IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA58/2022
[2024] NZCA 48

BETWEEN	XIAOLING (ANNIE) SHIU Appellant
AND	CSR POKENO LIMITED Second Appellant
AND	ZHENLIN (ROBERT) LUO First Respondent
AND	K C BROTHERS LIMITED Second Respondent
AND	ANG YIP Third Respondent
AND	MANFEI COMPANY LIMITED Fourth Respondent

Hearing:	4 July 2023
Court:	French, Gilbert and Mallon JJ
Counsel:	D R Bigio KC and Y Y Mortimer-Wang for Appellants S R G Judd and Z Chen for Respondents
Judgment:	7 March 2024 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed and the cross-appeal is dismissed.

B The decision of the High Court is quashed.

C The respondents must pay the appellants' costs in the High Court calculated on a 2B basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

D The respondents are ordered to pay the appellants one set of costs for a standard appeal on a band A basis, with usual disbursements. We certify for two counsel.

E Leave is reserved for the parties to come back to this Court for further orders in the event there are any difficulties regarding repayment of security for costs in both this Court and the High Court.

REASONS OF THE COURT

(Given by French J)

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Introduction

[1] Ms Annie Shiu[1] is a property developer who saw a development opportunity in Pōkeno West on the outskirts of Auckland.[2] It is a fast-growing area and there was a substantial amount of farmland that was being considered for rezoning from rural to residential. Ms Shiu embarked on a strategy of buying up individual properties in that area on terms that provided for prices above market value, delayed settlements and larger than usual deposits. She enlisted the support of the respondents, Ms Yip and

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1 Ms Shiu is also sometimes referred to as Ms Chen. This judgment refers to her as Ms Shiu throughout.

2 Pōkeno is also spelt as Pookeno. We have referred to it as Pōkeno throughout (except when referring to a specific legal entity) in accordance with the New Zealand Geographic Board.

Mr Luo, as investors to help fund some of the acquisitions pursuant to the terms of joint venture agreements.

[2] The other respondents are entities associated with either Mr Luo or Ms Yip. The second respondent is Mr Luo's investment company and the fourth respondent Manfei Company Ltd (Manfei) is owned by Ms Yip.[3]

[3] On Ms Shiu's case, it was the proposed rezoning that was the development opportunity which she took to the investors. Because it was an opportunity that would only be realised at the end of a long process, it was necessarily a long-term investment. It was only when the rezoning was obtained that the investors would be in a position to realise a return on their investment. It was inherently risky, but a calculated risk because of the known council sympathy for expanding residential development in the area.

[4] Mr Luo and Ms Yip claimed in the High Court that they were induced to enter into the joint venture agreements as a result of two misrepresentations made by Ms Shiu.[4] The first was that commission was payable to a real estate agent and the second that the respondents would be profit sharing partners across the whole development and not just the properties subject to the joint venture agreements they had signed.

[5] Their claim was upheld by Whata J.[5] The Judge found those misrepresentations had been made by Ms Shiu in breach of s 9 of the Fair Trading 1986 and had caused Mr Luo and Ms Yip loss warranting monetary compensation.[6]

[6] Ms Shiu and CSR Pokeno Ltd, a company owned and controlled by her and her husband, Dr Shiu,[7] now appeal. They contend the Judge made findings of fact that were against the weight of evidence and that he also erred in law.

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3 Ms Yip owns half of the shares in Manfei, the other half are owned by her business partner who took no role in these proceedings.
4 The respondents also pleaded a third misrepresentation, but this was abandoned at the hearing.
5 *Luo v Shiu* [2021] NZHC 3564 [judgment under appeal].
6 At [51], [64], [69], [87]–[88], [93], [102] and [133].
7 Dr Shiu has only been involved in these proceedings in his capacity as director of CSR Pokeno Ltd and not in his personal capacity.

Factual background

[7] Although the respondents Mr Luo and Ms Yip have joined forces for the purpose of the proceedings, they came into contact with Ms Shiu separately. For a period of time, neither was aware the other was dealing with Ms Shiu. They also had dealings in relation to different properties.

[8] In summary, there were three separate joint venture agreements, relating to the purchase of four parcels of land on Helenslee Road Pōkeno, which were entered into between January 2017 and October 2017.[8] Two of the joint venture agreements were with Mr Luo in relation to 119, 133, and 87/89 Helenslee Road. The joint venture agreement with Ms Yip related to 145C Helenslee Road.

[9] Also of relevance in the case is the purchase of a property located at 53 Munro Road. This property, which was much larger than any of the others, was not subject to any joint venture agreements with the respondents. CSR Pokeno was ultimately nominated by Ms Shiu as the purchaser of 53 Munro Road.

[10] It was anticipated by the surveyor that the four joint venture properties, 53 Munro Road and two additional Helenslee Road properties would yield in total some 1,447 new lots after rezoning.[9]

[11] In order to understand the issues, it is now necessary to set out the detail of the various transactions that took place.

Mr Luo and the three Helenslee Road properties

[12] Mr Luo first became aware of Ms Shiu's interest in Pōkeno West in December 2016 and initially agreed to provide funding for the purchase of a property situated at 133 Helenslee Road.

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8 There was also a joint venture agreement signed in December 2016, but this was superseded by the January 2017 agreement.

9 The whole Pōkeno West development, which consisted of 10 properties, was expected to yield approximately 1860 lots.

[13] The same month, Ms Shiu secured (and subsequently varied) a contract to buy 133 Helenslee Road. The purchase price was $3.1 million, with a deposit of $1.1 million payable on 12 January 2017. Settlement was to take place in four years' time.

[14] On 12 January 2017, Mr Luo entered into a joint venture agreement with Ms Shiu and her uncle Mr Zhong[10] relating to 133 Helenslee Road. The same day Mr Luo also paid Ms Shiu $1.2 million. The key aspects of the joint venture agreement were:

(a) Mr Luo was to fund the first stage of the investment project by paying the deposit of $1.1 million for the purchase of 133 Helenslee Road, and $100,000 towards the agent's fees.[11]

(b) The loan, which was said to have already been advanced by Mr Luo, was to have an annual interest rate of six per cent.

(c) The loan was not repayable on demand. The principal and interest were to be repaid to Mr Luo when 30 per cent of the land or houses on 133 Helenslee Road were sold.

(d) The agreement did not provide for a means of financing the balance of the purchase price on settlement. What it said was further negotiations would be needed if the project required additional funding to progress. It also said the parties were to consider whether the land was to be sold as a whole or in parcels or whether development would be proceeded with.

(e) After the repayment of the loan, profits and losses were to be shared on the basis of 45 per cent to Mr Luo, 40 per cent to Ms Shiu, and 15 per cent to Mr Zhong.

