IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 10/09
CRC 21/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROONEY EARTHMOVING LIMITED Plaintiff
AND	KELVIN DOUGLAS MCTAGUE First Defendant
AND	CLARENCE HENRY WHITING Second Defendant
AND	KERRY WAYNE BARTLETT Third Defendant

Hearing: 17-21 and 24-28 November, 10 and 15 December 2008
23 and 24 February 2009
(Heard at Christchurch)

Appearances: C H Toogood QC and R S Brown, Counsel for Plaintiff
K E Smith and J Paul, Counsel for First and Third Defendants until 10 December 2008 and for Third Defendant on 15 December 2008
Kelvin Reid and Jane Costigan, Counsel for First Defendant on 15 December 2008 and 23 and 24 February 2009
A C Shaw and A Shakespeare, Counsel for Second Defendant
Kathryn Dalziel, Counsel for Third Defendant on 23 and 24 February 2009

Judgment: 24 August 2009

JUDGMENT OF JUDGE B S TRAVIS

INDEX

Introduction

[1] The plaintiff company Rooney Earthmoving Limited (REL) is seeking substantial damages against the three defendants, its previous employees, for allegedly taking its clients, key personnel, undermining its business and removing confidential information, to assist them to set up a competing company.

[2] The matter came before the Court by way of a de novo challenge to a determination of the Employment Relations Authority, issued on 16 November 2006 (CA 156/06). This found that the second defendant, Mr Whiting, and the third defendant, Mr Bartlett, but not the first defendant, Mr McTague, had breached their employment agreements, although the breaches were not causative of any financial losses to REL, whose claim for damages was then dismissed. REL successfully applied for leave to extend the time for filing its challenge[1]. The trial was on liability only, issues of damages being reserved for future consideration, if necessary.

[3] The evidence was extensive and, as a result of the further disclosure of documents in the Court, somewhat different to that presented to the Authority. Much of the evidence dealt with financial matters such as the turnover of REL and the company set up by the defendants, BMW Contracting Ltd (BMW). At the

[1] *Rooney Earthmoving Ltd v McTague* [2007] ERNZ 356

commencement of the hearing I was advised that all counsel were agreed that interim suppression orders were required of the financial information that was likely to be revealed in these proceedings. I made an order preventing the publication of that material until further order. That order is to remain in force until further order of the Court and therefore no reference to that financial information will be contained in this judgment. The parties, however, will be aware of the material to which I am referring.

The plaintiff's allegations

[4] The plaintiff's amended statement of claim pleads against all defendants that during the course of their employment with REL they were required to act in good faith and with fidelity and not to mislead or deceive REL[2]. This was said to mean that they would not, without the knowledge and consent of REL, compete or assist any other person to compete; would not disclose confidential information or undermine the employer's business relationships; would not use to their personal advantage REL's business opportunities; and would not destroy or seriously undermine the necessary element of trust and confidence. I did not understand the defendants to seriously dispute the existence of those duties but they denied breaching them.

[5] Each of the defendants while employed by REL is alleged to have breached the duties they owed to the plaintiff, in one or more of the following respects:

(a) Soliciting current employees to leave their employment and commence employment with BMW;

(b) Soliciting existing clients and potential clients (those to whom quotations had been provided) to terminate their commercial relationships with REL and to enter into commercial relationships with BMW;

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[2] The plaintiff accepted that the extended statutory definition of good faith, introduced from 1 December 2004 by the Employment Relations Amendment Act (No 2) 2004 did not apply at any material time.

(c) Misusing confidential financial information as to pricing and quotations so as to:

(i) bind REL to unprofitable contracts; and

(ii) to obtain contracts for BMW in circumstances where the opportunities for those contracts were available to, and ought to have been taken advantage of, by REL.

d) Removing from REL, or destroying, documents belonging to REL, prior to or at the time of the termination of their employment including:

(i) a diary belonging to REL and containing information such as client contacts;

(ii) a "red quotation" folder, kept by Mr Bartlett, containing confidential and commercially sensitive information relating to quotations for clients; and

(iii) contact lists from their cellphones.

(h) Using confidential information belonging to REL relating to the circumstances of customers and potential customers of REL for their benefit or the benefit of BMW, rather than for the benefit of REL.

(i) Failing to inform their employer of their intentions to establish themselves in a business in competition with REL and taking steps to establish a competitive business without REL's knowledge including approaching REL employees to secure their employment and customers and potential customers of REL with a view to obtaining their business for BMW.

[6] Mr McTague is alleged to have been obliged to give and to work out 3 months' notice of resignation and his failure to do so meant he was able to apply his skills and experience for the benefit of BMW earlier than 31 July 2004.

[7] All three defendants are also said to have breached their continuing duty of confidentiality to REL after their employment ended in the following respects (implied in the case of Mr McTague and expressed in Messrs Whiting and Bartlett's written agreements):

> (a) By misusing confidential financial information as to pricing and quotations so as to obtain contracts for BMW in competition with REL;
>
> (b) By misusing for their individual benefit, or the benefit of BMW, commercial information contained in documents unlawfully removed from REL or unlawfully destroyed, including the items set out in (d) above;
>
> (c) By using confidential information obtained from their employment with REL relating to the circumstances of customers and potential customers of REL for their benefit or the benefit of BMW rather than for the benefit of REL.

[8] The amended statement of claim did not plead concerted action on the part of the three defendants, or that they conspired together against REL. However, as the matter developed, and as will be seen from the findings of fact that the plaintiff invited the Court to make, the plaintiff claimed that the three defendants did act in concert to establish BMW in direct competition with REL. In their closing submissions, counsel for the defendants did make some observations as to the lack of any pleading of acting in concert or conspiracy, but no formal objection to the case proceeding on that basis was made.

Factual background

[9] Unless otherwise indicated, all the material events took place in 2004. REL is part of a South Island based group of companies specialising in earthmoving and

other civil works, employing about 200 staff. It has been operating for some 30 years. It had been competing with another company, Doug Hood Ltd (DHL) in mid Canterbury. Gary Rooney, the principal director and shareholder of REL, was offered the opportunity to purchase DHL after its managing director died. DHL was purchased by REL in July 2003. There was a significant reorganisation of staff with the upper and middle management being removed.

[10] Mr Rooney wanted to appoint someone in whom he had confidence and trust to manage the Ashburton business on a day to day basis. He was introduced to Mr McTague, who was then the general manager of Ashburton Contracting Limited (ACL), a company owned by the Ashburton District Council. Messrs Rooney and McTague met and discussed terms of employment. Nothing was reduced to writing. There was no mention of a restraint of trade, although Mr McTague had such a restraint with ACL. Mr McTague was to be described as the regional manager of REL Ashburton and would oversee another subsidiary of REL, Rooney Boring Ltd in Christchurch. They also discussed Mr McTague's future career path, which could lead to him becoming the general manager of the whole of the Rooney group of companies.

[11] In the meantime Mr McTague was to report directly to Mr Rooney and would have a high level of independence in running the Ashburton branch. Effectively he was told to run the branch as if it was his own business. He was given sole cheque signing authority and access to a substantial overdraft. He had the authority to hire and fire staff. He received a substantial salary package, which was more than twice that received by any other comparable manager in the Rooney group.

[12] Mr Whiting had worked for much of his life in earthmoving in mid Canterbury and was working for DHL at the time it was taken over by REL. He had a close working association with Mr Bartlett, another employee of DHL at the time of the takeover, having been his mentor and having taught him the techniques of operating highly specialised earth-moving equipment. The two had worked together as a team, both as machine operators and in dealing directly with the clients, providing quotations, supervising and allocating machine operators to contracts,

ensuring the work was carried out properly and arranging for the billing of the work on completion. Both were well regarded by the local farmers who used DHL.

[13] Messrs Bartlett and Whiting continued in their roles after REL took over, although with the removal of the DHL management structure I find they assumed greater responsibilities and became supervisors with some management functions.

[14] The initial monthly turnover of REL Ashburton from the time it commenced trading on 1 August 2003, up to and including March 2004, was satisfactory to Messrs Rooney and McTague, although the latter wanted inter-company work credited to Ashburton. In April 2004 the income for Ashburton dropped by more than 30 percent.

[15] On 22 April 2004, Mr McTague gave a letter of resignation to Paul Allott, the group administration manager of REL, who used to visit Ashburton weekly to assist Mr McTague and the administration staff. The letter stated that, after a few sleepless nights and a week to ponder his future, Mr McTague had decided to terminate his employment as at 31 July. He went on to state:

> *You will no doubt be aware of some of the circumstances that brought about this decision the final straw being the very nasty tone of the discussion between you and myself on the afternoon of Wednesday 21st April.*
>
> *It is interesting to note that a long time employee of yours told me not long after I started that he did not see me working long term with you because we were too much alike.*
>
> *That may or may not be the case, although I can assure you that modern day employment requires less of the stick theory and more of the carrot approach. Obviously on that point we have differing views and so be it.*
>
> *Thankyou once again.*

[16] In late April or early May Mr McTague met with Messrs Bartlett and Whiting at his home on at least two separate occasions to discuss his proposed new earth-moving business venture. Mr McTague said in evidence he told them that if they wished to leave REL they could come and see him and he would talk to them about their joining him.

[17] On 4 May Mr McTague met with Garth Madden of Capon Madden Ltd, his chartered accountants, to discuss the establishment of BMW. At that meeting the following matters, amongst others, were discussed:

a) Mr Madden was to obtain approval from the Companies Office of the proposed company name BMW Contracting Ltd, and he did so that day.

b) There would be three directors, all *"blokes"*.

c) Mr McTague and his wife would be the initial shareholders in the company.

d) The three directors would receive a salary or fees of $70,000 per annum.

e) Mr McTague was keen to implement an incentive remuneration and/or share purchase scheme for the other two directors.

f) Capon Madden would prepare cash flow statements and profit projections to be presented to possible financiers of the new business.

g) Possible sources of capital and working capital requirements were identified.

h) Plant purchases were identified.

[18] Mr Rooney did not respond to Mr McTague's letter of resignation until 6 May when he left a telephone message. Mr Rooney spoke to Mr McTague briefly on 7 May to advise him that Andrew Rae would be replacing Mr McTague as manager of the Ashburton branch of REL. They did not discuss Mr McTague's resignation or his reasons for resigning.

