IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA504/2022
[2024] NZCA 614

BETWEEN	CROWN FINANCE LIMITED Appellant
AND	CROWN ASIA PACIFIC GROUP LIMITED First Respondent
	VISCOUNT INVESTMENT CORPORATION LIMITED Second Respondent
	MATVIN GROUP LIMITED Third Respondent
	HOBSONVILLE DEVELOPMENTS LIMITED Fourth Respondent

CA507/2022

BETWEEN	VISCOUNT INVESTMENT CORPORATION LIMITED Appellant
AND	MATVIN GROUP LIMITED First Respondent
	HOBSONVILLE DEVELOPMENTS LIMITED Second Respondent
	CROWN FINANCE LIMITED Third Respondent
	CROWN ASIA PACIFIC GROUP LIMITED Fourth Respondent

Hearing:	17 and 18 October 2023 (further submissions received 26 October 2023)
Court:	Gilbert, Katz and Wylie JJ

Counsel:	G J Kohler KC and T Nelson for Crown Finance Ltd (Appellant in CA504/2022 and Third Respondent in CA507/2022) and Crown Asia Pacific Group Ltd (First Respondent in CA504/2022 and Fourth Respondent in CA507/2022)
	D J Chisholm KC for Viscount Investment Corporation Ltd (Appellant in CA507/2022 and Second Respondent in CA504/2022)
	P J Dale KC and L T Meys for Matvin Group Ltd (Third Respondent in CA504/2022 and First Respondent in CA507/2022) and Hobsonville Developments Ltd (Fourth Respondent in CA504/2022 and Second Respondent in CA507/2022)
Judgment:	22 November 2024 at 2.00 pm

JUDGMENT OF THE COURT

A **The appeals are allowed in part. Specifically:**

(1) **Crown Finance Ltd's appeal against the High Court's finding that it is liable to Matvin Group Ltd and Hobsonville Developments Ltd on the breach of fiduciary duty cause of action is allowed.**

(2) **Viscount Investment Corporation Ltd's appeal against the High Court's finding that it is liable to Matvin Group Ltd and Hobsonville Developments Ltd on the dishonest assistance cause of action is allowed.**

B **The appeals are otherwise dismissed.**

C **The cross-appeal is dismissed.**

D **Crown Finance Ltd and Viscount Investment Corporation Ltd together must pay one set of costs to Matvin Group Ltd for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.**

E **We make no order of costs in relation to the cross-appeal.**

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] In July 2013, Matvin Group Ltd (Matvin), a property development company, entered into a sale and purchase agreement to acquire a 4.5-hectare property in Hobsonville, Auckland (the Property), conditional on completing due diligence and securing financing.

[2] Crown Finance Ltd (Crown Finance), a mezzanine (or second tier) finance company, was approached to provide finance for the acquisition and subsequent commercial development of the Property. Matvin shared extensive confidential information with Crown Finance regarding the Property's development potential, to enable Crown Finance to assess whether to fund the project.

[3] In October 2013, Matvin accepted an indicative loan offer from Crown Finance. Matvin was subsequently unwilling to agree to the final loan terms offered by Crown Finance, however, as they were significantly more onerous than the terms of the indicative loan offer. Matvin instead decided to seek an extension of time to pay the deposit from the vendor, Mr Buljan. If it was able to obtain such an extension, Matvin hoped to either negotiate more favourable loan terms with Crown Finance or source financing elsewhere. The possibility of an extension was pre-empted, however, by Viscount Investment Corporation Ltd (Viscount) making an unconditional offer to the vendor to purchase the Property, on essentially the same terms as Matvin. Viscount is related to Crown Finance and the two companies share a common director. On receipt of Viscount's competing offer, the vendor cancelled Matvin's agreement for failure to pay the deposit and sold the Property to Viscount.

Viscount then developed the Property, over a period of years, making a very significant profit.

[4] Five and a half years after Viscount had acquired the Property, Matvin and a related company, Hobsonville Developments Ltd (HDL) issued proceedings in the High Court against Crown Finance, Viscount and a related company, Crown Asia Pacific Group Ltd (CAPGL). They claimed, amongst other things, that: Crown Finance, CAPGL and Viscount had misused Matvin's confidential information to facilitate Viscount's acquisition of the Property; Crown Finance and CAPGL had breached fiduciary obligations they owed to Matvin; and Viscount had dishonestly assisted in that breach.

[5] Following a High Court trial, Duffy J found in favour of Matvin and HDL on each of their claims against Crown Finance and Viscount but found that CAPGL was not involved and dismissed the claims against it.[1] By way of relief, the Judge ordered an account of profits.[2] Crown Finance and Viscount now appeal the Judge's liability findings against them. They also argue that the Judge erred in ordering an account of profits, and that the appropriate form of relief in all the circumstances is equitable damages.

[6] Matvin and HDL cross-appeal the Judge's dismissal of their claim against CAPGL.

Factual background

[7] Most of the core facts are not in dispute. The major factual dispute relates to whether CAPGL was involved in the relevant events, which we address separately at [96] to [106] below.

The parties and their associates

[8] Matvin's directors are Kevin Clark and Matthew Ellingham, who each have a 50 per cent shareholding.

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1 *Matvin Group Ltd v Crown Finance Ltd* [2022] NZHC 2239 [judgment under appeal].
2 At [257]–[261].

[9] Crown Finance, CAPGL and Viscount are related companies. Each company is wholly owned by HWI Nominees Ltd in a trust structure related to the family of John Copson. They form part of a broad network of about 40 companies that were often collectively referred to in the contemporaneous documents and evidence at trial as the "Crown Asia Pacific Group", the "Crown Group" or simply "Crown". We will use the same terms when referring to the Group collectively, or when it is not clear which specific Crown entity is being referred to in the evidence or contemporaneous documents.

[10] At all relevant times, Christopher Arbuckle was the sole director of Crown Finance and its chief executive officer. In addition, he was a director of CAPGL and Viscount. Together with Mr Copson, Mr Arbuckle formed Crown Finance's Credit Committee, which was required to approve significant transactions (namely those over $1 million).

[11] Pierce Corbett was an independent contractor engaged by another company in the Crown Asia Pacific Group, Crown Mutual Ltd. He reported to Mr Arbuckle. Mr Corbett's role included sourcing property investment opportunities for the Crown Asia Pacific Group. He was also well-known to Mr Clark of Matvin, through previous commercial dealings. Mr Corbett did not have authority to bind any Crown entity, including Crown Finance. Matvin was aware of this.

Matvin's initial interactions with Crown Asia Pacific Group

[12] Throughout the relevant period, most of the dealings between the parties were between Mr Clark, on behalf of Matvin, and Mr Corbett, on behalf of Crown Finance and/or the Crown Group more generally.

[13] In July 2013, Mr Clark told Mr Corbett of Matvin's interest in the Property, which had been on the market for some time. Mr Corbett arranged a meeting with Mr Arbuckle to discuss the possibility of Crown providing the necessary funding. Mr Arbuckle's evidence was that he explained again (as he had at an earlier meeting in May regarding a different property that Matvin was interested in) what a facility of this kind would likely involve. Specifically, he indicated that it would probably be along the lines of: interest at 10 per cent; a facility fee of 2 per cent; and an exit fee

equivalent to 50 per cent of any development profits, as this was the pricing formula used by Crown Finance at the time for this type of transaction.

The commencement of the alleged joint venture

[14] On 29 July 2013, Matvin and Mr Buljan entered into a sale and purchase agreement for the Property, subject to due diligence. The purchase price was $14.5 million with a deposit of $1.45 million payable two months after the unconditional date. Matvin's pleaded claim was that the parties (through Mr Corbett and Mr Clark) entered into an oral joint venture agreement on 31 July, pursuant to which they agreed to work towards the common objective of acquiring and developing the Property. Various events or discussions that took place after 31 July are also pleaded as supporting the contention that the parties were in a joint venture relationship from 31 July onwards.

The due diligence process and ongoing dialogue regarding financing

[15] As Matvin's due diligence process progressed, Mr Clark kept Mr Corbett updated, including by providing him with various documents and information that Matvin obtained or produced as part of its investigations, much of which was not publicly available. The relevant information included preliminary designs, plans, feasibility analyses and forecasts. Mr Clark worked closely with Mr Corbett throughout this time, including meeting on average three to four times per week.

[16] On 19 August, Mr Corbett sent Mr Clark an excerpt from a memorandum relating to a project Crown Finance had previously funded, involving Tony Gapes of the Redwood Group (the Gapes funding template), as an example of the sort of funding structure that Matvin could expect if Crown Finance were to provide funding. That document stated that:

> Rather than structure this funding package by way of equity it is proposed that Crown Finance undertakes a mezzanine finance arrangement.
>
> It is proposed to price this by way of a fee of 2% and an interest rate of 10%. At the end of the project a fee is charged equivalent to 50% / 50% split of the profit.

[17] Mr Clark prepared a draft funding proposal along these lines and sent it to Mr Corbett for feedback. Mr Corbett then used that draft as a basis for a funding proposal he submitted to Mr Copson (copied to Mr Arbuckle) on 30 August. He also sent Mr Clark a copy of that document. Amongst other things, it included provision for 50 per cent of the profits of the development to be distributed to Crown by way of an exit fee to the loan facility.

[18] By this time, the due diligence period provided for in the sale and purchase agreement was nearing an end. However, Mr Arbuckle was absent on an overseas holiday throughout September. Mr Clark was aware of this, and also that the required loan documentation would take some time to prepare. He therefore sought, and obtained, an extension of time from Mr Buljan to 9 October.

[19] On 7 September, Mr Arbuckle responded by email to the funding proposal that Mr Corbett had sent him on 30 August. He raised a number of queries and concerns and sought further information. Mr Arbuckle emphasised that "it must be made clear that we have yet to approve any JV/funding facility". Mr Arbuckle's email concluded that:

> Matvin also need to provide us with a cv/background on themselves and their projects also some financial background as well. Are they putting any funds into the deal? … I will need time to consider and review all the above before making any recommendation to our board.

[20] Mr Corbett promptly forwarded a copy of this email to Mr Clark. Not surprisingly, this raised some concerns on Mr Clark's part. His evidence was that:

> It was around this time that I said to Mr Corbett that should [Crown Finance] not wish to proceed with the joint venture, Matvin would require sufficient notice of that intention to allow us time to explore alternative arrangements. Mr Corbett assured me that everything was on track with the joint venture. He also urged me to treat exclusively with Crown, as this would assist him in wrapping things up. I agreed, but again stressed that if necessary Matvin would require sufficient time to explore alternative arrangements.