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10 Mr Zhong took no part in the proceedings.

11 The agreement stated that Mr Luo had lent $1,700,000; $200,000 was for the change of land use and $300,000 was for the land division. Mr Luo appears to have never advanced the additional $500,000.

(f) The parties were to pay the real estate agent's commission fee of $200,000, half of which was said to have already been paid.

[15] As mentioned, Mr Luo paid $1.2 million on 12 January 2017. That comprised $1.1 million for the deposit and $100,000 for the outstanding balance of the commission fee.[12]

[16] During January 2017, two other things happened. The first was that Ms Shiu engaged a surveying company who gave her a preliminary report on 133 Helenslee Road.

[17] The second thing that happened was that on 31 January 2017, Ms Shiu entered into an agreement to purchase the property at 53 Munro Road. The purchase price was $12 million with a deposit of $2 million payable in three instalments. Settlement of the purchase was to occur in three years. A variation to the agreement was signed on 2 May 2017 and CSR Pokeno was nominated as purchaser.

[18] By the end of January 2017, Ms Shiu thus had a proprietary interest in two Pōkeno properties — 133 Helenslee Road and 53 Munro Road.

[19] Then, in April 2017, she signed up to buy 145C Helenslee Road for $4.5 million.

[20] A month later, on 19 May, Ms Shiu agreed to purchase a fourth property, 119 Helenslee Road, for the sum of $3.75 million, including a deposit of $1.5 million (payable in two instalments) and settlement in approximately two years.

[21] In July 2017, on instructions from Ms Shiu, surveyors prepared initial concept plans for Pōkeno West — an area including but not limited to the joint venture properties and 53 Munro Road. After the Council advised its intention to revise the District Plan in October 2017, Ms Shiu instructed her consultants to prepare submissions to support the Council's intended rezoning.

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12 Described in the agreement as "the agency fee".

[22] In October, Ms Shiu entered into a second joint venture agreement with Mr Luo in relation to the property at 119 Helenslee Road (which as mentioned she had already contracted to purchase) and a fourth Helenslee Road property, 87/89 Helenslee Road.[13]

[23] Key aspects of this second joint venture agreement between Ms Shiu and Mr Luo were:

(a) Ms Shiu was authorised to negotiate the final purchase agreements. However, Mr Luo was to agree to the terms before they were signed and was also to take part in all decision making processes.

(b) $2.9 million was needed for the first stage of the land investment project, comprising the initial deposits for each property totalling $2 million, a further $500,000 deposit due in respect of 119 Helenslee Road and $400,000 in commission fees.

(c) The money was to be lent to the joint venture by Mr Luo at an interest rate of 6 per cent per annum and was to be repaid when 20 per cent of the land was sold.

(d) If more money was needed, further negotiation was required.

(e) Mr Luo and Ms Shiu were to each hold 50 per cent of the shares and profits were to be divided accordingly, after Mr Luo's loan was repaid.

(f) The parties were to apply for the change of land usage and to divide the land as soon as possible. A decision was then to be made as to whether the subdivided land should be sold or used to build houses.

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[13] The sale and purchase agreement for 87/89 Helenslee Road was agreed to in December of that year.

[24] In December 2017 Ms Shiu duly entered into an agreement to purchase 87/89 Helenslee Road. The purchase price was $4.5 million with a deposit of $1 million (payable in two instalments) and settlement in approximately four years.

[25] For his part, in December 2017, Mr Luo paid the full amount of the deposit on 87/89 Helenslee Road and the first instalment of the deposit on 119 Helenslee Road (a total of $2 million) as well as the commission fee of $400,000.

[26] Shortly after Mr Luo made those payments, he learnt from Ms Yip and the real estate agent, Mr Chase, that there were no commission fees (variously also described as agency and brokerage fees) payable to Mr Chase and that he had never received any of the payments. When confronted about this, Ms Shiu denied any wrongdoing.

[27] Despite learning in December 2017 that he had been deceived by Ms Shiu over the commission fees, Mr Luo paid the second instalment of the deposit on 119 Helenslee Road ($500,000) the following year in June.

[28] He did, however, lodge a complaint with the Serious Fraud Office in October 2018 over the fictitious commission fees. The real estate agent had previously lodged a complaint in February. Ms Shiu was later charged and convicted of obtaining money by deception.

Ms Yip and 145C Helenslee Road

[29] Ms Yip first became involved in June 2017 after being contacted by Ms Shiu. They were friends.

[30] Following discussions between the two women, Ms Yip instructed her accountant to incorporate the third respondent Manfei for the purpose of taking over the purchase of 145C Helenslee Road which Ms Shiu had contracted to buy in April 2017. Under the purchase agreement with the owners of 145C Helenslee, Ms Shiu had agreed to a purchase price of $4.5 million, with a deposit of $1.1 million payable in two instalments and a settlement date four years away.

[31] Ms Yip's accountant considered the purchase price was excessive. Attempts were made to engage lawyers to assist Ms Yip, but at the time it was understood that she had been unable to arrange that before she was due to depart for an extended overseas vacation. In evidence, Ms Yip said she had consulted lawyers prior to leaving but did not disclose what advice she received.

[32] Ms Yip went ahead with the transaction and before leaving the country signed a joint venture agreement with Ms Shiu regarding 145C Helenslee Road. The agreement was titled "[Pukeno] Land Development Purchase Agreement" and recorded the following key aspects:

(a) Ms Shiu had partnered with Ms Yip.

(b) The purchase price was to be fully funded by Ms Yip and her business partner Lam Cho Fei.[14]

(c) The purchase of the land had been contracted in the name of Manfei for $4.5 million with a down payment of $1.1 million together with a commission fee of $100,000 to be paid in advance.

(d) All development fees were to be borne by Ms Yip and Lam Cho Fei.

(e) In the future, whether the land, project or house was sold, the principal and interest (at 6 per cent per annum) was to be deducted from the profits obtained and losses were to be equally distributed.

(f) If, under special circumstances, development became impossible midway, the property was to be put up for resale and the profits or losses shared equally.

[33] In short, Ms Yip was to provide 100 per cent of the finance for 50 per cent of the equity.

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[14] Lam Cho Fei played no part in the proceeding.

[34] Ms Shiu and Ms Yip remained in contact during the latter's overseas trip. Ms Shiu arranged for Ms Yip to take legal advice from Ms Shiu's lawyer. The lawyer recommended to Ms Yip that she have her own lawyer to protect her interests. The lawyer also advised that the property transaction was of high value and risky. She suggested that because there was a strong possibility the block would not be developed for ten years or more, Ms Yip might be better served buying a different Pōkeno property.

