in parcels, or consider whether to continue to with the development of the land." The agreement refers to the parties' share division as follows: Ms Shiu as to 40 per cent; Mr Luo as to 45 per cent; and Mr Zhong as to 15 per cent. The agreement also states that the parties:

> … agree to pay the agency fee of NZD$200,000. NZD$100,000 has already been paid. The other NZD$100,000 will be paid when there is a profit in the land investment project.

For ease of reference I refer to this fee obligation as a commission fee and to the agreement as the 133 Helenslee JVA.

[12] Mr Luo paid $1.2 m, as agreed, on 12 January 2017, comprising $1.1 m for the deposit and $100,000 for the commission fee.

[13] At about this time Ms Shiu engaged Sir William Birch (Sir William) to provide advice on the proposed 133 Helenslee Road purchase.

---

9 This is as pleaded in the plaintiffs' third amended statement of claim and is admitted by Ms Shiu.

10 See above at [8].

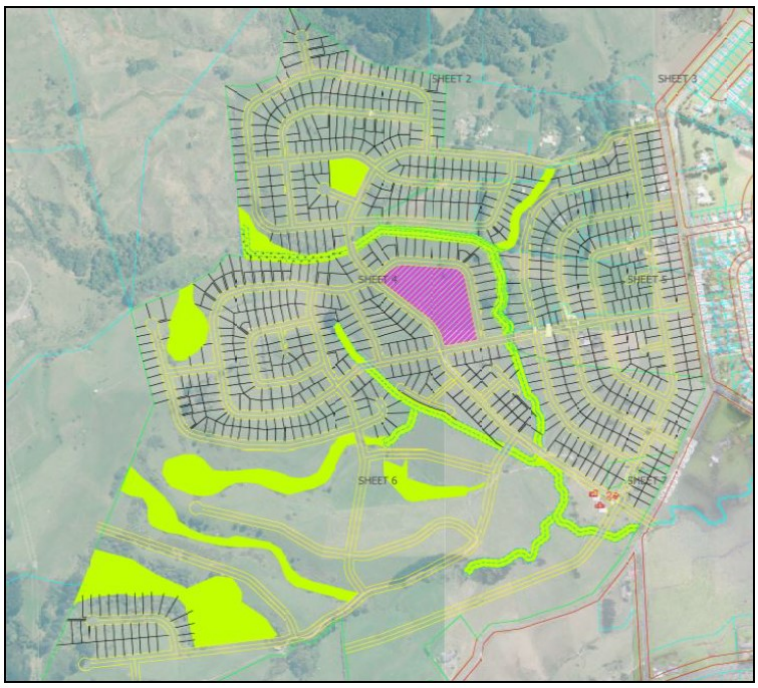
Acquisition of 53 Munro Road

[14] A few weeks after the 133 Helenslee JVA was executed, Ms Shiu learned that the property at 53 Munro Road was going to come onto the market and, on 31 January 2017, she and Dr Shiu agreed to purchase it. The purchase price was $12 m. The sale and purchase agreement required a deposit of $2 m, and provided a completion period for the purchase of 36 months. Sir William also provided advice in relation to this purchase and his firm Birch Surveyors were retained to assist with a plan change process affecting the Helenslee Road and Munro Road properties.

Mr Luo and 87–89 and 119 Helenslee Road

[15] Between March and May 2017, Ms Shiu proposed to Mr Luo, that in addition to 133 Helenslee Road, he should purchase the contiguous properties at 87–89 and 119 Helenslee Road. Then, on 19 May 2017, Ms Shiu entered a sale and purchase agreement for 119 Helenslee Road. The agreement records a purchase price of $3.75 m; a due diligence period of 60 days; and two deposits: the first, of $1 m, payable 60 working days from the date of the agreement; and the second, of $500,000, payable six months from the date of completion of due diligence. Settlement was then 48 months following the completion of due diligence.

[16] Meanwhile, Ms Shiu engaged Birch Surveyors to prepare a private plan change affecting properties encompassing an area including the Helenslee Road and Munro Road properties as depicted below:[11]



I refer to these as the Pōkeno West properties. However, this private plan change proposal was subsequently overtaken in October 2017 by a Council-led revision of its plan to enable residential development of this area.

[17] Also in October 2017, Mr Luo and Ms Shiu entered into an agreement in relation to the properties at 87–89 and 119 Helenslee Road. This agreement authorises Ms Shiu to negotiate for the final sale and purchase of these properties, but Mr Luo should agree to the sale and purchase agreements before signing, and that Mr Luo "is supposed to take part in all the decision making process[es]." The agreement also records that the "[d]etails are in the sale and purchase of the land agreement". The agreement states that "NZD$2,900,000 is needed at the first stage of the land investment project" comprising the initial deposits for each property, totalling $2 m; a further $500,000 deposit due within six months for 119 Helenslee Road; and a total of $400,000 in agency fees for both properties. The agreement states this money "was lent by [Mr Luo]" at a rate of six per cent interest per annum. Mr Luo is to be paid

[11] This is an early plan from April 2017.

back “when 20% of the land are sold out”. The agreement provides Mr Luo and Ms Shiu each hold 50 per cent of the shares, and profit is “to be divided in accordance with the proportion of equity.” I refer to this agreement as the 87–89 and 119 Helenslee JVA.

[18] On 8 December 2017, Ms Shiu entered into an agreement for the sale and purchase of 87–89 Helenslee Road. This agreement records a purchase price of $4.5 m; a 90-day due diligence period; and a deposit of $1 m, payable in two tranches: $400,000 due 30 days from the date of the sale and purchase agreement, and $600,000 upon satisfaction of the purchaser. The settlement date is specified as four years from the date the sale and purchase agreement is declared unconditional.

[19] In December 2017, Mr Luo made payments to Ms Shiu of $400,000 and $600,000 for the deposits owing on 87–89 Helenslee Road; a further $1 m for the first part of the deposit for 119 Helenslee Road; together with $400,000 in commission payments said to be for Eric Chase, the real estate agent working with Ms Shiu, for the purchase of all properties. Mr Luo subsequently paid a further $500,000 for the second part of the 119 Helenslee Road deposit on 15 June 2018.[12]

False commissions revealed

[20] Mr Luo learned about the false commissions in late December 2017 from Mr Chase and Ms Yip. The evidence on what then transpired between Mr Luo and Ms Shiu is sketchy. Ms Shiu denied any wrongdoing and attempts were made to reach settlement without success.

[21] In early 2018, Mr Chase lodged a complaint with the Serious Fraud Office and, in October 2018, so too did Mr Luo.

[22] In March 2020, Mr Luo applied to this Court for injunctive relief designed to protect his position under the JVAs pending trial, including an order preventing

---

[12] That Mr Luo made all of these payments is admitted by Ms Shiu: at [39] and [40] of the statement of defence dated 24 September 2021.

Ms Shiu from disposing of 53 Munro Road.[13] Lang J declined to grant the application, however he made the following orders by consent:[14]

> That Ms Shiu either personally, or in her capacity as a director of R&G Phoenix, will:
>
> i. Not sell, assign or otherwise encumber her interest or the interests of R&G Phoenix under the sale and purchase agreements for 87/89, 119 and 133 Helenslee Road;
>
> ii. Provide all information as to the re-zoning, subdivision and development of 87/89, 119 and 133 Helenslee Road before any decisions concerning the re-zoning, subdivision and development of those properties are made;
>
> iii. Make no material decisions concerning the re-zoning of the properties at 87/89, 119 and 133 Helenslee Road other than following discussion with either the agreement of Mr Luo or an order of the Court.

[23] Also before Lang J were further applications by Mr Luo for summary judgment in the form of an order requiring Ms Shiu to nominate the second defendant, R&G Phoenix Ltd (Phoenix), as purchaser to complete the purchase of 133 Helenslee Road; and order removing Ms Shiu as a director of Phoenix. Those applications could not proceed at the time of the application for injunctive relief and, accordingly, Lang J did not resolve them.[15]

[24] In October 2020, Mr Luo and Ms Shiu failed to agree on how to settle the purchase of 133 Helenslee Road. Mr Luo applied for an interlocutory injunction compelling Ms Shiu to accept his proposal. That application was ultimately resolved by consent orders made by Gault J on 4 November 2020, varying the earlier consent orders Lang J made on 23 March 2020.[16] Further exchanges about how to settle the property also proved fruitless and on 23 December 2021 the purchase did not settle. In January 2021, Ms Shiu lodged a caveat over 133 Helenslee Road hoping, it appears, to prevent its on-sale. On 19 July 2021, Andrew AJ declined to grant Ms Shiu's application for orders the caveat not lapse.[17] Following the caveat's lapse, on 31 July 2021, Ms Shiu repaid Mr Luo $470,906.06 of the deposit paid on 133 Helenslee Road.

---

13 *Luo v Shiu* [2020] NZHC 611.
14 At [5].
15 At [4].
16 *Luo v Shiu* HC Auckland CIV-2019-404-706, 4 November 2020 (Minute of Gault J).
17 *Shiu v Franklin Law Trustee Limited* [2021] NZHC 1825.

Ms Yip and 145C Helenslee Road

[25] The key facts of Ms Yip's relationship with Ms Shiu are more complicated. The following represents my findings on what happened. On 17 April 2017 Ms Shiu signed a sale and purchase agreement to purchase 145C Helenslee Road. The agreement's key terms include a purchase price of $4.5 m; a 60-day due diligence period; and a deposit of $1.1 m in two tranches: $700,000 payable 60 working days from the date of sale and purchase, and $400,000 payable 120 days from the date of the sale and purchase. A settlement date of 17 April 2021 was also agreed.

[26] In early June 2017, Ms Shiu contacted Ms Yip about a project involving the acquisition and development of land in Pōkeno. This included discussion about the development of the Pōkeno West area as a whole to enable residential development. Ms Yip was keen to be involved. They then met with an accountant, Sam Chan, on 12 June 2017, and instructed him to incorporate Manfei Company for the purpose of acquiring 145C Helenslee Road. Mr Chan also advised that he thought the purchase price was excessive. Attempts were then made to engage lawyers to assist Ms Yip but this could not be arranged before she departed for an overseas vacation.

