IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 169
EMPC 413/2019
EMPC 444/2019

IN THE MATTER OF	matters removed from the Employment Relations Authority
BETWEEN	SMITHS CITY (SOUTHERN) LIMITED (IN RECEIVERSHIP) Plaintiff
AND	JEREMY WALTER ETTLES CLAXTON First Defendant
AND	CANDO CREATIVE FLOORING LIMITED Second Defendant
AND	CANDO CREATIVE INSTALLS LIMITED Third Defendant
AND	MELANIE DOUGLAS Fourth Defendant

EMPC 414/2019
EMPC 445/2019

AND IN THE MATTER OF	matters removed from the Employment Relations Authority
BETWEEN	SMITHS CITY (SOUTHERN) LIMITED (IN RECEIVERSHIP) Plaintiff
AND	NICHOLAS GEORGE MILNE First Defendant
AND	CANDO CREATIVE INSTALLS LIMITED Second Defendant
AND	JEREMY WALTER ETTLES CLAXTON Third Defendant

Hearing:	15–19 March 2021, 22–23 March 2021, 26 March 2021, 29 March 2021 and 31 March 2021 (Heard at Christchurch)
Appearances:	J Goldstein and L Ryder, advocates for Smiths City (Southern) Ltd (in rec) K Dalziel, counsel for J Claxton, Cando Creative Flooring Ltd and M Douglas P Brown, advocate for N Milne and Cando Creative Installs Ltd
Judgment:	5 October 2021

JUDGMENT OF JUDGE K G SMITH

---

[1] Jeremy Walter Ettles Claxton and Nicholas George Milne were for several years employed by Smiths City (Southern) Ltd (in receivership). They both held senior positions in the company's Northwood store where they ran the flooring department, and the floor installation staff, respectively.

[2] Smiths City claimed that, while Mr Claxton and Mr Milne were employed by it, both of them were involved in establishing and operating competing businesses without permission from the company and to its detriment.

[3] Mr Claxton and Mr Milne were alleged to have breached their employment agreements and the duties of fidelity they owed to Smiths City arising from the circumstances in which they established and operated those competing businesses. Initially there were claims for alleged breaches of the Fair Trading Act 1986 but they were withdrawn.

[4] The claim against Mr Claxton was that he operated a competing business in three stages, the first of which began shortly after he was employed by the company. This stage was a partnership of sorts arranged with Dawn Wilde through a company she owned called Can Do Flooring Ltd. The second stage was after Mr Claxton wound down his business association with Ms Wilde and began to trade on his own behalf.

The third stage was said to be when he established and operated Cando Creative Flooring Ltd.

[5] The claim against Mr Milne was that he operated a competing business in two stages. The first was as a sole trader eventually using the description Tip Top Flooring. The second stage was when he collaborated with Mr Claxton to create and operate Cando Creative Installs Ltd.

[6] In the first proceeding, Smiths City sought findings against Mr Claxton that he acted in breach of his employment agreement and the other duties owed to the company. Smiths City sought an inquiry into damages it claimed to have sustained because of his activities.

[7] Cando Creative Flooring and Cando Creative Installs are defendants in the first proceeding. They were alleged to have breached s 134(2) of the Employment Relations Act 2000 (the Act); that is to have incited, instigated, aided or abetted Mr Claxton's breaches. Penalties against them were claimed with a request that they be made payable to Smiths City.

[8] The last defendant in this proceeding is Melanie Douglas. She is married to Mr Claxton. The allegation was that she assisted him and in so doing incited, instigated, aided or abetted his breaches contrary to s 134(2). A penalty was claimed against Ms Douglas with a request that it be made payable to Smiths City.

[9] All of the defendants in this proceeding denied Smiths City's claims.

[10] The second proceeding has been foreshadowed in this introduction. Smiths City claimed that Mr Milne, as head of its flooring installation service, established a business for himself competing with it and subsequently operated Cando Creative Installs, with Mr Claxton, to do the same thing. Damages were sought against Mr Milne.

[11] Cando Creative Installs and Mr Claxton are defendants in this proceeding and are also alleged to have incited, instigated, aided or abetted breaches by Mr Milne.

Penalties against both of them were sought. Smiths City requested that any penalties imposed on them be payable to it.

[12] All of the defendants in the second proceeding denied Smiths City's claims.

Counterclaims/Set Off

[13] Mr Claxton and Mr Milne both counterclaimed against Smiths City. Mr Claxton claimed that between 2012 and 2016 Smiths City did not pay him an incentive worth $34,000 that was part of his income. This claim was put forward on an alternative basis that it could be a set-off against Smiths City's claims.

[14] Mr Milne claimed that, between 26 April 2006 and 11 February 2019, he was short-paid for the hours he worked and that he had not been paid a contractual bonus of $1,000 which fell due to him in December 2019. Mr Milne's claims totalled $22,427.20. He also put forward this claim on the alternative basis that it could set off against Smiths City's claims.

[15] Smiths City denied it owes money to Mr Claxton or to Mr Milne.

Authority's determination

[16] These proceedings started life as claims lodged in the Employment Relations Authority. The Authority removed them to the Court without an investigation meeting being conducted.[1]

A brief employment history

[17] Mr Claxton started working for Smiths City on 27 April 2009 as its Flooring Manager based at its Northwood store in Christchurch.

[18] As Flooring Manager Mr Claxton was responsible for two salespeople and the "Laying Team". That was the name given to Smiths City's employed flooring

---

1 *Smiths City (Southern) Ltd v Claxton* [2019] NZERA 647 (Member van Keulen).

installers and meant that their manager reported to him. Mr Claxton's job was to achieve a profitable operation with effective and efficient management through "quality customer service" by achieving sales in line with a budget.

[19] Mr Claxton was a good salesman. During his tenure the flooring business of the Northwood store became successful. His success was such that, for a time, he assumed additional responsibility for the flooring businesses in two other Smiths City Christchurch stores before concentrating exclusively on the Northwood store.

[20] Mr Claxton reported to the Store Manager. Over the years of his employment there were several managers but the most significant for the purposes of these proceedings was Shane Moore. During Mr Claxton's employment, Mr Moore was promoted to Regional Manager based in the company's head office.

[21] Mr Claxton resigned in February 2019 following an investigation into his activities. The circumstances of his resignation led Smiths City to claim that he failed to work out an agreed notice period.

[22] Mr Milne started working for Smiths City on 26 April 2006 as an apprentice flooring installer. He was employed full time to work not less than 80 hours per fortnight. Mr Milne also signed an agreement relating to the use of his trade skills restricting his ability to perform work that was not for Smiths City.

[23] After Mr Milne completed the apprenticeship he worked for Smiths City as a qualified tradesman for several years before being promoted to Flooring Installation Manager at the company's Northwood store on 1 September 2013. A new employment agreement was signed on 1 September 2017. Mr Milne's employment ended when he was summarily dismissed on 11 February 2019.

The issues in these proceedings

[24] The issues relating to Mr Claxton are:

(a) Was he operating his own business in competition with Smiths City while employed by it?

(b) If the answer to (a) is yes, did he have permission from Smiths City to operate that competing business?

(c) If the answer to (b) is no, was establishing and operating a competing business a breach of the individual employment agreement between him and Smiths City?

(d) If the answer to (b) is no, was establishing and operating a competing business a breach of the duty of fidelity owed to Smiths City?

(e) If the answers to (c) and/or (d) are yes, what remedies (if any) are appropriate?

(f) If he breached the employment agreement and/or any duties he owed to Smiths City, did Cando Creative Flooring incite, instigate, aid or abet any of those breaches?

(g) If the answer to (f) is yes, should a penalty be imposed and, if so, in what amount?

(h) If he breached the employment agreement and/or any of the duties he owed to Smiths City, did Cando Creative Installs incite, instigate, aid or abet those breaches?

(i) If the answer to (h) is yes, should a penalty be imposed and, if so, in what amount?

(j) If he breached the employment agreement and/or any of the duties he owed to Smiths City, did Melanie Douglas incite, instigate, aid or abet any of those breaches?

(k) If the answer to (j) is yes, is a penalty appropriate and, if so, in what amount?

[25] The issues relating to Mr Milne are:

(a) Was he operating his own business in competition with Smiths City while employed by it?

(b) If the answer to (a) is yes, did he have permission from Smiths City to operate that competing business?

(c) If the answer to (b) is no, was establishing and operating that competing business a breach of the individual employment agreement between him and Smiths City?

(d) If the answer to (b) is no, was establishing and operating a competing business a breach of the duty of fidelity he owed to Smiths City?

(e) If the answers to (c) and/or (d) are yes, what remedies, if any, are appropriate?

(f) If he breached the employment agreement and/or any duties he owed to Smiths City, did Cando Creative Installs incite, instigate, aid or abet any of those breaches?

(g) If the answer to (f) is yes, should a penalty be imposed and, if so, in what amount?

(h) If he breached the employment agreement and/or any of the duties he owed to Smiths City, did Mr Claxton incite, instigate, aid or abet any of those breaches?

(i) If the answer to (h) is yes, is a penalty appropriate and, if so, in what amount?

[26] I will deal with the issues relating to Mr Claxton and Mr Milne first.

Claims against Mr Claxton

Was Mr Claxton competing with Smiths City?

[27] The first issue is, was Mr Claxton operated his own business that competed with Smiths City while he was employed by it? The answer is yes. He did so in three distinct ways over time.

[28] Mr Claxton formed a business relationship with Ms Wilde and, through her, gained access to a company she operated called Can Do Flooring Ltd. Despite the similarity in names between Ms Wilde's company and the company subsequently incorporated by Mr Claxton, called Cando Creative Flooring Ltd, they are not related.

[29] Over time the working relationship between Mr Claxton and Ms Wilde changed. Gradually he began operating as a sole trader before incorporating and operating Cando Creative Flooring Ltd.

[30] In each of those manifestations, Mr Claxton sold carpet and floor coverings in competition with Smiths City. The reasons he offered for being entitled to do that are discussed later.

[31] The story begins just after the Canterbury earthquakes in about February 2011. By that time Mr Claxton had been Smiths City's Flooring Manager for about 18 months. So far as can be ascertained, because of Mr Claxton's reticence in discussing when and how his association with Ms Wilde began, their relationship started sometime shortly after the earthquakes. The business they developed sold and installed carpet, vinyl, tiles and ancillary flooring products.

[32] Can Do Flooring was incorporated on 8 August 2011. Despite the business association Ms Wilde had with Mr Claxton, she was the company's sole director. When Ms Wilde and Mr Claxton began working together they had known each other for some time because she supplied ready-made curtains and drapes through Smiths City. Ms Wilde explained that many of her customers wanted flooring and supplying it was a natural adjunct to her other business activities. She did not, however, have

experience with carpet or flooring. Because of Mr Claxton's experience he controlled this aspect of the business.