[35] Later, while still overseas, Ms Yip told Ms Shiu's lawyer that she had taken her own legal advice and would be proceeding with the agreement. Through her company Manfei, Ms Yip then paid the first instalment of the deposit ($700,000) and the commission fee.

[36] It was after her return to New Zealand, in September 2017, that Ms Yip discovered the truth about the commission fees. She took it up with Ms Shiu but the latter was not prepared to provide any redress. Ms Shiu took the position that if Ms Yip had a problem with the commission fees, she should exit the joint venture agreement and Ms Shiu would sell 145C Helenslee Road to someone else.

[37] As the Judge put it in his decision, matters came to a head in October when payment of the second instalment of the deposit on 145C Helenslee ($400,000) became due. Ms Yip, however, paid it. She then also signed a deed of nomination dated 17 November 2017 under which Ms Shiu transferred her interest in the purchase of 145C Helenslee to Manfei. The effect of the deed was that if Ms Yip/Manfei completed the purchase and paid the balance of the outstanding purchase price, then Ms Yip/Manfei would receive 100 per cent of the equity. Finally the deed stated that upon performance of the parties' obligations under it, Ms Yip and Ms Shiu would be released from all terms of the joint venture agreement.

[38] The issue of the commission fee remained unresolved until Ms Yip took it up with the agent. That resulted in Ms Shiu refunding Ms Yip the commission payment together with interest in December 2017.

[39] Ms Yip also learnt from the real estate agent that Ms Shiu stood to benefit substantially from the rezoning of 53 Munro Road. That was a much larger property which it will be recalled Ms Shiu and her husband had purchased in January 2017 and then assigned to their company CSR Pokeno.

[40] The agent told Ms Yip 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 shared between all of the investors. According to the agent, the reason 145C Helenslee Road had such a high price was because it was an essential piece of the proposed Pōkeno West development.

[41] On learning of this, Ms Yip formed the view that she had paid an unjustified premium for 145C Helenslee, the effect of which was to subsidise Ms Shiu's purchase of 53 Munro Road. In evidence, she said Mr Chase advised her that the only way to develop 145C Helenslee profitably was to do so as part of a larger block.

[42] She then met with Mr Chase and Dr Shiu at the beginning of February 2018. According to Ms Yip, Dr Shiu agreed she should be involved in the Pōkeno West development as previously agreed and undertook to try to persuade his wife to bring the development back in line. Ms Yip then instructed her lawyers to draw up a new joint venture agreement.

[43] Dr Shiu was not called to give evidence.[15] There was evidence from Mr Chase of what appears to be a further meeting he had on his own with Dr Shiu, where the latter was said to have made comments along the lines that the only way forward was to bring all the purchasing parties together. Mr Chase did not testify about the meeting he attended where Ms Yip was present. Nor did Mr Chase say that Dr Shiu admitted there was a previous agreement already in place. In any event, at another meeting, in mid-February 2018, it is accepted that Dr Shiu said neither he nor his wife were interested in the new proposal.

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[15] Statements attributed to him were therefore hearsay, although admitted by the Judge. See judgment under appeal, above n 5, at [36], n 20.

The proceedings

[44] The proceedings were filed in April 2019. Between then and the trial in August and September of 2021, the statement of claim underwent three further iterations, making four versions in total.[16]

[45] The initial statement of claim pleaded, amongst other things, alleged breaches of the joint venture agreements and breaches of fiduciary duty in relation to the joint venture agreements.

[46] The focus of this initial statement of claim was on representations allegedly made by Ms Shiu that impacted on the likely profitability of the developments on the joint venture properties. For example, representations about the predicted number of lots available on the joint venture properties and a promise that all the joint venture properties would be developed in conjunction and that 53 Munro Road would be developed to maximise the profitability of those properties.

[47] The relief sought included enforcement of the joint venture agreements and orders restraining Ms Shiu from disposing of 53 Munro Road to a third party who would not be bound by the joint venture agreements.

[48] At the same time the statement of claim was filed, Mr Luo and Ms Yip filed an application seeking interim injunctive relief to protect their positions under the joint venture agreements. In the same application, Mr Luo also sought summary judgment in respect of the commission payments.

[49] In March 2020, consent orders were made relating to the three Helenslee Road properties that were the subject of the joint venture agreements with Mr Luo. The consent orders prevented Ms Shiu from dealing with any of those properties, required her to provide Mr Luo with all information regarding the rezoning, subdivision and development of the three properties and prevented her making any unilateral decisions about the rezoning of them.[17]

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16 Closing submissions took place on 1 October 2021.

17 *Luo v Shiu* [2020] NZHC 611 [interim relief judgment] at [5].

[50] The High Court declined however to make an interim order prohibiting Ms Shiu from selling or otherwise disposing of the Munro Road land as it did not consider there was any tenable legal basis for such an order.[18] The Judge hearing the application also found that the claims based on the alleged breaches of the joint venture agreements were weak to the extent that they alleged Ms Shiu committed to join with them in developing the land once rezoning had occurred.[19] That finding was based on Mr Luo's own description of the joint venture agreements which the Judge considered suggested the parties had proceeded on the basis they would co-operate in the rezoning process, but once rezoning was obtained the land was not required to be developed.[20] Under the agreement, it could be sold which made the claim of a representation about developing the land in tandem with 53 Munro Road after rezoning unlikely to succeed.

[51] Following that decision, an amended statement of claim was filed on 19 June 2020. For present purposes, the key amendment was the inclusion of a new allegation by Ms Yip (but not Mr Luo). The new allegation was that in order to induce Ms Yip into the 145C Helenslee Road joint venture agreement, Ms Shiu had represented that because the different plots of land would all be developed together (as part of the Pōkeno West Development), buying one single plot had the same effect, for a purchaser, as purchasing a portion of the overall development.

[52] Meanwhile, as the settlement date for the purchase of 133 Helenslee loomed closer, Mr Luo and Ms Shiu were unable to agree on how the purchase should be settled. It will be recalled that the joint venture agreement did not provide for a means of financing the balance of the purchase money owing on settlement, but had left it to be negotiated. In October 2020, Mr Luo unsuccessfully applied to the High Court for an order compelling Ms Shiu to accept a proposal that a new joint venture company be incorporated and nominated as the purchaser.

[53] In January 2021, Ms Yip, who must have become aware that Ms Shiu's contract to buy 133 Helenslee Road was in jeopardy, introduced the vendor to a new interested buyer, Ms Yip's sister Ms Ye. The vendor entered into a conditional agreement for

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18 At [33].
19 At [31].
20 At [31].

sale and purchase with Ms Ye at a price similar to that under the purchase contract with Ms Shiu.