[19] Sometime between 10 and 14 May Mr Bartlett travelled to a worksite where REL was carrying out a contract and discussed with two REL employees, Kenneth Thomson and John Galbraith, the new business being set up by Mr McTague.

[20] On or about 10 May Mr McTague provided financial workings to Mr Madden to allow the preparation of cash flow projections and the determination of working capital requirements. These were completed by an employee of Capon Madden, Jan Butterick, a support accountant, on 12 May. On that day Mr Madden discussed with Mr McTague the draft documents that had been prepared by Ms Butterick as well as the following issues: GST calculations; the computer software which would be required if BMW was to start operations in June 2004; advertising costs for the new business; plant hire costs; the start up capital required and profit projections.

[21] Mr Rooney, through Mr Allott, arranged for a meeting at the Waimate branch of REL to take place on 13 May between himself and Messrs McTague, Rae and Allott. Mr Rooney said in evidence this was to discuss the takeover by Mr Rae of the Ashburton branch and also its poor financial performance in April. Messrs Rooney and McTague met on that day ahead of the proposed meeting. They had a disagreement concerning who had acted unprofessionally over Mr McTague's resignation. Mr McTague left the Waimate branch at about 1.30pm and returned to Ashburton, removed a few personal things from his office and went home. Mr Allott telephoned him and was told by Mr McTague that he was leaving for good. Mr McTague never returned to work for REL. Mr Allott made up Mr McTague's final pay to 13 May. Messrs Allott and Rae travelled to Ashburton the next day to take over its management.

[22] On 14 May Mr McTague had another discussion with Mr Madden about obtaining an IRD number and GST registration for BMW. That same day Mr McTague rang Warrick Baxter, who was then a commercial finance manager with UDC Finance Limited (UDC). They had worked together while Mr McTague was with ACL and each had a high regard for the other.

[23] Also on 14 May, Mr Whiting handed Mr Rae a letter of resignation giving 14 days' notice. The letter contained no reasons for his resignation. On or about 16 May Mr Whiting signed a consent to be a director of BMW.

[24] On or about 17 May Mr McTague provided Mr Baxter with certain information in support of an application for substantial finance for BMW. Mr Baxter prepared a document, dated 19 May, which became a focal point in the hearing, described as a "*Credit Memorandum"*. It purported to describe what steps had been taken, to that point in time, in establishing BMW. Messrs McTague and Madden denied in evidence providing to Mr Baxter certain material information contained in the credit memorandum. Mr Baxter said in evidence he received the information from either Mr McTague or Mr Madden, a conflict I shall resolve shortly.

[25] On 18 May Mr Bartlett required Robin Thomson, who was the office administrator of REL Ashburton, to print off for him a list of the Ashburton REL clients. The following day, Mr Bartlett handed in his resignation giving 2 weeks' notice and gave no reasons. That same day BMW was incorporated.

[26] Mr Bartlett's wife, an insurance broker, was involved with Mr McTague in obtaining insurance quotations for BMW. She sent an email at 11.47am on 19 May in which she stated:

> *Hi David*
>
> *Have a VIP client – my husband and two partners are about to start their own earthmoving contracting business in Ashburton, so I need an idea of your sharpest premiums.*
>
> *Est annual T/O* [removed because of suppression order]
> *Staff: 3 directors*
> *4-5 employees*
>
> *At the moment can you quote on the following:*

(Here followed a list of equipment including heavy pieces of earthmoving machinery, 7 "*Utes*" and public liability cover).

[27] The month of May showed another substantial decline in the turnover of REL Ashburton. The turnover of REL Ashburton remained low for the balance of the 2004 year in comparison to what had been earned in the first 9 months after it was acquired by REL.

[28] On 22 May, BMW placed an advertisement in the Ashburton Guardian newspaper for new staff. On 24 May Glenn Shurrock, then a current employee of REL, resigned to join BMW. The same day Graeme Tutty, another employee of REL, resigned and became an employee of BMW starting work on 1 June. On 30 May Paul Stockdale, an employee of REL, resigned and in July became an employee of BMW. On the same day Bob Pellett resigned from REL and joined BMW. On 31 May, Gary Francen resigned from REL and joined BMW during June. These persons were all experienced and skilled plant operators.

[29] Mr Whiting went on leave on 21 May but was back in the office on 24 May, when Mr Bartlett was dismissed by Mr Rae for allegedly soliciting REL staff. That same day, with Mr Rae's agreement, Mr Whiting was released from REL without having to work out the balance of his notice period. Messrs Whiting and Bartlett immediately went to work for BMW.

[30] After raising finance with UDC, BMW commenced trading in competition with REL on 1 June. BMW traded successfully from commencement and its turnover for its first 5 months exceeded Mr McTague's projections by 64 percent in the first 2 months and by an average of 28 percent in the remaining 3.

The plaintiff's findings of fact

[31] The plaintiff sought the following findings of fact:

(a) The defendants acted in concert from March or April or at the latest immediately after Mr McTague tendered his resignation on 22 April, to establish BMW in direct competition with REL Ashburton;

(b) The general plan was that:

(i) Mr McTague would arrange for the incorporation of BMW and sort out the shareholding and remuneration arrangements and arrange necessary loan finance and the sourcing of plant and premises.

(ii) Messrs Whiting and Bartlett would take such steps, including unlawful steps, as would be necessary to ensure that BMW had sufficient work to trade successfully from June/July.

(iii) All three defendants would, and did, take all necessary steps, including unlawful steps, to actively solicit staff, especially highly skilled and experienced plant operators, from REL, to ensure a substantial level of work could be undertaken by BMW.

(c) Mr McTague abandoned his employment with REL on 13 May without cause for the purpose of freeing himself to work full time on the establishment of BMW, with a view to starting the business on 1 June.

(d) If Mr McTague had not abandoned his employment on 13 May it would have been unlikely Messrs Bartlett and Whiting would have resigned prior to 31 July.

(e) Between the end of March and up to 24 May Messrs Bartlett and Whiting solicited clients from whom REL might have expected to obtain work, to provide work for BMW and/or stockpiled work opportunities coming to their knowledge while employed by REL in order to have that work done by BMW, rather than arranging for it to be done by REL.

(f) Between the end of March and 24 May all three defendants wilfully slowed down the business operations of REL Ashburton causing a significant drop in turnover in April and May.

(g) Without the ability to satisfy UDC Finance that BMW would have a sufficient cash flow to service the intended loan, it would have been unlikely that UDC, or any other lender, would have granted the loan application. As a consequence, BMW would not have been able to commence full trading to generate a substantial monthly income from, and including, July.

(h) At or about the end of April Mr Bartlett deleted all information relating to forward orders of work from the whiteboard in his office, with a view to depriving REL of the knowledge of that work and for the purpose of using that knowledge to assist BMW.

(i) Prior to their departure from REL on 24 May, Messrs Bartlett and Whiting destroyed or removed copies of quotations provided to REL clients.

(j) The defendants did not disclose to their employer any of the matters set out above or the efforts they were making to set up in competition with REL.

[32] The defendants deny these allegations. There are direct conflicts of evidence between the plaintiff's witnesses and those of the defendants' witnesses on these issues. A resolution of these conflicts depends on credibility findings.

Standard of proof

[33] I accept Ms Shakespeare's submissions for Mr Whiting, which were not in issue, that the burden of establishing each of the disputed factual elements lies with the plaintiff and the standard is the balance of probabilities. Further, as Mr Reid submitted on behalf of Mr McTague, because of the serious allegations being made against the defendant there is a high threshold to be met and the evidence in support needs to be "*as convincing in its nature as the charge was grave*"[3].

[3] *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 394 (CA).

Credibility findings

[34] In making credibility findings and dealing with conflicts of evidence I have taken into account the thorough submissions of counsel for all parties on how these should be resolved. I have, for example, accepted for present purposes Ms Dalziel's submissions concerning one aspect of Mr Bartlett's cross-examination. Mr Toogood gave a warning to Mr Bartlett that he did not have to answer any questions if it might incriminate him. This was followed by an adjournment to enable Mr Bartlett to be given legal advice. He subsequently refused to answer certain questions. In spite of the warning and Mr Bartlett's refusal to answer those questions he did answer them when they were put in a different form. I therefore accept Ms Dalziel's submission that, in the circumstances, no adverse inference should be drawn from Mr Bartlett's exercise of his right to silence.

[35] In broad terms the plaintiff's witnesses were not shaken in cross-examination on the key points in their evidence. There was some confusion about the folders in which REL quotations were kept but in the end the allegations were clear. There were also some issues about the way in which the hierarchy of top management in the Rooney group operated at the relevant times and I shall make factual findings on these matters.

[36] The three defendants were all subjected to searching cross-examination, which disclosed material inconsistencies in their evidence and contradictions between their evidence and contemporary documents. These matters undermined their credibility. In the next section of this judgment where I deal with the disputed findings of fact, I will set out examples of material which led me to make these adverse findings. Because of these findings, where there were conflicts between the evidence of the plaintiff's witnesses and the defendants' witnesses on the key allegations I preferred the evidence of the plaintiff's witnesses.

Disputed factual findings

Mr McTague

[37] I find, as asserted by Mr McTague, that although the initial negotiations assumed that Mr McTague would eventually become the general manager of the Rooney group, this did not happen in practice in the 9 months he remained with REL. On one reading of an organisational chart prepared by Mr Allott, Mr McTague seems to be shown as Mr Rooney's second in command. However, in that 9-month period he operated solely as the regional manager of the Ashburton and Christchurch branches of REL and did not assume any responsibilities for any other branch within the group. It was presumably in anticipation of such a factual finding that at the commencement of the hearing Mr Toogood announced the abandonment of the plaintiff's initial claim that Mr McTague owed it fiduciary duties.

[38] There is compelling evidence that, from at least April, the defendants acted in concert to establish BMW as a direct competitor of REL Ashburton. I find that at least by the time Mr McTague submitted his resignation on 22 April, or shortly afterwards, he had had discussions with Messrs Bartlett and Whiting with a view to them all working together in a competing company. Although there is no direct evidence on the point, I find, after hearing the three defendants giving evidence and forming views as to their characteristics, that Mr McTague was the ring leader who orchestrated the establishment of BMW. Therefore it is more likely than not that he would have approached Messrs Bartlett and Whiting and invited them to become part of BMW. I find Messrs Bartlett and Whiting were to use their client contacts to obtain work for BMW and Mr McTague would use his prior experience with ACL and his contacts to establish the administrative setup of BMW, secure the required plant and equipment, and obtain the necessary financing.