[27] In any event, that day, Ms Yip signed an agreement with Ms Shiu in relation to 145C Helenslee Road. This agreement is titled "Pōkeno Land Development Purchase" and records that Ms Shiu[18] has "partnered" with Ms Yip on this land development project, "which is wholly financed by Ms Yip and Lam Cho Fei." The agreement records that the purchase of the land has been "contracted in the name of Manfei Company Ltd" for "$450+GST and a down payment of NZD 1.1 million, together with a brokerage fee of NZD 100,000 to be paid in advance." The agreement also records that all development fees are to be "borne by Ang Yip and Lam Cho Fei", through Manfei Company, and that, "[i]n the future, whether the land, project or house is sold, the principal and interest (at 6% per annum) shall be deducted from the profits obtained, or losses shall be equally distributed." Finally, the agreement states, "[i]f, under special circumstances, development becomes impossible midway, the [property]

[18] Ms Shiu's name is recorded as Annie Chen. See above n 6.

shall be put up for resale, and the profits or losses shall be equally shared by both parties." I refer to this agreement as the 145C Helenslee JVA.

[28] The 145C Helenslee Road sale and purchase agreement was varied twice, on 12 June 2017 and 10 July 2017. The 12 June 2017 variation document purports to make the sale unconditional and provides that the initial deposit of $1.1 m is to be paid in two tranches: $700,000 within seven working days of the variation, and the balance of $400,000 on or before 30 days of it. The 10 July 2017 document further varies the structure of the deposits, into three tranches: $700,000 payable on 12 July 2017; $400,000 payable on 4 October 2017; and $1 m payable on 17 April 2021. The variation records the balance of $2.4 m is then payable on 17 April 2023.

[29] Ms Shiu and Ms Yip remained in contact while Ms Yip travelled through Europe and Africa. Among other things, Ms Shiu arranged for Ms Yip to take legal advice from her lawyer, Diane Low. Ms Low's advice was clear. In an email dated 28 June 2017, Ms Low recommended that Ms Yip have a separate lawyer to Ms Shiu in order to protect her interests. She noted that "the property transaction is of high value and is risky" and that, as a conveyancing lawyer, she does "not have necessary expertise to assist with advising on the subdivision apart from identifying the risk involved". Ms Low also advised that, "[i]t has been agreed that the terms of the variation will not be enforced", and the variation was null and void as Ms Shiu had not received legal advice. She also said:

> The risk involved for your company is that if you do not obtain an on-sale and you cannot achieve section sales in order to raise a mortgage, you may not be able to settle the property unless the company or you personally have sufficient funds…

In a further email of 28 June 2017, Ms Low advised Ms Yip that "there is a high likelihood that this particular block will not be developed for 10 years or more and that you would be better served buying a front block."

[30] Ms Yip decided to proceed in any event and shortly before paying the $700,000 deposit—then due on 12 July 2017—Ms Yip told Ms Low she had taken her own legal advice on the agreement between her and Ms Shiu; confirmed her acceptance of that agreement; and advised she "take[s] responsibility on this". However, Ms Yip had not

in fact taken independent legal advice. Ms Yip's evidence was that this was because of pressure from Ms Shiu to use her own lawyer, Ms Low, and not Ms Yip's. Ms Yip, through Manfei Company, paid the $700,000 deposit around 12 July 2017. Ms Yip also paid the commission fees over the two-week period between 14 July to 28 July 2017.

[31] Soon after Ms Yip's return to New Zealand, the commission fee issue surfaced. In September 2017, Ms Low advised that there was no commission fee payable to Mr Chase. Ms Yip then retained independent legal advisers. She also sought repayment of the commissions. Ms Shiu refused. Ms Yip then met with Ms Shiu. Ms Shiu refused to engage on the commission fee issue, and maintained a position that if Ms Yip had a problem with the commission fees she should exit the JVA and Ms Shiu would sell 145C Helenslee Road to someone else. Ms Yip raised the possibility of increasing her percentage of the 50:50 profit share split to recognise her provision of the funding. This was not acceptable to Ms Shiu. A further meeting in September also proved fruitless, with Ms Shiu referring Ms Yip to her lawyer.

[32] Matters came to a head again in October 2017 as the requirement to pay the second deposit of $400,000 became due. Ms Yip was concerned that if she did not pay this deposit she would lose her initial investment of $700,000. I infer that she then decided to fully commit herself, independently of Ms Shiu, to the purchase of 145C Helenslee Road, and paid the further deposit on 25 October 2017. Following this, Ms Shiu and Ms Yip executed a deed of nomination dated 17 November 2017, under which Ms Shiu transferred all of her rights and interests as purchaser of 145C Helenslee Road to Manfei Company (the Deed of Nomination). The Deed also records that, upon performance of the parties obligations under it, Ms Shiu and Ms Yip "shall be released from all terms of the joint venture dated 12 July 2017."

[33] The commission fee issue remained unresolved. Ms Yip continued to pursue this issue with Ms Shiu with no response. She then took the issue up with Mr Chase in December 2017. Mr Chase reacted with complete surprise and confirmed that he had never received those commission payments.[19] Mr Chase then spoke to Ms Shiu's

[19] This is consistent with Mr Chase's evidence.

mortgage broker and on 22 December 2017, Ms Yip was refunded the commission fee payment together with interest.

[34] It was about this time that Ms Yip learned from Mr Chase that Ms Shiu stood to benefit substantially from the rezoning of 53 Munro Road, a much larger property than 145C Helenslee Road. His advice to her was that he had structured and priced the sections of the Pōkeno West Development on the basis the whole block would be developed together and future profits from it would be shared between all of the investors. He said that 145C Helenslee Road had such a high price because it was an essential piece of the proposed Pōkeno West Development.

[35] Ms Yip then formed the view that she had paid an unjustified super-premium for 145C Helenslee Road, the effect of which was to subsidise Ms Shiu's purchase of the 53 Munro Road property. Ms Yip's evidence was that she considered the only way to develop the land profitably was to do so as part of the larger block. She then set about to ensure that she was involved in the development of the Pōkeno West properties as a whole. I return to the issue of whether Ms Shiu had previously told her she would be involved in the wider Pōkeno West Development below.

[36] Mr Chase then arranged a meeting after the Christmas break for the purpose of mapping a way forward together, including Ms Yip and Mr Luo. Mr Chase chose to engage with Dr Shiu. Ms Yip and Mr Chase met with Dr Shiu at the beginning of February 2018. Ms Yip says that Dr Shiu agreed that she should be involved in the Pōkeno West Development as previously agreed and he would try to persuade Ms Shiu to "bring the development back into line" (in Ms Yip's words).[20] Following this, Ms Yip instructed lawyers to draw up a draft joint venture agreement and send it to Ms Shiu. Ms Yip met again with Dr Shiu in mid-February, this time one-on-one. Ms Yip's evidence was Dr Shiu said neither he nor Ms Shiu were interested in the new joint venture proposal.

---

[20] Mr Bigio objects to the admissibility of this evidence on hearsay grounds. He is technically correct insofar as Dr Shiu was available to give evidence (under witness summons) and insofar as his statement is evidence of the truth of what it asserts. But he was also available as a witness for Ms Shiu to rebut the fact that the statement was made. I therefore consider that the evidence about this is admissible. I also note, however, that insofar as his evidence purports to confirm the parties reached an understanding, it is only probative of the fact that, at the meeting, the parties had a conversation addressing these matters.

[37] Also relevant to the picture are meetings between Ms Yip and Sir William Birch, the surveyor who had drawn up the Pōkeno West Development concept plans. They first met at the end of 2017, together with Ms Yip's partner and a consultant she hired to assist Manfei Company. They met again in early March 2018. Ms Yip's evidence was she took the impression from Sir William that she would have to develop the 145C Helenslee Road property separately from 53 Munro Road.

[38] As noted above, Ms Shiu was subsequently charged and convicted in the District Court in relation to the commission fee deception. Ms Yip joined with Mr Luo in taking steps to secure their position, including through seeking relief in this Court in the proceedings referred to above.

[39] Completing the picture, Ms Yip's sister, Jennifer Ye, acquired 133 Helenslee Road in January 2021[21] and in April 2021 Ms Yip paid a further deposit owing on 145C Helenslee Road of $1 m.

The thresholds

[40] The plaintiffs' claims are based on allegations of misrepresentation under the CCLA and misleading and deceptive conduct under the FTA. The threshold tests for each are as follows.

Misrepresentation

[41] Section 35 of the CCLA relevantly provides:

> **35 Damages for misrepresentation**
>
> (1) If a party to a contract (A) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B),—
>
> > (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and

[21] Ms Ye gave evidence she initially purchased the property in her own name, and then nominated a company, of which she is a director, and shareholder as to 50 per cent, to take ownership.

> (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.
>
> ...

[42] As Mr Bigio submits, the elements that must be satisfied in a claim of actionable misrepresentation are: [22]

(a) there must be a misrepresentation of fact;

(b) it must induce the representee to contract;

(c) the representor must intend that result; and

(d) there must be reasonable reliance on the misrepresentation.

[43] In determining whether there is an actionable misrepresentation, the Court must consider the words used in context and what a reasonable person would have understood them to be in all the circumstances. As the Court of Appeal said in *Ridgway Empire Ltd v Grant* [2019] NZCA 134:[23]

> [11] Whether there has been a misrepresentation of fact is not determined merely by considering the literal meaning of the words used without regard to the context. The enquiry is what a reasonable person would have understood from those words in all the circumstances. Relevant considerations will often include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used. Where a party with superior knowledge takes it upon itself to make a representation of fact without qualifying it by reference to the basis for its assertion, it will generally have to accept the consequences of being wrong. However, each case will ultimately turn on its own facts.

[44] To establish inducement, the representee (here, Mr Luo and/or Ms Yip) must show either that:[24]

(a) the representor (here, Ms Shiu) intended that the representee would be induced by the misrepresentation to enter the contract; or

---

22 *Ridgway Empire Ltd v Grant* [2019] NZCA 134, (2019) 20 NZCPR 236 at [11].
23 *Ridgway Empire Ltd v Grant,* above n 22 (footnotes omitted).
24 *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145–146 per Hardie Boys J. Affirmed in *Mason v Magee* [2017] NZCA 502, (2017) 18 NZCPR 902 at [42].

(b) the representor used language that would induce a reasonable person in the same circumstances to enter the contract.

[45] If there has been a misrepresentation, s 35 of the CCLA creates an entitlement to damages as if the misrepresentation were a term of the contract. As noted by Blanchard J in *Marlborough District Council v Altimarloch Joint Venture Ltd* (dealing with the equivalent section under the Contractual Remedies Act 1979), the section operates so the representor is treated as though they have made a promise which the representee is entitled to have made good.[25]

Misleading and deceptive conduct

[46] Section 9 of the FTA provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[47] As stated in by the Supreme Court in *Red Eagle Corporation Limited v Ellis*, in relatively simple cases a court must answer three questions:[26]

(a) First, whether a reasonable person in the claimant's situation—that is with the characteristics known to the defendant of which the defendant ought to have been aware—would likely have been misled or deceived.