[54] Ms Yip herself subsequently acquired another Helenslee Road property (145B Helenslee), through her company Manfei. In addition, Ms Yip also paid a further instalment of $1 million owing on 145C Helenslee.

[55] In June 2021, a second amended statement of claim was filed with another new claim by Ms Yip. The new allegation was that in order to induce her to enter into the joint venture agreement relating to 145C Helenslee, Ms Shiu had promised her 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 this to occur.

[56] Meanwhile, Ms Shiu attempted to keep her purchase of 133 Helenslee alive by lodging a caveat and challenging a cancellation notice served on her by the vendor. She also proposed to Mr Luo that if he did not want to continue in business with her that they agree to complete the sale and put it on the market which would mean he would be able to recover the deposit monies he had paid.

[57] Ms Shiu was unable to obtain finance and on 19 July 2021 the High Court held the caveat could not be sustained.[21] Ultimately the $1.1 million deposit funded by Mr Luo was forfeited. In July 2021, Ms Shiu repaid Mr Luo $470,906 on account of the deposit monies. By then she had also refunded him all of the commission monies he had paid plus interest,[22] following her conviction in January 2021 for obtaining money by deception.[23]

[58] The hearing of the substantive proceeding commenced in August 2021. Due to Covid related reasons, the hearing was disrupted and took place in two stages. Between the two stages, Mr Luo and Ms Yip filed another amended statement of claim, in which for the first time Mr Luo sought cancellation of the other joint venture agreement he had signed, namely the agreement relating to 87/89 and 119 Helenslee.

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21 *Shiu v Franklin Law Trustee Ltd* [2021] NZHC 1825.
22 The payments to Mr Luo were made on 24 February 2021 and 20 April 2021.
23 *R v Chen* [2021] NZDC 25807.

[59] Compensation was sought on the alternative bases of contractual misrepresentation under s 35 of the Contract and Commercial Law Act 2017 and misleading and deceptive conduct under s 9 of the Fair Trading Act, the focus being on two alleged misrepresentations. First, that Ms Shiu had falsely represented that commission fees were payable to the real estate agent (the commission representation). Secondly, that she had falsely represented that Ms Yip and Mr Luo would have a share in the profits of the whole Pōkeno West development and not just the profits arising from the subdivision of the properties specified in the joint venture agreements (the Pōkeno West representation). According to a plan prepared by Ms Shiu's surveyors, the whole Pōkeno West development consisted of 10 properties and was to yield approximately 1860 lots.

[60] A third alleged misrepresentation about the value and profitability of the individual properties was abandoned at the hearing.

[61] Counsel advised us that in closing argument, the respondents sought the following remedies:

(a) Ms Yip sought damages based on the difference between the purchase price of 145C Helenslee Road and its true market value, together with interest;

(b) Mr Luo sought:

(i) repayment of the money forfeited in relation to the cancelled purchase of 133 Helenslee Road less the $470,906.06 Ms Shiu had already repaid, the balance being the sum of $632,815.50; and

(ii) repayment of the $2.5 million he had advanced in respect of the 87/89 and 119 Helenslee Road properties.

[62] After the hearing but before the Judge delivered his decision, Mr Luo's claim relating to 87/89 and 119 Helenslee Road was settled on terms involving the

cancellation of the relevant joint venture agreement and a payment of $2.5 million to Mr Luo, representing the full amount of money he had outlaid. The only outstanding issue relating to that part of his claim was the question of interest. The claim relating to 133 Helenslee Road was not part of the settlement.

The High Court decision

[63] The Judge held that the relief provided under s 35 of the Contract and Commercial Law Act for misrepresentations was not apposite to the commission deception .[24] The basis of relief under s 35 is that a claimant is entitled to damages as if the representation were a term of the contract that has been breached. However, Mr Luo and Ms Yip, the Judge said, did not want the false commissions to be treated as though they formed part of the contract.[25]

[64] The Judge did however uphold the claims under the Fair Trading Act, making the following key findings:

a) The commission representation constituted misleading and deceptive conduct for the purposes of s 9 of the Fair Trading Act.[26]

b) The commission representation did not literally induce Ms Yip and Mr Luo to enter into the joint venture agreements.[27]

c) They were however induced to contract with Ms Shiu based on a false premise of honest dealing that vitiated the basis and efficacy of the joint venture agreements.[28]

d) The deceptive conduct triggered a fulsome remedial response including, but not limited to, disgorgement of the commission payments.[29]

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24 Judgment under appeal, above n 5, at [50].
25 At [50].
26 At [48] and [51].
27 At [49].
28 At [49] and [51].
29 At [51].

e) There was a causative link between the commission representation and the claimants' respective losses.[30]

f) The evidence established that Ms Shiu had also represented that Ms Yip and Mr Luo would be in business with her in relation to the whole of the Pōkeno West development and would share in the profits of the whole development, when she did not intend this to happen.[31]

g) The Pōkeno West representation had induced Ms Yip and Mr Luo to enter into the joint venture agreements and, along with the commission representation, was actionable under s 9 of the Fair Trading Act as misleading and deceptive conduct.[32]

h) There was no clear evidence as to what the promise of involvement meant in terms of cost and profit sharing. The Pōkeno West representation was no more than an untrue promise to be involved at some level without committing to a particular outcome.[33]

i) The Pōkeno West representation was a compounding factor in a causative sense alongside the commission representation.[34]

j) Mr Luo was entitled to recover the full amount of the money he outlaid in relation to 133 Helenslee, which after deducting the $470,906.06 already refunded to him, amounted to $632,813.50.[35]

k) Mr Luo was entitled to interest under ss 9 and 10 of the Interest on Money Claims Act 2016 running from the date he advanced the funds and not the later date when the respective joint venture agreements were cancelled.[36]

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30 At [67] and [78]–[80].
31 At [62] and [64].
32 At [48], [64], [72] and [78].
33 At [64].
34 At [72] and [78].
35 At [87]–[88] and [133(a)].
36 At [88] and [133(a)].

l) In relation to 133 Helenslee, that meant an award of interest of $151,531.43. In relation to 87/89 and 119 Helenslee, an award of $255,732.20 was made.[37]

m) Due to the vagueness of the Pōkeno West representation, Ms Yip/Manfei was not entitled to damages based on an expectation loss claim.[38]

n) The correct measure of damages in relation to the losses of Ms Yip/Manfei was the difference between the contracted purchase price and the actual market value of 145C Helenslee Road, as at the date of the deed of nomination.[39]

o) The market value of 145C Helenslee at that date was $3 million, as opposed to the purchase price of $4.5 million, entitling Ms Yip/Manfei to an award of damages of $1.5 million plus interest.[40]

p) Under s 45 of the Fair Trading Act, CSR Pokeno was jointly liable with Ms Shiu to pay all the judgment sums in respect of the 87/89, 119 and 145C Helenslee Road transactions.[41]

The positions on appeal

[65] Ms Shiu admits she falsely represented that commissions were payable but having fully refunded the commission monies denies that Ms Yip and Mr Luo suffered any further losses as a result of that representation. She denies making any representation about involvement in the whole development and contends the claims by Ms Yip and Mr Luo to the contrary were not made out on the evidence.