[39] By the time Mr McTague had his first meeting with Mr Madden on 4 May the proposed company name reflected the surnames of the three defendants, they were to be its three directors and they were to receive a salary or fees of $70,000 per annum. This is precisely the same sum that Mr Bartlett claimed in evidence he had

told Mr Rae that, if he received it from REL, he would withdraw his resignation. I accept Mr Rae's evidence that if Mr Bartlett had made such an offer, Mr Rae would have been prepared to pay that level of salary in order to retain Mr Bartlett's essential services. In the event, Mr Bartlett did not become one of the directors of BMW until he took over the business some years later.

[40] The contemporaneous notes that Mr Madden made of the initial and subsequent meetings with Mr McTague and the material provided by Mr McTague which formed the basis for the documents prepared at Capon Madden, all show a commencement date for the operations of BMW as 1 June. Further, the cash flow projections provided by Mr McTague to Mr Madden, which showed a substantial turnover for a start-up company, were very conservative because, as I have indicated, what was actually earned in the first 5 months of BMW's trading was considerably higher. I find that Mr McTague must have already obtained, through the efforts of Messrs Bartlett and Whiting, who had the client contacts, accurate indications of sufficient ongoing work for BMW to be able to make confident predictions which turned out to be lower than what was actually achieved. The securing of that work, I find, was at the expense of REL and explains the downturn in April and May.

[41] The credit memorandum prepared by Mr Baxter contained material which supports these conclusions. It is common ground that Mr McTague approached Mr Baxter on or about 17 May with information used to support an application for a loan to BMW. The opening wording of the credit memorandum states:

> - *As this is a new company, client has secured the services of two key personnel. Both are currently employed by Rooney Earthmoving and hold senior management positions with this company. It is likely that both these people will become minority shareholders in this company. One of the people has a strong relationship with a number of the local farmers and has been successful in securing a large proportion of the work that this new company will undertake.*

[42] The only persons to whom this could refer, who held management positions, other than Mr McTague himself, were Messrs Bartlett and Whiting who, according to the credit memorandum, had agreed to join BMW. For one of them to have secured clients' work as at 17 May would mean that they had carried out solicitation of clients while still employed by REL.

[43] The credit memorandum goes on to state:

> - *The company is just in the process of being formed. This company is being formed to undertake border dyking excavation and onsite contracting work. The shareholders of this company have done their homework and due to the inefficiencies of a very large operator in the area, there is an opening for a smaller company with local based knowledge. Through their enquiries and canvassing of clients, they have already secured an indication of more work than they can undertake in their first 12 months.*

[44] The inefficiencies of the large operator in the area can only be a reference to REL. If it was operating inefficiently in April or May of 2004, that must have been solely the responsibility of the defendants who were the only managers of its day to day operations. Either this statement is an exaggeration, or efforts were being made to undermine the operations of REL at the time. It cannot be a coincidence that the turnover of REL showed such a marked decline in the months of April and May in comparison with the earlier months.

[45] No other adequate explanation for this downturn was provided. I reject the defendants' contentions that this was because of Mr Rooney's involvement with the Central South Island Fish and Game Council, which was concerned with the taking of excessive water from the Rangitata River for irrigation purposes. While some of the farmers who were called as witnesses by the defendants did take issue with Mr Rooney's involvement and said that they later diverted work away from REL to BMW, I am not persuaded that that would have caused the substantial decline in the turnover of REL Ashburton in April and May when BMW was not yet up and operating. Those witnesses said they would have remained loyal to Messrs Bartlett and Whiting who were still employed by REL at that stage.

[46] After setting out details of the work in which BMW could specialise, which was precisely the work being carried out by REL using similar equipment, the credit memorandum provides:

> - *Client will be employing 9 experienced operators (already confirmed).*

[47] This again supports the allegation that approaches to staff had been made at this point. In the event, including Messrs Bartlett and Whiting, seven of REL's best and most experienced plant operators joined BMW in June and July. I find that the wording of the advertisements placed by BMW for staff in May would not have attracted staff of their expertise.

[48] Under the heading "*Customers*" the credit memorandum provides:

> *Major customers and key supply contracts:*
>
> - *Client has already secured enough work to keep them busy for the first 12 months. They have also secured all the work of the local lime works, which will require an excavator almost full time. Due to the networks and experience of the shareholders, securing the clients it is not going to be the issue for this client.*

[49] It does not appear that BMW did secure the work of the local lime works but that clearly was the hope as at 19 May.

[50] Under the heading "*Competitive Advantage*" it states:

> *What gives customer an advantage over its competitors:*
>
> - *Competition will be there from all other contractors, but this company will be well positioned to make erodes* [sic] *into the in* [sic] *inefficient operations of the larger local companies. Also knowing the systems and background of these companies at a senior management level will advantage client.*

[51] The only person, according to the evidence, who would have known the senior management level systems and background of the two largest competitors in Ashburton, REL and ACL, was Mr McTague. Messrs Bartlett and Whiting, I find, knew the systems and background of REL Ashburton on a day to day level.

[52] Under the heading *"Key Business Drivers (4 to 5 key drivers – refer to template if core industry)"* the credit memorandum states:

- *Key personal* [sic]
- *Extensive local and industry knowledge.*
- *Good capital base*

- *Good forward work*
- *Late model equipment*

[53] The credit memorandum concludes:

> *For a long time client has looked at setting up their own operation, due to the service being offered by the local operators. Client would like to set up a small company with large high capacity equipment. They feel that the time is right for them now to enter the market, as the service being offered in the region is not of standard that this new company could offer. Due to their overhead structure they can also be more than competitive price wise.*
>
> *Client has sourced the equipment, staff and clients. They now seek finance to proceed.*

[54] Without that information, especially the securing of ongoing work as shown in the documentation prepared by Capon Madden to support the loan application, I find UDC would not have approved the substantial loan it made to BMW in late May.

[55] The statements set out above from the credit memorandum were inconsistent with the defendants' denials of client and staff solicitation. Mr McTague asserted that he did not provide that particular contested information to Mr Baxter. He lead hearsay evidence that Mr Baxter must have put that material in the credit memorandum in order to ensure the loan application would be granted because there would be some financial advantage to Mr Baxter in so doing. Apart from the contentious material I have set out above, Mr McTague conceded he had provided all the other extensive information included by Mr Baxter in the six pages of his credit memorandum**.**

[56] At some points during his cross-examination Mr McTague endeavoured to put the blame for making the statements on Mr Madden. Mr Madden's evidence on this point, which I accept, was that he did not provide that information to Mr Baxter.

[57] Mr McTague particularly denied ever saying to Mr Baxter that through his enquiries and the canvassing of clients, he had already secured an indication of more work than BMW could undertake in the first 12 months. He claimed that was absolutely incorrect, that Mr Baxter could not have got it from him or Mr Madden,

and that it was embellished and directly misleading of the Court. The latter allegation was not put to Mr Baxter in cross-examination. Mr McTague was then forced to accept that Mr Baxter, whom he had known for 8 or 9 years, was honest and a good man to deal with.

[58] That was precisely the impression that Mr Baxter gave in Court and I have absolutely no hesitation in accepting his evidence. He was summonsed to Court and said he would have preferred not to be giving evidence, given his relationship with Mr McTague. At the time he prepared the credit memorandum Mr Baxter was working out a period of notice with UDC in order to go into business on his own account and had no incentive available to him which might have encouraged a lesser person to exaggerate a loan application to ensure that it was granted. I accept that he made one mistake in his credit memorandum, in stating that a key employee joining BMW from REL, in a context which must have been a reference to Mr Whiting, was 40 years old, when Mr Whiting was then over 60. This was not a material error and does not undermine Mr Baxter's evidence that he was provided, by either Mr McTague or Mr Madden, with all the information in his credit memorandum.

[59] In view of the immediate success BMW enjoyed from 1 June onwards, I have no doubt the information provided by Mr McTague to Mr Baxter accurately records the efforts that the defendants had made to secure future work and to obtain key personnel at the expense of REL, at the latest by 17 May. Subsequent exchanges between Mr Baxter and Mr McTague in the process of obtaining the UDC credit approval, support this conclusion.

[60] Mr McTague also denied having any involvement in the preparation of a client list which the documentation showed was requested by UDC, somewhere around 24 May. This documentation indicated that either Mr McTague or Mr Madden was going to forward the client list within 1 or 2 days. No such list was produced to the Court but it appears that some of the UDC documentation was destroyed. The credit memorandum and an exchange of emails and other documentation involving UDC only came to light through third party discovery against UDC. This material was not available to the Authority.

[61] As Mr Toogood submitted, it seems unlikely that the UDC loan would have been advanced without the client list, and the material indicates that someone on behalf of BMW at the time was ready to prepare and provide such a list. This is consistent with the list in the diary which Mr Bartlett removed at the time of his departure from REL which was found by accident some months later and which contained a list of REL clients. It may also be consistent with Mr Bartlett's request of Ms Thomson for a client list the day before he resigned. I find it more likely than not that a client list was provided by Mr McTague to UDC.

[62] In cross-examination Mr McTague said that as at 1 June, BMW had six or seven employees. Four were ex-REL employees, not including Messrs McTague, Bartlett and Whiting. Mr McTague claimed that BMW did not have one job at that time and that no one had ever quoted for a job for BMW before 1 June. That evidence was contrary to what was in Mr Baxter's credit memorandum and which I have found was supplied by Mr McTague somewhere around 17 May. It is also contrary to a later document: an email from Mr Baxter to Duncan Smith, one of the UDC personnel responsible for approving loans, in response to a request for further information from Mr Smith about BMW. This stated, in part:

- *Client have spoken to a number of farmers, and are currently compiling a list of all the farmers/clients that they have spoken to, and will forward a list to UDC detailing the type of work that has been confirmed/timeframe, and $value. This will be forwarded to me in the next couple of days. This shouldn't hold up the approval process in the meantime?*

- *Kelvin is well respected in the contracting industry along with his 2 key personnel. This has resulted in a number of experienced operators approaching Kelvin, for employment. The 9 people that have been selected have been hand picked by Kelvin (previous employees of his).*

[63] Further Mr McTague's evidence is contrary to that of Mr Whiting. In cross-examination Mr Whiting admitted that Mr McTague had typed up for him, on 21 May, at least two quotations for two current clients of REL in favour of BMW while Mr Whiting was still employed by REL.

