IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1458
[2016] NZHC 2693

BETWEEN	DAVID PETER BAXTER Plaintiff
AND	MATTHEW DONALD COLEMAN First Defendant
AND	LET THE PEOPLE SPEAK ENTERTAINMENT LIMITED Second Defendant

Hearing:	22 - 26 August 2016
Appearances:	D W Grove for the Plaintiff First Defendant in person and for the Second Defendant
Judgment:	10 November 2016

JUDGMENT OF THOMAS J

This judgment was delivered by me on 10 November 2016 at 11am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:.....

Solicitors:
Media Arts Lawyers, Auckland.

Counsel:
D Grove, O'Connell Chambers, Auckland.

Introduction

[1] The plaintiff, David Baxter, is a musician who performs under the name Avalanche City. The first defendant, Matthew Coleman, a music manager and agent, was recommended to him. Mr Coleman, or his company Let the People Speak Entertainment Limited (LTPS), the second defendant, commenced acting for Mr Baxter around October 2010. Although Mr Coleman sent a draft management agreement to Mr Baxter almost a year later, it remained unsigned.

[2] In March 2013, Mr Baxter purported to terminate the relationship due to concerns over financial accounting. In particular, there were concerns as to income being earned but not disclosed, grants not reported, and failures to account properly for income due.

[3] Mr Baxter now claims that there were breaches of fiduciary duty and breaches of contract by Mr Coleman. He seeks $323,212.80.

[4] Mr Coleman says that any fiduciary duties were owed by LTPS, and that any corresponding contract was also with LTPS. He says he was employed by LTPS and never provided any services directly to the plaintiff. He also advances affirmative defences and claims for set-off, based on the money he says is owing to him by way of post termination commission.

[5] The major issues for determination of the claim include, factually, the identity of the parties to the management contract, the ownership of the master rights to Mr Baxter's musical works, the status of a draft management agreement (the draft agreement) sent to Mr Baxter in 2011 but never signed, and legally, whether Mr Baxter was owed fiduciary duties and whether they were breached. The counterclaims raise another range of primarily legal issues.

Factual Background

[6] Mr Baxter's first album, "Our New Life Above The Ground", was offered as a free download from Avalanche City's official website. It was positively received.

Mr Coleman was recommended to Mr Baxter as a music manager, and Mr Baxter subsequently approached him through a contact to arrange a meeting to discuss obtaining music management services.

[7] Mr Coleman is the sole director and shareholder of LTPS, which was established 8 years ago. He has an extensive background in the music industry, having worked as a sales representative for CBS/Sony Music in Sydney for three years from 1989 and then moving to Warner Music, where he stayed for ten years.

[8] LTPS is a record label/booking agent and is also involved with music management. It is based in New Zealand and provides management and agency services to a number of acts based in Australia and New Zealand across all genres of music.

[9] Mr Coleman described himself as the main provider of services to LTPS which then provides those services to artists. He said as at 2010, "I had a number of artists on the books at LTPS". In 2010 he was named Manager of the Year at the New Zealand Music Managers Awards.

[10] The parties agree that as a result of Mr Coleman and Mr Baxter's discussion at their first meeting in October 2010, they had an oral contract and from that date onwards either Mr Coleman or LTPS acted as manager for Mr Baxter with respect to Avalanche City. Mr Baxter was provided with global management services, with commission to the defendants of 20 per cent of the net income.[1]

[11] Not long after, a third party publishing company approached Mr Baxter and Mr Coleman looking for new songs for a TV2 (now TVNZ 2) advertising campaign and enquired about using the song from Mr Baxter's first album, "Love Love Love", as a backing track. The subsequent exposure was extensive: all major New Zealand radio networks began playing the song, which was then placed in the New Zealand singles chart.

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1 Given the dispute as to whether the contract was with Mr Coleman or LTPS, much of the evidence referred to "the defendants".

[12] The first album was re-released on 4 April 2011 and sold well, eventually achieving gold certification for sales. Mr Baxter's second album, "We are for the Wild Places", was released in July 2015.

[13] Sharanna Baxter is married to Mr Baxter. Mrs Baxter had been employed as an officer manager. When Avalanche City started to become successful, she resigned to travel full time with the band, looking after logistics and administration.

[14] Thereafter, Mr and Mrs Baxter became very busy dealing with promotions, gigs and tours. Mr Baxter's earnings increased substantially over a relatively short period of time. Income was paid to the defendants so that it could be receipted, expenses paid, commission deducted, and the balance paid to the plaintiffs.

[15] Mrs Coleman was for most of the relevant time married to Mr Coleman. She described herself as working for LTPS, focused on company logistics, administration, accounting (in conjunction with the accountants) and assisting with artist management.

Pleadings

Plaintiff's pleadings

[16] Mr Baxter claims Mr Coleman owed him fiduciary duties to act with utmost good faith, and to ensure all revenue and remuneration was fully reported, declared to him and properly accounted for.

[17] Mr Baxter says that, in breach of that duty, Mr Coleman did not disclose income and consideration owed to him for services provided and performances undertaken. He says that, in further breach of the duty, Mr Coleman misrepresented the remuneration to be paid to Mr Baxter and took the remuneration himself through the second defendant, LTPS. Mr Baxter says Mr Coleman failed to provide accurate accounting of income and consideration which he should have been paid.

[18] Mr Baxter pleads that as a result of the breach of fiduciary duties, he lost $251,143.62. The total claim subsequently increased to $323,212.80.

[19] Mr Baxter also pleads that, in breach of the management contract, Mr Coleman and/or LTPS failed properly to account for income and consideration received by the defendants during the term of the management contract. He says that, as a result of the defendants' breach of contract, he lost the same sum.

Defendants' pleadings

[20] Mr Coleman says that he provides agency, management and representation services to LTPS and does not provide such services directly. As a result, Mr Coleman says that LTPS, not he, owed fiduciary duties to Mr Baxter.

[21] Mr Coleman says Mr Baxter never told LTPS he disagreed with the post termination commission (or any other terms of the draft agreement) at any stage between October 2010 and March 2013. Further, Mr Coleman says that by continuing to instruct LTPS as his manager, Mr Baxter agreed to the terms of the draft agreement which superseded the previous oral contract.

[22] The defendants plead two affirmative defences, estoppel and set-off. The estoppel is said to arise because Mr Baxter represented to Mr Coleman and LTPS that LTPS' usual terms as discussed in October 2010 were acceptable to him. The defendants say that Mr Coleman made such representations by instructing LTPS to provide its services for Avalanche City and by representing to third parties that LTPS represented Avalanche City. The defendants say that Mr Baxter made the same representations after receiving the draft agreement, which represented to Mr Coleman and LTPS that the terms were acceptable to him.

[23] The defendants say that in reliance on these representations, LTPS provided agency, management and representation services on behalf of Mr Baxter in accordance with the terms of the draft agreement. They say that such reliance was reasonable, and LTPS would suffer detriment if Mr Baxter were permitted to deny the draft agreement's terms, including that LTPS would receive post-termination commission. They say it would be unconscionable for Mr Baxter to deny the terms as set out in the draft agreement.

[24] The defendants also say that Mr Baxter is indebted to LTPS and/or Mr Coleman for an amount which is likely to exceed the value of any claims by Mr Baxter against the defendants.

[25] Both LTPS and Mr Coleman bring counterclaims against Mr Baxter for breach of contract, and damages on a quantum meruit basis.

[26] LTPS' first counterclaim is brought on the basis that Mr Baxter is obliged to provide LTPS with full details of his worldwide revenue and pay commission on that revenue until 12 months after the release of his third album, and has not done so. LTPS says it is entitled to damages for the lack of revenue to them based on the number of albums to which the Court finds that LTPS has rights.

[27] Secondly, LTPS claims that by his actions, Mr Baxter demonstrated he had accepted the terms of the draft agreement and by purporting to terminate the agreement Mr Baxter in fact repudiated it, as it required a minimum term of three years or three albums. LTPS says that following Mr Baxter's repudiation, it could not fulfil its obligations and as such cancelled the contract effective from March 2013. It says that in cancelling, it suffered loss and that it should receive 20 per cent of Avalanche City's income until after the release of Mr Baxter's third album, and post termination commission.

[28] Thirdly, it says that in the alternative if it is found that LTPS agreed to early termination of the contract, it was on the basis that Mr Baxter would continue to pay post-termination commission and he has failed to do so.

[29] Finally, it says that if the contract did not provide for post-termination commission, then the parties intended that the oral contract would be replaced with written terms, and that from at least the date that Mr Baxter was sent the draft agreement, he knew that LTPS was to receive post-termination commission and the other remuneration set out therein. It says that from 1 August 2011 onwards, the oral contract was no longer in place, and there was no contract but LTPS continued to provide management and representation services, and was entitled to reasonable compensation for doing so, including commission on gross income going forwards.

[30] Mr Coleman's counterclaims mirror LTPS', in the alternative that the Court finds that Mr Coleman contracted with Mr Baxter and not LTPS.

Assessment of the factual issues

[31] The following factual questions must be determined:

(a) Who were the parties to the contract?

(b) What were the terms of the contract?

(c) What was the status and effect of the draft agreement?

(d) Who owned the master rights to Mr Baxter's works?

(e) Did Mr Baxter have cause to terminate the contract?

i. Outward Sound

ii. Recorded Music

iii. Air New Zealand Contra

iv. Other Issues

(f) What is the relevance of any non compliance by Mr Baxter?

(g) Was post termination commission payable?

[32] My decision on the facts centres principally on the credibility of the parties. That involved not only the assessment of them and their evidence, but also an analysis of other evidence and established facts, and whether or not that enhanced or detracted from the credibility of the witnesses.

[33] Mr Grove appeared for the plaintiff. In his submission, Mr and Mrs Coleman's evidence demonstrated they were both prepared to act dishonestly.

The most striking example, he said, related to the Recorded Music commission (discussed later) collected by them, spent by them, and never reported to Mr Baxter.

[34] Mr and Mrs Baxter's evidence was that they were constantly concerned about the accounting carried out by the defendants in respect of Mr Baxter's earnings and entitlements. Indeed, that is the reason Mr Baxter refused to sign or negotiate the draft agreement. The Colemans' email dated 6 March 2012 said:

> You can trust us implicitly and we will always have your best interest at heart, please never doubt that.

[35] As the plaintiff pointed out, at that time the Colemans were collecting money due to Mr Baxter without telling him about it, despite the fact that during this period, Mrs Baxter was writing to them raising concerns as to the Baxter's financial ability to pay tax and mortgages.

[36] Many of the issues requiring determination could have been dealt with comprehensively had the defendants provided relevant source documentation. For example, if Mr Coleman had provided original grant applications and associated documentation, a decision could have been made as to whether or not various payments were for Avalanche City or the defendants, and what expenses were being reimbursed. The only inference that can be drawn in these circumstances is that the failure to provide these documents was because they would be adverse to the defendants' case.

[37] Overall, in my observation, the plaintiff's witnesses were balanced and honest. They made concessions where appropriate and relied upon contemporaneous documentation to support their positions.

Who were the parties to the contract?

The evidence

[38] Mr Baxter's evidence was that, due to the success of his first album, he decided he would need a manager/agent to look after all of the business issues

arising out of his work. This was new ground to him as he had not previously been involved professionally as a performer.

[39] He had tried to get some representation without success and when Mr Coleman was recommended to him, he simply approached Mr Coleman directly. He said he had not carried out any internet checks on Mr Coleman before he met with him. The first time Mr Baxter found out about LTPS was "down the track" in the relationship, when he saw reference to LTPS as his label for Love, Love, Love when it made it onto music charts in April 2011.

[40] Mr Baxter met with Mr Coleman, at what he thought was Mr Coleman's office, on Friday 15 October 2010. Mr Baxter described the meeting as taking place in a small room which he recalled as being a rented room, not at Mr Coleman's house. He said there were no signs advertising LTPS or business logos on display to connect the room with LTPS. All there was in the room was a computer and paper.