[66] Her counsel, Mr Bigio KC, submits that the central error in the High Court decision was that the Judge wrongly approached the issues of liability and relief

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37 At [133(a)–(b)].

38 At [81]. This Court has in any event held that as a matter of law damages for expectation loss are not available in a claim under the Fair Trading Act; see *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 22–23 and 26; *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 at [13]; *Narayan v Arranmore Developments Ltd* [2011] NZCA 681, (2012) 13 NZCPR 123 at [49]; *Zurich Australian Insurance Ltd v Withers* [2016] NZCA 618, [2017] 2 NZLR 745 at [36]; and *Gavigan v Eichelbaum* [2017] NZCA 412, [2018] 2 NZLR 530 at [39].

39 Judgment under appeal, above n 5, at [97].

40 At [101]–[103].

41 At [129] and [134].

through the lens of an action for deceit or fraudulent misrepresentation, rather than the established tests under the Fair Trading Act. In essence, the submission was that the Judge allowed the commission deceit to so colour his thinking that it ended up being at the expense of a proper legal and evidential analysis.

[67] Mr Bigio stressed that while Ms Shiu lied about the commissions for personal gain because she needed the money, that was her only deception. She performed all the other obligations under the joint venture agreement. In particular, she did genuinely pursue the rezoning for the benefit of anyone who was owning land in the area, whether it was land in which she had an interest or not. She ultimately achieved the plan change,[42] and paid the vast bulk of the associated costs including the fees of legal and surveying consultants.

[68] For their part, Ms Yip and Mr Luo generally support the Judge's reasoning. Counsel, Mr Judd, emphasised the case was more straightforward than the appellants were suggesting. What happened was a fraud. The respondents were induced to pay money to Ms Shiu by deception and the remedy for that is to be put back in the position they would have been in had they not gone into business with her at all. All that was entailed was a calculation of how much they paid in reliance on her fraud less any benefit received.

[69] Although generally agreeing with the Judge's reasoning, the respondents cross-appeal the quantum of the damages awarded to Manfei on the ground that the Judge's assessment of the market value of 145C Helenslee Road was flawed. He is said to have failed to apply appropriate discount factors and as a result arrived at a valuation that was too high. Mr Judd submits the correct valuation on the evidence was $1,934,782 instead of the $3 million as found by the Judge,[43] and therefore Manfei should have been awarded damages in the sum of $2,565,217.

[70] Ms Yip and Mr Luo also cross-appeal the Judge's decision to award them scale court costs instead of the indemnity costs they were seeking.

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[42] At the hearing, counsel advised us that the plan change was however the subject of an as yet unresolved appeal in the Environment Court.

[43] At [101].

[71] There is no cross-appeal against the Judge's finding that s 35 of the Contract and Commercial Law Act was not applicable.

[72] We now turn to address the detail of the impugned findings. It is logical to begin the analysis with the challenge to the Judge's most important finding of fact, namely that Ms Shiu promised Ms Yip and Mr Luo their involvement would extend to the whole development and was not limited to sharing in the profits arising from the development of the specific joint venture properties.

Did the evidence support the finding that Ms Shiu made the Pōkeno West representation?

[73] The terms of the representation as found by the Judge were a promise that Mr Luo and Ms Yip would be involved in the entire development at some unspecified level of profit and loss sharing.[44] This was a promise about the future and although promises about the future are not generally categorised as capable of being misleading for the purposes of the Fair Trading Act, they will be if the promisor had no intention of carrying them out.[45] And that is what the Judge found was Ms Shiu's state of mind.[46]

[74] As Mr Judd properly emphasised, appellate courts should exercise caution when considering challenges to a trial judge's findings of credibility. A trial judge has not only seen and heard the witnesses but has also had the advantage of being able to evaluate the evidence as it progressively unfolds within the context of the trial as a whole.[47] In this case, Ms Yip and Mr Luo both gave evidence and were extensively cross-examined. The Judge found them credible witnesses and accepted their evidence.[48]

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44 At [64].

45 *Muollo v Creative Engineering Design Ltd* (2006) 8 NZBLC 101,675 (CA) at [24]–[25]; *McKeown Group Ltd v Russell* (2010) 9 NZBLC 103,068 (HC) at [29]; and *GSE Group Ltd v Walters Supplies Ltd* HC Auckland CIV-2005-404-3045, 16 July 2008 at [140].

46 Judgment under appeal, above n 5, at [64].

47 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [31]; *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199.

48 Judgment under appeal, above n 5, at [62].

[75] However, although mindful of the Judge's advantages, we have come to the clear conclusion that the weight of the evidence does not support his finding. On our assessment of the evidence, the respondents failed to prove that the Pōkeno West representation had been made.

[76] We refer to the following matters.

[77] First, the belated raising of the claimed Pōkeno West misrepresentation. Despite being the central feature at trial, it was only explicitly raised in the pleadings for the first time in the third iteration of the statement of claim filed over two years after the proceeding was filed, and even then, only in relation to Ms Yip. The two previous statements of claims had been prepared by senior counsel.

[78] The first time it was raised by Mr Luo was in his brief of evidence for the trial. Significantly, his affidavit filed in support of the summary judgment application had made no mention of any expectation of profits from properties other than those in his two joint venture agreements.

[79] The second factor is the inconsistency of this claim with the joint venture agreements themselves.

[80] Not only were Ms Yip and Mr Luo unclear in their evidence about the precise terms of the representation, they also gave no detail as to exactly when and where the representation was made, other than to say in effect that it was consistently made from the outset and that they were provided with a copy of the overall plan. The Judge did not expressly address the question of when the representation was said to have been made. However, in order to grant relief on the basis the representation induced them to enter into the joint venture agreements, the Judge must have been satisfied the representation was made some time prior to the dates of those agreements.

[81] The joint venture agreements do not, however, refer to the Pōkeno West representation, despite the fact the parties had gone to the trouble of making a written record of their agreement. Further, the agreements fix the percentages of equity sharing without any proviso or qualification. That cannot be reconciled with an

alleged understanding they would be sharing the profits from their property with another investor(s) who had funded another property.