(b) Second, whether the particular claimant before the Court was actually misled or deceived by the defendant's conduct.

(c) Third, whether the defendant's breach was an operative cause of the claimant's loss or damage. It does not have to be the sole cause, but it must be an effective cause.

---

[25] See *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [63] and following.

[26] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28]–[31] (citations omitted).

Did the commission fee deception induce Mr Luo and Ms Yip to contract?

[48] As noted above, on 27 January 2021, Ms Shiu was found guilty of obtaining money by deception in respect of the commission fees and the fact of the deception is not disputed.[27] The commission fee representation is therefore a qualifying misrepresentation of fact under the CCLA and misleading conduct under the FTA. Mr Bigio nevertheless maintains that this deception did not "induce" Mr Luo or Ms Yip to contract and that both Ms Yip and Mr Luo later affirmed those JVAs with full knowledge of this deception. He also submits they have already been compensated for any direct losses caused by the deception on the repayment of the commission fees.

Assessment

[49] I accept that the commission fee deception did not literally "induce" the plaintiffs to enter into their respective JVAs with Ms Shiu. The fact of a commission payment was not an inducement to contract. But, as Mr Judd submits, had Ms Yip or Mr Luo known the truth about Ms Shiu's dishonesty, they would not have entered into the respective JVAs with her. In this way Mr Luo and Ms Shiu were induced to contract with Ms Shiu based on a false premise, namely of honest dealing. I am therefore satisfied that deception induced them to enter into the JVAs.

[50] However, s 35(1)(a) of the CCLA provides that a representee is entitled to damages "in the same manner and to the same extent as if the representation were a term of the contract that has been breached". Relief of this kind is inapposite in relation to the commission fee misrepresentation: Mr Luo and Ms Yip do not want the false commissions to be treated as though they form part of the contract. I have come to the view therefore that s 35 does not provide relief in respect of the commission fee deception.

[51] But there is no problem of this kind in relation to misleading and deceptive conduct in terms of s 9 of the FTA. Obtaining by deception falls squarely within the ambit of consumer protection legislation, including the FTA. In this case, it is misleading and deceptive conduct of a kind that vitiates the basis and efficacy of joint

---

[27] Above n 6.

venture agreements, under which Ms Shiu is entrusted with several million dollars to acquire the Helenslee Road properties. For this reason, Ms Shiu's conduct triggers a fulsome remedial response, including but not limited to disgorgement of the commissions. I return to the issue of relief, as well as affirmation, below. For present purposes, my central finding is that the commission fee deception was a clear breach of s 9 of the FTA.

Did Ms Shiu make the Pōkeno West representation?

The evidence and argument

[52] Mr Luo and Ms Yip gave evidence that Ms Shiu told them they would be involved together in the development a large area of rural land to the west of the existing Pōkeno urban area, and that this was to be referred to as the "Pōkeno West Development". This area is shown above at [16]. More specifically Mr Luo and Ms Yip say Ms Shiu told them they would be in business together in relation to the whole Pōkeno West development. They also say they were shown a copy of the survey plan for the Pōkeno West Development prepared by Sir William Birch which showed approximately 1,600 residential sections (although Mr Luo concedes that this was after he signed the 133 Helenslee JVA).[28]

[53] Both Mr Luo and Ms Yip were cross examined at length about their dealings with Ms Shiu. They both steadfastly maintained that the ability to be involved in the Pōkeno West Development crucially underpinned their commitment to the JVAs. Their recollections of Ms Shiu's development aspirations is supported by Mr Chase's evidence. Mr Chase said that he discussed with Ms Shiu her plans to acquire rural lands to the west of the existing Pōkeno urban area and about the potential for a plan change that would enable the residential development of those lands. He said that central to their discussions was the benefit of owning all or most of the land in the Pōkeno West block, which were in eight separate titles (including those in dispute in these proceedings).

---

[28] I simply refer to this as the "Birch concept plan".

[54] Mr Chase also said that they discussed how to go about buying these properties given that the rezoning process would take some years and that the concept strategy he put to Ms Shiu was to propose long settlement periods, but with larger than usual deposits, to make the offers attractive to vendors. Mr Chase then described how Ms Shiu actively pursued the acquisition of these lands at prices well above then market value in furtherance of these plans. He also notes, for example, that she acquired the very large rural lot at 53 Munro Road as part of this overall plan and acquiring the smaller Helenslee Road properties were key to opening up this much larger property. He said that this was the consistent theme of their discussions from September 2016 right through to 2017 during which time he negotiated the sales of 87–89, 119, 133 and 145C Helenslee Road. Cross-examination did little to shake his clear recollection of these matters.

[55] In her statement of defence, Ms Shiu denies she told Ms Yip or Mr Luo that "they would be partners together in the whole of the Pōkeno West Development and would share in the profits of the whole development when she did not intend that this would occur." Mr Bigio submits that while the rezoning was a joint matter—as contemplated by the JVAs and shown in the Birch concept plans—the evidence shows that the "profit sharing" aspect of the alleged representation is an after-the-fact assertion based on advice received from Mr Chase. The direct evidence is also said to show that the plaintiffs had no more than a belief based on general statements that they would be "in business together" or similar statements. Cross-examination is also said to show there were no details of this profit share discussed with Ms Shiu. Mr Bigio also submits that, even if there was a representation of this kind, it could not have been reasonably relied upon and it is not credible to say the plaintiffs were induced by an unconditional offer to share an undetermined profit over the whole of the Pōkeno West Development. It was he says that any representation was at best even less than a bare agreement to agree (and therefore unenforceable on grounds of vagueness).

[56] Furthermore, Mr Bigio submits that there is no evidence to show that Ms Shiu never intended to involve the plaintiffs in any aspect of the Pōkeno West Development and, accordingly, the plaintiffs have not proven this representation (if it were made) is false, as required for an actionable misrepresentation. He also contends that evidence Dr Shiu refused to sign an agreement that would involve Ms Yip in the Pōkeno West

Development is not evidence of Ms Shiu's intent not to follow through on the alleged promise.

[57] Mr Bigio also identifies errors and inconsistencies in Mr Luo's evidence which are said to undermine his claim that he was promised involvement in the Pōkeno West Development, including that:

(a) Mr Luo claimed to have been shown a Birch concept plan for the Pōkeno West Development at about the time of the 133 Helenslee Road purchase when no such plan existed at that time and Mr Luo knew nothing about 53 Munro Road (Mr Luo's own evidence is this assertion was mistaken and he did not see a Birch concept plan until later in 2017);

(b) Mr Luo renegotiated his share of the 133 Helenslee JVA profits from 30 per cent to 45 per cent between the December 2016 and January 2017 versions of the 133 Helenslee JVA, apparently on the basis, on Mr Luo's evidence, that his suspicions were aroused;

(c) there is no reference to the Pōkeno West Development plan in either version of the 133 Helenslee JVA, nor to any other properties Ms Shiu had acquired or intended to acquire; and Mr Luo did not attempt to include any reference to a wider agreement if he were, as he claims, suspicious; and

(d) the 133 Helenslee JVA is limited to agreement the parties will achieve rezoning and subdivision of the property; and the agreement contains an entire agreement clause, recording that "any other subject not mentioned in this agreement should be negotiated by the parties".

(e) Mr Bigio makes similar criticisms in respect of Mr Luo's evidence about the 87–89 and 119 Helenslee JVA. In addition, Mr Bigio notes Mr Luo negotiated the 87–89 and 119 Helenslee JVA with full knowledge of the Birch concept plans but did not include reference to

those plans in that JVA (and, in any case, the Birch concept plans were simply consistent with the parties' rezoning agreement); and

(f) it is of even greater significance that this JVA does not reference any wider agreement or the Pōkeno West Development given Mr Luo's evidence he had seen the Birch plans and, by this point (October 2017), Ms Shiu told him she had signed or would sign sale and purchase agreements for further various properties that would form part of the development.

[58] Mr Bigio is also very critical of Ms Yip's evidence. He submits:

(a) Ms Yip's evidence at trial that her JVA with Ms Shiu was not tied only to 145C Helenslee Road was inconsistent with her pleadings and with contemporaneous documentation, including WeChat messages that clearly show the JVA was limited to that property;

(b) Ms Yip moulded her evidence to avoid the fact that she could have reasonably ascertained the value of 145C Helenslee Road at the time of the JVA if it were a real concern to her, and that, on its face, the JVA did not refer to a Pōkeno West Development;

(c) in her evidence, Ms Yip vacillated on the likely level of any profit share from this wider development she expected to gain;

(d) there is no contemporaneous documentation to support Ms Yip's evidence the parties were engaged in this wider development;

(e) it is notable Ms Yip made no mention of the wider Pōkeno Development when negotiating the Deed of Nomination and the reason for this is that it was never made; and

(f) in reality, the prospect of a wider development only came to Ms Yip's attention when she met with Mr Chase in December 2017, which

explains why she then sought to enter into a joint venture involving Ms Shiu's wider development plans.

Analysis

[59] As the Court of Appeal explained in *Perry Corporation v Ithaca (Custodians) Ltd*, the absence of evidence, including the failure of the party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case.[29] That will arise only when:[30]

> (a) The party would be expected to call the witness (and this can only be when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where the defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.

[60] Contrary to Mr Bigio's submission otherwise, each of these factors is present in this case. Given the evidence of both Mr Luo and Ms Yip, it was to be expected that Ms Shiu would give evidence on what was said or not said about the Pōkeno West Development. Also, Ms Shiu's credibility is directly relevant to whether the representations were made and what was said. However, given the seriousness of the allegation of fraudulent misrepresentation, I approach the assessment on the basis that there must be clear and credible direct evidence of a misrepresentation of this kind.[31]

[61] The absence of contemporaneous documentation supporting the making of the alleged Pōkeno West representation is a factor in Ms Shiu's favour. This includes the fact that the JVAs do not expressly refer to participation in any wider project other than in terms of the rezoning process. The various matters Mr Bigio raised tend to cast doubt on the robustness and credibility of Mr Luo's and Ms Yip's respective accounts. In addition, Ms Yip's formal attempts at securing a joint venture in relation to the wider Pōkeno West Development after her discussions with Mr Chase across

---

29 *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 (CA).
30 At [153].
31 See *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565.

December 2017 and into early 2018 also tends to support an inference that Ms Yip only became truly interested in Ms Shiu's wider development plans at about this time.