[41] Mr Baxter described the meeting as very casual, saying Mr Coleman discussed how to progress Avalanche City with Mr Coleman as his agent and manager. He said only he and Mr Coleman were present at the meeting. Mr Coleman impressed Mr Baxter as "a pretty big deal". He described Mr Coleman spending a lot of the meeting talking about his work with other artists and his contacts in the New Zealand music industry. They discussed radio plugging and Mr Coleman mentioned he could secure good rates for this service due to his relationships.

[42] Mr Baxter said Mr Coleman told him he could provide management services on a global basis. He said he would be his agent and work on his behalf with record companies and promoters. Further, he would provide all accounting services and collect funds due to Mr Baxter. Commission was to be calculated at 20 per cent of net income after taking into account costs. Mr Coleman also said he would need to be reimbursed for expenses paid by him for sales and/or tour income. Mr Coleman told Mr Baxter that, as this was a completely new venture, no commission would be payable if a live performance or tour did not make a net profit.

[43] Mr Baxter explained that he agreed the two of them would work together, but there were no other discussions in relation to the terms of the agreement and he was certain there was no discussion about payment of post termination commission. Mr Baxter said he had not previously entered into a management agreement and would not even have known to what post termination commission related. The whole arrangement was very informal, however it made sense to him, he said. Mr Baxter summarised the agreement as being that Mr Coleman would be his manager and agent and receive 20 per cent of income earned as his commission.

[44] Mr Baxter emphasised it was Mr Coleman who was recommended to him to act as his agent and it was Mr Coleman with whom he would be dealing. He had no idea who or what LTPS was, although he accepted that there were references to it at the bottom of email correspondence. The emails he was receiving from Mr Coleman used the email address matt.coleman@xtra.co.nz.

[45] Mr Baxter described the relationship with Mr Coleman as beginning well. He took over all issues in relation to Avalanche City and guided him on the steps he should be taking. Mr Baxter said as he was completely new to this side of the music industry, he was relying upon Mr Coleman from that time.

[46] The big breakthrough was when TV2 asked to licence Love, Love, Love in December 2010. Mr Baxter said he relied on Mr Coleman to negotiate and deal with this contract. It was at this point that he considered the relationship was really formalised, as it was the first tranche of income received on his behalf by Mr Coleman. Mr Baxter said they discussed that, as previously agreed, Mr Coleman would be entitled to 20 per cent commission on this amount.

[47] Mrs Baxter described Mr Baxter as the classic struggling artist, earning little income and working on his music from home. She said Mr Baxter had been impressed by Mr Coleman at their initial meeting. She understood from Mr Baxter that Mr Coleman agreed to act as his agent and manager worldwide, receiving 20 per cent of net income and reimbursement for expenses. Mr Baxter told her that Mr Coleman would deal with contract negotiations and all accounting for income and expenses.

[48] Mrs Baxter's understanding was that the agreement negotiated at the first meeting was a verbal but binding agreement.

[49] Mr Coleman's recollection of events was that in October 2010 Mr Baxter emailed him saying he was "interested in management, just to get higher profile shows and tours that I wouldn't normally get by myself", and asking to meet. He said the initial meeting took place at LTPS' office in Blake Street, Ponsonby in a villa where two businesses are located. Mr Coleman accepted it was likely he was the only person present. He said that they talked about Mr Baxter's music and goals. Mr Coleman said he told him about LTPS and its artists and what it did to 'break' artists around the world and in New Zealand and get them strong contracts with labels, publishers and touring companies in each region.

[50] Mr Coleman believed it was very clear that LTPS would be contracting with Mr Baxter, saying they met at the company's offices and he told Mr Baxter about the bands the company currently had on its books. They also discussed "my relationship with Warner and how my company had distribution with them to release music". Mr Coleman acknowledged he knew that Mr Baxter was naïve but said, given the discussion about other artists represented by the defendants and his deal with Warner Music New Zealand (Warner NZ), in his opinion, it would be hard to think Mr Baxter would have understood Mr Coleman to be referring to himself personally.

[51] Mr Coleman accepted that Mr Baxter's approach was an approach to him personally.

[52] Mr Coleman's evidence was that he told Mr Baxter about the standard management agreement, that commission would be 20 per cent, which was standard in the industry, and post termination commission would be included. He accepted he did not go into any fine details around this matter at this point.

[53] Mr Coleman said he "established and managed a careful plan to launch the band in 2011" into global markets, with the goal of achieving a number 1 single in New Zealand. Furthermore, that from an early stage Mr Baxter acknowledged "that I was his manager". On 22 February 2011, for example, A&R Worldwide in Los

Angeles reviewed the music video for "Love Love Love" and noted that all contact was to be directed to Matt Coleman from LTPS.

[54] Mr Coleman understood that parties can form a binding contract even though it is not in writing. He accepted that there was a contract formed between either him or LTPS and Mr Baxter in October 2010 at the initial meeting. He said, however, that in no way did that agreement incorporate the full terms which were necessary for a management agreement in a complicated industry such as the music one.

[55] Mr Coleman accepted that he was the main person providing services to LTPS, and the only other person who did so was Mrs Coleman, who worked part time.

[56] Kim Coleman said she was employed by LTPS to help with the "logistical side of things", including contracts, invoicing, bookings and accounting. She did not have an employment contract.

[57] Mrs Coleman said that, in October 2010, Mr Coleman met with Mr Baxter at LTPS' offices and came home very excited about that meeting and what he believed "he" could achieve for Mr Baxter. He told her that he and Mr Baxter had discussed how LTPS could provide global management services for Mr Baxter and his band, Avalanche City.

Analysis

[58] Determining the identities of parties to a contract requires an objective assessment of the relevant evidence.[2] The question is "what a reasonable person, furnished with the relevant information, would conclude."[3] The private thoughts of each party are irrelevant to the determination of the contracting parties, on the objective information available.

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2 *Mahon v Crockett* (1999) 8 NZCLC 262,043 (CA); *Hamid t/a Hamid Properties v Francis Bradshaw Partnership* [2013] EWCA Civ 470 at [57]; *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 at [87].

3 *Hamid t/a Hamid Properties v Francis Bradshaw Partnership* [2013] EWCA Civ 470 at [57].

[59] Standing back, I am satisfied that a contract was formed at the meeting between Mr Baxter and Mr Coleman on Friday 15 October 2010 (the oral contract). The parties to the oral contract were Mr Baxter and Mr Coleman.

[60] Essentially, I accept Mr Baxter's recollection of what happened at the meeting. It was obviously an important milestone for him in the circumstances at the time. He went to the meeting with a view to exploring the possibility of Mr Coleman, who had been recommended to him, being his agent. There was clearly nothing which occurred at that meeting which changed his impression that it was Mr Coleman with whom he entered into an agreement rather than LTPS. His evidence that there were no company signs, logos or paraphernalia at the office where the meeting took place was not challenged or refuted by Mr Coleman.

[61] Mr Coleman's version of events in many ways supported Mr Baxter's recollection. In particular, the way in which Mr Coleman (and Mrs Coleman) gave their evidence frequently confused the identities of LTPS and Mr Coleman. Mr Coleman's description of what happened at the October 2010 meeting included many recollections of what he said he told Mr Baxter, "I could do for him". After the meeting on 15 October 2010, Mr Coleman emailed Mr Baxter saying:

> I can do a lot for you.

[62] The email, which was from matt.coleman@xtra.co.nz, included in the signature a link to the LTPS website, Mr Coleman's additional LTPS email address, and the company Skype and Twitter and Facebook details. After a response from Mr Baxter, Mr Coleman replied:

> Let me handle it with my contacts.

[63] That Mr Coleman assumed Mr Baxter would have realised a company would be involved is insufficient to mean that the oral contract was formed between LTPS and Mr Baxter. The objective evidence of their dealings does not support the view that there was a concluded contract between Mr Baxter and LTPS. Indeed, Mr Coleman could not point to any specific interaction which suggested that the contract was with LTPS. The fact that inquiries could have been made which might

have explained Mr Coleman's view, but were not, is irrelevant to determining the identity of the contracting parties.[4]

[64] What happened subsequent to that meeting reinforced the position. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*, the majority of the Supreme Court held that post-contractual behaviour could be used to support the construction of the contract.[5] Tipping J held that the focus must be on conduct assessed objectively, and subsequent conduct must be "mutual or shared".[6] Subsequent cases have emphasised the need for evidence to support an objective intention.[7]

[65] In *Vector Gas*, Tipping J restated his views on contractual interpretation, saying that the "key point" with all extrinsic evidence is that it is admissible "if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear."[8] *In New Zealand Carbon Farming Ltd v Mighty River Power Ltd*, the Court of Appeal observed that it appeared from these comments that his Honour was intending to depart from the requirement expressed earlier that the relevant conduct must be shared or mutual.[9]

[66] In this case, the fact Mrs Coleman, Mr Coleman's wife, carried out the book keeping function reinforced the personal relationship between the parties. It objectively reflected the impression it was Mr Coleman personally who had procured his wife to assist with his role as Mr Baxter's manager and agent.

[67] The responses of Mr and Mrs Coleman when faced with enquiries about Mr Baxter's money and their accounting demonstrated their intention that there would be a personal relationship between them. For example, on 6 March 2012, the Colemans responded to enquiries from the Baxters about accounting issues by saying that the Baxters could trust the Colemans implicitly and that they would always have the Baxters' best interests at heart. This suggested an acceptance of personal obligations.

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4 *Hamid t/a Hamid Properties v Francis Bradshaw Partnership*, above n 3, at [67] – [71].
5 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277
6 At [53].
7 See John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (5th edition, LexisNexis, Wellington, 2016) at 190.
8 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [30].
9 *New Zealand Carbon Farming Ltd v Mighty River Power Ltd* [2015] NZCA 605 at [163].

[68] Mr and Mrs Coleman clearly confused their roles and what they maintained was that of LTPS, the most obvious example being payment of income due to Mr Baxter into the Colemans' personal bank accounts. I was left with the very clear impression that Mr Coleman relied on the existence of a company, LTPS, when it suited his purposes to do so, for example when liabilities were involved. However, for the most part he held himself out as agent for Mr Baxter in his personal capacity, including most importantly at his first meeting with Mr Baxter when a contractual relationship between the two of them was formed.

[69] Many of Mr Coleman's emails were from his personal email address although some of them were from his address at LTPS. However, external communications also referred to Mr Coleman's personal email, such as a March 2011 marketing flyer which said:

> For band management contact Matt Coleman at matt.coleman@xtra.co.nz

[70] The existence of LTPS and reference to it at times on the emails from Mr and Mrs Coleman does not alter the position. That Mr Coleman might have used LTPS to perform some of the administrative functions required in connection with his position as agent and manager was entirely logical and feasible. It did not detract from the fact that Mr Coleman and Mr Baxter's main dealings, from the formation of the contract onwards, were in their personal capacities.

What were the terms of the contract?

[71] There is no dispute that the terms of the oral contract included 20 per cent commission payable to the agent, reimbursement of approved expenses, and that tours without profit would not be subject to commission.

[72] Mr Coleman said the discussion also included discussion of the contract being for three years or three albums, and with a post-termination commission payable for five years. He said the agreement could be terminated for breach but could not otherwise be terminated prior to the end of the term, by notice or otherwise. He pleaded with more specificity what the 20 per cent commission

applied to, and said they agreed LTPS would be reimbursed for any approved expenses paid by it, including Mr Coleman's costs, for sales/marketing/touring.

[73] Mr Coleman maintained during the hearing that he mentioned post termination commission at the initial meeting but agreed he did not go into any details, saying everything else had to be negotiated. He accepted that any specific terms would be the subject of negotiation.

[74] In his closing submissions, Mr Coleman made a number of assertions about the evidence which were not correct. For example, that the evidence showed that at the first meeting between Mr Coleman and Mr Baxter, the arrangement was agreed as a minimum of the longer of three years or three albums. There was in fact no evidence which verified this claim.

[75] Mr Baxter completely rejected the proposition that post contract commission would be payable, saying he did not understand the concept and had it been mentioned, he would have asked about it.

Findings

[76] I am satisfied from the evidence that the terms of the oral contract were as described by Mr Baxter and set out in [42] above.

[77] Despite the defendants' pleading, there was no real evidence that LTPS' "usual terms" were discussed at the meeting. That contention was not put to Mr Baxter and I reject any such suggestion.