[64] These findings are also supported by answers Mr McTague gave during his cross-examination where he was asked if there was anything to stop him, as a loyal

employee of REL, from competing with that company. His response was that there was nothing written down or understood that would stop him from competing while still in REL's employ, other than his conscience. That exchange suggests to me that Mr McTague did not appreciate that he still owed duties of trust and confidence and fidelity to REL while he remained the regional manager of REL Ashburton.

[65] I accept Mr Toogood's submissions that another important credibility issue arose from Mr McTague's sworn answers to interrogatories in which he asserted the credit application to UDC had been made by Mr Madden. This was denied by Mr Madden. Eventually Mr McTague accepted in cross-examination that it was reasonable to assume that the uncontested information in the credit memorandum had come from conversations Mr McTague had had with Mr Baxter prior to 19 May.

[66] Although there are other minor matters which create a great deal of suspicion about Mr McTague's conduct in making phone calls to key staff, suppliers of equipment and the like while still in the employment of REL, these fell short of actual proof of any misconduct.

[67] On the evidence of Messrs McTague and Bartlett, UDC approved the finance on 21 May. It was the evidence of Messrs McTague and Bartlett that the latter decided to join the new business venture only when finance had been approved by UDC. This is incompatible with Mr Baxter's evidence, and the UDC documents, which confirmed that finance was not approved until 28 May after Mr Bartlett and Mr Whiting had already left REL and had joined BMW.

[68] I find Mr McTague abandoned his employment on 13 May and had no grounds to shorten his notice period through any actions on the part of REL or Mr Rooney. Apart from the adverse credibility finding I have made in relation to Mr McTague, the evidence supporting this conclusion is that Mr McTague had already cleaned out the majority of his personal items in his office before he left Ashburton to travel to Waimate on 13 May. If he was intending to work out his notice to 31 July, as stated in his resignation letter, there would have been no reason for him to have taken such action. From the financial material presented to Mr Madden on 4 May and to Mr Baxter on or about 17 May, it is clear that Mr McTague was

intending to commence the business of BMW on 1 June, 2 months before his notice period had expired. Further, there were personnel in the office at Waimate who would have heard any raised voices on Mr Rooney's part, as claimed by Mr McTague in his evidence, and their evidence satisfied me that no such raising of voices was heard. Their evidence of Mr Rooney's demeanour immediately after the meeting was consistent with him being shocked and surprised by Mr McTague's sudden departure.

[69] There was much detailed evidence as to matters from which Mr McTague claimed he was entitled to conclude that his relationship with Mr Rooney was becoming intolerable. None of that evidence stood up against the evidence led by the plaintiff, including that of an independent engineer who spoke of Mr McTague's interference on a work site, and I therefore reject Mr McTague's account.

[70] I also find that Mr McTague exaggerated his reasons for resigning in his written brief of evidence, laying the blame entirely on Mr Rooney and the way Mr Rooney had allegedly dealt with Mr McTague. During cross-examination, Mr McTague could not recall a key element of those reasons in his written brief of evidence when asked to set out what he regarded as the last straw which led to his resignation. This also undermined his credibility.

Mr Bartlett

[71] Mr Bartlett, in evidence-in-chief, claimed that all his quotations for REL were typed by him on the REL computer system. He claimed not to be aware of a folder of quotations he was alleged to have taken and denied destroying or taking any quotations with him. He denied that he had wiped the whiteboard to conceal ongoing work. He said he only used it to plan border dyking work (a particular type of irrigation) and the timeframe for such work and, as the jobs were finished, they were all wiped off the board. When there was no further border dyking work to complete there was nothing on the whiteboard and there had not been anything written on it for some 3 or 4 weeks prior to his departure. He claimed that Mr Rooney disliked him using the whiteboard because the opposition could come into the office and see the forward work. He claimed he was directed to wipe off the

board and not to use it. I cannot find that this claim was ever put to Mr Rooney in cross-examination.

[72] Mr Bartlett said that he was disappointed that Mr McTague had resigned and they had a discussion about what Mr McTague was going to do. One of Mr McTague's ideas was to start his own business but this was not discussed in any detail. He was also shocked when Mr McTague left suddenly on 13 May. He said the resignation of Mr Whiting on 15 May affected him badly. He was disappointed that no one in REL had discussed the replacement for Mr McTague or Mr Whiting with him.

[73] Mr Bartlett agreed that he had asked Ms Thomson to print off the active debtors list because he thought this could affect the level of work once Mr Whiting left. He claimed not to have had a chance to look at it before he handed in his resignation the following day. When he found Ms Thomson was very upset that he had asked for the list and had then resigned the following day, he tore it up in front of her. He said he never made a copy of it or recorded it in any way. He denied the solicitation of any clients or staff at REL. He admitted there was a red quotations folder on his desk in which he used to store quotations, when employed by DHL, but claimed he had ceased using it when he began working for REL. He said the primary source of storage of his quotations was the REL computer.

[74] Mr Bartlett was asked, near the commencement of Mr Toogood's cross-examination, whether, before or after he left REL, he had transferred information about quotations from REL's computer to his home computer. He said that he had made his own spreadsheet, which was a carbon copy of the one that had been used in DHL, which he had used in REL and that he did the same thing for BMW. He denied actually transferring information from the REL computer to his home computer. He claimed the documents that he had at home were unique original documents, but similar to REL documents. He was asked whether he could assure the Court that he had not taken from the REL computer any information relating to quotes he had done whilst employed by REL, and he said that was correct.

[75] Mr Bartlett claimed he used his home computer for BMW purposes and doing all of BMW's quoting. He claimed he only printed out hard copies from his

home computer when they were sent out to farmers. He explained, in answers to questions, that when it came to invoice jobs for BMW he would take all the information from the timesheets, put them into job numbers on a spreadsheet, print these off and then have another spreadsheet drawn up which was described as a "*Minor Contract Report*". These he would hand to Mr McTague who would send out the invoice to the client and attached to it would be the minor contract report. BMW's minor contract reports were not provided to the plaintiff in the informal disclosure undertaken during the proceedings before the Authority. They were disclosed for the first time in a supplementary affidavit of documents, sworn by Mr Bartlett on 4 April 2008.

[76] When the documents produced in the Authority and in the Court were compared, some major discrepancies appeared, which were put to Mr Bartlett in cross-examination. BMW quotations attached to the minor contract reports were different to the BMW quotations produced to the Authority. For example, one of the quotations for BMW disclosed to the Authority had been altered in a way which did not disclose that Mr Bartlett had used for BMW the same quotation he had prepared while working for REL, for a Mr Hood, dated 20 April 2004. After considerable prevarication, Mr Bartlett was forced to admit that he had sent the REL quotation to his home computer and had used that quotation for BMW, changing only the name from REL to BMW, the date to "*10/06/04*" and undercutting the amount of the BMW quote by deleting an establishment fee of $850 in the REL quote. The REL and BMW quotations for Mr Hood were identical in all other respects, in format, layout and repeated the same typographical errors.

[77] After much vacillation, Mr Bartlett could not give any rational explanation of how the REL quotation had ended up in his own computer and why it was then used by him for the benefit of BMW. He claimed it was a mistake, then attempted to withdraw this admission. This was not the only REL quotation which had later been altered in the same way to become a BMW quotation.

[78] Further detailed probing by Mr Toogood revealed that the BMW quotations disclosed to both the Authority and the Court had been renumbered in a way which omitted at least 16 of the early BMW quotations. Mr Bartlett claimed, for the first time, that he had had to renumber them when two of his computer drives went down.

I reject that explanation. The numbers would have been available on the hard copies of the invoices kept with the minor contract reports. The clear inference I have drawn from this evidence is that these documents were similar to the ones involving Mr Hood and had been taken from quotes prepared for REL clients while Mr Bartlett was still in the employment of REL.

[79] Mr Bartlett's demeanour in the witness box and his unsatisfactory responses to the questions about the contemporary documentation lead me to conclude that he was not a reliable witness and no weight could be given to his evidence or to his denials of the plaintiff's allegations.

[80] I therefore find, based on Mr Thomson's evidence, which I accept, that Mr Bartlett spoke to Messrs Thomson and Galbraith, both top class experienced operators, between 10 and 14 May before he resigned from REL. He told them that he had an exciting prospect coming up, was looking for new employees, was only taking the good operators and they wanted to employ Messrs Thomson and Galbraith. Mr Thomson talked over the offer with his wife and then advised Mr Bartlett that he was staying with REL. Mr Bartlett seemed surprised at this rejection.

[81] Mr Bartlett also admitted that during the weekend commencing Saturday 22 May he had taken an employment agreement for BMW to Mr Galbraith. That was the same weekend he and Mr Whiting had travelled with Mr McTague to Dunedin and back to look at a piece of mechanical equipment called a scraper. I note that the Authority found that Mr Bartlett breached his duty to REL by attempting to persuade Mr Galbraith to leave his employment with REL to join BMW while Mr Bartlett was still employed by REL. Because Mr Galbraith remained employed by REL the Authority found that no loss to REL was established.

[82] Mr Rae was contacted by Mr Galbraith and told of the endeavours that Mr Bartlett had made to persuade him to leave REL and join BMW. Mr Rae put this allegation to Mr Bartlett, who denied ever making such an offer. I accept Mr Rae's evidence that he believed the allegation that Mr Galbraith had made and therefore this was his basis for justifiably dismissing Mr Bartlett on 24 May.

[83] I also accept the evidence of Ms Thomson that Mr Bartlett told her on the day of his departure that she should sit tight for 3 or 4 months when he would then have a vacancy for her at BMW.

[84] On the basis of the credibility findings I have made, I accept Mr Toogood's submission that at or around the time of Mr McTague's resignation on 22 April, Mr Bartlett had indicated to Mr McTague that he would join him in BMW if the necessary financial and other arrangements could be made. I reject Mr Bartlett's evidence that he had not decided to resign until the evening of 18 May and that he had not decided to join BMW until after he was assured that finance was arranged. This assertion is contrary to Mr Madden's 4 May file note of what he was told by Mr McTague, Mr Baxter's evidence as to what he was told before he prepared his 19 May credit memorandum and Mrs Bartlett's request for insurance quotations on 19 May.