[62] However, the promise of involvement in the Pōkeno West development and profit share is consistent with proven facts. This includes the engagement of Birch Surveyors to promote a plan change affecting all the properties at about the time they were being acquired; the speedy acquisition of multiple contiguous properties by Mr Luo, Ms Yip and Ms Shiu; their individual and collective disinterest in the value of individual properties; and the common knowledge about the proposal to rezone the wider area identified as part of the Pōkeno West Development. Furthermore, it seems implausible that some cooperation and profit share according to respective investments was not envisaged given their investment returns hinged on the success of the proposed plan change as a whole and subsequent development of the properties. In addition, the clear common pattern of Ms Shiu's dealings with both Mr Luo and Ms Yip, including in respect of the commission fee deception, supports an inference that Ms Shiu was also duping Mr Luo and Ms Yip about their likely involvement in the Pōkeno West Development as a whole. Finally, while a matter of impression, I did not detect any dissembling by Ms Yip or Mr Luo in the basic thrust of their respective evidence: they clearly expected to be involved in the wider Pōkeno West Development. Therefore, I am satisfied on the balance of the probabilities that Ms Shiu made the Pōkeno West representation, or words to that effect, to Mr Luo and Ms Yip.[32]

[63] It does not automatically follow from Mr Luo's and Ms Yip's evidence of what Ms Shiu said that she did not intend to involve them. But, again, given Ms Shiu did not give evidence on this, an inference that she may well have conceded this point under cross-examination is available to me. In addition, given Ms Shiu's evident propensity to deceive people she contracts with and the fact that her interest in 53 Munro Road was always ringfenced from both Mr Luo and Ms Yip, I am satisfied on the balance of probabilities that she never intended at any time to involve either Ms Yip or Mr Luo as profit sharing partners in the wider Pōkeno West Development.

---

[32] I note that Lang J resolved in the context of an application for interim injunction in respect of the 53 Munro Road property, that the case for Mr Luo and Ms Yip was weak (above n 13, at [31]) noting that the JVAs suggest that the parties appeared to have proceeded on the basis that they would co-operate in the rezoning process only. But, since then, Ms Shiu has been found guilty of obtaining by deception and failed to give evidence to support her account.

[64] Accordingly, I find that Ms Shiu represented to Mr Luo and Mr Yip that they would be in business with her in the wider Pōkeno West Development—ie, beyond areas of agreement recorded in the JVAs—but that she never intended that to be the case. This is a qualifying misrepresentation of fact for the purpose of either s 35 of the CCLA or s 9 of the FTA.[33] However, as Mr Bigio says, there is no clear evidence as to what the promise of involvement meant in terms of sharing costs or profits. It appears from the evidence to be no more than a untrue promise to be involved at some level without committing to a particular outcome.

Did the misrepresentations cause the plaintiffs loss?

Mr Luo

133 Helenslee Road

[65] Mr Bigio submits that Mr Luo affirmed the 133 Helenslee JVA knowing that Ms Shiu had deceived him about the commission fees and that she did not intend to include him in the whole of the Pōkeno West Development. Mr Bigio also notes that early versions of the statement of claim sought relief that effectively enabled Mr Luo to participate in the wider Pōkeno West Development and maximise his return under the 133 Helenslee JVA. Mr Luo's litigation strategy is also said to show that he wanted to secure his position in relation to the wider Pōkeno West Development and that the acquisition of 133 Helenslee fell over because of Mr Luo's intransigence.

[66] In contrast, Mr Judd submits that Mr Luo was in a very difficult situation, having lost trust and confidence in Ms Shiu but with $1.2 m tied up in the 133 Helenslee Road property. She continued to deny her deception until she was convicted and so Mr Luo had to take whatever steps he could to protect his investment. Mr Judd also submits that Mr Luo is a defrauded partner and is entitled to full recovery of his losses and that his losses are not fixed by reference to the earliest date he could have given notice of termination of the partnership.[34]

---

[33] See *Muollo v Creative Engineering Design Ltd* (2006) 8 NZBLC 101,675 (CA) at [25] citing *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC) at [236]–[246] and *James v Australia and New Zealand Banking Group* (1986) 64 ALR 347 (FCA) at 372.

[34] Citing *Wills v Williams* CA38/99, 20 July 1999.

[67] I agree that some of the steps Mr Luo took appear to affirm the 133 Helenslee JVA, including the litigation he commenced to secure the JVA properties and involvement in the Pōkeno West Development. This might technically present as a bar to relief under the CCLA. But it is unnecessary for me to form a final view about this because I disagree with Mr Bigio's characterisation of Mr Luo's conduct is affirmation of a kind that should preclude relief under the FTA or that his conduct broke the chain of causation in terms of the loss suffered by him. When Mr Luo discovered the commission fee deception he was in an invidious position. He had paid several million dollars to Ms Shiu without any security. Mr Luo was faced with large litigation and commercial risk. In that context, it was reasonable for Mr Luo to try and secure his position by seeking an outcome that would enable him to obtain the 133 Helenslee Road property and otherwise protect his investment in that property.

[68] That Ms Shiu could not settle on the purchase was her problem, having induced Mr Luo to contract with her on the false premise that she could be trusted and that she would involve him in the wider project. She certainly cannot now complain that her position has somehow been unfairly compromised. In addition, Ms Shiu also actively resisted Mr Luo's attempts to secure his position and mitigate his losses. Furthermore, the settlement having failed, it was then available to Mr Luo to formally cancel the JVA because the entire premise of the JVA, the purchase of 133 Helenslee Road, had failed.

[69] In those circumstances, I can see no reason why Mr Luo should not be restored to the position he should have been had the misrepresentations not occurred; that is, by the refund of the sums paid by him pursuant to the 133 Helenslee JVA. The only residual issue is whether Mr Luo should receive interest on that sum from the date of his payments, or from the date of the dissolution of the JVA. I have come to the view that Mr Luo must be made good and restored to the position he would have been but for the deception. The steps taken by him subsequently were effectively steps to mitigate his loss. In addition, Ms Shiu had the benefit of Mr Luo's monies throughout and she must account for that benefit. Therefore, Mr Luo is entitled to interest on the sums he paid from the dates on which he paid them.

87–89 and 119 Helenslee Road

[70] The position in relation to 87–89 and 119 Helenslee Road is both more and less complicated. Without admitting liability, Ms Shiu offered to repay Mr Luo the $2.5 m he paid on these properties on the bases that he provides a clear statement he has cancelled the JVA; that the consent orders be discharged; and that he and Ms Yip withdraw the caveats over the affected properties. As noted above, that offer was accepted at about the conclusion of the hearing and has since been actioned. Mr Luo's counsel confirmed he received that sum on 17 November 2021. In any event it reflects a realistic appreciation of Ms Shiu's liability for her deception (for reasons explained above) and there can be no real doubt that Mr Luo has now cancelled the 87–89 and 119 Helenslee Road JVA. He is therefore entitled to the $2.5 m.

[71] Again, there is the residual issue of when interest should be paid: either from the date of the payments or from some later date; for example, from the date of the filing of the third amended statement of claim (27 August 2021), which was the first point at which Mr Luo clearly signalled the dissolution of the JVA. However, as with the 133 Helenslee Road payments, I have reached the view that Mr Luo is entitled to interest from the dates he made the deposit payments because he was doing no more than seeking to mitigate his losses and conversely, Ms Shiu has had the benefit of those monies since they were paid. She will also have the 87–89 and 119 Helenslee Road properties and any uplift in their value since acquisition. I have also considered the fact Mr Luo made the second payment of $500,000 after he knew about the commission fee deception. However, as explained above, I consider that Mr Luo was doing no more that seeking to protect his investment and mitigate potential loss.

[72] For completeness, the Pōkeno West misrepresentation compounds the wrongdoing in this case insofar as it induced Mr Luo to contract. But, sensibly, Mr Luo makes no claim for expectation losses. I therefore do not consider that head of claim requires further elaboration.

Partnership

[73] Given my findings so far, it is not necessary for me to make any definitive findings on the existence of a "partnership" involving Mr Luo and Ms Shiu. My tentative view is that whether expressed as a partnership duty or simply a fiduciary obligation to act in good faith,[35] Ms Shiu was in a position of trust in respect of Mr Luo and broke that trust by deceiving him about the commission fee and misleading him about her intentions to involve him in the wider Pōkeno West Development. In support of this conclusion, I note that Ms Shiu must have known that Mr Luo, as a recent immigrant to New Zealand, relied on her advice about how to structure their dealings. His vulnerability to her is exemplified by the commission fee deception. In addition, the evident object of the JVAs was to secure investment monies to enable acquisition of the Helenslee Road properties. The JVAs assumed that Ms Shiu would be primarily responsible for securing the properties while Mr Luo was obliged to provide the funds for the acquisitions. In sourcing funds in this way and for the purpose of acquiring the properties, Ms Shiu held herself out as a person to be trusted to act in the best interests of the joint venture.

Ms Yip

Argument

[74] Mr Bigio submits that even if Ms Shiu did make the Pōkeno West representation, Ms Yip did not rely on it, nor did it induce or otherwise cause Ms Yip's losses. There are several planks to his argument:

(a) If there was a Pōkeno West Development representation, there was still no clear promise about the nature or quantum of any profit share.

---

[35] See *Maruha Corporation v Amaltal Corporation Ltd* [2007] NZSC 40, [2007] 3 NZLR 192 for further discussion of fiduciary duty arising in commercial and joint venture contexts.

(b) The available documentary record shows that Ms Yip and Ms Shiu only reached agreement on a profit share in respect of 145C Helenslee Road.

(c) Ms Yip pressed on with the 145C Helenslee JVA in the face of advice that the land was over-priced and the transaction was high-risk and complex.

(d) Ms Yip was so determined to pay the first deposit, she lied to Ms Low that she had taken independent legal advice.

(e) Ms Yip's explanation that she had to go through with the JVA because the sale and purchase agreement was unconditional is inconsistent with the advice she received from Ms Low that it was not.

(f) Rather than cancel the 145C Helenslee JVA on finding out about the commission fee deception, she took over the purchase of 145C Helenslee Road and executed a Deed of Nomination under which Ms Shiu and Ms Yip are released from the JVA.

(g) The Deed of nomination makes no mention of the Pōkeno West Development.

(h) Ms Yip only took steps to involve herself in the wider Pōkeno West Development after discussing it with Mr Chase across late 2017 to early 2018.

[75] Mr Bigio thus submits the evidence shows that even if Ms Yip was, as she says, told about the Pōkeno West Development plan before she entered into the 145C Helenslee JVA, she did nothing to secure her involvement in it until after she had discovered the commission fee fraud; after she had terminated the JVA; and after she had spoken to Mr Chase in 2018 about what the wider development meant in terms of potential profits. Therefore, he says, the claimed Pōkeno West representation had no causative potency in terms of Ms Yip's decision to complete the acquisition of 145C Helenslee Road.