[78] I also reject entirely that the topic of post termination commission was mentioned at the meeting when the oral contract was formed. I accept Mr Baxter's evidence that, had it been raised, he would have asked for an explanation of what it meant and taken advice.

[79] The same applies with respect to Mr Coleman's assertion that the agreement was to be for a minimum term. Again, in the circumstances, had that indeed been

raised, then I am satisfied from Mr Baxter's general approach he would have required some time to take advice on the matter.

[80] The fact that, as Mr Coleman maintained, some of the terms he claims were part of their contract were standard in the industry does not mean they were part of the contract concluded at the October 2010 meeting between Mr Baxter and Mr Coleman. What Mr Coleman might have intended is irrelevant unless those terms were communicated to and agreed by Mr Baxter. I have found, based on a consideration of all the evidence, they were not.

What was the status and effect of the draft agreement?

[81] On 28 March 2011, five months after the formation of the oral contract, Mr Coleman emailed Mr Baxter a copy of the draft agreement.

[82] Mr Coleman said it was the same standard agreement from LTPS that all "my" artists sign. The agreement included the following terms:

(i) Sole and exclusive management in relation to all activities in the music entertainment industry;

(ii) Commission would be deducted;

(iii) The term was for three years or a minimum of three albums;

(iv) Mr Coleman's role with LTPS was described: "we will provide the services of Matt Coleman hereunder as reasonably required to provide you with effective management services";

(v) Commission was 20 per cent, calculated on gross income;

(vi) Commission for live performances was 20 per cent, calculated on net income, including any monies advanced as tour support, but after deduction of all costs incurred in the live performance;

(vii) After the expiration or termination of the term of the agreement, commission would be due on income for 5 years: 20 per cent during the first year, 15 per cent during the second year, 12 per cent during the third year, 10 per cent during the fourth year and 5 per cent during the fifth year.

[83] Mr Baxter has now located the email from Mr Coleman to him dated 28 March 2011. Although there was reference to the draft in the subject line of the email, the body of the email did not refer to it. March 2011 was a very busy time for him, Mr Baxter said. He did not recall ever receiving or reading the email and did not respond to it. He was not expecting to receive a management agreement from Mr Coleman because, as far as Mr Baxter was concerned, there was an existing contract in place already. He had no recollection of it being raised with him at that time.

[84] When he did not hear back from Mr Baxter, Mr Coleman said he gave him the benefit of the doubt, as he knew he was busy. At the time, Mr Coleman was negotiating a significant deal with Warner Music Australia (Warner Australia) to make Avalanche City one of their 'global priority artists'. Warner Australia eventually offered Avalanche City a record deal consisting of a payment upfront for his first album, in exchange for signing with them for five albums.

[85] Mr Coleman's evidence was that, while things had been busy, Mr Baxter and LTPS were operating on the basis of the draft agreement supplied in March, but he still wanted it signed. He emailed Mr Baxter on 14 June 2011 setting out a to-do list, which included "also need to finalize our management agreement before you head away".

[86] Mr Coleman said that Mr Baxter kept telling him over the phone or in person that he would sign the draft agreement. He did not say he had any concerns with the standard terms. He said they continued to conduct business with each other on the basis of the draft agreement and, as he had not raised any issues with it, Mr Coleman believed that he agreed with all of it.

[87] On 1 August 2011 Mr Coleman emailed Mr Baxter, attaching the draft agreement once again, telling him he needed to sign it before Mr Coleman could sign anything with an entity known as Nettwerk.

[88] Mr Baxter said he had never previously seen the draft agreement. He considered his oral contract with Mr Coleman was working well. He and Mrs Baxter were at this stage concerned as to the accounting being carried out by Mr and Mrs Coleman on their behalf and in no way wanted to commit to a three album contract. He was, however, extremely busy. He said he would not have been prepared to change his contract terms with Mr Coleman.

[89] Mr Coleman reminded Mr Baxter about the draft agreement with LTPS again on 17 August 2011. Mr Baxter responded "Yeah the agreement looks good to us. There was just one thing we were wanting explained to us about what it means ... I'll let you know what it is soon." The next day Mr Coleman emailed back asking about the final question, but Mr Baxter did not respond as he went overseas.

[90] Mr Coleman said he got on with negotiating a major publishing deal for the band, and achieved one of the best deals in the New Zealand music industry in years, as well as the Warner Australia deal.

[91] It was put to Mr Baxter that, at the time of negotiations with Warner NZ about the distribution deal, Mr Baxter must have thought he required a more formal management agreement. Mr Baxter consistently said he understood he had an agreement with Mr Coleman which entitled Mr Coleman to 20 per cent commission. He did not see any need to change the oral contract.

[92] On 12 September 2011, Mr Coleman emailed Mr Baxter again saying "also would be great to get my management agreement signed off this week if we can". Mr Baxter did not reply or raise any concerns with the draft agreement. That same day Mr Coleman sent a copy of the draft agreement to Mr Baxter's lawyer, David Vodicka. On 24 January 2012 and again in February, Mr Vodicka emailed Mr Coleman asking for a copy of the signed management agreement for his files.

[93] On 6 March 2012, Mr Baxter emailed Mr and Mrs Coleman with concerns over accounting and said he and Mrs Baxter were going through the draft agreement. Mr Coleman's reply requested a meeting.

[94] On 30 April 2012, Mr Baxter's lawyers emailed Mr Coleman asking if the management issues had been resolved as they had not received any further instructions. Mr Coleman said he took from this that they (and thus Mr Baxter) thought there were no issues with the draft agreement.

[95] On 6 June 2012, Mr Coleman gave Mr Baxter a hard copy of the draft agreement.

[96] In November 2012, Mr Coleman again emailed Mr Baxter's lawyers asking for an update on the draft agreement, and they informed him they had had no word from Mr Baxter.

[97] Mr Coleman said that, in addition to the Nettwerk and LTPS agreements, Mr Baxter had been "extremely slack" in progressing Warner Australia's contract. By March 2012 things with Warner Australia had reached the point where it threatened to suspend all funding until Mr Baxter signed their long form agreement.

Analysis

[98] The evidence about the sudden success of Avalanche City and Love, Love, Love was compelling. Mr Baxter was suddenly thrust onto a much larger stage than the one previously occupied by him. I accept Mr and Mrs Baxter's evidence of the considerable impact on them of that sudden success, their touring commitments and that these were the reasons why they did not respond to Mr Coleman in respect of draft agreement.

[99] In saying that, Mr Coleman's frustration is understandable. On a number of occasions, he sought to discuss the draft agreement with Mr Baxter and he followed up with Mr Baxter's lawyers. Mr Baxter either ignored his requests for a response or, as he did in August 2011, gave Mr Coleman some general assurance about the

draft agreement, although maintaining there was one point of concern. He did not respond to Mr Coleman's request to identify and discuss that point of concern.

[100] What is clear is that Mr Baxter did not sign the draft agreement. He did not tell, or give any real indication to, Mr Coleman that he considered himself bound by the draft agreement, and Mr Coleman's repeated requests to finalise it demonstrated that he also knew it had not been finalised. Indeed, Mr Coleman accepted the draft agreement was a draft only, never finalised and the terms needed to be the subject of negotiation and refinement.

[101] At the time, Mr Baxter had good reason to have serious concerns about how money due to him was being dealt with by the Colemans, as seen by the email correspondence. Furthermore, Mr Baxter said he and Mrs Baxter were extremely cautious when it came to concluding contractual arrangements. Mr Baxter said he would not sign a contract unless a lawyer had thoroughly reviewed it. He acknowledged he did not have a lawyer at the time the draft agreement was initially sent to him but said, in the circumstances, he would have found one. Support for this came from the length of time it took to negotiate the deal with Warner Australia. Although a heads of agreement was signed at the outset, it took around 12 months for the "long form" contract to be concluded. Mr Baxter involved his Australian-based lawyer in that process.

[102] The defence case seemed to rely on a number of terms of the draft agreement, for example, that accounting was to take place every six months. If the parties were not bound by the draft agreement, those provisions are not relevant.

[103] Mr Coleman criticised Mr Baxter for referring to certain provisions of the draft agreement after the termination date, for example, with respect to accounting obligations. That does not, however, alter the position that, prior to the termination of the relationship between Mr Baxter and Mr Coleman, the draft agreement did not apply to their relationship.

Who owned the master rights to Mr Baxter's works?

[104] Mr Coleman explained that, in his opinion, Warner Australia had worldwide rights to Avalanche City's music except in New Zealand, and in New Zealand, it was LTPS who had the rights to the works. He relied on LTPS' agreement with Warner NZ, which he said allowed him to collect the money due to the party who owned the works. Mr Coleman said he had a "general" written agreement with Warner NZ regarding all the artists LTPS managed.

[105] Two points arise from this. First, LTPS' agreement with Warner was not disclosed and secondly, in any event, unless Mr Baxter was party to that agreement, he could not be bound by it.

[106] Mr Coleman then maintained that Mr Baxter verbally agreed to LTPS and Warner NZ's arrangement, which gave the New Zealand rights to LTPS, which LTPS then gave to Warner. Mr Coleman described it as being "the way it works". Mr Coleman then contended that LTPS' ownership of the New Zealand master rights was referred to in the draft agreement which gave LTPS authorisation "to exploit".

[107] Mr Baxter's position was that there was an unwritten agreement between Mr Baxter and Warner NZ, which was a distribution deal only, and Mr Baxter retained ownership of the rights to the music. The deal is still in place, he said, and remains an oral agreement.

[108] Lynda Parsons is an accountant whose business focuses on clients from the music and film industries for their accountancy, business services and taxation work. She has worked in the industry for 19 years, and has run her own firm for 10 years. Mrs Parsons is familiar with contracts in the music industry, as her job is to interpret them to ascertain entitlements to management fees. She described a distribution deal as an arrangement whereby the artist retains a distributor or record company to manufacture and distribute the artist's music, on the basis of a share of receipts, and the artist owns the music.

[109] Mr Coleman acknowledged it was possible to have a distribution agreement without the artist losing ownership of his or her material.

[110] The agreement with Warner Australia was a global agreement whereby Warner Australia owned the rights to Avalanche City's music except in New Zealand. It was an extensively negotiated contract, first covered by a heads of agreement and subsequently covered by what is called a "long form" contract.

[111] Mr and Mr Baxter both said they had never agreed to LTPS having master rights to Mr Baxter's recordings. Mr Baxter was referred to various internet printouts concerning the publicity of Love, Love, Love and its place on the charts. This showed the following:

> Love, Love, Love – Avalanche City (LTPS-Warner).

[112] Mr Baxter was also referred to extracts from internet publications concerning the relationship between Avalanche City and Warner NZ, for example, a release on 15 March 2011 which read:

> Warner Music NZ and Let the People Speak (LTPS Music) Management are thrilled to announce an album deal and release date for exciting chart new comers Avalanche City.

[113] These various references were put to Mr Baxter in an attempt to show that he must have been aware, from some time in 2011, that LTPS was showing itself as the label for Avalanche City. Mr Baxter said that when he became aware of this, he was confused because it was not what he had agreed with Mr Coleman. He said he asked Mr Coleman why LTPS was listed and Mr Coleman said words to the effect of, "I guess they had to put something there".

Analysis

[114] The fact the draft agreement was of no legal effect between the parties is particularly important in relation to whether LTPS was the label for Avalanche City's recordings. There was nothing in either Mr Baxter or Mr Coleman's evidence about formation of the oral contract which supports the proposition that Mr Baxter agreed LTPS would be his label. Indeed, given I have accepted his evidence that he was unaware of LTPS at the time, that could hardly have been the case. Something as important as an assignment of Mr Baxter's rights cannot be achieved simply because Mr Baxter did not take any action when he saw the name LTPS as the label for Love,

Love, Love in various announcements. I accept his evidence that he did raise the issue with Mr Coleman and was satisfied by Mr Coleman's response.

[115] For these reasons, I conclude that Mr Baxter never agreed to transfer the ownership of his music in New Zealand to Mr Coleman or LTPS.

