IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV--2013-404-4230
[2015] NZHC 2384

	BETWEEN	STEPHEN RONALD BAMBURY Plaintiff
	AND	ANDREW JENSEN Defendant

Hearing: 4-8, 11-15 and 18-19 May 2015

Counsel: S C Langton and A M Evans for Plaintiff
G J Harley, S A Armstrong and C M Laband for Defendant

Judgment: 2 October 2015

JUDGMENT OF FOGARTY J

This judgment was delivered by me on 2 October 2015 at 11.00 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Langton Hudson Butcher, Auckland
Russell McVeagh, Auckland

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Introduction

[1] Stephen Ronald Bambury and Andrew Jensen had an artist-gallerist relationship for 15 years (1995 – 2010). They had considerable success. During this period of time, Mr Bambury enjoyed success as an artist, selling many works through his principal agent, Mr Andrew Jensen. Their professional relationship was mixed with a friendship, a close friendship.

[2] In the course of the long trial it became apparent that they are both strong personalities. By that I mean they had strong views and saw themselves, with some justification, as leading figures in the art world. Together they broke boundaries, exhibiting in Europe. Their relationship was very successful financially, for both of them.

[3] In 2010, the relationship ended badly. Each man has a different explanation for the breakdown – Mr Bambury, because he had lost trust in Mr Jensen. Mr Jensen, because he was shifting to Sydney. Unfortunately, the relationship has never been repaired. Since 2011, Mr Bambury has been seeking at least 60 per cent of the value of all works consigned by him to Mr Jensen which have been sold or are unaccounted for.

[4] Mr Bambury has become very suspicious of Mr Jensen, as a consequence of his loss of trust, and has made some serious accusations.

[5] Both men and their professional advisors have spent hundreds of hours in a painstaking audit of the agency relationship. Numerous claims (about 20) have been resolved. About 40 are left. These disputed claims have been examined over ten days of a High Court hearing.

[6] The remaining disputes have one common characteristic. Each has an extraordinary context. None of them is a simple sale of the work and a failure of the agent to take his commission and remit the net sale price to the artist.

[7] In large measure these disputes remain intractable because the two men did not either reach an agreement at the time or if they reached an agreement, record it in

writing. In many instances there were probably no agreements reached to resolve an issue, even though and because both men knew the nature of the issue.

General considerations on the relationship between the plaintiff and the defendant

[8] Ms White gave evidence as an expert. She is a gallerist. She has had a distinguished career. She was involved in putting together a guide book called "A Code of Practice for Artists and Dealers in Aotearoa/New Zealand". It is now in its second edition. She did not suggest that the code of practice was binding. She referred to it as evidence of her knowledge of custom and usage in New Zealand, broader than her own direct personal experience in running a gallery.

[9] It was the evidence of Ms White, that the artist/gallerist relationship was one of mutual trust and understanding, subject to established parameters and industry norms. But while there are standard practices within the industry in relation to the basics of representation, there are no hard and fast rules which apply to the relationship. Instead, each relationship tends to be fluid in response to different circumstances that arise over time.

[10] Generally, however, the fundamental terms (commission, exclusivity, pricing, exhibitions and responsibility for various costs) will be discussed at the outset of the relationship. It is still common today for there to be no formal written agreement. Over time there will be a level of understanding of the terms of the arrangement between the artist and the gallerist. The principal role of a gallerist is to sell the artist's works so that both the artist and the gallerist can make a living through the sale of art. The gallerist is responsible for building the artist's profile and assisting the artist in managing that profile and its influence on the value of the artist's work. The relationship is commercial as well as being a personal one.

[11] On the subject of discounts, she said it is common for artists and gallerists to agree a discount arrangement in order to provide flexibility for the gallery to facilitate sales. The exact nature of any discount arrangement will depend on what has been previously agreed between the artist and the gallerist. A shared 10 per cent discount is standard in the industry where the artist and the gallerist lose five per cent

each on the original sale price. In this relationship between Mr Bambury and Mr Jensen, there was no agreed discount arrangement, as we will see.

[12] It was Ms White's evidence that there is a starting presumption the gallerist will be entitled to a commission on every sale of an artist's work, not just purchases made in the gallery itself. As we will see, that is not an agreed term of this relationship. There were no agreements in place as to commission on sales from the studio, contra arrangements, sales to family and friends or to one-off public or private commissions. So that these transactions fall into the category of extraordinary, by which I mean out of the run of the mill transactions. They are the occasion of some of the disputes between the parties.

[13] Ms White gave useful evidence on record-keeping, recording the obvious but easily forgotten fact that during the period of this dispute, between 1995 and 2010, there were considerable developments in record-keeping where systems moved from everything still being written on paper and sent by mail or fax, to emails and electronic databases.

[14] Ms White usefully noted situations which were prone to error occasioned by movement of stock not noted at the time or incorrect notes. She gave as an example an artist might pop into the gallery without warning and want to take one or several works out of the gallery stock room, either to take back to the studio or ship to another subordinate gallery, say in Christchurch. As the works are the artist's property, so it is his/her prerogative to do so.

[15] It was her evidence that gallerists take a range of approaches to informing artists of any sales or potential sales. There is no common practice within the industry that would require a gallerist to inform an artist immediately after a sale or even shortly after a sale unless it is of particular significance. While the gallery will provide a record of the sale in respect of each payment it makes to an artist, the obligation is to provide sufficient information which is meaningful and useful but there are no standard of categories of information.

[16] She said it was common practice for gallerists to purchase works from artists that they represent. It was her opinion that once sold to the gallerist, the artist has to live with the fact that the gallerist might sell the work later. That while it would be inappropriate for a gallerist to purchase a work knowing that a third party was interested in acquiring the same, it is common for works to be bought and then sold at a later date. She gave some personal examples. She gave some specific examples related to the disputes which I will discuss later in the judgment.

[17] The second expert witness is Mr Lett. His evidence was similar. He is a gallerist and has 15 years of experience of working in art galleries in New Zealand. He has a prior background of working in museums in Australasia. His opinion was by way of comment on three issues:

(a) Whether there is a general industry practice that a discount of up to 10 per cent provided to a prospective buyer is shared by the artist and the gallerist.

(b) The parameters of a gallerist's entitlement to commission for works sold by his or her artist.

(c) Maintenance and retention of sale records by gallerists.

[18] It was his evidence that while gallerists commonly offer to discount a work, he was not aware of any convention or custom that a shared discount of any amount can automatically be offered by an agent without the agreement of his or her artist. It was not uncommon for a gallerist to absorb a small discount to secure a sale without acknowledging or discussing this with the artist. However, an agent may expressly agree with his or her artist, a certain level of discount to be generally applied.

[19] The scope and exclusivity of a gallerist's representation of an artist vary and the circumstances around when a gallerist is due commission are not universally defined. While it is an accepted convention that a gallerist who directly sells a work on behalf of his or her artist will receive his or her commission, there are less certain

circumstances outside this standard arrangement. He instanced examples such as when the artist sells or gifts a work to friends or family, noting however it was rare for an artist to sell directly from the studio to a third party without involving the gallerist.

[20] It was his opinion where an artist swaps or "contras" a work, it is unlikely a gallerist would receive a commission on the value of the new work being provided as a "contra".

[21] As to the maintenance and retention of sale records, he said there was no customary single method. It was his experience that galleries do retain sales invoices and a database and records of sale for a long period of time, if not indefinitely.

[22] Mr Lett provided a supplementary brief where he commented on Ms White's evidence. (The experts had not met and compared views prior to trial.) He commented that while he was aware of her compiled Code of Practice, it was not being used in the industry as a standard or a guideline. He agreed that the artist/gallerist relationship is built on mutual trust and understanding, on fundamental terms that will be generally agreed at the outset of the relationship, and that it is common as here that there would be no formal written contract. He agreed the relationship between the artist and the gallerist is both commercial and personal. He agreed discounts are common but they are not a given. He reiterated there is no convention or norm that governs discounts.

[23] Mr Lett does not agree that there is a starting presumption that a gallerist is entitled to a commission on every type of sale of an artist's work. He did say every artist/gallerist relationship is unique. He said he had a lot of experience with public commissions and did not agree that a gallerist is automatically entitled to his or her full commission on the full sale price of the commissioned work. His experience is to discuss the public commission with the artist and reach an agreement.

[24] It was his opinion that gallerists do purchase works from their artists. That might be to provide financial assistance to the artist or because the gallerist

personally purchased for their private collection. He said that these works could be made available as gallery stock in the future at the gallerist's discretion. He was of the view he did not consider there is a convention which prevents or permits a gallerist from on-selling an artist's work.

The conceptual impasses to settlement

[25] There are two main conceptual issues that differentiate the parties. The first is who are the proper parties to the dispute. The defendant claims that during the course of their relationship, both Mr Bambury and Mr Jensen began putting their business transactions through corporate entities. The defendant claims that the initial contract between the two men has been novated, such that Mr Bambury is no longer the principal in the relationship and Mr Jensen is no longer the agent.

[26] During their productive relationship, both men began putting their receipts and payments through corporate entities. For Mr Bambury, Unovis Limited (Unovis). For Mr Jensen, Ouroborus Limited (1 and 2). Ouroborus 1 has been struck off.

[27] The defence for Andrew Jensen begins with these propositions:

(a) From January 1995 to March 2003, Mr Jensen was the agent for Mr Bambury.

(b) From 1 April 2003 to 19 November 2006, Mr Jensen was the agent for Unovis.

(c) From 20 November 2006 to 10 July 2007, Ouroborus 1 was the agent for Unovis.

(d) From 11 July 2007 to 17 July 2007, Mr Jensen was the agent for Unovis.

(e) From 18 July 2007 to 23 February 2011, Ouroborus 2 was the agent for Unovis.

[28] The second conceptual dispute is the nature of the relationship between the parties. The defendant claims that the relationship is contractual in nature, whereas the plaintiff claims that the relationship is mixed contractual and equitable. The significance of this dispute is two-fold. First, some of the plaintiff's claims for breach of fiduciary duty are said to extend beyond the terms of the contract between the parties. Second, the nature of the relationship between the parties affects the relief claimed, and as a result the limitation periods that may apply.

[29] As a consequence of the relationship being in contract, the defendant pleads that many of the claims are out of time, barred by the Limitation Act 1950. These proceedings were filed in 2013. Claims could be entertained only from any breach of agency after 2007, i.e. confined to the last three years of the 15-year relationship.

[30] Mr Bambury argues that the agency relationship was personal to himself, as principal, and the defendant, as his agent. He seeks relief both in contract and in equity. Mr Jensen was entrusted with Mr Bambury's art for sale and he was entitled to 40 per cent commission on the sale. He further argues that he had the contractual obligation to pay Mr Jensen 40 per cent of the sale price and that Mr Jensen, as the immediate recipient of the sale price, was entitled to discharge Mr Bambury's obligation by taking the 40 per cent commission.

[31] The contention for Mr Bambury is that the balance of 60 per cent was his property and could not be expended for any other purpose. It had to be held in trust, pending payment to him. This trust obligation was consistent with, but separate from, the common law terms of the agency. Their mutual trust was a trust obligation, a fiduciary obligation, enforceable by equitable remedies. Failure to pay the purchase price monies, after deduction of the commission, was a breach of equity, from which s 21 of the Limitation Act 1950 exempted such enforcement from the six-year limit. Thereby Mr Bambury is able to seek an account from Mr Jensen right back to the commencement of the agency relationship.

[32] It is necessary to resolve the conceptual divides before examining the particular disputes.

The parties to the agency

[33] The character of and parties to the agency relationship are best examined chronologically.

Before Unovis Limited

[34] This was a personal agency between Stephen Bambury and Andrew Jensen. It had no special terms. It can be analysed as a typical artist/gallery relationship in New Zealand.

Burdens and benefits of the relationship

[35] The burden of the contract for the artist is to provide works to the agent and pay commission on his sales. The burden of the contract for the agent is to promote the sale of the works and pay the purchase price, net of the commission, to the artist.

[36] The benefit of the contract to the artist is that the agent has an incentive to promote the quality of the artist's work and to sell the artist's work for as good a price as the market will deliver. The benefit of the contract to the agent is the commitment of the artist to provide quality art works.

[37] An artist may have a primary agent, and secondary agents. In this case, Mr Jensen was the primary agent. This was a significant benefit to him as Mr Bambury was (and is) a leading contemporary artist in New Zealand.

[38] I reject the submission on behalf of Mr Bambury that he had no obligation to consign most of his works to Mr Jensen. That submission is contrary to their long history.

[39] Usually an agency has no promised duration. Either the artist or the agent can end it at any time. Here it was ended in one email from the agent.

[40] During this relationship, however, it was in the common interest of both that almost all works were consigned to the Jensen Gallery. The accepted exception was some continued supply to Jonathan Smart in Christchurch.

After Unovis any change: The conditions of novation

[41] At common law obligations assumed by a party to a contract cannot be assigned to a third person without the party to whom the obligations are due consenting. This is explained by Lord Collins MR in *Tolhurst v Associated Portland Cement Manufacturers*:[1]

> It is, I think, quite clear that neither at law nor in equity could the *burden* of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the *burden* of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor. (Emphasis added.)

[42] The requirements of this comprehensive assignment are summed up in its very name "novation". As the name suggests, a new contract has to be agreed. Here there are *burdens* on both contracting parties, the artist and the agent. If this agency was assigned by novation, then there needs to be evidence that the *burden* of the contract was removed from the artist and assigned to Unovis. The assignment must be an agreement. The need for consent carries within it the need for a comprehension by the original parties as to what burden is being removed and to whom it is being transferred. However, as a novation is a new contract, the proper approach to whether there has been agreement is always objective.[2]

[43] The Master of the Rolls discussed the reasons for this rule. Sometimes there are assignments of a debt after the performance of the obligation has been completed. In other cases, and here, there is an alleged assignment of an ongoing set of obligations. In this latter regard, the Master of the Rolls said:[3]

> There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person. "You have a right", says Lord Denman C.J., in a passage cited by Gray J. in delivering the judgment of the Supreme Court of the United States in the case of *Arkansas Smelting*

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1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 (CA) at 668 cited in Burrows Finn & Todd, *The Law of Contract is New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [17.2.1].

2 See *Savvy Vineyards 3552 v Karaka Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [29].

3 *Tolhurst v Associated Portland Cement Manufacturers (1900)* Ltd, above n 1, at 669.

> *Co. v Belden Co.*[4], "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract": *Humble v Hunter*.[5] To sue on these contracts, therefore, the original contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts *involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable*. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than were it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for – namely, work to be executed by the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent. (Emphasis added.)

[44] Now, of course, not all of those remarks are pertinent. It is not suggested in this case that a novation is not possible. But, as I have endeavoured to explain, such novation has to demonstrably make it clear that the parties understand and so are giving informed consent to the ramifications of assigning ongoing obligations.

[45] It remains to distinguish the Supreme Court decision of *Savvy Vineyards 3552 v Kakara Estate Ltd.*[6] This was a novation case where the Supreme Court split 3:2. It is authority for the proposition that a novation can be implied. Two companies, Kakara Estate Limited and Weta Estate Limited, purchased two separate vineyard properties from a company, Vines Development Management Company Limited (the Vines). On settlement, the Vines also transferred to Kakara and Weta its interest in agreements that the Vines had entered into with Goldridge Estates Limited for the management of the vineyards and supply of grapes to Goldridge. The Vines and Goldridge were owned by the Vegar family. The family had expertise in viticulture and winemaking.

[46] The family developed the idea of selling off vineyards which would be managed by Goldridge and under grape supply agreements. Goldridge would acquire the right to acquire the grapes which were produced. The very important

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4 *Arkansas Smelting Co v Belden Co* 127 US 379 (1888) at 387.
5 *Humble v Hunter* (1848) 12 QB 310 (QB) at 317.
6 *Savvy Vineyards 3552 v Kakara Estate Ltd*, above n 2.

material fact is that the contracts between Karaka and Weta and Goldridge Estate anticipated that there could be an "assignment" by Goldridge of both its benefits and burdens under the contract. The documents therefore anticipated the type of novation that eventually occurred. The trial issue was whether Kakara and Weta assented to the novation.

[47] William Young J, for the majority, reasoned:

> [96] In the case of assignments by Goldridge to a related party, Kakara and Weta were not entitled to insist on a covenant by the assignee to adhere to Goldridge's contractual obligations. As noted, this invites the questions of whether, and, if so, how, the assignee was to become contractually committed to Kakara and Weta. For the reasons just given, it does not seem likely that the parties envisaged that the joint venture between them would proceed on the basis that the management of the vineyards in particular would be provided by an assignee with no contractual obligations to Kakara and Weta. All of this suggests that the right of assignment to a related company was envisaged as being by way of novation, with the assignee taking over the role of Goldridge.
>
> [97] That novation was envisaged is consistent with other aspects of the agreements. As we have noted, the grape supply agreements envisage that they will subsist where the buyer is not Goldridge. And both the vineyard management and grape supply agreements envisage assignment by Goldridge not just of its rights but rather of its "interest" in the agreements. Similar considerations apply to the agreements which provide for assignments by Kakara and Weta of their rights and obligations under the agreements on sale of the tied parts of their vineyards. As the *British Gas* case suggests, this is the language of novation rather than assignment. A construction of the agreements so as to permit termination if an assignor were later liquidated would have the potential to be distinctly awkward for Kakara and Weta. On the approach favoured by the Court of Appeal, Goldridge and later the Savvy companies could have disengaged themselves from the agreements at least with Weta simply by putting Vines into liquidation. And in the case of on-sales by Kakara and Weta of the tied parts of their vineyards, the possibility that later liquidation of those companies would give rise to rights of termination would be likely to cause some anxiety to prospective purchasers.
>
> …
>
> *Did Kakara and Weta assent to the novations?*
>
> [107] It is helpful to start with the contractual position as between Goldridge and the Savvy companies. The only formal documentation to which they were party were the deeds of 28 August 2009. These deeds provided for substitution of Goldridge by the Savvy companies.
>
> …

> [109] From September 2009, the Savvy companies dealt with Kakara and Weta as the successors to Goldridge. Kakara and Weta accepted the Savvy companies as Goldridge's successor. They paid invoices and then even more significantly, once the disputes arose, they dealt with the Savvy companies explicitly on the basis that they were parties to the agreements and that Goldridge was not. As earlier recorded, Mr Forlong accepted that the benefit and burden of the contracts had passed to the Savvy companies. The corollary is that the pre 1 September 2009 contractual status quo was changed. For the reasons already given, an assignment theory does not explain how the Savvy companies came to be in contract with Kakara and Weta. This necessarily means that there was a novation of some kind. So what were the terms of that novation?
>
> [110] The only terms which Goldridge and the Savvy companies offered to Kakara and Weta were those set out in the deeds of assignment dated 28 August 2009. These provided for Goldridge to be replaced by the Savvy companies. It is not possible for Kakara and Weta to accept the Savvy companies as contracting parties without at the same time accepting the only proffered mechanism by which this could be achieved.

[48] These material facts are the reverse of the material facts in this case. Far from being contemplated at the outset of the relationship, Unovis and/or Ouroborus 1 and 2 were afterthoughts, conceived by accountants, directed to obtaining tax advantages, not to assume the burdens of the artist or the gallerist. There is no evidence at all that any of the parties in this case had even heard of the term "novation" let alone, on professional advice, intended to novate the obligations/burdens of the agency to these limited liability companies.

[49] There are at least four material facts in *Savvy Vineyards* not found here:

(a) The initial management agreement with Goldridge Estates anticipated the novations.

(b) Goldridge and the Savvy companies were paid for the services they provided to Kakara and Weta. It was not a case of directing proceeds into particular bank accounts.

(c) There was no relationship of trust.

(d) Kakara and Weta clearly accepted and acted upon what was anticipated, that the Savvy companies were Goldridge's successor.

[50] I turn now to the facts of the first contended novation, Unovis.

[51] The history of Unovis is that it was a limited liability company brought into being on the advice of Mr Bambury's accountant for his purchase of his Shaddock Street studio building in 1992. In or around 2000, his accountant advised him that the income from his paintings should also go through Unovis because managing provisional tax was difficult given his income fluctuations. Mr Bambury's evidence was:

> I told Andrew what my accountant had advised and why, and to now pay me the proceeds from the sales of my works into my Unovis bank account. I did not tell Andrew that he now represented Unovis instead of me. To the contrary, I told him that this did not alter our arrangements; Unovis was just an existing vehicle my tax accountants had recommended the payments for my paintings be paid into. I have never sold a painting under the name Unovis. All of my work is sold personally. The company has no public art profile.

[52] Mr Bambury was cross-examined on this evidence as follow:

> Q After that discussion your instruction was that all of Jensen Gallery's documents needed to refer to Unovis.
>
> A No that's completely wrong.
>
> Q As the vendor of the art.
>
> A That's completely wrong.
>
> Q But we've seen a number of instances Mr Bambury where you have directed the gallery to pay the sale proceeds due to you into Unovis' account.
>
> A I believe we've had two in the course of my cross, one was an invoice which I furnished to Andrew Jensen after termination, on that painting there, *At the Same Time a New Beginning*, and the other one was to do with the commission I undertook with Roller Mills which I undertook under Unovis, but I don't think there are any others.
>
> Q Those were certainly two of the sales that were made in Unovis' name Mr Bambury weren't they?
>
> A No I haven't been paid for that painting. It's damaged beyond repair. It's not been sold.
>
> Q I understand that but my point was simply to record that I agree with you, we have talked about those two transactions which were in the name of Unovis Limited.

A That is correct, that's correct.

Q My point was that you also explained in that discussion to Andrew that he needed to pay the sale proceeds to Unovis Limited.

A That was what the conversation was actually about.

Q Unovis, not you, was to be treated as the seller of the works to whom the gallery paid all of the proceeds going forward conversationally wasn't it?

A Well if that had been the case I would have signed the paintings Unovis.

Q But Unovis is not the artist of the painting Mr Bambury, you are. We all accept that don't we?

A Yes I think we do.

Q But you signed those paintings in your capacity as an employee of Unovis with Unovis being the party that gets the proceeds of sale, correct?

A The last part was, the second part was completely incorrect. Or one part was correct, the other part was wrong.

Q Now Mr Jensen also later on in your relationship took the step to incorporate a limited liability company in the name of Ouroborus, do you understand that?

A I understood what you said.

Q And is it your evidence that you were not aware of that happening at the time?

A Completely unaware of it. I didn't find out about this until post-termination.

Q Can you take volume 3 please and turn to page 1285. Have you got that page Mr Bambury?

A 1285.

Q Mhm.

A Yes I do, thank you.

Q This is an extract from the general ledger that your accounts prepared for the year ending March 2008 isn't it?

A It doesn't have their name on it but it certainly looks as though it would be.

Q The general ledger is for Unovis Limited isn't it?

A Yes.

Q And if you look down to the bottom third of the page you'll see there an entry with a heading, "Sales", in the middle column, do you see that?

A Sorry where am I trying to find this?

Q If you look down the description column to about a third from the bottom you can see a bold heading that says, "Sales?"

A Yes I can, thank you.

Q Do you see that?

A Yes.

Q And if you look down to the last three entries on that page you can see that there is a reference to Ouroborus Lim, can you see that?

A I can.

Q And if you turn over the page you can see that there's a substantial number of other sale entries also with that name?

A I can.

[53] In support of the novation, Mr Harley submitted that in this case there were three facts necessary to be established:

(a) there has been an annulment of a liability;

(b) the creation of a substituted liability in its place; and

(c) the consent of all parties to the original contract.

This formulation is not complete. It also requires the consent of the new party or parties to the novated contract.

[54] Mr Harley relied particularly on the question and answers set out above and then submitted:

> Regardless of whether Mr Bambury said "it did not alter our arrangements", the legal and practical effect of that request was to extinguish the liability of Jensen Gallery to pay Mr Bambury and to create a new agreement with Unovis as the owner/seller of the works.

> Jensen Gallery's consent to that change can be inferred from its conduct. It put in place the necessary systems to effect Mr Bambury's request, including paying the proceeds of the artwork sales into Unovis' bank account.

[55] Mr Harley went on to submit that there were numerous documents that showed that Mr Jensen, his assistant Miss Fox, and other gallery staff were mindful that it was Unovis, not Mr Bambury, that was to be paid. I agree.

[56] But, on the other hand, there were very few documents ever suggesting that it was Unovis Limited, rather than Mr Bambury, who was the principal of the agency contract.[7]

[57] All payments were subsequently put through Unovis' books. Yet Unovis was not recognised in the Jensen Gallery payment advice. These forms changed a little over the years. But to take a typical example, the form in 2004 has the following entries to be completed:[8]

Artist
Title
Stock number
Medium
Purchaser
Sale price
Date of payment to gallery
Date of payment to artist
Amount to artist
Gallery commission
Cheque number.

[58] The principal argument in support of the novation was that:

> The request and subsequent change in practices cannot be regarded as a mere payment direction by Mr Bambury.
>
> (i) In order for Unovis to legitimately be able to account for sale proceeds of all Mr Bambury's artwork it must be the art vendor. If not, the very reason he said he made the change (to avoid difficulties associated with managing provisional tax) could not be achieved.
>
> (ii) The art work has to become the property of the company for it to be able to claim GST and report the income from the sale.

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7 On one occasion a studio assistant of Mr Bambury, Kane Goulter, signed off Unovis Limited in his email to Andrew Jensen, attaching an installation image of a work, signing it "Kane Coulter, studio assistant, Unovis Limited". This is inconsequential.

8 CB 0657.

(iii) On the two occasions where Mr Bambury invoiced directly (Manson – Roller Mills) and to the Gallery for the damage to Slipped Cross, the documentation makes it clear that Mr Bambury held out Unovis not himself as the owner of those works.

[59] It would not be the first time that the tax treatment of a transaction might not conform to the binding relationship between the parties. I know of no authority on novation which tests its efficacy by reason of the internal management of one of the parties. At the time the alleged novation is said to have taken place, there were no records of Unovis as to execution of the novation. The statutory efficacy of the arrangement between Mr Bambury and Unovis Limited is a matter for the regulatory authorities and does not govern the common law of novation. At best the books of Unovis can be used as circumstantial evidence in support or against the conduct of Mr Bambury with a third party, in this case, Jensen Gallery. In this regard, the books of Unovis are consistent with Mr Bambury's advice to Mr Jensen at the time. The artworks created by Mr Bambury are not listed in the assets and liabilities statements. Unsold artworks are not listed as assets of the company. It is only revenue from sales which is entered in the income statement.

[60] As between the artist and the gallerist, the artist advised the gallerist to direct payments to Unovis Limited and the gallerist agreed. There is no suggestion in that evidence of novation. Indeed, everything is to the contrary. There was no practical disturbance of the essentially personal character of the relationship between Mr Bambury and Mr Jensen, including the obligations owed by Mr Jensen to Mr Bambury and Mr Bambury to Mr Jensen.

[61] This litigation is the outcome of a mutual loss of personal confidence between the artist and the agent and has nothing to do with the viability or otherwise of the three limited liability companies involved.

[62] Guided by the definition and supporting dicta of Lord Collins MR in *Tolhurst*, I am of the view that the informal redirection of payments and the agreement of Mr Jensen to so direct payments, was not a novation. The three occasions, amidst a multitude of transactions, in which Mr Bambury raised invoices in the name of Unovis, were not of themselves a novation and could not be and do not function as sufficient evidence to displace the plain and unchallenged content of

his discussion with Mr Jensen of his intended use of Unovis, the reasons for it and what he required of the gallery: solely that the payments be deposited to the bank account of that company.

[63] Mr Harley accepted that if he did not establish a novation in respect of Unovis, he did not have any stronger argument in respect of Ouroborus 1 and Ouroborus 2. In likewise manner, Mr Jensen had advised Mr Bambury that he was putting his business through the books of these two limited liability companies and it was deposits from these companies into Unovis' bank account which discharged the obligation of Mr Jensen as agent to pay the balance of the purchase price after taking the authorised commission.

[64] The effective principal and agent relationship remained personal between Stephen Bambury and Andrew Jensen. It was, for all sorts of reasons, of which this judgment will reflect many incidental examples, one which depended on personal mutual confidence and trust and, indeed, was so symbiotic that it has some characteristics of a partnership. Mr Jensen was not simply a factor or mercantile agent. He personally, astutely, and with considerable sophistication, promoted his artist, Mr Bambury, both in New Zealand and abroad. Many instances of that appear in this judgment, which I leave the reader to find as I progress through the resolution of the disputes between the two men which followed upon the breakup of their relationship.

[65] I record that following the hearing, the plaintiff invited the Court to add Unovis as a party in the event I found novation. By the time I received that invitation, I had already determined that the contract was not novated and therefore declined to add Unovis.

The terms of the arrangement between Mr Bambury and Mr Jensen

[66] Keeping in mind the qualifications above, it is useful to now consider the plaintiff's general contentions of Mr Jensen's obligations. A significant dimension of the plaintiff's case is that, as a fiduciary, Mr Jensen had certain strict obligations.

[67] As Millet LJ noted in *Paragon Finance Plc v DB Thakerar & Co*, there is a distinction between an agent having fiduciary duties and an agent having a trust obligation to keep the trust assets separate. [9] It is commonly accepted that agents in the position of Mr Jensen have fiduciary obligations. The issue is always on the facts, the extent of them. To be discussed later in this judgment is whether these fiduciary obligations engender equitable remedies and, if so, what type of equitable remedies.