[85] When Ms Dalziel became counsel for Mr Bartlett she argued strenuously that the UDC documentation was totally inadmissible against Mr Bartlett. No objection was taken to the admissibility of that documentation by Mr Smith when he acted for Mr Bartlett and the documentation was all admitted. I accept Mr Toogood's submission that this documentation is compelling evidence of concerted action on the part of the defendants long before Mr Bartlett or Mr Whiting tendered their resignations. The contemporary documentation shows that the defendants had obtained substantial work for BMW by at least 17 May, and were also confident of obtaining four or five key personnel from REL.

[86] I also accept the evidence of Ms Thomson that there was a large whiteboard in the office they shared covering virtually an entire wall and that Mr Bartlett was extremely diligent in writing up each of the jobs that were in progress, jobs that had been successfully quoted for and which were coming on stream. The whiteboard would have up to 50 jobs on it involving a substantial amount of money. In late December 2003 or early January 2004, Ms Thomson was relocated into a separate office at the other end of the building and spoke of secretive meetings behind closed doors which she and the other two administrative staff were excluded from. Whilst not proof of serious misconduct in itself, this evidence does provide some corroboration of the allegation that the defendants were acting in concert.

[87] Although Ms Thomson was adamant that there was more than border dyking work written on the whiteboard and she was able to assess in broad terms the value of the work shown there, she was unable to pinpoint the time when the whiteboard was cleaned. She was able to confirm that no issue was made of its cleaning at the time that Mr Rae took over on 14 May but it appears from her evidence that it was more likely to have been around that time. Mr Rae confirmed that on one occasion prior to his arrival as the manager on 14 May he had seen the large whiteboard and that it was full of upcoming work to be undertaken by REL. Mr Rae could not recall, after arriving on 14 May, seeing the whiteboard with the work on it and only realised the lack of forward work after Messrs Bartlett and Whiting left.

[88] Mr Allott's evidence, which was not challenged on the point, was that the whiteboard, which he had seen on his regular visits to contain a substantial amount of current and prospective work, was wiped at the end of April and Mr Bartlett in explanation said that this was because there was no work.

[89] I accept the plaintiff's evidence and find Mr Bartlett wiped the details of both ongoing and future work from the whiteboard before he left REL. I also find he removed a red quotations folder in which he kept hard copies of the quotations he had given for REL.

Mr Whiting

[90] Mr Whiting claimed that he had a phone discussion with Mr McTague on the evening of 14 May, the upshot of which was that if Mr McTague could get finance for his new company Mr Whiting agreed to work for him when he finished up at REL. He claimed he then agreed to become a director. During the weekend of 15 to 16 May he signed the consent to become a director of BMW. He claimed never to have contacted any REL staff while working for REL to ask them to work for BMW. He also claimed that it was Mr McTague's departure on 13 May which led directly to Mr Whiting handing in his resignation. It was put to him that if Mr McTague had worked through until the end of July he would not have given his notice on 14 May. He accepted that was probably so, but said his notice may have been coming anyway.

[91] Mr Whiting conceded in cross-examination that the day after Mr McTague handed in his notice on 22 April, Mr McTague was talking to a customer, Mr Gordon, about the work Mr Gordon had available. Mr Whiting confirmed that the record showed that he had rung Mr Gordon some four times on 23 April and twice on 26 April and that all of this had taken place 2½ to 3 weeks before his own resignation. It was put to him that the discussions he had had with Mr Gordon were about BMW doing the job. Mr Whiting denied this but accepted there was no reason why REL could not have done the job for Mr Gordon. It was put to him that in evidence before the Authority in 2005 he had stated that the reason the work could not have been done by REL was because Mr Gordon wanted BMW to do the work as he was related to one of the employees of BMW. In the Authority Mr Whiting had said that he told Mr Gordon that if they got the okay to go ahead, BMW would do the work. Mr Whiting said he could not remember but accepted that could have been right. He fairly conceded that if that is what he had said to the Authority, it must be so.

[92] It was then put to him that at the time that Mr McTague resigned they were talking about setting up BMW. He accepted that it could have been but he said he could not remember.

[93] Mr Gordon had not previously been an REL client and the work was done by BMW and invoiced in June. Mr Whiting was shown a quotation for Mr Gordon from BMW dated 21 May. He accepted that Mr McTague had prepared and typed that quotation on Mr Whiting's day off, while Mr Whiting was working out his notice for REL. He had signed it *"Clarry Whiting BMW Contracting Ltd"*.

[94] Mr Whiting also conceded Mr McTague had helped him prepare another quotation given by BMW to a Mr Williams, also dated 21 May, and signed by Mr Whiting in the same way. He conceded he had rung Mr Williams ten times in April and that on 28 April he could have spoken to Mr Williams about leaving REL and going to set up BMW.

[95] These admissions undermined Mr Whiting's earlier claim that he had never quoted for BMW work while he was employed by REL. These claims were also contained in an affidavit Mr Whiting swore on 3 March 2008, in answer to

interrogatories posed by the plaintiff, which asked whether quotations were provided to prospective clients of BMW Contracting Ltd during the months of April, May and June 2004. Mr Whiting stated in his affidavit:

> *No quotes were provided to prospective clients of BMW Contracting Limited during April and May 2004. I was not involved in providing quotations to prospective clients in June 2004.*

[96] The following matters, established through Mr Whiting's evidence in cross-examination, were also relied on by the plaintiff.

[97] The first job undertaken by BMW Contracting on 1 June was for the Somerset Trust and consisted of earth-moving work called "*gallery work*". Mr Ferguson was the principal of the Trust and the farm manager was Mr Binden. Mr Whiting confirmed that he had had discussions with either or both of those persons at the end of 2003 about the upcoming gallery work. He was advised by them on 5 December 2003 that resource consent had been granted for the jobs. In March, Mr Whiting confirmed with one of the staff of REL that the gallery job was to be done. He accepted it was one of the reasons he had persuaded Mr Rooney to purchase a $60,000 Sykes pump which was necessary for that work. Mr Whiting accepted in cross-examination that he spoke with Mr Ferguson and Mr Binden from his home telephone on the evening of 21 May, while he was still employed by REL, although he was already a director of BMW, and accepted they would have talked about the gallery job. Mr Whiting admitted that he had rung Mr Ferguson and said that he had finished with REL and was starting up a new company and that Mr Ferguson told him that when he was clear from REL to give them a ring about starting the job. Mr Whiting contended that the job could not have been started before late May and by then he had decided to leave REL, although he might have stayed on had Mr McTague worked out his notice until 31 July.

[98] Mr Whiting also conceded that he had discussed another gallery job for Rangitata Dairies, for which a Sykes pump would also be appropriate. This work was done by BMW in August and September and cost in excess of $76,000. Mr Whiting conceded that he knew this job was coming up while he was working for REL from discussions he had had and from going out and looking at the job.

[99] There was independent evidence led by the plaintiff from a Mr Price who established that Messrs Bartlett and Whiting had priced pipe work for this gallery job in late April or early May.

[100] Mr Wilson of the Rangitata Dairies Partnership filed an affidavit on behalf of Messrs McTague and Bartlett. He confirmed that he had a strong working relationship with Mr Whiting. REL had carried out work for his partnership properties on several occasions between December 2003 and June 2004 and that part way through the final work Mr Whiting left REL and the work was still completed by REL with Mr Rae in charge. Because of his regard for Mr Whiting he provided work to BMW after having obtained quotes from a number of contractors including REL. He engaged BMW primarily because he wanted Mr Whiting to do the work. When Mr Whiting left BMW he became an employee of Rangitata Dairies in January 2007. Rangitata has continued to engage contractors including BMW and REL.

[101] Mr Whiting conceded that he had spoken with a Mr Meadows on 29 March. BMW invoiced Mr Meadows in September and October for work it carried out for him. REL did not do any work for Mr Meadows.

[102] Mr Whiting accepted he had telephoned a Mr Clemens, twice on 5 April and 8 times on 23 April 2004 and discussed work which was performed by BMW in June. This was work that REL could have carried out in June. Both Mr Clemens and Mr Meadows appeared in a list of clients in Mr Bartlett's diary.

[103] Mr Whiting conceded that he had discussed a job with a Mr Pye while he was with REL in April and that he went out and looked at the job then and that this was work that could have been undertaken by REL. It was subsequently undertaken by BMW in August and September. Mr Pye gave an affidavit on behalf of the defendants, on which he was not cross-examined, which confirmed this. Mr Pye deposed he could not have had the work done in April and decided to put the job on hold until August that year.

[104] Mr Whiting also confirmed that he had spoken with Quintag Holdings Limited on 18 May which was not then a client of REL but later became a client of BMW.

[105] He also confirmed that he spoke to a Mr Horman of Northwind Holdings/Deegan Farms on 21 May and that BMW undertook significant work for that client from July onwards. Northwind Holdings is referred to in Mr Bartlett's diary for work undertaken by BMW in June/July. Mr Bartlett had provided a quote from REL to that client, dated 1 April, and then provided an identical quotation on behalf of BMW in December.

[106] Mr Toogood submitted that the totality of this evidence supported the plaintiff's allegations and undermined the defendants' denials that no quotations were prepared for BMW prior to 1 June by the defendants. I agree. He also submitted that other answers from Mr Whiting established other breaches of duties, although Mr Whiting may not have realised at the time what his legal obligations were.

[107] The plaintiff invited the Court to accept as genuine the concessions made by Mr Whiting as he had no reason to mislead the Court on matters where his concessions were against his own interests. I accept these submissions.

Mr Madden

[108] Mr Madden was the next witness for the defendants. Mr Madden, not unreasonably, did not appear to have any independent recollection of the meetings he had with Mr McTague in May other than from refreshing his mind from the contemporary notes he had taken of what Mr McTague had told him.

[109] The difficulty with his evidence was that he was not prepared to draw reasonable or logical inferences from those notes, if the result would be to suggest that, as at 4 May, Mr McTague's plans for BMW were very well advanced. For example, Mr Madden who lives in Ashburton, would not accept that the "*blokes*" who were going to be directors were the three defendants. He also would not accept that all the material provided to him by Mr McTague postulated his start date for BMW's operation as 1 June. This date, of course, would have been inconsistent with the notice period given by Mr McTague terminating on 31 July. However, the cash flow projections prepared by Capon Madden, based on the information received from Mr McTague shortly after 4 May, show BMW's expenditure in June/July and

predicted a substantial income for those combined months. The income actually received by BMW for those 2 months exceeded those projections by 64 percent.