Did Mr Baxter have cause to terminate the contract?

[116] Mr and Mrs Baxter began asking Mr and Mrs Coleman for records of income in March 2011, as they knew they would need to have a record for tax purposes with the end of financial year approaching. They believed Mrs Coleman brushed them off, telling them that, while the funds were held in trust, no tax would be payable. They did not receive the first statement until June 2011. Mr Coleman had received all income relating to Avalanche City to this point, but maintained he had also largely covered their travelling expenses from this income, particularly for the USA and UK trip in April/May 2011.

[117] Mrs Coleman kept records of all Avalanche City's income and expenditure in spreadsheets. She said she organised all the contracts, invoices, and hospitality riders and booked all travel and logistics for Avalanche City. She described Avalanche City as the most challenging band they ever dealt with at LTPS, both in terms of their demands and unreliability. Although she referred to someone helping her with the accounting, no evidence was provided from any accountant who assisted her or provided accountancy services either to LTPS or to Mr Coleman.

[118] Mrs Coleman's evidence was that Mr Baxter was well aware of each gig, the amount and details, and had full knowledge of all his earnings. LTPS did not "ignore" or hide income, she said.

[119] As Mrs Baxter had more of a "business" mind, she assumed responsibility for looking over the statements to make sure everything was in order, while Mr Baxter focused on his music, performances and promotions. She became concerned almost immediately after larger amounts of income were being received. She began raising issues right from the receipt of the first spreadsheet, thinking there were accounting mistakes. The number of issues Mrs Baxter discovered, and the amount of money

involved, grew as time went on. She became extremely concerned about the Baxters' financial position, given the lack of funds they were receiving and their commitments to the IRD. Mr and Mrs Baxter later purchased a property which had a substantial mortgage and needed his income to pay the mortgage. Mrs Baxter referred these concerns to Mr Coleman and Mrs Coleman, generally by email as Mr and Mrs Baxter were regularly touring.

[120] In June 2011, Mr Baxter set up a business bank account and formed a GST registered company. Prior to that time, income went directly to Mr Coleman.

[121] Mrs Coleman sent through a spreadsheet stating that $130,592.36 was being held for Avalanche City. She said she made it clear to both Mr and Mrs Baxter when she provided them information on 24th June 2011 that there might be some minor discrepancies, and welcomed their comments or identification of any issues. The Baxters raised concerns on the same day. In particular, Mrs Baxter questioned why management fees were being charged on the first tour which made a loss, commission on travel expenses, missing income and other discrepancies.

[122] Mrs Coleman's response dealt with most of Mrs Baxter's concerns.

[123] A further issue arose on 17 February 2012 in relation to funding for the first trips to the USA and London. Outward Sound (a funding entity run by the New Zealand Music Commission) and New Zealand On Air had made grants in respect of the band's first USA and London trips, for which the Baxters said they had in fact paid themselves. Mrs Baxter checked with Outward Sound and discovered that Avalanche City had received close to $100,000 in grants for travelling costs, but approximately $80,000 of this had been retained by Mr Coleman. The Baxters described alarm bells starting to ring very loudly at this stage.

[124] There were also delays in transferring funds which were due to Mr Baxter; GST had been taken off income twice; management fees were calculated on amounts inclusive rather than net of GST; and payments for gigs were missing. Mr and Mrs Baxter were unsure whether the issues were a result of dishonesty or incompetence.

[125] Mrs Coleman responded on 6 March 2012, saying the Baxters could trust "us" implicitly and the Colemans always would have the Baxters' best interests at heart. She accepted almost all of the queries Mrs Baxter had raised. However, despite these concessions, the Baxters' income spreadsheet was still wrong because the total income was in fact $599,584.40 as opposed to $572,479.88.

[126] Mr Baxter said he was, in fact, happy with the general services provided by Mr Coleman as his agent and manager. However, Mr Coleman was not disclosing income which was due to Mr Baxter. Mrs Baxter said they were completely reliant upon Mr and Mrs Coleman to collect funds earned by Avalanche City and account to them properly.

[127] Mr and Mrs Baxter decided in early 2013 that they simply could not trust the Colemans and that the relationship with Mr Coleman would have to be brought to an end. Because of his close relationship with Mr Coleman, Mr Baxter decided the best way to deal with the issue was to meet with him and explain his position, which he did on 23 March 2013. Mr Baxter said he cancelled the contract because of the defendants' failure accurately to advise him of the full amount of income and consideration he was receiving, failure properly to account to him for income to which he was entitled and should have received, and deliberate misleading of Mr Baxter as to his entitlements for specific performances.

Outward Sound

[128] Outward Sound gives grants to New Zealand artists for the purpose of overseas travel. The grants are for specific overseas tours. The artist first incurs the costs and is then reimbursed by Outward Sound, up to a maximum of 50 per cent of the costs incurred.

[129] Mr Coleman's position was that LTPS applied for a number of grants from Outward Sound. The grants were for LTPS, in the company's name, and were awarded to LTPS for Avalanche City work. He said a label/management company is able to secure grant funding for business development.

[130] Mr Coleman explained that the grants at issue were for international travel and business development/touring/marketing. All were submitted by LTPS and used as follows:

(a) Grant 1 was for $10,000. $9,918.35 was used to fly Mr Baxter and his band up to Los Angeles in April 2011, to showcase the band to Mr Coleman's USA contacts.

(b) Grant 2 totalled $30,000.00. LTPS paid Avalanche City $20,000 to cover any directly paid travel expenses and the remaining $10,000 was used to fund LTPS' travel.

(c) Grant 3 and 4, each for $30,000, were approved in 2012. These grants were used to cover LTPS' international travel to promote the band around the world.

[131] Mr Coleman's position was that Avalanche City did not lose out because the money was used by LTPS to promote and arrange tours for Avalanche City. If LTPS were not able to take advantage of the grants, then effectively it would be out of pocket for the expenses incurred. He said he was constantly on the road working for the benefit of Avalanche City at tours and international meetings.

[132] Mr Coleman acknowledged that the Baxters funded a substantial amount of travel themselves but also said that at no time was he reimbursed for his travel expenses. He said the plaintiff had not agreed in two and a half years to pay or support any travel for the band management to promote the band overseas. Unfortunately, Mr Coleman did not explore this issue in his cross examination of either Mr or Mrs Baxter.

[133] Mrs Coleman supported Mr Coleman's evidence in respect of grants 1 and 2. Mr and Mrs Baxter were both advised of, and agreed to, these expenses at the time they were incurred, she said. She said neither grant 1 nor the relevant expenses were shown on the spreadsheets and only $20,000 of grant 2 was shown, because the Baxters agreed. Mrs Coleman said she was no longer involved in the business at the

time of grants 3 and 4. She then said she did not record the grants on the spreadsheet because by that stage there was a dispute between the parties.

[134] Mr Kingsford, a chartered accountant, was called as a witness by the defendants. He is a director/partner of Staples Rodway Limited, a chartered accountancy firm based in Auckland. His experience includes all manner of accounting and tax advice for a range of clients across various industries including the entertainment industry. Mr Kingsford understood that the defendants claimed they were entitled to these various sums, as they had incurred costs on behalf of Avalanche City. He confirmed he had not seen any base invoices to support that position.

[135] In Mrs Parsons' experience, management would not normally take commission on grants, as they are received to cover costs. She concluded that Mr Coleman used grants from Outward Sound awarded to Avalanche City to fund himself and his business.

[136] From her review of the documentation, Mrs Parsons concluded that the defendants only disclosed to Mr Baxter funding of $20,000. That was despite the fact that they received a further $79,411.67, which was never paid to Mr Baxter. The New Zealand Music Commission confirmed the amount of Outward Sound funding paid to the defendants.

[137] Mrs Parsons did not agree that the grants in this case were business development grants to the manager. Having looked at the actual Outward Sound information, she said this clearly showed that all applications were for Avalanche City, but made by LTPS. Agents can apply for these grants on behalf of artists, she said. She also confirmed that managers can receive funding for business development. She was unable to comment as to whether that would include development for specific acts.

Analysis

[138] I addressed this issue squarely with Mr Coleman during the trial. Given that Outward Sound reimburses actual expenditure incurred, it would have been a simple

matter to show whether LTPS in fact incurred expenditure in relation to Avalanche City which would then entitle it to the Outward Bound grant money. This information was requested by Mrs Parsons in 2013 when she began investigating the finances between the defendants and Avalanche City. It should have been discovered during the pre-trial process. Even by the end of the trial, however, the relevant documentation had not been produced. In those circumstances, an adverse inference as to the reasons for non-disclosure will be drawn.

[139] During his closing submissions, Mr Coleman tried to produce some documents which he said would be relevant to the Outward Sound grant. That was strenuously opposed by Mr Grove. I did not allow that to take place. The documents had been requested for a number of years. It was made clear to Mr Coleman during the course of the hearing that the documentation was vital to show for what exactly the grants were. I accept that, from the plaintiff's position, it was too little too late to offer some of the documents at a time when the evidence had closed and the plaintiff's accounting witness was unavailable.

[140] Mr Grove submitted that it was highly likely that the expenses reimbursed to Mr Coleman via these grants related to payments in fact made by the Baxters. He said that, although Mr Coleman might have some legitimate claim to money from the grants in relation to expenses he paid, he had not provided the necessary information to allow an assessment to be made.

[141] There is force in Mr Grove's submission. The absence of documentation means the plaintiff cannot know what these grants were for, when the applications were made, what the terms of the grants were, what expenses were claimed to obtain the payments, and whether those expenses were paid by the Baxters or Mr Coleman.

[142] I am, however, satisfied that the defendants failed to disclose $79,411.67 of funding from Outward Sound which was obtained in relation to Avalanche City. Even if the defendants were entitled to some of these amounts, full disclosure should have been made to Mr Baxter. I am also satisfied that the plaintiff was entitled to receive the majority of the grants as reimbursement for costs he incurred.

Recorded Music

[143] Since filing his claim, Mr Baxter has discovered another revenue stream which he claimed the defendants had retained in breach of their obligations to him. This related to revenue collected by Recorded Music, an entity which collects royalties on behalf of New Zealand artists based on radio, public performances or television use of the artists' songs. It then distributes the royalties to the artists and any entity owning or controlling the rights in the sound recording or music video.

[144] Recently, Mr Baxter received an email from Recorded Music requesting Mr Baxter's invoice for the 2014 funds held on his behalf by Recorded Music. That was the first time Mr Baxter was aware that funds relating to his work were held by Recorded Music. Mr and Mrs Baxter both gave evidence that they were not aware of Recorded Music until the start of 2016.

[145] Enquiries were then made of Recorded Music as to funds previously paid out by Recorded Music. Seven such payments had been made between 4 August 2011 and 25 September 2014, totalling $32,148.46 ($36,970.73 inclusive of GST). Recorded Music said these were:

> ... payments paid to Let The People Speak Entertainment on behalf of the artist Avalanche City.
>
> Additionally, the label share i.e. remaining 50 per cent was paid to Let the People Speak Entertainment as the licensor per mandate agreement held.

[146] Mrs Parson confirmed there was no reference to this income in any of the documents discovered by the defendants. Mrs Parsons said the total undisclosed income from Recorded Music was therefore $73,941.46 including GST.

[147] Mr Baxter's position was that he was entitled to the full amounts of those payments because he had retained the rights to his works in New Zealand.

[148] Mr Coleman agreed he never told Mr Baxter that LTPS had registered with Recorded Music and never told him of the funds received. He said he was not required to and it was the right of LTPS as the label to receive all of the income through royalties. He acknowledged that the income was never shown in the

statements or spreadsheets prepared for Avalanche City. This was the case, he said, given the parties were in dispute.

[149] The application for monies held by Recorded Music was made by Mrs Coleman, through a form completed by her on 13 June 2011. She completed the form stating LTPS was the "nominated claimant". Neither Mr or Mrs Coleman were able adequately to explain who had nominated them as the claimant, save for saying Mr Baxter agreed to the distribution deal through Warner NZ, and Mr Coleman's evidence that LTPS "must" have the rights to the recordings.