[33] Ms Wilde said that, because Can Do Flooring intended to buy flooring products from Smiths City, an account was opened with the company. Mr Claxton opened it for her. The account was in her own name.

[34] Ms Wilde did not have much in the way of dealings with her company's customers who wanted carpet or flooring. Mr Claxton worked out the costings and quotes for the work, attended to measuring the jobs and arranged for installation. He also assisted Can Do Flooring with invoicing and answering customer queries.

[35] Mr Claxton was paid for his services. The arrangement was that he would share the profits evenly with Ms Wilde. What Mr Claxton did to secure his profit share was invoice Can Do Flooring for a consultant's fee. It is, however, a misnomer to describe the arrangement as equal sharing even though that was intended. Mr Claxton added GST to his invoices. He was not registered for GST, but kept the additional 15 per cent he added to each invoice.[2]

[36] Mr Claxton project-managed, and had responsibility for, a significant number of jobs performed by Ms Wilde's company. The details of his arrangement with Ms Wilde remained unclear until she answered a summons to attend Court and gave evidence. However, the extent of Mr Claxton's business activities with Ms Wilde was not fully explained by either them.

[37] All of the work Mr Claxton did for Ms Wilde and Can Do Flooring was in direct conflict with his position as Smiths City's Flooring Manager. The flooring products it is known he arranged to be purchased and on-sold by Can Do Flooring were available to be sold to the public by Smiths City as was the installation service.

[38] That conflict of interest was evident in the blurring of distinctions between businesses when Mr Claxton did things like follow up on payments due to Can Do Flooring using his Smiths City email address. Another example was that in October

---

[2] A voluntary disclosure was made to Inland Revenue Department on his behalf during the hearing.

2016, using his Smiths City email address, he wrote instructions to flooring installers engaged by Can Do Flooring telling them to undertake "a light sand/grind & seal prior to install" on a stated job. The installers were instructed to invoice Can Do Flooring, but Mr Claxton offered to answer questions or to be contacted if anything arose.

[39] Similarly, also in October 2016, Mr Claxton instructed an installer about "a couple of small jobs" laying floor tiles. The instruction was sent from his Smiths City email address but the tasks were described as "all Cando jobs".

[40] As best could be ascertained, given the passage of time and the incomplete document trail, Mr Claxton began working with Ms Wilde in about October 2011. Transactions continued to be recorded through Ms Wilde's Smiths City account until early 2019. The majority of transactions through her account named Mr Claxton as the salesperson. Smiths City's inquiries established that between 2011 and 2019 there were about 360 sales transactions on Ms Wilde's account where Mr Claxton was the salesman. The face value of these transactions was about $397,000 plus GST.

[41] Cando Creative Flooring was incorporated on 23 August 2017. Initially, Mr Claxton was its only director. Ms Douglas subsequently became a director. After Cando Creative Flooring was incorporated it appears Mr Claxton's transactions with or through Ms Wilde's account tailed off.

[42] Separately Mr Claxton was purchasing, or arranging purchases, of carpet and flooring through other Smiths City customer account holders for himself. The full extent of those transactions is unclear. A reasonable inference is that what he purchased was on-sold by him for a profit either via Can Do Flooring or other installers. Several accounts were used in this way but the most striking were accounts in the name of Ngaire Douglas, his mother-in-law, and Geoffrey Douglas, his father-in-law. Unlike Ms Wilde, Mr and Mrs Douglas did not operate businesses.

[43] Mrs Douglas had held an account with Smiths City for well over 10 years. She knew that her account enabled access to credit. Mrs Douglas was shown a list of transactions recorded through her account and was asked if she had purchased any of the items on it. She had not. She said Mr Claxton made the purchases with her

permission. She was a little less confident about whether her permission included the use of her credit.

[44] While those answers may have suggested Mrs Douglas knew what was happening that was not the case. She did not know why Mr Claxton was buying flooring products in her name. She did not discuss the subject with him and exercised no oversight of the account. She never went to the store to buy any flooring products from Smiths City. She did not get any statements from Smiths City about her account, although she acknowledged the company had her address when the account was opened. There was a PO box address on the account, but Mrs Douglas knew nothing about it. It transpired the PO box was held by Mr Claxton. Mr Claxton paid for the items on Mrs Douglas' account.

[45] It was much the same when Mr Douglas gave evidence. He had a Smiths City account which he used for some personal purchases. He did not, however, buy the flooring products shown in his account. He knew that Mr Claxton used his account to buy them from Smiths City.

[46] Using the accounts in this way gave Mr Claxton access to credit which Smiths City would not have allowed him if he had been trading with it as a bona fide customer. It also enabled him to circumvent Smiths City's staff purchasing policy that limited the dollar value of staff purchases and the circumstances in which they could be made.

[47] Initially Mr Claxton denied operating a competing business while employed by Smiths City but eventually acknowledged doing so. His defence, however, was a persistent denial of wrongdoing.

[48] Despite acknowledging the existence of his interests in other businesses the first part of Mr Claxton's defence to the claims was that he did not compete with Smiths City. He claimed to be offering a service to customers (or potential customers) unable to obtain credit from Smiths City. At times, he explained that some customers just did not want to deal with Smiths City. At other times his explanation was that referrals had been made to him directly and that the customers were therefore "his

customers". All of these explanations were separate from his contention that Smiths City knew what he was doing and granted him permission.

[49] There is no substance to Mr Claxton's claim that he confined his activities to dealing with customers ineligible for credit from Smiths City. It is correct that, in one instance, a transaction involving a Smiths City customer named Norton Construction was channelled by him through Ms Wilde's company (Can Do Flooring) with the knowledge and permission of the Store Manager, Mr Moore. That happened because Norton Construction had reached the limit of its available credit facility. Mr Moore approved of Mr Claxton's proposal for Ms Wilde's company to purchase the flooring Norton Construction wanted to buy and on-sell it to that company.

[50] That example was the only occasion when a credit-related issue may have meant a customer was unable to deal with Smiths City. Mr Claxton was the driving force behind the plan to work around the problem faced by Norton Construction, but he did not disclose to Mr Moore the interest he had in Can Do Flooring's business and the benefit that would flow to him from the transaction. The transaction was not, as Mr Claxton subsequently chose to portray it, an example of Smiths City being aware of his business or that he was only dealing with customers that had credit-related problems precluding them from doing business with the company. All Mr Moore approved was Smiths City doing business on a wholesale basis with Ms Wilde's company.

[51] That is as far as the evidence went in supporting Mr Claxton's defence. Overwhelmingly the evidence was that he picked and chose customers to suit himself and diverted Smiths City's business on the same basis.

[52] Smiths City called 11 witnesses who gave evidence the general effect of which was that Mr Claxton interposed himself, Can Do Flooring or Cando Creative Flooring, in transactions the customer thought were with Smiths City. Sometimes quotes were given by him on Smiths City's behalf, but the business was undertaken and invoiced by Cando Creative Flooring. On other occasions business was deliberately diverted away from Smiths City and was carried out by his company. Sometimes his company

provided a quote at a rate lower than the one offered by Smiths City and took away the work.

[53] The fact that Mr Claxton was able to place himself between Smiths City and its customers shows that he was involved in the same marketplace as the company buying, selling and installing floor coverings.

[54] Some examples illustrate the point. In about September 2018 Scott Ashworth went to Smiths City to buy carpet. He is a flooring installer. Mr Claxton showed him carpet samples. They agreed on a price. Mr Ashworth thought he was buying carpet from Smiths City but was invoiced by Cando Creative Flooring. When Mr Claxton left Smiths City Mr Ashworth continued to buy carpet from Cando Creative Flooring.

[55] Alana Daley would go to the Smiths City store on behalf of her son's business to look at samples and get quotes. In about October or November 2018, she got a quote from Smiths City in an email from Mr Claxton, signed by him as the Flooring Manager. Subsequently, Ms Daley received an invoice from Cando Creative Flooring for the same product. She did not know anything about Cando Creative Flooring. She said, and I accept, that she telephoned Mr Claxton and asked for an explanation. The explanation he gave was that the transaction was "all good" and that she was "not to worry and it was not a problem" because "Cando was another division of Smiths City".

[56] A similar thing happened to Wayne Dimock who was an existing Smiths City customer. In September or October 2018, he wanted to buy carpet and went to Smiths City to see what was available. Mr Dimock was shown some carpet and told that the company did not supply that particular product, but that Mr Claxton could supply it through his own company. Subsequently, he received an invoice from Cando Creative Flooring and had to pay for the product before picking it up.

[57] Rebecca Fraher was an existing Smiths City customer. She purchased three lots of carpet over several months thinking she had dealt with Smiths City but received two invoices from Cando Creative Flooring. Ms Fraher queried the invoices. Mr Claxton responded to her by email explaining that, because she did not hold a commercial account and her purchases were for investment properties, Smiths City

required a personal guarantee and a security interest to be taken over her property until the account was paid in full.[3] His explanation went on to include a statement that using the "Cando Flooring account" provided a shortcut. The explanation was unsatisfactory because Ms Fraher had not sought credit from Smiths City. It was also an obfuscation, by misleading Ms Fraher into believing there was a proper business association between Smiths City and Can Do Flooring where one did not exist.

[58] In 2017, Hayley O'Connor went to Smiths City to meet Mr Claxton. At that time she and her husband were buying "as is where is" houses to do them up, re-insure them and on-sell them. Ms O'Connor was happy to deal with Mr Claxton. She would go to the Northwood store, meet him, and make a selection from samples he showed her. So far as she was aware the business relationship was with Smiths City but the invoicing was from Cando Creative Flooring.

[59] Jacqueline McIlraith was concerned about receiving an invoice from Cando Creative Flooring not Smiths City. Mr Claxton had emailed Ms McIlraith to confirm when the carpet she was buying would arrive and advised her that it would "…be in our warehouse at [Smiths City's address] for cutting and collection". When Ms McIlraith asked Mr Claxton for an explanation about a conflict of interest, his answer was that one did not exist because Smiths City was happy for him to run his business from its site and to supply carpet from the Northwood store.

[60] Similar statements were made by the other witnesses called by Smiths City. There are at least three common themes arising from these transactions. The first theme was that each customer thought he or she was dealing with Smiths City. The second theme, contrary to Mr Claxton's explanation, was that none of these customers was seeking credit or, for that matter, was unable for some reason to conduct business with Smiths City. The third theme was that all of the purchases were diverted away from Smiths City to Mr Claxton's benefit.

[61] Smiths City compiled a list of at least 27 other customers with whom it had existing business relationships, and who had credit facilities available to them, but

---

[3] The reference to a security interest was to the Personal Property Securities Act 1999.

whose business was diverted to Cando Creative Flooring. This list was not challenged by Mr Claxton.