[68] The relationship between the contractual character of any agency and the notion of fiduciary obligation as independent of a contract is subtle. As the latest edition of *Bowstead and Reynolds on Agency* acknowledges,[10] the law recognises that agency is a contract made between principal and agent and, like every other contract, the rights and duties of the principal and agent are dependent on the terms of the contract between them, whether express or implied.[11] As noted above, the notion of fiduciary obligation is independent of the contract in the sense that it is not a contractual obligation. Rather, it derives from the law recognising the need for a degree of supervision to protect the principal.

[69] The regular recognition of fiduciary duties is a rule of recognition of a fiduciary relationship informed by the contractual terms of the parties, but not limited thereto:[12]

> [A fiduciary] is, simply someone who undertakes to act for or on behalf of another in some particular matter or matters. That undertaking may be of a general character. It may be specific and limited. It is immaterial whether the undertaking is or is not in the form of a contract.

[70] The plaintiff's counsel listed Mr Jensen's fiduciary obligations as follows:

(a) To act in good faith and in the plaintiff's best interests, including:

(i) when acting on his behalf;

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9 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA).

10 Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (20th ed, Sweet and Maxwell, London, 2014) at [6-035].

11 *Kelly v Cooper* [1993] AC 205 (PC) at 213-214 per Lord Browne-Wilkinson.

12 P D Finn, *Fiduciary Obligations* (The Law Book Company, Sydney, 1977) at [467].

(ii) dealing with his artworks and sale proceeds;

(iii) purchasing the plaintiff's artworks; and

(iv) entering into any transactions with the plaintiff (set-offs, contras and trade-ins).

(b) To avoid conflicts of interest unless with the plaintiff's consent.

(c) To receive the proceeds of sale of the artworks on trust for the plaintiff and to account to the plaintiff for them (less commission).

(d) To maintain and retain appropriate records of the plaintiff's artworks.

(e) To keep accurate accounts of all transactions entered into on behalf of the plaintiff in respect of the artworks and be ready with correct accounts of all dealings and transactions in the course of the agency.

(f) Not to purchase the artworks himself and to on-sell them for his own benefit.

(g) To deliver up to the plaintiff on demand, or on termination of the agency, any of the plaintiff's property in his possession.

[71] Proposition (f) is controversial. Otherwise these are contractual and fiduciary obligations. This is not a trust relationship in the purest sense of the word, as it is intended that the gallery profit from the sale of the artist's works. There are characteristics of partnership about their relationship. Mr Jensen was a very successful promoter of the artist's work.

[72] There were occasions in their relationship when Mr Bambury, as artist, owed the gallery funds. For instance, when Mr Bambury won the Roller Mills commission, he was paid directly by Mason Developments and he agreed that he owed commission to the agent, the monies not passing through the agent's hands.

[73] The obligations set out above are consistent with the normal contract terms and usages between the artist and the agent, as discussed at the start of this judgment.

[74] Part of the plaintiff's case is, however, that on no account, on no basis, was Mr Jensen ever entitled to make a profit, as distinct from obtaining commission on the works of Mr Bambury, the artist. For example, by buying a work of Mr Bambury on the secondary market and selling it for a profit. This contention is controversial.

[75] Mr Langton relies on the leading case of *Regal (Hastings) Ltd v Gulliver*.[13] In this case, the defendants were directors of a company. The company owned a cinema in the town of Hastings. The directors of the company wanted to acquire two other cinemas in the town, with a view to an eventual sale of all the assets. The original intention was that the appellant company would hold all the shares in a subsidiary company which would acquire these other two cinemas. For various financial reasons, that could not be worked out. The directors ended up holding 3,000 shares in the subsidiary company. The venture made a profit but the directors, as fiduciaries, were obliged to account for the profit. The profit was realised by sales of shares in the company, not by sales of the company. The case was underpinned by the axiomatic principle that directors of a company are fiduciaries in respect of the company.

[76] Here it is critical not to lose sight of a core fact in the relationship between an artist and his principal gallery; the relationship has characteristics akin to a partnership and has characteristics akin to a joint venture. A quality gallery plays a significant role in promoting the artist. Both principal and agent are separately rewarded by the sales of works on a 60:40 split. That core aspect of the relationship triggers a common interest of principal and agent in the market value of the artist's works. That in turn means that there is often a common interest in maintaining the market value of works that are being resold. This interest can be pursued by purchasing works when they come back onto the open market. Once purchased back by the gallery, is the gallery expected to absorb that cost and not be able to re-sell? A

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[13] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL).

common interest of this nature was not present in the facts of *Regal (Hastings) Limited v Gulliver*.

[77] The defendant's counsel used these joint venture facts to argue against a true fiduciary obligation and so against equitable remedies. That is a very respectable argument. It has been met with what I see as a "pure" argument of a fiduciary nature as applying to this agency so that, for whatever reason, on no account is it said must the gallery make a profit as distinct from simply obtaining 40 per cent commission on sales made. Therefore, one of the terms is that the gallerist is not allowed to purchase the artworks of the artist and to on-sell them for his own benefit, for whatever reason, and to avoid conflicts of interest unless with the plaintiff's consent.

[78] No one suggests that the principal gallery here, or commonly in New Zealand, must sell only works of one artist. The gallery will always be selling works of a number of artists. These works will be competing with each other for appeal. Collectors visiting a gallery will expect to see a range of works on sale.

[79] I will return to this common interest and conflict of interest when analysing some disputed purchases by the gallery of the artist's work and on-sale, particularly one to a public art gallery. It is sufficient to distinguish *Regal (Hastings)*. Whatever the fiduciary duties of the gallery in a particular instance are, they are not comparable to the duties of directors of a company.

[80] As already noted, none of the remaining transactions which are in dispute between the parties were run of the mill. Either the transaction itself or its timing or complexity has an extraordinary quality. By "an extraordinary quality", I mean, a context not anticipated in the usual terms of trade between the artist and the agent. Because of these extraordinary facts, it was necessary for Mr Bambury and Mr Jensen in each instance to reach an agreement accommodating each other's interests and consistently these disputed accounts, by and large, reflect a failure to do so. The fact that they remain unresolved, and both parties knew they were unresolved, places these disputes inevitably as not sufficiently significant to bring either party to the point of terminating what was essentially a very mutually advantageous relationship. But when the relationship ended, these disputes, which

had never been settled or abandoned wholly, were revived. Because they were extraordinary, there were no set terms or customs or trade usages which pointed to the immediate solution so the outcome was either a settlement, an arbitration, or a High Court action.

***Barkley v Barkley Brown* – the duty to account**

[81] I turn back to Mr Langton's list of obligations, a number of the plaintiff's claims centre on records, obligations (d) and (e):[14]

> (d) To maintain and retain appropriate records of the plaintiff's artworks;
>
> (e) To keep accurate accounts of all transactions entered into on behalf of the plaintiff in respect of the artworks and be ready with correct accounts of all dealings and transactions in the course of the agency.

[82] Mr Langton submitted there is an absolute duty to account whether or not records are available. He relied upon the law as applied in *Barkley v Barkley-Brown.*[15]

[83] Mr Barkley was one of the beneficiaries under the will of the deceased, the late Ms Farrell. He sought an order that Mrs Barkley-Brown account to Ms Farrell's executors in respect of money withdrawn from Ms Farrell's bank account over the period of February 1999 to 2005, during which time Mrs Barkley-Brown had possession and/or use of Ms Farrell's bank passbook. Mrs Barkley-Brown was Ms Farrell's niece and closest living relative.

[84] It was accepted that Mrs Barkley-Brown used Ms Farrell's bank passbook over the period 1998 to around 2003. She said Ms Farrell instructed her to draw money from her bank account for various housekeeping, pharmaceutical or other requirements and occasionally to purchase shares or investments. She said at the beginning she wrote notations in the bank passbook for the purpose of the withdrawals but that on an occasion Ms Farrell said, "For goodness sake, dear, just put it in the safe. No need to write things in". When Ms Farrell entered a nursing home, Mrs Barkley-Brown gave evidence that she was instructed by Ms Farrell to

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14 See [70] above.

15 *Barkley v Barkley-Brown* [2009] NSWSC 76.

use the bank book whenever she needed to buy anything for her - nursing fees and bills or clothes etc.

[85] It was not disputed that Mrs Barkley-Brown withdrew a considerable amount from Ms Farrell's account over the period from 1999 to 2005. Mrs Barkley-Brown was able to identify a number of specific disbursements. Mr Nelson, Ms Farrell's accountant, reviewed the passbooks and noted what he saw as an extraordinary number of withdrawals from the account, which were not consistent with his client's spending and saving habits.

[86] The application to account was based on Mrs Barkley-Brown acting in a fiduciary capacity for Ms Farrell. The application was opposed on the basis, among other things, that the accounts would relate to an excessive period, from February 1999 – eight years from commencement, now ten years ago – and would involve an examination of approximately 840 items. That there were inadequate records to enable Mr Barkley or Mrs Barkley-Brown to identify the items to be included in any account.

[87] Ward J, in the Supreme Court, Equity Division, found that Mrs Barkley-Brown was the agent of Ms Farrell and had a fiduciary duty to account. He held that her first duty was to keep, at least when requested, a clear account of the monies passing through her hands, citing *Pearce v Green*:[16]

> It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect, as was remarked by the Lord Chancellor in *Lord Hardwicke v Vernon*.[17] They all stand in the same situation, to be constantly ready with his accounts.

Second:[18]

> An agent who fails to render an account when called upon to do so will be in breach of that duty.

He cited the decision of *Yasuda Limited v Orion Underwriting Limited*:[19]

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16 *Pearse v Green* (1819) 1 Jac & W 135; 37 ER 327 at 140, 329.
17 *Lord Hardwicke v Vernon* 14 Ves. 500 and see *White v Lincoln* 8 Ves 360.
18 *Barkley v Barkley-Brown*, above n 15 at [101].
19 *Yasuda Limited v Orion Underwriting Limited* [1995] QB 174 (QB) at 185-186.

> Because the agent's duty to provide records of transactions to the principal is founded on the entitlement of the principal to the records of what has been done in his name, termination of the agent's authority to enter into further transactions should have no bearing on the continuance of the duty to provide pre-existing records pertaining to the period when transactions were authorised. Accordingly, in the absence of express agreement to the contrary, the agent's duty to provide to his principal the records of transaction effected pursuant to the agency must subsist notwithstanding termination of the agency's authority. That, as I have held, is a duty that is imposed by law in consequence of the existence of the agency relationship and is not founded on the existence of a contract of agency.

[88] That led to Ward J's conclusion that Mrs Barkley-Brown had a duty to keep proper records so she could, if called upon, account for all funds withdrawn by her.

[89] The Judge accepted that Mrs Barkley-Brown had not deliberately destroyed any documents. However, he did go on to say:[20]

> If Mrs Barkley-Brown cannot not account for transactions because of a lack of records which she could easily (and as an agent should) have kept, it seems to me that a presumption that the records would not have assisted her may well be available.

[90] The Judge did not, on the facts of that case, have to draw that inference.

[91] Mr Langton argues that this reasoning should apply right back to 1995 so that where Mr Jensen cannot produce a written record, for example a receipt from Mr Bambury of a cash payment, or a written acknowledgement that the proceeds from the sale of a particular painting had been applied by agreement to an extraordinary expense as agent, such as towards the production of the Monograph, that the onus of proof should be reversed and placed on Mr Jensen to prove the account.

[92] The Jensen Gallery maintained two sets of records relevant to the sales of the works of Mr Bambury. One was a stock list and internal ledger which recorded sales, receipts and payment. The second was a payment notice which recorded the sale of the work, the receipt of the purchase price and the payment to the artist.

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[20] *Barkley v Barkley-Brown*, above n 15 at [130].

[93] Neither document contains a receipt or acknowledgement from the artist of being paid. The artist, however, receives the notice of payment which contains advice as to the date on which he would be paid. Typically this is a couple of days or so after the date recording receipt of the purchase price.

[94] Mr Bambury kept a private ledger where he tracked the notice he received of sales, the details of the sales and the commission he was expecting against deposits to his bank account. It is obvious, if only because of the duration of the partnership that this process served him adequately. Frequently he checked these notices against deposits into Unovis' bank account.

[95] I am satisfied that, in normal circumstances, the gallery held a consignment note of the work received from Mr Bambury, a record of the sale, the commission and payment to Mr Jensen, and bank records dating at least seven years.

[96] It is one thing for this Court to recognise the fiduciary character of the obligations of the agent. It is another to impose perfect standards of bookkeeping to both of the parties over a long and strong relationship of mutual trust and confidence. Because the material facts are different, the *Barkley-Brown* case does not assist the Court.

The limitation issues

[97] It is common ground that if legislation applies, it is the Limitation Act 1950, rather than the 2010 Act. These proceedings were commenced in 2013, with the consequence that if the plaintiff's claims are in contract only, that is, common law claims, then Limitation Act 1950 excludes all claims arising more than six years prior to the commencement of the proceedings on 13 September 2013, that is, prior to 13 September 2007.

[98] Of the 40 odd outstanding disputes, only four date after September 2007.

[99] If, however, the plaintiff has relief in equity, then the six year time limit does not apply, except insofar as any provision of equitable relief would be applied by a Court in equity in like manner to common law relief. And, furthermore, if the action

is in respect of any equitable fraud (which does not mean fraud in the common law sense, equitable fraud is broader), or if the action is to recover trust property, then no period of limitation shall apply. The relevant provisions are s 4(1)(a), (2), (9) and s 21(1):

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act [or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005], the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
>
> (a) Actions founded on simple contract or on tort:
>
> …
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.
>
> …
>
> (9) *This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.*
>
> **21 Limitation of actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[100] The relationship between a gallery and its artist is contractual as well as having a fiduciary character. Where an artist's claim against the gallery does not rely upon breach of an equitable obligation, here a fiduciary obligation, then the six year limitation period will apply. The function of s 4(9) is to capture the policy that:[21]

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[21] *Halsbury's Laws of England* (5th ed, 2008) vol 68 Limitation Periods at [919]. See *Laws of New Zealand* Limitation of Civil Proceedings at [19]. See, for application, *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 544.

> Where the same facts which are relied on for alleging breach of contract … are also relied upon for alleging breach of fiduciary duty, the Limitation Act will apply to the claim in equity.

Tipping J in *Matai* found that the cause of action against the receiver for negligence "is exactly coincidental with part of the first cause of action in respect of the negligent conduct of the receivership". He went on to find that it was "highly inequitable that … a plaintiff in equity could circumvent the barring [by the Limitation Act] of his cause of action in law".[22]

[101] The plaintiff's claim from the outset has been that this is an action for equitable remedies. That the defendant is in breach of fiduciary obligations to the plaintiff.

[102] The defendant's argument from the outset is that the relationship extends no further than the contract and that while the defendant is a fiduciary, he does not hold the proceeds of sale of the works on trust on behalf of the artist. This is because under the terms of his contract with the artist, the gallerist is entitled to deposit the proceeds of sale into his general business account, so mixing the proceeds with other monies. This ability is said to be fatal to the claim that the proceeds are held on trust, as if Mr Jensen held the proceeds on trust, he could not use them in any way to his personal advantage.

[103] The defendant says that the relationship between the artist and the gallery in this case is at all times contractual. There is no concomitant fiduciary obligation owed by the gallery to the artist. Whereas, the plaintiff argues that there are two consistent but separate relationships. One is the contractual arrangements between the artist and the gallery. The second is the fiduciary obligations of the gallery which attach both to the artist's works in possession of the gallery and to the proceeds from the sale of those works.

[104] In response to that, the defendant says that the custodial obligations of the gallery for the artist's works pre-sale are covered by the common law of bailment.

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[22] At 544.

[105] I have already rejected the proposition that some of the gallery's obligations do not have a fiduciary character. But it does not follow that all fiduciary obligations and breach thereof warrant or entitle the artist to the full range of equitable relief. Equity responds to particular facts, as I will discuss later. But there is an issue as to whether it is possible for the artist to maintain a claim of a proprietary character over the proceeds of sale of a work and this is a major issue between the parties. It is directly related to resolution of the limitation issues.

[106] The plaintiff's argument rests on the material fact that the artist's works remain the artist's property until they are sold. The plaintiff's argument does not dispute the existence of the law of bailment but says that in this case the obligation of custody is coupled with a trust obligation which sits alongside but is independent of the bailor/bailee obligations.

[107] Mr Langton cited the dictum of Asquith LJ in the case of *Reading v R* where Asquith LJ said a consideration of the authorities suggest that for the present purpose a fiduciary relation exists: [23]

> (a) Whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information and relies on the defendant to deal with the property for the benefit of the plaintiff, or for purposes authorised by him, and not otherwise …, and
>
> (b) Whenever the plaintiff entrusts to the defendant a job to be performed, for instance the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available …

[108] Mr Langton submitted both branches of this definition of "fiduciary" apply here.

[109] Mr Harley relied upon a dictum by Millet LJ which, at the minimum, qualifies this definition of Asquith LJ. Millet LJ's dictum comes in the case of

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[23] *Reading v R* [1949] 2 KB 232 (CA) at 236.

Paragon Finance Plc v DB Thakerar & Co.[24] The plaintiffs had commenced proceedings against the defendants alleging breach of contract, negligence and breach of fiduciary duty. Subsequently, after more than six years had elapsed since the last transaction and so outside any applicable limitation period, the plaintiffs sought to amend their pleadings in order to allege fraud, conspiracy to defraud, fraudulent breach of trust and intentional breach of fiduciary duty. The defendants had acted for both the plaintiff mortgage lenders and the borrowers from the plaintiffs in relation to the purchase and mortgage of a number of flats. On the facts, there was both a sale of a flat and then a sub-sale. In other words, two transactions but at significantly different prices. The borrowers were the sub-purchasers, that is, the purchaser who purchased from the sub-vendors, being the persons who had originally purchased. The sub-purchasers were applying for a mortgage advance in amounts and purporting to buy the flats at prices which were significantly higher than the corresponding prices paid by the first purchaser, the sub-vendor. The solicitors did not inform the mortgage lenders of that fact. So they lent unaware that it was a sub-purchase at a much higher price.

[110] The solicitors had been retained on terms which required them to advise the lenders of any sub-sale. They did not. The original proceedings did not allege fraud. It was held on the facts that these amendments were now alleging intentional wrongdoing which is a distinct cause of action. Leave could only be granted if the pleading involved substantially the same facts. Because of the new pleading of intention, leave to amend was refused.

[111] In the course of his reasoning, Millet LJ dealt with an argument that because the conduct of the lawyers was a breach of fiduciary duty, it was outside the Limitation Act anyway and not subject to any period of limitation. He rejected that argument because he found, in the circumstances, while the defendant's solicitors had fiduciary obligations, the solicitors had no fiduciary or trust obligations in regard to the money.

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[24] *Paragon Finance Plc v DB Thakerar & Co,* above at n 9.

[112] Millet LJ reasoned by critiquing a decision relied upon by the plaintiffs, *Nelson v Rye.*[25] Millet LJ considered that decision was not on point and, in any event, was wrongly decided.

[113] In *Nelson v Rye* the plaintiff was a solo musician who appointed his manager on terms that he would collect the fees and royalties which were due to the plaintiff, pay the plaintiff's expenses and account to him *annually* for his net income after deducting his own commission. The Judge in that case had held that the defendant manager's failure to account was either a breach of fiduciary duty which fell outside the Limitation Act or a breach of constructive trust which fell within s 21 of the Act (the same number as our Act).

[114] Millet LJ said: [26]

> The law on this subject has been settled for more than a hundred years. An action for an account brought by a principal against his agent is barred by statutes of limitation unless the agent is more than a mere agent but is a trustee of the money which he has received.

He also said:[27]

> Accordingly, the [manager's] liability to account for more than six years before the issue of the writ in *Nelson v Rye* depended on whether he was, not merely a fiduciary (for every agent owes fiduciary duties to his principal), but a trustee, that is to say, on whether he owed fiduciary duties *in relation to the money*. (Emphasis in the original.)
>
> Whether he was in fact a trustee of the money may be open to doubt. Unless I have misunderstood the facts or they were very unusual it would appear that the defendant was entitled to pay receipts into his own account, mix them with his own money, use them for his own cash flow, deduct his own commission, and account for the balance to the plaintiff *only at the end of the year*. It is fundamental to the existence of a trust that the trustee is bound to keep the trust property separate from his own and apply it exclusively for the benefit of his beneficiary. Any right on the part of the defendant to mix the money which he received with his own *and use it for his own cash flow* would be inconsistent with the existence of a trust. So would a liability *to account annually*, for a trustee is obliged to account to his beneficiary and pay over the trust property *on demand*. The fact that the defendant was a fiduciary was irrelevant if he had no fiduciary or

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25 *Nelson v Rye* [1996] 1 WLR 1378.
26 *Paragon Finance Plc v DB Thakerar & Co,* above n 9 at 415, line (h).
27 At 416.

> trust obligations in regard to the money. If this was the position, then the defendant was a fiduciary and subject to an equitable duty to account, but he was not a constructive trustee. His liability arose from his failure to account, not from his retention and use of the money for his own benefit, for this was something which he was entitled to do.
>
> (Emphasis added.)

[115] Mr Harley emphasised the proposition that it is fundamental that the trustee be bound to keep the trust property separate from his own and apply it exclusively for the benefit of his beneficiary.

[116] Lord Millet is a master of equity. His observations are to be given the greatest weight. But, like all judgments, his observations have to be read in the light of the material facts. The material facts in *Nelson v Rye* were that the agent was obliged to account only once a year, "only at the end of the year".

[117] On the evidence before me the norm was for Mr Bambury to receive reasonably prompt payment from the gallery. Both Mr Jensen and Ms Fox, whose evidence I accept, said that the gallery would settle accounts with their artists for sales promptly, not on the very day of the sale, that being usually impracticable. As this judgment records, the Court has examined many gallery advices of sale and payment. Frequently the payment was made two days after receipt of the purchase price.

[118] On the expert evidence, prompt payment was and is the customary norm in New Zealand. I conclude that it was an implied term that the sale proceeds, (net of commission), were to be paid promptly.

[119] Whether an agent holds proceeds on trust does not depend upon a positive duty to bank the proceeds into a trust account. There is a distinction between banking the proceeds of a sale into a general bank account and using the funds banked for the benefit of the gallery rather than the artist. Of course, when the money is banked in, it is mixed immediately. It cannot thereafter be kept separate. Nor can it be said that it is being used if there are drawings against that account. It is trite law that a trust obligation in respect of funds is not lost if the funds are mixed.

See *Re Hallett's Estate* and also Lord Millet in *Foskett v McKeown.* [28] I note this reasoning is also consistent with a case recently brought to my attention, *Re Lehman Brothers International (Europe)*.[29]

[120] Equity looks at all the facts. In my view, the facts in *Nelson v Rye*[30] were materially different – as the agent accounted only once a year. That fact made necessary Millet LJ's conclusion that the agent could use the royalties as part of his own cashflow during that year and so did not hold the funds upon a trust for the artist.

[121] It is a classic illustration of the law of equity, looking at all the material facts affecting the relationship, then recognising or not a trust relationship.

[122] In *Phipps v Boardman* Lord Upjohn said: [31]

> The facts and circumstances must be examined carefully to see whether in fact a purported agent or even a confidential agent is in a fiduciary relationship to its principal. It does not necessarily follow he is in such a position. (See *In Re Coomber*).

[123] In *Re Coomber*, Fletcher Moulton LJ said:[32]

> There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

[124] The law of equity is quite settled in this respect: that one must look at all the facts before judging the existence and quality of a fiduciary obligation arising in a context of agency or otherwise.

[125] Accordingly, the issue in this case is not whether the gallery had fiduciary obligations but whether the gallery's fiduciary obligations were such that the proceeds of sale remained the property of the artist, to be handled accordingly.

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28 *Re Hallett's Estate* (1879) 13 ChD 696 (CA) and *Foskett v McKeown* [2001] 1 AC 102 (HL).

29 *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) at [250]-[260], on appeal *Re Lehman Brothers International (Europe) (in administration)(No 6)* [2011] EWCA Civ 1544, [2012] 2 BCLC 151 AT [68].

30 *Nelson v Rye*, above n 25.

31 *Phipps v Boardman* [1967] 2 AC 46 (HC) at 127.

32 *Re Coomber* [1911] 1 Ch 723 (CA) at 729.

[126] The critical criterion, consistent with Millet LJ's ANALYSIS in *Paragon*,[33] once the facts of *Nelson v Rye*[34] are kept in mind, is that an agent is a trustee only where the contractual terms of the agency forbid the agent to obtain any use or benefit from the proceeds of sale, net of the commission.

[127] That is the case here, there is nothing in the customary usages or in the evidence of the two experts to suggest that the galleries were entitled to use and obtain benefit from the net sums due to the artist after payment.

[128] I do not agree, however, with Mr Langton's submission that because the agent is a true trustee of the net proceeds of sale, therefore the agent must bank the funds into a separate bank account. On the evidence before me, the artist and gallery customs in New Zealand do not require that of the gallery. Some galleries may operate that way. As explained, the existence of a trust does not depend on an express contractual term to maintain separate bank accounts. That the agent has a true trust obligation in respect to the net proceeds is founded upon the fact, undisputed, that the artist's work in the gallery for sale, or sold from the artist's studio, remains the property of the artist until the point of sale when the personal property rights in the art pass to the buyer, not through the agent. The proceeds do not in any way belong to the agent. When the proceeds are, then and only then the agent has the right to take his commission from that property owned by the artist, the purchase price. The agent then has the obligation to pay the balance promptly, not use it as working capital. For the balance is the property of the artist, held in trust by the agent.

[129] Depending on the particular facts, it is possible for a Court to find that the plaintiff's claim is in equity for equitable relief by reason of the trust obligation described in [128] above or the plaintiff's claim can be met by application of the law of contract.

[130] Where the gallery's dealings with the artist are consistent with the contract between them, the question of equitable remedies may not arise. In case of a breach,

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33 *Paragon Finance Plc v DB Thakerar & Co*, above at n 9.
34 *Nelson v Rye*, above at n 25.

the remedy may sound in contract without the need for an equitable remedy. Take as an example a sale of a work, followed by advice of sale, purchaser, price and receipt of payment. If the payment is not made, an action can be brought in contract for the payment, net of commission, based upon proof of non-payment, without proof of breach of fiduciary obligation.

[131] Alternatively, there may be a case where a gallery fails to account at all so that the artist does not know the work has been sold and the gallery enjoys the benefit of the proceeds of sale. That enjoyment has the gallery as a fiduciary making a profit. The claim may not be made for many years out of ignorance.

[132] In such a case, the plaintiff will rely upon the conduct of the gallery not needed for the contract claim. This can be either unconscionable dealings by the agent, or breach of trust obligations.

[133] I do not think that in this case it is possible simply knowing the terms of the contract and the character of the relationship to find in advance whether s 4(9) and/or s 21(1)(a) or (b) of the Limitation Act apply and there is no limitation period or whether s 4(9) means the action is barred by analogy. This is because the character of the fiduciary duty of the agent in any instance is recognised ultimately after the facts are found, when equity examines the conscionability of the agent's conduct or not as a fiduciary.

[134] Therefore I think the correct approach is to consider the character of the claim being made on a case by case basis when working through the numerous claims which have been the subject of the trial.

Laches and acquiescence

[135] Where the disputes have been left unresolved, though capable of being resolved, the question arises as to whether equity will prevent the disputes being revived many years later, outside Limitation Act periods, by reason of seeking equitable relief.

[136] The defendant pleads that the first, third, fourth, fifth, sixth and seventh causes of action are time-barred under the doctrine of laches. The pleading adds that, in the circumstances, the delay was unreasonable and has caused significant prejudice to the defendant in that, due to the passage of time since the events referred to in the first cause of action, the defendant:

(a) has ceased to operate as a sole trader, trading as Jensen Gallery;

(b) has evidential difficulties responding to all of the claims due to completeness of records and movements of employees; and

(c) in some circumstances, the events relied on occurred as long ago as 1993.

[137] The 2014 (5th ed) of *Halsbury's Laws of England* reliably sets out relevant principles of the defence of laches applicable to this case:[35]

> A claimant in equity is bound to prosecute its claim without undue delay …
>
> In determining whether there has been such delay as amount to laches, the chief points to be considered are:
>
> (a) Acquiescence on the claimant's part; and
>
> (b) Any change of position that has occurred on the defendant's part.
>
> Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the complainant has become aware of it. …
>
> The modern approach to laches or acquiescence does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases; a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert its beneficial rights.
>
> Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them. … Hence acquiescence depends on knowledge, capacity and freedom. As regards knowledge, persons cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute those claims.

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[35] *Halsbury's Laws of England* (5th ed, 2014) vol 47, Equitable Jurisdiction, at [253], [254] and [255].

> Staleness of demand … may furnish a defence. A defence based on this ground renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief. In such a case whether laches arises depends on the negligence of the claimant to enforce his rights.

