IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 63
CRC 21/07

IN THE MATTER OF	a de novo challenge
BETWEEN	ROONEY EARTHMOVING LTD Plaintiff
AND	KELVIN DOUGLAS MCTAGUE First Defendant
AND	CLARENCE HENRY WHITING Second Defendant
AND	KERRY WAYNE BARTLETT Third Defendant

Hearing:	21-24 and 29 June 2011 (Heard at Ashburton) And by submissions and memoranda filed by the plaintiff on 6 July 2011 And by third defendant supplementary closing submissions filed on 20 July 2011
Counsel:	Mr Billington QC and Mr Brown, counsel for plaintiff No appearance for the first defendant Ms Shakespeare, counsel for the second defendant Mr Shamy and Ms Dalziel, counsel for the third defendant
Judgment:	23 April 2012

JUDGMENT OF JUDGE B S TRAVIS

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[1] This judgment deals with the plaintiff's claim for damages against the three defendants, the plaintiff (REL) having already succeeded in proving they individually and collectively breached their employment agreements. There are issues of causation, quantum and the difficult question of apportionment, if any, between the three defendants. The form of this judgment, to be released only to the

parties, contains confidential financial information and counsel will have the opportunity to apply for further suppression orders which may lead to that material being removed from the judgment as issued publicly.

[2] This case has been a classic example of the difficulties which have arisen because there is no court in New Zealand which has complete jurisdiction to deal with employees who allegedly solicit clients and/or other employees, while they are still in employment, to assist them in a new enterprise which is often in the form of a limited liability company. The employment institutions have no jurisdiction in respect of any claims of tortious liability, not involving strikes and lockouts, or for some claims against former employees, arising from the misuse of confidential information. Nor do they have jurisdiction to deal with the entities which employ the former employees. The common law courts have no jurisdiction to deal with employees' breaches of their employment agreements. These matters were first raised in cases such as *Medic Corporation Ltd v Barrett*[1] and discussed in detail by a full Court of the High Court in *BDM Grange Ltd v Parker*.[2]

[3] This is a situation which academics, practitioners and the courts have frequently stated has led to duplication of proceedings, and the problem that appropriate remedies cannot be sought in a single court. It has placed plaintiffs in a position similar to claimants in the pre-Judicature Act era where they were ruled by the particular writ they had pursued, a process ridiculed by Charles Dickens in *Bleak House* in the fictional *Jarndyce v Jarndyce* case.

[4] In the present case, I am advised that there are already proceedings before the High Court claiming the defendants are joint tortfeasors and also seeking damages from the company they helped to establish and then worked for, BMW Contracting Ltd (BMW). Those proceedings have apparently been stayed until the outcome of the present claims under the employment agreements is known.

[5] Of particular difficulty in the present litigation is whether the defendants can be held jointly and severally liable for all the consequences of their breaches or

[1] [1992] 3 ERNZ 523.
[2] [2006] 1 NZLR 353, [2005] ERNZ 343.

whether, under the law of contract, they each can only be liable for the consequences of their individual breaches that were in the contemplation of the parties at the time their individual employment agreements were entered into, that is the *Hadley v Baxendale*[3] line of authority. It may well be that forseeability tests in tort and the *Hadley v Baxendale* test have come closer together.

The findings of breaches

[6] In my judgment on liability, issued on 24 August 2009,[4] on which this present judgment is based, I found each of the three defendants, whilst employed by the plaintiff in 2004, breached the duties they owed to the plaintiff in the following respects:

The first defendant – Mr McTague

> [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.
>
> …
>
> [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.

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[3] (1854) 9 Ex 341, 156 ER 145.
[4] [2009] ERNZ 240.

Third defendant – 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.

Second defendant - 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.

[7] The liability judgment also dealt with a number of factual findings upon which the plaintiff now relies to prove the extent of the damages it claims to have suffered as a result of the defendants' breaches of duty. These findings are as follows:

[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.

…

Disputed factual findings

Mr McTague

...

[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.

…

[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.

…

[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.

[8] I was also invited by the plaintiff at the liability hearing to make certain findings of fact. Taking into account the allegations I found unproven, as summarised in paragraphs [114] and [115], of the liability judgment I found the following facts were proven on balance:[5]

[5] Based on paragraphs [31] and [115] of the liability judgment. The events set out all occurred in 2004.

