CERTAIN INFORMATION AND THE NAMES AND IDENTITIES OF THIRD PARTY BUSINESSES AND INDIVIDUALS ARE THE SUBJECT OF A NON-PUBLICATION ORDER

IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 65
EMPC 198/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CAFFE COFFEE (NZ) LIMITED Plaintiff
AND	SUNE FARRIMOND Defendant

Hearing:	22, 23 and 24 February, and 17 March 2016 (Heard at Auckland)
Appearances:	D Clark and M Breckon, counsel for plaintiff C Patterson and L Cole, counsel for defendant
Judgment:	2 June 2016

JUDGMENT OF JUDGE B A CORKILL

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Introduction

[1] Whilst an employee of Caffe Coffee (NZ) Limited (Caffe Coffee), which operates a coffee roasting business, Mr Sune Farrimond decided to leave his job to establish a business which would also undertake coffee roasting. After he did this, Caffe Coffee became aware of the extent of the new operation and concluded that Mr Farrimond had breached numerous employment obligations before his employment ended, and that he had used its confidential information.

[2] Caffe Coffee brought an action in the Employment Relations Authority (the Authority) seeking a permanent injunction, compensation and penalties. Mr Farrimond denied any breaches. After investigating the problem, the Authority determined there had been one minor breach only: that Mr Farrimond had incorporated a company without written consent. The Authority concluded that the imposition of a penalty was not justified in the circumstances.[1] Later it ordered Caffe Coffee to pay Mr Farrimond $14,000 towards his legal costs.[2]

[3] Caffe Coffee now challenges both determinations on a de novo basis. As to substantive matters it asserts there were multiple breaches of Mr Farrimond's employment agreement, as well as a Deed of Confidentiality, in the months leading up to the end of his employment and also afterwards. It no longer seeks an injunction, but does claim damages and penalties.

[4] Mr Farrimond denies liability in all respects. He says he complied with his employment obligations taking legitimate preparatory steps during his employment, which included him giving notice of his business intentions by email, and that he did not use Caffe Coffee's confidential information subsequently.

[5] It is unnecessary to outline the issues relating to the Authority's costs determination, as that challenge has yet to be heard.

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1 *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZERA Auckland 186.
2 *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZERA Auckland 328.

What are the issues?

[6] Distilling the assertions and denials contained in the pleadings, evidence and submissions, it is apparent the following are the issues which require determination by the Court:

a) What preparatory steps, in setting up a business in competition with Caffe Coffee, did Mr Farrimond undertake while he was still employed by Caffe Coffee?

b) Were any of those steps a breach of his employment obligations?

c) Did Mr Farrimond have a contractual obligation to tell Caffe Coffee that he was undertaking those steps?

d) If Mr Farrimond had an obligation to disclose his future business endeavours was his email to Caffe Coffee of 10 March 2014 sufficient to discharge that obligation?

e) Did Mr Farrimond intentionally and/or unlawfully promote his own future interests over those of Caffe Coffee, for example by entertaining customers?

f) Did Mr Farrimond use Caffe Coffee's confidential information or intellectual property in breach of his employment obligations?

g) If Mr Farrimond has breached any obligations owed to Caffe Coffee, did those breaches cause loss; if so what were those losses? Is it entitled to any penalties?

The process of commercial coffee roasting

[7] As I have noted, this case concerns two businesses which roast coffee. A brief explanation of relevant processes is necessary, based on evidence given by the parties themselves and an expert called for the plaintiff, Mr David Burton. Green beans are imported to New Zealand and supplied by the importer to an entity which

produces a roasted product. At that point, unique taste profiles may be created by blending beans in particular percentages imported from different countries of origin. The combination of origins may be recorded in a recipe. A process of roasting is then undertaken; as the word implies, this is a process of cooking. Typically such a process is undertaken in a drum roaster, and less frequently in an airbed roaster. Unsurprisingly, two key variables are cooking time and temperature. The end product can then be prepared for consumption. Those involved in developing a recipe may undertake a practice known as cupping: that is a process of observing the tastes and aromas of coffee which has been prepared for consumption. A commercial roastery will often supply roasted beans to a user such as a café, however, a café may undertake its own roasting process.

Chronology

[8] It will be necessary later in this judgment to analyse particular aspects of the relevant events in some detail, but at this stage a brief outline will provide a context for consideration of the issues.

[9] In 2011, Retail Food Group (Australia) Limited (RFGA), of which Mr Garry Alford is a joint Chief Executive Officer, purchased Evolution Roasters Limited, the proprietary owner of Roasted Addiqtion, Mafia, Koha, and other blends. This was a multi-million dollar transaction with the then owners, Mr Andrew Brodie, who was the majority shareholder of the company which owned the business, and Mr Farrimond who was a minority shareholder. He was involved with the chocolate manufacturing side of Evolution Roasters, but also held overall responsibility for the sales and operational performance of the business.

[10] The established blends (or recipes) which Evolution Roasters had developed and owned were identified and transferred to Caffe Coffee as part of the transaction.

[11] Following the acquisition Mr Brodie was employed by Caffe Coffee for approximately a year, before leaving to start another business. He was subject to a restraint of trade provision in respect of coffee.

[12] At the same time, Mr Farrimond was also employed by Caffe Coffee. In his case, a restraint of trade provision was entered into for chocolate powder, but not for coffee; this provision applied for the term of Mr Farrimond's employment, and for another three years; the restriction was described as relating to any business with which Mr Farrimond may be associated in New Zealand.

[13] These and other obligations were contained in an individual employment agreement (IEA) which Mr Farrimond signed on 8 August 2011. The letter of offer given to Mr Farrimond described his role as Commercial Manager. Mr Alford stated that Mr Farrimond assumed general management duties from 17 June 2013 and from then on, Mr Farrimond reported directly to him. The relevant terms of the IEA will be described more fully later. Soon after Mr Farrimond commenced his duties, a Deed of Confidentiality was entered into between him and RFGA Management Pty Ltd of Australia (RFGA), a company which was related to Caffe Coffee.

[14] In September 2013 Mr Farrimond sought legal advice from Chris Patterson Barrister Ltd with regard to the possibility of setting up a new business. Mr Farrimond said he was advised that providing he took only preparatory steps until the end of his employment with Caffe Coffee, he was under no obligation to inform his employer of his business intentions.

[15] On 10 March 2014, Mr Farrimond sent an email to Mr Alford in these terms:

> I wish to tender my resignation.
>
> As per the terms in my employment contract, my employment with RFG will cease on June 10, 2014.
>
> I would like to take this opportunity to thank you for all the opportunities that I have had to grow the business to the level it is today. I have learned a lot along the way while thoroughly enjoying myself.
>
> After thirteen years of working on the same brand, I think it's time for a change.
>
> I intend on staying in the same industry, but return to a smaller boutique style of coffee roasting business.

[16] Mr Alford acknowledged receipt of the email expressing disappointment as to Mr Farrimond's departure. He extended his best wishes to Mr Farrimond for the

future, stating he would be in touch shortly with regard to a hand-over. He said that if any assistance was required, Mr Farrimond need only ask. There was also a discussion between the two, the terms and timing of which are in dispute. Mr Alford said the conversation occurred prior to the sending of his email, and that Mr Farrimond had told him he intended to set up a café which self-roasted; Mr Farrimond said that such a conversation occurred when Mr Alford visited New Zealand a few weeks after the giving of notice, and that he told him he would be establishing a boutique roastery with a café attached. This divergence of account will be discussed more fully later.

[17] On 19 March 2014, Mr Farrimond incorporated a company called The Village Roaster Limited (Village Roaster). He was one of two persons who consented to act as a director of that entity. He said this initiative was undertaken so as to secure the name.

[18] Mr Farrimond then negotiated the purchase of an airbed roaster under the name of the company he had just incorporated as purchaser, paying a substantial deposit on 28 March 2014. The total consideration was double the deposit. This purchase followed a visit to the premises of the supplier, Chinook Coffee Roasting Systems Pty Limited (Chinook) in Sydney in October 2013. There is an issue as to whether this visit occurred whilst Mr Farrimond was on leave.

[19] In May 2014, Mr Farrimond viewed two potential sites for his intended business in New Lynn. After inspecting the second property, he exchanged emails with a representative of its leasor, finalising an agreement to lease on behalf of Village Roaster by 13 May 2014. The commencement date of the lease was 1 August 2014.

[20] On 26 May 2014, Mr Farrimond sent an email to multiple recipients, including persons who were customers of or suppliers to Caffe Coffee. He confirmed that he had tendered his resignation, and requested that any future emails to him be sent to a new email address which he provided.

[21] Mr Farrimond's final day of employment with Caffe Coffee was on 10 June 2014.

[22] Mr Alford had agreed that Mr Farrimond could retain his cell phone number, which he had long held. Although he was asked to return the cell phone which Caffe Coffee had provided to him, on his final day of employment, he was permitted to retain it when he advised his manager that he had not organised a replacement and his fiancé needed to be able to contact him. A SIM Card for the cell phone was returned; it will be necessary to review the circumstances of this more fully later.

[23] After taking possession of the leased premises, some fit-out work was undertaken; the roaster did not arrive from Australia until late August 2014. Mr Farrimond described it as a fully automated self-roasting system, which could be used readily with pre-programmed specifications, so that the roasting process could occur without the need for an operator to be present observing the roasting process at all times. It was contained in, and operated from, a shipping container some 35 cubic metres in size.

[24] Mr Farrimond stated that Village Roaster commenced trading on 13 October 2014.

[25] Soon after, on 22 October 2014, Mr Alford sent a detailed letter to Mr Farrimond. He asserted that Mr Farrimond had breached multiple obligations before and after employment with Caffe Coffee. He said that Caffe Coffee had not been informed of discussions which Mr Farrimond had held with suppliers or customers during the employment relationship, or of steps that were taken to incorporate Village Roaster. Mr Alford stated that it was evident that Mr Farrimond intended that his company would be a direct competitor of Caffe Coffee. He requested that Mr Farrimond respond to his letter within seven days, confirming that he would immediately cease contacting any customers or suppliers of Caffe Coffee and otherwise comply with his confidentiality obligations; he was also asked to explain his conduct, both during and after his employment with Caffe Coffee. Mr Alford requested the return of all records in whatever form obtained during the course of his employment with Caffe Coffee. Reference was made to customer and

supply lists, recipes, technical specifications, plans, designs, know-how, research, formulae, processes, applications and techniques. Mr Alford said that failure to do so would be taken as an admission that there had been a deliberate breach of the confidentiality obligations, and Caffe Coffee would initiate legal proceedings without further notice, seeking remedies which would not be limited to injunctive relief and damages.

[26] On 24 October 2014, counsel for Mr Farrimond wrote to Caffe Coffee stating that Mr Farrimond was not restrained from being involved in the coffee industry, that he denied any breach of confidentiality or retaining any of its confidential information; and that he denied any breach of his obligations to Caffe Coffee save for registering and consenting to act as a director of Village Roaster, a breach which was described as being "very minor". Attached to the letter was a signed document, which stated that at all times during his employment he acted in the best interests of Caffe Coffee; he denied retaining any confidential information.

[27] Following further exchanges between lawyers acting for the parties, Caffe Coffee initiated its proceedings in the Authority.

The IEA, and applicable legal tests

[28] The Court will need to examine relevant legal obligations as it deals with each of the alleged breaches. At this stage, however, it is convenient to set out the relevant provisions of the IEA which are relied on by Caffe Coffee.