[62] I am satisfied that Mr Claxton began to operate his own business in competition with Smiths City from about October 2011 and continued to do so right up until his employment ended in 2019.

Did Mr Claxton have permission?

[63] This issue is the crux of the proceeding. If Mr Claxton had permission there is no substance to Smiths City's claim.

[64] Eventually Mr Claxton said that he was given permission to operate his business by the store manager, Shane Moore. Mr Moore said he did not give Mr Claxton permission and, what is more, did not know that a separate business was being run out of the Northwood store's flooring department by Mr Claxton.

[65] For the reasons that follow, I reject Mr Claxton's claim that he had permission to establish and run his business. The conflict in what was said by him and Mr Moore raises serious issues of credibility. I begin this part of the decision by finding that Mr Claxton was untruthful in his explanations to Smiths City when he was interviewed and, subsequently, when explaining himself in Court. Where there is any conflict between Mr Claxton's evidence and what was said by witnesses for and on behalf of Smiths City, I prefer those other witnesses' evidence to what he said.

[66] Some examples explain why Mr Claxton's evidence was unreliable. The first of them has already been touched on, namely his claim that he only undertook business for customers unable to obtain credit from Smiths City. Plainly that was untrue.

[67] The shifting sand of Mr Claxton's explanations was illustrated by the defence pleaded to Smiths City claims and, at least initially, how he presented his case. His statement of defence did not plead that Smiths City gave him permission to run his business. When Ms Dalziel, his counsel, opened Mr Claxton's case she did not say that permission had been given by Mr Moore or by Smiths City. The nearest the

opening came to making that claim was a statement that the existence of his business was known to management.

[68] Mr Claxton's evidence did not begin with a statement that he had permission from Mr Moore or anyone else. When Smiths City's witnesses were questioned it was not put to any of them, including Mr Moore, that permission was given. The general thrust of his defence was that what he did was openly transacted and, it followed, that it was implausible for Smiths City to deny knowledge of his activities. Being able to act as he did is not the same thing as having permission. Mr Claxton's statement that he had permission was made only after he was unable to explain away some of the transactions put to him in questioning by Mr Goldstein.

[69] A significant portion of Mr Claxton's evidence was given over to explaining Smiths City's business, his role in developing the flooring business, and that Mr Moore knew about Ms Wilde operating an account. That explanation was lamentably short of detail, by omitting information such as any reference to the true nature of the relationship between him and Ms Wilde, and it stopped well short of asserting permission was given by anyone. The overall impression conveyed by the case put forward by Mr Claxton, until he made a belated statement that Mr Moore gave him permission, was that everyone knew. Mr Moore was recalled and denied giving Mr Claxton permission or being aware that there was a competing business operating from the Northwood store.

[70] The most telling point against Smiths City having granted permission was the subterfuge used by Mr Claxton. He disguised transactions through Ms Wilde's company, misused accounts in other people's names and diverted business away from Smiths City without declaring in advance to the customers he dealt with that he had permission to operate a business. As will become clear shortly, when the evidence of Smiths City's accounting expert is discussed, for a significant period of time payments made to Mr Claxton's business were channelled into a bank account in his son's name who was, at the time, a minor.

[71] There was no reason for this way of doing business if permission had been granted. If it had been granted, it is reasonable to think the relationship would have

been identified in a conventional way such as by Cando Creative Flooring having an account or some other means of clearly identifying itself to both Smiths City and customers. That clearly did not happen.

[72] It is important to mention two witnesses whose evidence might suggest that permission was given. One was Matthew Junge and the other Ashley Mogridge. Mr Junge's evidence was that he understood Mr Claxton had his own source of income and he (Mr Claxton) was open about having a flooring business of his own.

[73] Mr Junge was temporarily a store manager at Smiths City Northwood store. He said that Mr Moore told him, when offering him the manager's position in February 2017, that Mr Claxton had permission to operate his own business from the store.

[74] Ms Mogridge was a flooring consultant employed by Smiths City at its Northwood store. She reported to Mr Claxton. The effect of Ms Mogridge's evidence was to say that it was widely known that Mr Claxton ran his own business. She attributed, although could not explain quite why, that knowledge and permission to operate the business to Mr Moore.

[75] While I accept that Mr Junge and Ms Mogridge were genuine in what they said, I do not accept their evidence. Mr Moore denied making the admission Mr Junge attributed to him. Aside from preferring Mr Moore's evidence, the indicia point away from a competing business having permission to operate from Smiths City's premises.

[76] That conclusion is reinforced by Mr Claxton not being candid when eventually confronted about what was going on. He successfully misled Smiths City's managers who investigated his activities. Later he presented their conclusions, based on his deception, as proof that he had done nothing wrong.

[77] The background to this situation was a reversed sale. In March 2018 Mr Claxton attempted to buy from Smiths City discounted carpet using his staff account. The purchase was identified in an internal report, by Travis Delport, who was at that time the Store Manager, because its value adversely affected the stores daily margin.

[78] The purchase also contravened Smiths City's staff purchasing policy. All Smiths City staff had an account used to track any purchases they made. The purchasing policy required the transaction to be processed by a salesperson other than the staff member making the purchase and imposed a ceiling of not more than $1,000 per transaction. Mr Delport's prior approval was required because of the size of the purchase but had not been given. The transaction was reversed.

[79] Mr Delport asked Mr Claxton to explain. Mr Claxton's answer was that he was going to buy the carpet "just to get it out of the business and it may come in handy for doing bits and pieces".

[80] Mr Delport was not satisfied and began an investigation that culminated in a disciplinary meeting on 3 April 2018 attended by several managers, Mr Claxton and Mr Milne. Before the meeting Mr Delport's attention was drawn to the fact that there had been a high volume of flooring transactions processed through Mr Claxton's staff account. Some of them dated back to a time prior to Mr Delport's appointment in November 2017.

[81] Mr Delport became aware that a payment was made into Mr Claxton's staff account by Cando Creative Flooring. Other payments were made into that account by tradesmen, or flooring installers, and what looked to Mr Delport to be a personal credit card. Mr Claxton was stood down and an investigation into potential misconduct started.

[82] The volume of transactions through Mr Claxton's staff account was concerning to Mr Delport. However, at the disciplinary meeting Mr Claxton gave as reasons for the use of his staff account:

(a) Some of the purchases were for his own use and he produced photographs of carpet said to have been laid in his home to illustrate the point.

(b) Some purchases were for contractors and sub-contractors to provide them with staff discount and that had been an approved practice under previous management.

(c) Mr Moore knew about Mr Claxton running his own business from the store.

(d) He was buying product for family and as part of that explanation referred to his mother, or mother-in-law, and said that payments had been made on her behalf.

(e) He acknowledged paying using a debit card.

[83] The meeting discussed the fact that Mr Claxton was a director of Cando Creative Flooring. His explanation was that the company's business did not conflict with Smiths City's business because:

(a) He never dealt with Smiths City customers.

(b) He only dealt with people who could not get credit through Smiths City.

(c) He was working on commercial flooring in Auckland with some property developers, where Smiths City did not have a presence.

(d) His business, and Smiths City's business, were completely separate.

[84] Mr Claxton, as a seemingly trustworthy and long-serving employee, was believed. Mr Delport wrote him a letter on 5 April 2018, the subject of which was the disciplinary investigation about the volume of flooring sales processed through his staff account over the preceding 12 months. Mr Delport's letter recorded that, as a result of Mr Claxton's responses and further investigations based on them, he had determined that this matter was "not disciplinary". Mr Claxton was informed that no further action would be taken but that certain documentation would remain on his personnel file for information purposes.

[85] Mr Delport's letter stated that the transactions contravened the staff purchasing policy, but were excused on this occasion because the explanation that historical practices allowed these types of transactions was accepted. The letter went on to state that what had happened would not be deemed to be deliberately fraudulent or malicious. Having excused these transactions, the staff purchasing policy was re-stated. Mr Claxton was advised that any further breaches of the policy would be considered disciplinary and dealt with accordingly.

[86] Mr Claxton considered Mr Delport's inquiry to have excused his actions. What he did not acknowledge, however, was that he misled Mr Delport about the nature and extent of the competing business. His business was not confined to Auckland as he claimed. In fact, he may not have had any transactions there beyond dealing with one property developer. The rest of his transactions were in Christchurch directly competing with Smiths City.

[87] In responding to Mr Delport, Mr Claxton minimised what he was doing to deflect attention away from himself. The limited disclosures he made were about his staff account and did not touch on his dealings with Ms Wilde or the other accounts he used. That meant he was commenting on transactions amounting to about $19,000 when in reality over about the previous three years the value of his personal transactions probably exceeded $400,000. He did not mention having his carpets stored at Smiths City's premises or the underlay he imported from China and sold from the store. He did not mention any of the customers whose business was diverted away from Smiths City. The investigation did not stop Mr Claxton who continued to behave as he had previously done despite being on notice that his behaviour was unacceptable.

[88] I am satisfied Mr Claxton did not have permission to operate a competing business.

Was competition a breach of the employment agreement?

[89] I accept Mr Goldstein's submissions that there were multiple breaches by Mr Claxton of the employment agreement with Smiths City he signed in 2009.

[90] Under the employment agreement Mr Claxton agreed to abide by any rules, policies and procedures Smiths City created from time to time. One of those policies prevented an employee, without prior written consent, from engaging in any business or commercial activity which conflicted with, or was likely to conflict with, the employee's ability to perform duties for Smiths City. It prohibited any employee from using its assets or property for any unlawful or unauthorised purposes.

[91] The same policy prohibited an employee, without prior consent, from influencing negotiations or transactions between Smiths City and its suppliers, contractors, clients, or other parties for personal gain. Employees were also prevented from serving on the board of directors of a competitor company or acting in any other capacity for a competitor without consent.

[92] It will be apparent from the discussion of what happened that Mr Claxton had a conflict of interest and it existed for a very long time. He competed with Smiths City in his arrangements with Ms Wilde, the business he conducted on his own account and through Cando Creative Flooring. He used Smiths City's property to store his carpet and to show it to customers. He influenced potential transactions with Smiths City's customers by diverting them to himself for personal gain. He incorporated Cando Creative Flooring and was a director of that company, and Cando Creative Installs, contravening the agreement not to take up any directorships of competitors without consent.

[93] Mr Claxton breached clause 18(d)(5) of the employment agreement to:

> Not turn his/her personal knowledge or influence over any employees, clients, suppliers, customers or contractors of the Employer to his own benefit or indirect benefit.

[94] Mr Claxton exercised influence over customers in some cases for a direct benefit because the profit stayed with him or Cando Creative Flooring. In other cases it was more indirect, such as when he conducted business with Ms Wilde and billed a consultancy fee to her company for his share of the profit.