[110] That BMW was to start on 1 June derives further support from Mr Madden's file notes of his meeting with Mr McTague on 12 May which refer to "*computer software at start (June 04)*". Those same notes also refer to "*$20,000 in June 04 (set up costs)*".

[111] All of these projections relating to BMW took place before 13 May, the date on which Mr McTague claimed he was constructively dismissed by Mr Rooney. Mr Madden's wish to shield his client may do him credit but his prevarications in response to Mr Toogood's questions did not. From the material provided by Mr McTague to Mr Madden, it is clear that Mr McTague's plans for BMW were well advanced by 4 May and included a 1 June start date.

The property owners

[112] The remaining witnesses for the defendants were, with one exception, property owners in the Ashburton region and had engaged BMW to do earth works. Most did this because they had previous knowledge of Messrs Bartlett and Whiting, some going back to the days of DHL. None said that they were approached by the defendants while they were still in the employ of REL. Some have since used REL. Some of the farmers who were called had been unhappy about Mr Rooney's association with the South Island Fish and Game Council and the impact that would have had on local irrigation and had diverted work away from REL for that reason. This evidence may be relevant to the question of damages but it does not undermine the findings I have made of client solicitation. The witness who was not a client was Peter Hobbs, who traded as Hobbs and Banks Transport and Mayfield Transport, and provided trucks for BMW. Although Mr Whiting had rung Mr Hobbs on 22 April, Mr Hobbs could not recall what those conversations were about. He was a personal friend of Mr Whiting.

Allegations not proven

[113] As will have been seen under the heading "*The plaintiff's allegations*" above, the plaintiff's amended statement of claim, and also Mr Toogood's opening,

contained allegations that the defendants, while in the employ of REL, had taken steps to undermine REL's position by under-pricing some jobs. It was also said, in the case of Mr McTague, that he took steps to remove equipment where it was being gainfully employed by the Waimate branch and had not employed that equipment profitably for the Ashburton branch. These matters were not addressed in the plaintiff's final submissions or in the list of the findings of fact the plaintiff was seeking from the Court.

[114] The only reference to such undermining in the final submissions was an allegation that between the end of March and 24 May all three defendants wilfully slowed down the business operations of REL, causing a significant drop of turnover in April and May. That drop of turnover was consistent with solicitation of clients and delaying doing the work until after BMW was formed. Although the evidence of loss-making contracts and the efforts of Mr McTague in removing equipment may be suspicious, they do not support the allegations contained in the amended statement of claim and the opening. I also note that the removal of the equipment by Mr McTague may have caused some difficulties for the Waimate operation of REL but does not seem to have ever been intended to have a similar adverse effect on the Ashburton branch. These allegations therefore have not been proven.

Summary of disputed factual findings

[115] Turning to the findings of fact sought by the plaintiff, I have found with the exception of items (b)(iii) (that Mr Whiting had not solicited staff to leave REL) and item (i) (that Messrs McTague and Whiting did not destroy or remove copies of quotations provided to REL clients prior to their departure) that all of the other findings of fact sought by the plaintiff, although disputed by the defendants, have been proven on balance.

Legal issues

[116] I received extensive legal submissions from all the parties with supplementary submissions in writing coming until 30 March 2009. The plaintiff accepts that, apart from the duties of confidentiality which it claims the defendants owed, the defendants were under no continuing obligations to the plaintiff once their

employment with REL terminated. None of the defendants was restrained in any way from competing with REL once their employment ended.

[117] The plaintiff also accepts that Mr McTague's employment came to an end on 13 May and that his repudiation was accepted by REL by paying him up to that date. Although Mr McTague may have been lawfully entitled to compete after 13 May and to then entice clients and staff from his former employer, the plaintiff's case is that he acted in breach of his duty to the plaintiff by terminating his employment unilaterally, prior to the expiry of the period of notice which he had given in his resignation letter of 22 April. Mr Toogood submitted that the effect of what Mr McTague did, both before and after 13 May, was therefore highly relevant to the measure of damages for such a breach, namely that which would put REL in the position it would have been had there been no breach.

[118] The question which then arises is whether, in the absence of any intervening agreement or unilateral action by REL, Mr McTague was obliged to work out the notice period to 31 July. There was no basis for an assertion that Mr McTague's abandonment of employment amounted to a constructive dismissal and I therefore approach the plaintiff's submissions on the basis that Mr McTague's actions on 13 May were a unilateral abandonment or repudiation of his employment agreement.

[119] There was no issue between the parties that the defendants, while in the course of their employment with REL, owed duties of fidelity, good faith and trust and confidence. The extent of those duties, however, was in issue.

[120] It appeared to be accepted by the defendants, as helpfully encapsulated in Ms Shakespeare's submissions, that they owed an implied duty of fidelity and an obligation to act in good faith, which prevented them from making approaches to clients or potential clients of REL on behalf of BMW before they had ceased their REL employment. Before that time, if a client made an approach, the duty of fidelity obliged them to reject that offer of work and report it to REL. That reporting should have included any criticism made of the employer and the requirement for them to work with REL to rectify any perceived shortcomings: *Morris v Interchem Agencies Ltd*[4]. Further, whether or not a departing employee takes customer lists, that

[4] [2003] 1 ERNZ 93 at para [38] (CA)

employee may not solicit or approach a client of that employee's former employer in respect of a transaction current at the time of departure[5]. There are also circumstances in which top management may not profit from business opportunities that became known to them while in previous employment[6]. Again the extent of that duty was in issue.

[121] I do not accept Ms Shakespeare's analysis of the decision of Cooke J, who was in the majority in *Schilling v Kidd Garrett Ltd*[7]. Ms Shakespeare submitted that Cooke J had cited, with no disapproval, the findings of the trial Judge, Moller J, that matters such as: incorporating a company; seeking funding; informing the significant client of his resignation (prior to advising the employer of the same); and arranging a meeting with that client to discuss a possible transfer of the business, were no more than "*a legitimate preparation for the ultimate event of starting business on his own account …*" (p265)**.**

[122] Justice Moller was clearly referring to steps taken for some months before February 1974, the critical month in which Mr Schilling resigned, travelled to Sweden and obtained an important agency. Cooke J found that even during the time Mr Schilling was regarded as being on leave during the second week of his notice, the contract of service and the relationship continued until the last day. Cooke J, consistently with the later Court of Appeal decision *Morris v Interchem Agencies Ltd*, concluded:

> *It seems to me however, that in February, instead of negotiating for himself, Schilling was bound to take reasonable steps to enable Kidd Garrett to retain the agency. In a sense, of course, it is unrealistic to expect of him anything of the sort; but that is only because he had got himself into a position where his duty and his interest conflicted. To carry out his duty he would at least, I think, have had to allow Kidd Garrett the first opportunity of notifying Husqvarna (and the New Zealand dealers) of his resignation and the first opportunity of approaching Husqvarna.* (p270-271).

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[5] *Medic Corporation v Barrett* [1992] 2 ERNZ 1048; [1993] 2 NZLR 122
[6] *C E Elley Ltd v Wairoa-Harrison* (1987) 1 NZELC 95620
[7] *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243

[123] Ms Dalziel accepted an employer may not solicit other employees for his or businesses[8]. This case is also authority for the proposition that canvassing suppliers can undermine an employer's reputation and good will and cause rumours to circulate, as can approaches to staff without advising the employer. Tipping J stated at p518:

> *It is one thing to plan to leave your employer and set up a competing business if you proceed with discretion. It is quite another, in my view, to do so in such a way that your plans become widely known but without telling your employer, and in a way that is potentially damaging to your employer.*

[124] The case also establishes that dishonesty or fraud are not a necessary ingredient of a breach of fidelity and, although dishonesty may well be a breach of the duty, it does not follow that there can be no breach without dishonesty.

[125] It was common ground that the defendants, while they were employed by REL, could not without the knowledge and consent of REL act in such a manner as to compete with their employer or assist any other person to so compete[9].

Duty to disclose misconduct

[126] One highly contentious claim by the plaintiff was that each of the defendants was under a duty of fidelity and good faith that required them to disclose to REL, no later than 22 April, or a day or two thereafter, their intention to immediately take steps to establish and then to be employed in a business which would compete with REL Ashburton. Mr Toogood expanded this disclosure proposition by including reference to the means of competing which were said to be by approaching employees of REL and customers with a view to securing their employment and/or business for BMW. This allegation of a breach of duty to disclose was the subject of supplementary submissions from all the parties.

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[8] *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA)
[9] *Schilling* and *Big Save*

[127] In support of the proposition that the defendants had a duty to disclose their intentions to set up BMW to compete with REL Ashburton, Mr Toogood cited a number of English cases which he submitted touched on the obligations of employees acting in concert. The first was *Sybron Corp v Rochem Ltd*[10]. There the English Court of Appeal considered the classic decision of *Bell v Lever Brothers Ltd*[11]. The House of Lords held that an agreement could not be set aside on the grounds of mutual mistake where two senior employees, who were bought out of their positions, had not disclosed personal trading which may have provided grounds for their termination. The case had not been put on the basis of a duty to disclose. The trial Judge set aside the termination agreement on the grounds of mutual mistake. The Court of Appeal, while noting that it had not been pleaded, held that the conclusion of the trial Judge could be supported on the ground that the employees during the termination negotiations were under a duty to disclose the offending transactions of some 15 months before. In the House of Lords, reinstating the termination agreement, Lord Atkin said at p228:

> *It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow-servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to apply such a duty would be a departure from the well-established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned.*

[128] In *Sybron Corp*, an employee, Mr Roques, the manager of the plaintiff's European operations, conspired with other employees to set up and carry on a new business, Rochem, in competition with them so as to injure the business of Sybron and to conceal their involvement from Sybron. The top management headed by Mr Roques and another, Mr Bove, defected, unknown to Sybron, while still employees

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[10] *Sybron Corp v Rochem Ltd* [1983] 2 All ER 707; [1983] ICR 801
[11] [1932] AC 161

and worked actively against their employer. Mr Roques was entitled in the terms of his employment to the benefit of a pension scheme, which would have been forfeited if he had been dismissed for fraud or serious misconduct. Although the trial Judge found fraud, which would have been a basis for distinguishing *Bell*, he found instead that what entitled Sybron to recover the payments made to Mr Roques was the latter's serious misconduct in breach of contract in failing to report to his employer the fraudulent misconduct of his fellow employee, Mr Bove, and the other subordinates who left with them. The Court of Appeal, being bound by *Bell*, found there was no duty to report one's own misconduct but there could be such a duty to report the misconduct of fellow employees, both superiors and inferiors. This depended on the terms of the employment, the person's position in the hierarchy and all the circumstances of the case. This was so even though compliance by Mr Roques with his duty to disclose would inevitably have revealed his own fraudulent conduct. This was held to be irrelevant.