[21] On 11 September 2013, Mr Corbett sent a memorandum to Mr Arbuckle (copied to Mr Copson) advising of the due diligence extension date and also the

deferred settlement date of 9 April 2014. His memorandum stated further that:

> Matvin [has] been made aware that [Crown Asia Pacific Group] has yet to approve any JV/Funding facility. It understands that [Crown Asia Pacific Group] must be completely satisfied in the projects viability before entering into a joint venture funding arrangement with the developer.
>
> It has stated that it will still be proceeding with the development if [Crown Asia Pacific Group] is not satisfied with the project partnership during the next few weeks. Matvin will treat exclusively with [Crown Asia Pacific Group] to finalise a JV agreement but will require sufficient time to source a funding partner should [Crown Asia Pacific Group] not be satisfied with the project during the course of the due diligence period. …

Mr Corbett forwarded a copy of this memorandum to Mr Clark on 13 September 2013.

Crown Finance's indicative loan offer

[22] Mr Arbuckle returned to the office from his overseas holiday on or about 30 September, following which he met with Mr Clark and Mr Corbett on 2 October. Mr Arbuckle sent a memorandum regarding the project to Mr Copson the same day. He noted that Matvin was keen to involve Crown in the proposed development, utilising the Gapes funding template, structured as "a loan to the developer company". While Mr Arbuckle expressed optimism regarding the project, he also noted that there was "an element of risk here for us" and that "we need to be comfortable about accepting this before we commit and a discussion on this is warranted before making a decision to proceed".

[23] Crown Finance, as the finance company within the Crown Group, made an indicative loan offer to Matvin a week later, on 9 October, along similar lines to the Gapes funding template, with some additional requirements or detail added. Personal guarantees from Mr Clark and Mr Ellingham were required and Crown Finance was to have a right of first refusal for the development funding. The preconditions to drawdown included a review of the loan and security documentation, and approval by Crown Finance's Credit Committee. The indicative terms for providing further (development) funding included an exit fee of 50 per cent of the profits. If Crown Finance elected not to provide development funding, the interest

rate for the initial "working capital" loan would be increased by a further "default [interest] rate" of 20 per cent.

[24] Jennie Walsh, a financial consultant who gave expert evidence for Matvin, noted that this was a "high risk loan with no equity contribution from the borrower" and that "[i]t is important to remember that this loan was essentially unsecured" because it would not be possible to take mortgage security over the Property until the purchase was completed, some six months later. Ms Walsh further observed that:

> It appears that [Crown Finance] was willing to be creative in trying to assist Matvin to buy the land. Most lenders would have declined the loan outright.

[25] Nevertheless, Ms Walsh's opinion was that some terms of the indicative loan offer were not typical of finance industry loan agreements, or were outside of the normal market range, including the provision for a default interest rate of an additional 20 per cent if Crown Finance did not provide further development funding; and the 50 per cent profit share at the conclusion of the development "posing as a lender's exit fee".

[26] Matvin did not seek a further extension from Mr Buljan to give it time to either negotiate a better deal with Crown Finance or try and seek alternative financing. Rather, it declared the sale and purchase agreement unconditional on 9 October. This put Matvin in a difficult position, as it was legally obliged to pay the $1.45 million deposit immediately (under a variation to the sale and purchase agreement) but did not yet have committed finance in place. Following legal advice, HDL (as Matvin's nominee) accepted Crown Finance's indicative loan offer the following day, 10 October.

The final loan documentation

[27] On 15 October, Crown Finance's lawyer provided the lawyer for Matvin and HDL with draft loan documentation, noting the documents were subject to Crown Finance's instructions and that they "reserve[d] the right to make amendments". The term loan agreement remained conditional on the approval of Crown Finance's Credit Committee.

[28] On Friday 18 October, Mr Corbett advised Mr Clark in a phone call that Mr Copson wanted to introduce an additional term in the loan offer to also capture 50 per cent of the profits if the Property was on-sold immediately, rather than being retained and developed. The indicative loan offer had only required a 50/50 profit share following completion of any development. Mr Copson, however, was concerned that Matvin might decide to instead on-sell the land as a "quick flick" and "wanted to close this loophole". His evidence was that Crown Finance was not interested in what were essentially bridging finance transactions. Mr Copson's view was that it would be unreasonable for Matvin, which was not putting in any equity or finance, to expect to receive 100 per cent of the profit from a quick on-sale if the proposed development did not proceed.

[29] The proposed amendment to the 50/50 profit share clause turned out to be a dealbreaker for Mr Clark and Mr Ellingham as (apparently unbeknownst to Crown Finance) a quick on-sale of the Property was a possibility that they were considering. They discussed the matter over the weekend of 19 and 20 October and agreed that the loan terms now being offered were unreasonable and unfair, and that they were "not prepared to proceed with the [Crown Finance] loan with the current terms and conditions". Mr Clark's evidence was that:

> We decided to propose a re-structuring of the deposit payment with the vendor. If we could achieve this, then we felt we would have been able to address the problems with the Crown [Finance] offer. Our strategy was not to cancel the proposed joint venture, but we needed to have an option of proceeding forward without Crown [Finance]'s involvement if we were to negotiate on a level playing field. [Mr Ellingham] and I agreed we were being put under intense pressure from Crown [Finance], especially given the delays in providing the loan offers, and that the terms seemed to us very unfair.

[30] At about this time, Matvin received positive news regarding one of its other projects (Library Lane), which was subject to a conditional sale agreement. Matvin anticipated a profit of $6 to 7 million from a quick on-sale of that property, without development. This opened up a potential alternative avenue for paying the deposit on the Property, provided that Mr Buljan could be persuaded to agree to a further extension of time and a restructuring of the deposit payment.

[31] On Monday 21 October, however, the vendor served Matvin with a notice to pay the deposit within three working days. The vendor was entitled to cancel the agreement if the deposit was not paid within this period.

[32] The following day, 22 October, Crown Finance sent Matvin the final loan documentation. The major amendment to the terms of the indicative loan offer was the inclusion of cls 6.3 to 6.6, which dealt with the development profit share. The key provision, cl 6.3, provided that:

> **Development Profit Share**
>
> 6.3 The Borrower [HDL] irrevocably agrees and acknowledges that in consideration of the Lender [Crown Finance] issuing the Loan Offer and advancing the Loan to fund the Feasibility Stage, the Lender is entitled to an "Exit Fee" equivalent to a 50% profit share from profit achieved from or in connection with the Property and Development. This includes profit received from an on sale of the Property before, during, or after development and profit received from the completion of part or all of the Development.

[33] Clause 6.3 therefore provided for Crown Finance to receive 50 per cent of the profits from an on-sale of the Property at any time (before, during or after development), even if it elected not to provide any further funding after the initial working capital loan facility. As the Judge found, this was a very onerous clause.[3] Matvin's strategy from this point forwards, according to Mr Clark:

> … was to try and secure the further extension of the agreement with Mr Buljan so that we could keep open our options of trying to negotiate better terms with Crown [Finance] or take the opportunity elsewhere and hopefully still be able to obtain funding. By this time Library Lane was much further advanced. I was also not aware of any other competitor in the market for the property and so I was optimistic that Mr Buljan would agree to the extension.

Matvin seeks an extension of time from Mr Buljan

[34] The same day the final loan documentation was received from Crown Finance, Mr Clark, Mr Ellingham and David Morrison (one of the two solicitors who acted for Matvin during the relevant period) met with David Sneddon, Mr Buljan's solicitor, to discuss the situation and to outline Matvin's alternative proposal for payment of the deposit. Mr Clark explained that they felt they were being "badly let down" by

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3 At [171]–[173].

Crown Finance, and that if they had more time, they would be able to proceed without Crown Finance, if necessary. Mr Clark's perception was that Mr Sneddon seemed supportive of their proposal. The next day, Mr Sneddon called Mr Morrison and confirmed that he was comfortable with the proposed restructure of the deposit payments and that he was going to see Mr Buljan at 10 am the next morning to discuss Matvin's proposal. Later in the day, Mr Morrison sent Mr Sneddon a letter formally setting out the proposed deposit payment plan.

[35] Mr Buljan told Mr Corbett of the discussions that were taking place with Matvin. Mr Corbett in turn told Mr Arbuckle, who called Mr Clark. Mr Clark told Mr Arbuckle that Matvin had issues with the loan documents and that its lawyers would write to Crown Finance's lawyers regarding their concerns. Crown Finance became concerned that it was going to miss out on the deal.

Viscount purchases the Property

[36] Crown Finance decided to make a competing offer for the Property, through Viscount. The next day, 24 October, Mr Arbuckle approached Mr Buljan with an offer to purchase the Property, should Matvin not perform, on the same terms and conditions as Matvin's agreement for sale and purchase. Mr Sneddon contacted Mr Morrison to let him know of Mr Arbuckle's approach and that, as a result, it would now be hard for Mr Buljan to accept Matvin's proposal to restructure the deposit payments.

[37] The following day, 25 October, Mr Buljan cancelled Matvin's agreement for sale and purchase on the basis of its failure to pay the deposit. He entered into an unconditional sale and purchase agreement with Viscount the same day, on essentially the same terms as Matvin's agreement.

Did the Judge err in finding Crown Finance liable for breach of fiduciary duty?

[38] The Judge found the first cause of action, breach of joint venture obligations, proved against Crown Finance but not against CAPGL.[4] In this section we deal with

[4] At [220]–[221].

Crown Finance's appeal against that finding. We deal with Matvin's cross-appeal relating to CAPGL at [96] to [106] below.

The High Court decision

[39] The Judge found that the parties were in a joint venture relationship. In reaching that conclusion the Judge relied heavily on contemporaneous documents (particularly those authored by Mr Clark and Mr Corbett) that used the term "joint venture". The common objective of the joint venture, the Judge found, was the acquisition and development of the Property. Each party expected "some form of profit share" albeit the exact terms and form of their legal arrangement was yet to be determined.[5] Their joint venture involved "mutual dependence" with Matvin performing "the investigative due diligence role", and Crown Finance providing the funding.[6] Each party "was entitled to repose trust and confidence in the other", in order to achieve their joint goal.[7] Neither party was free to act solely in its own interests.[8]

[40] The Judge found that Crown Finance had breached its fiduciary obligations of loyalty in the various ways alleged in Matvin's statement of claim, which included making loan offers that were belated and on commercially onerous terms, and purchasing the Property (through Viscount), facilitated by access to Matvin's confidential information.[9]

Submissions on appeal

[41] Crown Finance submitted that its relationship with Matvin was not fiduciary in nature. The Judge was led astray, Crown Finance submitted, by focussing unduly on the use of the term "joint venture" in contemporaneous documents. In reality, however, this was just another way of referring to what was a quite complex mezzanine financing structure.