[95] Mr Claxton breached cl 19 of the employment agreement. Under that provision he was not, without prior written approval from Smiths City, to engage in

any activity for remuneration or otherwise that "may impinge on the proper performance of the Employee's responsibilities or duties". As is evident from the time Mr Claxton spent conducting his own business, such as sending emails for Cando Creative Flooring from his Smiths City email address during work time, he was not dedicating his full-time attention to his responsibilities to Smiths City.

[96] When Mr Claxton signed the employment agreement, he agreed to work the hours necessary to properly and effectively perform his duties for "at least 40 hours per week". He was required to be present and on duty during the hours and days in a schedule to the agreement. The schedule was not provided to the Court and, in fact, may never have been part of the agreement. However, the underlying purpose of the agreement was that Mr Claxton was to devote his full time and attention during his working hours to Smiths City's business. He did not do that. He misused the trust placed in him, and the autonomy that flowed from it, to his advantage by pursuing his own business interests.

[97] Smiths City has proved Mr Claxton breached the employment agreement.

Did Mr Claxton breach the duty of fidelity?

[98] Employees owe a duty of fidelity to their employer. The duty is broken when there is conduct that undermines the relationship of trust and confidence between employer and employee.[4]

[99] Mr Goldstein argued that the duty of fidelity has a number of features relevant to this case including:

(a) That it precludes an employee from using the employer's time to conduct activities in competition with the employer.

---

4 *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 at [517] referring to the earlier comments by the Court of Appeal in *Tisco v Communication and Energy Workers' Union* [1993] 2 ERNZ 779 at 782. See also *Schilling v Kidd Garrett Ltd* [1997] 1 NZLR 243 (CA).

(b) It imposes an obligation to act at all times in the interests of the employer, specifically that competing with the employer is incompatible with it.

(c) That the employee must not use business opportunities arising during the employment for his or her personal advantage without the consent of the employer. In order to obtain that consent it is necessary that the employer has full knowledge of the circumstances so that an informed decision is made.

(d) A failure to disclose relevant information to the employer, about the employee's business, is a breach.

[100] Mr Goldstein submitted that the duty is more extensive when applied to senior employees, relying on *Rooney Earthmoving Ltd v McTague*.[5] In that case Judge Travis considered the duty of fidelity in the following proposition:[6]

> During the employment the employee is under a duty to do nothing deliberately that is likely, by ordinary standards of foresight, to injure the employer's business. The prohibition includes competing with the employer directly or by working at the same time for a competitor. Competing for this purpose can in turn include hostile acts during the employment and preparation for competing after it has ended. …

[101] Judge Travis found that the duty included precluding soliciting clients prior to departure and:[7]

> …any other acts by the employer that involve an actual incompatibility in important respects that the employment relationship or a conflict with the interests of the employer, to serve which it remains the employee's duty so long as the employment subsists. …

[102] In that case the Court held that in relation to a senior employee involved in establishing a competing business that it was:[8]

---

5 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240, [2012] ERNZ 273.

6 At [140] by reference to comments by Chief Judge Goddard in *Ongley Wilson Real Estate Ltd v Burrows* [1999] 1 ERNZ 231 stated in reliance on *Walden v Barrance* [1996] 2 ERNZ 598,616.

7 Referring to *Blyth Chemicals v Bushnell* (1933) 49 CLR 66.

8 *Rooney Earthmoving*, above n 5, at [141].

> …no great extension of the duty of fidelity or trust and confidence to require that employee to report that conduct to the employer. That must be equally so when the conduct in question is being performed either by the employee or at that employee's instigation or where he or she is complicit in that conduct. …

[103] *Rooney Earthmoving* stopped short of concluding that the duty required all employees to disclose their plans to leave to begin competing businesses. To extend the duty that far would undermine the freedom of movement of employees.[9]

[104] I agree with the conclusions in *Rooney Earthmoving*, about the extent of the duty of fidelity, especially as it applies to senior employees in positions similar to the one held by Mr Claxton. Given his senior position, he breached the duty by failing to advise Smiths City before he began to compete with it that he intended to do that and subsequently by not disclosing that he was competing with it. He also breached the duty by failing to disclose Mr Milne's competing activities and plan to establish a competing business.

[105] There is another area where Mr Claxton breached the duty of fidelity not previously touched on. Immediately before his employment ended he emailed to himself, from a Smiths City computer, confidential information intended for the use of Cando Creative Flooring. This information was about flooring installation targets, profitability spreadsheets, laying profitability information from 2017, a template for flooring quotes, an installers contract, site safe cards and a pricelist.

What remedies are available to Smiths City?

[106] Smiths City sought an inquiry into damages arising from Mr Claxton's breaches. While expressed as an inquiry the claim was also described as being about "unjust enrichment". The use of that description was the source of disagreement over the appropriateness of the way Smiths City assessed the damages it claimed.

[107] Smiths City sought to have Mr Claxton account to it for the net profit made by him over the six years before it issued proceedings. Smiths City's accounting expert, Sandra James, assessed the profit made by Mr Claxton through his various business

---

9 At [141].

interests to calculate the sum claimed from him. Ms James was instructed to calculate Smiths City's financial losses on the basis she described as "unjust enrichment (if any)". She explained that meant to her an assessment on the financial gains by Mr Claxton at Smiths City's expense.

[108] Ms Dalziel criticised this method as flawed on the basis that the use of unjust enrichment was misplaced in a claim for breach of contract. Before considering those competing arguments, it is necessary to describe what the accounting investigation showed.

[109] The period of Ms James' inquiry was from 1 April 2013 to 31 January 2019. Those dates appear to have been selected by Smiths City because it considered anything more would be met with a limitation defence.[10] She acknowledged that Mr Claxton ceased employment in mid-February 2019.

[110] Ms James was given access to financial documents obtained from disclosure recording some, but not all, transactions from 4 October 2011. She was supplied with bank statements, supplier invoices, GST returns, GST working papers, financial statements, a general ledger, sales journal listing, income tax returns and sundry documents. She conducted her financial analysis using a conventional financial year ending 31 March.

[111] Ms James' analysis fell into two parts. The first part was when Mr Claxton operated in his own name and included transactions with Ms Wilde's company. The second part was after the incorporation of Cando Creative Flooring and ran from August 2017 onwards.

[112] There were limitations to Ms James' analysis. The first limitation she mentioned was not knowing if there was any other revenue from the flooring business that had not been declared because it was received in cash, not banked, or deposited into a bank account not disclosed to her.

---

[10] Employment Relations Act 2000, s 142.

[113] The second limitation was not knowing if any costs associated with, or attributed to, revenue had not been declared because it was paid in cash or was paid from a bank account not disclosed to her.

[114] The third limitation was that when Mr Claxton was operating as a sole trader:

(a) no financial statements or records of the operating results were disclosed;

(b) no income tax returns were provided to show any declaration of income derived from the carpet business; and

(c) very few invoices were disclosed.

[115] As to the last point, in paragraph [114], Ms James noted that for the period from 18 April 2012 to 14 July 2016 only 39 sales invoices were disclosed. However, by referring to the sequence of numbers on invoices supplied to her, she considered that there were likely to be other invoices that were not disclosed.

[116] The final limitation Ms James mentioned was that very few suppliers' invoices were disclosed. Those that were did not support all costs or payments made. She also did not know if any of those invoices that were disclosed were submitted to Smiths City and paid by it.

[117] Despite those limitations the information available to Ms James enabled her to construct an assessment of financial gain she attributed to Mr Claxton during the review period. She described this method as a way of showing profit, benefit, or gain acquired by the party in breach, during the review period. It involved identifying the revenue earned from the alleged breaches and deducting associated purchase costs, costs of installation and delivery.

[118] This method did not involve deducting the costs Smiths City would have incurred to complete the same transactions. Ms James' opinion was that the method she used was commonly applied where a claim was made for breach of fiduciary duty (which is not the case here) or breach of an employment agreement.

[119] In summary Ms James' calculations showed a financial gain attributed to Mr Claxton's activities over six years as $827,301.70 as follows:

Revenue	$2,096,886.53
Less Associated Costs Attributed to Revenue	-$1,269,584.83
Financial Gain	$827,301.70

This was a combined result of Mr Claxton's business as a sole trader and through the company Cando Creative Flooring.

[120] Ms James explained that, while Mr Claxton was operating his business as a sole trader, he used a bank account in his son's name. It was common ground that business-related payments were made into that account. When asked about this bank account Mr Claxton insisted that, while it was in his son's name, it was his wife's account and was treated by them accordingly. No decision is required about that subject other than to note, as Ms James did, that it was an unorthodox way for a business to receive and make payments.

[121] Ms James did not attribute costs to the business revenue she assessed between 4 October 2011 and 14 July 2016. She had not been able to identify any withdrawals from Mr Claxton's son's bank account during that time that could be attributed to earning business revenue. The first withdrawal that could be attributed to it occurred on 15 July 2016 and was a payment to Mr Milne. The first suppliers invoice disclosed was dated 17 February 2017.

[122] Ms James was illustrating the paucity of information available to undertake the assessment. For completeness she drew attention to matters that were not known and, I consider, not adequately explained by Mr Claxton:

(a) Where the supplies of inventory were sourced when Mr Claxton was operating the carpet business as a sole trader.

(b) How those supplies were paid for.

[123] Ms James said no financial statements or records of the business operating results were disclosed for the period of time Mr Claxton traded on his own behalf (meaning through Ms Wilde's Can Do Flooring and before he incorporated Cando Creative Flooring). There were few sales invoices and suppliers' invoices disclosed to support the business transactions identified in her review of the bank account records. She did not make any allowance for closing inventory as at 31 January 2019. That was because the information was not disclosed to her and she did not know what it was. She also did not know, because the information was not disclosed, what sales were made after 31 January 2019 from inventory that existed at that date.

[124] Ms James did receive bank account statements in Mr Claxton's son's name from July 2011 to February 2019. Bank statements for the same period of time for Ms Douglas were made available. From them Ms James was able to identify that the first carpet business-related transaction during this period of time was on 1 October 2013.

[125] Two bank accounts were opened in the name of Cando Creative Flooring on 29 August 2017. The bank account details supplied to her for Cando Creative Installs show it was opened on 5 February 2019, outside of her assessment period.

[126] Ms James concluded that the financial gain Mr Claxton obtained when he operated as a sole trader was $787,393.34 as follows:

Business Revenue	$990,203.21
Less Associated Costs Attributed to Revenue	-$202,809.87
Financial Gain	$787,393.34

[127] Ms James reached this conclusion by constructing a financial analysis from the bank account in Mr Claxton's son's name, a step that was necessary because there were no financial statements or records of the operating results of the business. She observed, without contradiction, that there were very few sales invoices and supplier's invoices disclosed in that period relating to the transactions shown in the bank account statements she inspected.

[128] From Ms James' analysis the bank account in Mr Claxton's son's name was routinely used for business transactions.[11] She identified examples where money paid into the son's account was transferred into an account held by Cando Creative Flooring.