[76] Mr Bigio accepts that the commission deception might give rise to a right to cancel. But he says that when Ms Yip acquired Ms Shiu's 50 per cent share in the JVA and the right to acquire 145C Helenslee Road without further consideration, she must be considered adequately compensated for this deception. He says she cannot "have her cake and eat it too". Mr Bigio also notes that as the Deed of Nomination does not change the parties to the sale and purchase agreement, Ms Shiu remains liable to settle the purchase price on the settlement date. So, he says, Ms Yip was and is still not "locked in", as Mr Judd contends, to the purchase of the property.

[77] Mr Judd submits that in cases involving fraud Ms Yip did not have to show she was acting reasonably at any time, that no legal advice would have helped her uncover the deception or Ms Shiu's duplicity about the Pōkeno West Development, and that Ms Yip's actions were simply those of the victim of fraud.

Assessment

[78] Ms Yip's decision to proceed with the JVA and make the first deposit payment in the face of Mr Chan's and Ms Low's advice would ordinarily disqualify her from relief had this been a simple case of misrepresentation as to price. Price was not a major concern for Ms Yip and she did very little to protect herself from a potentially very bad investment. In short, she was very keen to invest in association with Ms Shiu. But the commission fee deception colours everything. As Mr Judd submitted, the reasonableness of Ms Yip's decision to contract and pay the deposits is moot when, had she known about Ms Shiu's commission fee deception, she would not have contracted at all with Ms Shiu. Importantly, Ms Yip was clearly motivated by the prospect of profits through collaboration with Ms Shiu, who held herself out as an experienced property developer, in the development of 145C Helenslee Road together with the other properties. The entire premise of a collaborative approach was undermined by the commission fee deception. The Pōkeno West misrepresentation was and remains a compounding factor in a causative sense. Put simply, I am satisfied that Ms Yip would not have entered into a joint venture with Ms Shiu on the opaque and unfavourable terms she did, if at all, had Ms Shiu been honest with Ms Yip about her intention not to involve Ms Yip as a profit sharing partner in the wider development at all.

[79] Ms Yip's subsequent steps, then, to secure her position including by paying the additional $400,000 even though she knew about the commission fee deception must also be viewed in light of the fact that her position was unsecured. Indeed, Ms Yip's "do nothing" counterfactual was that of an unsecured plaintiff. In that context, her decisions to make the second deposit, and then take on the purchase of 145C Helenslee Road by herself and terminate the JVA were both logical and reasonable steps towards the object of obtaining some security for her investment and mitigating the risk of further loss. In this regard, the Deed of Nomination did not expressly or by necessary implication settle Ms Yip's claims to any losses arising from the JVA.[36]

[80] I also view Ms Yip's subsequent efforts to secure a joint venture in respect of the wider Pōkeno West Development on terms acceptable to her as consistent with her strategy for securing the investment she had made pursuant to the 145C Helenslee JVA. By this time, Mr Chase had made clear to Ms Yip that in order to realise the full potential of her investment and to mitigate her exposure given the price paid for 145C Helenslee Road, she needed to formally secure involvement in the wider Pōkeno West Development.

[81] As with Mr Luo's claims, however, I consider the Pōkeno West representation does not support an expectation loss claim. The promise of a profit share was simply too vague and too uncertain to sustain a claim to corresponding expectation losses.

Relief and quantum

[82] For reasons expressed above at [50], I consider relief is unavailable under s 35 of the CCLA in respect of the commission fee deception, and incapable of ascertainment in respect of any expectation losses arising from the Pōkeno West representation. I therefore proceed simply on the basis that relief should be granted under s 43 of the FTA.

---

[36] I note in this regard that Ms Shiu does not plead that the Deed of Nomination settled Ms Yip's claims.

[83] In cases of fraudulent misrepresentation or deceptive conduct, plaintiffs are ordinarily entitled to be put in the position they would have been in but for the fraud or deception.[37] As the Court of Appeal noted in *Harvey Corporation v Barker*:[38]

> [14] The proper question in a claim against Harveys under s 43 is whether the [plaintiffs] are worse off as a result of the making of the representation—by changing their position in reliance on it—not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of. The [plaintiffs] accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss. Normal measures of such a loss are whether what was acquired is worth less than what was paid and/or whether there has been wasted expenditure. … To the extent that the [plaintiffs] might by reason of the misrepresentation have paid too much for the land—and so did not get full value for their expenditure—the "lost" additional money would be recoverable under s 43. But in order to sustain such a claim, it was necessary for them to show that they paid more than the market value of the property as it actually was …

[84] That approach is broadly consistent with the common law approach in actions for deceit, which is particularly relevant here because of the commission fee deception. As Lord Steyn put it in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*:[39]

> There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants.

[85] While Mr Bigio rallied against the application of common law principles relating to deceit to claims under the FTA, they provide a useful guide in terms of what is just when dealing, as here, with misleading conduct that is tantamount to deceit. It always necessary however to be mindful that, as the Court in *Red Eagle Corporation v Ellis* said:[40]

> [31] The exercise of the power to make an order for payment under s 43 is, in the end, as Richardson J also said [in] *Goldsbro*, a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the [FTA].

---

37 *Cox & Coxon v Leipst* [1999] 2 NZLR 15 (CA) at 26; *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA) at [14] per Blanchard J.

38 Above n 37.

39 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (HL) [*Smith*] at 284.

40 *Red Eagle Corporation Ltd v Ellis*, above n 26, citing *Goldsboro v Walker* [1993] 1 NZLR 394 (CA).

[86] In this regard, the deceit authorities also make clear that any benefit conferred by the wrongdoer must be taken into account. Lord Browne-Wilkinson put it in this way in *Smith*:[41]

> …. [in]assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction.

Mr Luo

[87] Mr Luo's claim for relief is uncontroversial. He simply seeks to have the monies he wasted pursuant to the JVA refunded with interest. As noted, it transpires that after the hearing the parties agreed Ms Shiu would pay Mr Luo $2.5 m in settlement of his claims in respect of 87–89 and 119 Helenslee Road, and only interest remained in issue.[42] Counsel have since filed a joint memorandum, dated 17 November 2021, confirming Mr Luo has now received the settlement sum of $2.5 m. The memorandum confirms that any joint venture or partnership between Ms Shiu and Mr Luo is terminated, and the plaintiffs consent to the Court discharging the interim orders restricting Ms Shiu's interest in the properties.[43] Interest on that sum, and costs, must be paid and remain to be resolved.[44]

[88] In the result, I make an award of $632,813.50 in respect of 133 Helenslee Road and had it been necessary to do so I would have made an order for $2.5 m in respect of 87–89 and 119 Helenslee Road. Mr Luo should also have his interest on the deposit sums from the dates Mr Luo paid the relevant deposits.

Ms Yip

[89] Ms Yip's claim is, again, more complicated. Mr Judd steadfastly maintains that Ms Yip's damages should be measured by reference to the difference between the

---

41 Above n 39, at 267.

42 Counsel filed a joint memorandum recording this agreement on 13 October 2021. The memorandum also records, relevantly that Mr Luo, Ms Yip and Manfei Company have undertaken to remove the caveats over those properties, and to note lodge any further caveats, upon payment of this sum to Mr Luo. The parties have also agreed that the interim orders made, by consent, by Lang J on 23 March 2020, and varied, by consent, by Gault J on 4 November 2020, should be discharged on payment of this sum.

43 Imposed by Lang J and subsequently modified by Gault J, above n 42.

44 As recorded in my minute of 19 November 2021.

"true" value of 145C Helenslee Road at the time of the sale and purchase agreement and the value paid. That is said to be a sum of $2.566 m.[45] This is based on the evidence of his expert, Gary Cheyne, that the market value of the property was about $1.934 m[46] and a purchase price of $4.5 m. He submits that the actions taken Ms Yip at the time of the transactions or subsequently should not affect the availability of this relief, citing the following observation by Vos MR in *Glossop Cartons and Print Ltd v Contact (Print & Packaging) Ltd*:[47]

> The claimant is entitled to the difference between the price paid and the market value, whatever miscalculations it may have made in entering into the transaction. To be clear, therefore, claimants seeking damages for fraudulent misrepresentation can be compensated for making a bad bargain, even if they knew or ought to have known about defects in what they were buying before they entered into the transaction.

[90] Mr Bigio identifies several factors that he says would make any compensation of this scale unjust:[48]

(a) The loss has not yet been suffered because Ms Yip has not paid the contracted value for 145C Helenslee Road and may never:

(i) Ms Yip can still walk away from the Deed of Nomination and leave Ms Shiu exposed to the vendor on settlement in 2023;

(ii) Ms Yip could refuse to indemnify Ms Shiu;

(iii) Ms Yip may never pay the full price, but has been compensated as if she had;

(iv) if Ms Yip goes through with the transaction she could be entitled to future gain when its value inevitably rises in 2023; and

---

45 The plaintiffs' third amended statement of claim seeks relief in the form damages under this measure of $2,950,000, said to be the difference between Mr Cheyne's evidence as to the contracted value, $5,175,000 (including GST), and a market value of $2,225,000 (including GST). The plaintiffs calculate this award is $2,565,217 excluding GST (or $2,950,000 including GST).

46 $1.934 m is Mr Cheyne's valuation figure of $2,225,000 with GST excluded.

47 *Glossop Cartons and Print Ltd v Contact (Print & Packaging) Ltd* [2021] EWCA Civ 639 [*Glossop*] at [37].

48 The arguments (a)–(c) were directed to the Pōkeno West representation but are equally applicable to both representations.

(v) Ms Yip's intention to retain 145C Helenslee Road and her sister's decision to acquire 133 Helenslee Road is evidence that there is no real loss on the impugned transaction.

(b) There is no evidence that the vendors of 145C Helenslee Road would have ever been willing to sell that land at anything less than the contract price.

(c) The Real Estate Disciplinary Tribunal found that the price paid for 145C Helenslee Road was not "more than market price".[49]

[91] Mr Bigio also submits that the proper relief in relation to the commission fee deception is for Ms Yip to cancel and require her money back, but, as noted above at [76], in the circumstances where Ms Yip has obtained the right to purchase 145C Helenslee Road, and taken over Ms Shiu's share of the JVA for no consideration, she has been adequately compensated.