[150] Mrs Coleman essentially supported the position taken by Mr Coleman in relation to Recorded Music. She maintained she assumed Mr Baxter would have known about the fund and in any event, was not entitled to the money because LTPS was the label. Although she prepared the spreadsheets in relation to Avalanche City, she never recorded amounts received from Recorded Music in the spreadsheets because she said, Avalanche City was not entitled to the payments.

[151] On this and other issues, Mr Coleman maintained that it would have been a point of negotiation had Mr Baxter ever engaged in discussing the draft agreement. When asked how they could do so, given both Mr and Mrs Baxter said they were unaware of Recorded Music, Mr Coleman said he expected them to engage a lawyer to negotiate the draft agreement.

[152] At least two of the payments totalling approximately $8,000 were paid into a bank account controlled by Mr and Mrs Coleman. Three different bank accounts were used, the others being LTPS' account, and an account belonging to Mrs Coleman personally.

[153] Mrs Coleman said payments were made into the joint account because the wrong account number was put on the invoice. Another payment was made into her account because it had been set up that way, she said. She was unable to explain the reason it was set up that way.

[154] Later, she said that payments were put into the personal account of Mr and Mrs Coleman as a "holding account", and they were holding a large amount of money for Avalanche City to which the Baxters wanted access when they purchased their house. She explained that both Mr and Mrs Baxter were touring a lot and it was difficult to get instructions.

[155] Mr Kingsford was unable to comment on the position other than what he understood generally from reading the Recorded Music website and his discussions with Mr Coleman.

Analysis

[156] Neither Mr nor Mrs Coleman was able adequately to explain why some of the payments from Recorded Music were paid into their personal joint account and in one instance the personal account of Mrs Coleman. Their explanation that they used their personal account to hold money and to pay it out for the plaintiff was less than satisfactory. Mr Kingsford acknowledged that would not be the norm. This was particularly so, when LTPS had its own bank account.

[157] Mr Coleman justified the continued collection of those revenues after the contract was terminated as being because they were in dispute.

[158] The failure to disclose the Recorded Music income was a serious breach of Mr Coleman's contractual obligations to Mr Baxter. If Mr Coleman's defence is to be believed, Mr Baxter's contract was with LTPS. This makes the payment of money into the Coleman's personal bank account, instead of the company's account, particularly serious. In the circumstances, I choose to take the less serious inference. That is, Mr Coleman was the party to the contract and therefore payment into a personal account, should there have been any entitlement to it, would be more understandable. However, even then, there should of course have been a dedicated client account. The money was instead paid into the Colemans' personal household accounts.

[159] I have already concluded that ownership of the rights to Mr Baxter's work in New Zealand remained with Mr Baxter. He was therefore entitled to "the label share" of the money from Recorded Music.

[160] However, not only did the defendants collect royalties owing to Mr Baxter as owner of the rights to the music without disclosing them to him, but they also failed to disclose and retained the portion due to the artist. Even if the defendants genuinely believed they were entitled to the "label share", it is impossible to fathom any justifiable reason for the non-disclosure and retention of the artist's share.

Air New Zealand Contra

[161] Mr Baxter said things finally came to a head between him and Mr Coleman in December 2012 in relation to a contract to perform at an Air New Zealand function. Mr Coleman told Mr Baxter that his fee was $10,000 in travel credits (contra) together with $1,000 in cash for the band. Mr Baxter saw the original contract, which in fact was for $20,000 travel credit and $1,000 cash. In addition, the organisers told Mr Baxter they were surprised he did not take the cash offer of $15,000 instead of the travel credit. Mr Baxter said this was never mentioned to him by Mr Coleman and he was shocked that Mr Coleman had misled him to the true value of the travel credit.

[162] Mr Coleman said it was a long, complicated negotiation and he had not told Mr Baxter about the $20,000 contra because it had not been agreed and he was still negotiating the deal.

[163] There was then an issue about use of the contra. Mrs Coleman gave evidence that she had a telephone discussion with Mrs Baxter and asked whether Mr and Mrs Baxter would be utilising the balance of the flight allowance before it expired. She contended that Mrs Baxter said they would not, and approved the Colemans using the balance of the contra, even though it would exceed the 20 per cent commission.

[164] There was a direct conflict of evidence between that of Mrs Baxter and that of Mrs Coleman in this regard. Mrs Baxter refuted absolutely Mrs Coleman's evidence, noting that, if there were any excess, she would have booked a holiday for

herself and Mr Baxter. Furthermore, she said that she was trying to book flights when she became aware that the allowance had been all but used up.

Analysis

[165] It is difficult to go past Mrs Baxter's evidence on this point. I accept that, in the circumstances, she would have been focused on the flight allowance and would not have been trying to use the allowance if she had already agreed that Mr and Mrs Coleman could use any excess.

Other Issues

[166] There was clearly a difference of opinion between Mr and Mrs Baxter and Mr and Mrs Coleman as to who was responsible for the logistics of Avalanche City's tours, whether it was Mrs Baxter or Mrs Coleman. Mrs Baxter believed that the arrangements made by Mrs Coleman were unsatisfactory. Mrs Coleman described Avalanche City as the most challenging band she had dealt with. I need not take this any further save to observe that it contributed to feelings of frustration on both sides.

[167] There were a number of other irregularities in the financial accounting the defendants provided to the plaintiff. These are addressed under the section on quantum below. I have, however, addressed in this section the issues on which Mr Baxter primarily relied in respect of his decision to terminate his oral contract with Mr Coleman.

Conclusion

[168] I have already found there was no minimum contract term. Mr Baxter was therefore at liberty to terminate the contract at any time, with reasonable notice.

[169] I accept that, in the circumstances outlined above, Mr Baxter was entitled to terminate the contract for cause at the time he cancelled the contract. The evidence of financial mismanagement was compelling. In breach of the oral contract, Mr Coleman failed properly to account to Mr Baxter for income and consideration received by him during the term of the contract. On any assessment, accounting to

Mr Baxter for his income and accurately reporting and distributing that income was a substantial and important element of the manager/artist contractual relationship, which justified cancellation when breached.[10] Both parties would have viewed the term as an essential one to the manager/artist contract.

[170] The non-disclosure of, and failure to account for, the Outward Sounds grants together with the dealings around the Air New Zealand contra payments demonstrated to Mr Baxter serious failures. This was on top of the financial irregularities he and Mrs Baxter identified throughout this period. Furthermore, breaches of contract discovered after cancellation can also be the basis of the original cancellation.[11] The discovery, following commencement of these proceedings, of the Recorded Music income which the defendant received on Mr Baxter's behalf but did not disclose, was further evidence emphasising the plaintiff's justification in terminating the oral contract.

What is the relevance of any non compliance by Mr Baxter?

[171] It was put to Mr Coleman that his own accountant said the defendants did not account to the plaintiff for $104,000 and that was before considering Recorded Music. Mr Coleman pointed out that Mr Baxter had not reported to him either APRA payments or merchandising income.

[172] Merchandising income concerned income derived from the sale of merchandising associated with Avalanche City, for example, t-shirts and CDs. Mr and Mrs Baxter maintained they had accounted to the defendants for merchandising in relation to some of the larger tours, for example, the Winery Tour, Parachute, and The Big Day Out. They accepted there were some small tours when there had been some merchandising sales but no accounting for them to the defendants. Mr Baxter appeared to have little involvement in this aspect. Mrs Baxter accepted there would be some small amount due to the defendants, well under $2000. She explained that, when Avalanche City toured the USA, in many places they were unable sell

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10 Contractual Remedies Act 1979, s 7(3)(b) and (4)(b).

11 *Kumar v Station Properties Ltd (in liq and rec)* [2015] NZSC 34, [2016] 1 NZLR 99.

merchandise. She accepted they sold in New Orleans but said the sales were minimal and covered costs only.

[173] Mrs Parsons gave general evidence about merchandising, saying that when Avalanche City toured the USA it was a promotional tour and, in her experience, the likelihood of high merchandising sales at such events was low. Merchandise sales, she said, are generally achieved once an artist is well known. She had total access to Avalanche City's bank statements and did not see anything which suggested to her large amounts had been received in relation to merchandise sales.

[174] Mr Baxter accepted that he had not disclosed to the defendants APRA payments he received in respect of radio and television royalties. He maintained he had previously told Mr Coleman he was receiving them and Mr Coleman told him he would sort it out.

[175] Mr Coleman believed there was somewhere between $80,000 and $120,000, or even $160,000 of APRA not revealed to him by the plaintiff before the contract was terminated. He denied that he would have been able to access this information online.

[176] Mr Coleman's submission that Mr Baxter had hidden APRA income from LTPS and Mr Coleman was strongly objected to by the plaintiff. In fact, Mr Baxter's evidence on this, when cross-examined by Mr Coleman, was as follows:

> Q: So was there any reason why you never accounted for those?
>
> A: I did actually. I did tell you that I was getting APRA payments, you knew about it.
>
> Q: Was that, what, in March 2013?
>
> A: No that was earlier on.
>
> Q: But nothing was ever received?
>
> A: No you actually told me not to, that we would sort it out because you were getting payments and I was getting payments from APRA.

[177] Mr Coleman then commented that he "did not know about" that recollection and, in his closing submissions, said he did not recall any such conversation.

Analysis

[178] I am satisfied from the evidence that the plaintiff was receiving APRA income and Mr Coleman was aware of it. There was a small amount of merchandising income which Mr Baxter should have disclosed to Mr Coleman, but did not. Neither of these issues had the effect of preventing Mr Baxter cancelling the oral contract on the grounds of Mr Coleman's breaches.

Was post termination commission payable?

[179] Mr Coleman said he brought up post-term commission at the final meeting with Mr Baxter who agreed to it and said it could be worked out by the lawyers. Mr Coleman understood that this was to be based on the "unsigned agreement".

[180] In Mr Coleman's view, post-term commission was a normal part of a management agreement. He said that, if post-termination commission was not going to be part of the deal, he would have required a higher amount of commission during the term.

[181] The defendants wished to adduce evidence from James Southgate, who was overseas at the time of the hearing. The plaintiff did not object to the brief of evidence being taken as read although maintained it was, in any event, irrelevant. Furthermore, Mrs Parsons commented generally on Mr Southgate's evidence.

[182] Mr Southgate is a full time music manager, director of a music management company and has been involved in the music industry for 30 years, primarily in Australia and New Zealand. He was asked to comment on industry practice in New Zealand concerning post-termination commission and how it related to the reasonable compensation of music managers. In his evidence, it was an accepted principle of artist management agreements that the manager should continue to receive commission after the agreement term expired in respect of achievements during the term. This recognised that managers were usually a key component in the success of an album or artist. It incentivised them and was a necessary part of their compensation.

[183] In Mr Southgate's experience, post-termination commission was standard in management agreements in New Zealand. He said it would be unusual for an artist to negotiate out of such an obligation and he or she would likely have to agree to more favourable terms for the duration of the agreement, such as a higher rate of commission.

[184] Mrs Parsons has had many years dealing with management agreements as part of the services she provides to clients. She did not agree with Mr Southgate's statements as to what would be "standard" post-termination commission, saying these arrangements vary significantly depending on the circumstances leading to the management contract and negotiations between the artist and the manager. In her experience, post-termination commission was normally for a period of three years only: most commonly 15 per cent commission in the first year; 10 per cent in the second year; and 5 per cent in the third year.

[185] Although Mrs Parsons had seen contracts where the post-termination commission was up to five years, in her experience that would only be agreed where the manager had been employed for many years and had been instrumental in the artist's career development over several albums. Mrs Parsons considered that was certainly not the circumstances in this case.

[186] If any such commission were payable, Mrs Parsons calculated it at $67,620.87 as opposed to Mr Kingsford's calculation of $94,530.72. The main difference between them, she explained, related to royalties from Warner Australia and whether Warner Australia was still "recouping" advances previously made to Mr Baxter by deducting money from its royalty payments to him. She explained that it was only when those amounts had been fully recouped that the defendants would be entitled to commission on any payments. This was because the defendants had already received commission on recording advances and therefore any "recouped" amounts should not be subject to commission, as commission would have already been paid on them. Mr Kingsford acknowledged he may have overstated the position, given the recoupable amounts.