(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) Mr McTague and Mr Bartlett 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. [Not proven that Mr Whiting solicited staff to leave REL.]

(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) The significant drop of turnover of REL in Ashburton in April and May was consistent with the solicitation of clients and delaying doing REL's work by Messrs Bartlett and Whiting on Mr McTague's instructions until after BMW was operating.

(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) [Not proven]

(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.

Events subsequent to the liability judgment

[9] At the conclusion of the liability judgment, I observed that the question of damages, if any, then arose, and, if agreement could not be reached on the matter of damages and costs, the parties would have leave to file memoranda as to how these matters should be resolved and whether a hearing on damages was required.

[10] In the event, the plaintiff sought leave to amend its pleadings as to the quantum of damages it was seeking against the defendants. This application was opposed and a defended hearing took place on 4 May 2010. I issued an interlocutory judgment on 17 May 2010,[6] granting leave to the plaintiff to extend its claims for losses after December 2004, which were said to be continuing and had amounted to not less than $6 million. The amendment pleaded that the plaintiff sought the sum of not less than $6 million of damages from the defendants jointly and severally. It was argued by the defendants that they were prejudiced in dealing with new issues of quantum and causation by the way they had led evidence in the liability trial. I found that the proceedings had not changed their character and went on to hold:

> [22] If there are any risks that the defendants have not had the opportunity to lead evidence on matters such as causation, mitigation, the extent of the losses alleged by the plaintiff or the effect of market trends, then such evidence may be led in the quantum trial. It was conceded by Mr Toogood on behalf of the plaintiff, that the defendants should have the opportunity of giving such further evidence as they wish on these matters, including evidence from the defendants themselves as to their actions in relation to BMW Contracting after they left the employment of the plaintiff or from any other lay persons who may be able to assist them on these aspects. Such evidence would be in addition to the expert testimony which has previously been briefed by the parties.
>
> [23] Where the defendants were on stronger grounds was in opposing the amendment both as to the paucity of particulars of damages provided and, more importantly, on the claim of joint and several liability. I agree with the defendants that this later claim appears to sound more in tort than in contract. The defendants can only be liable for such damages that their proven breaches of contract caused to the plaintiff, in accordance with contractual principles. These include the test of remoteness which has traditionally been known as the rule in *Hadley v Baxendale*.

[6] [2010] NZEmpC 55.

[11] In my interlocutory judgment, I gave the plaintiff leave to re-plead the amendment sought and, directed that if the defendants did not take any new objection to the plaintiff's amended pleadings, leave would be granted to file them.[7]

[12] Without new objection from the defendants, a second combined amended statement of claim (the combined statement of claim) was filed on 4 August 2010. In a minute of 6 September 2010, I stated that, if leave was required for the filing of the combined statement of claim, then it was granted. Provision was made for the filing and service of statements of defence. Another chambers hearing by telephone conference call was held on 30 September 2010 which resulted in a further interlocutory judgment, dated 4 October 2010,[8] dealing with opposed applications relating to the disclosure of documents.

Current pleadings

[13] The combined statement of claim pleaded, at [24]:

> As a result of the several breaches of duty by the defendants as alleged, the plaintiff has suffered loss of revenue resulting from competition from BMW Contracting in a sum of not less than $6 million.

[14] Under the heading "Particulars" it was stated:

> (a) The measure of damages which the defendants or any of them ought to pay to the plaintiff was the cost of putting the plaintiff into the position it would had been had it not been for the defendants' breaches of duties.
>
> (b) If the defendants had not respectively breached their duties to the plaintiff as employee, they would not have been in a position, acting separately and in concert, to establish and operate the business of BMW Contracting in competition with the plaintiff.

[15] The particulars then list the breaches of duty by the defendants based on the findings set out above which I had made in the liability judgment. The combined statement of claim then pleads:

> (f) As a result of the springboard effect of the respective breaches by the defendants as alleged, by 19 May 2004 (the date upon which BMW

[7] At [27].
[8] [2010] NZEmpC 131.

Contracting was incorporated) the state of preparation of BMW Contracting for trading was that:

(i) The defendants had sourced sufficient plant and equipment to enable BMW Contracting to begin trading from about 1 June 2004;

(ii) Bartlett and Whiting had tendered their resignations from REL and were expecting to be free to work for BMW Contracting from about 1 June 2004.