[29] Sections 3 and 4 contain these provisions:

> **3. DUTIES OF EMPLOYEE**
>
> **3.1 Duties**
>
> (a) The Employee will perform the duties:
>
> i. set out in the Position Description;
>
> ii. necessary or incidental to the Employed Position; and
>
> iii. assigned to the Employee by the Employer from time to time, that are duties and responsibilities commensurate with the Employee's seniority, skills and experience and otherwise in the best interests of the Employer.
>
> (b) The Employee acknowledges that the Employee's duties or Position Description may be varied from time to time to allow

the Employer to respond to changing operational and business needs.

(c) In the performance of the duties the Employee must:

i. act in accordance with the lawful directions of the Employer;

ii. observe a duty of fidelity and [utmost] good faith to the Employer;

iii. comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer, or the Ultimate Holding Company, from time to time;

iv. subject to matters referred to in clause 4.2, devote the whole of the Employee's time and attention to the performance of the Duties and at such other times as may reasonably be necessary;

v. subject to matters referred to in clause 4.2, not, whilst employed by the Employer, directly or indirectly engage in or be concerned or interested in any other trade, business or profession without the prior written consent of the Employer;

vi. not make any statement or comment in any publication whether written, televised or broadcast, detrimental to the interests or welfare of the business of the Employer other than in the ordinary course of the Employee carrying out the Duties and responsibilities of the Employed Position; and

vii. not, during the term of this Agreement, without the prior written consent of the COO or CFO, give endorsements for goods or services sold or provided by any person or permit the Employee's name or photograph to be used for promotional advertising purposes other than in the ordinary course of the Employee carrying out the Duties and responsibilities of the Employed Position.

3.2 Reporting

The Employee must report to RFG's Head of Strategy (Gary Alford), or such other position determined by the Employer from time to time, promptly and fully with the information he requires relating to the Employee's responsibilities and the performance of the Employee's Duties.

4. PERFORMANCE OF DUTIES

4.1 Promotion of Employer's Interests

The Employee must use the Employee's best endeavours to promote the financial position, profits, prospects, welfare and reputation of the Employer and Related Corporations and not intentionally do anything which is, or may be, harmful to those interests.

4.2 Other Business, Occupation Or Directorships

During the term of this Agreement, the Employee must not carry on nor be concerned in a business or occupation nor hold a directorship of another corporation (with the exception of those entities named in the SPA for which the Employee is a director) other than that associated with the business of the Employer without the prior written consent of the COO.

4.3 Policies and Procedures

(a) The Employee will comply with the policies and procedures of the Employer, as amended from time to time;

(b) The provisions of the Staff Handbook which are not inconsistent with the provisions of this Agreement are binding on the Employee as if the provisions were set out in full in this Agreement.

(c) The Employee agrees to abide by and comply with the policies and procedures detailed in the Corporate Governance Charter, for so long as the Employee remains an Employee of the Employer or post employment where the Employee remains privy to any price sensitive information relating to the Ultimate Holding Company.

(d) The Employee acknowledges that a serious breach of any policy or procedure is likely to result in disciplinary action, which may include termination of employment.

4.4 Conflicts of Interest

(a) The employee will at all times endeavour to avoid situations where a conflict of interest may arise between the performance of the Employee's Duties and responsibilities of employment and the Employee's other interests.

(b) If the Employee becomes aware of any potential, likely or actual conflict of interest arising in the course of his employment with the Employer, the Employee will:

i. act promptly to identify any conflict or potential conflict of interest;

ii. immediately advise the Employer in writing of the existence, nature and extent of any conflict of interest or any fact or circumstance likely to result in a conflict of interest immediately upon identifying any conflict or potential conflict of interest; and

iii. act in accordance with the Employer's instructions to address any conflict or potential conflict of interest.

(c) The Employee acknowledges the provisions of the Corporate Governance Charter relating to transactions in securities and conflict of interest, and agrees that those provisions are binding on the Employee as if the provisions were set out in full in this Agreement.

…

[30] Later in the IEA, there are provisions as to confidential information and intellectual property rights, as follows:

9. CONFIDENTIAL INFORMATION

9.1 Maintenance of Confidentiality

(a) The Employee will, both during the Employee's employment and after the termination of the Employee's employment:

i. keep confidential all Confidential Information and use the Employee's best endeavours to prevent the

disclosure of Confidential Information to any person except:

- as required by law;
- with the prior written consent of the CEO; or,
- in the proper performance of the Employee's duties;

ii. not use Confidential Information for a purpose other than for the benefit of the Employer or a Related Corporation; and,

iii. not make a copy or other record of Confidential Information except in the proper performance of the Employee's Duties.

(b) The Employee will return to the Employer all Confidential Information and all records containing any Confidential Information including copies of any documents in existence immediately upon the earlier of:

i. demand by the Employer; and,

ii. the termination of the Employee's employment.

9.2 Confidential Information

'Confidential Information' means for the purposes of this Agreement all information belonging to the Employer, or a related Corporation, and includes information which:

(a) the Employer indicates is confidential;

(b) by its very nature, might reasonably be understood to be confidential or to have been disclosed in confidence;

(c) would be of commercial value to a competitor of the Employer;

(d) relates to the Employer's financial or business affairs (including financial information, accounts work, financing information, management reports and performance or profitability reports and margins);

(e) relates to any arrangements or transactions between the Employer and a third party (including details of the arrangements or transactions between the Employer and those third parties) and without limitation includes arrangements or transactions with customers, suppliers and financial institutions and or credit providers;

(f) relates to or is contained in any of the Employer's computer databases or software;

(g) relates to the marketing and selling techniques used by the Employer (including marketing plans, sales plans, research and data surveys);

(h) relates to trade secrets, technical specifications, know-how, plans, design concepts, ideas, design specifications, manufacturing or development processes, research, formulae, processes, applications, unique features or techniques in respect of any of the Employer's products or services, whether existing or in development.

10. INTELLECTUAL PROPERTY RIGHTS

10.1 Ownership

During the term of employment the Employee acknowledges and agrees that all existing and future Intellectual Property Rights:

(a) in any Confidential Information;
(b) in respect of any intellectual property developed, in development, created or conceived wholly or partly by the Employee during employment alone or together with any other person or body, whether during or outside working hours;
(c) in respect of or associated with any of the Employee's products or services, and any alterations or additions or methods of making, using, marketing, selling or providing those products or services,

vest in and belong to the Employer, and to the extent that they may for any reason vest in the Employee are assigned by the Employee to vest in the Employer or its nominee.

…

[31] Reliance was also placed on a Protection of Goodwill provision, which confirmed that there was a restraint of trade provision in respect of the manufacturing and retail distribution of drinking chocolate powder:

12. PROTECTION OF GOODWILL

12.1 Restraint

(a) Subject to clause 12.3, in consideration of the Employee's employment and to protect the Employer's goodwill the Employee agrees the Employee will not in any capacity, directly or indirectly do any of the following:
   i. induce other employees to resign;
   ii. be associated with or engaged or interested in any business within New Zealand which is engaged in drinking chocolate powder manufacturing and/or the retail, wholesale or commercial distribution of drinking chocolate powder, whether on their own account or as a consultant to or a partner, agent, employee, shareholder member or director of any other person, or in any other way whatsoever;
(b) For the term of this Agreement and for a three (3) year period after termination of this Agreement.

…

[32] Caffe Coffee also relied on the provisions of a Deed of Confidentiality entered into between Mr Farrimond and RFGA. It protected confidential information, including that provided by related companies which were listed in a schedule. That schedule was not included in the copy of the Deed which was introduced in evidence. Nor was any claim to enforce these obligations brought by Caffe Coffee under s 4 of the Contracts (Privity) Act 1982 or by RFGA. I will not therefore make findings in this decision as to the obligations of the Deed, although I note that its terms are very similar to those in cl 9 of the IEA, save for the fact that it

provided for a remedy of injunction without proof of damage to the claimant. Although an injunction had originally been sought from the Authority, that application was not maintained in the Court.

[33] Mr Clark referred also to alleged breaches of the duty of fidelity and the duty of good faith. These concepts were referred to in the IEA at cl 3.1(c)(ii), and there is no dispute that Mr Farrimond was bound by the IEA. There is no basis for concluding that the words used in the IEA should not bear the same meaning as they do at common law in respect of the duty of fidelity or under the statute in the case of the duty of good faith.

[34] However, Mr Patterson submitted that Mr Farrimond had, whilst employed, engaged only in preparatory steps to establish his business, and that there was no evidence that he fraudulently undermined or disclosed confidential information of Caffe Coffee, relying on the dicta of *Walker v Aiken*[3] and *Schilling v Kidd Garrett Ltd.*[4]

[35] But as the Court of Appeal made clear in *Big Save Furniture v Bridge*, a duty of fidelity is not breached only when an employee acts fraudulently or dishonestly.[5] The Court confirmed that the duty of fidelity and loyalty which an employee owes to an employer is broken "… when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee".[6]

[36] The duty does not prevent an employee from preparing for participation in his or her own business following the cessation of current employment; but the employee may not do so in a manner which undermines the duty of trust and confidence. It is also the case that the boundaries of the duty have to be decided on the facts of each case.[7]

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3 *Walker v Aiken* [1993] 2 ERNZ 240, at 248 – 249.
4 *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243, at 245.
5 *Big Save Furniture v Bridge* [1994] 2 ERNZ 507, at 517.
6 At 517, referring to the earlier dicta of the Court of Appeal given in *Tisco v Communication and Energy Workers' Union* [1993] 2 ERNZ 779, at 782.
7 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 (CA) at 174, and the discussion in *Tisco* at 782.

[37] In *Rooney Earthmoving v McTague*, Judge Travis made the following observation, which is of assistance when considering the scope of the duty of fidelity:[8]

> [142] As to the extent of that duty and the particular circumstances of this case, I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence. The position of employees who are also directors may well be different.[9]

[38] The duty is obviously breached where an employee uses an employer's infrastructure to assist in establishing a post-employment business,[10] or where an employee directs the employer's custom to a proposed business.[11]

[39] A more subtle example of a breach of the duty of fidelity is found in *Big Save Furniture*,[12] where the Court upheld a summary dismissal in circumstances where a departing employee had access to confidential financial and marketing information; the employee had informed suppliers and staff that he was intending to depart and compete. The Court held that it was reasonable for a managing director to consider there was a not insignificant risk of the employee taking staff with him; that is, the existence of a risk sufficed to establish an actionable breach.

[40] As already mentioned, Caffe Coffee also relied on the duty of good faith as described in s 4 of the Act, which states in this way:

> 1(A) The duty of good faith in subsection (1)–
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; …

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8 *Rooney Earthmoving v McTague* [2009] ERNZ 240.

9 Judge Travis then referred to Peter Watts "The Transition from Director to Competitor" (2007) 123 LQR 2007 21 at 21-26.

10 *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490.

11 *EIL Brigade Road Ltd v Brown*, HC Christchurch Civ 2001-409-00073, 5 August 2004.

12 *Big Save Furniture v Bridge*, above n 5.

[41] Whilst the duty of good faith may be broader than the duty of fidelity, in my view the two will in some circumstances overlap. Furthermore, although broad language was adopted when defining the scope of the statutory obligation of good faith, I do not consider that Parliament intended at the same time to broaden the scope of the duty of fidelity when it enacted the statutory provision in 2000. That duty should continue to be understood according to the principles which have been explained in many previous authorities.

[42] In a case such as the present, however, the specific aspect of the duty of good faith which precludes an employee from doing anything which would mislead or deceive the employer, or which would be likely to mislead or deceive the employer, may be relevant when assessing preparatory steps.