Analysis

[187] Mr Coleman claimed that, at the meeting where Mr Baxter terminated the contract, Mr Baxter accepted that post-termination commission would be payable to LTPS; told Mr Coleman that he wanted to tidy up outstanding revenues and commissions; and accepted that there was revenue he had received on which commission would be payable to LTPS, such as royalties from APRA.

[188] Mr Grove referred to the effect of cancellation under section 8 of the Contractual Remedies Act 1979 (CRA) whereby where a contract is cancelled, no party is obliged or entitled to perform it further. Furthermore, in his submission, the defendants could not claim compensation under a contract when it was their breach which led to cancellation. The only claim the defendants might have related to obligations which had accrued unconditionally before cancellation, he said. Mr Grove submitted that cannot be the case with post-termination commission, as it was a conditional term of the contract, and only payable upon the defendants' complying with their contractual and/or fiduciary duties.

[189] In Mr Grove's submission, as the defendants breached their fiduciary duties, there was no entitlement to ongoing commission, because a disloyal fiduciary is not entitled to remuneration, and in particular commission, whether incurred previously or in the future.[12]

[190] In his closing submissions, Mr Coleman incorrectly maintained that, when Mr Baxter gave evidence, he accepted that, at the meeting terminating the contract, he agreed post-termination would be payable to LTPS. I have earlier concluded that post termination commission was not a term of the oral contract. Furthermore, I am not satisfied that any general assurances Mr Baxter might have given when terminating the oral contract amounted to a binding agreement between the parties. There was insufficient certainty regarding the terms of any post termination commission and no consideration.

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[12] Citing *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384.

[191] I now turn to address the claim and counterclaim in light of my factual findings.

Breach of fiduciary duty

[192] I have already considered the plaintiff's claim for breach of contract and now consider the alleged breach of fiduciary duties.

[193] A fiduciary relationship is essentially a relationship of trust and confidence. The question of whether there is a fiduciary relationship has been said to turn on whether the relationship was one where one party was reasonably entitled to repose and did repose trust and confidence in the other, either generally or in the particular transaction.[13] However, there is no universal test: the assessment of whether a particular relationship is a fiduciary one is a factual assessment, derived from comparison with the established categories and the nature of the relationship between the parties, while bearing in mind that fiduciary obligations are not lightly to be imposed.[14] Established categories of fiduciary relationship include agents and principals (such as real estate agents and customers),[15] solicitors and their clients, doctors and patients, and other relationships the courts have deemed to be inherently ones of trust.

[194] In *Chirnside v Fay*, this was summarised as follows:[16]

> It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

[195] The effect of a contractual relationship will also be subject to extensive *factual* examination. In *Chirnside v Fay,* the Supreme Court emphasised that

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13 *Estates Realties Ltd v Wignall* [1991] 3 NZLR 482 (CA) at 492, citing *Day v Mead* [1987] 2 NZLR 443 (CA).

14 Andrew Butler "Fiduciary Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd edition, Thomson Reuters, Wellington, 2009) 471 at [17.5.2].

15 *Maketu Estates Ltd v Robb* [2014] NZHC 2664, (2014) 16 NZCPR 166 at [11].

16 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [80].

fiduciaries could still owe, and be liable for damages as a result of, non-fiduciary duties such as in contract.[17] Just because a duty is breached does not necessarily mean that it is a *fiduciary* duty. The content of the alleged duty and whether it has in fact been breached must be analysed.[18]

[196] However the mere fact of a contractual relationship does not exclude the existence of a fiduciary duty. In *Maruha Corp v Amaltal Corp Ltd* it was held that even commercial relationships could have aspects which engaged fiduciary obligations:[19]

> That is because in the nature of that particular aspect of the relationship one party is entitled to rely upon the other, not just for adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has agreed to perform for the other or for both or has, perhaps less formally, even by conduct, assumed.

[197] The defendants conceded that LTPS, as a contracting party, owed fiduciary duties to Mr Baxter. I have found that Mr Coleman was the contracting party. For the same reasons that a duty would have existed between Mr Baxter and LTPS, a fiduciary duty existed between him and Mr Coleman. Although it was a contractual relationship, the manager/artist relationship required a high level of trust and confidence between the parties. It was analogous to that of principal and agent, an established category of fiduciary relationship.

[198] In this case, the naivety of Mr Baxter in contractual dealings and music management processes, which was obvious to Mr Coleman, and the fact that the managerial relationship entailed Mr Coleman receiving all of Mr Baxter's income on trust, further created a particular relationship of good faith and trust between them, in which Mr Baxter reasonably expected Mr Coleman to act in the world on his behalf.[20] In the emails between the Colemans and the Baxters, the Colemans emphasised the trust relationship between them, exhorting the Baxters to trust them in respect of the discrepancies in the accounting.

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17 *Chirnside v Fay*, above n 16at [20].

18 *Maketu Estates Ltd v Robb*, above n 15, at [14].

19 *Maruha Corp v Amaltal Corp Limited* [2007] 3 NZLR 192 (CA).

20 See also *O'Sullivan v Management Agency Ltd* [1985] 1 QB 428, [1985] 3 All ER 351 (CA) at 448, in which it was held that a young and inexperienced musician was in a fiduciary relationship to his music management companies given his entire reliance on them.

[199] There was clearly a relationship of a fiduciary nature between Mr Coleman and Mr Baxter. The fact that the trust diminished toward the end of the relationship does not invalidate the relationship itself being one of fiduciary character.[21]

Content of fiduciary claim

[200] The core fiduciary duty is of loyalty:[22]

> The principal is entitled to the single-minded loyalty of his fiduciary. This liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

[201] A fiduciary must account for any unauthorised profits received as a result of the fiduciary relationship.[23] To the extent that Mr Coleman failed to disclose revenue and remuneration received in connection with Mr Baxter, retained Mr Baxter's money for himself, and did not account to Mr Baxter for the money to which he was entitled, this was a breach of his fiduciary duties.

Estoppel/Variation of contract

[202] The defendants rely on the act of sending the draft agreement to Mr Baxter as giving rise to a promissory estoppel, claiming Mr Baxter's conduct in continuing with Mr Coleman acting in a managerial capacity for Avalanche City represented to Mr Coleman that Mr Baxter agreed with the terms of the draft agreement. This included the fact that the contractual relationship was to be with LTPS and not Mr Coleman personally. The defendants say that they relied on Mr Baxter's representations that he had no issue with the terms of the draft agreement.

[203] I have concluded that an oral contract was formed in October 2010. Mr Grove submitted that placing new conditions on that contract would have to be

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21 Andrew Butler "Fiduciary Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd edition, Thomson Reuters, Wellington, 2009) 471 at [17.5.2], citing *Coleman v Myers* [1977] 2 NZLR 225 (CA) at 332 per Cooke J.

22 *Mothew v Bristol & West Building Society* [1998] Ch 1 (CA) at 18; cited in *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384 at [67].

23 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [19].

through a variation of contract, and that, in any event, there was no consideration for the claimed variations, which were only of benefit to the defendants.

[204] Furthermore, Mr Grove said, a promisee cannot rely on promissory estoppel if he or she has failed to act in conformity with his or her side of the bargain.[24] Mr Grove submitted that the defendants did not fulfil their part of the bargain, by misrepresenting income to Mr Baxter and failing to report and pay compensation due to him. He said that, as an equitable claim, it must fail because the cancellation of the oral contract was brought about solely by the defendants' breach of their obligations.

Variation

[205] The question is whether the provision of the draft agreement could constitute a written variation of the oral contract. Contracts once made can be varied. However, a variation must be agreed to by the parties.[25] This is the major barrier in this case: there was no action which demonstrated acceptance of the terms of the draft agreement by Mr Baxter.

[206] Acceptance may be communicated by conduct rather than express words.[26] In *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*, the Supreme Court considered whether the provision of a deed, where the other party did not sign or return the deed, could constitute a variation.[27] The majority focused on whether overall as a whole and objectively, ordinary contractual principles showed that there was a concluded bargain.[28] The Court treated provision of the deed as an offer, and considered whether the parties' conduct evidenced an intention to be bound on certain terms, looking at the totality of the contract. The majority analysed the parties' behaviour and whether it was consistent with the proposed variation, and

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24 Citing *Re Goile, ex parte Steelbuild Agencies Ltd* [1963] NZLR 666 (CA).

25 John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (5th edition, LexisNexis, Wellington, 2016) at [19.3.1], citing *Macdonald v CI Gloucester Street Ltd* [2012] NZHC 2842 at [26].

26 John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (5th edition, LexisNexis, Wellington, 2016) at [3.3.1].

27 *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281.

28 At [111]; see also the minority judgment at [29].

what a reasonable person on both sides would have thought of the circumstances that followed the offer.[29]

[207] Following that analysis, although the defendants pointed to "representations" by Mr Baxter as showing acceptance of the terms, there was nothing about the identified behaviour which demonstrated acceptance of new terms rather than simply a continuation of the existing terms. In treating Mr Coleman as his manager, Mr Baxter's behaviour was consistent with the oral contract. There was no basis on which a reasonable person could have concluded that the variations had been accepted by Mr Baxter. Mr Coleman's evidence did not support his allegations. The facts did not demonstrate any objective "agreement".

[208] Furthermore, the draft agreement was between different parties (Mr Baxter and LTPS) from the oral contract (Mr Baxter and Mr Coleman).

[209] There is some debate about the extent to which there must be fresh consideration for a variation. Recently, the Court of Appeal said in *Teat v Willcocks*:[30]

> Although the position is not yet settled, we consider that consideration in the form of a benefit "in practice" is sufficient to support a binding variation. Further, we are attracted to the alternative view expressed by this Court in *Antons Trawling Co Ltd v Smith* that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure. This seems to us to reflect the reality of what happened in the present case — a variation was proposed and willingly accepted, and the parties proceeded on that basis. In the context of an existing agreement supported by consideration, that seems to us to be sufficient to constitute a binding variation.

[210] This has been held, in subsequent cases, to suggest that lack of consideration may not be determinative,[31] although even accepting this view the "most important feature" of the test is that a variation must be proposed by one party and willingly accepted by the other.[32]

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29 At [111].

30 *Teat v Willcocks* [2013] NZCA 162, [2014] 3 NZLR 129 at [54].

31 *Mulholland v Hansen* [2015] NZHC 895; *New Zealand Local Authority Protection Disaster Fund v Auckland Council* [2013] NZHC 1858.

32 *New Zealand Local Authority Protection Disaster Fund v Auckland Council* [2013] NZHC 1858 at [35].

[211] In this case, for the same reasons as set out above in terms of the general requirement for acceptance, there was nothing in Mr Baxter's behaviour (accepting his evidence) to give rise to the view that he willingly accepted the terms of the draft agreement. If he had done so, he would have signed it. Although the parties could have reached a new oral agreement, there was nothing which demonstrated that occurred.

Estoppel

[212] However, variation and formal acceptance of the terms of the draft agreement are not necessarily required for the defendants to succeed on the claim of promissory estoppel. This doctrine was developed in equity to obviate the inequity of allowing someone to rely on representations made to another person which were relied on, where it would be unconscionable to deny the promise. No consideration was necessary.[33]

[213] In order to establish a claim in estoppel, the defendants must show that:[34]

(a) A belief or expectation has been created or encouraged through some action, representation or omission to act by the plaintiff.

(b) The belief or expectation has been reasonably relied on by the defendant.

(c) Detriment will be suffered if the belief or expectation is departed from.

(d) It would be unconscionable for the plaintiff to depart from the belief or expectation.

[214] In *National Westminster Finance NZ Ltd v National Bank of NZ*, Tipping J said:[35]

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33 John Burrows, Jeremy Finn and Stephen Todd (eds) *Law of Contract in New Zealand* (5th edition, LexisNexis, Wellington, 2016) at 137.

34 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

> The decisions of the Court in *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 and *Gillies v Keogh* [1989] 2 NZLR 327 have emphasised the element of unconscionability which runs through all manifestations of estoppel. The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so.