[129] Counsel for the defendants sought to distinguish this case on the basis that it formulated a somewhat unclear duty to report fraud or other illegal behaviour, and in the present case an intention to compete or take preliminary steps did not amount to fraudulent or illegal behaviour.

[130] The next case cited by the plaintiff was *British Midland Tool Ltd v Midland International Tooling Ltd*[12] which involved directors keeping secret their plans to set up in competition and soliciting employees to join them. The directors were held liable in an action for the tort of unlawful means conspiracy. It was held that the directors' duties required them to take active steps to thwart the process of poaching employees by others and this included a duty to alert their fellow directors to what was happening, even if this disclosed their own involvement with the others.

[131] Ms Dalziel submitted that the case only dealt with the obligations of directors and actually cast doubt on the duty to disclose the forming of a competitive intention and the taking of preliminary steps. It also makes it clear that any duty to report the behaviour of fellow conspirators depends on the circumstances of the case.

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[12] [2003] 2 BCLC 523

[132] The third case relied on by the plaintiff was *Item Software (UK) Ltd v Fassihi*[13]. This case also deals with the duties of directors. The defendant director had been involved in negotiations with the major supplier of his employer. During the negotiations relating to royalties the defendant encouraged his employer to take up a tougher stance knowing that would antagonise the supplier and at the same time wrote to the supplier offering to take over the distribution agreement himself. This was held to be a gross breach of duty by the defendant who had put himself in a position in which his personal interests conflicted with his duty to his employer. Another breach of duty alleged was that he had failed to act in the interests of his employer because he had not disclosed what he had done. The trial Judge examined *Bell* and found that item was a case for a "*superadded*" duty of disclosure. Arden J in the Court of Appeal observed that the duties of directors are higher than those imposed by law upon employees. Arden J held that it was unnecessary to consider the extent to which an employee had a duty to disclose his or her own conduct following *Sybron*. He held at p467 that:

> *No logical distinction can be drawn between a rule that an employee should disclose his own wrongdoing and a rule that he should disclose the wrongdoing of his fellow employees even if that involves his own wrongdoing too*. (para 60)

[133] Justice Arden further held that *Bell* was not authority for the proposition that there are no circumstances in which an employee can have a duty to disclose his own wrongdoing. Arden J also referred to the developing jurisprudence on the duty of trust and confidence which an employer and employee mutually owe.

[134] The final case relied on by the plaintiff was *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP*[14]. This case involved a mass walkout of employees. An injunction was sought for "*springboard relief*", to prevent defendants from taking unfair advantage of the springboard which the Court considered they must have built up by their misuse of confidential information. It was held that such relief was not limited to the abuse of confidential information. It was also available to prevent any

[13] [2005] ICR 450
[14] [2008] IRLR 965

future or further serious economic loss to a previous employer caused by former staff members taking an unfair advantage, and an "*unfair start*", by serious breaches of their contract of employment or, if they were acting in concert with others, of any breach by any of those others. There was yet to be a trial on the substantive issues, but it was claimed that the defendant was the organiser of the plan which caused all the other employees to leave and compete. Justice Openshaw stated at para 24:

> *I accept the convention in the City is that employees who are considering taking up alternative employment are under no obligation to their existing employers to disclose ongoing negotiations unless and until a clear agreement is made with the prospective employer, usually by the signing of a new contract of employment. I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the company itself, the more so when they are themselves party to these plots and plans. It seems to me that that would be an obvious breach of their duties of loyalty and fidelity to UBS.*

[135] Later in the judgment His Honour stated at para 38:

> *In my judgment, it would be one thing if these members of staff had independently and separately decided to go at times of their own choosing, as they are entitled to do. It is here the secret plotting to go together en masse and to join en masse a new startup competitor which is objectionable, for, as must have been foreseen and indeed intended, what was sought was a knockout blow to paralyse UBS, to torpedo them, as Mr McGregor put it, to make it difficult of UBS properly and professionally to continue to service their existing clients or even to comply with the FSA criteria. UBS was entitled to their loyalty and fidelity which, it seems to me, it may not have received. It is, to my mind, highly likely that this plotting and planning will be held to have taken place, which would be unlawful in itself or at least an unlawful means conspiracy.*

[136] Ms Dalziel submitted that this case illustrates what the courts are trying to avoid, which is the theft of an employer's business by senior management. She

noted that at para [10] of *UBS* the Court stated: "*The more senior the staff, the greater the remuneration and the greater the degree of loyalty, fidelity and diligence is required*". She observed that some 52 employees had gone to the rival company. She submitted that it was unsurprising that, in circumstances similar to the New Zealand case *EIL Brigade Road Ltd v Brown*[15] where again there was a mass walkout, that the courts would be looking to formulate a duty that creates a remedy "*for this egregious behaviour*" (para 22). She submitted that the case supports the proposition that the duty will depend on the circumstances of the particular case and would not apply to Mr Whiting.

[137] I have been assisted by an article relied on by Ms Shakespeare: "*Protecting The Business: Good Faith, Competition and Confidentiality*"[16]. The learned authors, after analysing *Sybron* and four others[17] concluded (at 3.104):

> - *There is no general rule that an employee or director may never owe a duty to disclose his own misconduct.* Bell v Lever Bros *is not authority for any such general rule.*
>
> - *An employee or director may owe a duty to disclose the misconduct of other employees, even where that necessarily involves discloses* [sic] *his own misconduct. Whether he owes such a duty depends on all the circumstances, including his position within the business and his express contractual obligations:* Sybron v Rochem.
>
> - *The director's duty to act in what he in good faith considers to be the best interests of the company may require the director to disclose his own misconduct. This general formulation is preferable to seeking to identify particular duties of disclosure, in part, because it has the merit of flexibility in novel circumstances:* Item Software.

[15] HC, Christchurch, CIV-2001-409-733, 5 August 2009, Fogarty J
[16] Paul Goulding QC and Jane Mulcahy, Blackstone Chambers (October 2005)
[17] *Horcal Ltd v Gatland* [1984] IRLR 288 (CA), *Tesco Stores Ltd v Pook* [2004] IRLR 618, *RGB Resources Plc v Rastogi* [2002] EWHC 2782 (Ch.) and *Item Software (UK) Ltd v Fassihi* [2005] ICR 450 (CA)

- *The issue whether an employee owes a duty to disclose his own misconduct is undecided. Earlier authorities such as* Sybron *are likely to be relevant to the determination of that issue, as is the evolving jurisprudence on the mutual duty of trust and confidence:* Item Software.

[138] Ms Dalziel accepted there may be an obligation on an employee to disclose his or her intentions, where the employee's plans to set up a business have been deliberately made widely known to suppliers and staff and not to the employer, citing *Big Save*. She submitted that there was no obligation on an employee to denounce the plans of their superior and their own plans to depart, citing *Nedax Systems Ltd v Waterford Security New Zealand Ltd*[18]. There Chief Judge Goddard, delivering an oral judgment declining interim injunctive relief, stated at p500:

> *I also find unconvincing the complaint that the second and third defendant did not denounce each other to the plaintiff by disclosing their knowledge of the other's intending imminent departure. The Court should not encourage such activity. It is enough that employees must answer truthfully if asked to account for their own stewardship of their duties. Anything more is to put an onus of uncertain ambit on them. We live in the era of management buy-out. Employees can surely be at liberty to discuss their future plans with each other without facing the risk of being reported as disloyal employees, or treated as such if they themselves fail to report every conversation to their supervisor, which may be of interest to him to know.*

[139] It is difficult to reconcile this statement with the recent English cases analysed above. They may show, as the learned authors of the article indicate, the evolving jurisprudence on the mutual duty of trust and confidence. They are also somewhat inconsistent with the views expressed by the Court of Appeal in the *Morris* case. There, although there was no fiduciary duty owed, the Court of Appeal held that the duty of an employee, even when approached by an employer's agency, required the employee to categorically reject the approach and to "*report it to his or her employer along with any criticisms made of the employer and to work with the*

[18] [1994] 1 ERNZ 491

employer to rectify any perceived shortcomings" (para 38). Also, in the context of the duties of employees during their period of notice, which included the responsibility for ensuring as far as possible the smooth transition with which a client was comfortable, the Court of Appeal observed "*The more senior the employee the more onerous is the duty of fidelity*" (para 45). That is consistent with the recent United Kingdom authorities**.**

[140] Whilst the observations of Chief Judge Goddard may be apposite for employees at the bottom of the hierarchy, when dealing with managers or supervisors, depending on the circumstances the position may well be different. As Chief Judge Goddard in a reserved judgment in *Ongley Wilson Real Estate Ltd v Burrows*[19] stated at 242, in reliance on *Walden v Barrance*[20]:

> ***Rule 1:*** *During the employment the employee is under a duty (called the duty of fidelity) 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. Common examples are removing, copying, memorising, or compiling for the employee's as opposed to the employer's purposes a list of customers or any other information, soliciting clients prior to departure, and 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:* Blyth Chemicals v Bushnell (1933) 49 CLR 66. *In short, any use of its property that a reasonable, prudent employer would be likely to oppose if its informed consent had been sought beforehand. This rule is strictly enforced: see* Schilling *for a stark reminder of the possible consequences*.

[141] If an manager or senior employee observes actions that are harmful to the employer it is 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

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[19] [1999] 1 ERNZ 231
[20] [1996] 2 ERNZ 598, 616

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. Mr McTague as the regional manager of the branch and Messrs Whiting and Bartlett as the branch's most senior supervisors, I find, were under such a duty to disclose misconduct damaging to REL.

[142] As to the extent of that duty and the particular circumstances of this case, I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence. The position of employees who are also directors may well be different[21].