[43] I refer also to that aspect of the case which relates to alleged breaches of obligations relating to confidential information. Again, Caffe Coffee relies on specific contractual provisions on that topic; however, reference should be made to the well-known discussion in *Faccenda Chicken Ltd v Fowler*, which suggests that the duty not to disclose confidential information contrasts with the duty of good faith:[13]

> The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae … or designs or special methods of construction … and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or required by the employee while in his employment, and in particular may not cover information which is only "confidential" in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith.

[44] The concept of "confidential information" is assisted in this case by the broad definition which the parties adopted in the IEA, at cl 9.2. Some of the terms used in that definition require a consideration of what the parties themselves understood was confidential information in the particular circumstances.[14]

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13 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 136.

14 For instance cl 9.2(b).

[45] But guidance on that topic is again available from the authorities. In *Faccenda Chicken*, the English Court of Appeal stated that in determining whether any item of information is protected after termination of employment, all circumstances need to be taken into account; in particular there were four factors which were "helpful guidelines as opposed to strict tests".[15]

> (a) The nature of the employment. Thus, employment in a capacity where "confidential" information is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.
>
> (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classified as a trade secret or as material which, if not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine …
>
> (c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure *merely* by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. …
>
> (d) Where the relevant information can be easily isolated from other information which the employee is free to use or disclose … the fact that the alleged "confidential" information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

[46] Finally, the dicta in *Peninsula Real Estate Ltd v Harris* is of assistance on the issue of using client names; there, Tipping J stated:[16]

> There is nothing wrong with an ex-employee, not under a restraint of trade, making use of a name or names of a former employer's clients. The malice comes in my view from the ex-employee taking away with him either on paper or in his head, the whole or a material part of his former employer's business records.
>
> …
>
> In my judgment the essential point is this. An ex-employer who, without a list or deliberate memorisation, happens to recall that somebody is a customer or client of his former employer is ordinarily allowed to approach that person to do business in competition which is former employer. What

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15 *Faccenda Chicken Ltd v Fowler*, above n 13, at 137.

16 *Peninsular Real Estate Ltd v Harris* [1992] 2 NZLR 216 (HC) at 6 – 9.

> the ex-employee may not do is deliberately to copy, take away or memorise lists of customers or the like to facilitate his competition which is former employer.
>
> …
>
> Genuine unaided memory is one thing; copying either on paper or in the mind lists or other customer data is quite another.

[47] It is these principles which I must now apply to the facts of this case.

The key witnesses

[48] As already mentioned, Mr Alford is a joint Chief Executive Officer of RFGA, a company which is listed on the Australian Stock Exchange that owns and operates a number of franchises. He is an experienced businessman, well used to acquiring and operating franchise systems throughout Australasia. His experience as an employer is evident from the IEA which he signed on behalf of Caffe Coffee with Mr Farrimond, which is comprehensive and included broad and wide-ranging obligations designed to protect the proprietary interests of the employer. That Mr Alford was clearly familiar with those concepts was also evident from the detailed letter of concerns which he wrote when he discovered that Mr Farrimond was competing with Caffe Coffee more directly than he had anticipated.

[49] Although Mr Alford's relationship with Mr Farrimond had at times been strained, for example with regard to a bonus issue in 2013/2014, upon receiving Mr Farrimond's notice of termination of employment which indicated on its face the setting up of a small roastery, he was prepared to trust Mr Farrimond and wished him well, even offering him assistance in his new venture.

[50] Later he concluded he had been seriously misled by Mr Farrimond as to the scale and scope of the intended business operation. That led to a wide range of assertions some of which were speculative. Whilst it was understandable that Mr Alford reacted in this way, his reasoning with regard to particular assertions requires careful analysis as to accuracy. That said, his evidence was given openly and honestly; on a number of issues he made appropriate concessions which persuaded the Court that his evidence on matters of which he had direct knowledge was reliable.

[51] Turning to Mr Farrimond's circumstances, it is evident that he has been involved in various aspects of the coffee industry for over 15 years, which is practically all of his working life. He said he had a significant general knowledge of that industry, including the processes which relate to the air roasting of coffee, a matter which will require further consideration later.

[52] Mr Farrimond decided in late 2013 that he wished to establish his own business. He said that he took legal advice because he did not want to breach the IEA. Given its comprehensive obligations that was unsurprising, but it demonstrated the careful and deliberate way he went about establishing his own business. He knew he would be competing with Caffe Coffee, and also that it was unlikely this would be appreciated if the true scope of the competition was known.

[53] Mr Farrimond is commercially savvy. He had a good understanding of the commercial issues which would arise in establishing a new business, as was evident from the way in which he negotiated the purchase of a commercial roaster, and from his negotiations for a lease. He also took the prudent step of incorporating a limited liability company. He acknowledged that ultimately he adopted an aggressive approach in obtaining customers, which he said was a necessity given the fact he was establishing a new business and had family responsibilities. Also relevant for credibility purposes is Mr Farrimond's belief that the claims made against him amounted to bullying by a corporate giant; it is apparent that he considered those claims should accordingly be resisted strongly.

[54] Mr Farrimond had described the steps he took on several occasions by the time he gave evidence to the Court – for example for the purposes of lawyers' letters and affidavits. He was very familiar with the issues and it was evident he had thought about these before giving his testimony. He was thus able to readily and confidently answer questions which would otherwise have been challenging.

[55] However, there were several instances where his answers became inconsistent. These will need to be discussed later, but they include the accuracy of his account as to when he acquired a roaster, his explanation as to why he incorporated Village Roaster without obtaining Mr Alford's consent, his explanation

as to what he actually told Mr Alford regarding his intentions, and the manner in which he provided information in the course of the Authority and Court processes, particularly with regard to his cell phone. Mr Clark went so far as to submit that Mr Farrimond had not been open and honest as to his intentions, and that his behaviour on all these matters was consistent with someone who had something to hide and was not acting in good faith. Accordingly, in this decision it will be necessary to analyse Mr Farrimond's explanations in considerable detail, in order to test their reliability.

[56] I turn now to consider each of the various allegations which are said to amount to a breach of Mr Farrimond employment obligations.

Were the preparatory steps legitimate?

Purchasing a roaster

[57] Caffe Coffee asserts that Mr Farrimond was in breach of multiple terms of his employment agreement, by virtue of arrangements he made to acquire a roaster whilst still in employment.

[58] The evidence is that Mr Farrimond visited the Sydney premises of Chinook in October 2013, soon after he had obtained legal advice as to the preparatory steps he could undertake.

[59] Mr Farrimond stated that this occurred during a period of annual leave. This was not necessarily accepted by Caffe Coffee, which led to an application being made for particular discovery of documents relating to this event.[17] When Mr Farrimond was asked why he had not produced documentation with regard to flights and other details, which might have confirmed the relevant arrangements, he said that he had an e-passport so that he did not have a rubber stamp to verify dates of travel, that emails relating to his flights would have been sent to his Roasted Addiqtion email address which the company could check, and that he stayed with his parents who reside in Sydney. Since the company has not produced any documents to contest Mr Farrimond's evidence, I am not persuaded that the visit was undertaken

[17] Discussed in *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZEmpC 208.

during work time or whilst Mr Farrimond was in Sydney on business for Caffe Coffee.

[60] Next, it is asserted that Mr Farrimond corresponded with Chinook regarding the acquisition of a roaster during work time. The evidence relied on to support this assertion was derived from a sequence of emails received and sent in the second half of March 2014. Mr Farrimond, in the main, sent emails to Chinook from a non-work email address, and at times which were either before or after work, despite Chinook sending him emails at various times of the day. In one instance only, after Chinook had sent Mr Farrimond an email in the early afternoon, did Mr Farrimond respond with a brief email in response half an hour later. I do not consider that sending one email only is sufficient to provide a satisfactory basis for a finding that there was a breach of cl 3.1(c)(iv) so that the imposition of a penalty should be considered.

[61] More significant is the evidence which confirms that the emails related to the acquisition of a roaster, with Mr Farrimond entering into an unconditional contract in late March 2014, and paying a substantial deposit on 28 March 2014. The contract between the parties provided that the equipment would not be available until approximately 12 weeks after receipt of the deposit. The evidence is that in fact it did not arrive in New Zealand until August 2014, when it was installed.

[62] It was submitted for Caffe Coffee that such a step meant there was a breach of the obligation to devote the whole of Mr Farrimond's time and intention to the performance of his work duties,[18] a breach of the obligation not to be directly or indirectly engaged in or being concerned or interested in a trade business or profession without prior written consent,[19] a breach of the positive obligation to report on information relating to Mr Farrimond's responsibilities and the performance of his duties,[20] a breach of the obligation to use best endeavours to promote the employer's business and not intentionally to do anything which would

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18 Clause 3.1(c)(iv).
19 Clause 3.1(c)(v).
20 Clause 3.2.

be harmful to those interests[21] as well as being a breach of the obligation to avoid a conflict of interest.[22]

[63] Mr Patterson submitted, in summary, that there were no such breaches because all that happened was that Mr Farrimond entered into a contract to acquire a roaster which would not be available until after his employment ceased; obviously in those circumstances there would be no competition during the period of employment when the relevant obligations applied.

[64] I accept Mr Patterson's submission. In my view the step of causing a third party, the recently incorporated company, to enter into a contract for acquisition of a roaster which would not be available until some months later – well after Mr Farrimond's employment with Caffe Coffee ended – was not a breach of the relevant obligations. In this case, the absence of any actual trading or competition during the employment period is a complete answer to the allegation that the acquisition of the roaster breached the relevant employment obligations in multiple respects.

[65] It was put to Mr Farrimond that he had made a number of misleading statements via his lawyer and in affidavits as to when he had purchased the roaster. The impression he gave in several statements was that it was purchased after his employment ended. He acknowledged this was a mistake. Given the careful way he proceeded at all times, I do not accept Mr Farrimond's response. The "mistake" was repeated on several occasions. That said, I do not consider that this evidence leads to a conclusion that since the acquisition in fact occurred during employment, there was a breach of employment obligations.

The agreement to lease

[66] Similar allegations were made with regard to the steps taken by Mr Farrimond to lease premises. Although it was accepted for Caffe Coffee that the formal agreement to lease was not signed by Village Roaster until 18 June 2014, soon after the cessation of Mr Farrimond's employment, it was submitted there was a

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21 Clause 4.1.
22 Clause 4.4.

breach of employment obligations because Mr Farrimond negotiated and finalised the lease terms during his employment with Caffe Coffee. In particular, he had viewed two sites in early May 2014, he forwarded a proposed agreement to lease for review by a lawyer on 9 May, and he finalised the terms of agreement by 13 May. Some emails relating to this transaction were produced; none were sent by Mr Farrimond during work hours.

[67] For Caffe Coffee it was argued that there were breaches of the same provisions as it relied on for the previous issue. For Mr Farrimond it was submitted that Mr Farrimond was plainly not in competition whilst employed and the relevant premises could have been used for any purpose.

[68] In my view, the same conclusion should be reached as for the previous issue. Although some steps were taken with regard to the acquisition of leased premises, they were preparatory only: while there appears to have been agreement between Village Roaster and the intended leasor as to applicable terms in May, the agreement to lease was not signed until 18 June, and the commencement date was 1 August. There was no actual competition between Village Roaster and Caffe Coffee as a consequence of this step being taken during Mr Farrimond's period of employment. Nor is the evidence sufficient to allow an inference to be drawn that by undertaking these arrangements Mr Farrimond was not devoting his time during the notice period to Caffe Coffee, but rather to himself and his own interests.