[138] The Supreme Court considered the doctrine of laches in *Eastern Services Ltd v No 68 Ltd.*[36] I consider that the approach of the Supreme Court is consistent with the passage from *Halsbury's* just cited. In particular Anderson J for the Court stated:[37]

> the doctrine of laches requires a balancing of equities in relation to the broad span of human conduct. In the abstract, facts and the weight to be given to them are infinitely variable. But in a particular case they have to be identified and weighed for what they are, as a singular exercise.

[139] I consider that this is consistent with the principle stated in *Halsbury's* that "a broader approach should be adopted, namely whether it is unconscionable for the party concerned to be permitted to assert its beneficial rights."

[140] In the course of its judgement the Supreme Court also cited what it referred to as the classic exposition of the doctrine:

> [34] The classic exposition of the doctrine by Lord Selborne LC bears repetition. The part most often cited is in these terms:
>
> > Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

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[36] *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.
[37] At [37].

> [35] An authority often cited in the same breath as *Lindsay Petroleum is Erlanger v New Sombrero Phosphate Company*. We particularly refer to the speech of Lord Blackburn. After referring to Lord Selborne LC's exposition Lord Blackburn said:
>
> > I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting a remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

[141] It follows that whether the defences of laches and acquiescence are available has to be considered on a case by case basis after the facts are found to be proved.

Extraordinary nature of the remaining disputes

[142] The plaintiff's case tended to treat each disputed transaction without regard to the facts which made the transaction extraordinary, either in its own right, or because the transaction took place during or after an extraordinary event which was unresolved. That tended to have the potential effect of leaving out facts which make the behaviour of the defendant explicable in special circumstances or, to put it more simply, leaving out the facts which when understood took the transaction out of the ordinary.

[143] In the course of the trial, I issued a minute which was my endeavour to reorganise the context into categories, but that did not meet with agreement between counsel. I hope, by introducing these contexts now, to forewarn the reader as to the issues likely to come into play as explaining the reasons for the dispute and the problems resolving them, and potentially the criteria for resolving them.

Extraordinary expenses of the gallerist

[144] It is common ground that the gallerist is running a business and that business will have usual expenses such as cost of the gallery, cost of staff wages, etc. These expenses are recovered from the commissions. The gallery's costs, however, can become an issue when the gallery incurs extraordinary expenses to promote an artist.

[145] In this case, there are at least two, and arguably three, events of extraordinary expense: tthe production of a book known as the Monograph, the preparation of an expensive catalogue, as distinct from the usual catalogue, known as the Viba catalogue, and the cost of a very large poster for highway billboard advertising an exhibition.

[146] Then there were overseas trips made by Mr Bambury and Mr Jensen to promote the artist's work in Europe, one of these trips being partly funded by a government agency, but not wholly.

Insurance/damaged works

[147] There can be an issue of the cost of repairing damaged works not covered wholly by insurance and as to the entitlement to insurance monies.

Extraordinary sales/purchases/commissions

[148] There were extraordinary purchase transactions which caused record-keeping problems. These tended to be purchases in which the whole or part of the purchase price was a cash sale and/or a traded-in work. There is a significant disagreement between artist and gallerist as to the entitlement to commission in respect of traded-in works to be resold.

[149] There was a one-off substantial commissioned work known as Roller Mills, where the artist was paid directly by the client.

Defendant's duty to account – plaintiff's onus of proof

[150] A civil common law trial proceeds on the footing that the plaintiff bears the onus of proof on the balance of probabilities to prove the facts which, once proven and taken together, merit the remedy being sought or some lesser remedy.

[151] In the course of the trial the onus of proof can shift to the defendant. Normally it shifts when the plaintiff's case, standing on its own, requires to be answered by the defendant, otherwise the plaintiff has established proof on the balance of probabilities. That is called the shift in the evidential burden.

[152] It is alleged to have shifted in this case because, as a matter of law, Mr Jensen's status as agent means that he has a positive duty to account to the plaintiff for the proceeds of the sale of the works, minus the commission payment. Because of that obligation, he has a duty to maintain and retain appropriate records of the works. That duty includes, to keep accurate accounts of all transactions including, at least, a record of the transactions entered into in respect of the artist's work, and recording receipt(s) of proceeds of sale and a record of accounting to the plaintiff.

[153] As discussed, there is no essential dispute in the nature of these duties. The pleadings admit that the gallery was obliged to maintain records of the works while in the gallery's possession; to keep accurate accounts of all transactions; to inform the artist of any sale with details of to whom and the price (with a reciprocal obligation on the plaintiff when the plaintiff sold directly to third parties); to account for the share of the proceeds (with the qualification that in some instances the parties agreed to defer payment and to apply it for other joint business purposes). Therefore, I accept that once the plaintiff establishes an evidential basis to show that an artwork was in the defendant's possession as agent and a transaction that should be accounted for, the evidential burden will shift to the defendant to prove he has accounted for the work.

Accounting and "Settled Account"

[154] In any business agency, the agent must account to the principal. Once an accounting has been made by the agent and accepted by the principal, that settlement cannot be reopened unless there was a mistake in it or some wrong committed by either party in the process. That ordinary process should not be confused with the concept of "settled account".

[155] By "extraordinary purchases" here, I am focusing on those purchases where the artwork was not paid for by a cheque or a series of cheques but instead was paid for by cash or some combination of cheque and cash or, even more complicated, by trade-ins and cheque and/or cash or both. In these instances, the defence is

frequently that the cash was handed over and agreement was reached as to the trade-ins. These are not defences of "settled account" as strictly understood.

[156] "Settled accounts" are properly applicable to cases of mutual debits and credits only, and not to cases where one party has to do all the accounting.[38] The mere statement by one party to the other of how an account stands does not amount to a settled account. The other party must agree that it is right.[39] It is not necessary for a settlement to be recorded in writing. That is desirable of course but oral settled account agreements are possible. In *Phillips-Higgins v Harper,* Pearson J said:[40]

> The question whether there were agreed and settled accounts here can be dealt with fairly shortly. One possible answer is that, to constitute a settled account, you must have an account in the sense of a written document in which figures are set down, and that written account has to be agreed between the parties, and here there is no such settled account, no document in writing.
>
> …
>
> I do not, however, propose to rely on that point because it seems to me that it would theoretically be possible for parties, without making any settled account in that sense, to arrive at an oral agreement which might have much the same effect. If they were uncertain about a figure or did not wish to incur the expense of further investigations, they might meet and agree orally that a certain figure be deemed to be the right figure for the purpose, and the person to whom it was owing would not ask for any more and the person by whom it was owed would not seek to pay any less. That seems to me to be a perfectly possible oral agreement – an agreement of accord and satisfaction rather than by way of settled accounts.

[157] This dictum applies to accounting generally. This agency relationship was coupled with a strong personal friendship. These men were close friends. That is clear from the frequent social contacts, and the personal communications which were mixed with business in their emails.

[158] As I have indicated, the situations in which there was a mutuality of obligation which needed to be settled were unusual, outside the norm. They were not easy to resolve as both men have strong personalities. Neither man wanted disputes.

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38 *Halsbury's Laws of England* (5th ed, 2014) vol 47 Equitable Jurisdiction at [52].

39 Ibid.

40 *Phillips-Higgins v Harper* [1954] 1 All ER 116 at 117 per Pearson J; *Halsbury's Laws of England* (5th ed, 2014) vol 47 Equitable Jurisdiction at [52].

Resolution by a Court in the absence of prior agreement on a term, or of an established custom, or of a proven settlement, formal or informal

[159] It became apparent to me in the course of the trial that some difficulties may not have been resolved by agreement, but rather were possibly abandoned by either Mr Bambury or Mr Jensen, or both, for the sake of keeping the agency going. But that raised a problem as to the justicability of disputes in a trial after the agency ended. I alerted counsel that I might have to be guided by a trade customs such as they are. And, secondly, in order to identify any loss referable to one or other party to the agency, I might have to make a judgment about what reasonable parties in the same situation might have agreed to by way of compromise.

[160] In the end, I find that there is no applicable trade custom which resolves extraordinary transactions placed before this Court for resolution.

Summary of legal method

[161] I will now move through the disputes one by one, keeping in mind the expert evidence and these contextual considerations I have endeavoured to outline. I have decided to deal with the disputes broadly in the order pleaded by the plaintiff.

[162] I proceed on the following methodology: In the first instance, the plaintiff must prove, on the balance of probabilities, that he is entitled to an account from the defendant by reason of a transaction by the defendant as agent. Secondly, at that point the evidential burden of proof transfers to the agent who must prove, on the balance of probabilities, that he has accounted. That accounting may be straightforward or complicated. A straightforward example may be that the sale of the work was paid for by cash and the cash proceeds were split 60:40 and Mr Jensen handed 60 per cent of the cash to Mr Bambury. Or it may be a complicated account, such as that Mr Jensen argues he and Mr Bambury agreed that the proceeds of an artwork could be used to meet Mr Bambury's agreed contribution to an extraordinary expense, such as the printing of the Monograph.

[163] Where Mr Jensen has failed to account, by using the proceeds in an unauthorised way, but with sufficient information to place Mr Bambury on enquiry, I

will then consider whether or not on the particular facts the remedy is in equity, or available at common law, whether the Limitation Act applies and/or whether equity will accord the agent the defence of laches and/or acquiescence.

[164] The ultimate issue is whether it is unconscionable for Mr Bambury to assert his beneficial rights and that requires a balancing of equities as they arise out of the particular case. That balancing of equities will have regard to the conduct of the gallery's accounting such as it may have been. For the gallery cannot take advantage from an unconscionable wrong.

Conclusion on fiduciary obligations and the Limitation Act

[165] All in all, I have identified this is a case where, depending on the facts, the agent's fiduciary obligations may enable a claim for proprietary remedies in equity. Such is the legal method of equity that here, as in so many cases, the analysis comes down to looking at all the relevant facts to a particular dispute and then deciding whether the plaintiff can maintain a claim more than six years after a failure to account.

Equitable compensation

[166] In respect of artworks which were sold and for which the artist was not paid for the sale proceeds, the plaintiff claims not the proceeds net of commission, which would be the sum he would have been paid had it been sold, but the full value of the work. Similarly, in respect of artworks that were bought from him by the defendant and then on-sold, he has either suffered the loss of profit on their on-sale or the sale proceeds he would have been entitled to had another one of his works been sold. There are other instances of this measure of damages which differs from the common law measure of damages based on net loss.

[167] Mr Langton, for the plaintiff, relies upon the Supreme Court's judgment in *Premium Real Estate Ltd v Stevens.*[41]

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[41] *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 per Blanchard J for the majority at [85] and [89].

[168] In essence, the submission is that where a fiduciary is in breach, the fiduciary should not retain any profit or reward for the breach, i.e. placed in the position he would have been in had he not been in breach but had rather discharged his duty. So, for example, if he had wrongly sold a work of art worth $10,000, then he owes $10,000 to the plaintiff as distinct from if he had sold the work properly, he would have owed $6,000 to the plaintiff. The underpinning reason is that the fiduciary should be given no incentive at all for breach of a duty.

[169] The plaintiff relies on two passages from the Supreme Court decision in *Premium Real Estate v Stevens*. The first passage is [85] where Blanchard J stated:

> [85] It was once the strict rule that when a fiduciary committed a breach of duty by non-disclosure of material facts which the party to whom the duty was owed was entitled to know in connection with the transaction, the fiduciary could not be heard to maintain that the disclosure would not have altered the decision to proceed with the transaction; once the court had determined that the undisclosed facts were material, speculation as to what course the beneficiary, on disclosure, would have taken was not regarded as relevant. The strict rule could sometimes lead to unfair results and has been modified in this country by an approach which affords the fiduciary a limited opportunity of showing that all or some of the loss would have occurred even if disclosure had been made. The matter was put in the following way in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* in a passage approved by this Court in *Amaltal Corporation v Maruha Corporation*:
>
> > "[O]nce the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part … Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach."
>
> The same general approach should be taken when the matter in issue is restricted to the quantum of the loss. The same policy applies to both. That policy is designed to deter fiduciary breaches by limiting the circumstances in which fiduciaries in breach can escape or reduce their liability for the consequences of the breach. It would be artificial, and inconsistent with that policy, to distinguish between causation and quantum issues. Where there is a normal or prima facie measure of loss, the fiduciary must positively show that it is not an appropriate measure. The normal and natural measure of loss, when a fiduciary breach has affected the price at which property is sold, is the difference between the sale price and market value. Policy dictates that the onus should be on the fiduciary to

> demonstrate that the plaintiff's loss was actually less (or non-existent). If there is any doubt about that, the doubt should be resolved against the fiduciary

[170] As with all statements of principle, those observations need to be seen in light of the factual context of the case. In *Premium* the plaintiffs claimed that their real estate agent had breached its fiduciary duties. The agent was found to have misled the plaintiffs into accepting a purchase price below market value by suggesting that the purchaser wanted to buy the property as a residence when to the agent's knowledge the purchaser was a property investor who frequently resold properties at a profit. The losses claimed were the difference between the market price of the property and the lower price that the agent misled the plaintiffs into accepting. Crucially however, there is the following passage:

> [88] In one minor respect only the damages award made by Courtney J should, however, be varied. Because, on the approach we take, the assessment assumes a sale at $3.25m [the market price] for the purpose of comparison and on a sale at that figure the commission would be a higher amount, the more appropriate comparison is of the two prices both net of commission. Counsel have advised that the commission on the higher sale price would have been $82,237. Therefore the damages payable should be ($3.25m — $82,237) less ($2.575m — $67,050) = $659,813.

[171] Thus when calculating the amount of damages the Supreme Court took into account the commission that would be payable on sales at each of the prices. It did not disallow commission as part of the calculation of compensation.

[172] In the present case, there is no allegation that Mr Jensen sold works at undervalue. All of the claims are generally of the nature that Mr Jensen did not account for the proceeds of the sale. So in that respect the losses claimed are different than those claimed in *Premium Real Estate*. Nevertheless, what *Premium Real Estate* makes clear is that the calculation of loss (even in equity) is a comparison of the position that the plaintiffs would have been in if there was no breach of duty with the position they found themselves in because of the breach of duty. That requires making an allowance for the commission payable in the situation where there has not been a breach.

[173] For that reason I consider that the plaintiff's claim that his loss should be measured by the full value of the works is misconceived.

[174] The plaintiff has also submitted that Mr Jensen should be forced to disgorge his commission. This submission has more merit as it recognises that the claim for commission is not strictly a claim for compensation but rather for "restorative damages".[42] In this respect, the plaintiff's claim for the full value of the artwork can be regarded as two separate claims, one for the difference between what Mr Bambury has received and what he would have received if Mr Jensen had fully accounted for the sale of works and a second for a disgorgement of the commission Mr Jensen received on the basis that he has no entitlement to the commission because he has breached his fiduciary duties. The plaintiff has relied on part of [89] of Blanchard J's judgment in *Premium* as authority for the ability to recover commission from a defaulting agent, it is useful to set out the whole paragraph:

> [89] The final matter is whether, as Courtney J ordered, Premium should also forfeit its commission of $67,050 by reason of its breach of fiduciary duty. In this respect the law remains as it was stated in 1926 by Atkin LJ in *Keppel v Wheeler*:
>
> > "Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission."
>
> In that case the real estate agents believed, erroneously, that their duty to their principal ceased when they had procured an offer to purchase which the principal had accepted subject to contract (and therefore, unlike the normal position in this country, still leaving the vendor in a position to withdraw). In that belief, and therefore acting mistakenly but innocently, committing only what the Privy Council in *Kelly v Cooper* called an honest breach, the agents failed to inform the vendor of a higher offer. They were found liable for breach of duty and ordered to pay damages measured by the difference between the two offers. But, as indicated in the passage from Atkin LJ, the Court of Appeal allowed the agents' claim for commission on the sale at the lower figure, which had proceeded. It

[42] At [102] per Tipping J.

> is, however, quite clear that if the agents had not acted in good faith they would have been denied their commission, or been required to disgorge it if already received, notwithstanding that the plaintiff was being "made whole" by the award of damages. That would have left the plaintiff better off than if the transaction had proceeded without any breach of fiduciary duty, but the double sanction of damages and forfeiture of moneys received or receivable by way of remuneration is equity's method of deterring disloyal behaviour by fiduciaries, as Jacob LJ has very recently confirmed in *Imageview Management Ltd v Jack*:
>
> > "The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him — notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the strict rule is there as a real deterrent to betrayal."

[175] This paragraph suggests that an agent will forfeit his right to commission unless he can show that the breach was honest, or the breach did not go to the whole contract.

[176] On the facts of *Premium* the defendant was ordered to compensate the plaintiff for the difference between the price they did receive and what they would have received if the property was sold at market value (net of commission) and was also ordered to repay the commission that had been paid. The agent was ordered to repay the commission because the agent deliberately misled the principal.

The defendant's argument

[177] The defendant submits that most of the plaintiff's claims are better characterised as a claim for a debt rather than for damages, as they are a claim for an amount owing under the contract.

[178] The defendant criticises the plaintiff's approach to compensation saying that it would result in a windfall to the plaintiff. The defendant submits that the plaintiff should only be able to recover the amount owing as a debt.

[179] The defendant accepts that for some of the claims a different measure would need to be applied if the claims were successful. These are the claims for:

(a) failing to return unsold works;

(b) claim for damage to *At the same time a new beginning*; and

(c) the claim that Mr Bambury on-sold works for an unauthorised profit.

[180] As those claims are not in the nature of a debt.

[181] For the reasons set out above, I agree that usually the plaintiff should not be able to recover the full value of the works as "compensation", when all he would have received but for the failure to account would be 60 per cent of the sale price. If the breach, however, is egregious such that notions of equity and conscience are brought into play, the strict rule of allowing the fiduciary no reward comes into play.

[182] On the issue of whether Mr Jensen should forgo his commission the defendant submits that:

(a) any breach of fiduciary duty was an "honest breach"

(b) compelling repayment of the commission would be disproportionate and inequitable in the context of the relationship; and

(c) and allowance for the time skill and effort of the defendant should be made to reduce any compelled repayment of commission.

[183] It will be necessary to analyse the appropriate remedy for each alleged breach by the defendant but at this point I indicate that generally I agree with the defendant's submission that he should not be required to repay his commission where the alleged breach is a failure to account, especially if it is unwitting.

[184] For an example, consider *Hippisley v Knee Bros* where the defendant auctioneers received a discount on advertising expenses but charged those expenses

through to the plaintiff at the undiscounted rate.[43] Lord Alverstone CJ held that because the discount that the auctioneer had received had nothing to do with the duty of selling it was not appropriate that the auctioneers forfeit their commission.[44] Kennedy J agreed and suggested the following test:[45]

> where the agent's remuneration is to be paid for the performance of several inseparable duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it—and I here use that word "unfaithful" as including a breach of obligation without moral turpitude—it may be that he will forfeit his remuneration, just as in certain cases a captain of a ship might be held in the Admiralty Court to forfeit his wages as a result of misconduct in any branch of his duty as a captain; but where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties.

The plaintiff's acknowledgement of debt to the defendant

[185] Before the plaintiff pleaded his causes of action against the defendant, after pleading the terms of the agency, which this judgment has discussed, the plaintiff acknowledged in the pleadings that upon the termination of the agency he owed the defendant $14,250 in commission payments. This acknowledgement of debt of $14,250 was as to $1,250 being the balance of what the plaintiff says he owes in respect of the Roller Mills commission[46] and $13,000 being the remaining commission payment owed to the defendant on the sale of the work known as the Bell/Wyndham commission. This work was completed after the termination of the agency. The plaintiff has succeeded on a number of claims, summarised in the schedule headed "Summary of findings and awards" attached to this judgment.

[186] In the plaintiff's pleadings, the plaintiff "sets off $1,250 from the amounts pleaded against the defendant in this amended claim", and similarly, "sets off $13,000". The statement of defence denies the right to set off the $1,250 and, I infer, the $13,000. It is not for the plaintiff to set off. Any set off has to be just. Essentially, I am of the view that the remedy of set off is impracticable in respect of

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43 *Hippisley v Knee Bros* [1905] 1 KB 1 (KB).
44 At 8.
45 At 9.
46 See [333].

the $13,000. The impracticality of it in respect of the Bell/Wyndham commission is that there is no concomitant liability of the defendant dating from 2009 sufficient to maintain a set off. Rather, I record here and will repeat it in the summary of results that the respective sums of $1,250 and $13,000 are to be brought into account in the resolution of entitlements established by this judgment. Leave is granted to the defendant to apply for the recovery of interest, nominating a date for the calculation of interest, in a similar fashion to the awards of interest granted to the plaintiff.

The current pleadings

[187] This judgment is written against the plaintiff's fourth amended statement of claim dated 6 May 2015, the defendant's fifth amended statement of defence and counterclaim dated 6 May 2015 and where relevant, the plaintiff's second amended reply to the defendant's amended statement of defence and counterclaim dated 19 December 2013. It is also cross-checked against the table of plaintiff's claims undated. It may be noted that the trial started on 8 May. Some works of art are relevant to more than one cause of action. I note that the pleadings frequently pleaded the value of the works as at the date of termination of agency. No evidence was led as to current values. I have reached my decisions on relief, where appropriate, without the need to examine whether the relief should be of the current valuation.

The plaintiff's first cause of action – breach of agency/fiduciary duty – failure to deliver up to the plaintiff consigned works

Great Wall (II) 2006
Ghost (XXXIII) 2005
Blind 2006
Must Form a Unity 1994
And it Conditions Us 1998
The Eternal Persistent 2000

[188] Essentially, the contention in this cause of action is that between 1995 and 2009 a number of identified works were consigned by the plaintiff to the defendant and the artist does not have an accounting for them. So that the defendant has either failed to return the works at the termination of the agency in 2010 or has failed to inform the artist that the works had been sold and to account for the proceeds of sale.

Great Wall (II) 2006

[189] The plaintiff claims that this work was consigned to the defendant and is recorded in the gallery's stock list of December 2007 but he has never been informed that the work was sold. There has been no accounting for any proceeds of sale, nor has the work been returned.

[190] The defendant says that this work was consigned to Mark Hutchins Gallery in May 2006. It was sold by that gallery for $6,000 in May 2007. That Jensen Gallery received from Hutchins Gallery $4,200. Mr Jensen says that Mr Bambury agreed orally that his share of the proceeds would be set off against an amount owing to Scottish Pacific for printing costs which Jensen Gallery had paid earlier in 2007, being a cost which fell outside Jensen Gallery's normal expenses.

[191] There is no dispute now between the parties that the painting was indeed consigned to the Mark Hutchins Gallery, sold for $6,000, that Jensen Gallery received $4,200 for the sale in or about July 2007 and that the balance of the purchase price after payment of the two sets of commissions due to Mr Bambury was $3,600.

[192] It was not disputed that around about the same time, between 29 May and 14 July 2007, the gallery staged a solo show for Mr Bambury called, *"For the People of Auckland City"*. Big AO sized posters (which I would call highway billboard sized posters) were printed by a company called Scottish Pacific. The gallery proved by way of a cheque stub the payment to Scottish Pacific of $3,150. This payment was made on 17 July 2007. That is approximately two weeks after the gallery had been paid by Mr Hutchins on 4 July 2007. The stub of the cheque book is dated 17 July and reads:

> To Scottish Pacific for profile plus 4 SB posters. This cheque 3,150.00.

[193] Two exhibited photographs show the posters mounted on billboards in Auckland streets demonstrating the scale of them. There was no evidence of the precise dimensions of the posters but they appear to be at least two metres in height

by more than one metre in width. In the two photographs I have examined,[47] they are at the same location. One is a close-up. One is from a distance. Taken together, they are a very prominent advertisement of the exhibition.

[194] There is evidence before the Court that galleries frequently show exhibitions of a collection of works of one of their artists as a special programme. The Court takes judicial notice of the fact that such gallery shows are not normally advertised by way of large billboards on highways. I accept therefore that the cost of these posters could be regarded as an extraordinary expense of the gallery.

[195] Of course a gallerist can absorb extraordinary expenses or can discuss them with the artist. Mr Bambury denied that he agreed to this. He did not persuade me that this a usual cost to be borne by a gallerist. I am impressed by the coincidence of receipt of payment for the works and the expenditure paying the Scottish Pacific account.

[196] There is, however, a $450 difference between the printing account and Mr Bambury's share of the proceeds. In that regard, Mr Jensen's evidence was:

> Often Stephen and I orally agreed to offset proceeds against other similar but not identical Jensen Gallery expenses in the knowledge they would generally balance out in the end.

The problem with Mr Jensen's evidence is that he is speculating after a long period of time. Initially Mr Jensen's position on the pleadings was that Mr Bambury had been paid. The earlier pleading was:

> There was no record of *Great Wall (II) 2006* being returned to the Jensen Gallery and does not appear in any subsequent stock list provided to the plaintiff and no issue previously taken in respect of this work.

[197] Subsequently Mr Bambury proved that the work was sold by a sub-agent and that Mr Jensen was paid, supporting that with an affidavit from the sub-agent. I am satisfied that Mr Jensen is relying now on the coincidence of the payment to Scottish Pacific and the approximate coincidence of the receipt for this work as a

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47 SCB 0431.

justification. The problem for me is the $450 difference. The evidence of Mr Jensen that that would have been agreed is speculation on top of speculation.

[198] While the large posters could be regarded as an extraordinary expense of the gallery, they are not obviously so. One would expect the gallerist to discuss the matter with the artist before diverting proceeds of sale to payment of such an invoice.

[199] On production by the plaintiff of the affidavit of the sub-agent, I consider the burden of proof shifted onto the defendant to establish that the payment was agreed by the artist and that the defendant has not discharged that burden. I consider the inability of Mr Jensen to match this transaction to, in his words, "other similar but not identical Jensen Gallery expenses" persuades me that he did not account for this transaction at the time.

[200] To be clear, I am not finding that Mr Jensen's evidence is untrue. I am simply finding that, in this instance, he had a duty to account and has not been able to account.

[201] The plaintiff's claim is for equitable damages, he claims $7,200, as the current valuation of the work, rather than the $3,600 due after the work had been sold.

[202] This is a case where the artist was not informed that the work had been sold. It is more probable than not that the proceeds were applied to the printing account. But in this case, in my judgment, it was necessary for the gallery to have discussed this matter with the artist before applying the proceeds to the billboard.

[203] This case differs from others that the reader will find where notice of a sale was given but then there are issues about the payment of the proceeds, net of commission. On those occasions the artist was on notice of the sale.

[204] On this set of facts, the artist was not placed on notice and Mr Jensen is speculating upon speculation that there would have been an agreement.

[205] I find for the plaintiff that there has been a failure to account. The question becomes whether his remedy is in equity. The measure of damages he is seeking is equitable damages. As I have discussed above, the amount of compensatory damages due must take into account the commission that would have been payable. The question is then whether Mr Jensen should be required to forfeit his commission on this sale. I consider that this is not an appropriate instance for Mr Jensen to forfeit his commission. While Mr Jensen breached his fiduciary duties by failing to account for the proceeds of the sale and by using the proceeds in an unauthorised manner there was no breach of fiduciary duty in the actual sale of the work. Furthermore, there was a serious argument that the artist should have met the costs of the billboards. I apply *Hippisley*.[48]

[206] I do not consider that this action is time barred. Section 21(1)(b) of the Limitation Act applies. The funds held were trust property. No claim for acquiescence or laches has been made out because Mr Bambury had no in notice of the sale. The claim is partially successful. Mr Bambury is entitled to $3,600, together with interest running from 20 July 2007 at the Judicature Act rate.

Ghost (XXXIII) 2005

[207] This was a work consigned to the gallery and recorded in the December 2007 stock list. The plaintiff claims the defendant never informed the plaintiff that he had sold the work and, if he has, he has never accounted for the proceeds and he has not returned the work to the plaintiff.

[208] The defence is that the work was sold to a client for $5,000 on 29 June 2007. Payment was received in cash and Mr Bambury was paid in full on 20 July. However, the paperwork for the sale mistakenly identified the work as *Ghost (XXXI)* which has also been sold separately and 60 per cent of the proceeds paid to the plaintiff.

[209] The evidence as to the confusion is that there is a diary note of the gallery saying that the client wanted to place the piece on hold and discussed the price for

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[48] See discussion above at [184].

purchase with AJ (Andrew Jensen). The gallery's sales ledger on 29 June records a sale of *Ghost (XXXI)* in the same client's name. The price is for $5,000 and it was paid in cash.

[210] An internal file note of the gallery records a payment of cash to Mr Bambury for two works – *Ghost (XXXI)* $3,000 and *Signature (XXIV)* for $3,600, total $6,600, and records it as received by SB on 20 July 2007 and has Mr Bambury's signature on it.

[211] The gallery then proved a second payment for the same title *Ghost (XXXI) 2006*. This time the purchaser is different and the payment to the artist is recorded as $3,600 on a sale price of $6,000 made on 8 May 2008. The proof followed that through into the gallery's bank statements.

[212] Although the gallery tried via photographs to prove the mix-up and failed, the gallery did prove that it appeared on its records that Mr Jensen had been paid twice for *Ghost (XXXI)*. There is evidence that there were two works with this same name. I am satisfied on the balance of probabilities that the gallery is right, one of those payments was for payment for *Ghost (XXXIII)* The plaintiff's claim fails.