[82] The agreements also confer a great deal of discretion on the individual investors as to their options once the rezoning is obtained. That individual autonomy is difficult to reconcile with being part of an overall plan and profit-sharing arrangement.

[83] The third matter is the absence of any other contemporaneous written record or note of the alleged representation. There is not a single mention or direct hint of it in contemporaneous communications between Ms Shiu and the claimants in emails or on WeChat. Ms Shiu and Ms Yip in particular communicated extensively on WeChat.

[84] Surely too if there had been a representation, the deed of nomination afforded Ms Yip the perfect opportunity to record it and protect herself. By then Ms Yip knew of the commission deceit and had lost trust in Ms Shiu. The representation about involvement in and profit sharing of the subdivision development was far more important than the representation about commission payments. It defies belief, in our view, that despite this and despite her losing trust in Ms Shiu, there is no reference to this even more important representation in the deed of nomination. Significantly, the deed was drafted by lawyers.

[85] In our assessment, it is simply not plausible that Ms Yip and Mr Luo would have entertained significantly increased risk, over which they had no control, without documenting it, especially given there was written documentation in which the representation could have been included.

[86] The fourth matter is the complete absence of evidence from any third party that they either heard Ms Shiu make the Pōkeno West representation to Ms Yip or Mr Luo or that Ms Yip or Mr Luo ever told them it had been made.

[87] Importantly, that includes Ms Yip's professional advisers including her accountant, her own lawyer and Ms Shiu's lawyer, all of whom Ms Yip consulted about the 145C Helenslee transaction.

[88] When the advisers, for example, said to Ms Yip that the purchase price was too high, there is no evidence she ever told them not to worry that it was high because she was looking at a bigger picture. If the Pōkeno West development representation had been made, it was crucial information and it is reasonable to expect she would have relayed it to her advisers. It does not make sense for her to have withheld it, especially from the lawyers drafting the deed of nomination. Ms Yip said she spoke to her husband about the transaction, but in his evidence, even he made no mention of her telling him about the Pōkeno West representation.

[89] The fifth factor is the vagueness of Ms Yip's and Mr Luo's evidence about the representation. As mentioned, neither was able to say with any degree of precision what the promise of the involvement entailed in terms of cost and profit sharing. Further, when asked whether she had considered what kind of risks she might be exposed to from being involved in the entire development, Ms Yip said that she did not know how much the whole project was worth and did not think about the detail.

[90] Apart from raising issues about the reasonableness of any reliance on such a vague ill-defined representation (which were not considered by the Judge), the lack of clarity points away from any representation having been made in the first place.

[91] It is noteworthy too that there were internal inconsistencies in Ms Yip's evidence. Despite saying she was not concerned about the risks, she claimed she paid the second instalment on 145C Helenslee out of concern that if she did not pay it, she would lose the $700,000 she had already paid. Yet, in another part of her evidence she claimed the money she invested in 145C Helenslee was security for her investment in the entire arrangement, the detail of which she said was unknown to her.

[92] In accepting the evidence of Ms Yip and Mr Luo that the Pōkeno West representation was made, the Judge appears to have placed significant weight on the evidence of Mr Chase the real estate agent,[49] weight which in our view was not justified.

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[49] See for example at [53]–[54].

[93] That is because Mr Chase acknowledged in evidence that he actually had no knowledge of the discussions between the parties. He also acknowledged that, although Ms Shiu told him she was buying the properties with other investors, she did not tell him the details. At best for the respondents, he appears to have made assumptions based on his own vision of how the properties should have been developed, including profit sharing among all the investors. He then shared this with Ms Yip during a meeting that took place after she had acquired 100 per cent of the profits from the 145C Helenslee venture. We note too Ms Yip's evidence that her reaction to Mr Chase telling her about the profit sharing was one of shock. That is not the reaction of a person who has already been told all of this by Ms Shiu.

[94] In our view, the true significance of Ms Yip's discussion with Mr Chase is that it provides an explanation as to when and why Ms Yip's thinking suddenly changed. The evidence established that it was shortly after this discussion that she truly became interested in wider development plans and instructed lawyers to prepare a different joint venture agreement. Mr Judd characterised the document she presented to Ms Shiu and Dr Shiu as an attempt to revive the existing joint venture. But that submission is contrary to Ms Yip's own evidence. She regarded it as "a new and fairer" joint venture agreement.

[95] In addition to relying on Mr Chase's testimony, the Judge also considered that the promise of profit sharing in the whole development was consistent with proven facts, notably the engagement of surveyors to promote a plan change affecting all the properties and the speedy acquisition of multiple contiguous properties by Ms Yip, Mr Luo and Ms Shiu.[50]

[96] He also considered it was inherently implausible that some co-operation 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 the subsequent development of the properties.[51]

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50 At [62].
51 At [62].

[97] In our view however, the "proven facts" cited are neutral, that is to say they are equally consistent with the competing view that the representation was not made and that the arrangements were limited to the development of the specific properties. Ms Shiu driving the plan change, for example, is consistent with the pursuit of the individual agreements. Mr Luo and Ms Yip always knew there was a rezoning proposal in the pipeline, and the fact the properties were acquired in a 10 month period can reasonably be seen as reflecting a willingness to buy in anticipation. It does not, in our view, indicate there must have been going to be a pooling of profits.

[98] It needs to be borne in mind too that the rezoning was going to be for the benefit of all landowners in the area, not just the land subject to joint ventures with Ms Shiu. Therefore, drawing inferences favourable to the respondents' claim from Ms Shiu's involvement in the plan change is tenuous. She did not acquire an interest in all the properties.

[99] Likewise, in our view, the fact that any return hinged on the success of the plan change is equally consistent with a situation where each individual party has a separate joint venture agreement in respect of their investment in a single property and the development of that property. So too the fact Ms Shiu showed the overall plan to Ms Yip and Mr Luo. There was obvious benefit to Mr Luo and Ms Yip in having their own joint venture agreements in the context of a wider development proceeding, and that would have been an obvious selling point.

[100] Crucially, the machinery that would be required for some all-encompassing scheme binding all owners of property in the Pōkeno West development is simply absent. In our view, what *is* inherently implausible is that, despite the representation having supposedly been made and the need for such a machinery being self-evident, neither Mr Luo nor Ms Yip insisted on it being documented. That they would have insisted had they been told about it from the outset is evidenced by the fact that almost immediately after her conversation with Mr Chase, Ms Yip attempted to do just that.