The incorporation of The Village Roaster Limited

[69] Village Roaster was incorporated during Mr Farrimond's notice period, on 19 March 2014. Mr Farrimond accepted that this was a "minor" breach of cl 4.2; as already indicated he said that all he was doing was securing a company name. He also stated that Village Roaster was not in trade or in business at any time whilst he remained an employee of Caffe Coffee, or indeed for approximately four months after that employment ended. He says Village Roaster was a shell company with no assets or business until it commenced trading on 13 October 2014.

[70] For Caffe Coffee, Mr Clark submitted that several steps were taken in breach of cl 4.2. Not only was the company incorporated, but it entered into the purchase of

a roaster and an agreement to lease was negotiated on its behalf; liabilities were thereby entered into.

[71] Mr Clark also submitted that the language of the relevant clause was not limited to trading. Rather, unless the prior written consent of the Chief Operating Officer was given, Mr Farrimond could not "… *carry on nor <u>be concerned in a business</u> or occupation nor hold a directorship of another corporation*…", (emphasis added) other than that of Caffe Coffee.[23]

[72] Mr Alford stated that if he had been aware of the steps being taken by Mr Farrimond, he would have been able to take steps to protect Caffe Coffee by looking at options such as placing Mr Farrimond on garden leave, removing him from being in contact with key customers, ensuring all intellectual property was properly protected, and putting such other plans as may have been appropriate to protect the interests of Caffe Coffee. It was accepted that this would not have precluded the possibility of competition following the cessation of Mr Farrimond's employment since there was no restraint of trade clause, but it would have enabled protective steps to be made during the notice period.

[73] In response to these submissions, Mr Patterson submitted that merely incurring liabilities and making plans for a future undertaking did not fall within the scope of the concept described in cl 4.2. Village Roaster was not "in business". Mr Farrimond's position was that there was no business at that stage. Mr Patterson also emphasised that there was a one-off breach, which was not deliberate.

[74] Mr Patterson also submitted that no evidence had been led by Caffe Coffee that it would have refused any request, if made. He argued that any such refusal would have been a breach of an implied term only to withhold approval on reasonable grounds. Nor did the failure to obtain approval cause any actual loss, since the purpose of the clause appeared to relate to the duty of fidelity, and Village Roaster had not traded during the notice period so that there could be no breach of that obligation.

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[23] Clause 4.2.

[75] I first consider the appropriate interpretation of the words "concerned in a business". This is a phrase which has been considered on many occasions. In *GSE Group Limited v Walters Supplies Limited*,[24] Winkelmann J held that whilst words such as "interested in" have been held to mean a "proprietary" or "pecuniary" interest, the expression "concerned" relates to a far wider category of behaviour.[25] Plainly, the terms used in the present case should be construed broadly.

[76] Here Mr Farrimond provided capital which was crucial to the setting up the Village Roaster business; that capital was invested in the purchase of significant fixed assets central to production. I find he was thereby "concerned in the business" of "another corporation".

[77] Dealing with the second point made for Mr Farrimond, I do not consider that a consideration of this obligation is assisted by implying a term that approval would not be unreasonably withheld. Such a term is not needed for business efficacy; nor could the provision when considered against its background be reasonably understood to carry this proviso.[26] In my view, disclosure of the fact that a company was being established under the name "The Village Roaster Limited" was likely to have led to a broader discussion between Mr Farrimond and Mr Alford than that which had occurred to that point, including discussion as to the scope of the company's intended business. Actual disclosure by Mr Farrimond as to the full extent of the company's intentions might well have led to consent being withheld, and/or Caffe Coffee would have been in the position of undertaking the protective steps referred to by Mr Alford.

[78] I consider there was indeed a breach of cl 4.2, and one which is more significant than that which was acknowledged by Mr Farrimond.

[79] Whether there should be any consequences (either by way of an order as to damages or for a penalty) is an issue to which I shall return later in this decision.

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[24] *GSE Group Ltd v Walters Supplies Ltd* HC Auckland CIV- 2005-404-3045, 16 July 2008.

[25] At [64]; and see *Smith v Hancock* [1894] 2 Ch 377, *Batts Combe Quarry Ltd v Ford* [1943] Ch 51 at 53, and *Bramwell Scaffolding Dunedin Ltd v Brazier* HC Dunedin CP53/97, 1 July 1999.

[26] *White v Reserve Bank of New Zealand* [2013] NZCA 663, [2013] ERNZ 367 at [35]; *Attorney-General of Belize v Belize Television Ltd* [2009] UKPC 10, [2009] 1 WLR 1998; *Marks and Spencers & PLC v BNP Paribas Security Services Trust* [2014] EWCA Civ 603, [2014] All ER (D) 147.

Entertaining customers

[80] There is no doubt that Mr Farrimond entertained customers from time to time, both before and after giving notice. Caffe Coffee asserts that during the notice period itself, he entertained three of its customers who subsequently became customers of Village Roaster. One of those customers, Mr A, the proprietor of Café A, was entertained on three occasions, once in April and twice in May 2014; on the second occasion, Mr Johnstone, Commercial Manager for Caffe Coffee, also attended so as to be introduced to the client as he would be assuming customer liaison responsibilities instead of Mr Farrimond. The second customer, Mr B, the proprietor of Café B, was entertained on two occasions, once in March 2014 and once in May 2014. The third customer, Ms C of Business C which was a supplier of roasted coffee, was entertained on one occasion in March 2014.

[81] Caffe Coffee also asserted that Mr Farrimond entertained other customers excessively. This contention was made with reference to 15 invoices which related to dates between July 2013 and early June 2014. Eleven of those occasions occurred in the notice period; on seven of those occasions, Mr Johnstone also attended for the purposes of being introduced to customers or suppliers.

[82] It was asserted that there were infringements in two respects. First, it was argued that cls 4.1 and 4.4 were breached due to a failure on the part of Mr Farrimond to fully inform Mr Alford that he intended to compete with Caffe Coffee and that he would be conflicted by continuing to entertain customers. Mr Clark submitted that had Mr Farrimond disclosed his intentions he would not have been given the opportunity to continue to provide entertainment to possible customers. It was also asserted that the three particular persons who received hospitality from Mr Farrimond were existing long-term customers, "none of whom increased their business with Caffe Coffee" as a result of the entertainment provided by Mr Farrimond.

[83] Secondly, it was asserted that such entertainment was not approved in advance and that this was a breach of a relevant policy.

[84] Mr Patterson submitted that a breach of the entertainment policy had not been pleaded, so this aspect of the claim should fail. However, the pleading referred to this issue and Mr Farrimond was squarely on notice of it.

[85] Mr Patterson also submitted that Mr Farrimond had given evidence that the way he entertained his clients and used the company credit card was consistent throughout his employment, and that at no stage was an issue raised as a result of receipts being provided. Mr Patterson emphasised that during the notice period Mr Farrimond had introduced Mr Johnstone to customers; understandably there were regular lunches for this purpose. Further, it was clear that the expenses incurred were for the purpose of either winning new customers or retaining them, which was a legitimate business purpose. In short, there was no evidence that the underlying reason for the entertainment was "for the underlying purpose of soliciting customers away from …" Caffe Coffee.

[86] Each of the three customers who subsequently acquired product from Village Roaster gave evidence. None of them were cross-examined as to what occurred on the occasions when Mr Farrimond entertained them prior to the cessation of his employment with Caffe Coffee. Indeed they each said that the possibility of them becoming customers of Village Roaster was not raised until after Mr Farrimond ceased to be an employee of Caffe Coffee. I find that he did not inform those persons of his plans when entertaining them.

[87] It is clear from the receipts which were produced in evidence that client entertainment also occurred prior to Mr Farrimond giving notice, and that on some occasions significant amounts were spent. There is no evidence of any concerns being raised with Mr Farrimond as to excessive expenditure at any time. Such entertainment was an aspect of Mr Farrimond's role as a General Manager who held customer liaison responsibilities.

[88] The evidence establishes that a legitimate purpose for some of the entertainment in the notice period was to introduce Mr Johnstone to customers. Mr Alford accepted that this was in accordance with usual practice. This included

one of the three customers who subsequently purchased products from Village Roaster.

[89] Mr Farrimond said that he continued to work tirelessly for Caffe Coffee during his notice period. He referred to the fact he improved the company's net profit for the 2013/2014 financial year by about 20 per cent; more significantly he said that in his final two weeks he secured two major supply contracts which at the time of his departure were the combined equivalent of 20 per cent of Caffe Coffee's supply value. This evidence was not disputed and tends to confirm that he did focus on his employer's interests to the end of his term of employment.

[90] Mr Alford also said that entertainment expenditure was supposed to be approved in advance; he accepted, however, that in practice Caffe Coffee staff did not adhere to this requirement. Mr Farrimond cannot be criticised for adopting a standard practice.

[91] Mr Alford stated that whilst the entertainment of "good customers" was within the ambit of the company's protocols, the frequency and cost of lunches during Mr Farrimond's notice period was "remarkable". At the heart of his concerns was the belief that Mr Farrimond was entertaining customers to promote himself over and above the interests of Caffe Coffee; that he was deliberately placing himself in a favourable light.

[92] The high point of the company's assertion is that the frequency of entertainment in the notice period should lead to a conclusion that this was part of a deliberate strategy to solicit customers. I am not satisfied that this assertion is established for the following reasons:

a) There is a complete absence of any evidence that Mr Farrimond told any customer or supplier whom he entertained that he was establishing a new business in competition. Indeed, the three customers who ultimately gave Village Roaster their custom did not learn of the new business until shortly before it was established.

b) Upon analysis, the number of occasions when Mr Farrimond provided entertainment to the three particular customers who subsequently acquired product from Village Roaster is modest.

c) Given the total number of occasions when Mr Johnstone also attended so as to be introduced to customers or suppliers, I find that an escalation of the frequency of entertainment is unsurprising.

d) Although there was a policy requiring approval of expenditure before it was incurred, the company did not insist on compliance with this requirement. Had it done so, it could have addressed any issue as to the scale of expenditure.

e) In any event, the expenditure was transparent. Caffe Coffee reimbursed Mr Farrimond for that expenditure, raising no concerns as to the frequency of the entertainment which Mr Farrimond provided.

[93] I find that none of these asserted breaches are established.

The resignation email

[94] Caffe Coffee alleges that Mr Farrimond breached his employment obligations by the statement he made in his resignation email of 10 March 2014 that he would be returning "to a smaller boutique style of coffee roasting business", and in a subsequent conversation held between him and Mr Alford where he advised that he intended opening a café with an attached boutique roaster. Caffe Coffee says the reporting obligations contained in cl 3.2 were breached because Mr Farrimond failed to provide information fully and promptly to Mr Alford as was required in the circumstances.

[95] In his submissions, Mr Patterson emphasised that Mr Farrimond was not under any obligation to disclose his future business endeavours. There was no restraint of trade provision in respect of coffee and there was no other relevant post-employment obligation which would require Mr Farrimond to notify Caffe Coffee of his future business endeavours. He went on to argue that were the Court to find Mr Farrimond was under an obligation to disclose, the resignation email was

sufficient to discharge that obligation. It clearly and unequivocally outlined Mr Farrimond's intentions. It was submitted that the business that Mr Farrimond has in fact established is indeed a smaller boutique style of coffee roasting business.

[96] For the purposes of assessing this issue, it is necessary to summarise the evidence as to what occurred after Mr Farrimond sent his email of 10 March 2014.