[129] Ms James isolated revenue earned by Mr Claxton when he was trading in his own name of $1,143,975.29. An adjustment was made for sums deposited into Mr Claxton's son's account and then transferred to Cando Creative Flooring's account. With that adjustment the total revenue assessed as having been earned by Mr Claxton and deposited into this account from October 2011 to January 2019 was $1,138,879.98.

[130] To offset the income attributed to Mr Claxton's businesses Ms James prepared a schedule of business and personal costs. She identified withdrawals from the account in Mr Claxton's son's name as either being business related or personal. She ascertained that no associated costs attributed to business revenue including costs of inventory, or carpet installation, were identified as coming from this account in the period from 4 October 2011 to 14 July 2016.

[131] The records available to Ms James for Cando Creative Flooring were more complete. She was able to ascertain costs associated with revenue earned from the company's general ledger and relevant financial statements.

[132] Ms James assessed that between 23 August 2017 (when the company was incorporated) and 31 January 2019 the financial gain was $304,377.01. From August 2017 to January 2019 there were 180 sales. The revenue during the relevant period was $1,051,379.60. Costs during that period were $747,002.59. While the accounting records made it possible for Ms James to assess revenue and associated costs she made some adjustments that were, at least initially, the subject of disagreement. Ms James' adjustments were all for the period from 31 March 2018 to 31 January 2019.

---

[11] Between October 2011 and January 2019 deposits into his account totalled $1,143,975.29. In the same time period withdrawals totalled $1,144,015.07.

[133] The net position, in Ms James' assessment, was that the overall financial benefit enjoyed by Mr Claxton from all of his business activities during her assessment period came to $827,301.70. That was assessed as revenue of $2,096,886.53 less costs attributed to that revenue of $1,269,584.83.

[134] Mr Claxton relied on expert accounting evidence from Belinda Canton. Ms Canton made several criticisms of Ms James' analysis. Her first criticism was about a claim made by Mr Claxton and Mr Milne that Smiths City had assigned causes of action against them to another company, Smiths City (2020) Ltd, and could not, consequently, pursue a remedy against them. That issue has been dealt with previously and does not need to be revisited.[12]

[135] Ms Canton's second criticism was that, in any event, Smiths City had been paid for the value of this claim against Mr Claxton in the sale and purchase between the receivers and Smiths City (2020). That issue was effectively dealt with in the earlier judgment.[13] In any event, Ms Canton was not familiar with that transaction beyond instructions given to her by Mr Claxton's counsel and the receivers were not called to give evidence. While Smiths City was paid for the sale and purchase of its business there is insufficient evidence from which I could satisfactorily conclude that the receivers have, in some way, received consideration encompassing the subject matter of this litigation so that they have sought what would amount to a double recovery.

[136] Ms Canton's third criticism was about Ms James' value judgments in accepting, or rejecting, items as revenue or costs. While initially there was significant disagreement between the experts about what should be brought to account, by the end of the hearing the differences between them had narrowed considerably. Those remaining areas of disagreement are discussed later.

[137] Ms Canton was critical of Ms James' assessment not taking account of Smiths City's true costs where purchases were made from it by Mr Claxton. Her concern was that those purchases involved a margin for the company over and above the cost of the flooring so that the company received some profit on each purchase. Her view was

---

12 *Smiths City (Southern) Ltd (in receivership) v Claxton* [2021] NZEmpC 25, [2021] ERNZ 61.
13 *Smiths City (Southern)*, above n 12.

that this profit must be allowed for and, unless it was, Smiths City would obtain a super-profit. Because Ms James' assessment made no allowance for that profit margin the criticism was that her assessment was unreliable. Ms Canton did not offer her own assessment of what allowance should be made for this profit and said that information about Smiths City's costs, and margins, was requested by her but not supplied.

[138] Ms Canton was also critical that Ms James made no allowance for Smiths City receiving rebates from its suppliers. Smiths City had arrangements with suppliers through which it received a rebate on the cost of carpet it stocked for on-sale, depending on the volume of sales made. Those rebates would, she said, reduce the acquisition cost to Smiths City. In Ms Canton's opinion that meant Smiths City made more of a profit on those transactions that might otherwise appear to be the case.

[139] The last major area of criticism was about how Ms James dealt with the GST. Ms Canton said that Ms James required Mr Claxton to account to Smiths City for the GST he had improperly claimed and kept. Her opinion was that the GST wrongfully retained by Mr Claxton was payable to the Inland Revenue Department not Smiths City. As it happened, during the hearing Ms Canton made a voluntary disclosure to the Inland Revenue Department on Mr Claxton's behalf. Once that step was taken Ms James accepted GST should not be included in her calculations and it was removed from her assessment.

[140] Ms Canton did not make her own damages assessment based on any other method of calculating the loss said to have arisen from Mr Claxton's breaches. Her review of the information made available to her meant that she was aware that Mr Claxton purchased flooring products from Smiths City for his own businesses, but the full extent of his activities was not disclosed to her. For example, at least initially, she took the view that Mr Claxton had dealt only with customers who could not obtain credit from Smiths City when his activities were wider than that.

[141] Ms Canton's opinion was that revenue for the assessment period stood at $1,756,336. From that sum expenditure of $1,097,158.98 should be deducted, so the

net profit from Mr Claxton's activities was $659,177.02. Initially, at least, the difference between expert assessments was $168,124.68.[14]

[142] The areas of disagreement were identified in a joint experts' report to the Court. After further discussion the disagreement reduced to $54,229.99. Ms James adjusted her assessment of financial gain to $732,399.84. Ms Canton adjusted her assessment of the gain to $678,169.85.

[143] The revised difference is represented by the following subjects:

1.	Mobile phone costs said to have been duplicated by Ms Canton	$380.12
2.	J Ewer and E Wilson invoice dated 2 February	$1,000.25
3.	Carpet installation and labour costs (no invoice and no evidence of payment)	$25,300.00
4.	Disputed costs – carpet cleaning	$316.25
5.	Expenses not considered direct and necessary, for Cando Creative Flooring	$27,233.75

[144] There is a minor reconciliation difference of a few cents that is immaterial. I will return to this calculation and the differences between experts after considering the disagreement between Mr Goldstein and Ms Dalziel over the method used to assess the damages claim.

[145] Ms Dalziel began by submitting that Smiths City had not suffered any loss because of the sale by the receivers to Smiths City (2020). That issue has already been dealt with and does not need to be reconsidered.[15] Turning to the method used by Smiths City to assess its claim, Ms Dalziel submitted that it was flawed and, as a consequence, the company had failed to prove any loss. On this analysis, it followed that the worst position Mr Claxton might be in, if the Court found he breached his

---

14 $827,301.70 compared to $659,177.02.
15 *Smiths City (Southern)*, above n 12; and above [135].

duties to the company, was to have a declaration made to that effect and (perhaps) a nominal award of damages.

[146] Underpinning Ms Dalziel's submissions was that the correct method to assess damages where a breach of contract was proved was exemplified by *Rooney Earthmoving v McTague*.[16] In that case the Court's assessment of damages considered the revenue obtained by the defaulting employees from which the plaintiff's operating expenses were deducted to arrive at a net amount to award.

[147] Ms Dalziel described the exercise in *Rooney Earthmoving* as involving two points of reference for the lost revenue pursued by the plaintiff in that case. One was the actual sales by the defaulting employees through a company they incorporated to attempt to acquire the plaintiff's business. The other point of reference was the lost revenue sustained by the plaintiff, fixed by assessing the gap in revenue before and after the defendants offending behaviour occurred. Any resulting uncertainty was addressed by the Court allowing a contingency for those customers who may have taken their business elsewhere regardless of the defendants' activities.

[148] Ms Dalziel's starting proposition was that for any breach of contract claim damages must be assessed to return the plaintiff to the position it would have been in had the breach not occurred (or perhaps put another way, if the contract had been performed) as had been done in *Rooney Earthmoving*. From that starting point she criticised the adoption of an unjust enrichment approach.[17] While not dismissing the possibility that a damages assessment could be undertaken on a different basis than the one in *Rooney Earthmoving*, her argument was that the concept of unjust enrichment was an equitable remedy and not "a passport to do whatever is considered fair and just".[18] Ms Dalziel recognised that an account of profits method might be

---

16 *Rooney Earthmoving*, above n 5.

17 Pointing out that there were occasions when the approach used by the plaintiff was also called disgorgement or restitution.

18 Ms Dalziel's reference was to Andrew Butler "Restitution" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 1237; and Graham Virgo, "Restitution Through the Looking Glass: Restitution within Equity and Equity within Restitution" in J Metzler (ed) *Rationalising Property, Equity and Trusts* (Lexus Nexus, London, 2003) 82 at 46.

available but cautioned that it is only appropriate in exceptional circumstances and the plaintiff, she submitted, had not established such circumstances existed in this case.[19]

[149] To illustrate her point Ms Dalziel asked Ms James why she had not considered a calculation based on the approach in *Rooney Earthmoving*; by using Mr Claxton's revenue and deducting Smiths City's costs. The explanation was that the method used was considered to be a better calculation in the circumstances.

[150] Ms James was asked about the possibility that Mr Claxton's transactions would have involved Smiths City earning a margin anyway, so that the method she used resulted in the company being rewarded with a super-profit. Ms James response was that her analysis did not make an allowance for that margin but it was at best minimal.

[151] Ms James rejected Ms Dalziel's proposition about how to calculate the loss, explaining that the method suggested by Ms Dalziel was unrealistic and impractical, because there were too many variables to consider that would make the task almost impossible. Her view, which was not disputed by Ms Canton, was that to do as Ms Dalziel asked required calculating Smiths City's daily margins on a significant number of transactions, some of which were unknown, over several years.

[152] It also has to be said that this proposition was difficult for Mr Claxton to advance. In many cases he set the company's margin because his authority extended to offering discounts on sales including those he organised for himself through customer accounts. For that matter, not all of Mr Claxton's transactions involved buying and on-selling products purchased from Smiths City.

[153] The variables Ms James was referring to could be summed up as the lack of reliable information to properly support an assessment undertaken as suggested by Ms Dalziel. Those variables included the fact that very few supplier invoices had been made available for significant parts of the time Mr Claxton was operating while employed, the source of the carpet products he sold was frequently unknown, she did not know in many cases how the carpet and installation services were being paid for

---

19 Relying on *Attorney General v Blake* [2001] 1 AC/268.

and there would be difficulties in trying to assess the costs, and margins, Smiths City might have incurred over time.

