

# High Court decision on luxury property serves as timely reminder for real estate agents

*James v Luxury Real Estate Ltd* [2023] NZHC 1104

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## At a glance

- + The High Court's decision in *James v Luxury Real Estate Limited* was an appeal from the District Court by the owners of a luxury property in Queenstown.
- + The case concerned allegations of a breach of fiduciary duties and repudiation of an agency agreement by the listing agency and agent.
- + Ultimately, despite a finding of breach of fiduciary duty, Luxury Real Estate Ltd (Luxury RE) was successful in recovering its commission.
- + The decision serves as a useful reminder for real estate agents and other professionals about their obligations in their interactions with clients.



## Background

The plaintiffs, Mr and Mrs James, entered into a sole agency agreement with Luxury RE by its director, Mr Spice (**the Agent**), for the sale of their Queenstown property.

A prospective purchaser, Mr Bharadwja, was introduced to the property by the plaintiffs' neighbour and, due to the Agent's other commitments, was shown the property on two occasions by the plaintiffs without the Agent being present. Following the viewings, negotiations took place directly between Mr Bharadwja and the plaintiffs. The plaintiffs' understanding of those negotiations was that Mr Bharadwja would submit an offer of \$3,250,000. However, Mr Bharadwja submitted an offer of \$3,000,000.

As a result, the plaintiffs instructed the Agent to negotiate with Mr Bharadwja. Due to other interest in the property, the Agent initiated a multi-offer process to promote a competitive environment, however, the only offer received was an increased offer from Mr Bharadwja of \$3,150,000. The Agent considered he was ethically bound to advise Mr Bharadwja that he was no longer in a multi-offer

situation, and after informing the plaintiffs, proceeded to do so. The plaintiffs belatedly asked the Agent not to do this as they considered it detrimental to their interests.

A subsequent meeting between the Agent and plaintiffs became tense and ended with angry recriminations. The Agent swore and used aggressive language. The Agent also said words to the effect that he could not work with Mrs James and, as he left the property, said he was "walking away". Mr James then emailed the Agent saying it was not feasible to continue to work together, but requested ideas for a resolution and continued to correspond with the Agent regarding the sale.

The plaintiffs eventually accepted Mr Bharadwja's offer. Later, by their lawyer, the plaintiffs told the Agent that "it appears you ended [the Agent's] agency agreement on 2 March [the date of the Agent's outburst]. The [plaintiffs] do not wish to resume a relationship with [the Agent]." The plaintiffs refused to pay the Agent's commission on the sale.

## Legal issues

Three key issues were highlighted in the case:

- whether the Agent repudiated the agency agreement during his heated meeting with the plaintiffs
- whether the Agent breached his fiduciary duties to the plaintiffs, and
- if the Agent had breached his fiduciary duties to the plaintiffs, whether he was nevertheless entitled to commission for the sale.

## The High Court's decision

### **Repudiation / cancellation of contract**

The High Court upheld the trial judge's finding in the District Court that the agency agreement had not been repudiated by the Agent, nor cancelled by the plaintiffs.

The trial judge reasoned that swearing is commonly used for emphasis in modern New Zealand and, in this instance, it was not directed at the plaintiffs. In saying he could not work with Mrs James, the Agent did not clearly indicate an unwillingness to continue with the agency agreement –

the statement could be construed as meaning the Agent wanted to deal solely through Mr James going forward. The Agent's statement that he was "walking away" could similarly be construed as 'walking away from the heated discussion to cool off', rather than walking away from the agency agreement. Later correspondence between the Agent and the plaintiffs showed an intention to continue to work together.

### **Breach of fiduciary duty**

Contrary to the trial judge's findings, which found no breach of fiduciary duty, the High Court found the Agent had breached his fiduciary duty to the plaintiffs in one respect. The High Court considered that whilst the Agent had obtained the plaintiffs' consent to advise Mr Bharadwja that he was no longer in a multi-offer situation, the consent was not "informed". The plaintiffs, in agreeing to the terms of the agency agreement (which included a term that the plaintiffs consented to the Agent providing information to potential purchasers that 'should by law or in the Agent's opinion in fairness be provided'), would not reasonably have understood that in agreeing to the multi-offer process, they authorised the Agent to disclose information that he could not otherwise disclose due to the duty of loyalty.

### **Commission entitlement**

Generally, a fiduciary in breach of duties will not be entitled to remuneration. However, in exceptional cases, where an agent is found to have acted in good faith and the transaction was completed to the benefit of the principal, that rule may be parted from (as discussed in *Premium Real Estate Ltd v Stevens* [2009] NZSC 15).

The High Court considered the facts of the case fell squarely within this exception. The Agent had not been dishonest or deliberately deceptive, nor was his failure to obtain informed consent motivated by bad faith. The plaintiffs still obtained the benefit of the sale within the period of agency. Therefore, the High Court held the Agent was entitled to his commission.



## Implications for real estate agents

The facts of this case illustrate the tension between an agent's duties to its vendor client and an agent's ethical duties of disclosure and the duty to deal fairly with all parties engaged in the transaction, as detailed in Rule 6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

In *Luxury Real Estate*, the Agent was successful in his argument that the agency agreement had not been terminated, despite his aggressive behavior, and that he was entitled to his commission, despite a finding of breach of fiduciary duty. However, the case serves as a useful reminder for real estate agents and other professionals to:

- be mindful of how their words and actions may be construed/interpreted, and
- ensure they explain how a client's information might be provided to others and obtain informed consent before disclosure.

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## Need to know more?

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