Blind 2006

[213] The plaintiff's argument is that *Blind 2006* was consigned to the gallery in 2006. It had a stock number 421-06 and is recorded in the December 2007 stock list. But the plaintiff has never been told it was sold and it was not returned. The defendant's argument is that it was received by the gallery in November 2006 and then sent back to the studio to be repaired. When at the studio after the repair, it was re-dated 2007 and renamed *Blind (VI)*. The gallery sold *Blind (VI)* to a client in July 2008 and the artist was paid in full for that sale. Mr Bambury disputes the defendant's answer.

[214] The Jensen Gallery stock list of 5 December 2007 records *Blind 2006* with the then simple name *Blind*. It has the reference number ABAM421-06. It is recorded as being "on appro". That meant it was not in the gallery. "On appro" can mean, and often does, that it is out with a client who has an interest in purchasing it.

However, there was evidence from Ms Fox that it could mean that it is simply not in the gallery though on the stock list and rather is back in the studio. The same stock list records stock as being with the artist.

[215] Ms Emma Fox, now a director and minority shareholder of Fox Jensen Limited, and Mr Jensen's partner, was at the time of this dispute, the gallery manager. She points out that the sale of *Blind (VI)* in 2008 records the title as "*Blind (VI) 2006*". The payment forms do not have a stock number but record "the studio" meaning the work was sold ex the artists' studio. The photograph of the back of *Blind (VI)* was produced. It shows the work title as *Blind (VI)* and has the date 2007.

[216] It was Mr Bambury's evidence that he did touch-up two *Blind* paintings. The touch-ups were very minor. He does not remember which *Blind* paintings these were. He says he would not have altered the title of a painting after it had been repaired. The only change he ever made to paintings that were altered or repaired was to enlarge the date of the painting to take into account the year the change was made. For example, if a work was dated 2001 and repaired in 2003, it would become "work 2001-2003". He acknowledges that the consignment note indicating that *Blind (VI) 2006* had been sold, was countersigned by him, and has added, in Mr Bambury's own handwriting, the original stock number of *Blind*. He says, however, he wrote that when undertaking a works audit in August 2010. That it was not written contemporaneously, when he received the receipt. Then Ms Clark, who was assisting him, pointed out his mistake. The photograph of the back of *Blind (VI) 2006* does contain the date 2007. And there was an original called *Blind* created in 2006.

[217] This is a dispute which brings into sharp relief the onus of proof. It is a dispute that dates back to events that happened in 2006 and 2007. Plainly, the work then simply named *"Blind"* was repaired. There is no other explanation for the original documents referring to 2006 and for 2007 to be recorded on the back. Plainly, at one point in time the artist was of the view that *Blind (VI) 2006* was the same as *Blind 2006* but had been repaired.

[218] I am satisfied that the defendant's case shifted the burden of proof back to the plaintiff. The defence is a more than plausible account, proving the curious fact that a work named *Blind (VI) 2006*, was repaired in 2007 and was sold. There was no evidence led by the artist of the full sequence of the *Blind* paintings and their dates of execution and sale.

[219] I am satisfied that the gallery has provided a sufficient account for the sale of *Blind 2006*, originally listed as *Blind*, sufficient to discharge its duty to account and that the plaintiff has not proved that *Blind 2006* was either not returned or not paid for. The claim fails.

Must Form a Unity 1994

[220] This work was consigned to the gallery and is recorded in its 1996 stock list. Again, the complaint is that the artist has never been informed that the gallerist has sold the work and if he has, he has never accounted for the proceeds.

[221] The defence is that it was never consigned to the defendant. Rather, the work appears on the Jonathan Jensen Gallery stock list. This defence requires a little explanation. Mr Jensen's career as a gallerist began in Christchurch. He and Mr Jonathan Smart opened a gallery known as the Jonathan Jensen Gallery. After some time, Mr Jensen moved to Wellington where he opened a gallery and shortly thereafter ended his association with the Jonathan Jensen Gallery in Christchurch. Later still, Mr Jensen moved to Auckland and opened his gallery here. Mr Bambury consigned his work to all three galleries. During the period of this litigation Mr Jensen's Auckland gallery was the principal gallery. Mr Bambury still, however, consigned some works to Jonathan Smart in Christchurch, with the consent of Mr Jensen. This practise reflected Mr Bambury's long association with Mr Smart. These assignments were direct so that the Jonathan Smart's Gallery in Christchurch would not be described as a "secondary" gallery. Secondary galleries are those galleries who have a relationship with the Jensen Gallery such that the 40 per cent commission is shared 30 per cent by the secondary gallery and 10 per cent by the Jensen Gallery. An example of this would be Ms Nadine Mill's Gallery in Arrowtown.

[222] Mr Jonathan Smart has not participated in this litigation and has not responded to emails inviting him to. The painting does not appear on Mr Jensen's gallery stock list in June 1996.

[223] The plaintiff agrees that by his records he did consign this work to the Jonathan Jensen Gallery in Christchurch. He gave evidence that he subsequently instructed all works held by that gallery to be consigned to Mr Andrew Jensen. That he did not keep a stable of works with Jonathan Smart. Mr Bambury gave evidence that he queried the whereabouts of the work with Mr Andrew Jensen after he believed his works were consigned to him, that Mr Jensen provided no response and has failed to maintain and keep records of the work.

[224] Although Mr Bambury does not make a point of it, it would appear from that evidence that he did not receive a list of stock from Mr Jonathan Smart complying with his request to Jonathan Smart that he consigned the works with him to Mr Andrew Jensen. The answer to this dispute could lie with Mr Jonathan Smart. Neither party called him.

[225] Mr Bambury's evidence that he requested all stock to be transferred to Mr Jensen's Wellington gallery may be contradicted by Mr Smart's email to Emma Fox on 15 October 2013. Mr Smart had received an email from Ms Fox on 14 October advising him that Mr Bambury was asserting that all of his stock went to Wellington from Christchurch and that he kept none. In the second paragraph she particularly refers to *Must Form a Unity* on a price list from the Jonathan Jensen Gallery but the work does not show up in any Auckland list after that. Ms Fox ended the email by also requesting an answer in respect of a purchaser of other work and their *Sienna* painting. Mr Smart replied:

> The Sienna painting sold to [named customers] was from memory (as I have no records that far back) a Jonathan Smart Gallery sale.
>
> Andrew and I established Jonathan Jensen Gallery, Wellington for a brief five month period, then we dissolved our partnership. Although Stephen would not show in Christchurch for a few years, he remained as far as I was concerned, quietly on my books. The [customer's name] sale for example, was probably made during this time.

It can be seen that Mr Jonathan Smart made no comment in his reply on the work

Must Form a Unity.

[226] The first stock list produced from Mr Jensen's new Wellington gallery was in June 1996. On Mr Bambury's copy is a "what happened next?" note from Mr Bambury querying the whereabouts of *Must Form a Unity*.

[227] The submission for the defendant was that given Mr Bambury's identification that the work was missing back in 1996 and the lack of any other documentation or evidence of enquiry, the likelihood is that the work was accounted for to Mr Bambury's satisfaction at that time.

[228] This is a work that was originally consigned to Mr Jensen and Mr Smart 19 years ago, in Christchurch. Mr Bambury did discover a bank book for the tax year 1997 to 1998 which records two payments from Jonathan Smart, one on 17 December 1997, the other on 21 January 1998, for $7,800 in total but does not identify the work. This appears to be a little unusual because elsewhere the statement records bankings of a number of works in the *Sienna* series.

[229] When Mr Jensen was a partner of Mr Jonathan Smart he had a duty to account. It cannot be argued that Mr Jensen's duty survived the complete control of that gallery by Mr Smart. Mr Bambury maintained his relationship with Mr Smart. He continued to send him works. On the probabilities, this work remained with Mr Smart and it may well have been the unnamed work sold in December 1997 and paid for in two instalments totalling $7,800. The defendant gallery did make the appropriate enquiry, and did not receive a complete answer. I do not think the evidential burden had shifted. The burden remains on the plaintiff to prove a failure on the part of Mr Jensen to account. It is clear that at the time Mr Bambury did not follow-up his request that all stock be transferred from Christchurch to Wellington. Indeed, I am not sure that Mr Bambury has proved that he made that request. The email from Mr Jonathan Smart subsequently undermines that proposition. I conclude that the plaintiff has not proved that the defendant failed to account for the painting.

And It Conditions Us 1998

[230] The issue is whether this work was ever consigned by the plaintiff to the defendant. It appears on a list of works described as *The Sienna Show* in Wellington. The work does not appear on any stock list of the Jensen Gallery in Auckland. No issue had been taken before litigation in respect of alleged non-payment in respect of this work. The list of stock for this *Sienna Show* in Wellington is reliable evidence at artworks that were intended to be shown in the Wellington show. However, there is in the bundle a catalogue of *The Sienna Show* containing photographs of a number of works and a list of the names of those photographs as illustrated works. Of the nine works illustrated there, five works: *Sienna (III), Sienna (XVI), Sienna (XVII), Sienna (XX),* and *Sienna (XXIII)*, all appear on the handwritten list of stock for *The Sienna Show*. But three works of art in the catalogue do not appear on that handwritten stock list, they are *Sienna (XIX), Sienna (XXI)* and *And It Conditions Us*.

[231] I am left quite neutral as to the whereabouts of this painting. The plaintiff's case that it should be accounted for by the agent depends on proof that it was consigned to Mr Jensen. It is quite possible that these works went from the artist's studio directly to the Wellington exhibition. There is no evidence that Mr Bambury ever queried an account for this work of art prior to the break-up of the agency. We are now 19 years after the alleged date of consignment. In cross-examination Mr Bambury agreed that part of his argument in respect of this work is that all stock of his had gone from Jonathan Smart in Christchurch to Wellington. It does not appear on the stock list of Jensen Gallery in 1996.

[232] Mr Bambury accepted in cross-examination that the work had been with Jonathan Jensen Gallery before Mr Jensen moved up to start his gallery in Wellington. "There is no question of that."

[233] Mr Bambury's claim in respect of this work fails.

The Eternal Persistent 2000 aka The Eternal Persistent (Aluminium)

[234] The issue is whether this work was sold in 2000 or has never been sold and has to be accounted for today at a current value of $7,200. It is Mr Bambury's

evidence that this aluminium painting appears on a checklist for an exhibition that took place at Mr Jensen's Upper Queen Street gallery in September 2000. There is an undated list of works of Mr Bambury in an exhibition in two galleries, Gallery 1 and 2, which includes this work listed at $4,200. Mr Bambury also exhibited a photograph of the work which he said was taken during that exhibition.

[235] Mr Jensen produced a tax invoice statement dated 19 July 2000 (earlier), describing the work with a value at $4,200 as being sold to a named client with an address. That invoice has been cross-cancelled, with Mr Jensen's evidence that the invoice was cancelled because the client paid in cash.

[236] Mr Jensen produced an extract from a catalogue of the work being auctioned in July 2003 but, although it has the same name, it is different from the photograph which Mr Bambury produced. Mr Bambury's photograph does not have any description on it of the title of the work. Whereas, the catalogue photograph has the correct description, *The Eternal Persistent*, present on graphite on two aluminium panels. The title is inscribed and signed and dated 2000.

[237] In his first statement of defence, Mr Jensen said the painting was not consigned to him and was sold out of Mr Bambury's studio without any commission payable. In his second statement of defence, he said he sold the painting in July 2000 and was paid cash.

[238] Given the undated character of the catalogue and the plaintiff's photograph not matching the description of the same work correctly titled in the Webb's catalogue, I find the plaintiff's evidence unsatisfactory.

[239] The invoice drawn up by the Jensen Gallery on 19 July is in the standard form and consistent with an intent to report the same to the artist and shows the sale at $4,200.

[240] In his cross-examination, Mr Bambury accepted that the buyer named in the invoice did put the work up for auction three years later, in July 2003. But then said he did not know he was even aware it was up for auction.

[241] The same work, consistent with the Webb catalogue, turns up on a November 2009 Jensen stock list at a price of $7,000, recorded as owned by Mr Jensen. This is a stock list of works of Mr Bambury.

[242] The Webb's Gallery stock list and the Jensen Gallery stock list, just referred to, prove that the work was sold. Certainly the later 2009 stock list of Jensen Gallery would indicate that it was back with the gallery, at that point not owned by the artist.

[243] In the course of the trial, I was impressed by the reliability of the Jensen Gallery documents. At the very least, they reflected the bona fide view of the Jensen Gallery staff as to the works.

[244] I am satisfied that the probabilities are that this work was sold for cash in the sum of $4,200 and Mr Bambury was paid. This claim fails.

Second cause of action – breach of agency/fiduciary duty – failure to deliver up *Seven Witnesses/Seven Truths*

[245] This is a trade-in dispute centering upon the purchase of a very valuable piece of work called *Chinese Whispers (II)* by a wealthy American client for $150,000 in August 2006. It was common ground that the payment for this work was made by a payment of $70,000 in cash and a trade-in of two works: *But to Dream of a Poem* and *Seven Witnesses/Seven Truths*.

[246] Later the gallery sold the first work, *But to Dream of a Poem*, and five of the seven works in the set *Seven Witnesses/Seven Truths*.

[247] The total cash proceeds received from these sales, including the $70,000 cash received from the client, is $156,133. That has been split 60:40 so the plaintiff has received $93,680. The position now is that the plaintiff seeks the return of the two unsold pieces. The defendant is retaining them, arguing that they are jointly owned property of the plaintiff and the defendant on a 60:40 basis. If the two pieces are held to be wholly the property of the plaintiff, then the defendant will lose the opportunity to obtain 40 per cent of their value on sale.

[248] The factual dispute between the parties is whether or not it was agreed that the works traded-in would be jointly owned on a 60:40 basis or, rather, would be owned by the artist, with the expectation but not entitlement on the part of the gallery that the gallery would get commission as the items were sold.

[249] To examine the merits of the competing arguments, it is useful to reflect upon the disadvantages and advantages of trade-ins and the general complications that they have upon the normal terms of business between an artist and a gallery. I am confining this discussion to trade-ins of work by the same artist who is selling the work. From the gallery's perspective and likely the artist, the preferred sale of a major work such as here would be on a straightforward financial basis. The gallery gets the full commission immediately and the artist gets the balance of the worth of the work immediately. The effect of a trade-in is that the full financial benefits of the transaction have to be realised over time. On a trade-in the vendor takes the risk that the value allocated for the purposes of the trade-in may fall when the trade-in is resold and, equally, has the prospect that the value may rise. From the point of view of the gallery, the consequence of a trade-in is that it may not possible to obtain the full value of the commission from the cash component and, indeed, that may not be a satisfactory outcome for the artist. Yet both the artist and the gallery have long term interests in maintaining the value of works of the artist in the resale market. So that the artist and the gallery have a common incentive to accept trade-ins of the artist's works rather than those works being resold by the owner in the open market.

[250] There was no general agreement or practice in the relationship between Mr Bambury and Mr Jensen as to how to deal with trade-ins. There is no customary practice sufficient to imply a term thereon. Rather, it was always necessary for them to reach an agreement, case by case.

[251] Both parties agree that a deal was discussed between them. They just have two different interpretations of the deal. The commercial effect of the two different interpretations is straightforward. Mr Bambury wants to be able to sell these works through another agent, probably his current agent, Ms Clark, and Mr Jensen would prefer to sell them himself so that he gets 40 per cent. If the agency relationship between the two men had not broken down, this would not be an issue as the

financial consequences would be much the same whether the works are considered jointly owned or whether they are owned by Mr Bambury with the opportunity of the agent to sell them and collect commission. It is more probable than not that the artworks were traded-back on a 60:40 basis as there is no doubt that at the time of the trade, Jensen Gallery was entitled to 40 per cent of the value of the transaction. That would potentially be lost if no understanding was reached as to the division of the proceeds of sale of the traded-in art. The deal of a trade-in on a 60:40 basis shares the risk of the traded-in art selling below the value ascribed to them at the point of sale and shares the benefit if that risk is run and translates into a higher value.

[252] What has happened is that the works that have been sold so far have sold for a value higher than that attributed to them for the purposes of the trade-in so that given that the original total value of the transaction was set at $150,000 and $153,000 has been recovered, the plaintiff's argument is that the gallery has now got 40 per cent commission on $150,000 and, indeed, a little more. Therefore he should simply hand back the remaining two trade-ins. But that argument ignores the risk that both parties took that the trade-ins might have fallen in value. Mr Jensen did not take all of the cash component for his commission.

[253] Mr Bambury's proposition is that:

> When these are traded-in, there is a certain point on which the value to which they have been traded-in, or in this case traded-up to be more correct, is satisfied. Beyond that point these are just more of my work to be sold and commission generated for the seller in the usual fashion.

[254] It was put to Mr Bambury that if he proceeded on the basis and sold the balance of the work through his new agent, Trish Clark, he, Mr Bambury, would receive approximately 81 per cent of the total sale proceeds from the $150,000 sale to the Amercian client.

[255] Mr Bambury did not present his case on the basis of a different agreement. Rather, he argued for a trade practice. He said:

> Where a client "trades up" (i.e. returns a particular artist's work or works to enable him or her to buy another work at a higher price belonging to the

> same artist), and the purchase price of the new work is satisfied, the original work is once again owned by the artist. The original work may stay in the agent's stock, but is no longer part of a transaction and ownership is solely with the artist. … When [client] traded up these paintings, I never discussed nor agreed with Andrew he and I would own them jointly.

[256] Yet Mr Bambury's evidence was also:

> Stephen and I agreed to resell the seven paintings that made up *Seven Witnesses/Seven Truths* separately, meaning that theoretically they each had a value of approximately $5,714 ($40,000 divided by 7). There was an established market for diptychs of this size. We thought they were more likely to realise profitable sales than if we attempted to sell the completed work again.

[257] Mr Jensen relies on a general agreement, distinct from this particular transaction, which he says existed between him and Mr Bambury. He says:

> As with all trade-ins that we conducted together, unless it agreed otherwise, works traded back into Jensen Gallery were jointly owned according to the commission arrangement (60/40) … If Stephen was not willing to share in such trade-in arrangements then Jensen Gallery would have had no interest in pursuing them.

As will appear elsewhere, I do not think Mr Jensen has proved such an agreement.

[258] Mr Jensen explained his position to Mr Bambury by an email on 20 July 2010, about the time of the breakup. Relevantly, he said there:

> I have quietly sold the majority of the works then a little over the $150,000 price she quoted so there has been an almost $7,000 realised over that amount so far which of course we have both benefitted from and we still have two *Seven Witness* paintings to sell yet to conclude that entire process.

[259] That was a cordial email. I am satisfied it reflected Mr Jensen's view of the position, a position which he articulated further in the evidence I have just quoted.

[260] The parties did agree to deal with the commission on this sale by a 60:40 split as proceeds were received, starting with the cash. They did not address the possibility that the agency would end during this process. It is not possible to imply a term on what they would have agreed had an officious bystander said, "But what happens if the agency comes to an end?" Nor is there customary practice in an unusual situation such as this.

[261] In the absence of an agreement, an implied term or a customary practice as to what would happen if the agency ended, I think the status quo should remain. The question is, what is the status quo? The status quo can be approached in terms of possession or in terms of property. In terms of possession, the agent, who has taken a substantial risk on the trade-in alongside the artist, is in possession of the work with the duty to sell them for the best possible price, allocating the proceeds 60:40. The question of property is doubtful. The sale of *Chinese Whispers*, had it been in cash, would have netted the agent $60,000 in cash. $70,000 was paid as part of the purchase price. But that was split 60:40. The result is that both the agent and the artist then took a risk that the value of the two traded-in works might fall. They rose.

[262] In my judgment, the equitable outcome is to hold both parties to their conduct from the trade in to the break up – where the proceeds of sale were being split 60:40. Therefore there is no breach of any fiduciary duty by Mr Jensen, let alone any breach of contract. The plaintiff's claim fails. These works should be dealt with in the same way other jointly owned works are. If the parties are unable to resolve this, there is leave to apply.

Third cause of action – breach of agency/fiduciary duty – failure to account for sale proceeds from sold works

[263] This cause of action divides into two parts. The first part is in respect of works sold where Mr Jensen has failed to account for any of the proceeds and the second part is for works sold and a failure to account for all of the proceeds.

The first part – failure to account for any of the proceeds

[264] The first part pleads the following works:

By Its Direct Action (1995)
In His Pursuit of the Absolute (1999)
Letters to Paul (VII) (2001)
To Hold On to That Consciousness (1998)
China (XXIX) (2003)
The Eternal Present (2000) and an untitled work on Paper
Newtons Seven (2004)
Ngamotu (1993)
Cartesian Circle (XI) (2004)
Ghost (LII) (2006)
Sienna (XLIV)

Blind (III) 2006
What Remains When the Object is Named (2000)

Total claimed $254,241.

[265] The claim in respect of all items is that these works have been sold but Mr Jensen failed to account for any of the proceeds.

[266] *Newtons Seven (2004), Ngamotu (1993)* and *Cartesian Circle (XI) (2004)* are dealt with under a separate topic to follow, the Roller Mills commission.

[267] I also do not resolve *China (XXIX) (2003)* here as I will deal with that work when dealing with the subject of the *Viba* catalogue.

[268] *The Eternal Present (2000) and an untitled work on paper* are discussed in the second part of the third cause of action.

By Its Direct Action (1995) and In His Pursuit of the Absolute (1999)

[269] These were two works sold to a customer on 6 April 1999 – *By Its Direct Action* for $2,800 and *In His Pursuit of the Absolute* for $3,800. Originally the defence was that the proceeds of these works had been put to the Monograph project (not yet explained). However, in cross-examination Mr Jensen changed his evidence, saying he believed Mr Bambury received payment in respect of these two works at the time.

[270] Artist payment forms were issued in respect of both works. *In His Pursuit of the Absolute* was initially misdescribed as *Freely Dispersed in Space*. The date of payment to the gallery is 6 April 1999, the day of payment to the artist was 8 April and the amount to the artist is $2,280. It has a marking in red on the payment note saying, "Found a payment of $2,280 but not this one". *By Its Direct Action* has the same buyer. The sale price is described as $2,800. The date of payment to the gallery is 6 April. Date of payment to the artist is 8 April. The amount due to the artist on the second work was $1,680. The payment form for the *By Its Direct Action* is marked "to pay".

[271] *In His Pursuit of the Absolute/Freely Dispersed in Space* also has a red dot on the right top, over-marked "F/P" which stands for "fully paid". Mr Bambury's office ledger where he checked payments due with payments received in his bank shows on 6 April a receipt of $2,280. That is two days before these payment notices.

[272] The defendant's argument is that Mr Bambury must have been satisfied at some stage that he received the sum of $2,280 for *In His Pursuit of the Absolute/Freely Dispersed in Space.* And having marked the *By Its Direct Action* payment form "to pay", would have followed-up receipt of the sum due of $1,680.

[273] Some of the handwriting on these entries appears to have been later, during the audit process, after the termination of the agency. The principal argument from the defendant, in support of these materials, is that Mr Bambury had clearly received the payment forms and noted them, and did not follow them up in the intervening years because he would have been satisfied that he been paid. There is no doubt that at one stage he thought it might have been paid because he has written in red ink "by direct action" against the payment of $2,280 in his office ledger and then struck it out.

[274] The argument for the plaintiff relies on the duty to keep full accounts and the proposition that in the absence of clear banking records, should be construed against the defendant. This is again relying on *Barkley v Barkley-Brown*.[49]

[275] These are transactions in 1999. The defendant's bank statements are not available. The defendant had a practice of issuing artist payment forms. Some of the detail that appears on that form is set out in [57] above. The artist payment form functions to inform the artist what work has been sold, the date of sale, the date of payment to the gallery and the date of payment to the artist. Typically, as here, there is a short lag between date of receipt of the payment and date of payment to the artist. In this case, two days. In my view, given the technology at the time, this is a good method of accounting to the artist. At that time the payments were made directly into the bank account of Unovis. That saved the time of the artist

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[49] *Barkley v Barkley-Brown*, above n 15.

negotiating the cheque. The artist agreed to that practice. It was an easy task for the artist to check payments and if the payment did not arrive, to go back to the gallery.

[276] In this case, there is no doubt that the gallery's advice of payments to the artist were given at the time and that the artist had the opportunity, at the time, to check receipt of the payments in his bank account. There is a doubt as to whether or not Mr Bambury was paid for these two works. That is also reflected in the fact that originally it was thought these receipts may have gone to the Monograph.

[277] What impresses me is that the payment advices appear to be utterly routine. They have plainly been received by Mr Bambury who has endorsed one "fully paid" and the other "to pay": Those two endorsements appear to be concurrent. They are not in the red ink of the later taking of accounts. They are relatively small amounts and there would appear to be no difficulty in the gallery deducting its commission and writing out a cheque to the artist. The Jensen Gallery payment either assumed that the date payment would be two days after the date of payment to the gallery or may be accurately stating that the deposit was on the 8th or may be made payment on the 6th, the same day it received payments. There is a possibility of an office error in making the deposits.

[278] In the circumstances, I am satisfied that the lack of complaint or follow-up records that whatever happened, Mr Bambury had no complaint about the gallery accounting to him for these two sales. He probably was paid. He has not proved failure to account. This claim fails.

Letters to Paul (VII)

[279] This work was sold to a client in February 2004. At that time it was listed on the gallery ledger as being the property of Mr Jensen by way of initials "A.J.'s". This is the standard reference to Mr Jensen owning a work in gallery stock. Plainly, it is a work of the artist and would have been consigned to the gallery for sale. Something must have happened for it to be listed as Mr Jensen's work.

[280] It was the defence of Mr Jensen that he acquired this work by agreement from Mr Bambury in settlement of two sums of money owed by Mr Bambury to

him. The first was a debt for travel expenses of $3,159.93 and the second, a sum of $1,800, on the balance of purchase by Mr Bambury of a Callum Innes work.

[281] Mr Jensen proved these two debts. As to the $3,159.93, Mr Jensen established that there were two sets of expenses incurred on a European trip. One set covered by a City Art Gallery grant, the other is out of pocket and funded by Mr Jensen. Nor was there any dispute that Mr Bambury did acquire a painting by Mr Callum Innes, in part, by way of swap, Mr Callum Innes owing him $3,000 for a Bambury painting and, in part, by an obligation that "the balance be paid in a work", this being set out in a letter from Mr Jensen to Mr Bambury dated 16 May 2000. So in total Mr Bambury owed Mr Jensen $5,000 ($4,959.93).

[282] The value of *Letters to Paul (VII)*, after the deduction of sale commission, was $6,000. Mr Jensen's defence was that Mr Bambury had agreed that he, Mr Jensen, could take this work, *Letters to Paul (VII)*, in lieu of this $5,000 debt.

[283] I am satisfied that Mr Jensen is not the sort of person who would let travel expenses in the order of $3,000 go by. There had to have been some settlement along the way. The above account fits in timing. True, it is a rough settlement. On the balance of probabilities, I find, however, this is a settled account. Both the travel expenses and the balance due on the Callum Innes purchase by Mr Bambury offset the transfer of *Letters to Paul (VII)*. Accordingly, the plaintiff's claim fails. Rather, it is a settled account.

To Hold On To That Consciousness (1998)

[284] It is common ground that this work was sold on 5 April 1999 for $3,800. It is also not disputed that Mr Bambury received an artist payment form. Mr Bambury wrote on the form "to be paid". The amount due to him was $2,280.

[285] Mr Bambury had his own bank books. These should not be confused with bank records. Essentially it was a ledger notebook with the date on the left hand column, a description of the depositor and the subject matter (normally "artworks") and the total banked, splitting out GST etc. The bank form page exhibited runs from 6 April 1999 to 16 March 2000. There are three payments in the sum of $2,280 but

two are for *Sienna* paintings in April and May 1999 and another payment on 6 April 1999 appears to be a part payment for another work. The Jensen Gallery payment form Mr Jensen relies on has a date of payment to the artist of 5 September 1999. The date of payment of the purchase price to the gallery is entered at 5 May 1999. There is a four-month difference. The fact that there is a four-month difference suggests to me that that date of payment to the artist was not a casual entry. There can be no suggestion of any deceit for the sale has been reported in detail.

[286] The problem is that Jensen Gallery no longer have access to their bank accounts in 1999. They have no banking records as distinct from internal stock records for that time. That period of time is outside the minimum time of seven years in which business records are required by statute law to be held.

[287] However, Mr Langton argued that in the case of fiduciaries, in a principal and agent relationship, the principal has an absolute liability to maintain records in order to be able to answer any enquiry. *Barkley v Barkley-Brown* is discussed above.[50]

[288] By contrast to Ms Barkley-Brown, not keeping any records, this particular setting is one of ample records. The essential problem of the agent gallery is it cannot corroborate its own internal records of payment being sent to the principal at the time, with a record of a debit to its own bank account.

[289] I am satisfied that on the probabilities, the Jensen Gallery payment form is accounting to Mr Jensen for his proceeds of sale, net commission, on 5 September 1999. These payment forms have a history of reliability in this trial. I do not think it is necessary for the agent to be able to produce bank records. I find the agent has discharged his obligations in relation to this work.