[97] The starting point must be the exchange of correspondence which occurred between the parties after Mr Alford wrote to Mr Farrimond on 22 October 2014 with his concerns that Mr Farrimond had taken steps to solicit and approach existing customers and suppliers of Caffe Coffee by using confidential information. In the first response which was sent on behalf of Mr Farrimond on 24 October 2014, express reference was made to the resignation email, and also to conversations which Mr Farrimond said he had held with Mr Alford and other senior members of RFGA and Caffe Coffee. His lawyer said that Mr Farrimond had told Mr Alford he was leaving Caffe Coffee in order to renovate a property, be present for the birth of his child, and that he would then:

> … establish a boutique coffee roasting business. Again, despite my client's openness about his intentions to establish a boutique coffee roasting business (which would inevitably compete with Caffe Coffee), no objections were raised by you and my client was still required to work out his notice period.

[98] In response, lawyers acting for Caffe Coffee relevantly stated in a letter of 30 October 2014:

> The intention of your client's email and the way further discussions occurred between our clients (particularly with Mr Johnstone from our client) was that your client intended *to purchase a café with a small boutique coffee roasting business attached to that business*. Our client, in good faith, accepted this representation by your client and indeed wished him all the best for his endeavours. That is why no objections were ever raised but what your client is attempting to do now is far removed from what was represented to it. …
>
> (Emphasis added)

[99] On 28 November 2014, Mr Farrimond through his lawyer denied that he had indicated his intention was "only" to open a café that roasted its own coffee. He thereby acknowledged he had told Mr Alford he would establish a café.

[100] In Mr Alford's affidavit evidence for the Authority's investigation he expanded on their discussions. He stated that although Mr Farrimond had been "somewhat evasive", he had indicated that "his desire was to establish a café that self-roasted".

[101] In his oral evidence to this Court, Mr Alford developed his earlier evidence by stating that upon becoming aware of Mr Farrimond's resignation by email, he telephoned him, asking as to his future business intentions in light of what he had said in his email. Mr Alford went on to say:

> Although guarded, he indicated that his desire was to establish a café that self-roasted. In short, he wanted to diversify into a wider hospitality role but with the novelty of where the café made its own blend of coffee. In these endeavours I personally offered any assistance required and encouragement for success.

[102] In Mr Farrimond's oral evidence he referred to the resignation email and then to a number of conversations which he had with Mr Alford and other senior employees. He again denied that he had ever been evasive or guarded about his intentions after leaving Caffe Coffee, or that he indicated that his intention "was only to open a café that roasted its own coffee". He did not deny, or even comment on, Mr Alford's evidence as to a telephone conversation having occurred soon after the sending of his resignation email.

[103] In his cross-examination, however, he elaborated. He said that he could not recall a telephone conversation, but did recall a conversation some two weeks later where he told Mr Alford that he intended "to start a boutique roastery with a café attached". When asked to confirm that he had never opened a café, he said that he had not done so "yet". He also said that he had not wanted anyone to know what his future business intentions were in detail. He said he told people only what he was "required to tell", although in some instances he had gone further. He did not believe he needed to disclose "the greater details" of his business. This occurred in a context where he and Mr Alford had some months earlier had a disagreement over a bonus so that they were not on the best of terms.

[104] I am not satisfied that any conversation between Mr Alford and Mr Farrimond occurred prior to the sending of Mr Alford's email which responded to Mr Farrimond's resignation email, since there is nothing in it to confirm such a conversation; had it occurred at this time, it is more likely reference would have been to the fact that the two had spoken.

[105] I am satisfied, however, that at some later point there was indeed a conversation where, for the first time, Mr Farrimond referred to operating a café, as well as a roastery.

[106] However, the real issue is whether he conveyed the impression that he would be operating a café with a "café-based roastery" attached, or whether he indicated the reverse, namely that he would establish a smaller "boutique roastery with a café attached."

[107] I find that it is more probable that the impression he created was the former rather than the latter. I accept Mr Alford's evidence that he understood that the business would operate a café with a roastery making its own blend of coffee; he volunteered this understanding in his lawyer's letter of 30 October 2014 which was the first reference to the issue in the post-employment correspondence.

[108] I do not consider this is merely a mix-up over semantics. Mr Farrimond fairly conceded that he did not want to provide actual details as to his intentions. It is evident that the reference to the opening of a café was intended to give the impression that the business would be very small-scale. A minimalist approach was adopted. I find that this persuaded Mr Alford that there was no basis for undue concern, and that he did not need to take any protective steps during Mr Farrimond's notice period, such as garden leave, restrictions on contact with customers and suppliers or the like.

[109] It is also the case that no café was in fact established. Although Mr Farrimond said that this had not happened "yet" (that is, as at February 2016 when he gave his evidence), no evidence was provided as to why the establishing of a café had not occurred to this point, or when this might occur. He had arranged a

lease of part of a warehouse, not café premises. Nor was there any evidence to suggest that Mr Farrimond's actual intentions in 2014 were to do other than what he did do, which was to set up a roastery only.

[110] Would the roastery be "smaller", as was asserted by Mr Farrimond? Significant capital expenditure was incurred in acquiring a large roaster, which as mentioned earlier was housed in a shipping container 35 cubic metres in size. It was obviously designed to operate on a commercial scale. Mr Farrimond leased a warehouse of some 250 square metres; that also suggested it was not an insignificant operation. On the information provided to the Court, the average monthly cost of beans from Village Roaster's main suppler was not insignificant for the first 12 months of its operation. He said he had targeted a broad range of potential customers with the aim of securing as many supply agreements that Village Roaster could comfortably handle; he accepted that "some would say I have taken a rather aggressive approach to securing new business for The Village Roaster". The emphasis was on expanding the roastery, and that is what occurred.

[111] No analysis of Village Roaster's turnover was provided, but on the totality of information which is before the Court I find that the new business was obviously "smaller" than that of Caffe Coffee, but it was not so modest as to amount to a café-based operation.

[112] The use of the word "boutique" must also be considered. As to the meaning to be ascribed to that word, the parties' evidence differed. Mr Farrimond's case was that the term is not necessarily restricted to a small business. Mr Johnstone said that in the coffee industry a boutique roastery is one that sells its own product, rather than one which builds brands for others. Mr Alford considered that the term would apply to a business which blends and roasts "very exclusive coffee". Mr D Burton also stated that the use of the term in the New Zealand coffee industry relates to a business that is both small and buys top quality coffee beans.

[113] I accept the evidence called for Caffe Coffee on this point. I find that Mr Farrimond described the intended business as being a "smaller boutique" style of

coffee roasting business: this too was intended to emphasise a small scale operation which need not be of any concern to Caffe Coffee.

[114] In summary, the reference to the establishing of a café which contained a small boutique roastery was misleading. It minimalised the scale and nature of the intended operation. It suggested that the roastery would meet the requirements of an intended café only. However, the actual intention was to supply roasted coffee to other cafes and suppliers – some of whom could be customers of Caffe Coffee. The statement had the potential to mislead representatives of Caffe Coffee as to Mr Farrimond's actual intentions. I find that Mr Farrimond made this statement deliberately so as to imply that his new business would not be a direct competitor of Caffe Coffee.

[115] As indicated earlier, it was the case for Caffe Coffee that the foregoing amounted to a breach of the reporting obligations in cl 3.2. The clause required Mr Farrimond to report "promptly and fully" information Mr Alford would require relating to Mr Farrimond's responsibilities and the performance of his duties.

[116] The objective approach to interpretation "concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean".[27] The relevant enquiry may direct the third party to read the document as a whole and in context.[28] In this case, cl 3 of the agreement is titled "Duties of Employee". Two sub-clauses follow. Clause 3.1(c)(ii) requires an employee to observe a duty of fidelity and utmost good faith to the employer. Clause 3.2 describes another duty which falls on the employee. Viewing the document as a whole, it is coated with the duty of fidelity and good faith. It follows that any reporting under cl 3.2 must be accurate.

[117] I find that in circumstances where Mr Farrimond recognised that he had an obligation to inform Mr Alford of his intentions, he needed to do so not only fully but also accurately. That did not happen, and accordingly there was a breach of the obligation described in cl 3.2.

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27 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 per Tipping J at [19].

28 At [45] and [47], per Tipping J.

[118] This aspect of the matter also constitutes a breach of the statutory duty described in s 4(1)(b) on the Act, in that the inaccurate information as to the establishing of a café-based operation was likely to mislead Mr Alford; he was lured into a false sense of security so that the possibility of implementing protective steps was not considered.

Duty of fidelity/duty of good faith

[119] Since Caffe Coffee referred to these duties in its submissions with regard to the obligations owed by Mr Farrimond during his employment, I address each of them now briefly in light of the principles which I discussed earlier.

[120] To this point I have found that Mr Farrimond breached contractual obligations as to the incorporation of Village Roaster as well as being concerned in its business without the prior written consent of Mr Alford;[29] and by his failure to report to Mr Alford fully on matters that impacted on the performance of his duties.[30]

[121] In my view those are factors which undermined the relationship of trust and confidence between Mr Farrimond and Caffe Coffee. But I do not regard an analysis which turns on the duty of fidelity as adding anything to my earlier conclusions relating to breaches of particular provisions of the IEA.

[122] Similarly with regard to the duty of good faith. As I indicated when considering the information which Mr Farrimond provided to Mr Alford as to his intentions, statements were made which were likely to mislead. I consider Mr Farrimond deliberately understated his intentions, and there was thereby a breach of the duty of good faith. But this is simply an alternative means of analysing the conduct which is of concern.

[123] Whether these alternative findings impact on remedies is a topic to which I shall return below.

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[29] Clause 4.2.
[30] Clause 3.2.

Did Mr Farrimond use confidential information in the new business?

[124] Caffe Coffee alleges that Mr Farrimond used or attempted to use four types of confidential information. These were:

a) The names of customers which were stored electronically on a cell phone used by Mr Farrimond.

b) Caffe Coffee's pricing structures, particularly as offered by John Burton Limited (JBL).

c) The method of roasting, that is by using an airbed roaster.

d) The recipes and blends used by Mr Farrimond and in particular those which were used for three of Village Roaster's customers, Café A, Café B and Business C.

[125] In his closing submissions, Mr Clark analysed each of these categories, although he properly accepted that ultimately the Court would have to make a global assessment. He agreed that in the end it would be artificial to separate each category of information from any other, and that the Court should stand back and look at all matters together.

[126] That said, I shall first discuss each of the categories which Caffe Coffee has raised, before making an overall assessment.

Customer lists

[127] Caffe Coffee alleged that Mr Farrimond breached his employment obligations by removing a list of Caffe Coffee's customers and suppliers on his cell phone.

[128] Mr Farrimond stated that a week or so before his employment terminated, it was agreed that he could retain his cell phone number, which he had held for many years including before his employment with Caffe Coffee. Initially he was asked by Mr Johnstone to return the cell phone itself on his final day; Mr Farrimond told Mr Johnstone that he had not organised a replacement phone and that he needed to

be contactable by his fiancée; it was agreed that he could retain it. The evidence of Mr Farrimond and Mr Johnstone diverged on the question of whether a replacement SIM Card with a new number which had been allocated by a provider was given to Mr Farrimond on his final day, or subsequently either through the post or by courier. No evidence was produced as to whether the SIM Card in fact held confidential contact information; accordingly the issue as to when the SIM Card was actually returned is of limited relevance.

[129] After Mr Alford raised his concerns with Mr Farrimond in October 2014, the parties decided to attend mediation. Before doing so Mr Farrimond was asked to return his cell phone. He did so, but said that because there was personal data on the cell phone he restored the phone to its factory settings first which had the effect of deleting data relating to contacts.

[130] He accepted that there would have been contact numbers for customers on the cell phone including in particular the phone numbers for three longstanding friends who were associated with Café A, Café B and Business C. He believed their contact information was public, and did not regard this information as confidential.