(ii[i]) In breach of their duties as employees as alleged respectively in paragraphs (c), (d) and (e) of these particulars the defendants, by 19 May 2004

(1) had secured sufficient forward orders for BMW Contracting to undertake 12 months work; and

(2) had recruited nine skilled and experienced staff to undertake the work.

(h) But for the springboard effect of the breaches of duty by the defendants as alleged respectively in paragraphs (c), (d) and (e) of these particulars, and the consequences alleged in paragraph (f) and (g), neither UDC Finance Ltd nor any other lender, would have approved the substantial loan it granted to BMW Contracting on or about 28 May 2004.

[16] The combined statement of claim then pleads that, as a result of the springboard effect of the respective breaches by the defendants, BMW was able to source sufficient plant and equipment, was able to satisfy UDC that it would have sufficient cashflow to service a substantial loan and was therefore able to commence full trading so as to generate a monthly income, of approximately $200,000 from and including July 2004, in direct competition with the plaintiff and at the plaintiff's expense.

[17] It alleges that if it were not for the springboard effect of the breaches of duty, the plaintiff's managing director, Mr Rooney, would have had the opportunity to discuss the concerns of Messrs Bartlett and Whiting and would have persuaded them to stay in REL's employment, to have canvassed clients and potential clients and, most particularly, BMW would never have been able to commence trading in direct competition with the plaintiff. It goes on to plead that the defendants, and each of them respectively, contributed directly to, and personally benefited from, the operations of BMW which traded in direct competition with the plaintiff and at the

plaintiff's expense. It sets out particulars of such benefits. The combined statement of claim then concludes as follows:

> [28] The losses suffered by the plaintiff as alleged in paragraphs 25-27 have been, and will be, caused as a result of the alleged breaches of duty by each of the defendants separately and in combination, in the manner alleged against each of them respectively in paragraphs 18-24, with the result that the plaintiff seeks damages from each of the defendants, apportioned in such amounts as the Court thinks just having regard to the respective breaches of each defendant and such consequences flowing therefrom as the Court determines, the sum to be recovered by the plaintiff from the defendants in total, not to exceed the total amount of the losses suffered by the plaintiff as determined by the Court in respect of the allegations in paragraphs 18-24.

Suppression orders

[18] I was at pains to remove any reference to actual figures from the substantive judgment even though this may have had the effect of making passages in the judgment dealing with such matters somewhat cryptic. That has become an even more acute problem in dealing with the evidence of the alleged loss, based as it is, partly on the evidence of what REL claims it would have earned but for the defendants' breaches and partly on the actual earnings of BMW. It was agreed that there should be further interim suppression orders suppressing any publication other than to the parties to this case of the financial evidence led in both hearings and these orders were made. As I have indicated at [1] above, in the first instance, the judgment will be released to the parties alone who will then advise the Court which material should be redacted from publication. That is the course I have adopted, although I have again tried to avoid, wherever possible, the actual figures.

The assessment of damages

[19] There was no issue between the parties that the starting point for an assessment of damages must be to restore the plaintiff to the position the plaintiff would have been in, had the breach of contract not occurred. This proposition is based on *Hadley v Baxendale* which contains the following classic statement:[9]

[9] At 355, 151.

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[20] Mr Billington QC, now lead counsel for REL, cited *McElroy Milne v Commercial Electronics Ltd.*[10] The Court of Appeal in *McElroy Milne* accepted the classic statement from *Hadley* but noted that it was not to be regarded "as either Holy Writ or statute".[11] The Court also accepted that the starting point and basic principle is that the injured party is to be put as nearly as possible into the situation that he or she would have occupied if the contract had been performed.[12] The case is also authority for the proposition that, although the general rule is that damages for breach of contract should be assessed at the time of the breach, that rule is not of universal application and must yield, when necessary, to the overriding principle that the injured party is to be placed in the position it would have been if the breach of contract had not occurred.[13]

[21] The underlying concept is compensation for loss of bargain, which is often expressed in the authorities as the "expectations interests".