[215] For this reason, any representation must have been clear and unequivocal, and must have led the other party to believe that the promise would affect or result in legal relations.[36]

[216] In some scenarios, silence may give rise to an estoppel. This can be either by amounting to a genuine misrepresentation or because the silent party was under a duty to speak.[37] *Equity and Trusts in New Zealand* states:[38]

> Silence rarely amounts to a genuine representation. This is because "silence and inaction are of their nature equivocal" and will not generally actively create a belief or expectation. Instead silence is normally relied on in the sense that the mistaken party would have acted differently if the other party had spoken up. Therefore, the crucial issue is whether the silent party had a duty to warn the mistaken party that they were relying on a mistaken assumption.

[217] In determining whether there is a duty to speak, the Court looks at the parties' relationship, the knowledge of the mistaken belief, and the ability of the mistaken party to correct its own error, as well as any conflicting duties owed.[39] The Court of Appeal has upheld a duty to speak where the failure to speak was "misleading",[40] and where the silent party knows that the other party is relying on a false assumption.[41]

[218] In my assessment, the promissory estoppel argument must fail on the basis that there were no "representations", and certainly none which could have been reasonably relied on. As discussed above, there was no real evidence that LTPS' "usual terms" were discussed at the meeting in October 2010 and Mr Baxter gave no

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35 *National Westminster Finance NZ Ltd v National Bank of NZ* [1996] 1 NZLR 548 (CA) at 549.
36 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [38].
37 *Connell Street Ltd v Purewal BS & JK Ltd* (2010) 8 NZCPR 587 (HC) at [59].
38 James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 601 at [19.5.2].
39 James Every-Palmer "Equitable Estoppel", above n 38, at [19.5.4].
40 *Purewal BS & JK Ltd v Connell Street Ltd* [2012] NZCA 42, (2012) 13 NZCPR 108 at [64].
41 *Official Assignee v Kingston Developments Group Ltd* [2016] NZCA 415 at [121].

representation that those terms were agreed. The fact that Mr Baxter continued, after the provision of the draft agreement, to hold Mr Coleman out as his representative and continue in a managerial relationship with him was consistent with the oral contract and cannot constitute a representation that Mr Baxter was bound by the draft agreement.

[219] Mr Baxter's evidence was that he did not look at the draft agreement, and did not sign it. Although Mr Coleman said that Mr Baxter indicated he accepted the terms of the draft agreement and had simply not signed it, this is essentially a credibility dispute as to whether those circumstances arose. I have found they did not and there was no basis for interpreting Mr Baxter's behaviour as being supportive of acceptance of the proposed new terms. It would have been unreasonable for Mr Coleman to have interpreted them as such without making enquiries as to whether Mr Baxter actually agreed with the draft agreement. Mr Coleman continued to raise the issue. Mr Baxter continued to deflect it. Such behaviour does not amount to a representation that the terms of the draft were agreed. This is particularly so given the parties were already operating under an oral contract and at the relevant times, Mr Baxter was raising issues about financial misreporting. There was nothing which suggested that either the active representations made by Mr Baxter (by continuing to act as if Mr Coleman was his manager) or his silence and equivocation as to the draft agreement, was reflective of clear and unequivocal conduct which could found an estoppel claim.

[220] Furthermore, there was no evidence that Mr Coleman reasonably (or indeed, in fact) relied on any representation, as opposed to continuing to perform his duties in accordance with the oral contract.

[221] For these reasons, I am not satisfied that promissory estoppel can be made out.

Quantum meruit

[222] Is quantum meruit available as a counterclaim?

[223] Mr Grove submitted that quantum meruit was no longer available as a claim given s 9 and 10 of the CRA, citing *Brown & Doherty Construction Ltd v Whangarei County Council (No 2)*.[42] In any event, he said that it was the defendants' breach which led to cancellation of the contract. He submitted that a claim for quantum meruit must be brought by the party who is not at fault, and that it is therefore not available in this case. Finally, in his submission, the claim was brought on an equitable basis, but in *Yoon v Cullen* the Court said that where settled law achieved a just balance between the parties, there was no need to depart from those principles.[43]

Analysis

[224] Quantum meruit refers to the concept of a right to remuneration for goods supplied or services rendered, and can refer to the right of remuneration implied into a contract or of a restitutionary right.[44]

[225] The Court of Appeal in *Morningstar (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* stated:[45]

> Historically, a quantum meruit claim was treated as being based upon an implied contract. Today a quantum meruit claim is generally seen as being a restitutionary claim. As such, it is said to be based upon unjust enrichment principles. ...
>
> [But] not all commentators agree that the principle of unjust enrichment underlies a quantum meruit claim. ...
>
> We will not attempt to resolve the doctrinal dispute here. It is sufficient to say that there is general agreement that a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff, in circumstances where the defendant knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.

[226] The claim therefore clearly still survives to some extent, and has been consistently pleaded in recent cases.[46] However, in *Brown & Doherty Construction*

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42 *Brown & Doherty Construction Ltd v Whangarei County Council (No 2)* [1990] 2 NZLR 63 (HC).

43 *Yoon v Cullen* (1999) 4 NZ ConvC 192,973, (1999) 9 TCLR 141 (HC).

44 *Laws of New Zealand* Restitution (online looseleaf edition, LexisNexis) at [47].

45 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2005 at [40] – [50].

Ltd v Whangarei County Council, Smellie J held that although before the passage of the CRA, where a contract had been terminated for breach, the innocent party had a common law claim in quantum meruit for services provided under the contract, the CRA now provided a code which excluded the claim. His Honour found that s 9 of the Act, which provided a discretionary power on the court to order restitutionary relief following cancellation of a contract, was now the appropriate remedy.[47]

[227] The result is that the claim of quantum meruit is not available where the relief sought would be available under s 9 of the CRA. Section 9 provides broad powers for relief when any contract is cancelled. A quantum meruit claim will remain available where it is sought in the context of services provided outside a contract.

[228] The defendants say that from 1 August 2011, the oral contract was no longer in place. This appears to be on the basis that on that date, Mr Coleman sent the draft agreement to Mr Baxter. The defendants also counter-claim under s 9 of the CRA that the sending of the draft agreement constituted an accepted contract, which Mr Baxter then breached. I presume that the quantum meruit argument proceeds in the alternative. This argument would require the provision of the draft agreement to have constituted a cancellation of the oral contract. It did not.

[229] The sending of the draft agreement to Mr Baxter did not have the effect of terminating the oral contract, or of forming a new, secondary contract capable of being breached. For the reasons discussed above in relation to estoppel, the variation argument cannot succeed. The oral contract therefore continued until Mr Baxter cancelled it for breach in March 2013.

Conclusions as to the claim and counterclaim

[230] For the reasons set out above, I reject the affirmative defences and find for the plaintiff in respect of his claim that Mr Coleman breached the fiduciary duties he owed to Mr Baxter. I also find that, in breach of the oral contract, Mr Coleman failed properly to account to Mr Baxter for income and consideration received by

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46 See, for example, *Mulholland v Hansen* [2015] NZHC 895.

47 *Brown & Doherty Ltd v Whangarei County Council*, above n 42, at 67.

him during the term of the contract. As a result, Mr Baxter has suffered loss as addressed in the next section of this judgment.

[231] For the reasons set out above, I dismiss the counterclaims for breach of contract, and for damages on a quantum meruit basis.

Quantum

[232] At the plaintiff's request, Mrs Parsons inspected and reviewed the relevant accounts and records to ascertain whether amounts had been commissioned correctly, and expenses validly incurred. Mrs Parsons appeared as a witness for the plaintiff, not as an expert. She is not a chartered accountant.

[233] Mr Kingsford is a chartered accountant. Although he referred to the High Court code of conduct for expert witnesses, it was clear, and he acknowledged, he was not giving evidence as an expert but he was giving it for the defendants. In this regard, he also acknowledged he had not seen the vast majority of the base documents to which the various payments related, and he had accepted in large part what he had been told by Mr Coleman. He saw his role as being to comment on the adjustments of the accounts proposed Mrs Parsons. In instances where he did not have the source documents and was solely relying on Mr Coleman's advice, his approach was to disagree with any suggested adjustments which did not favour the defendants.

[234] The original spreadsheet provided by the defendants showed that Mr Baxter owed the defendants $28,555.58. After the formulas in the spreadsheet were corrected, Mrs Parsons concluded the defendants owed Mr Baxter $41,947.20, adjusted after discussion with Mr Kingsford to $34,641.15.

[235] Mrs Parsons was not provided with any of the defendants' bank statements to allow her to confirm actual deposits received or payments made on behalf of Mr Baxter. She referred to Mr Kingsford's statement that both parties struggled to obtain complete accounting information. Understandably, she queried why that should be the case when the defendants were responsible for accounting services and

they should have had access to whatever accounting information was necessary, including invoices and bank statements.

[236] Once some documentation and confirmation of payments were obtained, the sum Mrs Parsons calculated was due to Mr Baxter significantly increased. This was made up of under-stated income; under-stated funding; disputed expenses; overstated commissions on merchandise sales; and commission charged in error.

[237] After various amendments to reflect Mr Kingsford and Mrs Parsons' discussion and agreement, up to the date of termination of the contract, Mrs Parsons considered the defendants owed $251,143.62 to the plaintiff. Mr Kingsford considered the sum should be $104,228.61. Neither figure included Recorded Music payments. The differences are addressed below.

[238] In final submissions, the plaintiff conceded disputes about the payments to the defendant in respect of a conference in Miami and the Home Bake Concert. In my assessment, that was a reasonable approach given that the defendants would have been entitled to reasonable expenses in connection with promotional work associated with Avalanche City.

Outward Sound

[239] What makes the assessment of the Outward Sound grants difficult is that, as the funding is a reimbursement, funds must have been expended in connection with Avalanche City. As noted above, the absence of documentation from the defendants means it is simply not possible to undertake an accurate calculation. It is obvious that Mr Coleman would have incurred some expenses in relation to the band touring, which he would have been entitled to claim. Of the understated Outward Sound income, totalling $79,411.67, I make an allowance of $10,000 to Mr Coleman with a balance owing to Mr Baxter of $69,411,67.

Recorded Music

[240] The plaintiff's amended claim included $73,941.46 in respect of Recorded Music. This was based on Mrs Parsons' evidence that there was no reference to any

income from Recorded Music in any of the documents discovered by the defendants and this sum represented the total undisclosed income from Recorded Music, including GST.[48]

[241] The plaintiff's claim was then increased by another $10,804.45 by the time the case closed. This was as a result of evidence given by Mrs Coleman and disclosure showing a payment of that sum from Recorded Music into her personal bank account on 17 September 2015. She was asked to bring to Court a breakdown of the figure but she failed to produce any detail at all. The plaintiff asked the Court to draw an inference that the payment related to Avalanche City and, given the timing of the payments, would have related to the 2014 year.

[242] Recorded Music advised Mr Baxter that it held royalties for him personally, as the artist, in respect of the 2014 year. Because the application named LTPS as the label, Recorded Music must have paid the amount allegedly due to the label, to the defendants. However, it was Mr Baxter who was due the 50 per cent attributable to the party who owned the rights to the recordings. I am satisfied that the $10,804.45 paid directly into Mrs Coleman's account must represent the 50 per cent share held by Recorded Music due to the party who owned the rights to the songs, and is therefore owing to Mr Baxter.[49]

[243] As Mr Grove observed, there was no reference in any email or indeed in the draft agreement to Recorded Music. In Mr Grove's submission, had the defendants been open about those payments, they would have been entitled to commission on them but, given the breaches of their fiduciary duties, they were not entitled to any such commission.

[244] The traditional position is that fiduciaries cannot profit from their role as fiduciaries. There are obvious complications where the fiduciary relationship

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48 The sum should be inclusive of GST as Mr Baxter will need to account to the IRD for both income tax and GST.