[101] The Judge appears to have assumed there was less risk and greater security for the investors if they were part of the bigger picture. We are not persuaded that was necessarily the case. If anything, being part of that wider development, especially in

the absence of any detailed agreement as to how that was going to work, was significantly more risky. On the evidence, the advantage of being part of a wider deal is not readily apparent. Mr Luo and Ms Yip would be committing to the profits or losses of the as yet unknown parts of the development. They had no idea or control over what was going to be paid for the acquisition of other properties.

[102] The remaining matters relied upon by the Judge relate to Ms Shiu, who did not give evidence. The Judge considered that the fact she lied about the commission fee supported the likelihood she was also deceiving Mr Luo and Ms Yip about their involvement in the Pōkeno West development as a whole.[52] In effect, the Judge treated the false commission representation as a form of propensity evidence.

[103] Contrary to a submission made by Mr Bigio, we consider that Ms Shiu's proven deceit in one matter had some, but admittedly limited, probative force in relation to the issue of whether she also made the Pōkeno West representation. As for her failure to give evidence, Mr Bigio explained that the reason for this was because the respondents had not raised even a credible case that this representation could have been made. There was therefore nothing to answer. That may have been the assessment, but it did not in our view preclude the Judge from relying on that failure as a factor lending support to the respondents' version of events.

[104] However, although the Judge was entitled to take those matters into account, he was still required to look at what evidence there actually was of the representation having been made. And, in our view, that evidence was not sufficiently cogent for him to have been satisfied on the balance of probabilities that a representation about being in business together in the overall development had been made. There are just too many question marks.

[105] We therefore conclude that the Judge was wrong to find Ms Shiu had made a representation about Ms Yip and Mr Luo being involved and sharing in the profits of the whole development. It follows there was only, in our view, one misrepresentation and that was the representation relating to the commission fee to which we now turn.

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[52] At [63].

Did the commission representation render Ms Shiu liable for losses in addition to the commission payments?

[106] In relation to the commission representation, there is no issue as to whether the representation was made. It clearly was made. There is also no dispute that the making of this representation amounted to misleading and deceptive conduct and was therefore a breach of s 9 of the Fair Trading Act. There is no doubt either that Ms Yip and Mr Luo relied on the representation by paying the commission monies, thereby incurring the loss of that money, which Ms Shiu then became liable under the Fair Trading Act to refund.

[107] The contentious issue is whether the Judge was correct to find that although the commission representation was not an inducement to contract,[53] it nevertheless rendered Ms Shiu liable for other losses, that is losses in addition to the commission payments.[54] As will become apparent, this issue essentially turns on causation.

[108] The leading authority on causation under the Fair Trading Act is the decision of the Supreme Court in *Red Eagle Corporation Ltd v Ellis*.[55] In that decision the Court endorsed the following propositions:

(a) The language in the remedy section of the Fair Trading Act (s 43) requires a practical or common-sense concept of causation.[56]

(b) The court needs to ask whether the defendant's conduct in breach of s 9 was an operating cause of the claimant's loss or damage. It need not be the sole cause, but it must be an effective cause.[57]

(c) There must be a clear nexus between the conduct and the loss or damage.[58]

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53 At [49].
54 At [51], [69]–[70] and [78].
55 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.
56 At [29], citing *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ, which concerned the equivalent Australian legislation.
57 At [29].
58 At [29], citing, *Goldsbro v Walker* [1993] 1 NZLR 394 at 401 per Richardson J.

(d) A claimant's own conduct may be an operating cause.[59]

[109] To similar effect is the statement in a decision of this Court (quoted in *Red Eagle*)[60] that "there must be a sufficient relationship between the impugned conduct and the loss or damage to make it reasonable to say that the loss or damage is the consequence of the conduct".[61]

[110] In making the findings he did, the Judge in this case reasoned that neither Mr Luo nor Ms Yip would have entered into the joint venture agreements had they known the truth about Ms Shiu's dishonesty over the commission.[62] They were therefore induced to enter into their respective joint venture agreements by "a false premise, namely of honest dealing".[63] The Judge acknowledged they had continued with the joint venture agreements after learning of the deception but considered they were doing no more than seeking to protect their investments and mitigate potential losses.[64]

[111] Therefore, their loss was not limited to the money they paid on account of the commissions, but rather, it extended to the other losses claimed.

[112] There are some difficulties with this analysis which appears to conflate the specific commission representations with a different generalised representation of honest dealing.

[113] The first difficulty is that a representation of honest dealing or character was never pleaded and there was no evidence of Ms Shiu making any such express representation. Secondly, taken to its logical conclusion, the approach adopted by the Judge would mean that a representation that did not induce a contract — in this case the commission representation — could nevertheless be found to have induced it for the purposes of relief under the Fair Trading Act because of the fact it was a false representation. We know of no legal authority for that proposition.

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59 At [30].
60 At [29], n 19.
61 *Cox & Coxon Ltd v Leipst*, above n 38, at 38.
62 Judgment under appeal, above n 5, at [49].
63 At [49].
64 At [67]–[69], [71] and [79]–[80].

[114] The correct focus in our view must on be the commission representation itself without the complication of an overlay of another implied representation.

[115] In relation to the commission representation, we accept it is likely that had Mr Luo and Ms Yip known that Ms Shiu was lying to them about the commission, they would not have gone into business with her. We also acknowledge that parties to a joint venture are in a relationship of trust and confidence and that Ms Shiu's deception over the commission may well have entitled Ms Yip or Mr Luo to rescind or cancel the joint venture agreements and seek a refund of all the monies they had paid.[65]

[116] But the problem is that they did not do that. Both elected to affirm the contract despite knowing of the deception. There was no evidence that either of them said they wanted out. On the contrary, they paid further money and importantly, they actively sought court orders to enforce the joint venture agreements. It was over three years after discovering the deception that Mr Luo first sought cancellation.

[117] We disagree with the Judge that Ms Yip and Mr Luo acted in the way they did in order to mitigate loss and secure the money they had already paid. That finding is in our view not supported by the evidence of their actual conduct as opposed to the self-serving evidence they gave of their subjective intentions at trial.

[118] In our assessment, the far more likely inference to be drawn from the respondents' conduct is that notwithstanding Ms Shiu's deception over the commission, they still considered Pōkeno West as a good commercial opportunity and were keen to remain involved. Mr Luo discovered the deception in December 2017 but held onto the agreements for another three years. Ms Yip, as Mr Bigio put it, "continue[d] to embrace" the commercial opportunity, settling not only the transaction of 145C Helenslee, but also purchasing 145B Helenslee as well as facilitating the purchase of a third Helenslee Road property by her own sister.