[92] Finally, Mr Bigio submits that in any event, as Ms Yip (or Manfei Company) was never a purchaser of 145C Helenslee Road, Ms Yip's loss has to be measured by reference to her share of the value of the joint venture, not the full value of 145C Helenslee Road. He says there has been no evidence of that value and as such Ms Yip's claim must be rejected.

Assessment

[93] I am satisfied that Ms Yip is entitled to damages in the sum of $1.5 m (plus interest as explained at [133] below). My reasons are as follows.

[94] First, this case is not like *Glossop*, involving a claim by the purchaser of a property or shares based on a misrepresentation as value or price. As Mr Bigio submits, Ms Yip was not and is not a party to the sale and purchase agreement for 145C Helenslee Road; she never had and does not have a direct legal relationship with

[49] The context for this finding is a complaint lodged by Mr Chan against Mr Chase. On 12 November 2020, the Real Estate Agents Disciplinary Tribunal's Complaint's Assessment Committee issued its "Decision to take no further action" on the complaint.

the vendor; and Manfei Company, while a nominee, is not a party to the sale and purchase agreement. Conversely, only Ms Shiu contracted to purchase the property, was a party to it and, in theory at least, remains liable to pay the purchase price.[50] Rather what happened is better described as follows. Ms Yip entered into a joint venture involving the purchase of that property, which was terminated on the discovery of the fraudulent commission deception. In those circumstances, the proper measure of damages are the losses arising from her involvement in the failed joint venture, not the purchase of the property directly.

[95] Second, that loss can be quantified in two ways: by reference to Ms Yip's wasted costs as a reliance loss,[51] or the difference between Ms Yip's contribution to the joint venture and the value of that joint venture. There is no evidence in relation to the latter, but the quantum of her wasted costs is clear. As at the date the joint venture was cancelled, she had invested $1.1 m in it (being the two deposits, of $700,000 and $400,000). Prima facie, therefore, Ms Yip is entitled to this sum in damages.

[96] Third, Ms Yip acquired the right to purchase 145C Helenslee Road from Ms Shiu. Mr Judd says that Ms Shiu must compensate Ms Yip for the cost completing the acquisition, while Mr Bigio claims that the transfer of the right to purchase without any consideration compensated Ms Yip for her losses. In my view, neither explanation is satisfactory. Ms Yip acquired the right to purchase to secure her investment and thus mitigate her potential losses. Equally, Ms Shiu conferred a benefit on Ms Yip, being the value of the property as at the date of cancellation. For reasons that I will explain below at [114]–[118], I estimate the property's value at about $3 m. Given that the balance of purchase price payable as at the date of cancellation was $3.4 m, Ms Yip requires $400,000 to fully account for her loss. As a consequence, she is entitled to $1.5 m in compensation.

[97] Fourth, contrary to Mr Bigio's submission, the fact that the contracted value has not yet been paid does not disqualify an award of compensation for Ms Yip's loss

---

50 For discussion on novation see DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [3.03]; *Lambly v Silk Pemberton Ltd* [1976] 1 NZLR 427 (CA); and *Cowan v Martin* [2014] NZCA 593, (2014) 3 NZTR 24-021.

51 See *Anglia Television Ltd v Reed* [1971] 3 All ER 690 (CA). While this is a contract case, the principle stated there is apposite.

arising from Ms Shiu deceptive conduct. Ms Yip committed herself to the purchase of 145C Helenslee Road to mitigate her losses. She reinforced her commitment when she paid the additional $1 m in April 2021. I see no latent risk of her absconding without completing the purchase. In this regard, Ms Shiu's residual liability is a red herring. If Ms Yip or Manfei Company does not go ahead with the purchase of 145C Helenslee Road, Ms Shiu will be in no worse position because Ms Yip has already paid $2.1 m of the purchase price and under this scenario, Ms Shiu also gets the property. If what is being suggested is that Manfei may take 145C Helenslee Road and not complete the purchase on settlement, Ms Yip would have clearly played false with this Court. I discount that as a reasonable possibility. Given this, the relevant measure of loss remains the difference between the actual value of 145C Helenslee Road as at the date of the Deed of Nomination and the contracted price.

[98] Fifth, the point made by Mr Bigio that there is no evidence the vendors of 145C Helenslee Road would have sold at less than the price paid misunderstands the function of the market valuation. The valuation exercise is not concerned with what the victim of the intentional wrongdoing may have achieved in the counterfactual. Rather, it is concerned with quantifying, as fairly as can be done, the value of the benefit of the impugned transaction to Ms Yip so that this can be deducted from the total loss suffered by her—in this case, the value of the property as at the date she assumed responsibility to complete the purchase. As Lord Steyn put it in *Smith*:[52]

> … it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred.

[99] Finally, while intuitively attractive, the argument concerning possible future gain invites speculation as to the quantum of that gain for which there is no supporting evidence. Furthermore, if gains are to be made, it includes those achieved by Ms Shiu, who stands to benefit from the gains on her investment in the Helenslee Road and Munro Road properties which she has retained and for which Ms Yip can no longer expect to enjoy a profit share. Based on Mr Cheyne's evidence, any net gains on 53

---

52 Above n 39, at 793.

Munro Road, if they eventuate, are likely to be very substantial and proportionately much more significant than any net gains enjoyed by Ms Yip.[53]

[100] For completeness, in case I am wrong about taking a wasted costs approach, I have also assessed the likely quantum of Ms Yip's loss on the basis advanced by Mr Judd, namely by calculating the difference between the market value of 145C Helenslee Road and the purchase price payable for it. The market value is to be assessed as at the date of the Deed of Nomination, reflecting the benefit conferred by Ms Shiu. Unsurprisingly, the result is the same.

[101] The only substantive valuation evidence to inform the market value assessment was given by an expert for Ms Yip, Mr Gary Cheyne.[54] I review his evidence below, together with the short critique of that evidence provided by Ms Shiu's valuation expert, Mr Ian Colcord. In summary, I find Mr Cheyne's evidence sufficiently cogent to provide a helpful reference point for the damages assessment. However, I do not agree with the net 65 per cent discount he applies. I consider a 30 per cent discount is much more realistic. Adjusting Mr Cheyne's figures to reflect this revised discount, I am satisfied that the market or true value of 145C Helenslee Road is about $3 m (exclusive of GST).[55] The purchase price is $4.5 m (exclusive of GST). Therefore, applying Mr Judd's methodology, Ms Yip's loss (through Manfei Company) as far as that can be measured as at the date of judgment is in the order of $1.5 m.

[102] Overall, I consider that compensation of $1.5 m achieves a just outcome in terms of s 43 FTA. Ms Shiu deceived Ms Yip into an investment involving false commissions and a misrepresentation as to Ms Yip's involvement in the Pōkeno West Development. The joint venture inevitably failed; Ms Yip having invested $1.1 m for no return. She (through Manfei Company) is entitled to be compensated for that wasted investment. Ms Yip's subsequent decision to acquire 145C Helenslee Road

---

53 See discussion at [107] below.

54 Mr Cheyne's valuations are as at the date of the sale and purchase transactions. But as Mr Cheyne's sales data upon which he bases his valuations spans the period 2014 to 2017 I see no material difference between the valuation as at the transaction date (April–October 2017) and as at the date of Deed of Nomination (November 2017), save to note that by this date the Council had promoted its plan change to enable Residential zoning of the sites.

55 Mr Cheyne's pre-discount figure psm for 145C Helenslee Road is $70.00 psm (GST inclusive). Applying a 30 per cent discount, as opposed to Mr Cheyne's 65 per cent discount, results in a psm figure of $49.00. Multiplied by the property size (7.056 ha) the adjusted valuation becomes $3,461,850 (GST inclusive) or $3,010,304 (GST exclusive).

was a step in mitigation. The cost to her of doing so will be an additional $400,000, being the difference between the value of the property and the remainder of the purchase price as at the date of cancellation.

[103] For all of the foregoing reasons, I am satisfied that Ms Shiu must pay Manfei Company the sum of $1.5 m together with interest on the wasted costs comprising the two deposits from the date each was paid, and then interest on the judgment sum of $1.5 m from judgment date until that sum is paid.[56]

Valuation evidence

[104] As noted, Mr Cheyne gave valuation evidence for Ms Yip. Mr Ian Colcord gave valuation evidence for Ms Shiu. Both are experienced and well respected valuation experts.

[105] In his brief, Mr Cheyne records 145C Helenslee Road comprises 7.0650 ha and is presently zoned Rural. He notes that this site, along with the other Helenslee Road sites and the 53 Munro Road site, formed part of a larger development he refers to as "the Project". In January 2017, Ms Shiu contracted Birch Surveyors to co-ordinate a private plan change encompassing the Project lands. In April 2017, Birch Surveyors produced a subdivision concept plan for the proposed private plan change, as well as a staging plan. Birch Surveyors' planning continued and by the end of 2017, the drafting of the staging plan had evolved so that 145C Helenslee Road formed part of the "stage 3" development timing where previously "stage 2"; while 53 Munro Road was moved forward to "stage 2". He notes that on 18 July 2018, the Waikato District Council publicly notified its Proposed District Plan.[57] The Project lands were zoned Residential. He also notes that in October 2018, Birch Surveyors made a submission on the Proposed District Plan, on Ms Shiu's behalf, which according to Mr Cheyne's evidence promoted a markedly different layout to the staging plan concept of April 2017. 145C Helenslee Road is identified as "stage 3" development land.

---

[56] Calculated by reference to ss 9 and 10 of the Interest on Money Claims Act 2016 and to be fixed by the Registrar.

[57] I note Mr Cheyne refers to documentation Birch Surveyors prepared for the Council that utilises the Pōkeno West naming.

[106] Mr Cheyne notes that 145C Helenslee Road is subject to significant rights of way, power, telephone and drainage rights but otherwise has clear title. He also notes that some plans for the site anticipate subdivision into 72 full sized lots, but that not all of these are feasible given the steepness of the site. He based his valuation on the assumption that it can be subdivided into 72 lots but adjusted for the reality that some lots (he puts this estimate at 15) would not be readily buildable on the steeper land.

[107] Mr Cheyne refers to the sale and purchase agreement for 145C Helenslee Road, noting its terms—as referred to above: a purchase price of $4.5 m; the two deposits, of $700,000 and $400,000 respectively, and a final payment of $3.4 m due 48 months from the agreement's date. He also notes the variation of 10 July 2017; the unconditionality of the agreement; the provision for further payment of $1 m on 17 April 2021; and the balance of $2.4 m due on 17 April 2023. Mr Cheyne approaches his valuation on a GST-inclusive basis, with the result his purchase price figure is $5,175,000 (including GST). Mr Cheyne also provides a comparison of the prices paid between the "project" lots (87–89, 119, 133 and 145C Helenslee Road and 53 Munro Road) noting that the transaction rate per square metre (psm) for 145C Helenslee Road was $73.25 psm, compared to 53 Munro Road which was $9.21 psm; and the average for all lots was $18.89 psm.