Sienna (XLIV)

[290] This is a cash sale. It is common ground that the purchaser viewed the work at Mr Bambury's studio. Shortly after the viewing, Mr Jensen emailed Mr Bambury to report that the purchaser had confirmed the purchase of "*The Sienna*". The

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[50] *Barkley v Barkley-Brown*, above n 15,

gallery's ledger of sales (of which I have seen many examples and find reliable) records the sale as being a cash sale but does not record any payments. That is not unusual in the case of cash sales.

[291] Mr Jensen gave evidence recalling that he gave Mr Bambury his share of the sale in Mr Bambury's studio and that Mr Bambury put it in the bottom drawer of a set of drawers. Mr Bambury's case is not that the work was not sold, nor that it was not sold after the client viewed the painting in his studio. His complaint was that he was not paid. He said, even if he were paid in cash, he would have received an artist's payment form. He instanced examples of that. There is an example on a payment form of 2006 of a sale price in cash and there are other examples of payments recording prices in cash.

[292] The plaintiff's argument accepts he was informed of the sale via email after the purchaser left his studio. He contends that the defendant has no records to evidence payment. That the absence of the documents should be construed against the defendant.[51] As discussed above, I do not think that the gallery was obliged to retain paper copies of all of its bank statements as far back as 2005. This work was sold on 7 July 2005. There is no doubt that Mr Bambury was fully aware of the sale at the time. He has not complained about non-payment until after termination of the agency, five years later. It was of a significant sale value at $18,000, entitling him to at least $10,800. He would not have forgotten that amount of money being due if he had not been paid. I am satisfied there has been adequate accounting by the agent gallery. This claim fails.

Ghost (LII) (2006)

[293] This was a work in respect of which the defendant has given previous different explanations. He first pleaded that proceeds from this work went to the Roller Mills commission.

[294] The defendant's final position at trial was that the gallery made two significant sales of Mr Bambury's works in November/December 2006 and the

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[51] *Barkley v Barkley Brown*, above n 15.

payments to Mr Bambury for these transactions got mixed up. An American client purchased *Ghost (LII)* for $46,000, Mr Bambury's share being $27,000. There is a consignment note of Mr Bambury's with a photograph of the painting, a title *Ghost (LII),* and a note saying "consign Jensen Gallery December 2006 sold via studio to [name of the American client]". The price is left blank. There is a note, "request artist payment form". So there can be no doubt that Mr Bambury knew it had been sold.

[295] The defendant says that the American client paid the gallery by direct credit, the total amount being $77,480 which included $46,000 for *Ghost (LII)* and other amounts that he owed the gallery for storage of his artworks.

[296] Then around about 20 December 2006, through an art consultant, Mrs Vavasour, two clients, a husband and wife, purchased two works for $41,400, discounted from $46,000. Mrs Vavasour's evidence confirms this. The works were *Dreams of His Youth* and *In Reference to a System of Magical Signs* and Mr Bambury was provided with an artist's payment form. Mrs Vavasour's evidence was that the client met the negotiated price by a cheque for $15,000, by cash for $14,000 and by trading in some Callum Innes prints at an agreed value of around $12,500.

[297] It was put to Mr Bambury in cross-examination that what happened was that the direct credit that he received on 9 January of $26,220 actually came from the American funds which were used to pay him for his entitlement on the New Zealand couple's purchase and that cash was given to him to pay for the American transaction. Mr Bambury did not agree. His answer, though, is complicated. He says, "I certainly don't agree with it because there isn't a cash thing, but logically, it's a good story". He accepted he knew of both the substantial purchases by the American and by the New Zealand couple. He answered, "I certainly knew about them". He was then asked the question, "And you didn't raise any issue about not being paid for just one of them did you?" Answer, "Most of my issues have been raised post-termination and since the auditing process was conducted".

[298] Clearly this is a muddle. There is no doubt there were two significant transactions, one on 29 November 2006 – the sale of *Ghost (LII)* for $46,000 – and

the other about three weeks later of two artworks for a total of $41,400. The first transaction was by direct credit and went through bank accounts. The second transaction was a mixture of cheque, cash and trade-ins (as we have seen, always a complicated mix, threatening good record-keeping).

[299] It is significant that Mr Bambury was aware of two major sales at the time. It needs to be kept in mind that there is a pattern of conduct of Mr Bambury throughout the agency of checking that advice of payment from the gallery to him is matched by deposits to his bank account. That works for run of the mill transactions but is inherently qualified where there are cash transactions going on and/or contras and trade-ins.

[300] Again, the plaintiff's case seems to rest on the proposition of law that the onus after all this time remains on the principal because of the principal's obligation to maintain good records. For sure, the principal must maintain good records but it does not follow that there is no room for mistake.

[301] In my judgment, the amounts due to Mr Bambury were so large – in the order of 60 per cent of $80,000+, that his lack of complaint for about four years prior to the termination of the agency is fatal to his claim. For, although the agent's story has changed, the evidence that he gave at the trial is, as Mr Bambury said, "a good story". It hangs together in a detailed way. It is corroborated by the direct evidence of Mrs Vavasour as to one of the transactions. It is corroborated by the direct credit of the American buyer. The defendant exhibited the overseas payment notification to the gallery and the gallery bank statement. So the funds were there to pay Mr Bambury. On the balance of probabilities, Mr Bambury was paid his entitlements. This claim fails.

Blind (III) (2006)

[302] This was a painting consigned to Mr Jensen. The consignment notice has a sale price on it of $15,000 and is marked "sold to [a husband and wife client]". Mr Bambury says that he did not discover that he had not been paid for this painting until after the agency ended.

[303] The defendant's argument is that in 2006 the same clients had put up for auction another Bambury work, *Even Though It Appears Abstract*, and that as both Mr Jensen and Mr Bambury were keen to remove that work from the secondary market, Mr Jensen persuaded the couple to trade it into the gallery in exchange for a $30,000 credit. Mr Jensen has proved this by the production of the relevant emails recording this agreement. The credit that the couple negotiated was able to be applied against any work sold by the Jensen Gallery. They chose to apply part of that credit, $14,000, to the work, *Blind (III)*, which explains why Mr Bambury wrote "sold [names]" on his consignment form. Mr Bambury's evidence does not dispute that he knew of the sale. He says:

> And, according to his [Jensen's] and my records sold to [the clients] in November 2005.

[304] The Bambury painting that was traded in with a credit of $30,000 was called *Even Though It Appears Abstract*. It was not sold and, after the agency ended, Mr Jensen tried to auction it. But that sale was stopped by Mr Bambury's solicitors as Mr Bambury was unsure whether Mr Jensen held clear title at that time. Inferentially he was claiming an interest in that work. Mr Jensen still has possession of it.

[305] The plaintiff's legal submission was that, in the circumstances, the onus of proof was on the defendant to prove the plaintiff's consent to delay payment to him. Mr Jensen's evidence was that Mr Bambury agreed that his share of the $14,000 balance of the credit ($8,400) would be received once the traded in work had been sold. He says that he and Mr Bambury were confident they would be able to sell the piece in time, recover the smaller debt and possibly make a profit as well. He says the work was subsequently exhibited in Jensen Gallery in an attempt to sell it and produces a photograph of it so exhibited.

[306] An examination of the probabilities has to take into account the consequences to the artist and the gallery of trade-ins. This topic is discussed above.[52] The clients did not pay cash for the acquisition of *Blind (III)*. Rather, they took advantage of a credit being part of the trade-in. If the gallery had treated the sale of *Blind (III)* in

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[52] At [249]-[262].

the ordinary way, the gallery would have paid the net sale price, after commission, of $8,400, not from the proceeds of sale but from its working capital.

[307] Mr Bambury knew at the time of the trade-in and on-purchase of *Blind (III)* as his endorsement of his consignment note shows. Against these facts, Mr Bambury's evidence: "After the agency ended, I discovered I'd not been paid for this painting", is on the probabilities not a reliable statement of Mr Bambury's appreciation of the situation at least back in 2005. *Blind (III)* was a valuable piece of work. It had a list price of $14,000. The sum of $8,400 is a significant sum. Mr Bambury knew it had been sold. He would have also known it was sold on credit. On the probabilities, at the time he agreed to the trade-in basis of the sale of *Blind (III)*, relying on the traded-in painting *Even Though It Appears Abstract* being sold and possibly at a profit, which he would share.

[308] Mr Jensen has acknowledged a liability of $8,400 to be paid when the trade-in is sold. The practicalities of the situation are that the traded-in work was used to offset the purchase of two works, the other work not belonging to Mr Bambury. The Bambury work traded-in gave rise to a credit of $30,000. The Bambury work taken as part of that credit has been credited by Mr Jensen with the sum of $14,000.

[309] If *Even Though It Appears Abstract* is sold for more than $30,000, then the profit can be shared in a variety of ways, depending on Mr Jensen's arrangements with the artist of the other work acquired by the credit. It is suffice for the moment to record that Mr Bambury has recognised an obligation to pay more than $8,400 if there is a profit. One would hope that after this litigation the parties can agree upon a formula for that. That topic is formally adjourned with leave to apply.

What Remains When the Object is Named (2000)

[310] It is common ground that Mr Jensen gifted this work to a prominent Australian gallerist.

[311] There is a handwritten consignment of two works, one of which is *What Remains When an Object is Named*, underneath the Australian gallerist, in Mr Bambury's handwriting. At the very top of the page is the word "To". The

obvious inference is that this is a consignment note that the work, *What Remains When an Object is Named*, is consigned to the Australian gallerist.

[312] Mr Bambury accepted he wrote the name of the Australian gallerist on the consignment form, he agrees would not have written this unless he had been told the gallerist was purchasing the painting. He has later understood, in the course of this litigation, directly from the Australian gallerist, that it was gifted to him by Mr Jensen when the gallerist purchased three paintings by other artists. Mr Jensen cannot remember the transaction but, relying on the Australian gallerist's evidence that it was gifted to him, says, "I would have accounted to Stephen in cash at the time". Mr Jensen says that the fact that Mr Bambury wrote the Australian gallerist's name on the form shows that the arrangement must have been discussed with him at the time and agreed to.

[313] Mr Jensen was cross-examined on the basis that he only gave evidence that he paid Mr Bambury after it was ultimately proved that he had given the painting to the Australian gallerist. Prior to that, his position had always been that the work was never consigned to him. Mr Jensen said that that earlier evidence was because there was no evidence of the work on his database. Obviously, Mr Jensen's evidence that he paid Mr Bambury for it is a supposition. The submission of his counsel in closing was the more pertinent submission that Mr Bambury would not have consigned the work to the Australian gallerist without discussion of payment for the work so that on the probabilities Mr Bambury would have been paid in cash at the time. The amount claimed for the work is $4,200.

[314] The argument is again on the proposition of law that Mr Jensen, as agent, having no records to show the alleged agreement was reached, the absence of such records should now be construed against him.

[315] I consider it is a telling fact that Mr Bambury did not consign the work to Mr Jensen's gallery, or at least if he did, the surname of the Australian gallerist is written on the consignment note in his handwriting. That is evidence that there must have been some discussion about this transaction directly between Mr Bambury and Mr Jensen or one of his staff. More probably the former. If Mr Bambury was

awaiting payment and keeping in mind that payments were made promptly after sales, then the question becomes, why there was no follow-up by Mr Bambury?

[316] On the probabilities, that must have been because whatever happened, Mr Bambury was satisfied. He either received payment for the work in some proportion or agreed to it being gifted to a gallerist. Mr Jensen had taken the painting to Australia where he had shown it to the gallerist. The gift was in conjunction with the gallerist buying three other works of art, one by a Mr Federe and two by Mr Callum Innes. This was for a total payment of AUD70,000. In this context, there were ample funds to pay Mr Bambury his 60 per cent, being $2,520. The fact that the work was consigned directly to the Australian gallerist and not to the gallery indicates a sale.

[317] Mr Bambury was either paid or failed to follow-up notice of the transaction at the time. On the probabilities, the former is more likely than the latter. This claim fails.

Third cause of action – second part – failure to account for all the proceeds

Necessary Correction XVIII
Necessary Correction 14
Mudra (II)
Golden Echo N-C XIX (1999)
Of the properties of the materials
Insert Cross 089322

[318] *Necessary Correction 14* aka *Leaden Echo* and *Golden Echo N-C XIX* are discussed under the topic of the Monograph of this judgment.[53]

Necessary Correction XVIII, The Eternal Present,[54] and Untitled work on Paper

[319] There is no issue between the parties that these three works were sold to a husband and wife, who were established customers of the gallery, and of Mr Bambury. The two issues for determination are whether Mr Bambury knew of the sale of the two lesser works, *The Eternal Present* and *Untitled work on Paper*. The plaintiff's case is he knew these two works had been purchased but had no

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53 At [437]-[493].
54 Also referred to as *The Eternal Persistent (Wood)*

knowledge of payment for them. He denies agreeing to gift the two lesser works to the purchasers. One of the purchasers, the wife, was called as a witness and gave evidence that the works were not gifted to her. The plaintiff says there is no evidence to suggest that the payment of $20,000, which she did make and of which Mr Bambury received $12,000, or the payment of $40,000 if the Court finds there was a second cash payment of $20,000, covered these two works as $40,000 would have only covered the third work purchased, *Necessary Correction XVIII.*

[320] The defence case, supported the wife's evidence, is that she purchased the three works. There was no gift. She purchased them during a visit to Mr Bambury's studio. Mr Bambury was present. She did ask Mr Bambury and Mr Jensen if they would consider giving her one of the works and her evidence is that she was told they were not in the business of giving art away. Following the sale, Mr Jensen sent Mr Bambury an artist payment form. The purchase price was "$20,000 (a.k.a. $40,000)". There is another version of the artist payment form listing the price as $20,000. Mr Bambury accepts that he was paid $12,000, being 60 per cent of the $20,000 sum. But he denies that he received a share of a further $20,000 cash payment.

[321] Mr Bambury did not dispute the visit but said in evidence he may not have partaken in the discussion as to price. He certainly knew she had bought all three works. In cross-examination he was questioned:

> Q You accept the sale related to all three of those works and the price was $40,000.
>
> A I presumed they signed a list of those three works, yes. They have those three works…
>
> Q You say in your brief of evidence, don't you Mr Bambury, that you knew the price was $40,000?
>
> A Well I know the price of these big works. They were all forty at that period in time and a number of them sold at that price.

[322] The issue seems to be raised in that answer as to why it is only $40,000. The husband also gave evidence and was cross-examined. His evidence was that he paid the balance of $20,000 in cash. There is no doubt Mr Bambury received 60 per cent of the sum paid by cheque of $20,000, that is, he received $12,000. The husband's

evidence is that Mr Jensen came to his office and collected a further payment. There is a diary note of the gallery of 16 September 2000, "Gave Jan B. $2,000 – in advance of [name of purchaser]". This records a cash payment to Mr Bambury's wife.

[323] The defence submitted that in the light of this history, if Mr Bambury had not been paid his full share of the $20,000 cash payment, another $12,000, he would have followed it up and the situation would have been resolved. Reliance can also be placed on the fact that this is after all nearly 15 years ago.

[324] I am satisfied that Mr Bambury knew that these clients had paid $40,000. He did not know how the price was split against the three works. He does not dispute that he received $12,000 from the $20,000 paid by cheque.

[325] On his own evidence, Mr Bambury was expecting another $12,000. I think the evidential burden in this case has shifted back to Mr Bambury. These were very substantial and established clients. There would not have been any thought that they had not paid. If he had not received the money, he would have been following it up with Mr Jensen. The evidence that the defendant has given in this Court is an adequate account for the transaction. Therefore this claim by the plaintiff fails.

Mudra (II)

[326] The *Mudra (II)* artwork was sold for $65,000 in October 2007. The balance of the purchase price due to Mr Bambury was $39,000. He was accidentally paid $30,900 (into the Unovis account), leaving a balance due of $8,100. The defendant accepts this amount is outstanding. The plaintiff is entitled to $8,100 with interest at the judicature rate from 1 November 2007 to the date of this judgment. There is no basis that Mr Jensen should forfeit his commission on this sale because of his mistake.

Of the properties of the materials

[327] This work was sold by the Jensen Gallery for $30,000 in March 2009. The artist was entitled to $18,000 to be paid into Unovis but only $14,000 was paid. It is

acknowledged that a further $4,000 is payable. I note that this was a sale in which there were three part-payments for the work. Artist payment forms were sent in respect of the first two items and the third but, due to an administrative oversight, the third artist payment form was not completed with the electronic payment. $4,000 is due, with interest calculated from 1 April 2009. Again, there is no basis for ordering Mr Jensen to forfeit his commission on this sale.

Insert Cross 089322

[328] This work was sold at a discount. The purchase price was agreed to be $28,000 minus a 10 per cent commission to an art consultant, Mr Baragwanath. The issue is whether or not Mr Bambury agreed to share in the 10 per cent commission paid to the consultant. The gallery received $25,200, that is, 90 per cent of the sale price. Mr Bambury was paid $15,120, that is, 60 per cent of $25,200. Mr Bambury received two payment forms. The first, dated 20 November, shows the purchaser as Mr Paul Baragwanath, the sale price at $28,000, and the first payment of $11,400, with the amount to the artist of $6,840. This is noted as received by Mr Bambury on 5 December. The second payment notice is dated 17 December. It records a payment received to the gallery of $13,800 and a payment to the artist of $8,280.

[329] On its face, it clearly shows a shortfall of $1,680. There is an audited note to this effect on the face of the payment notice, with Mr Bambury's evidence that he did not become aware he had not received the final $1,680 until after the agency was terminated. Also handwritten on the second payment notice was a tick against payment to and the words "received" and under it, the date "17/12/08". It was self-evident from the payment notice that two payments totalling $25,200 had been paid in respect of a painting with the sale price of $28,000.

[330] In cross-examination Mr Bambury agreed that he knew at the time that Mr Baragwanath was an art consultant. He also admitted that at the time he could have worked out that there had been a 10 per cent discount to Mr Baragwanath.

[331] There was clearly no intention on the part of the Jensen Gallery to disguise the discount. Mr Bambury would have known there was either a discount or he was

to expect a third payment. He would know that the shortfall either way was 60 per cent of $2,800.

[332] We know from other evidence that Mr Bambury did not like discounts. It is possible he may not have agreed to this but accepted it as a *fait accompli.* What is clear is that there was no follow-up. On the probabilities, he either agreed to it, albeit reluctantly, or he decided not to pursue a complaint with the gallery. In the latter case, that would be laches. Either way, he has not made out a claim for the sum of $1,680.

Roller Mills commission: The defendant's set-off argument versus plaintiff's claim for full proceeds of sale

The proceeds of the sales of Ngamotu (1993), Newtons Seven (2004) and Cartesian Circle (XI)(2004) and the shared work, Necessary Correction (XV) set-off against Jensen commission on Roller Mills

Part of plaintiff's third cause of action – failure to account for sale proceeds from Ngamotu, Newtons Seven and Cartesian Circle (XI), Part of the plaintiff's eighth cause of action – seeking sale of co-owned works – Necessary Correction (XV)

[333] There are three issues here. The first is a dispute as to whether Mr Jensen can prove and enforce an agreement with Mr Bambury that the Jensen Gallery was entitled to $100,000 commission in respect of the Roller Mills commission. If not, the second is whether or not Mr Jensen has accounted for the sales of the above works. The third is whether the claim is out of time, under the Limitation Act 1950. I place the limitation point third as the terms of s 4(9) and s 21 require a full appreciation of the facts before they can be applied.

An agreement?

[334] In his statement of defence the defendant pleads that he and the plaintiff orally agreed that Jensen Gallery would recover a $100,000 commission in respect of the Roller Mills commission. That Mr Bambury/Unovis had paid Jensen Gallery $33,750, leaving a balance due of $66,250. That in about December 2005, the plaintiff and the defendant agreed at a meeting at the plaintiff's studio that the outstanding commission would be set-off against the artist's share of the proceeds

from the sale of three works: *Ngamotu* (artist's share $39,000); *Newtons (VII)* (artist's share $21,000); and *Cartesian Circle (XI)* (artist's share $6,450) and that no issue was taken with this arrangement until after the termination of the agency agreement.

[335] The plaintiff disagrees. In his third cause of action, he sues for failure to account in respect of these three works. He contends that on 26 May 2004, Mr Jensen agreed with Ms Trish Clark, as the agent of the developers of the Lumley Centre, Shortland Street, that Mr Jensen's commission would be $35,000. The plaintiff acknowledges that he is currently $1,250 short of that payment.

[336] By way of context, it is important to appreciate at the outset that this commission was not directly won by the gallery for its artist. Mr Bambury was approached by agents of the developers, Manson Developments Limited (Manson) of the Lumley Centre, for the project.

[337] However, it was always understood between Mr Jensen and Mr Bambury that the Jensen Gallery would obtain a commission for this work.

[338] The chronology of facts is important.

[339] Manson is a property developer. In 2002 Mr Manson approached Ms Patricia Clark to discuss how to deal with art in the public floor of what became the Lumley Centre. Subsequently Ms Clark was contracted to Manson, as the agent, to commission art for the public floor. Ms Clark approached Mr Bambury about the possibility of a commission. Mr Bambury pondered this and, in an undated memorandum, wrote out the pros and cons of accepting such a large commission. Among the cons was this note:

> Commission % to be confronted = conflict.

That was clearly a reference to the need to agree a commission fee to Mr Jensen.

[340] On the bottom line of this note Mr Bambury has a range of prices as follows: $200, $300, $400, $500, $600. He has circled around $500 with an arrow back to $400. These numbers were in the thousands.

[341] It is understandable that Mr Bambury knew the Jensen Gallery's commission would have to be negotiated with Mr Jensen. There is no standard practice for the commission of the artist's agent for projects of this scale which are privately negotiated with the developer. The agent is not selling a work. The entitlement of the agent to a commission is a reflection of the past work of the agent building the artist's reputation which is a factor in the artist being approached for the commission. Having prepared these notes, Mr Bambury went back to Ms Clark and suggested $500,000. She said the price would never work. He mentioned to her that he would need to discuss Mr Jensen's commission with him.

[342] Ms Clark asked him to prepare a written proposal and to come back to her with a lower price. She told him not to worry about Mr Jensen's commission in her estimate. She said she would speak to him about it. Ms Clark's evidence corroborates this chronology. She confirmed she told Mr Bambury she would negotiate the agent commission with Mr Jensen. Both of them were of the view that an appropriate commission would be about 10 per cent in these types of situations. (I do not take their views, Ms Clark's and Mr Bambury's views, into account as experts because they are partial to the dispute.)

[343] The next step was a letter from Mr Bambury to Ms Clark dated 19 August which proposed a fee of $300,000, excluding GST, and in addition material costs and installation. It is silent on commission. Ms Clark then entered a figure of $330,000 on her initial workings for Mr Bambury's work, the additional $30,000 taking into account a roughly 10 per cent commission for Mr Jensen as his agent.

[344] This summation of events is not accepted by Mr Jensen. He contends the phrase "commission % to be confronted = conflict" could just as easily apply to an issue with Ms Clark and the developer as to one with him. It was his view that when Mr Bambury first suggested a figure of $500,000, that figure included his commission of 40 per cent. He says that as a compromise, given Ms Clark's

opposition to the $500,000 figure, he and Mr Bambury agreed to set the price at $410,000, including GST. At this price Mr Bambury would secure the fee of $300,000 and Jensen Gallery would be entitled to a $100,000 commission. This, of course, is less than 40 per cent, about 25 per cent. It is also his evidence that this division in the contract amount was to remain private between himself and Mr Bambury.

[345] The next firm date we have is 6 April 2004 when Mr Jensen emailed a draft contract to Ms Clark for Mr Bambury's Roller Mills work. Mr Jensen was acting for three artists involved in commissions on this building. The other two artists were Mr Speers and Mr Savvas.

[346] Mr Jensen's draft contract for Mr Bambury had the contract price as $417,778, plus GST, "to be paid to the artist's agent". There was no reference to any commission to Mr Jensen. On the same day that this draft contract was emailed to Ms Clark, Mr Jensen sent an email to Mr Bambury which begins:

> Trish is of course having trouble with the contract price as it has increased. I have talked with her at length and she is of the view that she and Ted Manson are entitled to know what the fees being paid out are, over and above what the determinable fixed costs of the work are … I've said we are unhappy about such disclosure and this information ought to remain private to you and I …

[347] Then, in the last paragraph he says:

> … She felt he [Mr Manson] would be happier so I am prepared to pass on a simple spreadsheet to her in which I have altered some of the fixed costs upwards to diminish the fee portion for ARTISTS/JENSEN GALLERY. Of course this seems a bit silly but if it can be signed off on because they have this version rather than not being okayed because they don't, then I guess it should be sent. Can you have a look at it and get back to me.

[348] The enclosure has three columns of numbers:

[a] Express costs, excluding GST;
[b] With GST
[c] "EST" – cost.

[349] The first column of costs show the artist's fee at $242,222.21 and the agent's fee at $55,111.11. Including GST, the respective figures of $272,500 and $62,000. The third column, Est-Cost, was private and never shown to Ms Clark. In the private column the artist's fee comes in at $300,000 and the agent's fee at $100,000. And the total cost comes in at $456,000 rather than $418,666.65 on the first column. This is achieved by reducing the other costs, except artist's fee and agent's fee. There is no evidence that Mr Bambury, who received the full spreadsheet on 6 October, objected at that time to the $100,000 fee disclosed in the private column.

[350] Ms Clark was cross-examined on the basis that in this process she became involved in acting both for Manson to get a low price for the commission, and for Mr Bambury in negotiating his commission to pay Mr Jensen:[55]

> Q You are not acting for both parties?
>
> A Essentially at that point I was, I wasn't acting for both parties cos I was attempting to find a resolution that would assist Stephen because he made it very, very clear to me that he would only do this project for Manson's if I negotiated the commission that Andrew Jensen would pay, direct with Andrew Jensen. He said otherwise if it was to be 40% he would not do the project. So I was working under instructions essentially from both Manson's and from Stephen, in, to some extent …
>
> Q Why would he provide you with a note at the outset that includes $500,000, factoring in an estimate of 40% commission for Mr Jensen?
>
> A Umm, that was a starting position.
>
> Q Right.
>
> A And I said that's completely untenable. They wouldn't even take that price to Manson. I said it's completely untenable. There's absolutely no, no justification either for that price or for that commission on that project, and there are, there are conventions about large scale projects like that, 40% commissions are not usual.

[351] The spreadsheet was sent by Mr Jensen to Ms Clark except for the last private column, EST -cost. So what was presented to Ms Clark by Mr Jensen was the total price of $471,000 including GST.

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[55] Notes of evidence, 528.

[352] The next event was a meeting between Ms Clark and Mr Jensen on 26 or 27 May which is recorded in notes made at the time by Ms Clark. These notes cover Ms Clark's negotiations with Mr Jensen in respect of all of the artists that he was acting for. Against Mr Bambury's name is the figure of $440,000. Then in the next column there is the figure of $350,000 with a square around it. And then in the third column, the figure of $365,000, some references to GST and then on the far right of the line, the figure of $365,000 is repeated. Down the page, in open space, there is the figure of $35,000, a circle around it and the initials "AJ" repeated over the top of each other. Ms Clark says $35,000 was the commission to Mr Jensen, to which he agreed by initialling.

[353] Mr Jensen's view is that these negotiations with Ms Clark, arriving at the agent's commission of $35,000 plus GST, did not alter the private arrangement that he and Mr Bambury had previously agreed.

[354] He contended:

> It was in our interest to push the price up as high as reasonably possible, even if Trish Clark was only amenable to this because she thought my commission was coming down.

[355] Mr Bambury's evidence was that both Ms Clark and Mr Jensen told him that a final agreement had been reached and his contract price would be $365,000 plus GST, plus the cost for the copper he would use. It was his evidence that Andrew's commission was $35,000 but he is not explicit that Andrew told him this. He records he was given Ms Clark's written notes from the discussion which I have just referred to. The written contract he signed with Manson did not record Mr Jensen's commission.

[356] During the progress of the work, Mr Bambury was paid directly by Manson, leaving him to account to Mr Jensen for his commission.

[357] Approximately a year passed while the commissioned work was constructed. The final payment from Manson's to Mr Bambury was on 23 September 2005.

[358] On 15 November Mr Bambury emailed Mr Jensen. This was a routine email covering a number of topics. It includes:

> Working also on rounding out the Manson file and accounts so will have funds for you once I close it. Not too far off.

[359] On 5 December, Mr Jensen emailed Mr Bambury attaching a spreadsheet of funds held in the United States for Mr Bambury. The emails links these funds with payment to the Manson's commission. The relevant part reads:

> Attached is a simple spreadsheet of the funds held in the US for you as you requested. We can get together over coffee away from the gallery probably and go through the Manson's commission and sort this out easily I'm sure.

[360] Twenty-two minutes later, Mr Bambury replied:

> Sorry I should have and forgot to say yes. We will sort out those bits of business this week, i.e. Manson etc. That's if the clients give us a wee bit of space!

[361] Mr Bambury says he did not open the spreadsheet. The spreadsheet reads (purchasers redacted):

Bambury Sales in USA		60%
Ngamotu	$ 65,000	39,000 [ ]
Newton Seven	35,000	21,000 [ ]
NC XV	22,000	13,200 [ ]
Cartesian	11,000	6,450 [ ]
	$133,000	**79,650**

[362] The funds were held to the account of Mr Jensen in US dollars. The above figures are in NZ dollars. The purchases were in US dollars and reflect the fact that the overseas sales did not incur GST because the first two works were purchased by a client who was an American and the second two were purchased by two persons resident in New Zealand, but who paid through a US dollar account. Those were the sales of *Necessary Correction (XV)* and *Cartesian Circle (XI)*.