[131] Following an unsuccessful mediation which took place on 4 December 2014, counsel progressed interlocutory matters for the purposes of an intended investigation meeting. With regard to the cell phone, the following statement was made by counsel in a consent memorandum:

> A smart phone has been returned by the Respondent with of its information deleted. Counsel have agreed that the smart phone held information some of which was confidential (contact details for customers etc) to the Applicant. An electronic copy of that electronic record was taken by the Respondent and Counsel further agree that the respondent is not entitled to have access to the information which is confidential to the applicant. That electronic copy shall be provided to Counsel for the Respondent and held by him and the Respondent will not hold a copy of that electronic record save any files created post the termination of the Respondent's employment with the Applicant provided that such files are not confidential to the Applicant. He will be entitled to hold a copy of other information which is irrelevant to this proceeding.

[132] This issue became the subject of a notice of disclosure, which eventually came before the Court by way of an objection to disclosure.

[133] For the purposes of that objection, Mr Farrimond said:

> 3. I used the iPhone to take personal photographs, store music and contact information. I also used the iPhone to send personal emails and text messages. When I say personal, I mean not related in any way whatsoever to my job or the business of Caffe Coffee. I did not, because I did not know or think of it, to separate out my personal from the business contacts on the iPhone. All of the contacts, whether personal or business, were stored on the iPhone. To explain what I mean by contact information, I mean the electronic contact cards that are part of Apple's iPhone Operating System. It is where you can record, for example, a person's name, address, phone number and email address etc.
>
> 4. I configured my iPhone to automatically run daily backups of my personal photographs, music collection and both personal and business contact information. The backup was via Apple's iCloud service.

[134] In my interlocutory judgment[31] resolving the objection I noted that Mr Farrimond had not disputed evidence which had also been given regarding the agreement to provide an electronic copy of the cell phone's electronic record, as referred to in the consent memorandum.[32] Inter alia, I directed disclosure of that "document".[33]

[135] This resulted in Mr Farrimond requesting a technician at an Apple shop to place information from the iCloud backup on a USB memory device which could be supplied to Caffe Coffee lawyers, so as to comply with the directions of the Court. It was later found that the technician had downloaded the first contact only, being AA Insurance. Mr Farrimond said that since the representatives for Caffe Coffee requested no further information from this source, no further information from the iCloud backup was provided.

[136] An attempt was made by Mr Farrimond to comply with the Court's direction. The issue could have been taken further by either party but was not. Since Mr Farrimond agreed that personal contact information had been contained on the

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31 *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZEmpC 208.

32 At [35].

33 At [36]. The word "document" was used in the wide sense provided for in the High Court Rules, which includes information recorded or stored electronically, and information derived from that information: High Court Rules 1.3.

cell phone which he retained, I draw no adverse inference from the fact that a full electronic copy of an electronic record was not provided.

[137] Apart from this point, the essence of Caffe Coffee's submission was that Mr Farrimond obviously had access to customer contact details which amounted to confidential information; it was also argued that whether Mr Farrimond had a personal relationship with three particular customers was irrelevant because the confidentiality obligations had to prevail.

[138] For Mr Farrimond it was submitted in essence that Mr Farrimond did not understand that contact details were supposed to be confidential, that Caffe Coffee did not act as if this information was confidential having regard to information on its website and Facebook pages, and that the contact information was not in fact confidential.

[139] This issue can be dealt with shortly. There is no evidence that at any time Caffe Coffee impressed on Mr Farrimond that contact details of customers or suppliers were confidential. Furthermore, at the time Mr Farrimond's employment ended, Caffe Coffee knew that he was retaining his cell phone, and did not require any contacts to be deleted.

[140] Secondly, there is evidence that there was no particular secret regarding such information, since Caffe Coffee published its association with a number of its customers on a Facebook page, including one of those who became a customer of Village Roaster.

[141] Thirdly, the three customers who acquired products from Village Roaster were operated by persons who were longstanding friends of Mr Farrimond. In those circumstances it would be entirely unrealistic for Caffe Coffee to expect that confidentiality obligations would preclude Mr Farrimond from using their telephone contacts. This information falls within the fourth category referred to by the English Court of Appeal in *Faccenda Chicken*: the telephone contacts should be regarded as information which Mr Farrimond was free to use, and which could be easily isolated

from any other information which might be regarded as confidential such as recipes or pricing information.

[142] I conclude that the identity and contact details of customers, particularly those with whom Mr Farrimond later engaged on behalf of Village Roaster, does not constitute confidential information for present purposes.

Pricing

[143] Caffe Coffee asserts that in breach of his employment obligations, Mr Farrimond used Caffe Coffee's confidential information as to pricing, so that Village Roaster could provide discounted pricing to customers.

[144] This assertion is based on a single conversation between Mr Farrimond and Mr John Burton, the Director of JBL which imports high quality green beans to New Zealand. That company was a key supplier to Caffe Coffee. However, Mr Burton accepted that his company had also supplied beans to Mr Farrimond for over a decade, that is well prior to the acquisition of Evolution Roasters by RFGA in 2011. Mr Burton also confirmed that JBL supplied a significant majority of roasters in New Zealand.

[145] The conversation in question occurred on 3 July 2014. When giving his prepared evidence, Mr Burton said that Mr Farrimond told him at a meeting that he would be undertaking roasting, and that he wanted to adopt "much of the same blends and … the same origins (green coffee beans)" which had been previously supplied to Caffe Coffee. In cross-examination, Mr Burton modified this statement, confirming that there was no mention of blends, so that the effect of his evidence was that Mr Farrimond would purchase beans having the same origins.

[146] Mr Burton went on to say that Mr Farrimond had not said who his customers would be, but that Mr Farrimond "wanted us to supply a price to him which was the same as what we previously supplied" to Caffe Coffee. He said he explained to Mr Farrimond that supplying him would be completely different from supplying an established entity such as Caffe Coffee, and the best he could offer was a price which was similar to any other person who was starting a roasting business.

[147] Mr Farrimond said in response that whilst he might have met Mr Burton in early July 2014 and discussed his intentions, what he said was that he wanted "sharp pricing" as given to Caffe Coffee. It was his point that he did not refer to a specific price for a particular origin, and did not in this conversation use confidential information.

[148] For Caffe Coffee it is submitted that Mr Farrimond had a close knowledge of Caffe Coffee's pricing margins and profitability as part of his job, and that it was evident even at the time of the hearing that he could readily recall specifics of pricing for some customers. It was accepted that Mr Farrimond could not "un-know" what he had learnt.

[149] Thus it was submitted Mr Farrimond had used his knowledge to attempt to obtain advantageous pricing for Village Roaster, which was a breach of the obligation not to use confidential information for a purpose other than for the benefit of the employer.[34]

[150] For Mr Farrimond it was submitted that he had been careful not to discuss his intentions whilst he was still an employee of Caffe Coffee, and that in the conversation under review all he had asked for was a "sharp price". Mr Patterson submitted that it would be unsurprising that a large entity such as Caffe Coffee had a discounted price for bulk buying; and the statement made by Mr Farrimond was based on this obvious fact.

[151] I accept Mr Patterson's submission. Caffe Coffee operated a significant roasting business, and had done so for many years. The size of its operation was evident from information presented to the public by Caffe Coffee, for instance on its Facebook page and website.

[152] When Mr Farrimond requested "sharp pricing" he was seeking supply of beans at discounted rates, as would apply to a significant and established customer such as Caffe Coffee. Any person or entity commencing business could equally have

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[34] Clause 9(a)(ii) of the IEA.

made a request based on the reasonable inference that an established existing customer would be able to purchase at discounted rates.

[153] Significantly, Mr Farrimond did not refer to a particular price for particular origins. Had he done so, he would have been using confidential information. I do not consider there was a breach of the relevant obligations.

[154] In any event, Mr Burton declined the request. In those circumstances there could be no actionable loss entitling Caffe Coffee to relief even if specific pricing information had been referred to.

[155] It was also argued for Caffe Coffee that the proprietor of Café B, Mr B, had been persuaded to purchase roasted beans from Village Roaster because these were available at a lower price. Mr B said he had known Mr Farrimond for some 13 years; he was also a former employee of Caffe Coffee's parent RFGA. He said he had subsequently become a customer of Caffe Coffee only because Mr Farrimond worked there. After Mr Farrimond left, he wanted to cut his ties with Caffe Coffee. Plainly there were factors other than price which were relevant for Mr B.

[156] The Court was provided with no evidence as to what prices Café B had been paying to Caffe Coffee, or how the price which it ultimately obtained from Village Roaster was fixed. Whilst Mr B was persuaded to transfer his allegiance in the circumstances he described which included the offer of a lower price, there is no evidence to suggest that Mr Farrimond deliberately used confidential information to secure that custom. Furthermore, as I discuss below, the blend of coffee purchased by Café B is stated by Mr B to have a quite different flavour profile; in his case he says that Mr Farrimond has produced a "unique coffee blend" for Café B.

[157] In all these circumstances it cannot be concluded that Mr Farrimond used Caffe Coffee's confidential information for the purposes of pricing the different product it was agreed Village Roaster would sell to Café B.

The method of roasting

[158] Caffe Coffee alleges that Mr Farrimond caused Village Roaster to adopt its confidential roasting technique, when an airbed roaster was acquired.

[159] When operating Evolution Roasters, the business undertook roasting; it acquired a Sivetz Airbed Roaster in 2004. Mr Farrimond explained that he and Mr Brodie assembled the equipment, and learned to use it, developing a recipe book as they did so.

[160] Caffe Coffee acquired the roaster as part of its acquisition of Evolution Roasters in 2011. Thereafter the Roasted Addiqtion website publicised the fact that it used a Sivetz airbed roaster, rather than "low end drum roasters that have the tendency to lace burn spots on the beans and leave an undesirable bitter taste".

[161] Mr Farrimond entered into a contract for an airbed roaster which was built 10 years later by a different manufacturer. It was also common ground that this equipment had modern operating features which meant it was more automated than the roaster operated by Caffe Coffee. That said, in the proposal document which Chinook sent to Mr Farrimond it stated:

> The Sivetz Air Roasting process is a recent revolutionary approach to roasting coffee. We believe that our containerised approach will be perceived as a revolutionary implementation of the Sivetz method.

[162] Caffe Coffee's case was that a significant majority of commercial roasters used drum roasters, and that relatively few use airbed roasters.

[163] Mr Alford gave uncontradicted evidence that recipes roasted in a drum roaster have a significantly different flavour profile from those roasted in an airbed roaster. Further, he said it was impossible to replicate a drinkable coffee in a drum roaster with a high X content.

[164] For his part, Mr Farrimond said that he had worked with X beans over the 15 years in which he had been involved in the coffee manufacturing industry, and preferred it so as to keep his blends affordable, and so as to achieve a particular

crema which it brings to a blend, using a range of percentages, including relatively high percentages.

[165] Mr Farrimond also said that although he decided to purchase an airbed roaster for his "small-scale business", it employs advanced technology so that it is fully automated, allows the machine to be pre-programmed and accordingly achieves consistent results. He said that it operated quite differently to the machine operated by Caffe Coffee, not least because their roaster needed to be present and observing the roasting process at all times. He was not asked to comment on the proposition that the reason he selected an airbed roaster was to facilitate the use of X beans.

[166] Mr Farrimond chose a roasting technique with which he was reasonably familiar, having been involved in a business which operated such equipment for some six years before it was acquired by Caffe Coffee.