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5 At [213].
6 At [213]–[214].
7 At [214].
8 At [214].
9 At [219].

[42] Crown Finance submitted that the Judge failed to properly stand back and consider the overall nature of the relationship between the parties, and whether it required subordination of self-interest. Specifically, Crown Finance submitted that its relationship with Matvin was antagonistic rather than collaborative. The parties remained in negotiations throughout the relevant period, and never reached a stage where they moved past the pursuit of individual self-interest to focus on a mutual joint interest in pursuing a common goal. Matvin was an experienced developer with legal representation. Crown Finance, as a mezzanine financier, had its own commercial interests to protect. The absence of a vulnerability dynamic, and the parties' mutual commercial expertise, negated the need for the imposition of any fiduciary obligations.

[43] In addition, Crown Finance argued that Matvin's own actions, including approaching alternative financiers and attempting to renegotiate the terms of the deposit payment, demonstrated that Matvin itself did not regard the relationship as fiduciary. It clearly considered itself entitled to act in its own self-interest by taking steps to exclude Crown Finance when loan terms could not be agreed.

[44] Matvin, on the other hand, submitted that the Judge did not err in finding that Crown Finance owed it fiduciary obligations and breached those obligations, largely for the reasons given by the Judge. It submitted that the Judge was correct to find that it was engaged in a joint venture with Crown Finance, with the mutual objective of acquiring and developing the Property. Crown Finance was responsible for providing financing, and Matvin undertook the due diligence and planning for the property development. Their mutual dependence created a joint venture relationship, rather than a normal borrower-lender relationship. As joint venture partners, mutual fiduciary obligations were owed. Crown Finance was therefore required to act in Matvin's best interests, including by making loan offers in a timely way and on terms that were fair and reasonable. Further, Crown Finance was under an obligation to only use the information Matvin provided to it for the purposes of the joint venture. Crown Finance's use of Matvin's confidential information to purchase the Property (through Viscount) was therefore a fundamental breach of loyalty.

Fiduciary relationships — legal principles

[45] The defining characteristic of a fiduciary relationship is an obligation of complete loyalty owed by the principal to the beneficiary. Millett LJ in *Bristol and West Building Society v Mothew* described it in this way:[10]

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[46] A relationship may give rise to fiduciary duties in two situations:

(a) First, there are well-recognised categories of relationship that are recognised as *inherently* fiduciary, such as those between solicitor and client, trustee and beneficiary, and principal and agent.[11] These are all relationships where one party places significant trust and reliance on another, and significant potential for abuse of trust exists.

(b) Second, particular aspects of a relationship that is not inherently fiduciary may nonetheless justify the relationship being classified as such.[12]

[47] As Tipping J (writing for himself and Blanchard J) observed in *Chirnside v Fay*:[13]

> No single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind.

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10 *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at [18], in part cited by the Supreme Court in *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 at [67].

11 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73] per Blanchard and Tipping JJ.

12 At [75].

13 At [75]. See to a similar effect: *Maclean v Arklow Investments Ltd* [1998] 3 NZLR 680 (CA) at 691 per Gault J; and *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA) at 315 per Cooke P.

[48] Nevertheless, Tipping J identified the following common feature of fiduciary relationships:[14]

> … all fiduciary relationships, whether inherent or particular, are marked by the entitlement … of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

[49] Similar observations were made by Blanchard J in both *Paper Reclaim Ltd v Aotearoa International Ltd*,[15] and *Amaltal Corporation Ltd v Maruha Corporation*.[16] In *Dold v Murphy*, having reviewed the relevant authorities, this Court summarised the relevant principles as follows:[17]

> Some relationships are inherently fiduciary in nature, involving trust, confidence and a degree of dependence, such as solicitor and client and trustee and beneficiary. In other cases a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

[50] Matvin's position in the High Court, and before us on appeal, was essentially that joint ventures are inherently fiduciary relationships, with reference to *Chirnside*. Hence, if the relationship between Matvin and Crown Finance was a joint venture, it necessarily follows that Crown Finance owed fiduciary obligations to Matvin. The Judge accepted this submission and focussed her analysis on whether the parties were in a joint venture relationship.[18] It is therefore necessary to consider the proposition that joint venture relationships are inherently fiduciary more closely.

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14 *Chirnside v Fay*, above n 11, at [80].
15 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31].
16 *Amaltal Corporation Ltd v Maruha Corporation* [2007] NZSC 40, [2007] 3 NZLR 192 [*Maruha Corporation* (SC)] at [21].
17 *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [55].
18 Judgment under appeal, above n 1, at [213]–[214].

[51] Matvin relied on the Supreme Court's decision in *Chirnside* in support of this proposition. In *Chirnside*, Tipping J stated that:[19]

> [74] There is a strong case for saying that most joint venture relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership. The relationship between partners is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith; and they must, in all matters relevant to the activities of the partnership, put the interests of the partnership ahead of their own personal interests.

Elias CJ took a similar view, at least in relation to joint ventures that involved the sharing of profit.[20] Gault J expressed a somewhat more cautious view, noting that the term "joint venture" covers many kinds of arrangements, not all of which will give rise to fiduciary obligations.[21]

[52] Subsequently, in both *Paper Reclaim* and *Maruha Corporation*, the Supreme Court revisited the issue of fiduciary obligations that were said to arise in an (arguably) joint venture context. *Paper Reclaim* concerned the termination of a wastepaper export contract. Both the High Court and this Court had found that the relationship between the parties' was a joint venture.[22] Giving the judgment of the Supreme Court, Blanchard J commented that the Courts below were too ready to label a contract of agency a joint venture. In his words: "[t]o style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution."[23] The Court found that there was an agency relationship that created obligations of loyalty from the agent to the principal, but not vice versa. No joint venture was found.[24]

[53] In *Maruha Corporation*, this Court rejected the existence of the alleged fiduciary duties. This Court observed that while in some circumstances it might be possible for there to be fiduciary duties between joint venturers, the case before them was not such a case.[25] On appeal, the Supreme Court was clear that if any fiduciary

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19 *Chirnside v Fay*, above n 11 (footnotes omitted). See also at [91].
20 At [14].
21 At [52].
22 *Paper Reclaim Ltd v Aotearoa International Ltd*, above n 15, at [30].
23 At [31].
24 At [33].
25 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [137].

duty of loyalty was owed by Amaltal to Maruha, it had been breached. The key issue was therefore whether such a duty had arisen in all the circumstances. With reference to its earlier decision in *Paper Reclaim*, the Court stated that:[26]

> The characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations. In our view, when commercial parties elect to use an incorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature.

[54] Hence, simply calling a commercial arrangement a "joint venture" (as both Mr Clark and Mr Corbett did at times in the contemporaneous documents) provides little guidance as to whether the parties owe each other fiduciary obligations.[27] This reflects that "[t]he term 'joint venture' is not a technical one with a settled common law meaning".[28] Joint ventures may be operated through a range of business structures, including contracts, partnerships, companies, trusts, unincorporated entities, or through an agency relationship. It is well-established that fiduciary obligations do not require a formal contractual relationship and could therefore potentially arise in any one of these contexts.[29] However, the mere fact that the parties may have referred to the relationship between them as a "joint venture", or regarded it in that way, "does not mean the relationship between the parties is fiduciary, or that equity may legitimately be called upon to supplement the bargain reached".[30] Rather, as a unanimous bench of the High Court of Australia observed in *United Dominion Corporation Ltd v Brian Pty Ltd*:[31]

> One would need a more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one ... The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.

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26 *Maruha Corporation* (SC), above n 16, at [20] (footnote omitted).

27 *Paper Reclaim Ltd v Aotearoa International Ltd* , above n 15, at [31]; and *Maruha Corporation* (SC), above n 16, at [20]. See also: *Detection Services Pty Ltd v Pickering* [2019] NZCA 575 at [31]; *Li v 110 Formosa (NZ) Ltd* [2020] NZCA 492 at [102]–[103]; *Keller v Daisley* [2021] NZCA 351 at [137]; and *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd* [2022] NZCA 218, (2022) 23 NZCPR 259 at [89].

28 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10 per Mason, Brennan and Deane JJ.

29 *Chirnside v Fay*, above n 11, at [91]

30 *Green & McCahill Holdings Ltd v Ara Weiti Development Ltd*, above n 27, at [89].

31 *United Dominions Corporation Ltd v Brian Pty Ltd*, above n 28, at 10–11.

[55] Hence, although many joint ventures (such as those that are closely analogous to partnerships) are likely to give rise to fiduciary obligations, merely labelling a relationship a joint venture does not make it inherently fiduciary. Rather, it is necessary for the Court in each case to undertake a careful fact-based examination of the relationship between the parties to ascertain what duties they have expressly or implicitly assumed.

[56] As noted above at [42], Crown Finance submitted that the relationship between it and Matvin was an essentially antagonistic one, and therefore not fiduciary in nature. In *Chirnside*, Tipping J referred to the distinction in commercial contexts between antagonistic transactions and collaborative transactions, with reference to Dr Gerard Bean's book *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship*.[32] On the facts of *Chirnside*, Tipping J rejected the submission that the parties were in an antagonistic relationship, finding that the parties had reached sufficient agreement or understanding on key issues "to move this transaction from one of antagonism to one of collaboration".[33]

[57] In our view, the collaborative/antagonistic distinction provides a helpful lens through which to assess the commercial relationship of the parties here. In antagonistic relationships each party seeks their own advantage and pursues their own self-interest. The examples Dr Bean gives of such relationships are vendor-purchaser and lender-borrower, where each party's goals and interests are opposed.[34] As each party in an antagonistic relationship is pursuing its own self-interest, it will be rare for a fiduciary relationship to arise in this context, as pursuit of self-interest is the antithesis of a fiduciary relationship.[35] On the other hand, in a collaborative relationship:[36]

> The parties aim to create an association to serve joint goals and objectives. Thus at some point during the negotiation process that creates the relationship the parties shake off the character of antagonists and take on that of

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32 *Chirnside v Fay*, above n 11, at [86], citing: Gerard MD Bean *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (Clarendon Press, Oxford, 1995) at ch 3.