[363] The sales of *Ngamotu* and *Newton Seven* were made to American clients on 26 May 2004. An internal invoice was raised recording a payment of $60,000 to SB.

The invoice has "cancelled" written across it because Mr Bambury said the funds were going to America as opposed to New Zealand. The internal sales sheet (which records numerous sales) shows the sale of *Ngamotu* and *Newton Seven* and the amount that would normally go to the artist of $39,000 and $21,000 respectively, the same amount appearing in the spreadsheet attached to the email. But that was not paid at the time. Mr Jensen also agreed that there were no artist payment forms prepared for Mr Bambury in relation to these two works. This agreement by Mr Jensen is significant because it means that unless he told Mr Bambury informally, Mr Bambury would not know those two works had been sold. Mr Jensen did not say he told Mr Bambury informally of the sales.

[364] The sale of *Necessary Correction (XV)* and *Cartesian Circle (XI)* to the New Zealand clients in US dollars was made on 15 June 2004. An internal invoice records the sale of *Necessary Correction (XV)* at $25,000 and *Cartesian Circle (XI)* at $12,000 and the sum of $19,700 to Mr Bambury.

[365] Mr Jensen agreed that that sum equates to Mr Bambury owning a half share of *Necessary Correction (XV)* and entitled to 60 per cent of *Cartesian Circle (XI)* after the gallery took its commission. Mr Jensen agreed the gallery was proceeding at that time on the basis that Mr Bambury half owned *Necessary Correction (XV)*. Mr Jensen also agreed that, again, there is no artist payment form. Asked why not, he said because the funds were being sent to America to be held.

[366] Again, this is a significant answer by Mr Jensen. It means that Mr Bambury does not know of the sale of these four works made in May and June 2004, and could not have until at the earliest he could have seen the spreadsheet attached to the email on 5 December 2005.

[367] The lack of notice of these four sales is very unusual (even putting aside co-ownership of *Necessary Correction (XV)*, as not possibly triggering the agent's responsibilities). The lack of prompt dispatch of artist payment forms is contrary to the practice of the gallery, to advise of sales within a day or so. As with the sales to the American clients, these latter two sales would not be known to Mr Bambury until they were reported to him.

[368] The only reason given by Mr Jensen is that they were sales in US dollars. There was no evidence of a practice or agreement not to disclose such sales. Rather, the inference that I draw, on the probabilities, is that Mr Jensen, conscious of the dispute with Mr Bambury over the unresolved issue of the commission for Roller Mills, deliberately did not disclose these four sales at the time that they were made, and parked the funds separately, pending resolution of that dispute.

[369] The second fact of significance is that, not having notice of the sales, Mr Bambury would not know the amount being held unless he opened the spreadsheet. Certainly the email he received on 5 December did not mention the amount. There is no other evidence that he was ever told the amount.

[370] On 2 March 2006, Mr Jensen sent an email to Mr Bambury discussing a date to see the "LAIB" show suggesting that the following Sunday and adding, "it would be good too if we could go through the Roller Mills and square that away".

[371] On 7 March, Mr Bambury paid Mr Jensen $22,500 and asked him via email to let him know if he needed any more for his provisional tax. Mr Jensen responded immediately saying, "Well, if you can make it $30,000, that will help immensely. Then once the funds come back from NY we can sit down and square it." Mr Bambury made the additional payment.

[372] The evidence was Mr Bambury paid an additional $11,250, in all $33,750. He said he could not remember the exact amount that had been agreed upon between Mr Jensen and Ms Clark. He thought it was about $30,000 but knew it may have been a little more.

[373] Jensen Gallery, on 7 March, raised an invoice described as commission (part payment) for a total of $33,750 including GST. That was paid on the same day by two cheques, one of $22,500 and the other of $11,250.

[374] On 19 May 2006, Mr Jensen emailed Mr Bambury first discussing a Te Papa matter and then, in the second paragraph:

> We also have to set aside some time between studio visits and a busy life to go through Manson accounts and give the [another matter] a concentrated look.

[375] On 19 May, Mr Jensen emailed his separated wife:

> As soon as Stephen Bambury has settled his debt to me for the Roller Mills commission I will give you a one-off payment of $60,000 which is all the spare money I have at present. You can start an account.

[376] It was Mr Jensen's evidence that they later agreed in the same month to set-off the outstanding Roller Mills commission against the sale proceeds from *Newtons Seven, Ngamotu* and *Cartesian Circle (XI).* And that prior to the breakup of the agency in late 2010, Mr Bambury never asked for payment in respect of these works:

> This was because we both understood they are being offset against the commission for the Roller Mills project.

[377] Mr Jensen gives no detail of how this agreement was reached in May 2006. There was no release of Mr Bambury's share of the proceeds of sale of *Necessary Correction (XV)*.

[378] The spreadsheet was sent on 5 December 2005. This was in respect of sales of work on 26 May and 15 June 2004. The particular stories as to invoices and absence of notification of payments are set out in [363] and [365] above. In [367] and [368] I have drawn the conclusions that there was a deliberate non-disclosure of these transactions. The sales were in mid-2004, about the time of the negotiation of the Roller Mills commission.

[379] The key issue becomes whether or not putting this information in a spreadsheet and attaching it to an email discharged the duty of Mr Jensen as agent to account to the principal. As a trustee, Mr Jensen had a duty of full disclosure before reaching any agreement with a beneficiary to have the benefit of trust funds.

[380] It is quite possible that there was a meeting in which it was agreed to let matters lie where they were with the payments made by Mr Bambury in March of that year. That could have happened if, as Mr Bambury says, he never opened the

spreadsheet and so saw how much was being retained, let alone in respect of which works.

[381] To obtain the flavour of Mr Bambury's evidence, I set out part of the cross-examination:[56]

> Q Do you dispute, Mr Bambury, that you were aware that these funds were held in the US for your benefit?
>
> A Yes I do dispute that up to the point that I get this document [the email of 5 December 2005] and I just expect to get paid on a sale, fairly soon after it's made.
>
> Q As at the 5th of December 2005, do you accept that this email made you aware of the funds held for your benefit in the US?
>
> A I accept that that is here in this email yes.
>
> Q You would've obviously talked with Andrew about those funds wouldn't you, as part of your daily conversations?
>
> A I have no recollection of what we talked around this subject.
>
> Q You have no recollections of not talking to him about this either, do you Mr Bambury?
>
> A As I have said I have no recollections at all. I was actually very surprised when this was discovered in my auditing process.
>
> Q Well if you have a look at what it is that is set out in the spreadsheet, you will see that those are the four works we were just talking about won't you –
>
> A Yes I can see that yes indeed they are.

[382] The cross-examination went on to take Mr Bambury through the spreadsheet and note that there was an error in respect of *Necessary Correction (XV)* showing an entitlement to commission for him at 60 per cent when the property was owned 50/50, which he agreed to. The cross-examination continues:[57]

> Q If you were to remove that line from the spreadsheet [the line showing funds from *Necessary Correction (XV)*], you can take it from me that you would get a total of $66,450?
>
> A Yes I'll accept that yes.

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[56] Notes of evidence, page 370.
[57] Notes of evidence, page 371.

Q Mr Jensen's case is that that amount was set off against the balance of the Roller Mills commission that was outstanding to him at that time? You understand that's his case?

A I understand that's his case.

Q And presumably you would disagree with that then, Mr Bambury?

A Sorry what am I disagreeing with?

Q Mr Jensen's case that that amount was –

A Yes I do.

Q - set off from the balance of the outstanding –

A No, I clearly disagree with that.

[383] In his evidence in chief Mr Bambury had said it was after the agency was terminated that Ms Clark identified that he did not appear to have been paid for *Ngamotu* (and *Newtons Seven*). That Ms Clark found the email dated 5 December 2005 and opened the spreadsheet, something Mr Bambury had never done.

[384] Counsel for the plaintiff, Mr Langton, identified three factual issues for determination in respect of the Roller Mills commission:

(a) First, whether an agreement was reached between Trish Clark, on behalf of the plaintiff, and the defendant, for the payment to the defendant of a $35,000 commission. (There may also be a legal issue as to whether Ms Clark was able to bind the plaintiff.)

(b) Secondly, whether a separate agreement was reached between the plaintiff and defendant to pay him a $100,000 commission.

(c) Whether the plaintiff and the defendant agreed that the sale proceeds held in a US bank account could be paid to the defendant.

[385] The defendant's summary of the issue is contained in his counsel's "overview":

(a) The Roller Mills commission was a private commission for which Unovis was paid $410,000, including GST (excluding the cost of copper materials). Mr Jensen and Mr Bambury orally agreed that Mr Jensen would take a reduced commission of $100,000, including GST. Unovis paid Jensen Gallery $33,750 directly and the parties later agreed to set off the balance of $66,250 against Unovis' share of funds held in a US account relating to the sale of *Newtons Seven, Ngamotu, Cartesian Circle (XI)* and *Necessary Correction (XV)*.

[386] It is a fact that Mr Jensen agreed commission of $35,000 with Ms Clark. He signed the document. She at some stage advised Mr Bambury of that figure. This negotiation took place on 26 May 2004.

[387] It was in Mr Bambury's interests to confine the commission to the sum agreed between Mr Jensen and Ms Clark, but he was not sure he could. Mr Jensen was repeatedly anticipating the need for a further discussion, to "go through the Roller Mills and square that away". "Then once the funds come back NY we can sit down and square it."

[388] If it was agreed between the two men that the commission due was $35,000, that left $1,250 to pay. If that is right, the preceding email on the same day, saying, "Then once the funds come back from New York we can sit down and square it" makes no sense. There is no basis for suggesting that Mr Bambury needed access to the funds from New York to pay the balance of the commission if he only had to pay $1,250.

[389] Mr Jensen was not sure of his ground. On one analysis, Mr Jensen could have taken the view that a combination of the two cheques just received from Mr Bambury totalling $33,750 and from the US dollar funds NZ $66,250 would account for $100,000. But if that was right, Mr Jensen could have disclosed the US dollar sales promptly in the usual way, and obtained agreement to apply $66,250 to make up the $100,000.

[390] Mr Jensen still pursued trying to finalise the Manson account on 31 March and 9 May 2006. In April 2006, Mr Jensen sent a letter to his now ex-wife explaining he would be getting funds in from the Roller Mills commission and would then be able to pay her $60,000. It was submitted that this was consistent with Mr Jensen expecting $66,250, rather than $1,250. It is also consistent with the amount of the commission being unresolved.

[391] It was Mr Jensen's evidence that the two men sat down to square the accounts at a meeting in Mr Bambury's studio in May 2006. But there is no record of it. On the other hand, there is no further correspondence whereby Mr Jensen sent emails pursuing his Roller Mills commission. And after that date there is no evidence that Mr Bambury pursued any issues about the money held in the United States or his payments for the sales of *Newtons Seven, Ngamotu, Cartesian Circle (XI)* or *Necessary Correction (XV). Necessary Correction (XV)* was regarded a jointly owned piece of art in the books of the gallery at the time. Mr Jensen and Mr Bambury had bought back on the secondary market and held 50:50. But in this trial liability of the gallery to account to Mr Bambury is disputed because Mr Jensen said he had never been paid Mr Bambury's 50 per cent of the buy-back price. Sale of *Necessary Correction (XV)* was also not disclosed, except in the spreadsheet.

[392] Without the *Necessary Correction (XV)* funds, the money held in the US account was gross NZ $111,000, net of commission $66,450, $200 more than was needed to be pursued by Mr Jensen in respect of Roller Mills after the payment of $33,750.

[393] There are two evidentiary problems with this narrative. The first and most significant, is that there is no written record recording satisfaction of the balance of $66,450 (net of commission) to match the invoice dated 7 March for $33,750. This was a very substantial transfer of money by the standards of the normal transfers between Mr Bambury and Mr Jensen. No invoice was raised, even internally, to receipt the $66,450.

[394] Second, it seems implausible that there would be no compromise on the $100,000 figure which was agreed when it was intended that the total price of the project would be $500,000, not $410,000.

[395] Mr Jensen's evidence about the meeting, he says in May 2006, to discuss the set off arrangement proceeds on the assumption that it was agreed that the commission would be $100,000. There is no evidence that that number was ever mentioned. In the absence of sales and payment advice, if Mr Bambury had not opened the spreadsheet, "Bambury sales in USA", he would not know that the sum being held there was $133,000, or net of commission $79,650. (*Necessary Correction XV* was mistakenly assumed to be sold on behalf of Mr Bambury, not co-owned).

[396] If Mr Bambury's evidence is accepted that he had not opened the spreadsheet, it is possible that he had no idea of the amount of funds held. That he would simply be attracted to the proposition that he did not have to pay any more. The only explanation Mr Jensen gives for not immediately paying him in addition the sum of $13,200 which on that spreadsheet shows as his share of *Necessary Correction (XV)* is:

> It was not until the dispute arose and we were going back through the records we were reminded that Stephen was not entitled to any share of the proceeds of that sale.

[397] I have already noted that accounts can be settled orally and have recognised that for small amounts. But in the scale of this issue I think that the suggested May 2006 settlement appears incredibly casual and, ultimately, is not believable. Why would Mr Bambury give up on his argument that the commission was agreed at $35,000 (and there is no doubt that Mr Jensen had agreed that figure with Ms Clark), and immediately agree to the $100,000 figure which was against a price then projected at $500,000, and on top of that not bother pursuing *Necessary Correction (XV)*? If the spreadsheet had been opened, immediate payment of Mr Bambury's share of the proceeds of sale of *Necessary Correction* would have been discussed. Those proceeds were not needed to make up the $100,000, as Mr Bambury had already paid $33,750. And at that time they were recorded as due to Mr Bambury as to 60 per cent. It is not uncommon for spreadsheets attached to emails not to be

opened. This can be for a variety of reasons. Nine years ago many people had computers which were slow or required several instructions to open attachments. Ms Clark assisted Mr Jensen in the audit after the termination of the agency. It was her evidence that "the software … on Mr Bambury's PC had low functionality and was visually complex, e.g. attachments to emails were not readily discernible when an email was opened. It took a long time to locate attachments".

[398] Taking into account all of this analysis, it is more probable than not there was a meeting as Mr Jensen contends. However, Mr Bambury is correct that he had not opened the spreadsheet. Had he seen these sums it is more probable than not that he would not agreed settlement of $100,000 and *Necessary Correction (XV)* would have been discussed. At the very least, Mr Jensen must have been on notice that Mr Bambury may not have read the spreadsheet. This is because *Necessary Correction (XV)* was there to be sorted, independent of the commission. And it was not. I accept that when the spreadsheet was sent, Mr Jensen was ready then to negotiate against disclosure of the detail in the spreadsheets. In that sense he anticipated the spreadsheet would be read. On the probabilities, however, the spreadsheet information was never discussed between Mr Jensen and Mr Bambury. Second, it is more probable than not that they agreed to leave things as they were. Mr Jensen may have inferred Mr Bambury had read the spreadsheets.

Is the agreement to leave things as they were enforceable?

[399] Mr Jensen cannot enforce upon an agreement transferring trust assets (the proceeds of the sales) without an express agreement from Mr Bambury, as the beneficial owner of them, with full knowledge of facts which the trustee had a duty to disclose. To be enforceable, such an agreement had to be accompanied by a full disclosure. It was not:[58]

> **289 Transactions by trustee to prejudice of beneficiary**. A transaction or arrangement between a trustee and a beneficiary with reference to the trust property by which the interest of the beneficiary in that trust property is in any way prejudiced is liable to be set aside unless it can be shown that the beneficiary, in concurring in it, was fully aware of all the circumstances of the case and had not been subjected to any pressure or undue influence.

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[58] *Laws of New Zealand*, Trusts at [289] and [290]. See also *Halsbury's Laws of England* (5th ed, 2013), vol 98 Trusts and Powers at [384] and [385]

> **290 Purchase by trustee of beneficiary's equitable interest.** A trustee may purchase the beneficial interest of a beneficiary if he or she can establish the propriety of the transaction, showing that the trustee had taken no advantage of his or her position and that the beneficiary was fully informed and received full value.

The agreement between Mr Jensen and Mr Bambury to leave things where they were is not an enforceable agreement, justifying Mr Jensen taking the proceeds of sale of *Newtons Seven, Ngamotu* and *Cartesian Circle (XI)*

[400] There never has been a final agreement between these two men as to the commission payable to Mr Jensen in respect of the Roller Mills commission.

[401] Having indicated to counsel near the end of the hearing that I might find that no commission had been agreed for the Roller Mills commission, I invited submissions as to whether or not this Court had any jurisdiction to set the commission. I received submissions from the defendant, but not from the plaintiff.

[402] Citing *Bowstead and Reynolds on Agency*[59] the defendant submitted that in the absence of express or agreed terms in a contract, an agent's right to remuneration and the amount and terms of this remuneration will be determined by such terms as may be implied in the contract. In the absence of contrary indication as to the amount payable, the Court will imply a term for a reasonable sum on reasonable terms.

[403] They also cited *Chitty on Contracts*[60] submitting a term can be implied from circumstances of the parties having consistently on former or on similar occasions adopted in the particular course of dealing.

[404] Article 55(3) of *Bowstead and Reynolds on Agency* can suggest that the Court has jurisdiction to find what is the reasonable remuneration for the agent. However, [7-004] opens with this proposition:

> What terms may be implied into the contract will depend on the normal rules for the implication of terms into contracts.

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59 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency*, above n 10.

60 H G Beale (ed) *Chitty on Contracts* vol 2(31st ed, Sweet and Maxwell, London, 2012) at [31-135].

[405] Those normal rules enable financial terms to be implied by reference to standard market benchmarks.

[406] Mr John Gow, a prominent gallerist in Auckland, gave evidence, though not as an independent expert. He informed the Court that the Gower Langford Gallery received 22.2 per cent for the commission awarded to Len Lye on the Roller Mills project.

[407] We do not know the material component of Len Lye's work. Therefore it is doubly difficult to compare the Gower Langford commission with the commission that Mr Jensen should have received.

[408] The problem in this case is, therefore, that the Roller Mills commission does not have a standard market benchmark. As I have explained above,[61] the negotiations were complicated by the other costs, except the artist's fee and the agent's fee. One estimate of the material costs was $136,500. The Court does not know what the total material costs were. But what the Court does know is that they represented a much higher percentage of the total price for the work than would be the norm for a painting. It follows that there can be no inference under the normal rules of implying terms of contract to the margin received by the agent for the sales of paintings. This was a one-off commission with its own one-off cost structure. There is simply no basis for using the usual techniques of implying terms and contracts to identify a relatively narrow range of numbers within which reasonable parties would agree.

[409] Accordingly, again the Court has no basis for identifying, as an implied term, the fee. Nor, indeed, does it have a basis for reliably identifying the range of fees for such commissions. The Court has no basis therefore for altering Mr Jensen's agreement with Ms Clark for his agent's fee. Mr Bambury has acknowledged a shortfall of $1,250.

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61 At [345]-[348].

Failure to account?

[410] I need repeat some of these findings to gather together the facts that need to be brought into play when judging whether or not Mr Jensen did account to Mr Bambury, albeit belatedly, such that he should not be found liable as an agent for failure to account. In my judgment his duty to account was back in May and June 2004 when the sales were made. At best, the spreadsheet attachment could have partially rectified that earlier failure. In fact it did not. This was because I found on the probabilities Mr Bambury did not open it.

[411] Part of the duty of an agent to account to the principal is to inform the principal clearly, in writing, of the funds being held on his behalf. I have recorded in the narrative above this unusual departure from Mr Jensen's normal practice; of reporting transactions when they took place. Mr Jensen did not account for those four sales.

[412] Had Mr Jensen notified those sales in the usual way, at the time of sale, he would not have been able to set the funds aside. It is more probable than not that such accounting would have brought the unresolved issue of the commission to resolution earlier.

[413] As has been analysed above, Mr Jensen did not consider he could hold Mr Bambury to the earlier discussions to the effect that he would receive a fee of $100,000, so that he needed to further negotiate with Mr Jensen.

[414] The need of Mr Jensen to conduct further negotiations with Mr Bambury is the principal reason for the failure of Mr Jensen to give notice in May and June 2004 of the sales of *Ngamotu, Newton Seven* and *Cartesian Circle (XI).* This failure to give notice is a clear breach of his fiduciary duties as agent to Mr Bambury as principal. In context, he also had at least a contractual obligation to report the sale of the shared work, *Necessary Correction (XV).* At the time Mr Jensen prepared the spreadsheet, he treated *Necessary Correction (XV)* as the artist's work, showing a 60 per cent share due to Mr Bambury. Not only is that evidence of his state of mind at the time but it also confirms that he had assumed a responsibility as agent in respect

of the sale of that work. And that is a fiduciary responsibility, even if there is a mistake as to co-ownership rather than entitlement to commission.

[415] Equity will not stand by and tolerate breach of fiduciary duties where the breach entails a deliberate failure to disclose.

Is the claim for commission on these sales recorded in the spreadsheet out of time?

[416] In [128] I have explained that the proceeds of a sale are the property of the artist, held by the agent on trust. Section 21(1)(b) of the Limitation Act 1950 applies. There is no limitation period. There is no question of acquiescence or laches as I have found Mr Bambury did not open the spreadsheet in 2006, indeed, not until the audit after the agency ended.

[417] Throughout this process, the legal onus remains on the plaintiff. I have previously found that the agent is in a fiduciary relationship to the artist because the proceeds of sale belong to the artist, and that fiduciary relationship is not lost by the proceeds being banked in the gallery account.[62]

[418] So we start with accepting that the proceeds of sale of these three works wholly owned by the artist are the property of the artist and the agent has a fiduciary duty in respect thereof. I also find as a fact that there was a deliberate decision by the gallery not to notify the artist of the sale and payment of the works at the time of sale, in May and June 2004.

[419] Mr Jensen does not have a defence to the claim by reason of attaching the spreadsheet. The advice that the US funds were contained in the attached spreadsheet was inadequate. It would have been simple to put on the face of the email the names of the works, the sale prices and the receipt of the payments at the time.

[420] The failure to account for these sales made in May and June 2004 until at least December 2005, and in the context of a live dispute between the artist and the gallery over the Roller Mills commission is, in my judgment, a serious breach of the

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62 See [105] – [120]

fiduciary obligations the gallery owed to the artist. I can well understand Mr Jensen's frustration and annoyance at being put in the invidious position of negotiating his commission with Ms Clark, rather than directly with Mr Bambury. I can readily understand his sense that the figure he agreed with Ms Clark should not bind his relationship with Mr Bambury. I can also appreciate that it was always going to be very difficult to negotiate a special commission with Mr Bambury. Making allowances for those difficulties, in my judgment, they do not justify what happened.

[421] As I have explained, to decide the plaintiff's entitlements, the ultimate question remains an examination of the conscionability of the agent's conduct or not as a fiduciary.[63]

[422] In this case, as I have endeavoured to explain, Mr Jensen believed that he had a bargain with Mr Bambury for a commission of $100,000. His goal obviously was to set aside funds sufficient to satisfy this payment and get Mr Bambury's agreement to them. For the reasons that I have already explained, at the critical time in May and June 2004, Mr Jensen knew that he had agreed a much lower commission with Ms Clark acting as agent for Mr Bambury. He was not sure of his ground.

[423] As to whether the agent is entitled to commission, as I have previously explained in the early part of the judgment, the law requires an evaluation by the Judge of the seriousness of the breach of fiduciary obligation. For example, if the fiduciary obligation is breached accidentally, then the cases show that the agent will not be deprived of his commission.[64] I rely particularly on [89] of Blanchard J's judgment in *Premium* set out at [174]. In marked contrast to the history of prompt advice of sales and payments, this is an exceptional case in the history of the relationship between the gallery and the artist whereby the gallery did not disclose the sale, nor make prompt payment. I have explained the reasons why and expressed some sympathy for them. But, in my judgment, Mr Jensen crossed the line here and breached the trust reposed in him. Faced with the difficulty of negotiating with Mr Bambury, he took advantage of Mr Bambury's lack of knowledge of the sales

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63 At [131] above.

64 See the discussion above under the heading "Equitable Compensation", [166] – [184].

and his possession of the proceeds to the disadvantage of Mr Bambury. I do not think in these circumstances equity would allow him his commission because to do so would undermine the purpose of the strict rule which is, as Jacob LJ said in *Imageview Management Ltd v Jack*, that there be "a real deterrent" to breach of fiduciary obligation.[65]

[424] In making this judgment, I have taken account that the facts here against the agent are not as strong as in the case of *Premium*. Here, the direct failure to account lasted approximately 18 months, from May/June 2004 until December 2015. That was when the spreadsheet was sent. Mr Jensen reasonably expected that spreadsheet to be read. As it happened, it was not. (I should add, I do not place any weight either way on the doubt as to when the US funds were removed or drawn upon by Mr Jensen.)

[425] So I am not directly applying *Premium* but am making a judgment that, in the interests of the rule that the fiduciary should not profit from a breach of fiduciary obligations, this is not an occasion where entitlement to commission should be carved out and allowed to the agent.

[426] Except for *Necessary Correction (XV)*, there was no dispute about the New Zealand dollar figures as shown in the spreadsheet. Nor was there any argument that there should be any further adjustment for the exchange rate. Nor was there any argument for compound interest.

[427] In respect of *Ngamotu, Newton Seven* and *Cartesian Circle (XI)*, the plaintiff is entitled to equitable damages calculated as the sale proceeds he should have received free of commission in the particular circumstances: *Ngamotu* $65,000, *Newtons Seven* $35,000, *Cartestian Circle (XI)* $11,000.

[428] Interest is awarded pursuant to s 87 of the Judicature Act 1908, from 28 May 2004 in respect of *Ngamotu* and *Newton Seven*, and from 17 June 2004 in respect of *Cartesian Circle (XI)* to the date of this judgment.

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65 *Imageview Management Ltd v Jack* [2009] EWCA Civ 63 at [50].

Necessary Correction (XV)

[429] That leaves as a different issue recovery in respect of *Necessary Correction (XV)*. The internal invoice records a sale at NZD25,000 verses the spreadsheet at NZD22,000. The statement of claim seeks its current value. No evidence was lead on that.

[430] As already noted, internally the gallery recorded at the time of sale that it was owned 50/50. However, at the trial Mr Jensen claimed 100 per cent of the sale proceeds on the basis that Mr Bambury could not prove that he had paid for 50 per cent. He required proof of payment of his 50 per cent share.

[431] The plaintiff was able to produce a stub from his cheque book indicating he had paid for it but no corresponding entry could be discovered in the bank records. These were not available. The cheque book stub is dated 9 October 2003. It has MC (purchased at Webb) and it is stamped "posted" and has a sum of $8,900. It was agreed by the parties that this corresponds with the purchase of this work of art in the secondary market. I consider that on the balance of probabilities, this provides sufficient evidence that Mr Bambury paid for his share. I couple this with absence of any previous history of dispute on this point.

[432] The difference between the NZD25,000, as the price in the internal office invoice, and the $22,000 appearing in the spreadsheet, a later document, is that the $25,000 probably reflects the prevailing exchange rate at the date of sale. I prefer that sum as the more reliable estimate in New Zealand dollars of the value of the work at the time of sale.

[433] I turn then to again consider whether or not this claim is barred by the Limitation Act 1950 and, if not, whether relief is available in equity. The essential question as to availability of equitable relief is whether or not given the co-ownership the gallery is a trustee for the co-owner's share of the work. This work was purchased from the secondary market at an auction by Webb's and then held in stock at the gallery as jointly owned by the gallery and the artist. As the facts display, the gallery had complete control over disposal of the work. The gallery did not consider it necessary, nor was it suggested at trial that it had to, to seek consent

of the artist to resell the work or approval of the price. That unchallenged pattern of conduct is a clear indicator that, at the very least, the gallery remained an agent for the purpose of disposal of its work on behalf of the owners, one of which was the gallery.

[434] As has been discussed earlier, all agent/principal relationships have a fiduciary quality. The question always is whether, on the particular facts, a trust arises as to the care of the proceeds of sale. I am quite satisfied that the gallery was a trustee in respect of the proceeds of sale. That it had a duty to account for all practical circumstances in the same manner as it had to account for works of art wholly owned by Mr Bambury.

[435] For these reasons, the same analysis that is set out above in respect of the proceeds of sale of the other three works applies. I am satisfied that the remedy is in equity and that s 21(1)(a) of the Limitation Act applies. I am equally satisfied for the same reasons that there is no defence available to the gallery of laches or acquiescence by Mr Bambury.

[436] The claim for current value fails, for want of justification. The plaintiff succeeds in recovering the sum of $12,500, together with interest pursuant to s 87 of the Judicature Act 1908, from 19 June 2004 (four days after the sale) to the date of this judgment.