[154] In some cases, the nature and extent of what Mr Claxton did was only hinted at in the disclosures made, illustrating that the task would have been impractical. The obvious example is that the true extent of Mr Claxton's dealings with Ms Wilde remains unknown given the paucity of available information. The fact that he had a business relationship with her, and that their agreement was to share profits, was only disclosed when Ms Wilde gave evidence. To that could be added the obvious difficulties in attempting to assess Smiths City's costs spread over several years and in deciding whether they would be those attributed to the Northwood store's flooring department, the Northwood store more generally, or the company as a whole.

[155] The effect of Ms Dalziel's submissions would be to require a very rudimentary, and unreliable, calculation of what might be attributed to Smiths City's transaction costs. The alternative, as Ms James said, would be an attempt to assess the costs that would have been attributable to Smiths City's business, on a transaction by transaction basis, over the six years of the claim.

[156] In describing how to assess damages Mr Goldstein and Ms Dalziel both referred to *Attorney General v Blake* but from different perspectives.[20] Mr Goldstein relied on that case for the proposition that the damages are a flexible remedy that respond to the circumstances. Ms Dalziel relied on this case as placing an onus on Smiths City to show why unjust enrichment was the preferable method for calculating damages and that it could only do so if there were exceptional circumstances.

[157] *Blake* involved an admitted spy who sought to profit from what he had done by publishing a memoire in breach of his employment agreement. The House of Lords accepted that the Crown had not suffered a loss but that it could claim the publishing royalties otherwise payable to Mr Blake. In so doing the Court recognised that circumstances may require damages to be measured by reference to the benefit obtained by the wrong doer.

---

[20] *Blake*, above n 19.

[158] Similar comments were made in *Stevens v Premium Real Estate Ltd*.[21] While the Supreme Court's decision in that case was about damages and disgorging commission where a real estate agent had breached fiduciary duties (which was not argued in this case), the observations of Tipping J about gains-based damages are pertinent. Tipping J observed that it is well established that, for certain types of civil wrong, the Courts may award monetary relief based either on the loss caused to the plaintiff or the gain made by the defendant.[22]

[159] I do not share Ms Dalziel's view that *Rooney Earthmoving* is the touchstone for assessments of damages in all cases where a breach of an employment agreement has been proved. What damages are appropriate is a question of fact. The key purpose in assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. Determining the appropriate basis for quantification for a loss arising from such a breach can be a difficult exercise.[23] It may be necessary for the Court to make the best assessment it can, being satisfied on the balance of probabilities that the conclusion as to loss is correct.[24] A pragmatic view is sometimes required.[25]

[160] The real issue was whether Ms James' method was the best fit in the circumstances to properly compensate Smiths City for the breaches it established. It is noteworthy that Ms Canton agreed with a proposition put to her by the Court, to the effect that there may be more than one method by which compensation might be assessed and it would be necessary to find the method that best fits the circumstances.

[161] I agree with Ms James that it would be artificial and impractical to have expected an assessment to be undertaken which tracked the costs Smiths City might have been expected to incur had it undertaken transactions Mr Claxton was responsible for in breach of the employment agreement. The method used, while not perfect, was the best fit in the circumstances. I consider that accepting Ms James' method of

---

21 *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 38.

22 At [99].

23 See for general discussion Burrows, Finn and Todd (eds) *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at ch 12.

24 See for example *Cemix Ltd v Flowcrete Asia SDN BHD* HC Auckland CIV-2006-404-001537, 2 April 2008.

25 Burrows, Finn and Todd, above n 23; and see for example *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] NZLR 726.

calculating damages is appropriate in this case and is consistent with the Court's equity and good conscience jurisdiction.[26]

[162] That leaves for assessment the outstanding differences between Ms James and Ms Canton. I prefer Ms James' assessment. By the end of the hearing there were five remaining areas of disagreement. They were a claim that there had been a duplication of mobile phone costs by Mr Canton that needed to be removed, attribution of an invoice for Ewer and Wilson of $1,000, disputed carpet cleaning costs of $316.25 and two larger amounts, one being a proposed adjustment of $25,300 for carpet installation and labour costs where there was no invoice or evidence of payment. The other large amount was labelled, in a joint report from the experts, as expenses not "direct and necessary" relating to Cando Creative Flooring of $27,233.75. There is a small reconciliation difference that is not material.

[163] I would not make the adjustments of $25,300 and $27,233.75 given the absence of proof that the expense was a business cost. By and large the bona fides of those transactions appears to have relied on advice from Mr Claxton to Ms Canton. For reasons that do not need to be repeated it is inappropriate to accept his view of what costs ought to be brought to account. Obviously mobile phone costs that have been duplicated need to be removed. That leaves the Ewer and Wilson account and disputed carpet cleaning costs but there are no reasons to make these deductions.

[164] It should be noted that no claim was made that Mr Claxton should be recompensed for his effort or skills in securing the revenue, presumably because during the time he was acting in his own interests he was being paid a salary by Smiths City.

[165] I would not make any adjustment to Ms James' assessment to take account of either the claim that Smiths City would receive a super-profit or that it has obtained a return through rebates. I prefer Ms James' assessment that it is likely any margin made by Smiths City would have been minimal, especially bearing in mind that Mr Claxton had the autonomy to set margins and could do so at any figure without any real concern that his actions would draw attention. Several witnesses said that Smiths City was not

---

[26] Employment Relations Act 2000, s 189.

concerned by the margin on any particular transaction but, instead, concentrated on the overall margin for the business. In the absence of reliable information about the margin set by Mr Claxton on product he purchased from Smiths City and the margin subsequently charged by him when that product was on-sold it cannot be concluded that a super-profit would actually result.

[166] There was also an assumption underpinning this part of the argument that all transactions were channelled through Smiths City and there can be no confidence that Mr Claxton did so.

[167] As to the rebates, that was something of a red herring. Smiths City did not gain some extra advantage out of being able to claim a rebate that somehow needed to be reflected in the calculation of damages. Smiths City was entitled to the rebate regardless, and it has no bearing on the calculation.

[168] In addition to an inquiry into damages Smiths City sought general damages to reflect damage to its reputation. Mr Goldstein accepted that, if the claim for an inquiry into damages was successful, there was no basis to continue the claim for general damages. It was not pursued. If it had been, the claim would not have succeeded given that Smiths City will be compensated by the damages that are awarded.

[169] There were two claims for special damages. The first claim was to recover fees paid to licensed private investigators for professional services supplied in January, February and March 2019. One invoice was for $18,911.75 and the other was for $2,044.13. The nature of that surveillance was described by Stephen Wilson, Smiths City's former Loss Prevention Investigator. Basically, because Mr Claxton (and for that matter Mr Milne) were thought to be working in competition with Smiths City while on paid leave shortly before their employment ended, the private investigators were asked to make inquiries.

[170] Surveillance was undertaken and photographs and other information was presented to the Court to attempt to show further breaches by Mr Claxton (and Mr Milne). The information gleaned was, however, not compelling. I am not persuaded

that it is appropriate for these invoices to form part of the damages awarded against Mr Claxton (or Mr Milne).

[171] The second claim for special damages was for the value of executive time expended in investigating Mr Claxton, and Mr Milne, and in preparation for this case. A calculation was presented breaking down that executive time into charge out rates per hour and attributing to named executives the number of hours said to have been occupied with this case. The claim was for about $110,000. What those executives did, and the connection between their conduct and Mr Claxton's breaches, was not described in any detail. I am not satisfied that was sufficient to establish the claim and it is therefore unsuccessful.

[172] The damages payable by Mr Claxton to Smiths City are (rounded) $732,399.

Mr Claxton's counterclaim

[173] Mr Claxton's counterclaim was for money said to be due and owing to him under an incentive scheme that would pay $500 per month on achieving a flooring laying target of $45,000 per month. He claimed 68 months' worth of incentives totalling $34,000 plus interest. The claim was said to run throughout the whole of his employment from 2012 through until 2019.

[174] Mr Claxton's claim can be dealt with briefly. When giving evidence he acknowledged having been paid for all incentives and bonuses except one called a "magic bonus". That is not what he claimed was owing to him or what Ms Dalziel described the claim as in her opening address. He did not say any incentive payment due to him was unpaid. Despite that unpromising start, Mr Claxton did not say how the claimed $34,000 was made up other than that it was for sums payable monthly. No evidence was presented about whether the targets set for him were achieved or, if they were, how and when that happened.

[175] Valerie Wright, a senior Smiths City employee, undertook a roadshow in 2017 and 2018 travelling to each store to tell staff about proposed changes to the incentive Smiths City paid its employees. The roadshows were necessary because Smiths City

decided to remove all of the previous incentives and replace them, so it needed to explain those changes to the staff. The first of those roadshows, in 2017, changed the method by which incentive payments were to be calculated. The second one, in 2018, stopped them altogether because the previous years' changes had not worked. Staff were paid to attend these roadshows.

[176] Mr Claxton attempted to say that he was unaware of these roadshows and may have gone so far as to try to say he did not attend them. I do not accept that. For something as significant as income incentives it is unlikely that he did not attend.

[177] In any event, Ms Wright also said that all incentive payments that were due and owing to Mr Claxton were paid. From Ms Wright's evidence it was obvious that from 1 August 2017 the magic bonus, the one that Mr Claxton is now saying was owing to him, was not paid after 1 August 2017. If that is correct, it was because of the changes notified to staff during the roadshows and was a decision permitted by the employment agreement Mr Claxton had with Smiths City.

[178] Ms Wright said, and I accept, that Mr Claxton was paid all of the incentive payments owed to him. She was not contradicted. For completeness, Mr Claxton's payslips showed he routinely received incentive payments.

[179] I am satisfied that Mr Claxton was paid for all incentive payments due and owing to him. His counterclaim fails.

Claims Against Mr Milne

[180] Nicolas Milne started working for Smiths City on 26 April 2006 as an apprentice floorcoverings installer. He completed his apprenticeship and worked for Smiths City as a qualified tradesman. On 1 September 2013 he was promoted to the position of Flooring Installation Manager based at the company's Northwood store. In this manager's position he reported to Mr Claxton. A new employment agreement as signed on 1 September 2017.

Was Mr Milne operating a business that competed with Smiths City?

[181] When Mr Milne was first employed he signed a separate agreement with Smiths City about the use of his trade skills outside working hours (trade skills agreement). The agreement restricted what he could do. It applied to jobs that might be undertaken by him, for his own benefit, referred to during the hearing as "foreigners", "cash jobs" or "cashies". In some respects the trade skills agreement repeated the employment agreement.

[182] Under the trade skills agreement Mr Milne was prevented from setting up a business in competition with Smiths City and undertaking any outside work conflicting with his responsibilities to the company. Permission was to be sought from a manager before undertaking any extra work. The trade skills agreement included the following paragraphs:

> The use of these trade skills is to carry out jobs that are referred to generally as "Foreigners".
>
> 1. The Employee will not set up in business in competition with the Employer during the term of their employment with the Employer.
> 2. The Employee shall not seek or accept any "foreigner" that is in conflict with their duty to the Employer.
> 3. The Employee shall seek permission of their manager prior to starting or accepting each "foreigner".
> 4. The Employee may use their trade skills for "foreigners" outside their normal hours of work provided that,
>
>   - The company vehicle shall not be used.
>   - The tools and equipment provided to the Employee for their normal work related duties shall not be used.
>   - The materials supplied to the Employee for work related duties shall not be used.
>   - The trading name of the Employer is not used.