33 *Chirnside v Fay*, above n 11, at [86].

34 Bean, above n 32, at 50–51, citing as examples: *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC); and *Catt v Marac Australia Ltd* (1987) 9 NSWLR 639 (SC).

35 At 52.

36 At 52 (footnote omitted).

> collaborators, making their own interests subservient to the joint interest. Collaboration is the joining together to achieve a common goal.

[58] An example of a collaborative relationship is a partnership. Having a common goal leads the parties to move from a position of self-interest to prioritising their joint interest.[37] Once relationships reach that stage, fiduciary obligations are more likely to arise, because mutual trust and loyalty tend to be key features of such relationships.

Discussion

[59] Both the High Court decision and Matvin's submissions on appeal placed heavy reliance on the use of the term "joint venture" in contemporaneous documents, particularly those generated by Mr Clark and Mr Corbett. The Judge identified the common goal or objective of the joint venture as being to acquire and develop the Property.[38] Each party was therefore required to subordinate their own self-interest in pursuit of that common goal. Crown Finance was not free to negotiate whatever financing terms it wished but was instead obliged to offer fair and reasonable financing terms to Matvin (however that might be assessed), and in a timely manner. Matvin was obliged to undertake due diligence and presumably also to complete the acquisition (in pursuit of the common objective) if the results of the due diligence process were favourable. Matvin was not entitled to seek financing elsewhere. The relationship, on the Judge's analysis, was a collaborative one, with the common objective of acquiring and developing the Property. This gave rise to fiduciary obligations of trust and loyalty.

[60] As we have noted above at [55], the label "joint venture" can be apt to distract. Rather it is necessary to consider the parties' overall conduct and dealings, in order to assess the true nature of their relationship, and the obligations they owe to each other. In our view, the Judge erred in finding that the relationship between Matvin and Crown Finance had reached the stage where it was collaborative rather than antagonistic. Both parties were commercially experienced and acted with legal advice, at least in the later stages of their dealings. Matvin was aware that Mr Corbett did not have authority to bind Crown Finance and that the ultimate decision-makers

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37 At 53.

38 Judgment under appeal, above n 1, at [213].

were Mr Copson and Mr Arbuckle. Mr Arbuckle, however, was notably less enthusiastic about the project than Mr Corbett (who stood to make a significant commission if the transaction proceeded). Mr Arbuckle raised a number of concerns and queries about the viability and commercial risk profile of the project on 7 September 2013, only a month before the extended due diligence date. He emphasised to Mr Corbett that "it must be made clear [to Matvin] that we have yet to approve any JV/funding facility". Mr Corbett passed that information on to Mr Clark.

[61] Matvin was seeking to enter into a complex financing arrangement with Crown Finance. As Matvin's own expert, Ms Walsh, observed, this was an essentially unsecured "high risk loan with no equity contribution from the borrower" that most lenders would have declined outright. It was therefore quite possible that significant negotiation of any financing terms would be required to reach an agreement that both parties were satisfied with, even using the Gapes funding template as a precedent.

[62] Until 9 October 2013, when Crown Finance made the indicative offer, nothing had been agreed. Matvin was specifically advised of this on at least two occasions. From 10 October 2013 onwards, after HDL accepted Crown Finance's conditional offer, negotiations continued (as permitted by the terms and conditions of the indicative loan offer). Until the loan documentation was finalised, the parties' interests remained in conflict. Each party was entitled to try to negotiate terms that would maximise their own profits and commercial interests.

[63] We are not persuaded that there was an overarching mutual objective of acquiring and developing the Property that required the parties to subordinate their own commercial self-interests to ensure that the acquisition proceeded. Acquisition of the Property would only be in Crown Finance's best commercial interests if it was able to agree financing terms that were acceptable to it. It if could not, Crown Finance's money would likely be better invested elsewhere. Similarly, Matvin was not required to subordinate its self-interest in pursuit of an overarching mutual objective of acquiring the Property.

[64] We do not accept Matvin's submission that this case is analogous to *Chirnside.* In *Chirnside*, the two parties had previously worked together on a property

development project in a 50/50 joint venture. They embarked on a second project together, but while it was still in its early stages, Mr Chirnside seized the opportunity for himself and cut out Mr Fay. Nevertheless, although the venture was pre-contract, the Court found that the key terms were implicitly agreed or assumed, as "[t]he history of the parties' relationship and equitable principle alike gave rise to an implication of equal sharing unless agreement was subsequently reached for a different outcome".[39]

[65] The parties in *Chirnside* were therefore in a collaborative, rather than an antagonistic, relationship (as Tipping J found). Both parties were property developers (albeit with different skills and expertise) and there was an implicit assumption that they would undertake the proposed project on the same basis as their previous project, including sharing in the profits on a 50/50 basis. They were working together towards the common goal of acquiring and developing a particular property, for their mutual benefit. As a result, they were required to subordinate their self-interest in pursuit of their mutual objective of acquiring and developing the property.

[66] Here, however, there is no history of dealings between Matvin and Crown Finance. Given the nature of the project (which in Ms Walsh's view most financiers would decline to finance at all) there was no basis for implying some form of agreement or implicit understanding as to the precise terms on which Crown Finance was required to provide finance. Rather, until any loan documentation was finalised, each party was entitled to prioritise its own self-interest. In such circumstances each party was entitled to pursue its own self-interest and fiduciary obligations did not arise.

[67] The Judge accordingly erred in finding the fiduciary duty cause of action proved against Crown Finance.

Did the Judge err in finding Crown Finance and Viscount liable for breach of confidence?

[68] The Judge found against both Crown Finance and Viscount on the breach of confidence cause of action but concluded that there was no evidence that CAPGL was

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39 *Chirnside v Fay*, above n 11, at [86] per Tipping and Blanchard JJ.

also involved.[40] Crown Finance and Viscount both appeal. Matvin cross-appealed the Judge's finding that this cause of action was not proved against CAPGL, which we deal with separately at [96] to [106] below.

The High Court decision

[69] The Judge identified two categories of confidential information that Matvin had provided to Crown Finance:

(a) details of the sale and purchase agreement, the subsequent variation agreement and "the fact that Matvin had no immediate alternative source of funding with which to pay the deposit due on 9 October 2013";[41] and

(b) the due diligence information that Matvin had "assiduously gathered … and provided … to Crown [Finance]" from August through to early October 2013.[42]

[70] The Judge was satisfied that both categories comprised confidential information, and that the information was communicated to Crown Finance in circumstances that imported an obligation of confidence, namely for the purposes of advancing their joint project.[43] Crown Finance then misused the confidential information, to its own advantage, in order to make an unconditional offer (through Viscount) on the same terms as Matvin's agreement for sale and purchase, which it knew would likely be attractive to Mr Buljan.[44] The Judge noted that the due diligence information was information that Crown Finance could:[45]

> … not have obtained by its own efforts in the short space of time between 24 and 25 October 2013, when Mr Buljan cancelled the agreement with Matvin and entered into an unconditional agreement with Crown [Finance].

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40 Judgment under appeal, above n 1, at [229]–[230].
41 At [225].
42 At [226].
43 At [228].
44 At [225] and [230].
45 At [226].

[71] As for Viscount's liability, the Judge held that:[46]

> Here the purchase of [the Property] was done by Viscount. But it was done in circumstances where Mr Arbuckle was the sole director of Crown [Finance] and, therefore, knew all that Crown [Finance] knew in terms of the confidential information Matvin had provided to Crown [Finance] and was also a director of Viscount. In this way the knowledge that he obtained through his role as a director of Crown [Finance] was then utilised by him as a director of Viscount to enable Viscount to complete the acquisition.

[72] The Judge accordingly found that Viscount was liable as the knowing recipient of information obtained in breach of confidence. The Judge observed that if Viscount had not offered to purchase the Property from Mr Buljan, using Matvin's confidential information, Matvin may have been able to negotiate an extension of time to pay the deposit with Mr Buljan.[47]

Submissions on appeal

[73] Crown Finance submitted that its relationship with Matvin was strictly that of a financier or potential lender engaged in preliminary negotiations with a prospective borrower, and that obligations of confidentiality do not arise in such circumstances. Mr Copson's evidence was that had Matvin sought such restrictions, Crown Finance would have declined, because although Crown Finance itself was a mezzanine financier, the Crown Asia Pacific Group had wider business interests in property investment and would have wished to preserve the ability to pursue acquisition of the Property independently. Matvin voluntarily shared information about the Property in the hope of securing financing, without stipulating any restrictions on its use or securing assurances or agreements that the information would remain confidential. Crown Finance was therefore entitled to assume that the information was shared freely.

[74] Crown Finance further submitted that some of the due diligence information was already in the public domain. To the extent that it was not publicly available, Crown Finance's position was that it could have acquired similar information by undertaking its own due diligence investigations. Even without such information,

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46 At [228].
47 At [230].

however, Crown Finance argued that there was sufficient publicly available planning and feasibility information for Viscount to make its own assessment as to whether it wished to purchase the Property, without recourse to Matvin's information.

[75] Viscount's submissions were to similar effect. It referred to evidence that the Crown Asia Pacific Group was already investigating properties in the area before Matvin's involvement. Viscount's decision to acquire the Property was therefore based on its own independent interest in and knowledge of the Property, rather than due to any confidential information sourced from Matvin.

[76] Matvin, on the other hand, submitted that the Judge's decision to find both Crown Finance and Viscount liable for breach of confidence was correct, largely for the reasons given by the Judge. It submitted that the parties were in a fiduciary relationship characterised by mutual obligations of trust, loyalty, good faith, and confidentiality. In the context of that relationship, Matvin shared detailed confidential information with Crown Finance, including property purchase terms, feasibility studies, and development potential. Crown Finance and Viscount were aware of the confidential nature of such information, and breached confidence by using it for their own benefit.

Breach of confidence — legal principles

[77] There are three key elements that must be established to succeed in an action for breach of confidence:[48]

(a) The information must "have the necessary quality of confidence" — it should not be trivial, public or widely known.[49]

(b) The information must have been imparted in circumstances importing an obligation of confidence. This obligation can arise through express

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48 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (Ch) at 47–48; and *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1 at [76].