[108] As Mr Cheyne explained, he undertook a retrospective valuation of the properties. He applied a "block sale" approach to his primary valuation. He observes that the strong growth in the residential market in the Auckland region and its surrounds is well documented. In his brief of evidence he also reviews sales of comparable properties in the Pōkeno and Pukekohe area in the period 2014–2017. He observes, "[t]hese sales show in broad terms that small of areas of well-located residentially zoned land will sell in the $100–200 [psm] range" whereas, at the other end of the scale, land zoned Rural in medium sized blocks will sell around $10 psm. Applying these observations, Mr Cheyne concludes that if at the respective dates of valuation the properties at 87–89, 119, 133 and 145C Helenslee Road and 53 Munro Road were fully zoned Residential—consistent with the development plans drafted by Birch Surveyors—the sales indicate rates per sqm of $70 psm for 145C Helenslee Road.

[109] Mr Cheyne notes that the approach to purchasing those properties—long settlement periods but with some substantial deposits—removes the need to "allow in value terms for the time taken ... before the land obtains a satisfactory Residential zoning." However, Mr Cheyne adjusts the psm rate by 25 per cent accordingly to account for the risk and reward in rezoning the land from Rural to Residential. He notes the percentage adjustment is a matter of judgement, but has regard to the following factors he identifies: first, Birch Surveyors' confidence the land would be rezoned, even if this would take some time; the Council's notification of a review of the land's zoning under the District Plan; and the evidence of a planning expert, Mr Colin Hardacre, for the plaintiffs, whose evidence Mr Cheyne says confirms it is likely the land will remain zoned Residential despite an appeal against the Council's rezoning decision in the Environment Court. He also makes a further adjustment on the basis 145C Helenslee Road will be reliant on the development of 133 Helenslee Road if the programme of development promoted by Birch Surveyors is followed. Mr Cheyne also considers there will be additional delay given the proposed staged development of the property and adjusts for this by a further 40 per cent discount. In the result, he values 145C Helenslee Road at $31.50 psm.

[110] As a cross-check on that valuation, Mr Cheyne also applies a hypothetical subdivision approach. He assumes an average site will sell for $300,000, and smaller sites for $225,000 per household unit. He applies a profit and risk allowance of 25 per cent and assumes subdivision costs at a global rate of $100,000 (plus GST) per site, noting this "is necessarily an approximation". Taking into account risks in timing and certainty in rezoning, he has allowed a 25 per cent discount to the initial hypothetical subdivision result. Finally, he applied a further five per cent per annum discount to account for the fact that 145C Helenslee Road may take 10 years to develop, and added GST back in.

[111] In summary, the results under each of Mr Cheyne's approaches to valuing 145C Helenslee Road are:

(a) under the block sales approach: $2,225,475 (GST inclusive); and

(b) under the hypothetical subdivision approach: $2,177,753 (GST inclusive).

[112] Mr Colcord's evidence is a critique of Mr Cheyne's evidence without any substantive evaluation. He is critical of the factor that the valuation is unorthodox and takes non-market factors into account. He also notes, for example, that Mr Cheyne applies a subjective 25 per cent discount to account for the risk in establishing Residential zoning without providing any supporting evidence for this allowance. He also notes that Mr Cheyne's hypothetical subdivision approach estimates costs of $100,000 per site. He criticises this as an approximation only.

[113] While some aspects of Mr Cheyne's approach appear novel and with respect confusing (particularly as it relates to assessment and quantification of cost of delay), his evidence is nevertheless substantially helpful. His valuation of 145C Helenslee Road is based on a combination of available market information about the present day values of comparable properties zoned Residential; an assessment of rates psm assuming the property is zoned residential; a discount to reflect the risk and reward in rezoning the land from Rural to Residential and a further discount to reflect potential delays associated with the development of the property. Each of these factors appears relevant to the assessment so I am content to adopt Mr Cheyne's evidence as a starting point.

[114] However, I do not accept his 65 per cent discount is reasonable. I commence by observing that, on the available evidence, it is inevitable the rezoning of all of the properties to Residential will proceed. Mr Cheyne agrees with Mr Hardacre's opinion that the risk of the rezoning not proceeding is remote. I note in this regard that at the time Ms Yip acquired the right to purchase, the Council had already notified its plan change enabling residential development. The risk to her that rezoning would not proceed within the settlement period was always small. While there are some site constraints, development of all of the sites for residential purposes is also feasible. So, the only basis for discounting the (retrospective) present value, is the cost and delay to the achievement of the residential zoning, which Mr Cheyne has put at 25 per cent.

[115] I agree with Mr Colcord that this generic 25 per cent discount is not obviously justified. It has no empirical basis and appears arbitrary. I also consider that, contrary to Mr Cheyne's view,[58] to the extent a discount is necessary to account for the delay in zoning, it is offset by the premium any purchaser would be expected to pay for the deferred settlement of six years. In this regard, Ms Yip is not paying the full purchase price until the end of the settlement period, by which time full residential zoning would likely have been achieved. Notably, as at the date Ms Yip acquired the property, only the first two instalments of totalling $1.1 m were paid (or about 50 per cent of Mr Cheyne's present value) with a further $1 m not due until April 2021 (which, in total, is comparable to Mr Cheyne's present value). I therefore consider that only a small discount (if any) is required for the delay to establishment of the residential zoning.

[116] I turn to the reasonableness of Mr Cheyne's further discount of 40 per cent, based on various delays to realisation of the subdivision. Mr Cheyne refers in particular to the proposed staging (presently "stage 3", but "stage 2" as at the date of valuation), noting also that the development of 145C Helenslee Road appears contingent on the development of 133 Helenslee Road. While these are relevant considerations, they do not warrant a discount of the scale Mr Cheyne adopts. Various steps can be taken to mitigate this delay, as amply illustrated by the fact that Ms Yip's sister now owns 133 Helenslee Road. The prospect of integrated development of these sites is not unrealistic. While that fact was not known as at the date of valuation, it shows that Mr Cheyne's approach is unduly pessimistic. Indeed, as Sir William also noted under questioning from Mr Judd, individual owners will determine the stage they want to develop and what form the development will take and it will be a matter for those owners to work out determine the exact nature of the subdivision. In addition, Mr Cheyne accepted under cross examination that his assessment (at least in respect of the hypothetical subdivision) was not based on settled subdivision plans and that, in terms of costs, he had not sourced any estimates from independent experts.

[117] Further, stepping back from the detail, the pressing need for land zoned Residential in and around the Auckland region is a matter of common knowledge. This will inevitably drive the timing of the development, including any staging. A further

---

[58] Under questioning from me, Mr Cheyne explained that his discount would have been even larger but for that premium.

10-year horizon from settlement to realisation of value and a corresponding 40 per cent discount for this factor alone on the property value is excessive.

[118] While necessarily a matter of impression from the available evidence, I conclude a discount in the order of 30 per cent to account for cost and delay overall is reasonable given the inevitability of rezoning and a more realistic assessment of the likely pace of development of the properties, including 145C Helenslee Road.

Liability of CSR Pokeno

Section 45(2) of the FTA

[119] The plaintiffs claim CSR Pokeno is liable for Ms Shiu's conduct by virtue of s 45(2) of the FTA. The Court of Appeal recently summarised the effect of s 45 in *Commerce Commission v Steel & Tube Holdings Ltd* as follows:[59]

> [61] The Fair Trading Act is a consumer protection statute which regulates conduct in trade. It promotes fair conduct and prohibits certain unfair conduct and practices. ...
>
> [62] The Act creates special rules of attribution. In s 45(2) it attributes to a body corporate the conduct of any servant or agent acting within the scope of their actual or apparent authority:
>
> > (2) Any conduct engaged in on behalf of a body corporate—
> >
> > (a) by a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
> >
> > (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
> >
> > shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.
>
> ...
>
> [64] Attribution of a state of mind is addressed in s 45(1), which provides that where, in proceedings under Part 5 (which includes the offence provision,

[59] *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549, (2020) 15 TCLR 743 (footnotes omitted).

s 40) in respect of any conduct engaged in by a body corporate, "it is necessary to establish" the state of mind of the body corporate, it is sufficient to show that a director, servant or agent, acting within the scope of that person's actual or apparent authority, had that state of mind:

> **45 Conduct by servants or agents**
>
> Where, in proceedings under this Part in respect of any conduct engaged in by a body corporate, being conduct in relation to which any of the provisions of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person's actual or apparent authority, had that state of mind.
>
> …
>
> (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for that intention, opinion, belief or purpose.

[65] The statutory language is obviously concerned with attribution to a corporation of the state of mind and conduct of a director, servant or agent. The corporate defendant is liable by reason of its agency relationship with the individual director, employee or agent concerned, so long as that person was acting within the scope of their actual or apparent authority.

[66] The extent of the statutory attribution reflects the purpose of consumer protection. It is not confined to senior management; rather, it extends to the conduct or state of mind of any employee or agent whose conduct on behalf of the defendant firm may mislead consumers. Nor is it confined to actions within that person's actual authority; it extends to their apparent authority. Apparent authority arises in trade where a firm holds out that its employee has authority to make representations as to its goods or services, there is a reasonable basis on which the consumer can assume this authority exists, and the consumer relies on that authority.

The parties' positions

[120] The plaintiffs plead:[60]

> 7. The third defendant is CSR Pokeno Limited, which was nominated to purchase the property at 53 Munro Road, Pokeno. It is a company owned by Ms Shiu and her husband, Andrew Shiu, and interests associated with them

[60] Third amended statement of claim (dated 27 August 2021).

> and Ms Shiu was, at all material times, a director. It now owns 70% of the shares in Pokeno West Limited, which owns 53 Munro Road, Pokeno.
>
> 8. At all material times, Ms Shiu's dealings with the plaintiffs as pleaded below were on her own behalf and on behalf of CSR Pokeno Limited.

[121] Mr Judd elaborates on this starting point in submissions, noting that at the time of the key transactions with Ms Yip, CSR Pokeno stood to benefit the most from Ms Shiu's Pōkeno West misrepresentation as nominee for the purchase of 53 Munro Road and as the applicant for the Pōkeno West plan change.