[183] The trade skills agreement stated that Smiths City's staff discount policy applied to purchases from it of any materials to be used in "foreigners". That agreement reminded Mr Milne that the staff policy provided a discount for purchases of goods that were for the use of the employee and dependants only. The trade skills agreement ended by reminding Mr Milne that any other purchase was subject to the company's usual trading terms for members of the public.

[184] The trade skills agreement was not limited to his time as an apprentice. Mr Brown, Mr Milne's advocate, did not attempt to argue that it was subsequently overtaken or ceased to have effect.

[185] When Mr Milne was promoted the employment agreement recorded his new position as Flooring Installation Manager. The new employment agreement contained a clause dealing with confidentiality, conflicts of interest and private interests largely repeating the restrictions in the trade skills agreement. The employment agreement prohibited the use or disclosure of confidential information relating to Smiths City's affairs, clients or business practices except so far as reasonably necessary to fulfil the job.

[186] Under the employment agreement Mr Milne was required to devote his full-time and attendances to his job during working hours. He was prohibited from taking on any employment, business or other interests, which had the potential to impact on his time and attendances during working hours without Smiths City's prior written consent. He was also under a positive duty to inform Smiths City of any business activities or secondary employment in which he became involved.

[187] For the reasons that follow, I find that Mr Milne was operating a flooring installation business that competed with Smiths City and knowingly breached the employment agreement and the trade skills agreement.

[188] Mr Milne did not initially concede that he operated his own business while employed by Smiths City without first obtaining permission. His reply to Smiths City's claim was that the company knew its qualified installers, including him, undertook work for themselves. He stopped short of acknowledging the true extent of his activity and, in referring to the knowledge he attributed to Smiths City, chose not to mention the employment agreement that restricted his ability to work on "foreigners" without permission.

[189] Mr Milne was in a bind, however, because Ms James identified payments to him that only made sense if he was in business. Nevertheless, he attempted to say that

some of the transactions she discovered from pursuing Mr Claxton's financial records were not related to flooring installation and could not be shown to be.

[190] Mr Milne eventually acknowledged that he undertook some work for Mr Claxton as early as December 2015. He did so because he was named as the installer on an invoice by Mr Claxton, to Can Do Flooring, dated 16 December 2015. It will be recalled that Can Do Flooring was Ms Wilde's company.

[191] When asked about working for Mr Claxton, in the manner suggested by the December invoice, Mr Milne passed it off as no more than getting a job done on the weekend. Eventually he conceded that he did "the odd job here and there" and acknowledged knowing Mr Claxton controlled Can Do Flooring (prior to Cando Creative Flooring).

[192] It transpired that Mr Milne had done quite a few jobs for Mr Claxton. Ms James' reconciliation showed Mr Milne received payments from Mr Claxton on several other occasions, in 2016 and 2017. Those payments were:

Date	Amount
15 July 2016	$2,000
11 August 2016	$3,000
30 August 2016	$2,300
13 September 2016	$1,800
21 December 2016	$7,000
18 April 2017	$4,700
20 June 2017	$3,000
29 August 2017	$6,250
Adjustment overpayment	-$1,000
Total	**$29,050**

[193] Ms James' inquiries showed that from 14 November 2017 until 22 May 2018 Mr Milne undertook work for Cando Creative Flooring totalling $54,518. There were five payments during that time as follows:

Date	Amount
14 November 2017	$1,400
16 February 2018	$16,975
7 May 2018	$10,000
7 May 2018	$20,000
21 May 2018	$6,143
Total	**$54,518**

[194] The combined total of transactions identified by Ms James was $83,568. The frequency of these payments suggested more than an occasional job.

[195] Mr Milne's explanation for the earlier payments by Mr Claxton to him (from July 2016 – August 2017) was that they were not for carpet laying but other private transactions. A shared interest in classic cars was mentioned as a reason for some of them. I do not accept that explanation.

[196] In fact, Mr Milne worked for himself, eventually describing his business as "Tip Top Flooring", to undertake installations for Mr Claxton and/or Cando Creative Flooring and he invoiced for his services.

[197] The details on several invoices rendered by Mr Milne as Tip Top Flooring were less than honest. Mr Milne admitted that:

(a) The business address on the invoices was false.

(b) What purported to be the cell phone number on the invoices was false.

(c) The first invoice in the sequence disclosed to Smiths City was numbered 134, but it was not preceded by 133 other invoices.

(d) GST was claimed but Mr Milne was not registered for that tax.[27]

[27] A voluntary disclosure has now been made to Inland Revenue Department on Mr Milne's behalf.

(e) Money due on some invoices was paid into bank accounts held in names other than his own.

[198] The deceptive nature of these invoices was telling. Mr Milne attempted to explain away some invoices directing payment into his brother's bank account by claiming that he was paying off a debt owed to him. He could not adequately explain why the combined total of the invoices paid into his brother's bank account was $27,000 when the debt was said to be $22,000. He eventually admitted being paid the balance.

[199] Another invoice directed payment into his father-in-law's bank account. This time the explanation was that Mr Milne was repaying a loan to buy a house. Other payments were made into an account in his young son's name, a payment method Mr Milne could not satisfactorily explain.

[200] It was put to Mr Milne that the way in which he presented the Tip Top Flooring invoices, with the false information on them and directing payment to be made in bank accounts not in his name, was an attempt to hide the fact that he was in a competing business. He denied that but his denial was unconvincing. Mr Milne knew he was involved in business for himself that comfortably exceeded anything he could have considered complied with the trade skills agreement or his employment agreement.

[201] Mr Milne also knew Mr Claxton was operating a competing business through Can Do Flooring, and subsequently Cando Creative Flooring, and that both of those companies competed with Smiths City. I find that Mr Milne knew Mr Claxton was competing with Smiths City from at least late 2015. He also knew that the competition was ongoing because he continued to work for Mr Claxton and, in 2018, began to make plans with him for the creation of Cando Creative Installs Ltd.

Did Mr Milne have permission?

[202] When pressed, Mr Milne claimed Mr Moore had given express permission to him to conduct this competing business. Mr Moore was not questioned about having given permission to Mr Milne even though he gave evidence twice. The allegation

that Mr Moore had done so was not in Mr Milne's evidence in chief and it emerged only when it became apparent that he was struggling to explain his activities.

[203] Mr Milne's evidence was unreliable. Where there is a conflict between his evidence and any witness called for Smiths City contradicting that evidence, I prefer what was said by the other witness.

[204] The elaborate steps taken by Mr Milne were an attempt to conceal what he was doing. Those steps show he knew his private work competed with Smiths City and was in breach of his agreements with that company. They also show that he knew he did not have permission to operate his own business.

Was the competing business a breach of the employment agreement?

[205] For the reasons that follow, the answer to the question is yes. Under the employment agreements Mr Milne entered into with Smiths City he was not entitled to undertake or be involved in a competing business without obtaining the company's prior written consent. He was also constrained by the trade skills agreement.

[206] Mr Milne made no effort to obtain consent from Mr Moore, or anyone else at Smiths City. That much is apparent from the steps he took to attempt to hide the existence and extent of his business. It is also apparent that Mr Milne did not have Mr Moore's implied consent. Most of Mr Milne's response involved saying that it was common for tradespeople to undertake "foreigners", and that was something Mr Moore knew and accepted.

[207] Several former installers who worked for Smiths City, as employees or as contractors, gave evidence. By and large, they said that it was accepted in the industry that installers might do work for themselves outside of conventional business hours, perhaps for a family member or a friend, at favourable rates.

[208] Smiths City accepted the inevitable, that it would not know if its installers were working in this way unless that was disclosed, and it was better to allow the transaction to proceed in a limited and reasonably controlled way than attempt in vain to prevent

it. That was why Smiths City's policy (and the trade skills agreement) was that these jobs were only to be for family members and friends, to be undertaken outside normal working hours and that the flooring product had to be purchased from it.

[209] While Mr Moore denied giving Mr Milne express permission, he accepted that tradespeople did work for themselves on the "family and friends" basis recognised by Smiths City's policy. What Smiths City allowed was a far cry from what Mr Milne was doing.

[210] When was this competing work done? Mr Milne was clearly installing floor covering for himself, for Cando Creative Flooring, Mr Claxton, and Cando Creative Installs well before his employment with Smiths City ended. The limited information obtained through Ms James' analysis showed the activities ranged over about five or six years from about 2015 onwards.

[211] I do not accept that Mr Milne's installation work was always conducted in his own time. He had a good deal of autonomy not only because he managed tradespeople, but because work took him away from the Northwood store. He also reported to Mr Claxton which suggests supervision undertaken with self-interest in mind. Mr Milne arranged for Smiths City's employed installers to undertake work. He did that for Smiths City and on behalf of either Cando Flooring or Cando Creative Flooring during the working day. There was more than one occasion when installers worked on flooring supplied by Cando Flooring where the customer thought he or she was dealing with Smiths City. That could only have happened if Mr Milne directed the tradespeople to jobs that were for his benefit not Smiths City's benefit. On one occasion, for example, Ms Fraher paid Can Do Flooring for carpet but the installers, who worked during the business day, were wearing tee-shirts with Smiths City's name on them.

[212] I accept Mr Goldstein's submissions that the activities referred to breached the employment agreement between Mr Milne and Smiths City. Under that agreement Mr Milne agreed to devote his full time and attention to his job but he did not do that. He agreed not to take on employment, or be involved in a business, or to have other interests that might impact on his time and attendances while employed, without

obtaining the consent of his employer. He breached that obligation in two ways. First, it is clear that he was diverting time and attention away from the flooring business. Second, he did not obtain consent.

[213] Mr Milne agreed to abide by Smiths City's rules and procedures but did not do that. Under the employment agreement he agreed to notify Smiths City of any business activities in which he became involved during his employment. He did not do that. The reasons for not notifying Smiths City were simple. He did not want to interrupt his extra income or disrupt his future plans.

[214] I am satisfied Mr Milne breached the employment agreement he had with Smiths City.

Did Mr Milne breach the duty of fidelity?

[215] This issue does not need great elaboration. Mr Milne was also in breach of his duty of fidelity. He did so in the work he undertook and in approaches he made to existing Smiths City employees, while he was still employed by the company, to invite them to transfer to Cando Creative Installs. He was successful in one attempt by persuading Aleks Dorrance to resign his employment and begin work with Cando Creative Installs. He approached another Smiths City installer, Dan Jones, and asked him to take up employment with Cando Creative Installs. Mr Jones declined.