49 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203 (CA) at 215; *A B Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 (CA) at 521; *CF Partners (UK) LLP v Barclays Bank PLC* [2014] EWHC 3049 (Ch), [2014] All ER (D) 179 (Sep) at [123]–[125]; *Coco v A N Clark (Engineers) Ltd*, above n 48, at 47; and Tanya Aplin and others *Gurry on Breach of Confidence* (2nd ed, Oxford University Press, Oxford, 2012) at [5.16].

agreement, implied understanding, or by the nature of the relationship itself.[50] Certain relationships naturally give rise to an obligation of confidence. These include fiduciary relationships (for example, between a solicitor and client, or doctor and patient) and contractual relationships where confidentiality clauses are included. In cases where no formal fiduciary or contractual relationship exists, the courts must look at whether the nature of the relationship or the circumstances suggest an expectation of confidentiality.[51]

(c) There must be an unauthorised use or disclosure of the information, (sometimes identified in a commercial case by the detriment of the confider).[52]

[78] Equity will also impose obligations of confidence on a third party that receives confidential information if the third party knew or ought reasonably to have known that the information was confidential.[53]

Discussion

[79] The Judge's findings that Crown Finance owed, and breached, obligations of confidence were predicated on her finding that Crown Finance and Matvin were in a fiduciary relationship, requiring the utmost loyalty. We have found, however, that the parties were not in a fiduciary relationship. Rather, they were in an arm's length commercial relationship of prospective financier and prospective borrower. It is therefore necessary for us to re-assess this cause of action through that lens.

Did the information have the necessary quality of confidence?

[80] The first issue is whether the two categories of information identified by the Judge (as set out at [69] above) had the necessary *quality* of confidence. The first

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50 *A B Consolidated Ltd* v *Europe Strength Food Co Pty Ltd*, above n 49, at 520; and *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*, above n 49, at 211.

51 *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181 at [43], quoting *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL) [*Spycatcher case*] at 281.

52 *Karum Group LLC v Fisher & Paykel Financial Services Ltd* [2014] NZCA 389; [2014] 3 NZLR 421 at [193]; and *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [93].

53 Stephen Todd (ed) and others *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) ch 13.5.2(2)(b); and *Spycatcher case*, above n 51, at 281.

category of information, which included details relating to Matvin's sale and purchase agreement and the subsequent variation agreement, was not publicly available, and highly commercially sensitive. It clearly possessed the necessary quality of confidence.

[81] As for the second category (due diligence materials) Matvin had compiled and presented an extensive collection of information, providing Crown Finance with insights into the Property's value, potential for development, and associated risks. This material was commercially valuable, and, when taken as a whole, conferred a significant advantage on any potential purchaser. Despite some elements of this information being potentially inferable from public sources, the overall package (and many of the individual documents within it) possessed the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

[82] The key dispute between the parties was whether the information was imparted in circumstances importing an obligation of confidence.

[83] It is well-established that a banker/lender owes a duty of confidentiality to their customers at common law.[54] The duty of confidentiality is generally implied in the contract between a bank and its customer and extends to all information obtained by the bank concerning the customer. It can only be breached in limited circumstances, such as where the customer consents, where the bank is compelled by law, where disclosure is necessary in the public interest (for example to prevent a crime or fraud), or where necessary to protect the bank's legitimate interests, such as in legal proceedings to recover a debt owed by the customer.[55] Unless the circumstances require otherwise, a similar duty will arise in relation to a prospective customer.

[84] Crown Finance and Viscount submitted, however, that similar obligations of confidentiality do not (or should not) apply in a mezzanine financing context. Obviously, each case will turn on its own facts. Mezzanine financing is likely to

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54 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA) at 480–481.
55 Aplin and others, above n 49, at [9.52]–[9.59].

involve a much wider range of circumstances than traditional lending, utilising a range of different financing structures (including subordinated debt with equity-like features).

[85] There may be some cases where the overall circumstances weigh against finding an implied obligation of confidentiality. There is no principled basis, however, for approaching such relationships on the assumption that implied obligations of confidentiality will not arise. On the contrary, many of the policy reasons that justify imposing an implied obligation of confidentiality on ordinary banker/customer relationships would appear to apply equally to mezzanine financiers. These include: the protection of customer privacy; promoting and maintaining trust and confidence in financial institutions (by assuring customers that their information will not be misused); and fostering investment, economic stability and efficiency.

[86] Our view that mezzanine financing is not inherently different from more conventional lending in relation to issues of confidentiality is consistent with the evidence of several of Crown Finance's own witnesses. For example, Richard Shores, an expert witness on property finance (including mezzanine financing) gave the following evidence in cross-examination:

> Q. Mr Shores, can I ask you firstly, a hypothetical question regarding for example, the way you conduct your own business. If a borrower comes to you seeking loan finance and they have a valuable opportunity let's say to acquire some land where there's going to be or has been a signific uplift in value, and so you're approached to fund the transaction, and for whatever reason you and the borrower cannot agree on terms, would you consider it appropriate for the lender having received this information to go out and take the opportunity for itself?
>
> A. No.

[87] Noel Kirkwood, another expert witness on property financing, similarly accepted in cross-examination that a prospective lender could not utilise valuable information provided by a potential borrower for its own benefit. Mr Copson also accepted in cross-examination that a prospective borrower was entitled to expect that a lender would not take a financial benefit from an opportunity introduced by that prospective borrower. He further acknowledged that it would not have been appropriate for Crown Finance itself to have used confidential information provided

to it by Matvin to purchase the Property but suggested (in our view unconvincingly) that it was unobjectionable for Crown Finance to provide that information to a related entity, who could then use it to purchase the Property. Finally, Mr Arbuckle accepted that Crown Finance was not entitled to pass on to another company within the Crown Finance group the confidential information that Matvin had shared about the purchase and development of the Property.

[88] Matvin shared inherently confidential and commercially valuable information with Crown Finance for the sole purpose of enabling Crown Finance to make an informed decision as to whether to provide finance for Matvin's proposed acquisition and development of the Property. There is no evidence that Crown Finance disclosed to Matvin, at any stage, that it reserved the right to use Matvin's confidential information to compete with Matvin (either directly or through an associated entity) to purchase the Property. On the contrary, the evidence we have referred to above suggests that Crown Finance did not consider itself free to use Matvin's confidential information for its own purposes, but did so regardless.

[89] We are satisfied that the circumstances in which Matvin disclosed the relevant information to Crown Finance were such that an implied duty of confidentiality arose, obligating Crown Finance to protect the confidentiality of Matvin's information and use it solely for the purpose for which it had been provided.

[90] Although our reasoning differs in some respects from that of the Judge (who based her reasoning on the existence of a fiduciary relationship), her conclusion, namely that the information was imparted by Matvin in circumstances that imposed an obligation of confidence, was clearly correct.

Was there an unauthorised use or disclosure of Matvin's confidential information?

[91] The final issue is whether there was an unauthorised disclosure or use of Matvin's confidential information by Crown Finance and/or Viscount.

[92] This limb is also clearly satisfied. Crown Finance's disclosure of Matvin's confidential information to Viscount clearly went beyond the purpose of evaluating Matvin's financing request and constituted a misuse of Matvin's confidential

information. Viscount then exploited Matvin's confidential information for its own purposes.

[93] Knowledge of the confidential terms and status of Matvin's agreement was critical to Crown Finance and Viscount's strategy to acquire the Property. They were aware that Matvin was highly exposed, having made its agreement for sale and purchase unconditional, which had triggered the obligation to pay the deposit. As Crown Finance knew, however, Matvin did not yet have the necessary funds. Matvin was therefore in a vulnerable position and needed to negotiate an extension of time with Mr Buljan, which it was endeavouring to do. While those negotiations were underway, however, Viscount exploited its knowledge of the terms and status of Matvin's agreement to make a competing unconditional offer, on the same terms to Matvin's agreement. In the circumstances, it was almost inevitable that Mr Buljan would prefer Viscount's competing offer, which he did. As a result, Matvin lost any opportunity of completing its own acquisition of the Property.

[94] Crown Finance and Viscount's knowledge of the terms and status of Matvin's agreement was obviously critical to Viscount's acquisition of the Property. However, the due diligence information Matvin had provided to Crown Finance over the preceding months also played a key role. The Property had been on the market for several years but had not previously attracted any interest from the Crown Group. As late as 7 September 2013, Mr Arbuckle raised a number of concerns and queries with Mr Corbett (who in turn referred them to Mr Clark) regarding the commercial viability of the proposed development. These concerns were progressively addressed by Matvin and Mr Corbett over the next month or so. It was only once Mr Arbuckle was satisfied of the commercial viability of the proposed development that Crown Finance made a conditional offer of funding to Matvin. Subsequently, Viscount clearly also relied on the due diligence information in making an *unconditional* offer to purchase the Property on the same terms as Matvin. It is apparent from the evidence, including the cautious approach taken by Mr Arbuckle to assessing the merits of the proposed acquisition, that Crown Finance/Viscount would have been unlikely to take such a risk in the absence of satisfactory due diligence. An offer conditional on due diligence, however, would have been much less likely to succeed, given that Mr Buljan already

had an unconditional agreement with Matvin, and Matvin had identified a potential alternative source of funding to pay the deposit.

[95] For the reasons we have outlined, it is our view that the Judge was correct to find that all three elements of the breach of confidence cause of action (as summarised at [77] above) were proved. This ground of appeal must accordingly fail.

Did the Judge err in finding CAPGL was not liable on either the breach of fiduciary duty or breach of confidence causes of action?

[96] Matvin cross-appealed the Judge's findings that CAPGL was not liable on either the breach of fiduciary duty or breach of confidence causes of action.

The High Court decision

[97] The Judge dismissed the causes of action against CAPGL "for want of proof" and entered judgment in its favour.[56] On the breach of fiduciary duty cause of action, the Judge found that "[t]he evidence has not established that [CAPGL] played any role in the events that led to Crown [Finance] being liable under the first cause of action".[57] As for the breach of confidence cause of action, the Judge held there "is no evidence to involve [CAPGL] in the second cause of action".[58]

Submissions on appeal

[98] Matvin submitted that Mr Corbett and Mr Arbuckle made no distinction in their dealings with Matvin between Crown Finance and CAPGL "who were collectively described as the Crown Asia Pacific Group". Correspondence and actions were undertaken in the name of the Crown Asia Pacific Group, leading Matvin to believe that both companies were involved. In addition, Matvin submitted, the shares in both Crown Finance and CAPGL were beneficially owned by entities associated with Mr Copson, who ultimately directed and controlled their activities. Mr Arbuckle was a director of Crown Finance, CAPGL and Viscount. CAPGL must therefore have received the same confidential information that Crown Finance did.