Fifth cause of action – Monograph joint venture – alleged breaches of fiduciary duty

Necessary Correction 14 aka (Leaden Echo) and Necessary Correction XIX (1999) aka Golden Echo

[437] The Monograph is a hard-covered book of 230 pages, being illustrations of Mr Bambury's work and three essays published by Craig Potton Publishing in 2000. It has a dedication by Mr Bambury to his wife and family and then under that there is this paragraph:

> With increasing clarity I see that my project is nurtured and cradled by many people in a variety of ways. For this I am deeply grateful. My special thanks go to Andrew Jensen, without whose tireless enthusiasm,

> commitment and vision, this book would not exist. His support in guiding all aspects of its production with the utmost professionalism and patience has touched me greatly.

[438] The fifth cause of action pleads a joint venture dating from 1999 for the production, printing and sale of the Monograph.

[439] The claim pleads that:

(a) The plaintiff and defendant would each contribute to the total cost of the production (including writing, design and photography) and printing of the Monograph;

(b) The plaintiff and defendant would share equally in the revenue from the sale of copies of the Monograph;

(c) The joint venture would open and operate a bank account on which any transactions would have to be jointly authorised by the plaintiff and the defendant; and

(d) The Monographs would be sold by a joint venture for between $90 and $95 each, excepting Roger Parson's book seller, to whom they would be sold at an agreed wholesale price.

[440] The claim pleads:

(a) That the plaintiff contributed to the cost of the joint venture (i.e. the cost of production of the Monograph) by the provision of his works or sale proceeds from his works, to the approximate value of $48,000; and

(b) Donors made monetary donations to the joint venture's bank account.

[441] It pleads that the joint venture printed 720 copies of the Monograph, of which the plaintiff retained around 50 and the defendant retained the remainder for sale or distribution. It pleads the defendant has failed to account for any revenue or profit

obtained from the sale of the Monographs. Further, that the defendant appropriated to his sole account all of the money paid into the joint venture's bank account that was remaining after the costs were paid, including:

(a) In February 2005, $6,000 was debited by the defendant and transferred to his own account; and

(b) On 6 June 2009, $3,608 was withdrawn by the defendant.

[442] The remedy the plaintiff seeks is a payment of $4,804, interest on that cost and any other orders as the Court thinks appropriate.

[443] Mr Jensen substantially agrees the joint venture character of the production. He says the joint venture received approximately $63,800 from donations or as the proceeds of sale of works that were attributed to the production costs of the Monograph. He notes that contribution from proceeds of sale represented a 60:40 share between the parties. He pleads that the plaintiff has the remainder of the copies, approximately 900, from the 950 printed. He pleads that there was no profit realised from the sales of the Monograph.

[444] For all practical purposes, Mr Bambury's sole source of income came from his primary gallerist, Mr Jensen. So any finance from Mr Bambury to the Monograph would come from his income, resulting from sales of his works by Mr Jensen. A joint account was opened with the National Bank in the name of Ouroborus Publishing. Mr Bambury said that there was no record of the joint venture in writing, however, they agreed inter alia:

> We would each contribute to the final cost of the production of the Monograph. We did not agree that contributions would be 50:50.

[445] As to his financial contributions, he says:

> I can estimate the financial contributions I made to the Monograph at $48,000 (approximately). This amount included:
>
> (a) I gave in-house designer a painting (*Tibet (1999)*) worth $20,000 in lieu of payment for designing the book;

(b) I gave Winston Kurnow (curator) a painting (a large *Sienna*) worth $14,000 in lieu of payment for writing the essay for the book and assisting with the history of my work;

(c) I think Andrew may have given Willum McCoon a smaller painting for assisting with the text in the Monograph; and

(d) [A donor] put money into the Monograph account and took a credit on part payment of one of my paintings in exchange.

I also gave Andrew a painting as a thank you for his involvement in the Monograph. It was a vertical diptych cross worth $20,000.

I did not have any visibility of Andrew's financial contribution to the Monograph.

I am unsure of all the donor amounts that were contributed to the Monograph. (He goes on to instance three that he knew about.) That [a donor] put money in and received credits on my paintings in exchange.

[446] Mr Bambury's description of the joint venture did not directly address who would pay the costs of printing and binding, including the cost of photographing the paintings. His description of the joint venture, in terms of contributions, is as follows:

> We would each provide time and labour. I was responsible for arranging the paintings to be photographed, i.e. retrieving the works from storage, arranging a photographer and repacking and storing the paintings once they had been photographed. I was also responsible for assisting Winston Curnow (New Zealand art curator/critic) prepare his essay for the Monograph and assisting Arch McDonnell with the design composition for the Monograph. Andrew was responsible for raising funds from donors, running the business and financial side of the production and liaising with the printer (Colourcraft Proprographics Limited) and the publisher (Craig Potton Publishing); and
>
> The sale price of the Monograph was between $90 and $95 (although I am aware the wholesale price was less than $90. I do not know the exact wholesale price Andrew agreed with book sellers etc.

[447] Inferentially, Mr Bambury was saying that the plan was that donors would come up with the cash to meet the invoices. As it happened, apart from one significant donation, donors did not fund production costs. That meant the production invoices had to be paid for or exchanged for works of art.

[448] As that narration implicitly records, there was no rigorous accounting between the two joint venturors on the production of the Monograph.

[449] As can be seen from Mr Bambury's narration of his financial contributions, he considers he did not make any direct financial contribution to the printing and publishing cost of the Monograph, as were incurred by the publishers.

[450] The plaintiff denies ever discussing, let along agreeing to offset the sale proceeds of any of the works listed above under this heading "Monograph" against printing costs. He submits the absence of any records of funds from the proceeds of these sales being directed to the printing costs should be construed against the defendant, relying on *Barkley v Barkley-Brown*.

[451] An issue common to most of the disputed works listed above is did the plaintiff authorise the defendant to apply the funds from the purchase price of these work to the Monograph? It is common ground that the Monograph was a joint venture. The plaintiff's case is that he knew the works had been sold but did not know the defendant had received further funds from the purchasers that should have been paid to him until after the agency was terminated.

[452] Mr Jensen does not agree. His evidence was:

> We agreed to divert funds from sales to establish a reservoir of funds to finance this joint project. We began accumulating and setting aside funds well before any account was opened.
>
> We must have begun discussions about a Monograph by at least 1997 when we met with Craig Potton and sought examples of cost.
>
> Sometime in 1997 or 1998, Stephen and I had a specific discussion about how to fund the Monograph. We wanted to write letters requesting sponsorship to some of Stephen's more prolific collectors. I made a list of potential sponsors on the Jensen Gallery letterhead.
>
> Most of the clients preferred to sponsor the book by purchasing a work rather than donating money. [A sponsor] contributed $10,000 directly to the Monograph (for which we later offered her a concession on a work she purchased a year later in recognition of her contribution).
>
> Stephen and I agreed to attribute the funds from a few large sales to underwrite the total production cost. We originally discussed using the total of $40,000 from the sale of *Necessary Correction (XIV)* (aka *Leaden Echo*) to underwrite the Monograph, but as a result of Stephen's cashflow needs he was paid some of the funds from this sale so we needed to take more funds from others. These included *By Its Direction* and *In Pursuit of the Absolute* and *Necessary Correction XIX* (aka *Golden Echo*).

[453] It may be noted that Mr Jensen's evidence is unreliable in part. As the reader will have already seen, he corrected his brief at the trial and said that funds were not contributed to the Monograph from the proceeds of *By Its Direct Action* and *In His Pursuit of the Absolute*.

[454] Mr Jensen goes on in his evidence to say it was the *Necessary Correction* work sales which primarily funded the arrangement.

[455] Mr Jensen agreed that there was never an express agreement that the cost would be split 50:50. However, he does say that they agreed to share in the total cost of production, printing and sale of the Monograph.

[456] Because they did not expect the venture to run at a profit, they took advice from accountants as to whether or not it could be treated as a non-profit activity and possibly a charitable activity. A copy of that advice was exhibited in the trial. That would have made expenditure income tax deductible.

[457] It was Mr Jensen's evidence that the total production cost was roughly $65,000 to $70,000 and that the proceeds of works were attributed as per their usual commission arrangement, that is, 60:40. That the hard cost of film work, editing, jacket printing, printing costs, marketing, postage, proof copies were all covered from amounts set aside from the sales.

[458] Mr Jensen exhibited numerous records recording this expenditure. But there is no written agreement nor any note on payment advices recording the diversion of proceeds from the sale of works to meeting these printing costs.

Necessary Correction 14

[459] *Necessary Correction 14* was sold for $40,000 and there were four separate payments of $10,000 each. Had it been treated as a normal sale. Mr Bambury would have received four payment advices, one for each payment of $10,000, and a deposit into his account for $6,000 and received a payment form, receiving in total $24,000. Rather, he received $16,000.

[460] The first Jensen payment form received by Mr Bambury was, in fact, in respect of the second payment of $10,000 for *Leaden Echo/Necessary Correction 14*. It records a sale price of $40,000, records the date of payment to the gallery at 27 September and date of payment to the artist of 27 September (same day) in the amount of $8,000 and commission taken by the gallery of 40 per cent. Of course, that information does not make sense. Mr Bambury was paid $8,000. That is, 80 per cent rather than his usual 60 per cent. There is the notice advice, "First payment of $8,000, two to follow of three".

[461] A second payment form followed later with the same details, same sale price and records a date of payment to the gallery of 15 March 2000. And, again, an amount to artist of $8,000, with the note "Second of three". Had there been a third payment in the same terms, Mr Bambury would have received $24,000, 60 per cent of the $40,000. He is short of $8,000.

[462] There was a fourth payment by the purchaser. But its proceeds were diverted to the printing costs. Mr Bambury did not receive a payment notice.

[463] The defence argument is familiar. That Mr Bambury had a regular practice of noting and following up progress payments. The absence of any inquiry or complaint at the time is evidence that he agreed or, at the least, acquiesced in the diversion of the last payment to pay outstanding bills on the Monograph project to follow up payments.

[464] The plaintiff denies authorising the defendant to apply any funds free to him from the sale of works to the Monograph. He notes the defendant has no record showing payments were authorised or were made to the Monograph bank account or that the Monograph bank accounts do not show any payments which could be attributed to these funds.

Necessary Correction (XIX) aka *Golden Echo*

[465] This work was purchased by two established clients for $40,000 in 1999. It was paid in three payments, the first two of $15,000 each and the last of $10,000.

Mr Jensen's evidence is that in respect of the first payment, Mr Bambury's company Unovis was paid $9,000 on 22 December 1999.

[466] The second payment of $15,000 was attributed to the Monograph and of the third payment of $10,000, Unovis was paid $6,000 on 13 July 2000. There is a Jensen Gallery document recording this sale. The sale price is recorded at $40,000. The date of payment to the gallery of 13 July 2000. The date of payment to the artist of 13 July and the amount to the artist of $6,000.

[467] It should be noted at once that there is nothing to indicate on the payment advice that the $40,000 sale price has been paid in instalments or that there are further instalments to come or that had already been paid. The evidence of the other payment of $9,000 is not by way of a payment advice but by way of a gallery cheque stub recording a payment on 22 December 1999 to S Bambury for "first [client] payment".

[468] There is handwriting on the payment notice recording the $9,000 received in December 1999 and $9,000 paid in March 2000 and $6,000 paid in July 2000. There is something of a mystery as to why "9 pd [paid] in March" is written down and it is agreed, however, that that was not paid. It may be that the notes on the payment advice were at some much later date.

[469] The significant context for the purpose of answering the question as to whether or not the agent has accounted for the sale are that the terms of the advice of payment do not make sense. Where a sale price was to be paid by instalments, that is usually plain on the payment advice. On its face, the payment advice suggests that the total amount to the artist is $6,000 out of the sale price of $40,000. That cannot be right. Even if the artist is presumed to recollect that he had banked $9,000 in December, it is still not right. If it was an ordinary transaction, he was due $24,000.

[470] Mr Bambury was not sure whether all the handwritten notes on the Jensen Gallery payment were his. After some clarification, he did agree that the three notes, "9 paid received", "9 paid" and "6 received paid" were in his handwriting.[66] He said

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[66] Notes of evidence page 332, line 20.

he discovered during the audit process that he was not in fact paid in March. Then he says the note was not in his handwriting. It was put to him that the middle instalment had been paid to his benefit but not actually received by him into his account. He agreed it was possible that the middle instalment could have been allocated to the Monograph cost.

Analysis of diversion of funds to the Monograph

[471] Mr Jensen did not account fully to Mr Bambury for the proceeds of sale of *Necessary Correction 14 (aka Leaden Echo)* and *Necessary Correction XIX 1999 (aka Golden Echo)*. He did, however, disclose the purchasers and correct purchase price paid. The payments to the artist did not make sense. At the very least, Mr Bambury was on inquiry.

[472] On the balance of probabilities, Mr Jensen did not agree expressly with Mr Bambury to use these transactions to partly fund the printing cost. In making this conclusion, I am taking into account that right up to giving his oral evidence he had been of the view that two other paintings had also been used for the printing cost.

[473] That evidence of itself indicates that Mr Jensen did not keep a record at the time of the source of funds for paying the printing and photographic costs of the Monograph publication. It also suggests that he unilaterally made decisions as to what proceeds of sale of works of Mr Bambury would be used for those costs.

[474] Mr Jensen said, generally, and near the end of his evidence, that he believed he had always made decisions in the best interests of Mr Bambury. I think the funding of the Monograph is an incidence of such decisions.

[475] One consistent fact which emerged over two weeks of hearing is that Mr Jensen's gallery usually disclosed, and promptly, the sale of any work of Mr Bambury and the purchase price. As we have seen, where monies were diverted for the Monograph, the reporting in the payment forms simply does not make sense.

[476] At the very least, however, the notices of payment placed Mr Bambury on inquiry. The record of this trial shows that by making notes on payment forms and

maintaining his own ledger, Mr Bambury followed collection of his share of the purchase price meticulously. He made notes when he was not paid in full. He did not rely wholly on the bookkeeping by the gallery. This was sensible. He was a prolific artist, selling many works at this time. It was ordinary, prudent and businesslike behaviour by himself as principal to keep track himself as a cross-check against the revenue stream coming from the gallery to him upon the disposal of his works.

[477] Mr Langton, for the plaintiff, treats the defence of Mr Jensen as a contra arrangement. He argues that because they were done without Mr Bambury's consent, that was a breach of Mr Jensen's fiduciary duties. He cites the case of *Reading v R.*[67] This case involved a petition of right by an ex-sergeant in the Royal Army Medical Corp to recover money taken from him by military authorities in Egypt. He had acquired these funds by selling illicit spirits and/or drugs to locals in Egypt. In each, doing so in full military uniform and, by his presence in uniform, diverting the suspicions of the police. Not surprisingly, he failed. He had petitioned of right in which he sought to recover about £13,000, being the balance of the sum seized by the military authorities. It was conceded the onus lay on the Crown to establish a right to retain the monies or, if the suppliant was entitled to them, a right to set off an equal sum against his claim. Not surprisingly, the Crown relied on the fact that he used His Majesty's uniform to escape police inspection. With regard to the law at first instance, Denning J said:[68]

> In my judgment, it is a principle of law that if a servant takes advantage of his service by violating his duty of honesty and good faith, to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the real causes of his obtaining the money, as distinct from being the mere opportunity to getting it, that is to say, if they play the predominant part of his obtaining the money, then he is accountable for it to the master.

[478] Denning J did not treat this as a fiduciary relationship between this man, Reading, and the Crown. In the Court of Appeal, counsel for Reading argued that the whole case for getting money back from the Crown was based on the principle of

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67 *Reading v R*, above n 23..

68 *Reading v Attorney-General* [1948] 2 KB 268 (KB) at 275.

unjust enrichment. Asquith LJ had the occasion to observe on what he thought were the principles of law applicable to this strange case. He said:[69]

> The principles of law applicable to such a case is the person would seem to be the following. When a servant, or agent, by breach of duty damnifies his master or principal, the latter can, of course, recover in an ordinary action for breach of contract for any loss he has actually suffered. But there is a well established class of cases in which he can so recover, whether or not he has suffered any detriment in fact. These are cases where the servant or agent has realised a secret profit, commission or bribe in the course of his employment; and the amount recoverable is the sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the defendant and that the defendant acted in breach of this relation. But the term "fiduciary relation" in this connection is used in a very loose, or in all events a very comprehensive, sense. A consideration of the authorities suggest that for present purposes a "fiduciary relation" exists:
>
> (a) Whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff for the purposes authorised by him, and not otherwise … and
>
> (b) Whenever the plaintiff entrusts the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available …

[479] I have previously found that the agent is a fiduciary of the artist. I have no difficulties, of course, with the enunciation of the law by both Denning J, as he then was, and Asquith LJ. The difference in the material facts between *Reading* and this case are that the funds diverted by the sales of these two paintings were diverted to the cost of producing the Monograph. The Monograph was being produced to enhance and celebrate Mr Bambury's status as an artist. Though it was unlikely from the outset that it would make a profit, it would be obviously collected in libraries of established art galleries and become, at the very least, part of the archives of New Zealand art and part of the heritage of Mr Bambury to New Zealand art.

[480] The Monograph was a collaborative venture. The two men had not raised as much funding as they had hoped from collectors of Mr Bambury's work. Mr Jensen gave detailed evidence of the amount of the invoices coming in. He ended up having

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[69] *Reading v R*, above n 23 at 236.

a significant argument with Craig Potton Publishing over the terms of sale of the work by that company. Financially, the project was something of a black hole.

[481] This is not a case of Mr Jensen diverting monies owed to Mr Bambury to Mr Jensen's own ends.

[482] The payment notices from Mr Jensen's gallery sale payment notices left Mr Bambury in no doubt that he was not receiving a full account of these sales

[483] Part of the context is that these two men have very strong personalities, and were both difficult about money. We have already seen a number of issues in that regard. Mr Bambury avoided personal conflict with Mr Jensen. Mr Jensen did not want to confront Mr Bambury.

[484] On the probabilities, Mr Jensen did not square up to Mr Bambury and explain how he was meeting the Monograph costs, and get Mr Bambury's full consent. He just did it out of some of Mr Bambury's income. However, he disclosed at all times the total purchase price for which the sold works from which some of the proceeds meet Monograph costs. Mr Bambury was in a position to work it out or, at the very least, ask some very probing questions. He did not.

[485] The Monograph is a splendid text of the highest quality of production. There is no evidence that, as one of the joint venturers, Mr Bambury kept tabs on the printing and photographic costs. He left all that to Mr Jensen. He did not pursue an accounting after the production. It was not in his interests to do so. He must have known it cost a lot to produce, and that his direct contributions were in kind only. He did not inquire.

[486] The Monograph venture was close to the heart of Mr Bambury, as is made plain from his dedication quoted above. He knew that it was dependent on the endeavours of Mr Jensen. He must have known that only one of his clients made a significant donation to the cost. So he must have known that the original plan for raising funds to meet the printing costs had to be abandoned. The sale prices of these *Necessary Correction* works were significant and the shortfall of payments

(*Leaden Echo* $8,000 and *Golden Echo* $17,000 or even $32,000) are the sort of sums that Mr Bambury would chase up. Mr Bambury would not be surprised if the missing payments were diverted to the Monograph. He would not want to take up the issue directly with Mr Jensen. On the probabilities, Mr Bambury acquiesced in short payments to him in respect of these two *Necessary Correction* works, appreciating that they would have gone to the printing costs of the Monograph.

[487] This is not a case of laches on Mr Bambury's behalf. It is not a case of examining the prejudice to Mr Jensen. But, rather, it is a case of acquiescence on the part of Mr Bambury. Taking into account the very significant benefit to Mr Bambury of the Monograph production as a means of ensuring a permanent place in the history of New Zealand art, it is not conscionable for Mr Bambury to pursue Mr Jensen, given his acquiescence at the time. This claim fails.

[488] There is a further claim of the plaintiff's on a failure of the defendant to account for the profits (if any) of the Monograph and that the defendant had taken money out of the joint venture's bank account.

[489] There is no proof of any profit from the Monograph. To the contrary, I find it did not make a profit. There were not many sales.

[490] The joint venture account was originally opened in the joint names of both Mr Bambury and Mr Jensen. It was envisaged at the outset that it would require both signatories. A further account was opened and operated by Mr Jensen.

[491] Given the overall shortfall in funding of the Monograph, there is no inference to be drawn that there were surplus monies payable in respect of these two works which were not applied to the Monograph costs. The joint venture account operated by Mr Jensen has not been subject to audit but there is no significant proven fact to warrant any equitable remedy in respect of that account.

[492] In the course of the trial, Mr Jensen agreed to deliver any copies that he still has of the Monograph, to Mr Bambury.

[493] The plaintiff's claim in respect of *Necessary Correction 14* and *Necessary Correction (XIX)* fails, as does the plaintiff's claim to recover funds from the Monograph.

Plaintiff's fourth cause of action – breach of agency/fiduciary duty/failure to account for insurance claim payments on damaged works

Necessary Correction (XVI), Colour Work and At The Same Time A New Beginning

[494] The core dispute is whether the proceeds from insurance claims belong wholly to the artist or whether they should be treated as equivalent to a sale of the work, compensating the agent for his loss of commission of 40 per cent and so be split just like a sale, 60:40.

[495] The defendant breaks the argument into three propositions, any one of which he contends enables him to succeed:

(a) The value of the work in the hands of Mr Bambury is only ever 60 per cent and so he could never be entitled to receive more than that value; and/or

(b) Mr Bambury agreed (expressly, impliedly or through acquiescence) that he would receive 60 per cent in these circumstances; and/or

(c) This is a matter of trade practice and custom.

Necessary Correction (XVI)

[496] This was a painting consigned from the Jensen Gallery to a secondary gallery, the Nadene Milne Gallery in Arrowtown, in or around April 2003, with a sale price of $20,000.

[497] While consigned the painting was damaged and an insurance claim was successfully made. Ms Milne received $19,500 ($20,000, less her $500 excess) from her insurer which she paid in full to Mr Jensen. Mr Bambury received $13,200 from Mr Jensen. Mr Bambury knew that it was an insurance payment. The Jensen

Gallery payment form to him at that time enters "insurance" as "the purchaser", sale price is stated at $22,000, "amount to artist", $13,200. It was his evidence that after the agency ended, he realised that Mr Jensen had valued the painting at $22,000, being its retail value in 2004 and had taken a commission of $6,300.

[498] The gallery commission is shown on the advice of payment at 40 per cent.

[499] What Mr Bambury did not see is that Ms Nadene Milne did not claim any commission. As a secondary gallery, had the work been sold, she would have been entitled to a 30 per cent commission and the Jensen Gallery 10 per cent.

[500] Mr Jensen's evidence was that the arrangement in respect of insurance proceeds was clear. Jensen Gallery was to account to Unovis for 60 per cent, as with any other sale. However, the sale price of the work had increased to $22,000 whilst on consignment. Jensen Gallery accounted to him for 60 per cent of that. Mr Jensen is sure that Mr Bambury would have checked the amount paid to him. That does not answer the issue of course.

[501] During cross-examination, Mr Jensen's evidence was that Ms Milne was not entitled to 30 per cent of these insurance monies because "we made an express obligation that if work was damaged in care of a third party gallery that she would account in full".

Colour Work

[502] This was one of a group of paintings. In June 1998, Mr Jensen paid Mr Bambury $3,720. It is marked in Mr Bambury's ledger book as "Jensen (insurance)". He said he knew it was of a damaged *Colour Work* but not which *Colour Work* it was.

[503] Mr Bambury says that after the agency was terminated, he was made aware by Trish Clark that Mr Jensen deducted 40 per cent commission from the insurance payout, even though he did not sell the painting.

Analysis in respect of both works

[504] Mr Bambury was cross-examined on the basis that he analysed the proceeds in both cases, assuming it was a sale. In cross-examination Mr Bambury acknowledged he knew in respect of *Necessary Correction (XVI)* that there was an insurance claim and he obviously knew from the insurance proceeds that he received a lesser amount than the sale price recorded on the artist payment form. He agreed he looked at the form because he was dividing the number he received by nine to isolate the GST calculation. He agreed that that is what he would do if it was a sale. In respect of *Colour Work*, he agrees that he knew it was valued at $6,200 at the time. It was put to him that he would have known that the sum of $3,720 was 60 per cent of that value. He did not agree and said he thought it was one of the smaller, lower valued *Colour Works*. It was put to him that on any way you looked at it, what he was paid was not the full value either for a small or large *Colour Work.* He agrees he did not raise any query with the Jensen Gallery at that time.

[505] Expert evidence was given on this point by Ms White. Ms White's evidence was that the insurance payment was reasonably treated as a sale as between the artist and the gallery. She justified it in this way:

> The commission is the payment for the gallery's services so the gallery has been paying the premiums on insurance policies for years and years and years and may not have made a claim, so they are carrying that insurance on the artist's stock on behalf of the artist, so when the work, if there is a claim, then the gallery is entitled to their commission.

[506] Another expert called by the defendant was Ms J M Rae, an artist of Sydney. She was not a wholly independent witness. She is an artist who has been represented by Mr Jensen for a number of years. She might be described as a specialist character witness.

[507] On the subject of insurance on works, she said that she did not have insurance over her works, either in her possession or kept by the gallery. She was aware, however, that Jensen Gallery had insurance in place. She had never had the need to call on the insurance for a damaged work. She said:

> If a work of mine were damaged and the gallery received an insurance payment for the full retail price of the painting, I would only expect to

> receive 60 per cent of the insurance payment, i.e. the retail price minus the gallery's commission. I would never expect to receive the full retail price of the work.
>
> If the work were damaged or destroyed and the insurance covered the full retail value of the work, there is no reason the gallery should not take a commission. The work is as good as sold in such circumstances. This is when the simple commercial context is relevant again. In this business, artwork is reduced to money – there is no reason that an artist should receive a windfall because the payment is by an insurer rather than a client. In fact, the gallery could quite reasonably present a case the commission may be a little bit higher as the money was only there because it had an insurance policy in place and paid the premium.

[508] The ultimate submission by the defendant was in both instances Mr Bambury had every knowledge that this was an insurance payout, was well aware of the full values of the works and so knew he was getting a payout akin to a sale.

[509] As I have noted, the payments out recorded the 40 per cent commission.

[510] It is too late, submits counsel for the defendant, for Mr Bambury to reopen these accounts.

[511] As this narrative records, there was ample material upon which Mr Bambury could have made an issue over the collection of insurance and questioned its payout. As I have recorded before, Mr Bambury did not like to get into conflicts with Mr Jensen. He may not have been happy about this. In my view, this is another instance of acquiescence on the part of Mr Bambury. He tolerated what was happening. It is too late for him to reopen the matters now.

At The Same Time A New Beginning (a Slipped Cross work)

[512] This work was exhibited at the Auckland Art Gallery in 1994. Prior to the exhibition, the Auckland Art Gallery compiled a written condition report on the condition of the work at the time. It reported that the work was undamaged. Following the exhibition, the work was packed and transported by the Auckland Art Gallery to Mr Jensen's gallery for sale. In June 2010, at the end of the agency, the gallery returned the work to the plaintiff. It arrived damaged. The plaintiff pleads that the value of this work was $62,000, that it has been damaged beyond repair and the defendant should account for the value of $62,000 plus interest.

[513] Mr Jensen's evidence was that the painting was never exhibited at his gallery although it was stored there for many years. His estimate of the value of the work was that it would be in the region of $40,000 to $50,000, not $62,000. Further, his view was that as with any damaged stock, Mr Bambury would be entitled to, at best, only 60 per cent of the sale price.

[514] He also raised some issues about some other existing marks which were noticed by the Auckland Art Gallery. He also points out the work was packed in accordance with usual industrial practice (the two panels face-to-face with material in between). Finally, he challenged whether it had been damaged beyond repair.

[515] In his supplementary brief Mr Bambury said he believed the painting had been unwrapped after the Auckland Gallery exhibition in 1994. It has an "aBAM" number on the back which Ms Fox advised was a system of numbering introduced in 2000 only. Second, he saw the painting hanging in a client's office in Parnell in the old Blind Institute building and that he asked Mr Jensen about it. When he was told that this person had not purchased the painting, he told Mr Jensen to get it back. He maintained that the current value of the painting was now $65,000 based on the value of a comparable *Slipped Cross* painting exhibited at the Jonathan Smart Gallery in Christchurch in 2015.

[516] In reply to this, Mr Jensen's evidence was that the work did not need to be unwrapped to place a stock number on it. The stock number can be applied by accessing the work from the back. As the panels of the work were packed face-to-face and the work was well packaged, it cannot have been this process (of putting a number on) which caused the damage.

[517] There is a complaint about the late assertion of the work being seen on a client's office wall in Parnell. Mr Bambury was cross-examined on this proposition. It was put to him he never saw the painting on this client's wall. The client, however, was not called as a witness nor his absence explained.

[518] The defence submitted that the work could have been damaged after the condition report was prepared by the Auckland Art Gallery but before it was packed

or in the course of unwrapping by Mr Bambury once he received it back into his possession. The defence challenges Mr Bambury's doubts about the ability to repair the work and submits, finally, that Mr Bambury is only at best entitled to 60 per cent of the current value. The submissions are silent on the ability of the Jensen Gallery to claim insurance on the damage.

[519] I am satisfied that there was no serious challenge to the proposition that the work has been severely damaged in a way independent of the minor marks noticed by the Auckland Art Gallery in its condition report. The Court was not told whether or not Mr Jensen had notified his insurers.