[216] Mr Milne breached his duty in two other ways. When he was promoted, in September 2013, he was responsible for all of the floorings installers who worked from Smiths City's Northwood store. That meant he was in charge of their productivity. Part of his responsibility was to keep track of the floor laying work in a profitability sheet. That was a spreadsheet to track the work of each installer and the profitability of the flooring department. It included the costs associated with the individuals as well as the total cost of the installation team. Mr Milne retained those profitability sheets after his job ended. He referred to them in his evidence when discussing work over the years 2012 to 2018.

[217] The second way he breached his duty of fidelity arose from his reasonably senior position and was in not reporting to Smiths City that Mr Claxton was operating a business that competed with it.

[218] The fact that Mr Milne established a business that competed with Smiths City while still employed by it, approached Smiths City employees to change employers and retained its confidential information showed he breached his duty of fidelity to Smiths City.

What remedies are available?

[219] Smiths City sought damages from Mr Milne using the same approach to the calculation of them as it applied to the claim against Mr Claxton. Mr Goldstein submitted that the methodology was appropriate because it was extremely difficult to accurately assess the losses caused by Mr Milne's actions. The company was unaware, he said, of the true level of Mr Milne's activities as a sole trader; exemplified by the way he was prepared to write invoices for Tip Top Flooring.

[220] Complicating the damages assessment was that Smiths City was not able to track down how much money Mr Milne actually received for the work he undertook. Smiths City could not ascertain reliably when and where he did the work and whether it was all undertaken on Smiths City time or otherwise.

[221] The potential extent of Mr Milne's activities was illustrated by an example calculated by Mr Goldstein. Mr Milne said an installer could lay 20 lineal metres of carpet a day. At the time he left his employment he was being paid $29 per hour. At an assumed charge-out rate of $30 per metre, that would equate to about $600 per day. The income Ms James determined had been received by Mr Milne was $83,568. Mr Goldstein undertook a reverse calculation and submitted that at $600 per day Mr Milne needed about 139 days to earn the amount of money paid into bank accounts on his behalf. Mr Goldstein was not attempting to be literal but to illustrate the extent of Mr Milne's known breaches and to hint at the true extent of them.

[222] I accept Mr Goldstein's submission. As with Mr Claxton, efforts taken by Mr Milne to hide his activities, and the difficulties involved in attempting to identify the costs that Smiths City would have been put to in order to generate the same level of income, make any other method of calculation inadequate.

[223] I find that the damages payable by Mr Milne to Smiths City are $83,568.

Mr Milne's counterclaim

[224] Mr Milne's counterclaim against Smiths City was that his wages were underpaid. He claimed his work began at 7 am but he was only paid from 7.30 am so that he was underpaid by 30 minutes per day.

[225] The losses claimed by Mr Milne were broken down into four parts as follows:

(a) From 2013 to 2016, at 2.5 hours per week, $12,960.

(b) From January 2017 to April 2017, $1,080.

(c) From May 2017 to 2019, $5,800.

(d) Holiday pay on all of those sums in the amount of $1,587.20.

[226] Those payment intervals appear to track changes in Mr Milne's pay over time. In addition, he claimed a bonus of $1,000, negotiated for a project involving work at a particular job, had not been paid to him. The total of Mr Milne's counterclaim was $22,427.20.

[227] Mr Brown argued that the weight of evidence showed Mr Milne usually arriving at work at around 7 am daily and deactivated the alarm system then. That showed, it was said, that he began work on most days at least 30 minutes before his contractual starting time. Mr Brown's submissions relied on his questioning of Ms Wright who, not surprisingly, was unable to say whether Mr Milne started work at 7 am or 7.30 am each day.

[228] I do not accept Mr Brown's submissions or what Mr Milne said about when he started work. He may have been present on many days from 7 am but that is not the same thing as starting work under the terms and conditions of the employment agreement which entitled him to be paid. Contractually work began at 7.30 am. Pay was made up in reliance on timesheets. Mr Milne completed his timesheets and, with some exceptions, filled them in with a start time of 7.30 am. On those occasions where he was directed to start early, and completed his timesheet stating that he began work at 7 am, he was paid from that time.

[229] As to routinely showing 7.30 am on his timesheets rather than 7 am, Mr Milne made a half-hearted attempt to place responsibility for doing so on an instruction said to have been given to him by a clerk in Smiths City's head office. An instruction was attributed to that person that, because his contract required work to start at 7.30 am, the timesheets had to be filled in that way.

[230] While Mr Milne was often at work before his starting time, I do not believe that he was working as he claimed. First, there was never any disagreement about his hours of work and pay from Smiths City on those occasions when he completed his timesheet with an earlier start time. He was paid. Had he routinely started work early it is reasonable to assume other pay claims beginning at 7 am would have been paid. The fact that he did not routinely claim from 7 am suggests he was not working and knew that. Second, he was unable to explain how a clerk, who had no authority over him whatsoever, might have been able to issue an instruction to incorrectly complete timesheets.

[231] As to the bonus, Mr Brown submitted that the withdrawal of the incentives in the roadshows, about which Ms Wright gave evidence, did not apply to Mr Milne. He premised this submission on the basis that Ms Wright was asked if Mr Milne was ever told that he would not be paid the last month, but she did not know. I do not accept that Mr Milne's bonus had been earned by him or was unpaid.

[232] This counterclaim was an attempt by Mr Milne to dampen the effect on him if Smiths City's claim succeeds. There is no substance to the counterclaim and it is dismissed.

Penalties against Cando Creative Flooring and Cando Creative Installs?

[233] Smiths City sought penalties against Cando Creative Flooring and Cando Creative Installs, payable to it.

[234] To be liable to a penalty it is necessary for Smiths City to establish that the companies incited, instigated, aided or abetted a breach of the employment agreements of by Mr Claxton or Mr Milne.[28]

[235] Section 134(2) of the Act embraces encouragement or assistance. It would seem, however, that it is at least necessary to establish that the party alleged to have breached s 134(2) was aware of the employment relationship at the time and intended to interfere with it.[29]

[236] Presumably these companies were pursued because Cando Creative Flooring and Cando Creative Installs were incorporated by Mr Claxton and Mr Milne is a director of Cando Creative Installs. At a stretch it might be possible to say that Mr Claxton and Mr Milne, as directors, have their knowledge imputed to the company.

[237] In the circumstances here, however, it is difficult to see either company as having been involved in inciting, instigating, aiding or abetting the breach. The companies were passive vehicles enabling the breaches. The reality is that the breaches were always by Mr Claxton and Mr Milne. I am not satisfied that it would be appropriate in this case to impose a penalty on either company.

[238] The penalty claims against Cando Creative Flooring and Cando Creative Installs are unsuccessful. Even if Smiths City had succeeded in establishing that a penalty might be appropriate, I would not have made it payable to the company. Imposing a penalty would only, in reality, amount to a backdoor method to augment the damages already awarded.

---

28 Employment Relations Act 2000, s 134.

29 *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)* [2007] ERNZ 252.

Penalty against Ms Douglas?

[239] What was said about Ms Douglas' action was general and vague. At one time, although precisely when is not known, Ms Douglas worked for Smiths City. She was not working there during the time when Mr Claxton was managing the flooring department at Northwood. The extent of her knowledge of Mr Claxton's employment agreement with Smiths City is unknown and there was no evidence from which it might be inferred.

[240] It was established that Ms Douglas assisted Ms Wilde with bookkeeping. She operated the bank account in the name of her son into which substantial payments were made, and paid out, over time. She is a director of the Cando Creative Flooring and undertook tasks for it such as bill paying.

[241] There was no other evidence linking Ms Douglas to any action that might be said to have incited, instigated, aided or abetted a breach by Mr Claxton of the employment agreement he had with Smiths City. I do not regard providing clerical or administrative assistance as sufficient, even though what was done was probably in the knowledge that a substantial sum of money was being paid for business activities.

[242] Smiths City was not able to establish (and really did not try to establish) that Ms Douglas knew anything about the terms and conditions of Mr Claxton's employment. There was no evidence that Ms Douglas knew Mr Claxton was breaching his employment agreement with Smiths City and in some way encouraged him to do that.

[243] I have not put aside one troubling episode that might raise a suspicion about Ms Douglas' activities. On one occasion, when Mr Claxton was working late and left the Northwood store to go home for dinner, Ms Douglas came to the workplace. She took up station at his desk in front of a Smiths City's computer. She was not a Smiths City employee at that time and had no entitlement to be where she was. The fact that she was there was not explored any further by Smiths City. There was, for example, no proof that while there she conducted business for and on behalf of Mr Claxton's competing business.

[244] While Ms Douglas' presence in the workplace raised a suspicion that she knew what was going on that is not enough. I am not prepared to find that this occasion means the threshold has been reached at which it could be said she was inciting, instigating, aiding, or abetting Mr Claxton's breach of his employment agreement with Smiths City.

[245] The claim for a penalty against Ms Douglas is unsuccessful.

Penalty against Mr Claxton and Mr Milne?

[246] That leaves for consideration whether there should be penalties against Mr Claxton and Mr Milne for their breaches. Multiple breaches were claimed. In a global sense the value of the claimed penalties came to many thousands of dollars, but Mr Goldstein said Smiths City would support a penalty being imposed of $10,000 each on Mr Claxton and Mr Milne, on the basis that such an amount would be a finding of disapproval about their activities.

[247] Smiths City's statement of claim asked for any penalty that was awarded to be paid to it. In reality, if that was the outcome, it would augment the damages already ordered to be paid by Mr Claxton and Mr Milne. There is no basis to take that position because Smiths City has been fully recompensed.

[248] The claim for penalties against Mr Claxton and Mr Milne is unsuccessful.

Conclusion

[249] Smiths City has succeeded in establishing its claims against Mr Claxton and Mr Milne. In summary:

(a) Mr Claxton is to pay damages to Smiths City of $732,399.

(b) Mr Milne is to pay damages to Smiths City of $83,568.

(c) The claims for penalties are unsuccessful.

[250] Before the hearing Mr Claxton applied to strike out Smiths City's statement of claim. He did so at a time where the hearing for the substantive proceeding was imminent. The application was deferred to be dealt with as part and parcel of the substantive proceeding. Smiths City's proceeding has succeeded and it follows that the application to strike out must be dismissed.

[251] The costs of these proceedings are reserved. Smiths City may make an application for costs within 20 working days. If any of the defendants against whom penalties were sought consider they may be entitled to seek costs they may apply within the same 20 working days. Mr Claxton and Mr Milne may reply to Smiths City's costs application within a further 15 working days. Smiths City may respond within a further five working days. All costs submissions must be no more than 10 pages long.

K G Smith
Judge

Judgment signed at 5.30 pm on 5 October 2021