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56 Judgment under appeal, above n 1, at [256] and [271].
57 At [221].
58 At [229].

[99] Underlying Matvin's decision to include CAPGL as a defendant to the proceeding appears to be a concern that Viscount may have insufficient assets to meet an order for an account of profits. Matvin submitted that Viscount has no known assets other than the part of the Property that still remains in its ownership, which is valued at $14,050,000 and that:

> It is in the event of a shortfall, including if Viscount has transferred or will transfer any funds to other parties, that Matvin seeks Judgment against [CAPGL] as well as [Crown Finance].

[100] CAPGL submitted that the Judge correctly dismissed the causes of action against it. It emphasised that CAPGL, Crown Finance, and Viscount are separate legal entities. Any use of terms like "Crown Group" or "Crown Asia Pacific Group" as collective descriptors has no legal significance and does not prove CAPGL's involvement in any actionable capacity or somehow override each company's individual legal identity. Overall, CAPGL submitted, there is no evidence that it played any role at all in the events leading to either the fiduciary breach claim or the breach of confidence claim.

Discussion

[101] We have found that the Judge erred in finding the breach of fiduciary duty cause of action proved against Crown Finance. It was not suggested that there was any basis on which a distinction could be drawn between CAPGL and Crown Finance on this cause of action. There is accordingly no possible basis for finding CAPGL liable on that cause of action. The issue, therefore, is whether the Judge erred in not finding CAPGL liable for breach of confidence, along with Crown Finance.

[102] The Judge was correct, in our view, to find that there is no evidence that CAPGL was involved in the relevant events. Crown Finance and CAPGL each have a separate legal personality. Matvin and HDL were required to establish the elements of the breach of confidence cause of action against each defendant.

[103] It is common ground that Crown Finance, CAPGL and Viscount have a common director through Mr Arbuckle. Each is wholly owned by HWI Nominees Ltd in a trust structure related to the Copson family. That structure, however, also extends

to many other companies. Mr Arbuckle stated in cross-examination that there are "40 odd companies in the group". Throughout the relevant period the companies in the group were frequently referred to (particularly by Mr Corbett and Mr Clark) in a collective sense as "Crown" or the "Crown Asia Pacific Group". It is not possible, however, to sue a collective group of companies, and Matvin does not purport to do so. Rather, Matvin has identified Crown Finance, Viscount and CAPGL as the appropriate defendants.

[104] There is clear evidence that both Crown Finance and Viscount were involved in the relevant events. However, there appear to be no references at all in the (extensive) contemporaneous documents to CAPGL. CAPGL did not author any documents and is not referred to in any of the key documents, including the various loan offers (which were made by Crown Finance). Matvin endeavoured to rely on Mr Corbett's standard email sign off, which includes the words "Crown Asia Pacific Group" and a Group logo, as somehow being a reference to CAPGL, the company. However, the email sign off is clearly a reference to the Crown Asia Pacific Group in a collective sense, not CAPGL specifically.

[105] All the shares in CAPGL, Crown Finance and Viscount are owned by HWI Nominees Ltd. The ability of Mr Copson to exercise indirect control over each company does not prove any involvement by CAPGL in the relevant events. Indeed, if that were sufficient to establish liability, all the companies in the Crown Asia Pacific Group would potentially be liable. It is not clear why CAPGL was singled out to be named as a defendant (as opposed to other companies in the Crown Asia Pacific Group), other than possibly that its name is similar to the collective name used for the group as a whole. It may have been assumed by Matvin that CAPGL was a holding company and would therefore be well-placed to meet any claim if Viscount had insufficient assets. There is no evidence, however, that CAPGL is a holding company for Crown Finance or Viscount. Nor is there any evidence that CAPGL received any property or profits, or otherwise benefitted from, the relevant transactions. Matvin cannot seek joint and several liability against CAPGL merely because of an anticipated shortfall in recovery against Viscount.

[106] In conclusion, the Judge was correct to dismiss the claims against CAPGL on the basis that there is no evidence of its involvement in the relevant events. Specifically, there is no evidence that CAPGL used the confidential information in any way.

Did the Judge err in finding Viscount liable for dishonest assistance in Crown Finance's breaches of fiduciary duty?

[107] Viscount appealed the Judge's finding that it was liable for dishonest assistance in Crown Finance's breaches of fiduciary duty. We have found that there was no fiduciary relationship between Crown Finance and Matvin and hence no breach of fiduciary duty. The dishonest assistance claim against Viscount necessarily falls away. This ground of appeal must therefore succeed.

Did the Judge err in finding Crown Finance and Viscount had failed to establish their affirmative defences?

The High Court decision

[108] Crown Finance and Viscount advanced several affirmative defences at trial, most notably the equitable defences of: (a) unclean hands; and (b) laches and delay. The Judge found that the affirmative defences had not been established, stating that:[59]

> [262] The defendants raised various affirmative defences in their statements of defence. Some were dependent on the counterclaim they brought against Matvin. At trial the counterclaims were abandoned, which removed the factual foundation for the defences of equitable set off (Viscount) and lack of clean hands (all defendants). There remains defences of delay and acquiescence, neither of which was pushed strongly at trial.
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> [263] The proceeding has been brought within six years. A money claim under the Limitation Act 2010 includes a claim for monetary relief in equity. This includes a claim for an account of profits. I see no basis to deny the plaintiffs the relief they seek on the basis of laches or acquiescence when the Limitation Act imposes a six year time frame in which they can bring their claim.

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59 Footnote omitted.

The clean hands defence

[109] The submissions of Crown Finance and Viscount both addressed this defence as being a defence to the breach of fiduciary duty cause of action. Given our view that the appeal in relation to that cause of action should be allowed, it is not necessary for us to consider this defence further. For completeness, however, we note that the various matters advanced by Crown Finance on appeal as supporting its clean hands defence do not appear to arise out of or relate to its pleading. Rather, the specific actions pleaded as establishing Matvin lacks clean hands fell into two categories:

(a) that Matvin "throughout negotiated with third parties as potential joint venturers, investors and/or financiers"; and

(b) various facts pleaded as supporting Crown Finance's counterclaim to the effect that if the parties were in a fiduciary relationship then Matvin owed corresponding duties to Crown Finance and Viscount in relation to "other projects that arose at the same time … including … at Library Lane, Albany" (the Library Lane counterclaim).

[110] The allegation at (a) above is, in essence, an allegation that if the parties were in a fiduciary relationship, Matvin also breached it by negotiating with third parties. It is not relevant to the breach of confidence cause of action. The allegations underpinning (b) above all related to Crown Finance's Library Lane counterclaim, which was abandoned at trial. Those allegations, in respect of which no findings have been made, are also not relevant to the breach of confidence cause of action. (We note that Viscount's pleading of this defence mirrored that of Crown Finance.)

[111] Clean hands is an affirmative defence, which must be properly pleaded. The Judge did not err by engaging with (and dismissing) the clean hands defence on the basis that, as pleaded, it had not been established. We note that Matvin sought (and was granted) leave to amend its statement of claim during trial. Neither Crown Finance nor Viscount appears to have made a similar application to amend their affirmative defences.

The defence of "delay, laches and acquiescence"

[112] Crown Finance and Viscount both pleaded an affirmative defence of "[d]elay, laches [and] acquiescence". Specifically, it is pleaded that:

(a) Matvin and HDL knew of all the material matters giving rise to their claims in October 2013, yet "acquiesced and/or have unreasonably delayed in bringing proceedings"; and

(b) Crown Finance and Viscount had each altered their position in the meantime such that it would now be inequitable to grant any relief.

[113] As noted above, the Judge stated this defence was not "pushed strongly at trial" and dismissed it, on the basis that Matvin's proceeding was brought within the relevant limitation period (six years) under the Limitation Act 2010.[60]

Legal principles

[114] The doctrine of laches is an equitable affirmative defence that bars a plaintiff from seeking relief if:[61]

(a) the plaintiff has unreasonably delayed in asserting their rights; and

(b) that delay has prejudiced the opposing party, rendering the grant of equitable relief unjust.

[115] The length of the delay and the nature of the acts done during the interval are important factors when assessing where the interests of justice lie. In some circumstances "an inference may be drawn as a matter of common sense that delay in making a claim has prejudiced the defendant".[62]

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60 At [262].

61 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [36]–[37], citing *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA) at 26; and *Neylon v Dickens* [1987] 1 NZLR 402 (CA) at 407–409.

62 *New Zealand Law Society v Wellington City Council*, above n 61, at 26, citing *Neylon v Dickens*, above n 61, at 407–409.

[116] Laches developed as a means of balancing the equities between plaintiff and defendant in the absence of statutory limitation periods. The defence of laches will therefore only apply if the Limitation Act is not applicable and a limitation period cannot be applied by analogy under s 9 of that Act.[63] Otherwise, a plaintiff is entitled to the full limitation period before their claim becomes unenforceable. As Lord Wensleydale explained in the House of Lords' decision of *Archbold v Scully*:[64]

> … the fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, … cannot be any equitable bar.

[117] The affirmative defence of acquiescence overlaps with, and is closely related to, the defence of laches. Acquiescence, however, may bar relief even before the limitation period has accrued. Rather than "mere" delay, acquiescence involves a person standing by while their rights are infringed in such a manner as to induce the person committing the act, and who might otherwise have abstained from it, to believe that he consents to the acts being committed.[65] In essence, it is "no more than an instance of the law of estoppel by words or conduct" in which the person standing by is found to have, in effect, made a misrepresentation as to a fact.[66] The court will look to whether there was anything in the actions of the plaintiff that makes it unconscionable for him or her to now pursue action against the defendant. The focus is on whether the plaintiff engaged in conduct (including making express or implied representations) that could have reasonably induced the other party to believe that the plaintiff was not going to pursue its claims.[67]

Submissions

[118] "Delay, [l]aches [and] [a]cquiescence" was pleaded as an affirmative defence (which Mr Chisholm acknowledged, on behalf of Viscount, was "the harder aspect") and also relied on in relation to the appropriate form of relief, namely an account of profits or damages.

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63 *No 68 Ltd v Eastern Services Ltd* [2006] 2 NZLR 43 (CA) at [61], citing *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 544.

64 *Archbold v Scully* (1861) 9 HLC 360 (HL) at 778.