[119] When Ms Yip was asked in cross-examination if she had advised her sister about Mr Chase's analysis, that the property was overpriced and that her sister would

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65 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [91].

not make any money on it, Ms Yip claimed she did not get involved. Given that the evidence also established that Ms Yip was the one who had introduced her sister to the vendor, we consider that response is not credible. The irresistible inference is that she must have considered that Pōkeno West remained a good commercial opportunity worth pursuing. Otherwise, she would never have made that introduction in the first place.

[120] Mr Judd submitted that in assessing his clients' conduct, it was important to remember that Ms Shiu defended the charges and only admitted them at sentencing following trial. In effect, he suggested Ms Yip and Mr Luo suspended judgment on her character pending her conviction. But that is not supported by the evidence. Ms Yip recorded the loss of trust as occurring in September 2017 which was two months before the deed of nomination.

[121] Mr Judd also suggested that Ms Yip considered she was legally bound to complete. But against that, is the evidence that also in September 2017 Ms Yip had taken independent legal advice and would have known her full legal rights. In our assessment, she made a fully informed choice to proceed thereby breaking any causal link there might have been between the commission representation and the claimed loss.

[122] Further, by entering into the deed of nomination it is difficult to see how, viewed objectively, that made her investment more secure than it had been under the joint venture agreement. She had always been committed to funding 100 per cent of the transaction. The only change to her position as it had been under the joint venture agreement was that she was now to get all of the profit and as a corollary of that, all of the potential loss.

[123] Mr Judd further sought to support the Judge's approach to causation by reference to a number of decisions which he said were authority for the proposition that in cases of fraudulent misrepresentation, it was not appropriate to carry out a close critique of each step taken by the victim, or to rely on concepts of intervening causes

or contributory fault, but instead the court should hold the deceiver accountable for all consequences.[66]

[124] However, none of the core decisions relied on by Mr Judd were claims under the Fair Trading Act which are governed by the tests laid down in *Red Eagle*. A number of the decisions cited by Mr Judd were claims in the tort of deceit or in equity for breach of fiduciary duty where a different more stringent approach to causation is applied.[67] In so far as the Judge may also have been influenced in his findings by the deceit cases in preference to the causation tests in *Red Eagle*, we consider that was an error.

[125] In fairness to the Judge, it needs to be pointed out of course that his causation analysis was undertaken on the basis of there being two false representations whereas we have found there was only the one.

[126] Standing back in this case and applying the tests laid down in *Red Eagle*, we are satisfied it is not reasonable to say that the losses claimed by Ms Yip and Mr Luo were the consequences of the commission representation. The representation was neither the effective cause nor an effective cause.

[127] In relation to Ms Yip, we are satisfied the effective or operative cause of any loss she has suffered or may suffer (which we consider is questionable), was her own choices. She made a commercial decision to assume the risk of future loss and "stay in" as Mr Bigio put it, taking 100 per cent of the profit.

[128] As for Mr Luo, the effective cause of his loss in respect of 133 Helenslee Road was the failure to settle the purchase, a foreseeable outcome he understood. Under the relevant joint venture agreement, his loan was not required to be repaid until 30 per cent of the land or houses were sold. Although Ms Shiu chose to refund him some of

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66 Mr Judd relied in particular on *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254; and *Glossop Cartons and Print Ltd v Contact (Print & Packaging) Ltd* [2021] EWCA Civ 639, [2021] 1 WLR 4297.

67 Even in the deceit cases, it has been said that a wrongdoer's liability must be kept within practical and sensible limits, see *Smith New Court Securities Ltd v Citibank NA*, above n 66, at 281 per Lord Steyn.

his loan, despite the collapse of the purchase, that does not mean he was legally entitled to receive any further payment or interest.

[129] As regards 119 and 87/89 Helenslee, we were not provided with the terms of the post-hearing settlement agreement. However, it was not suggested by any party that the settlement itself required interest to be paid. So, as we understand the situation, any entitlement to interest was still dependent on the success of the claims about the misrepresentations. Therefore, because we have found those claims were not well founded, the question of interest and its calculation also no longer arises for determination.

[130] We note too that in evidence Mr Luo said he accepted the full refund of the commission payments and interest in full settlement. That in itself would appear to preclude him from attempting to rely on the commission representation (which we have found was the only misrepresentation made) as the basis for claiming any other losses.

Liability of CSR Pokeno

[131] The conclusions we have already reached in relation to the two pivotal issues are dispositive of the appeal and cross-appeal and mean that the other issues fall away. However, in deference to the arguments raised by counsel, and for completeness, we wish to record our reservations about the High Court findings regarding the vicarious liability of CSR Pokeno.

[132] Section 45(2) of the Fair Trading Act relevantly provides that any conduct engaged in on behalf of a body corporate by a director acting within the scope of their actual or apparent authority is to be deemed, for the purposes of the Act, to have also been engaged in by the body corporate.

[134] In imposing liability under s 45 of the Fair Trading Act, the Judge reasoned that because CSR Pokeno was the vehicle through which Ms Shiu would enjoy the

benefits arising from her misrepresentations, she acted on behalf of CSR Pokeno.[68] He also held that due to the absence of direct evidence from Ms Shiu herself or the company, a reasonable inference could be drawn that she did act on behalf of the company.[69]

[133] There was however no evidence that, in her dealings with Mr Luo and Ms Yip, Ms Shiu ever held herself out, either expressly or impliedly, as acting on behalf of CSR Pokeno. All of the joint venture agreements were with Ms Shiu in her personal capacity and there was no evidence that CSR Pokeno would share in profits under the joint venture agreements. CSR Pokeno's only involvement was as the nominee purchaser of 53 Munro Road, and of course 53 Munro Road was not part of the joint venture agreements.

[134] There was thus a critical evidential gap, a gap which we do not consider the Judge was able to fill in by drawing inferences from a failure to give evidence.

Outcome

[135] The appeal is allowed and the cross-appeal is dismissed.

[136] The decision of the High Court is quashed.

[137] The respondents must pay the appellants' costs in the High Court calculated on a 2B basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

[138] As regards costs in this Court, there is no reason why these should not follow the event, meaning there is no reason why the unsuccessful respondents should not pay costs to the successful appellants. Accordingly, the respondents are ordered to pay the appellants one set of costs for a standard appeal on a band A basis. We certify for two counsel.

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68 Judgment under appeal, above n 5, at [129]. However, at [128] the Judge acknowledged that as CSR Pokeno did not exist when the 133 Helenslee was acquired, Ms Shiu could not have been acting on its behalf at acquisition. Additionally, the Judge only found CSR Pokeno liable for the Pōkeno West misrepresentation not the commission fee deceptions, see [129] and [131].

69 At [129].

[139] Leave is reserved for the parties to come back to this Court for further orders in the event there are any difficulties regarding the refunding of security in both this Court and the High Court.

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