[143] As a matter of practicality, when it comes to an employee disclosing that employee's own intentional misconduct, it is unlikely that the duty to disclose, whether "*superadded*" or not, will actually add anything to the consequences of the breach of duty itself, especially as it is unlikely to cause such employees to confess at the time.

[144] As framed in the plaintiff's supplementary submissions it is said that the alleged duty was to inform the plaintiff of their intention to compete by what would be in themselves unlawful means, such as enticing REL clients to provide them with work, stockpiling work opportunities pending the establishment of their competing business, and attempting to recruit REL employees. With the exception of the duty that is said to exist to inform the plaintiff of their intention simply to compete, proof of the other matters would constitute breaches of duty which, if they caused damage, would render the defendants liable. As I have stated I am not persuaded by the English authorities cited that there is a duty to disclose the intention to compete after termination of the employment and the lawful acts taken in preparation.

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[21] see P Watts, "The Transition from Director to Competitor", LQR 2007, 123 (Jan), 21-26

Mr McTague's notice obligations

[145] The second matter which provoked supplementary submissions related solely to Mr McTague. Mr Toogood referred to a number of cases dealing with damages arising from breaches of an ex-employee's duties, which confirmed the existence of a right to obtain such damages where an employee had failed to give, or work out a period of notice.[22]

[146] The final case relied on by the plaintiff was *RDC Dominion Securities Inc v Merrill Lynch Canada Inc*[23] in the Court of Appeal for British Colombia. This has now been finally determined by the Supreme Court of Canada[24]. Mr Delamont, the branch manager of an investment brokerage business in a small city in British Colombia, co-ordinated the departure of virtually all of the investment advisors of the appellant and their employment including his own, by the first respondent Merrill Lynch Canada Inc. No advance notice had been given to the appellant, client records had been surreptitiously copied and transferred to Merrill Lynch and the appellant's office was effectively hollowed out and all but collapsed. None of the employees was subject to contractual restrictive covenants nor were they fiduciary employees. The trial Judge found that the former employees had breached the implied terms of their employment contracts requiring reasonable notice and prohibiting unfair competition with their former employer. Mr Delamont was found to have breached his contractual duty by coordinating the departure and failing to inform his employer's management. Damages were awarded against Mr Delamont and Merrill Lynch for a 5-year period. The majority of the Court of Appeal varied some of the damages awarded and set aside an award against Mr Delamont on the finding of the breach of the contractual duty of good faith.

[147] Chief Justice McLachlin, writing for the majority, upheld the trial Judge's awards, with the exception of an award against the defecting employees for losses due to unfair competition based on their actions during what should have been their

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[22] *Evening Standard Co Ltd v Henderson* [1987] ICR 588; *Systems Engineering & Automation Ltd v Power* (1989) 78 Nfld & PEIR 65; 244 APR 65; 90 CLLC 14/018; *Zueliig v Pulver* [2000] NSWSC 7.
[23] (2007) BCCA 22
[24] (2008) SCC 54

notice period. It was held that the notice required was 2.5 weeks and the trial Judge had assessed damages for that period following the cessation of the defendants' employment. That effectively would have been to impose a restraint after the termination of the employment and the Supreme Court of Canada, not surprisingly, rejected that proposition.

[148] Damages for losses due to the failure to give adequate notice were upheld, as were substantial damages awarded against Mr Delamont who orchestrated the departure. It was held that he owed an implied duty of good faith in the performance of his employment duties and that he breached it by failing to make efforts to retain employees under his supervision, orchestrated their mass departure and had either endorsed or participated in the removal of confidential client information. He was liable for lost profits not just for a period of reasonable notice but over a 5-year period.

[149] Counsel for Mr McTague relied on the sole dissenting judgment in the Supreme Court which talked of the uncertainty of creating a new legal category of "*quasi fiduciary employees*". The minority judgment is less persuasive than that of all the other Justices. The minority judgment did not reflect the changes in the mutual obligations of trust and confidence. The judgment of the majority held that an employee terminating his or her employment may be liable for failure to give reasonable notice and for a breach of specific residual duties such as the duty not to misuse confidential information. Subject to these duties, and as accepted by the plaintiff, the employee is free to compete against the former employer. The majority however recognised that damages may be awarded for a failure to give the contractual notice, or, if none is specified, reasonable notice of the termination. That is consistent with the Court of Appeal's decision in *Ogilvy and Mather (NZ) Ltd v Turner*[25].

[150] The plaintiff's submissions in this regard are that either 3 months' notice was a reasonable notice period for Mr McTague to have given in the position he held as the regional area manager or, in the alternative, the plaintiff argued that the implied

[25] [1995] 2 ERNZ 398 (CA); [1996] 1 NZLR 64

acceptance of the notice period in Mr McTague's letter of resignation constituted a fixed term contract which Mr McTague breached by engineering an early departure.

[151] I accept the submissions of the plaintiff. Although Mr McTague did not have a written employment agreement, which is contrary to the requirements of s65(1)(a) of the Employment Relations Act 2000, nothing turns on the point[26]. Mr McTague had an obligation to give reasonable notice of termination: see, for example *Ogilvy & Mather*.

[152] I did not receive any evidence as to what would have been reasonable notice in the circumstances but, given the seniority of Mr McTague's position, because he was running the branch as though it was his own, and the level of his salary, I would have thought that 6 months notice would have been reasonable. The plaintiff did not argue for that length of notice.

[153] Mr McTague gave what amounted to 3 months and 9 days' notice in his letter of 22 April. There was no express acceptance of that notice period, nor any protest from the plaintiff that the notice given was not long enough. There was, however, implied acceptance of that notice period in Mr Rooney's communication on 7 May, appointing a replacement for Mr McTague at the expiration of his notice period. The conduct of REL was consistent with the acceptance of Mr McTague's notice period.

[154] The legal effect of a party to an employment agreement giving accepted notice of termination is that it turns what otherwise would have been an open-ended employment relationship, by agreed variation, to a fixed term employment arrangement. In the absence of consent from the other side or good cause, neither party is entitled to change his mind and to terminate the employment relationship earlier than the expiry of the notice period[27].

[155] I have found Messrs Bartlett and Whiting would not have left their employment with REL before 31 July if Mr McTague had worked out his notice period.

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[26] *Warwick Henderson Gallery v Western (No 2)* [2005] 1 ERNZ 921; [2006] 2 NZLR 145 (CA)
[27] *NZ Labourers IUOW v Hodder and Tolley Ltd* [1989] 1 NZILR 430; (1989) ERNZ SEL Cas 235: *Harris & Russell Ltd v Slingsby* [1973] ICR 454; [1973] IRLR 221; [1973] 3 All ER 31

[156] For the reasons given I have found that Mr McTague unilaterally abandoned his employment on 13 April and therefore is liable for any damages suffered by the plaintiff as a consequence of his not working up until 31 July. The issue of damages will not be addressed in this judgment.

Breaches of duty

Mr McTague

[157] The preparatory steps taken by Mr McTague, while still in the employ of REL, to establish BMW with a view to competing with REL, by incorporating BMW, arranging funding and purchasing or hiring of plant and equipment, did not amount to a breach of fidelity or trust and confidence in the absence of evidence that such steps in themselves undermined REL during the currency of Mr McTague's employment.

[158] However, the following are breaches of his duties of fidelity and trust and confidence:

- Acting in concert with Messrs Bartlett and Whiting to secure customers for BMW whilst the defendants were still in the employ of REL;

- Acting in concert with Mr Bartlett to solicit staff for BMW, even if not done personally;

- Soliciting Messrs Bartlett and Whiting to join BMW while he was still in the employ of REL.

[159] The conclusions I have set out above indicate the extent of those breaches and when they occurred and Mr McTague will be liable for any damages that can be shown to have flowed from such breaches, in accordance with the usual principles.

[160] There is no evidence that Mr McTague personally took steps to bind REL to unprofitable contracts or that he took confidential financial information as to pricing and quotations or REL documents when he left on 13 April.

[161] Finally, Mr McTague as regional manager was under a duty to disclose to REL his knowledge of the efforts of Messrs Bartlett and Whiting to obtain work for BMW in the period from, at the latest, 4 May when he was able to provide accurate, if conservative, predictions of the amount of work that BMW would have, to Capon Madden. He was also under a duty to disclose any knowledge he may have had concerning the solicitation of employees, including Messrs Bartlett and Whiting, to join BMW. Such knowledge is evidenced from his communication to Capon Madden on 4 May and later and also to UDC on or about 17 May. If those failures to disclose have caused losses to REL, Mr McTague may be liable for damages.

Mr Bartlett

[162] Mr Bartlett, in concert with Messrs McTague and Whiting, while in the employ of REL, breached the duties he owed to REL by:

(a) Soliciting employees of REL to join BMW;

(b) Clearing the whiteboard of confidential information relating to ongoing contracts;

(c) Removing his quotations folder;

(d) Obtaining the client list from Ms Thomson;

(e) Using the quotations he unlawfully obtained from REL to undercut REL for the benefit of BMW.

[163] If loss can be shown to have flowed from these breaches of contract Mr Bartlett may be liable in damages.

[164] I also find that Mr Bartlett would not have left his employment with REL before 31 July if Mr McTague had worked out his notice period.

[165] Mr Bartlett breached the duty to disclose to REL his solicitation of clients and employees of REL whilst still in the employ of REL, and if such non-disclosure caused loss to REL he may be liable in damages.

Mr Whiting

[166] Mr Whiting, in concert with Messrs McTague and Whiting, whilst still in the employ of REL, breached his duty of fidelity by soliciting work from clients of REL and preparing quotations for BMW clients with the assistance of Mr McTague.

[167] If REL suffered loss as a result of those activities Mr Whiting will be liable in damages.

[168] I also find that Mr Whiting would not have left the employment of REL before 31 July 2004 if Mr McTague had worked out his notice period.

[169] Mr Whiting breached his duties to disclose to REL his knowledge of the solicitation of clients of REL whilst still in the employment of REL and, if such non-disclosure caused loss to REL, he may be liable in damages.

Conclusion

[170] The plaintiff has established breaches of duty on the part of the defendants. Because liability has now been determined in the plaintiff's favour, the question of damages, if any, now arises. If agreement cannot be reached on the matter of damages and costs, the parties have leave to file memoranda on how these matters should be resolved and whether a hearing on damages is required.

B S Travis
Judge

Judgment signed at 12.30pm on 24 August 2009