65 *Halsbury's Laws of England* (5th ed, 2021, online ed) vol 47 Equitable Jurisdiction at [253], citing *Archbold v Scully*, above n 64, at [383].

66 *Halsbury's Laws of England*, above n 65, at [253] (footnote omitted).

67 *Wham-O Manufacturing Co v Lincoln Industries* [1984] 1 NZLR 641 (CA) at 676.

[119] Crown Finance and Viscount submitted that, despite being aware of all of the facts necessary to bring a claim, Matvin waited five and a half years to file proceedings. Despite some "general threats" in correspondence in October 2013 and September 2014 (outlined at [123] and [124] below), it did not take any steps to challenge Viscount's purchase of the Property. During this period, Viscount proceeded with and completed the development of the Property at its sole risk, assuming there would be no legal challenge. Matvin's delay, they submitted, inhibited Viscount's ability to mitigate or reconsider its investment strategy earlier in the process. Plaintiffs who seek a "remedy in equity cannot stand by and permit the defendant to make … profits over a period of years and then claim those profits for [themselves]".[68] Given Matvin's delay in bringing proceedings, Crown Finance and Viscount argued it would be inequitable for it to now receive a share of the profits. Equitable relief should accordingly be refused.

[120] Matvin submitted that the Judge was correct to dismiss Crown Finance's and Viscount's affirmative defence of delay, laches, and acquiescence. It submitted that since its claims were brought within the statutory limitation period, equitable defences like laches and delay should not independently bar relief. Crown Finance was on notice of Matvin's intention to pursue legal action until the expiration of the limitation period. Matvin further submitted that the delay was not unreasonable in the circumstances, given the complex nature of the underlying facts and relationships, and Matvin's other commitments during the relevant period.

Discussion

[121] The pleaded defence appears to be primarily one of laches. Specifically, the two key elements of that defence, as set out at [114] above, are pleaded. No additional particulars are provided on the issue of acquiescence. Rather, the pleading simply asserts that Matvin "*acquiesced and/or* … unreasonably delayed in bringing the proceedings".[69] The word "acquiesced" appears to add nothing in this context. The key complaint in the pleading is that Matvin's delay in bringing proceedings was

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68 *Aquaculture Corporation v NZ Green Mussel Co Ltd (No 3)* (1986) 1 NZIPR 678 (HC) at 690.
69 Emphasis added.

unreasonable. In submissions, however, a number of arguments were advanced that are arguably more relevant to acquiescence than mere delay.

[122] To the extent that the defence is one of laches, the Judge did not err in dismissing it, given that the relevant limitation period had not yet expired, as we have explained at [116] above. Assuming for present purposes, however, that the defence is actually one of acquiescence (or includes an assertion of acquiescence), then relief may be barred even before the limitation period has accrued, as we explained at [117] above. Viewed through the lens of an acquiescence defence, the issue is whether there is more than "mere" delay here. Did Matvin stand by while its rights were infringed in such a manner as to induce Viscount that Matvin consented to Viscount's purchase and subsequent development of the Property, in circumstances where Viscount might otherwise have abstained from such conduct?[70]

[123] On 25 October 2013, Matvin's solicitors wrote to Crown Finance's solicitors, asserting that Crown Finance and Matvin were in a joint venture relationship. Matvin's solicitor raised concerns about delays by Crown Finance in issuing loan documentation and the fact that the final loan documentation did not reflect the terms of the loan offer. She rejected the suggestion (previously advanced on behalf of Crown Finance) that Crown Finance "was entitled to alter fundamental terms of the loan offer". Finally, she advised that if Matvin's agreement for sale and purchase was cancelled by the vendor, Matvin would seek recourse from Crown Finance for its losses "and reserves all rights it has against Crown in respect of the losses (which will extend to loss of profit)". Later that day the vendor (having received an offer to purchase from Viscount) cancelled Matvin's agreement for sale and purchase and entered into an agreement with Viscount on essentially the same terms.

[124] Subsequently, in September 2014, Crown Finance's solicitors sought payment from Matvin of legal costs Crown Finance had incurred in relation to the loan documentation, pursuant to an undertaking that had been provided by Matvin. Matvin's solicitors orally advised Crown Finance's solicitors that Matvin was "preparing litigation … to sue Crown" in relation to "that deal that did not proceed".

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70 *Intellectual Property Development Corporation Pty Ltd v Primary Distributors New Zealand Ltd* [2009] NZCA 429, [2010] 2 NZLR 729 at [38].

Matvin's solicitor also wrote formally to Crown Finance's solicitor on 23 September 2014, confirming that HDL would be bringing proceedings in the matter and that payment of the relevant legal fees (pursuant to Matvin's undertaking) was being made without prejudice to that claim.

[125] Legal proceedings against Crown Finance were not filed, however, until about four and a half years later, in March 2019. Viscount was joined to the proceeding in September 2019.

[126] Mr Arbuckle's evidence was that:

> As time passed and the threatened proceedings did not eventuate, we considered we were free to proceed with developing the property. It appeared to us that Matvin must have abandoned its earlier allegations.

[127] The overall evidence does not support the contention, however, that Viscount put its development plans on hold after receiving advice that Matvin/HDL intended to pursue proceedings and only progressed them at a later stage, on the assumption that (due to the passage of time) Matvin must have "abandoned" any intention to pursue litigation. Work on preparing a resource consent application for the residential part of the development commenced in early 2014 and continued unabated following advice that Matvin/HDL intended to issue legal proceedings. The application was finalised and lodged in March 2015, and granted in November 2015. A construction tender programme for the infrastructure works was completed in December 2015 and a contract was awarded to commence bulk earthworks in mid-January 2016. An application for an engineering consent to complete roads, drainage infrastructure works and so on, and to subdivide the property, was made in February 2016. A sales campaign for the residential property commenced in March 2016 and a conditional sale agreement was entered into with a purchaser in April 2016. Engineering works for the infrastructure works followed in May 2016 and this work was finally completed in December 2016 when titles were issued. The sale of the residential area was settled on 23 December 2016. All of this work took place within just over two years of Matvin advising that it intended to issue legal proceedings. This suggests that Viscount was not deterred from pursuing the development of the Property by Matvin/HDL's threat of legal action. Rather, it appears to have been willing to take a calculated commercial

risk and push ahead with its proposed development, despite knowing that legal action was a possibility.

[128] We accept that, as time progressed, Viscount may well have believed that the likelihood of Matvin issuing proceedings was decreasing. At no stage, however, did Matvin or HDL say or do anything that would have suggested to Crown Finance that it had abandoned any intention of bringing proceedings. Crown Finance and Viscount were therefore on notice that, until the expiration of the limitation period, there was at least some risk of a legal claim against them arising out of the way in which Viscount had acquired the Property. In such circumstances we are not persuaded that the four-and-a-half-year delay between Matvin notifying its intent to bring proceedings, and bringing those proceedings, renders it unconscionable for Matvin to now receive any equitable relief for Crown Finance and Viscount's egregious breach of confidence. The Judge did not therefore err in dismissing Crown Finance and Viscount's affirmative defences of delay, laches and acquiescence.

Did the Judge err in finding the appropriate form of relief was an account of profits?

[129] Crown Finance and Viscount submitted that the Judge erred in finding that the appropriate form of relief was an account of profits.

High Court decision

[130] The Judge found an account of profits to be the appropriate remedy in respect of the causes of action that had been proved. Specifically, in relation to the breach of confidence cause of action, the Judge found that:[71]

> [260] An account of profits is … an appropriate remedy against an unsuccessful defendant in a breach of confidence action, be they the confidant who made the unlawful disclosure or the third party recipient of this confidential information. Viscount argued that damages were the more appropriate remedy. I disagree. Viscount's liability under the second cause of action arises in equity not from contract. An account of profits is a traditional remedy for equitable wrongdoing. Indeed, until *Aquaculture Corporation v NZ Green Mussel Co* the general view was that compensatory damages were

[71] Judgment under appeal, above n 1 (footnotes omitted).

> not available for breach of confidence and that a plaintiff had to look to traditional equitable remedies, which would include account of profits.

[131] The Judge noted that there was no evidence before the Court regarding the extent to which Crown Finance and/or Viscount had "profited from the actions which have resulted in the liability findings I have made against them".[72] Accordingly:[73]

> An account of profits will require a further hearing to enable the Court to determine profits, and how they should be shared as between [Matvin and HDL] and [Crown Finance and Viscount]. It is not clear to me to what extent [Crown Finance] has profited if at all and whether the profits now all lie with [Viscount]. These are matters that can be clarified in a hearing for an account of profits.

[132] Matvin and HDL subsequently filed an interlocutory application in the High Court seeking an order for the taking of an account of profits. That application was opposed. It appears, from a minute of Duffy J dated 2 February 2023, that the parties reached agreement that the application would not be pursued pending the outcome of this appeal. Nevertheless, the Judge considered that there was merit "in some progress being made now for the taking of accounts in respect of [Viscount]" and made various orders (apparently with Viscount's consent) to "enable the taking of accounts against it to commence now". These involved the appointment of an account taker for the purposes of pt 16 of the High Court Rules 2016 to prepare a report. Following this the matter was to be returned to the High Court "for determination of all relevant evidential, factual and legal issues in dispute".

[133] A further minute from the Judge the following day noted (amongst other things) that there was general agreement that the account taker's role would essentially be an information gathering role and that it would ultimately be for the Court, after a hearing:

> … to determine the quantum of the profits [Viscount] has received; whether the Court should make allowance for Viscount to retain some of those profits given the work it has undertaken to derive them; and the quantum of the profit Viscount must account for to Matvin.

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72 At [258].
73 At [258].

Submissions on appeal

[134] Crown Finance and Viscount submitted that equitable damages would be a more appropriate remedy than an account of profits. They submitted that there is no general principle mandating that a defendant who breaches confidentiality must forfeit the profits gained. Instead, the Court has discretion to determine the most appropriate form of relief. Here, equitable damages would more appropriately balance the interests involved. Matvin's financial stake and involvement in the project were minimal, and it delayed in bringing proceedings for over five years. It assumed no risk in relation to the development and damages would more fairly reflect Matvin's lack of contribution to the project and the risks involved, which it did not share.

[135] Crown Finance and Viscount further submitted that an account of profits would be disproportionate to the nature and extent of the alleged wrongdoing. They argued that any breach of confidence only resulted in Viscount acquiring the Property. Its subsequent development plans were independent of any confidential information it had received from Matvin. The development of the Property commenced in 2015, well after the alleged breach, and was not causally linked to the breach.