[520] On the probabilities, this work was unwrapped by the Jensen Gallery, either at its premises or when it was taken to a client's premises to be hung there, perhaps on appro. While unwrapped it was damaged. It is inherently unlikely that it would have been damaged while being unpacked upon its return to Mr Bambury's studio when the damage was first noticed. It is also very unlikely that it would have been damaged during its care by the Auckland Art Gallery, without the Auckland Art Gallery notifying Mr Bambury of any damage.

[521] Mr Bambury succeeds on this claim. The damage is the responsibility of the agent.

[522] One of the terms of the agency is that the agent is responsible for the care of the work entrusted to it by the artist. That is why agents always carry insurance. The Jensen Gallery did. The correct course for the agent to have done, even at the termination of the agency, was to have made an insurance claim for the damaged work. The agenct may still be able to do that. If the insurance company will not accept the claim because it is more than five years old, that is essentially a problem of the agent. On the probabilities, had the relationship not broken up, the agent would have made a claim against the insurance company as soon as the damage was identified.

[523] In the course of the trial, there was some dispute as to whether or not the damage could be repaired. But the defendant did not call any expert evidence in

support of that opinion. That may be an issue that would be taken up by the insurance company.

[524] The result of this claim is a finding of an indeterminate monetary liability by the defendant for the damage to the work. This part of this cause of action is adjourned pending the Jensen Gallery making a claim for insurance. There is leave to apply to either party to bring the matter back for a final judgment.

Sixth cause of action – breach of agency/fiduciary duty/misappropriation of works

Angkor III

[525] This is a claim that in 2002, Mr Bambury consigned to Mr Jensen this work with a value and sale price of $4,800. That the value and sale price of *Angkor III* later rose to $8,000. It is alleged, in breach of his obligations, Mr Jensen gave the work to Arch McDonald/In-House in lieu of payment he owed them. The Jensen Gallery had engaged a firm, Arch McDonald/In-House to provide them with services related to the development of a website. The claim is for equitable compensation of $8,000, together with interest and costs.

[526] The defence is that this painting was not given but was sold by the gallery to Mr McDonald. Furthermore, Mr Bambury was paid his share of the purchase price two days later, an amount of $2,880 appearing in his bank statement. It has not been attributed by Mr Bambury to any other sale. That there were no other sales of Mr Bambury's paintings around that time for the same purchase price, reliance being placed on the gallery ledger. The sale was by way of a cheque swap.

[527] There was no gallery advice of payment to Mr Bambury. The evidence of the transaction appears on the internal invoice. The invoice discloses the sale of two works, Mr Bambury's *Angkor III* and another artist's work. It does not have a separate price for each work. It has a total price, inclusive of GST, of $9,858. It records that the payment was by way of cheque swap. It records on the last line, "$2,880 to SB". That reflects an allocation of value of $4,800.

[528] The sale was made in February 2005. There are two possible reasons why Mr Bambury did not get the normal artist's payment advice at the time. The first is that it was a combined sale and there was doubt as to the allocation of value (that not being disclosed on the tax invoice) and, second, that there may have been a dispute with Mr Bambury as to the allocation of value.

[529] This is an unsatisfactory dispute. Mr Bambury did not give evidence justifying the increase in value of the work to $8,000. He was paid his commission on the initial sale price value of $4,800. In the end, I am satisfied on the probabilities that he has not made out a claim for a higher payment. To justify a sale price of $8,000, the payment to the other artist would have only have been in the area of $1,858. There does not appear to have been any practice between the two men whereby I can find a breach of the agency because Mr Jensen maintained the initial price of the work and did not adjust it for greater values.

[530] I have concluded, on the balance of probabilities that the plaintiff has not made out a claim for more than $2,880. I am satisfied that there is proof that there was payment about that time in this sum and, on the probabilities it was for the sale of this work. This claim fails.

Seventh cause of action – breaches of fiduciary duty/agency

Brother/Sister - The Schwarzwalder sale
Viba Catalogue – The Rhythm of His Truth 2001, China XXIX
Ideogram II
Not Through the Logical Law of Dialectics
The Air is Filled with an Infinite Number of Lines

Brother/Sister

[531] In and around 2001, Mr Bambury held an exhibition at a gallery in Austria owned by Ms Rosemarie Schwarzwalder. A number of works were consigned to her via Mr Jensen, as primary agent for the exhibition. Ms Schwarzwalder purchased one of the paintings exhibited at the gallery, *Brother/Sister*. The painting had been on sale for the equivalent of NZ$5,000. Ms Schwarzwalder paid €1,650, equivalent to NZ$3,000.

[532] Mr Bambury describes the transaction as follows:

> The value and sale price of the painting was $5,000. Rosemarie paid €1,650 for the painting. This was equivalent to the sale price of the painting less 40% commission. I expect the difference was on account of bank fees or currency fluctuations. Andrew received the funds from Rosemarie for me and took a 10% commission from the sale of the painting and another $1,000. It was correct for Andrew to take a 10% commission because European commissions are 50% i.e. 40% for Rosemarie and 10% for Andrew. Andrew should not have taken the additional $1,000. That money belongs to me.

[533] Mr Jensen's evidence was that:

> Stephen wanted to show our appreciation for Rosemarie's work and the exhibitions so we agreed a special price for the work of $3,000 which at that time came to approximately €1,650. I was more than happy to participate in the arrangement and forego the commission on the normal sale price of $5,000. Stephen and I had agreed to split the proceeds 50/50. This was not a typical transaction and we are making a sacrifice as a gesture of goodwill to Rosemarie. When the payment came in from Rosemarie it was only NZD2,817.02 presumably as a result of the currency exchange and bank fees. I elected not to pursue the matter and just accounted to Stephen as though the full amount was received. Stephen was definitely aware of the arrangement at the time. Jensen Gallery issued him with an artist payment form in July which recorded $3,000 received, $1,500 to the artist and a 50% commission. This is also consistent with the Jensen Gallery's internal ledger although Stephen would not have seen that at the time.

[534] Mr Jensen and Mr Bambury agree that in Europe the standard commission is 50 per cent.

[535] This is a case in which the probabilities have to be resolved by placing weight on the payment advice showing the sale at $3,000 and a 50 per cent commission to the gallery. Mr Bambury had notice of this and to say in cross-examination he thought it was just an error is not an adequate response. The payment notice is either correct or he acquiesced in not challenging it. Either way, the claim fails.

Viba catalogue - The Rhythm of His Truth 2001

[536] The Viba catalogue was Mr Bambury's personal project. It followed a period of an artist's residency in Slovenia in late 2000.

[537] While in Slovenia, Mr Bambury had completed a suite of *Sienna* paintings on stone tiles. The paintings were exhibited in Slovenia in 2004. In June 2005, they were transported back to New Zealand. It is Mr Bambury's evidence that the idea of producing a catalogue of the paintings did not come to him until after they were returned to New Zealand. Mr Jensen says that the idea of the catalogue was discussed much earlier than this.

[538] Mr Jensen dealt with the printer, Source Print, on Mr Bambury's behalf. The printing cost was first estimated at $14,073 but subsequently Mr Bambury received an invoice for $20,250. Mr Bambury's evidence was that his original intention was to pay by cheques, that he had written them out, but Mr Jensen did not collect them.

[539] On 16 December 2005, Mr Bambury received an email from Jensen Gallery, written by Emma Fox, attaching the invoice from Source Print and advising:

> He [Source Print] has bought *The "Rhythm of His Truth"* … for $25,000. This is the work he viewed in the gallery of Peter Shaw a wee time ago. I will double-check the paperwork on this with Andrew re the cheque swap etc as I'm not 100% sure of the arrangement you both made in regard to Viba catalogue/Source Print. But for now it's good to have this close to finalised.

[540] Mr Bambury replied to that invoice saying:

> We'll get that invoice paid in the next few days for certain.

[541] On 21 December, there is a note written on the invoice from Mr Bambury to Mr Jensen:

> AJ – when you can please take a look at this and advise me. It doesn't sound correct to me. Original quotation equals $14,073.00 plus GST. Difference (4K) $3,927.00 plus GST.
>
> I would like to clear this as soon as I can. Thanks.
>
> Stephen B.

[542] On 31 March 2006 and on 4 April 2006, emails from Mr Jensen explained that the printing cost was $18,000 (excluding GST) and that the purchase of the painting, of which the artist's share was $15,000 after deduction of the gallery's commission, would cover most of the printing invoice.

[543] The plaintiff's case was that the defendant was not authorised to use the work as a contra. Mr Bambury's evidence was:

> I did not agree with Andrew using my painting *By the Rhythm of His Truth*, as a contra without my knowledge but by the time he told me the painting had already been given to Daniel Wright and I did not think I could change things.

[544] The defence case includes the proposition that, on the plaintiff's case, Mr Bambury still owes Mr Jensen $18,000 plus GST in respect of those printing costs.

[545] Before completing the analysis, I go on to address the balance of the printing costs being paid by the sale of *China (XXIX)*.

China (XXIX)

[546] This was a painting consigned to Mr Jensen on 13 November 2003. This painting was in the possession of Mr Daniel Wright of Source Print, by 11 October 2004, when his assistant requested Mr Jensen to provide Source Print with an invoice for the painting "Daniel bought. I will need to mark it as a payment on this account". An invoice was raised by the Jensen Gallery to Daniel Wright, Source Print, on 29 October marking the price at $5,000, indicating it as a "contra". The timing is something of a puzzle because the first quote from Source Print for the Viba catalogue is dated 17 August 2005 but obviously came to be treated as a contra.

[547] Mr Bambury's attention was drawn to an email sent by Emma Fox to Daniel Wright on 20 December 2005, which reads:

> Just so we are all clear, you have $30,000 worth of paintings, $25,000 for the Diptych and $5,000 for the *China* painting from October last year. We have invoices for $34,143.75 worth of printing. (Stephen Bambury and Winston Roeth).
>
> So you write us a cheque for $30,000 and we pay you $34,000 in two cheques ($20,250 from Stephen and the balance from us).
>
> Stephen is dropping the cheque round to you, I can pop in to see you and do this tomorrow if that works for you. Let me know. Thanks. Emma.
>
> I will bring invoice for the Bambury PTG for your records.

[548] Mr Bambury responded in cross-examination that that was an arrangement entered into with Mr Wright by Mr Jensen "without telling me". He was cross-examined on the basis that in his earlier email exchange he said he would call Emma Fox. It was put to him that sometime between her email to him and her email to Daniel, she had talked to Mr Jensen and found out the details of the arrangement. It was also put to him it was likely that she had explained the arrangement to Mr Bambury as well and that that discussion was between Ms Fox's first email to him on 19 December saying she needed to talk to Mr Jensen and her second email to Source Print the following day that it was likely that they did speak on the 20th because that is what he indicated in his email on the 19th that he was going to do.

[549] Mr Bambury accepted that by April 2006, he understood the full transaction.

[550] The contra arrangement in respect of *China (XXIX)* was made after Mr Jensen and Mr Bambury returned from Slovenia.

[551] There was late notice of the *China (XXIX)* transaction, but the full picture emerged whereby the printing costs incurred by Mr Bambury, not by Mr Bambury and Mr Jensen, were settled by contra sales of paintings.

[552] As I have had occasion to observe, all personal liabilities of Mr Bambury were going to be settled out of proceeds of sales of his work, because that was his source of income, and the only source of income it would appear from the evidence at the trial. The fact that the printer wanted to buy works of Mr Bambury made contras a natural fit to the cash flow problem that would have occurred to Mr Bambury, in any event, he having unilaterally accepted liability for the cost of printing the Viba catalogue.

[553] It does appear that the matter was taken in hand by Mr Jensen and then explained thereafter to Mr Bambury. That can be characterised as a breach of the principal/agent relationship. But the important fact is that Mr Bambury knew about it all in April 2006.

[554] From April 2006, Mr Bambury could have challenged these transactions with Mr Jensen. He did not. That is not surprising given, first, his natural reluctance to confront Mr Jensen on financial matters and, secondly, the weakness of his position, given that the Viba catalogue was his project. There was no obligation at all on Mr Jensen to meet the costs. Mr Bambury has had the benefit of the contra arrangement with Mr Wright, relieving him of personal liability to meet the printing costs directly. It is now unconscionable for him to pursue this claim against Mr Jensen. Back in 2006, while the agency was continuing, there would have been some ability to unwind the financial aspects of this transaction or come to some other settlement. On the probabilities, Mr Bambury acquiesced in the arrangement after he understood it in April 2006. It was after all a transaction which pursued his interests.

[555] There is also a claim for delivery up of the remaining catalogues. That is not disputed. If there are any remaining catalogues, they can be delivered by Mr Jensen to Mr Bambury.

Ideogram II

[556] There are a number of issues in dispute in relation to this work. It is common ground that Mr Bambury agreed to sell this work to Mr Jensen and another in May 1996. It is also common ground that the work was on-sold by these two men to the Auckland Art Gallery. The first Auckland Art Gallery acquisitions meeting, in which the potential purchase of this work was discussed was in March 1998.

[557] There are a number of issues in dispute in relation to this work:

(a) Did Mr Jensen and his co-purchaser underpay Mr Bambury the first purchase price by $800?

(b) Did Mr Jensen intend at the time to on-sell the work at a profit?

(c) Did Mr Jensen act fairly towards Mr Bambury in setting the price when he purchased the work in 1996?

(d) Did the Auckland Art Gallery know at the time it purchased the work it was not owned by Mr Bambury?

Alleged underpayment

[558] Mr Jensen and a client purchased this work in May 1996 for $25,000. There is a handwritten record of this sale which is a consignment note in the pen of Mr Bambury and records the sale price at $25,000 less 40 per cent, recording a first payment on 8 May of $11,000, with a balance due of $4,000 and a second payment of $3,200, leaving $800 outstanding. That consignment/sale note records that the sale is to Mr Jensen and another advised buyer. Mr Bambury says that he did not object to the sale at the time due to health issues he was having at the time. It is clear Mr Bambury would have known $800 was outstanding.

On-sale

[559] A little over two years later, Mr Jensen and his co-purchaser sold the painting to the Auckland City Art Gallery for $35,000 plus GST. Mr Bambury's evidence was that this sale must have been put in train well before the actual date of transfer of the work in July 1998. His evidence was that selling to a public art gallery is a long and drawn-out process, it takes many months and sometimes years to complete.

[560] Mr Bambury's counsel's submissions are that the onus was on the agent to prove he was entitled to personally purchase the work and on-sell it for a profit for otherwise the relevant fiduciary duty was against him being able to purchase goods acquired from the principal, let alone make a profit from selling those goods acquired. So that it was in breach of his fiduciary duties that the plaintiff purchased the work and on-sold it for a profit, citing two decisions – *Regal (Hastings) Ltd v Gulliver*[70] and *Parker v McKenna.*[71]

[561] Mr Jensen's argument is that Mr Bambury agreed to sell his work to him and his co-owner in May 1996. Mr Jensen disputes that there is any clear evidence of an underpayment, as the first payment of $11,000 appears in Mr Bambury's handwritten

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70 *Regal (Hastings) Ltd v Gulliver,* above n 13.
71 *Parker v McKenna* (1874-1875) LR 10 Ch App 96 (Ch).

bank ledger as part of a global payment of $17,266 made on 2 May 1996. It is not clear from that ledger how much is attributable to *Ideogram II*. Second, on 23 July when Mr Jensen sent Mr Bambury a further cheque which included $3,200 stated to be "final payment for *Ideogram II*". And on 28 October 1997, Mr Bambury's bank book records Mr Jensen having a $2,000 credit.

[562] I have examined that ledger and do not think it establishes a $2,000 surplus. The total banked was $69,141.76, accounted for by the columns of GST, sales, fees and sundry, the "sundry" being an item of $270.10.

[563] More significantly, however, the question of an under-payment was not raised at the time until 14 years later, during this audit process.

[564] The defence case is that there is no evidence at all of an intention to on-sell, let alone to the art gallery, when the art was purchased in 1996. The question of acquisition first appears in the art gallery minutes on 25 March 1998 when negotiations were obviously in train for the acquisition of this work.

[565] The defence also relied on evidence indicating that the public galleries had their own ideas as to which works of an artist they want to acquire.

[566] In October 1996, Mr Jensen had written to Mr Bambury recording that Te Papa had begun talks regarding acquiring a Bambury. Mr Ian Webb from Te Papa had asked whether *Ideogram II* was available and then talked about *Rani*. This did not result in a sale of *Ideogram II* by Mr Jensen to Te Papa.

[567] I draw two inferences from this note. The first is that Mr Jensen is reporting Te Papa's interest in acquiring Bambury works. Second, he was asked if *Ideogram II* was available. I note that, if it was, it was not sold at that time (1996) by Mr Jensen to Te Papa and, indeed, never acquired by them. (Te Papa ultimately purchased other Bambury works.)

[568] The legal submissions in support of this topic are based on an absolute prohibition of a fiduciary making a profit out of his fiduciary position. I have

discussed this aspect of the artist/gallery fiduciary relationship in the first part of this judgment.

[569] As I concluded there,[72] judgments as to fiduciary obligations and dealing in properties previously owned by the person to whom the fiduciary duty is owed, depend on the facts. Equity looks at all the facts. There are good business reasons and customs, supported by the expert evidence, to explain why galleries do purchase works of artists that they show and on-sell them. Normally this is to the advantage of the artist.

[570] In this instance, I consider that there is no breach of fiduciary obligations by Mr Jensen in respect of either the purchase or the sale of *Ideogram II* to the Auckland Art Gallery. I accept that Te Papa and the Auckland City Art Gallery are very discerning buyers and have their own views as to what examples of an artist's work that they wish to acquire.

[571] The acquisition of *Ideogram II* by the Auckland Art Gallery was driven by the judgment of the deceased senior curator, Mr William McAllern. I am satisfied on the evidence from Mr Brownson that this is not a case where Mr Jensen approached the Auckland Art Gallery to sell *Ideogram II,* let alone a case where Mr Jensen was promoting this work of Mr Bambury over other works for acquisition by the Auckland Art Gallery. When the work was examined by the Auckland Art Gallery, it would appear that it was located in Mr Bambury's studio, not in the Jensen Gallery's stock.

[572] This claim fails. There was no breach by Mr Jensen of a fiduciary obligation.

Not Through The Logical Law Of Dialectics

[573] This is a work of Mr Bambury's which was in the Jensen Gallery stock in August 2004. The plaintiff alleges that the defendant on-sold this work, in breach of fiduciary duty. By email dated 4 August 2004, Mr Jensen wrote to Mr Bambury. After discussing other matters, he went on:

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[72] At [74]-[79].

> I also need your bank account details for two separate payments to you for the sale of one of the resin and graphite horizontal diptychs and a *Cartesian Circle*. These works are being purchased by my family to hold in perpetuity for the boys.

[574] There is a handwritten note dated 6 August, two days later to the effect:

> AJ is direct crediting these payments into my

[575] On the same day, about an hour later, the email exchanges continue, first with a thank you from Mr Bambury for Mr Jensen buying the works, a reference to the payments being made directly to him (keep in mind Unovis was the normal recipient of payments) and then a reply by Mr Jensen about 11.26 a.m. at this point saying, inter alia:

> Re the paintings – it's in our best interests I'm sure. I sold a work of yours that I own to [ ] and have regretted it ever since. I feel an obligation to replace that and so I sold other works which I didn't want [two other works by two different artists].

[576] The plaintiff defined the issue as being to:

(a) Was the defendant entitled to on-sell the work; and

(b) Were the full sale proceeds paid to the plaintiff by the defendant.

[577] The defence case was that, as to payment, that came through another entity, Fisher's On-Line, who owed Mr Jensen a considerable sum of money.

[578] Fisher On-Line is another bank account of Mr Jensen's, related to a closed gallery, the Fisher Gallery. The documentation shows a credit to Mr Bambury for $16,631.25 coming in and him querying it. The money came in on 6 August. It is difficult to discern the distinction between the audit notes many years later and whether some of the queries were at the time. The other work of two, *Cartesian Circle (XII),* was valued at $12,000.

[579] The first work, *Not Through the Logical Law of Dialectic*s, was on-sold by Mr Jensen to the art consultant, Ms M Vavasour, who gave evidence in the case, for $16,200, being less than the $19,000 purchase price for the work in 2004. The sale

was made at a time when Mr Jensen's marriage was breaking up and he was short of funds.

[580] I am satisfied that the most probable explanation of the direct credit of $16,631.25 was related to this purchase of *Cartesian Circle (XII)* and *Not Through the Logical Law of Dialectics*. The sum received is short of the $18,000 Mr Bambury would have received if both works had been sold to a third party. What is of no doubt is that he did receive $16,631.25 and no other explanation, apart from these two sales, has been offered by either party.

[581] Arguably, there is a shortfall of $1,368.75. Mr Bambury is still pursuing the shortfall. His legal submissions are that the defendant does not have any records to show the shortfall was paid and the on-sales were in breach of his fiduciary obligations.

[582] Mr Jensen is not in breach of the fiduciary duties by on-selling the artwork as that was within the terms of his agency, as explained earlier in the judgment.[73] The shortfall dates from August 2004. Accordingly, it is statute barred from being litigated unless ss 21 or 28 of the Limitation Act 1950 apply. There is no evidence that the shortfall was deliberate. Mr Bambury did query it at the time. If it were to breach a fiduciary obligation, it was minor and not deliberate. This case falls far short of meeting the criteria enabling the application of ss 21 or 28. The claim is dismissed.

The Air is Filled with an Infinite Number of Lines

[583] This was a work completed in 1988, at which time Mr Bambury estimates its value was $6,000 and now he estimates its value at $19,000. It was Mr Bambury's evidence that in the mid-1990s Mr Jensen purchased the work, the agreement being he would pay $2,700 for the painting, a special price. Mr Bambury said he remembered having to chase Mr Jensen for the payment, who said he would negotiate his payment via a commission (which never went ahead). He did,

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[73] At [74]-[79].

however, receive $1,000 from Mr Jensen for the painting but never received the balance of $1,700.

[584] Mr Jensen agrees he did buy the work, he says in 1993. But he is not able to confirm the arrangement for payment. He says he must have paid Mr Bambury for the work. He points out it is recognised in the Monograph as belonging to him.[74] He says that Mr Bambury had not previously taken an issue in respect of payment for this work.

[585] Mr Bambury was cross-examined on the basis that a note he made "Tondo 1000 paid, never balance". It is undated and Mr Bambury could not be sure when he made that note. Mr Bambury pointed out that prior to 1999, there weren't any artist payment forms as such. Mr Jensen agreed he could not produce any documentary proof that all the payments of the work had been made. He agreed that there was at least one point in time when Mr Bambury wanted the work back but he had said, "No, I really want to keep the disc" and he declined to return the work.

[586] The plaintiff's argument relies on the legal duty to account, to shift the legal onus on the agent to prove that he had paid the plaintiff the full price of the work and that the absence of records should be construed against him.

[587] I accept Mr Jensen's evidence that this is a very late claim.

[588] It is definitely possible that the balance of the purchase price was never paid. But it is more probable than not that the matter has never been raised by Mr Bambury until after the relationship came to an end. The Monograph was published in 2000. At that time the relationship between the two men was strong. Mr Bambury will have read the Monograph carefully.

[589] There are two alternatives. Either the $1,000 was not paid, to the knowledge of Mr Bambury, but he elected during the course of their relationship not to raise the point, or Mr Bambury simply forgot that he was owed $1,000 and only remembered in the course of the scrutiny of the relationship after it collapsed, or that he was paid

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74 Monograph, p 97.

and has now forgotten the circumstances. In the first case, the defence of laches would apply. In the second case, I think any duty to account had fallen away more than 15 years later without any complaint.

[590] This claim is dismissed.

Eighth cause of action – claim under the Property Law Act 2007 in respect of joint works and for damages

Also Relieve the Heaviness of Materials (1991)

The Air is Filled with an Infinite Number of Lines (No 3) (1989)

The Direction of a Metalic Organisation (1988/89)

Necessary Correction (XV) (1998)

[591] The first three works in the above list are agreed by the parties to be jointly owned and in the possession of the defendant. The parties have jointly instructed an Auckland firm to take possession of the works from the Fox Jensen Gallery, report on condition, provide an opinion as to the timing of offering the works for sale by auction and paying the parties, net of all costs, 50 per cent of the sale proceeds.

Necessary Correction (XV)

[592] I have dealt with the dispute over this work in the course of the Roller Mills commission.[75]

Defendant's counterclaims – no commission paid

[593] These are two sales by Mr Bambury - one of an artwork called *Keeping the Beat for Blake* and an unspecified work sold to a couple. The issue between the parties is whether or not Mr Bambury is obliged to pay Mr Jensen a commission on these sales of art.

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[75] See [428]-[434].

Keeping the Beat for Blake

[594] *Keeping the Beat for Blake* was sold on or about 9 September 2003, when the value of the work was approximately $18,000, says Mr Jensen. He seeks commission of $7,200.

[595] *Keeping the Beat for Blake* was sold to the daughter of one of Mr Bambury's main collectors. It was put to Mr Bambury that the sale was really no different substantially to any other sale to any member of that same family, whether they live in New Zealand or overseas. He argued no, because he did not have a relationship of exclusivity, his answer was:

> A You would be absolutely right if I had a relationship of exclusivity with Andrew Jensen but I never did, neither in New Zealand or outside of New Zealand.
>
> Q He has a different view on that.
>
> A I know that.

An unnamed work

[596] The unnamed work was sold for $3,200 in about October 2000 and came out of a relationship developed when Mr Bambury's wife worked with one of the couple at UNITEC in Auckland. That was concluded at Mr Bambury's studio in Auckland.

Analysis

[597] I refer to the discussion on the customary terms of the agency at the beginning of this judgment. I am satisfied that these are two sales, both New Zealand based and both arising in the context where Mr Jensen was the principal agent. Commission was payable to Mr Jensen. As I have explained earlier in this judgment, the commission is due not because the sale has been made by the agent but ultimately as a reward for the ongoing and necessary commercial support of the artist's profile and value in the marketplace by the agent.

[598] This counterclaim was lodged for the first time in the fourth amended statement of defence and counterclaim dated 21 April 2015. As artist, Mr Bambury

had a contractual duty to pay commission to the gallery. But it was not a fiduciary obligation. These two claims are out of time.[76]

Conclusion

[599] A schedule of the findings and awards follows. It is drafted to collect the findings and awards made in the course of the judgment.

[600] The defendant is entitled to recover the debts admitted by the plaintiff, being the balance of commissions due the defendant in respect of the Roller Mills commission and the Bell/Wyndham commission, as recorded in [185] and [186] of this judgment.

[601] This judgment reserves leave to apply for further relief on three matters: the plaintiff's acknowledgement of two debts of $1,250 and $13,000;[77] *Blind (2006);*[78] and *At the Same Time A New Beginning*.[79] Leave is also reserved to both parties to apply for resolution of any issue pleaded, which, upon analysis, has not been resolved by this judgment.

[602] I reserve the question of costs.

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76 Limitation Act 2010, s 32.
77 See [186].
78 See [308] and [309].
79 See [524].

SUMMARY OF FINDINGS AND AWARDS	
Title	**Result**
Plaintiff's acknowledgement of debt to the defendant	$14,250, leave to apply for interest.
Great Wall II	$3,600 and interest from 30.7.07
Ghost XXXIII	Failed
Blind 2006	Failed
Must From a Unity	Failed
And it Conditions Us	Failed
The Eternal Persistent	Failed
By Its Direct Action	Failed
In His Pursuit of the Absolute	Failed
Seven Witnesses Seven Truths	Jointly owned 60:40. Leave to apply.
Letters to Paul (VII)	Failed
To Hold On To That Consciousness	Failed
Siena (XLIV)	Failed
Ghost (LII)	Failed
Blind (III) 2006	Adjourned, leave to apply.
What Remains When the Object is Named	Failed
Necessary Correction (XVIII), The Eternal Present and untitled work on paper	Failed
Mudra (II)	$8,100 and interest from 1 November 2007.
Of the properties of the materials	$4,000 and interest from 1 April 2009.
Insert Cross 089322	Failed
Ngamotu	$65,000 and interest from 28 May 2004.
Newton Seven	$35,000 and interest from 14 June 2004.
Cartesian Circle (XI)	$11,000 and interest from 17 June 2004.
Necessary Correction (XV)	$12,500 and interest from 19 June 2004.
Leaden Echo aka Necessary Correction 14	Failed
Golden Echo aka Necessary Correction XIX	Failed
Funds from Monograph sales	Failed
Necessary Correction XVI	Failed
Colour Work	Failed
At the Same Time A New Beginning	Adjourned, leave to apply.
Ankor III	Failed
Brother/Sister	Failed
The Rhythm of His Truth 2001	Failed
China (XXIX)	Failed
Delivery up of Viba catalogues	Granted
Ideogram II	Failed
Not Through The Logical Law Of Dialectics and *Cartesian Circle XII*	Failed
The Air is Filled with an Infinite Number of Lines	Failed
Also Relieve the Heaviness of	Settled

Materials – The Air is Filled with an Infinite Number of Lines (No 3) (1989). The Direction of a Metalic Organisation (1988/89)	
Keeping the Beat for Blake	Barred by Limitation Act 2010
An unnamed work	Barred by Limitation Act 2010