49 By memorandum received after the hearing, and well after the close of evidence, Mr Coleman claimed there was evidence demonstrating that the $10,804.46 was not paid on behalf of Avalanche City. He did not provide that evidence. It cannot now be considered. In any event, I note that, as Mr Baxter was not aware of the Recorded Music income, there must have been a period following the cancellation of the oral contract when Mr Coleman continued to receive Recorded Music income attributable to the "label share" without entitlement.

crosses over a contractual relationship, under which the fiduciary will likely have a contractual right to be paid, for example in the sense of a solicitor/client relationship. There, the contractual agreement allows payment. In relation to agents, Dr Butler in *Equity and Trusts in New Zealand* says that, because the relationship is consensual and contractually controlled, fiduciary obligations will not necessarily apply to all fiduciaries to the same degree.[50] Where there is an express contract, the rights and duties between the parties will be determined by reference to it, and no term will be implied which is inconsistent with the contract.[51]

[245] Dr Butler says, however, that a fiduciary who breaches his or her fiduciary obligations to the beneficiary disentitles himself or herself to remuneration,[52] even if the beneficiary has had the benefit of the services and has suffered no loss.

[246] In *Stevens v Premium Real Estate*, the Supreme Court held that a real estate agent who had breached fiduciary duties towards the vendors (by misleading the vendors as to the identity of the purchaser which led them to sell for less than they otherwise would have) was required to pay damages of the difference between the value of the house and what the vendors would have sold for. The agent was also required to disgorge the commission she had been paid.[53] The majority stated that the law remained that where agents acted in good faith, there was no requirement that the commission be disgorged but that otherwise, irrespective of any damages, the commission would need to be refunded.[54] This could lead to the plaintiff benefiting from the breach (by receiving more than he or she would have without the fiduciary breach), but the strict approach reflected equity's method of deterring disloyal behaviour by fiduciaries. The majority stated:

> [90] The remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction. There is no inconsistency in awarding the principal both damages and the refund of the commission, as there would be, for instance, if a court were to order a defendant fiduciary both to pay damages and to account for profits made by the use of the principal's asset. Remuneration for services is not a profit of

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50 Andrew Butler "Fiduciary Law", above n 14, at [17.3.5].

51 Andrew Butler "Fiduciary Law", above n 14, at [17.3.5], citing *Brown v Thornes* [1920] NZLR 306 (SC) at 321; *Gadsby v Blake* (1909) 11 GLR 449 at 450-451; *Westpac Banking Corp v Savin* [1985] 2 NZLR 41 (CA) at 49; *Kelly v Cooper* [1993] AC 205 (PC) at 213-215.

52 At [17.6.1].

53 *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384.

54 At [89].

> this kind. It is something to which an agent has no entitlement once he or she has committed a breach of fiduciary duty ... The principal is advantaged because the property has been sold without commission being payable but the agent should not receive a credit against the damages for the fact that the commission is not payable because that would effectively allow the agent the benefit of the forfeitable remuneration.

[247] This was based on dicta from Atkin LJ in *Keppel v Wheeler* in the UK Court of Appeal:[55]

> 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.

[248] The evidential burden of proving good faith was said to be on the defaulting fiduciary.[56]

[249] Outside of the real estate agent context, in *Bambury v Jensen* Fogarty J considered a dispute between an artist and his gallerist/dealer, who it was claimed had failed to account to him for commissions owed on the sale of various artworks.[57] The dealer counterclaimed for commissions owed on works that the artist had sold without having accounting to him. Fogarty J focused his analysis on each individual transaction, and weighed up whether equity should allow a commission to be claimed.[58] However, generally he agreed that the dealer should not have to repay his commission where the breach was a failure to account especially if it was unwitting.[59] Where the breach of duty had nothing to do with the fiduciary's actions in selling on behalf of another, there was no need to forfeit commission. It was a question to be assessed on each set of facts rather than generally. Fogarty J drew on the English case *Hippisley v Knee Bros*, in which the Court stated that where the breach was in relation to part of one of many inseparable duties then the fiduciary might have to forfeit their remuneration, but where there were separable duties then

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55 *Keppel v Wheeler* [1927] 1 KB 577 (CA) at 592.
56 *Stevens v Premium Real Estate Ltd*, above n 53, at [91].
57 *Bambury v Jensen* [2015] NZHC 2384.
58 See, for example, at [205] and [424].
59 At [183].

the receipt of a secret profit in relation to one of those duties (in the absence of a fraud) involved the loss of remuneration.[60]

[250] Few of the cases in this area directly deal with the paying of commission in an ongoing contractual relationship, other than the *Bambury* decision. In most cases where there is one impugned transaction (for example in the case of errant real estate agents), the fiduciary will generally be considered undeserving of reward. Where there is a wider relationship between the parties, and the breaches of duty are minor in nature (or do not feature in respect of all of the transactions between the parties) there is a stronger argument for either not clawing back all of the commissions received by the fiduciary, or allowing the errant fiduciary to receive payments for other work completed.

[251] Mr Baxter is not attempting to claw back past commissions paid to Mr Coleman. He quite properly acknowledged that Mr Coleman expended time and effort on Mr Baxter's career and helped him establish him some significant relationships. A generous interpretation of Mr Coleman's dealings with Mr Baxter would conclude that he had not deliberately siphoned off money due to Mr Baxter but rather displayed an inexcusably lax attitude towards accounting practices. Allowing him to retain his commissions recognises Mr Coleman's contribution to Mr Baxter's career.

[252] The Recorded Music situation however falls into a different category. It is difficult to accept any innocent explanation of the non-disclosure of those sums even if Mr Coleman genuinely believed the retention of the label's share was justified. The payment of the money into various personal bank accounts of Mr and Mrs Coleman emphasises the concerns. Those circumstances are more suggestive of active dishonesty and disentitle Mr Coleman from receiving any commission on those payments. Mr Baxter is entitled to the full sum of the Recorded Music payments.

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60 *Hippisley v Knee Bros* [1905] 1 KB 1.

Warner Tour Support understated

[253] Tour support was paid by Warner Australia to the defendants. Not all payments were received by Mr Baxter. Of the three payments received by the defendants ($12,579, $26,744.80 and $46,808.97), the plaintiff was paid $12,579 and $14,000.

[254] The defendants agree $59,553.47 is owing to the plaintiff. Mrs Parson said it was impossible to reconcile that figure with her figure of $63,479. She thought that the difference might relate to exchange rate movements as these funds were paid from Australia to New Zealand. The difficulty is that Mr Coleman has not produced the bank statements in discovery or any other sourced documentation to support his proposition. Given the relatively small difference and the likely explanation, the lower figure of $59,553.47 should be used. I therefore find that, as he has acknowledged, Mr Coleman owes Mr Baxter that sum.

Commission on tour support

[255] The plaintiff claims commission of $6,425.40 was charged in error by the defendants in respect of a payment by Warner Australia.

[256] In Mrs Parsons' opinion, $220,000 received from Warner Australia was made up of $190,000 as a recording advance and $30,000 for tour support/international marketing. The $190,000 had withholding tax deducted but not the tour advance. She confirmed that withholding tax should not be deducted from a tour advance which is a reimbursement of expenses. Mrs Parsons referred to Mr Baxter's evidence that the payment related to tour support for the May 2011 trip to the USA. The $30,000 was repayable to Warner Australia who had deducted it from royalties paid to Avalanche City, as confirmed by royalty statements from Warner Australia. Accordingly no commission should have been charged, in Mrs Parsons' opinion.

[257] Mr Coleman's version of events was that Warner Music agreed to advance $30,000 for Avalanche City's first promotional tour, which was to be used at the management/band's discretion. However, an Outward Sound grant covered the

expenses during the band's first trip to the USA. As the band was in profit, the $30,000 was commissionable as an advance.

[258] Mr Coleman then maintained he had negotiated a deal with Warner Australia for $220,000 but, because of Warner's internal requirements, it had to be split into different payments. Therefore, although $30,000 was described as tour support, it was in fact part of the general advance, in his opinion, and he was entitled to commission in respect of it.

[259] Mr Kingsford accepted that, if the $30,000 was a payment for a tour, it was a reimbursement of costs. However, he understood withholding tax was deducted and therefore it was not a reimbursement of costs.

[260] The contract with Warner Australia provided:

> Warner shall contribute $30,000 towards an international trip for the Artist in May 2011, receipt of which is hereby acknowledged, which sum shall be considered an Advance and 100% recoupable from Royalties...

[261] The contract with Warner Australia defined "Advance" as:

> **Advance** means a prepayment of royalties recoupable by Warner from royalties (except mechanical royalties) payable to or on behalf of the Company under this Agreement.

[262] Mr Kingsford was reliant solely an advice from Mr Coleman on this issue. He did not examine any of the base documents. Given the combination of Mrs Parsons' evidence that withholding tax was not deducted from the $30,000, the wording of the contract with Warner Australia, and that the payment has been recouped as Warner Australia's records demonstrate, I accept this amount was tour support and therefore not subject to commission. As a result, the commission charged should be refunded to Mr Baxter.

[263] I also accept Mrs Parsons' evidence that commission was otherwise properly calculated and the sum of $2,923.06 which the defendants claim as still owing is not owing to them.

NZ expenses disputed

[264] All the plaintiff's positions on New Zealand expenses, except as to New Zealand on Air funding, were accepted by Mr Kingsford. Mr Kingsford agreed that $7,626.72 was owing to the plaintiff in this regard.

[265] The plaintiff claims $20,000 received by the defendants from New Zealand On Air was grant income received on behalf of Mr Baxter. The defence position was that the payment was in respect of an expense to the defendant and was included on the defendants' statements to the plaintiff for information only.

[266] I accept the plaintiff's evidence that this payment related to international funding. The $20,000 was paid to the defendants to assist in covering costs incurred by Mr Baxter, including expenses charged to Mr Baxter by the defendants. It was a 50 per cent reimbursement, paid as a grant, which is confirmed by the documentation provided. It should have been paid to Mr Baxter.

[267] Another payment of $20,000 was received by the defendants from Radio New Zealand and was on-paid to the plaintiffs. The defendants claim this was income and therefore commission of $4,000 should have been deducted by the defendants, but was not and is therefore owed to them. Mr Kingsford was relying on verbal advice from Mr Coleman in respect of this payment and its status as income. I accept Mrs Parsons' evidence that this was a "radio plugging" grant, paid out to cover costs. It was therefore not subject to commission.

APRA and Merchandising

[268] Part of the review conducted by Mrs Parsons and discussed with Mr Kingsford included Mr Baxter's APRA income, on which commission was owing to Mr Coleman. Mr Kingsford and Mrs Parsons reached an agreed position regarding the APRA income. Mr Coleman had an issue regarding three songs which he claimed had been omitted but Mrs Parsons confirmed she had been made aware of those three songs and the calculations took those into account.

[269] The APRA income and commission has therefore been included in the plaintiff's calculation of funds claimed from Mr Coleman and no further adjustment is required.

[270] In light of Mrs Baxter's evidence, and being generous to the defendants in circumstances where there is little information, the sum of $2,000 should be paid to the defendants in respect of non-disclosed merchandising income.

Conclusion and result

[271] The plaintiff's adjusted claim was:

(a)	Adjusted balance:	$242,867.83
(b)	Less conceded sums:	$4,400.94
(c)	Plus Recorded Music:	$84,745.91
		$323,212.80

[272] From that claim I deduct for the reasons set out above:

(a) $10,000 in respect of the Outward Sound grants;

(b) $2,000 in respect of commission on undeclared merchandising; and

(c) $3,925.53, where I have given the defence the benefit of the doubt on a disputed currency conversion.

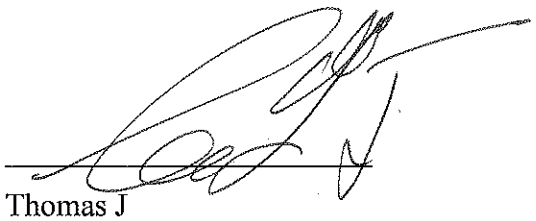
[273] The total, taking into account these entitlements of the defendant, results in an award to the plaintiff of $307,287.27.

Interest

[274] I award interest on that sum pursuant to the Judicature Act from the date of commencement of these proceedings.

Costs

[275] Costs are awarded to the plaintiff. I note the proceedings were described as category 2 at a pre-trial conference. Band B would seem appropriate. If there is any difficulty in this regard or further submissions to be made, the plaintiff is to file a memorandum with 28 days with the defendants to reply 14 days thereafter. A decision will be made on the papers.



Thomas J