[136] Although neither Crown Finance nor Viscount addressed in any detail how damages should be assessed, their position appeared to be that any damages should be limited to Matvin's actual losses (the sum of approximately $32,000 Matvin invested in pursuing the opportunity to purchase the Property).

[137] Matvin submitted that the Judge was correct to award an account of profits. It advised that it only seeks 50 per cent of the profits of the development, not all the profits. It also accepted that any account of profits should have regard to Viscount's contribution (such as its skill and time) to the development. Matvin submitted that an account of profits, assessed on this basis, would produce an equitable outcome that would align with the parties' original expectation that the parties would share equally in the profits of the development.

[138] On the issue of causation, Matvin submitted that Viscount's profits arose directly from the opportunity provided by Matvin. The profits Viscount made were entirely foreseeable (due to zoning changes and other factors) at the time Viscount

seized the opportunity to purchase the Property for itself. The valuation that Matvin commissioned and provided to Crown Finance assumed that the Property would be subdivided, and Viscount has not departed materially from that plan. Damages alone would not produce an equitable outcome, rather the fair and appropriate outcome is that Matvin receive half the profits of the development.

Equitable remedies — relevant legal principles

[139] Equitable remedies are discretionary. The cardinal principle is that "the remedy must be fashioned to fit the nature of the case and the particular facts".[74] The primary remedy available in equity for a breach of confidence was historically an account of profits. However, in *Aquaculture Corporation v NZ Green Mussel Co Ltd,* this Court held that damages were available for an actionable breach of confidence in appropriate cases (and that exemplary damages were available where compensatory damages would not adequately reflect the gravity of the conduct).[75] The majority held that:[76]

> There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages) may be awarded for breach of a duty of confidence or other duty deriving historically from equity … In some of these cases the relevant observations were arguably obiter, but we think that the point should now be taken as settled in New Zealand. … For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.

Hence, a remedy can be chosen on the basis that it provides the most just outcome in a particular case, without the need to focus on whether it arose out of equity or the common law.

[140] An account of profits and damages are calculated on different bases. An account of profits requires the defendant to surrender the net profits attributable to the breach of confidence to the plaintiff, while damages are assessed on the basis of the

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74 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

75 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) [*Aquaculture Corporation* (CA)] at 301–302 per Cooke P, Richardson, Bisson and Hardie Boys JJ.

76 At 301.

plaintiff's loss due to the wrongdoing. These different approaches will generally yield different outcomes, as "what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so".[77]

[141] An account of profits is typically granted in circumstances where it is appropriate to ensure that the party in breach does not retain the benefit of its wrongdoing. The courts have consistently recognised, however, that an account of profits is restitutionary and should not be used to penalise the defendant, particularly if it has made substantial contributions to the profits from its own skills, investments, or efforts.[78] Overall, the remedy of an account must be equitable and proportionate to the circumstances.[79] Hence, in some cases it may be unjust to award the entirety of profits to the plaintiff. Rather, it may be appropriate for the court to award only a share of the profits, particularly where the defendant's own efforts, resources, and risk-taking played a significant role in generating those profits. This prevents the unjust enrichment of the plaintiff and ensures the remedy aligns with the equitable principles of fairness.[80]

[142] Finally, difficulties can arise in breach of confidence cases if the misuse of confidential information only partially contributed to the profit made. In such circumstances the Court must assess the amount of profit which is "fairly attributable" to the plaintiff's confidential information.[81] Leggatt J suggested in *Marathon Asset Management LLP v Seddon* that:[82]

> In such cases the appropriate method of valuation, as it seems to me, is to assess the amount of profit made by the wrongdoer which is *fairly attributable* to its wrongful use of the claimant's property (or other wrongful act). As the law currently stands, there are two routes by which this can in principle be achieved. One is to order an account of profits and to apportion the profits made by the defendant between profits which should be attributed to its wrongful act and profits which should be attributed to other factors. The other route is to order payment of a percentage of the defendant's profits as licence

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77 *Coldbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 32.

78 *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 (HC) at 629–630; *Re Jarvis* [1958] 1 WLR 815 (Ch) at 820; *Edmonds v Donovan* [2005] VSCA 36, (2005) 12 VR 513 at [70]; and *Warman International Ltd v Dwyer*, above n 74, at 560–561.

79 *Warman International Ltd v Dwyer*, above n 74, at 561.

80 See *Edmonds v Donovan*, above n 78, at [70].

81 *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] ICR 791 at [236].

82 At [236] (emphasis added).

> fee damages [on the basis that the defendant should "make some reasonable recompense"[83]].

Discussion

[143] The preference of Crown Finance and Viscount for a damages remedy was predicated on the assumption that such damages would be minimal — most likely assessed based on Matvin's out of pocket expenses (approximately $32,000) rather than the value of its lost opportunity to acquire the Property. In our view, however, an award of damages based on reimbursing Matvin's out of pocket expenses would not adequately compensate Matvin or reflect the extent of Crown Finance's and Viscount's wrongdoing. Rather, if damages were awarded, they should be assessed on a "loss of chance" basis, to reflect that the consequence of Crown Finance and Viscount's misuse of Matvin's confidential information was that Matvin lost the opportunity to purchase the Property.[84] The recognised approach for assessing the value of a loss of chance was described in *Takaro Properties v Rowling* as follows:[85]

> In general a calculation of damages based upon the value of a chance will involve assessment at three levels. First there is the question as to whether there is affirmative evidence from a plaintiff that in the absence of the … conduct complained of he would have had some opportunity of achieving a particular purpose. … Second, there is a need to estimate what would have been the outcome had there been complete success. And finally that outcome reduced to money terms will have to be discounted to accord with what can fairly be regarded as the actual *prospect* of success.

[144] Here, the evidence appears to satisfy the first requirement. Specifically, there is evidence that if Viscount had not misused Matvin's confidential information to offer to purchase the Property on essentially the same terms as Matvin, Matvin would have had *some* prospect of obtaining a further extension from Mr Buljan and ultimately purchasing the Property itself (see [30], [34] and [72] above). The second requirement in *Takaro* would require the Court to assess the outcome as if there had been complete success (namely, if Matvin had been able to fully implement its development plans). Finally, that outcome would need to be discounted to accord with the Court's assessment of the *actual* prospect of Matvin successfully doing so. Assessed on this

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83 *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 at [26].

84 *Aquaculture Corporation* (CA), above n 75, at 301.

85 *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 (CA) at 64 (emphasis added).

basis, it is possible that an award of damages could exceed an account of profits, given Matvin's concession that it only seeks to recover 50 per cent of Viscount's profits.

[145] Matvin's preference, however, is for an account of profits. That is what it sought in its pleading. The Judge did not err, in our view, in concluding that such a remedy was appropriate. Mr Arbuckle acknowledged in cross-examination that by October 2013, Matvin had provided all of the information Crown Finance needed to make a decision on the merits of the proposed development and, further, that he was aware that acquiring the Property "was a sure path to a big profit". Ultimately, the misuse of Matvin's confidential information by Crown Finance and Viscount provided a springboard that enabled Viscount to make significant profits it would not otherwise have been able to make. It is therefore not unjust to require Viscount to disgorge some of that profit. We are also not persuaded, for the reasons set out at [128] above, that Matvin's delay in bringing proceedings would make an account of profits unjust.

[146] In conclusion, the Judge did not err in finding that an account of profits was the appropriate remedy. The matter should therefore now proceed to the further hearing in the High Court that the Judge envisaged (and directed), in order to determine any factual or legal issues relating to how the relevant profits should be assessed.

Estoppel

[147] Viscount's final ground of appeal was that the Judge erred in not dismissing the estoppel cause of action against Viscount. Rather, the Judge found that a ruling on the estoppel cause of action was unnecessary.[86]

[148] At the hearing, Mr Chisholm advised that the estoppel issue was no longer pursued, as Matvin was no longer supporting the judgment on another ground (namely, that judgment should have been entered in Matvin and HDL's favour on the estoppel cause of action). We therefore do not consider this ground of appeal further.

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[86] Judgment under appeal, above n 1, at [236]–[237].

Costs

[149] Crown Finance has succeeded in overturning the Judge's finding that it was liable for breach of fiduciary duty. It necessarily follows that Viscount cannot be liable for dishonestly assisting such a breach. However, Crown Finance and Viscount's appeals against the Judge's finding that they were liable for breach of confidence were unsuccessful.

[150] In order to succeed in its proceeding, it was not necessary for Matvin to prove both its breach of fiduciary duty cause of action and its breach of confidence cause of action. Either would suffice. Further, the core alleged breach underpinning both causes of action was Crown Finance and Viscount's misuse of Matvin's confidential information, which was proved. As for relief, an order for an account of profits was an available remedy for either cause of action and we have upheld the Judge's decision to make such an order. It is therefore our view that, overall, Matvin is the successful party in respect of Crown Finance and Viscount's appeals. Although our reasoning and findings differ in some respects from those of the Judge, the end result is the same. Matvin is accordingly entitled to an award of costs against Crown Finance and Viscount. We certify for second counsel.

[151] Matvin and HDL were unsuccessful in their cross-appeal against CAPGL. However, the submissions on the cross-appeal were very limited in scope and took up minimal hearing time. CAPGL was represented by the same counsel as Crown Finance. Given the minimal costs associated with the cross appeal, relative to the appeal, it is our view that the costs of the cross-appeal should lie where they fall.

Result

[152] The appeals are allowed in part. Specifically:

(a) Crown Finance Ltd's appeal against the High Court's finding that it is liable to Matvin Group Ltd and Hobsonville Developments Ltd on the breach of fiduciary duty cause of action is allowed.

(b) Viscount Investment Corporation Ltd's appeal against the High Court's finding that it is liable to Matvin Group Ltd and Hobsonville Developments Ltd on the dishonest assistance cause of action is allowed.

[153] The appeals are otherwise dismissed.

[154] The cross-appeal is dismissed.

[155] Crown Finance Ltd and Viscount Investment Corporation Ltd together must pay one set of costs to Matvin Group Ltd for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

[156] We make no order of costs in relation to the cross-appeal.

Solicitors:
Friedlander & Co Ltd, Auckland for Crown Finance Ltd and Crown Asia Pacific Group Ltd
Lawler & Co, Auckland for Viscount Investment Corporation Ltd
Neilsons Lawyers Ltd, Auckland for Matvin Group Ltd and Hobsonville Developments Ltd