[167] Reference can usefully be made to the Court of Appeal decision in *Graphic Holdings Limited v Dunn.*[35] In that instance, a director of a printing company remained as an employee when its business was sold. When he left that employment, an individual who had been an original customer of the defendant prior to the sale of the business, transferred his business to the defendant's new employer. The defendant's contract contained a clause which precluded him making use or communicating to any person any confidential information which might have come to his knowledge during his employment (cl 11). In his judgment, Somers J discussed whether the customer's particular preferences as to nature and type of business constituted confidential information in these terms: [36]

> It is true, as Mr Gault submitted, that although his knowledge arose antecedently to the employment it was preserved or renewed or fostered, and even built on from day to day, and that the continuation of the good will of the [customer] was dependent upon that attention. But can it really be said that this was "confidential information which shall have come to his knowledge during his employment" by [the employer]? I do not think so. The purpose of cl 11 was to preclude the use and disclosure of secrets and employers' confidence gained during the employment. [The defendant] learnt nothing about dealing with [the customer] from his employers.

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35 *Graphic Holdings Ltd & Litho Productions (1979) v Dunn* (1988) 2 NZELC 95, 721.

36 At 18 – 19 per Somers J, Casey and Chilwell JJ in agreement.

[168] The same applies here. I do not consider that the experience as to roasting techniques which Mr Farrimond acquired prior to his employment with Caffe Coffee can be regarded as confidential information for present purposes. I find that his familiarity with airbed roasting and use of X were developed prior to his employment with Caffe Coffee. Furthermore, the use of the "Sivetz method" was a public fact. It was not a trade secret.

Recipes

[169] Caffe Coffee asserts that on the balance of probabilities Mr Farrimond copied, memorised or used Caffe Coffee's blends according to its recipes. Although it is accepted there is no direct evidence of photocopying of recipes, it nonetheless alleges that such a conclusion can be reached taking into account a variety of factors, including:

- The systematic wiping by Mr Farrimond of his computer before he left employment.
- His alleged failure to return the SIM Card; Caffe Coffee says that it was thereby never in a position to determine what was stored on it.
- The removal of his cell phone so that he had continued access to its data, together with a subsequent erasing of all information on it and his failure to produce the "electronic copy" of the phone.
- The general difficulty Caffe Coffee had in the course of the Authority's investigation and subsequently in this Court to obtain relevant information.
- A schedule produced by Mr D Burton which shows 11 varieties of beans purchased by Mr Farrimond that are the same as those which Caffe Coffee purchases, and a marked increase in the purchasing of two particular beans used by Caffe Coffee for a Café A blend, for the same period when Village Roaster was roasting for that entity.

[170] To support this conclusion, Caffe Coffee relies on three particular aspects of evidence given by Mr D Burton:

a) That Mr Farrimond appeared to have used prior knowledge of the blend utilised by Caffe Coffee, to supply Café A.

b) That decaffeinated coffee supplied to Business C was exactly the same as that supplied to Café A.

c) That in respect of other blends supplied to Café B and Business C there was a predominant use of X as a core ingredient, which resulted in Village Roaster supplying a product which had a similar taste profile to that supplied by Caffe Coffee, although the percentages of other beans used were different.

[171] Caffe Coffee asserts that all of this occurred on the basis of what Mr Farrimond learned when he was an employee of Caffe Coffee, both as to blend profiling and as to roasting techniques. Consequently it had to be concluded that Mr Farrimond had breached his obligations as to confidentiality.

[172] For Mr Farrimond, it was argued in summary that there had been no deliberate memorising or use of Caffe Coffee's recipes, that Mr D Burton's evidence did not establish use of Caffe Coffee's recipes, and in any event was unreliable in its conclusions; that the particular origins used by Caffe Coffee were not confidential since the company published this information on its website, and that Mr Farrimond had used his longstanding skills and experience to develop new blends for the three particular customers who either had or continue to have products supplied to them by Caffe Coffee. Each of them confirmed that the taste of the blends provided by Mr Farrimond were different.

[173] My consideration of the respective cases of the parties on this important issue begins with a comparison of the recipes actually adopted by each party. Because the recipes are the subject of a non-publication order, I will not refer to them in detail except for one example which I shall address shortly.

[174] It is apparent that the combinations of blends supplied by each entity to Café A, Café B and Business C differ. Bean for bean, the recipes for each are different. That much is not in dispute. The real issue is whether there are similarities such that Village Roaster's recipes must have been based on Caffe Coffee's recipes.

[175] The first example relates to a decaffeinated product. Village Roaster supplied such a product to Business C; it was the same as that which was provided by Caffe Coffee to Café B. Does that mean confidential information was used?

[176] The evidence was that information regarding this product was in the public arena. On its website, Caffe Coffee referred to a Roasted Addiqtion product (which I infer would have been available at the Café B café). This was fully decaffeinated and chemical-free, meaning it was regarded as a "free trade" bean. JBL supplied only one bean that was organic and free trade, and it was that bean which was used by both Caffe Coffee and Village Roaster.

[177] In the circumstances I conclude that the production of a 100 per cent caffeine-free product by Village Roaster did not result from the use of confidential information. It purchased the only bean that could be acquired from JBL if a caffeine-free product was to be created.

[178] Turning to the remaining recipes in question, Mr D Burton considered there were features of Village Roaster recipes which could not have been generated by someone who had no previous experience as a blender or roaster. He said that prior knowledge must have been used in developing the Village Roaster product, an opinion he expressed simply by analysing that entity's recipes – he had not observed the roasting process at Village Roaster, nor tasted its products. This was also the opinion of Mr Johnstone.

[179] Mr Burton referred particularly to the high use of X, and the use of two particular origins in combination. His conclusions, however, assumed that Mr Farrimond had no previous skills or experience as a blender or roaster; and/or

that he had obtained such knowledge as he possessed only while he was an employee of Caffe Coffee.

[180] In fact, Mr Farrimond had assisted in developing one of the blends which involved two particular origins before Evolution Roasters was sold to RFGA.

[181] Mr Johnstone said that when Mr Farrimond was an employee at Caffe Coffee he had not demonstrated blending expertise; and that this was also the case in 2004 or 2005 when he undertook a cupping with Mr Farrimond on one occasion. But he also conceded that he could not say Mr Farrimond definitely did not have the necessary skills. By contrast, Mr Manson, who was employed as a roaster for Caffe Coffee, confirmed that Mr Farrimond had and could develop blends via a cupping process, and had operated the Caffe Coffee roaster from time to time.

[182] Mr Farrimond explained that he was also assisted in selecting origins by information derived from Mr J Burton's website. He also roasted and cupped coffee samples at Mr Burton's head office; seeking assistance from his experienced staff.

[183] I am satisfied that Mr Farrimond held previous relevant experience in the blending and roasting processes which was developed prior to his employment at Caffe Coffee. In the absence of a restraint-of-trade provision, I consider he was entitled to use that personal know-how in the manner which he did.

[184] It is unsurprising that Mr Farrimond purchased many of the same origins as were supplied to Caffe Coffee. He purchased a significant proportion of the range of origins available from Mr Burton, so that there was bound to be some overlap. Mr D Burton placed some weight on the quantities of particular origins which were acquired for Village Roaster, which he said showed a buying pattern of green beans that was similar to Caffe Coffee's core ingredients. It does not follow that confidential recipes were being copied; such patterns are equally possible as a result of the use of established expertise or advice from Mr J Burton's office.

[185] It was also the case that selections of some origins which Caffe Coffee used were published on its website. By reference to that information and to JBL's

schedule of available beans which specified their origins, including some which were fair trade, conclusions as to blends could be deduced. There is no evidence that Mr Farrimond resorted to such an analysis, but the fact that someone in his circumstances could undertake this exercise casts doubt on the extent of confidentiality which Caffe Coffee claimed for its recipes.

[186] I have referred to the fact that Mr D Burton had not observed the Village Roaster roasting process, or sampled its products; it was his evidence that in reaching his conclusions regarding similarity of the products of the two entities, he had taken into account the fact that the same type of roaster was used and assumed that each entity had adopted the same roast-temperature and same drop-temperature. He accepted that if any one of these variables was altered, a different taste would result. In fact, he did not have knowledge of Mr Farrimond's end bean temperatures, or ambient air temperatures; and he said he had very little experience using a Chinook airbed roaster. That said, he considered that the types of beans being used by Village Roaster were such that even given variations in factors relating to the production process he considered that the most significant factor was the types of coffee being used which were "quite dramatic". While he accepted that there could be variations which arose from the roasting process, he did not think those factors would significantly alter his opinion which was based on blends rather than roasting.

[187] Against this evidence I must consider the evidence given by the three customers in question as to flavour profiles, or taste. Each of the proprietors of Café A, Café B and Business C gave evidence that the blend of coffee they acquired from the two entities were different. These differences were marked. Ms C reverted to acquiring a small proportion of her coffee beans from Caffe Coffee to ensure customer satisfaction. Mr A said that the profile produced by Village Roaster's blends was so different that he acquired product from Village Roaster for only two weeks, and then reverted to Caffe Coffee as his preferred supplier. And Mr B said that the blend obtained from Village Roaster tasted quite different from Caffe Coffee's blends. This evidence is significant, since those persons were familiar with the products obtained from each entity.

[188] Also relevant is the process by which recipes were developed with those customers. Mr A stated that Mr Farrimond made it clear that he would not match the taste profile of the products previously supplied to that entity. He said that a lot of time was devoted to developing a blend which was satisfactory to him, which he thought may have involved cupping "maybe 500 types of coffee".

[189] Ms C was less specific as to the process which was adopted, but she too confirmed that there had been a process by which blends had been developed and that she sampled taste profiles.

[190] Mr B confirmed that he had asked for a particular style of coffee which was produced by another company (other than Caffe Coffee) which he wanted Village Roaster to provide. He said Mr Farrimond presented samples of this which he trialled and worked through.

[191] The various processes by which Mr Farrimond developed the Village Roaster's end product do not suggest the use of information which had been copied; rather, I am satisfied that a process of development was used so as to meet the taste preferences of individual customers.

[192] Finally, I address the submission which was made that Mr Farrimond's approach to the disclosure of information in the processes of the Authority and the Court should lead to an inference that he had something to hide.

[193] It was submitted that the erasing of material by Mr Farrimond from his work computer prior to his departure from Caffe Coffee was relevant. The evidence was that shortly before logging out of his Caffe Coffee computer for the last time, he deleted confidential emails which contained sensitive information such as remuneration packages of employees; this, he said, was because it was likely his computer would be allocated to another employee. In any event, such information would be saved on the Caffe Coffee server, which could be forensically examined. In fact this occurred; the text of the examiner's report was introduced in evidence, but not the schedules of that report where the deletions were apparently described. In short, the Court has not been supplied with any reliable information as to precisely

what content was erased; I am not satisfied there is reliable evidence of confidential information having been deliberately recorded then deleted.

[194] Similarly with regard to the cell phone issues. Although Caffe Coffee places some reliance on issues relating to the return of a SIM Card and cell phone, there is no evidence that either contained confidential information such as recipes. Accordingly I draw no adverse inference from this evidence.

[195] I have already commented on the assertions made regarding the production of an "electronic copy" of the cell phone; the history of that aspect of the matter does not provide any reliable evidence on which an adverse inference could be based.

[196] Mr Clark also referred to the fact that two applications for particular discovery had to be brought, and suggested that this too demonstrated Mr Farrimond had something to hide. Given the totality of evidence I have had to review which points away from the use of confidential information, I do not regard the fact that such processes were instituted should persuade the Court that recipes were copied. Mr Farrimond said he was concerned at the risks that could arise if Caffe Coffee assessed his confidential information; given the relations between the parties, that is an understandable concern, although I make no finding that there was in fact such a risk.