[122] He also submits the fact Ms Shiu did not give evidence[61] is "highly relevant to the claim against CSR" because, at tort, a presumption operates that a company is liable for torts committed by its director, as the company's alter ego. Mr Judd submits it is significant that the defendants did not call Ms Shiu and Dr Shiu as witnesses to rebut this presumption. He says it is evident Dr Shiu was "heavily involved", and on that basis the Court should infer Ms Shiu's and Dr Shiu's evidence would have shown Ms Shiu's deceptive conduct in breach of the FTA was carried out for and on behalf of CSR.

[123] For CSR Pokeno, Mr Bigio submits the plaintiffs' position is mistaken in fact and law.

[124] In respect of the commission fee representation, Mr Bigio says any attribution of liability to CSR Pokeno is misplaced because it was solely for Ms Shiu's personal benefit, not the company's; and in any case, she was not acting in the scope of her actual or apparent authority.

[125] In respect of the Pōkeno West representation, Mr Bigio contends:

(a) The plaintiffs are wrong that any promise (if made out) was on behalf of CSR Pokeno. Ms Shiu represented to the plaintiffs (on their evidence) that she had signed sale and purchase agreements in her own name, or was about to do so.

---

[61] See the discussion of *Perry Corporation v Ithaca* and its application here at [59] above.

(b) If Ms Shiu did make this misrepresentation as alleged, it must include all properties in which Ms Shiu had a personal interest in the Pōkeno West Development: "to Mr Luo, she was promising to share profits in any property she subsequently purchased with Ms Yip as well. In respect of Ms Yip, she was promising to share profits in any property she had invested with Mr Luo." The development project was always described as Ms Shiu's own, personal project, not CSR Pokeno's; and CSR Pokeno's only concerns an interest in 53 Munro Road. Both plaintiffs knew Ms Shiu had involved "other investors"; and on that basis, Ms Shiu was making the misrepresentation in her personal capacity, not on behalf of the company.

(c) It is alleged Ms Shiu made this misrepresentation as early as December 2016. At this time, 53 Munro Road had not been listed for purchase, nor had CSR Pokeno been incorporated.

(d) Any argument for vicarious liability could only have attached to the abandoned third misrepresentation claim—that Ms Shiu took certain steps for the specific benefit of developing 53 Munro Road. The remaining misrepresentations do not concern the development of 53 Munro Road.

Analysis

[126] Because Dr Shiu and Ms Shiu did not give evidence, I have no direct evidence about whether Ms Shiu was acting on behalf of CSR Pokeno at the time of the misrepresentations. I therefore accept it is available to me to make an adverse inference that that their evidence could have been unhelpful to them on this point. But I must first be satisfied there is an adequate evidential basis to infer that Ms Shiu was acting on behalf of CSR Pokeno at the time she made the misrepresentations. In this regard, it is helpful to provide a brief recap of the sequence of events as they specifically relate to CSR Pokeno:

(a) following Christmas day discussions, on 30 December 2016, Ms Shiu signs the sale and purchase agreement for 133 Helenslee Road (which had been listed, on Mr Chase's evidence in February 2016); and Ms Shiu also signs an agreement with Mr Luo concerning 133 Helenslee Road;

(b) that agreement is varied on 12 Jan 2017, and Mr Luo pays money for deposits and commission fees;

(c) on 31 January 2017, 53 Munro Road is purchased;

(d) in April 2017, Birch surveyors prepare a high-level plan for the Pōkeno West Development;

(e) on 17 April 2017, Ms Shiu signs the sale and purchase agreement for 145C Helenslee Road; and

(f) on 2 May 2017, CSR Pokeno is nominated purchaser of 53 Munro Road.

[127] CSR was then incorporated on 4 May 2017, with Ms Shiu as a director (along with Dr Shiu). Following that:

(a) in early June 2017, Ms Shiu contacts Ms Yip regarding the Pōkeno West Development and their discussions continue;

(b) they sign the 145C Helenslee JVA, and its subsequent variations, and Ms Yip goes overseas; and

(c) in July 2017, Manfei pays deposit of $700,000; and separately, the false commission fee.

(d) It is then across the latter half of 2017 that the balance of the key agreements and payments happen—including in respect of 87–89 and

119 Helenslee Road; Ms Yip makes the final 145C Helenslee Road deposits and her and Ms Shiu sign the Deed of Nomination; and so on.

(e) Finally, on 12 August 2020, CSR Pokeno signed a deed of nomination under which Pokeno West Limited is nominated to acquire 53 Munro Road, and title is transferred to it.

[128] As can be seen, there can be no basis to infer that Ms Shiu was acting on behalf of CSR Pokeno as at the time of the acquisition 133 Helenslee Road for the simple reason CSR Pokeno did not exist at the time of its acquisition.

[129] However, by the time of the respective 87–89, 119 and 145 Helenslee Road JVAs, CSR Pokeno had come into existence and was nominated purchaser of 53 Munro Road. From that point, CSR Pokeno stood to benefit from the acquisition of these properties insofar as this enhanced the viability of the integrated development of the Pōkeno West area as a whole. Indeed, as the owner of 53 Munro Road, it stood to gain the most from comprehensive development of the Pokeno West properties. Thus, while I agree with Mr Bigio that the picture emerging from the evidence is that Ms Shiu embarked on the Pōkeno West Development scheme for her personal benefit and held herself out as acting for her own benefit, in the absence of direct evidence otherwise, it can be reasonably inferred that Ms Shiu, in making the Pokeno West misrepresentation, did so on behalf of CSR Pokeno for the purpose of s 45(2) because CSR Pokeno was the vehicle through which Ms Shiu would enjoy those benefits.

[130] I note for completeness that Birch Surveyors were told to formally engage only with CSR Pokeno in respect of the Pōkeno West plan change in early 2018. This might suggest that CSR Pokeno's involvement post-dated the JVAs altogether. But that would belie the fact that, as I have said, CSR Pokeno stood to gain the most from the Pokeno West misrepresentation.

[131] The position is less clear in relation to the commission fee deception. It cannot be readily inferred from the evidence that the benefits of this deception accrued to CSR Pokeno. I therefore do not find that the commission fee deception was carried out on behalf of CSR Pokeno.

Outcome

[132] The claims based on the CCLA are dismissed.

[133] The FTA claims have been proven. Ms Shiu is liable as follows:[62]

(a) Ms Shiu must pay Mr Luo the sum of **$632,813.50** in respect of his 133 Helenslee Road claim, together with interest on the deposit sums from the date Mr Luo paid them until the date they were repaid:[63]

(i) on $1,100,000 from 12 January 2017 until 30 July 2021: $151,021.43; and

(ii) on $3,719.68 from 9 May 2018 until 30 July 2021: $510.00.

(Total interest payable: **$151,531.43**)[64]

(b) Ms Shiu must pay interest on the deposit sums paid by Mr Luo in respect of the 87–89, 119 Helenslee Road properties, from the date he paid those deposits to the date Ms Shiu paid the settlement sum of $2.5 m, as follows:

(i) On $400,000 from 9 December 2017 until 17 November 2021: $42,556.65.

(ii) On $600,000 from 15 December 2017 until 17 November 2021: $63,464.60.

---

62 All interest sums in these orders are calculable by reference to ss 9 and 10 of the Interest on Money Claims Act.

63 As noted above, on 31 July 2021 Ms Shiu repaid Mr Luo $470,906.06 of the deposits he had paid on 133 Helenslee Road.

64 It appears $3,719.68 is the combined sum of additional payments Mr Luo made to Ms Shiu and seeks interest on, comprised of: $639.25 paid on 27 January 2017 for services by Go Legal; $2,747.93 paid on 29 January 2017 for services by Birch Surveyors; and $332.50 paid on 9 May 2018 for services by Pidgeon Law. However, Mr Luo seeks interest only from the final of those dates: 9 May 2018.

(iii) On $1,000,000 from 12 December 2017 until 17 November 2021: $106,082.94.

(iv) On $500,000 from 15 June 2018 until 17 November 2021: $43,628.00.

(Total interest payable: **$255,732.20**)

(c) Ms Shiu must pay Mr Luo interest on the judgment sum of $632,813.50 until payment.

(d) Ms Shiu must pay Manfei Company:

(i) the sum of **$1,500,000**, together with interest on that sum from the date of judgment until payment; and

(ii) interest on the deposits Manfei Company paid prior to Ms Yip cancelling the 145C Helenslee JVA, from the date those deposits were paid until the date of judgment:

1. on the sum of $700,000, from 12 July 2017 to 21 December 2021: $86,219.63; and

2. on the sum of $400,000, from 25 October 2017 to 21 December 2021: $44,904.97.

(Total interest payable on deposit sums: **$131,124.60**)

[134] CSR Pokeno is also liable for the judgment sums in respect of the 87-89, 119 Helenslee Road transaction and the 145C Helenslee Road transaction.

Costs

[135] The plaintiffs seek indemnity costs, because (among other things) Mr Judd submits:

(a) Ms Shiu denied fraud on her pleadings until July 2021. She did not pay back the $500,000 she obtained by deceit from Mr Luo until after she was found guilty in the District Court; nor did she accept the commission fee deception until this point.

(b) Relatedly, Ms Shiu swore a false affidavit dated 13 December 2019 denying the false commissions were for Mr Chase, instead asserting they were a finder's fee.

(c) The decisions of Lang J and Gault J respectively in these proceedings were issued in reliance on that affidavit; and accordingly, were falsely obtained and part of a manipulative litigation strategy in order to see the Council plan change through.

(d) The litigation has been prolonged, expensive and stressful for the plaintiffs as a result of Ms Shiu's denial of fraud. Ms Yip continued to defend this claim after she was decided against giving evidence, and agreed to pay Mr Luo a settlement sum, at "the eleventh hour".

(e) As a matter of public policy, the foregoing warrants a message of clear renouncement by the Court, and the only way to do this is through an award of indemnity costs.

[136] I am not satisfied these matter justify indemnity costs. Mr Judd's submissions have the benefit of hindsight. Ms Shiu was entitled to defend the serious claims of fraud made against her, at least until the criminal convictions on the commission fee deception. She then proceeded to trial conceding the commission fee deception and she ran a case that was open to her: that is, to put the plaintiffs to the burden of proving their cases. She also succeeded on some important points, including on quantum. It also has to be observed that the plaintiffs' case evolved over the course of the proceedings, particularly in terms of relief. While this is does not warrant an adjustment to scale costs, it is a reason to be circumspect about taking a punitive approach to costs. This was also a case with the usual ebb and flow of claims and concessions and in which a partial settlement was reached.

[137] Stepping back and looking at the case as a whole, I am satisfied that the plaintiffs are entitled to their costs on a 2B basis, together with disbursements to be fixed by the Registrar.