[197] As I noted earlier, Mr Clark invited the Court to look at the totality of issues relating to customer lists, pricing, the method of roasting and recipes. My conclusions with regard to each of these factors are that it has not been established confidential information was used by Mr Farrimond in breach of his employment obligations. Standing back and looking at these factors globally, I reach the same conclusion. The causes of action relating to the use of confidential information post-employment and as to a breach of intellectual property rights are accordingly dismissed.

Remedies

[198] Caffe Coffee alleges that as a result of Mr Farrimond's breaches, the company has suffered loss. It asserts that it should receive damages in the sum of

$101,328.28 because it lost permanently two key customers, Café B, Business C and for a small period Café A. It says it should be restored to the position it would have been in, had the breaches not occurred (by reference to the dicta of Judge Travis in *Rooney v McTague*).[37]

[199] Caffe Coffee also claims penalties for breaches of the IEA, up to a maximum of $5,000 per breach.

[200] I begin with the damages claim. The first issue which requires consideration relates to causation. The general principle is that there must be a causal connection between a defendant's breach of contract and a plaintiff's loss.[38] Such a principle has been affirmed in New Zealand on many occasions.[39]

[201] In *Sew Hoy and Sons Ltd (In Rec & Liq) v Coopers & Lybrand*, an issue of causation was discussed by Henry J in these terms.[40]

> What must be borne in mind is the law is concerned with responsibility for the damage or loss in question, or as was said by Cooke P in *MacElroy Milne v Commercial Electronics Ltd*[41] "the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances."

[202] This concept has been affirmed in many cases involving breaches of employment agreements.[42]

[203] Causation is an important issue in the present case. The question is whether the breaches which I have found to be established – a failure to obtain consent to the incorporation of Village Roaster, and the provision of misleading information as to intentions, caused the subsequent loss of custom.

[204] Mr Clark placed considerable weight on Mr Alford's evidence that if during the notice period Caffe Coffee had known what Mr Farrimond intended then he

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37 *Rooney v McTague* [2012] NZEmpC 63, [2012] ERNZ 273 at [19].
38 *Galoo v Bright Graham Murray* [1995] 1 All ER 16 (CA) at 24 – 25.
39 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 524.
40 *Sew Hoy and Sons Ltd (In Rec & Liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 402.
41 *MacElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41.
42 *Rooney v McTague*, above n 37 at [52]; *Masonry Design Solutions Ltd v Bettany* (2009) 6 NZELR 834 at [52]; and *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA) at [96].

could have been placed on garden leave, removed from contact with customers or other protective steps could have been undertaken.

[205] It does not follow that had those steps been taken the three customers in question would not have subsequently acquired products from Village Roaster, when it ultimately commenced its business some three months after the end of Mr Farrimond's employment. None of these witnesses were questioned on this point. I find that each of them had well established professional relationships and friendships with Mr Farrimond. They willingly engaged with him when they became aware, after the cessation of Mr Farrimond's employment at Caffe Coffee, of his new business.

[206] On a commonsense basis, I am not satisfied that if Mr Farrimond had been placed on garden leave or otherwise precluded from contacting customers the three particular customers would not have acquired product from Village Roaster. Consequently, the important component of causation is not established.

[207] For completeness, I refer to the issue of quantum of damages. Some evidence was provided on this topic, but the basis on which losses had been calculated for Caffe Coffee was not accepted by the expert called for Mr Farrimond. Had I been satisfied that Caffe Coffee were entitled to damages, it would have been necessary to receive further evidence on the topic on quantum after proper analysis had been carried out by the relevant witnesses.

[208] I turn to the remaining question of penalties.

[209] Mr Patterson raised a legal issue as to the claim for a penalty for Mr Farrimond's failure to obtain consent to act as a director. He said that Caffe Coffee had not pleaded in the amended statement of claim a penalty action against Mr Farrimond in this regard, so that any claim in this Court was out of time. He submitted that Caffe Coffee should not be permitted to "revive" penalty claims he had brought in the Authority, and that these should be "deemed to have been abandoned".

[210] In fact, both the statement of claim and the amended statement of claim sought "Penalties for breaches of [Mr Farrimond's] employment agreement up to a maximum sum of $5,000".

[211] Mr Patterson said the penalty claim was out of time.

[212] Section 135(5) of the Act establishes the time limit for the commencement of a penalty action, as follows:

> …
>
> (5) An action for recovery of a penalty under this Act must be commenced within 12 months after the earlier of–
>
> (a) the date when the cause of action first became known to the person bringing the action; or
>
> (b) the date when the cause of action should reasonably have become known to the person bringing the action.

[213] The statement of problem was filed in the Authority on or about 21 November 2014.[43] The earliest indication that Caffe Coffee was aware of the breach of the failure to obtain consent to act as a director was contained in Mr Alford's letter of 22 October 2014. The Court has not been provided with any evidence as to precisely when that information came to Mr Alford's attention, and since that issue was not explored, I find that 22 October 2014 is the time limitation date under s 135(5)(a).

[214] Accordingly, there could be no issue as to time limitation in respect of the penalty for the purposes of the investigation meeting, and there is no evidence that one was raised.

[215] Subsequently, the Authority determined that no penalty should be paid. That determination was challenged in this Court by proceedings which were filed on 20 July 2015.

[216] I consider there is no time limitation issue for two reasons. First, the claim for penalty was brought within time in the Authority, and the issue was then brought

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[43] *Caffe Coffee (NZ) Ltd v Farrimond*, above n 1, at [18].

before this Court by way of challenge. Accordingly, for the purposes of s 135(5) of the Act, the action for the recovery of the penalty was commenced within the time frame stipulated in that subsection. The subsection does not provide that a challenge raising a penalty must be brought within 12 months of the accrual of the cause of action. Nor can or should such an inference be inferred.

[217] Secondly, even were such an interpretation to be adopted, the proceeding as filed in this Court was still within the 12-month period contemplated in s 135(5) of the Act.

[218] The time limitation defence must be dismissed.

[219] I turn now to the question as to whether a penalty is appropriate.

[220] I recently reviewed the applicable principles with regard to the imposition of penalties in *O'Shea v Pekanga O Te Awa Farms Ltd* and summarised the relevant legal principles in this way: [44]

> [29] In *Xu v McIntosh,* Chief Judge Goddard said with regard to the imposition of penalties:
>
> > [47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
> >
> > [48] The next question focuses on the perpetrators culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. …
>
> [30] In *Tan v Yang & Zhang,* Judge Inglis suggested that the following non-exhaustive list of factors could be relevant when considering penalty issues:
>
> - the seriousness of the breach;
> - whether the breach is one off or repeated;

[44] *O'Shea v Pekanga O Te Awa Farms Ltd* [2016] NZEmpC 19 (footnotes omitted).

- the impact, if any, on the employee/prospective employee;
- the vulnerability of the employee/prospective employee;
- the need for deterrence;
- remorse shown by the party in breach; and
- the range of penalties imposed in other comparable cases.

> [31] It is necessary to assess the factors which might be regarded as aggravating any breach, and the factors which might be regarded as mitigating any breach. A penalty, if imposed, should be proportionate to the breaches which the Court, or Authority, has been required to consider. Higher penalties should be reserved for more serious breaches.

[221] Mr Patterson submitted that any penalty should be "at the lower end of the scale and no more than $300 which should be paid to the Crown". This was because it had been Mr Farrimond's case that the failure to obtain consent to act as a director was inadvertent, and was only to secure a company name.

[222] In my view, neither breach was so minor as to be regarded as minimal. The IEA set out comprehensive obligations which needed to be observed in just such a situation as occurred. Mr Farrimond was well aware of these, to the point that he had taken legal advice as to what preparatory steps he could legally undertake. He also took advice when preparing his email of resignation, although it was the oral remarks which he made subsequently that created the problem.

[223] The two established breaches were serious to the point where Mr Alford was misled, and as I have found he was lulled into a false sense of security so that protective steps which he might have undertaken were not introduced.

[224] In short, this was more than an isolated aberration, and the two established breaches were an aspect of a planned exit of an employee who intended to compete.

[225] I do not consider that the imposition of penalties is necessary in order to deter Mr Farrimond in the future; however, a relevant consideration is deterrence of other employees who may be in such a situation, since there are many who leave their employment to commence business in competition who are subject to strict obligations.

[226] Whilst Mr Farrimond has properly acknowledged that he did breach his employment agreement, he has minimalised its effect. The expressed remorse was modest.

[227] No evidence has been provided to suggest that Mr Farrimond does not have the means to meet any penalty which may be imposed.

[228] I was referred to no other determinations or decisions in respect of breaches of the present kind. Limited assistance is provided by *Credit Consultants Debt Services New Zealand Limited v Wilson (No 3)*, where the Court imposed penalties against a company where there was a breach of a restraint provision and the use of confidential information.[45] The breaches were regarded as significant. At the time of the breach (2006) the maximum penalty in respect of a company was $10,000. Two penalties of $2,500 were imposed.

[229] By the time of the events which I have reviewed, s 135(5) of the Act provided that maximum penalties were $10,000 in the case of an individual, and $20,000 in the case of a company.[46] Recent decisions of the Authority where penalties have been imposed in circumstances where an individual goes into business, with or without a restraint provision, indicate a very wide range of penalties. Where the conduct was particularly egregious and involved multiple breaches, awards as high as $30,000[47] or even $50,000[48] have been imposed on individuals. This case is by no means as serious as those. I take into account these and other cases; but at the end of the day, each case is fact specific.

[230] I recognise that a proportionate response is required. Standing back and considering all the foregoing factors, I consider that an appropriate penalty for each of the established breaches is $5,000. Recognising that the imposition of a penalty is to punish wrongdoing and not to compensate, I direct that half of this sum is to be paid to Caffe Coffee whose rights were infringed.

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45 *Credit Consultants Debt Services New Zealand Ltd v Wilson (No 3)* [2007] ERNZ 252 at [97]-[100].
46 *Caffe Coffee (NZ) Ltd v Farrimond*, above n 1 at [70].
47 *Nova Energy Ltd v Mitchell (No 6)* [2015] NZERA Auckland 337.
48 *Zeald New Zealand Ltd v Bernard* [2013] NZERA Auckland 402.

[231] Whilst I made a finding as to good faith under s 4(1)(a) of the Act, no penalty was sought for such a breach. Had such a claim been made, I would have considered the relevant considerations to be the same as those which were relevant to the established breaches of the IEA, with the same result.

Conclusion

[232] Apart from the two established breaches of the IEA and of the duties of fidelity and good faith, I find that all other allegations brought by Caffe Coffee against Mr Farrimond were not established and are therefore dismissed.

[233] The claim for damages is also dismissed. Penalties totalling $10,000 are imposed, half of which is to be paid to Caffe Coffee.

[234] Because my conclusion differs in some respects from that of the Authority's determination, it is set aside and the decision of the Court stands in its place.

[235] I will now need to deal with issues as to costs – that is costs arising from the substantive challenge, and the challenge as to costs brought by Caffe Coffee. The parties are invited to resolve these matters in the first instance if possible. If not, a party seeking costs with regard to the substantive challenge should file and serve submissions and evidence relating to any costs application within 21 days of the date of this decision. Any response is to be filed and served 21 days thereafter. It would be helpful if the parties referred to the Guidelines as to Costs which are available on the Court's website, even although these proceedings were commenced before that scale was implemented.

[236] As regards the costs challenge, Caffe Coffee should file and serve its submissions within 21 days of this judgment, and Mr Farrimond should file and serve his submissions 21 days thereafter.

B A Corkill
Judge

Judgment signed on 2 June 2016 at 2.20 pm