[22] The next issue Mr Billington dealt with is the question of remoteness, which may bar the recovery of all the damages which have flowed from a breach. As Cooke P said in *McElroy Milne,* even the House of Lords has not been able to achieve precision in English law as to how the test in contract should be formulated and whether there is any true difference between negligence in breach of a contract and negligence in breach of a tort duty.[14] Cooke P also stated that the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.[15]

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[10] [1993] 1 NZLR 39 (CA).
[11] At 45 per Hardie Boys J.
[12] At 49 relying on the judgment of Cooke J in *Stirling v Poulgrain* [1980] 2 NZLR 402 at 419.
[13] At 49 per McKay J, based on Richardson J's judgment in *Stirling v Poulgrain* at 424.
[14] At 43.
[15] At 41.

Joint and several or individual liability?

[23] Mr Billington relied on two Scottish cases addressing the liability of defendants under separate contracts for the same loss: *Grunwald v Hughes,*[16] and *Preferred Mortgages Ltd v Shanks,*[17] which both rely on the earlier Scottish case of *The Belmont Laundry Company Ltd v The Aberdeen Steam Laundry Company Ltd*.[18] In the *Belmont Laundry* case, the pursuer (the equivalent of the plaintiff) sought to recover its losses from two defenders (the equivalent of defendants) jointly and severally as a result of an employee leaving without giving sufficient notice. The pursuer claimed the employee left as the result of the Abdereen Steam Laundry Company inducing him to break his employment agreement. Although the grounds pleaded against each of the two defenders were different, the action was held by the Inner House of the Court of Session to be competent in that both defenders were alleged to have contributed to the one wrong of which the pursuer had complained.[19] That is arguably not dissimilar to the present situation.

[24] In *Grunwald*, an architect was employed to design and supervise structural alterations to a restaurant business. A boiler was installed under his supervision by heating and ventilation engineers. As a result of the way the boiler was installed, a fire broke out causing considerable damage to the premises. The pursuer restaurateurs sued the architect and the heating engineers jointly and severally for damages for breach of contract. It was pleaded that the negligent breach of contract of each of the defenders contributed to the wrong that the pursuers suffered. Even though there were no reported cases of joint and several liability being upheld in a breach of contract action where there were separate contracts and no express provision for such liability, in reliance on the *Belmont Laundry* case, it was held by the Inner House of the Court of Session that the action was competent. The Court permitted the pursuers to sue for a joint and several decree against two defenders for the same loss and damage which was said to have been caused by the defenders' breaches of their separate contracts. Although the alleged failures were different, it was held that in material respects, they had contributed jointly to substantial losses

[16] 1965 SLT 209.
[17] [2008] CSOH 23.
[18] (1898) 1 F 45.
[19] At 47.

as a result of a single wrong, namely the fire in the premises, to which the pursuer claimed each defender by his breach of contract had contributed.[20]

[25] In the *Shanks* case, the pursuers provided a mortgage advance on the basis of a negligent valuation and the solicitor acting was professionally negligent in arranging standard security over the property concerned. When the borrowers defaulted, the pursuers suffered a loss of some £500,000. The defenders were sued jointly and severally in contract for the same loss and, notwithstanding a settlement with the valuer, the Outer House of the Court of Session found that the action could proceed against the solicitor on the basis of both the *Belmont Laundry* and *Grunwald* case. The Court concluded that:[21]

> ... the crucial issue is whether the actings of each defender contributed to a single loss sustained by the pursuer. For this purpose the precise nature of the legal liability of each defender does not matter, provided that the actings of each defender contributed to the single loss.

[26] Mr Billington also relied on the decision of the House of Lords in *Heaton and others v AXA Equity and Law Life Assurance Society plc and another*[22] which dealt with the difficult issue of whether a settlement against one contract breaker extinguished claims in contract against other alleged contract breakers. In *Heaton*, the House of Lords decided that when a plaintiff (A) brings an action against a defendant (B) and the parties reach a settlement ending their dispute, whether (A) can bring proceedings against another defendant (C) for the same loss which was incurred, depends upon whether the settlement was intended to represent the full value of (A)'s claim.[23] If the settlement was intended to be full settlement then (A) may not recover the same loss twice but, if it was not a full settlement, then (A) may take action against (C) for the outstanding loss.[24] In *Heaton*, the proceedings against the two defendants were brought in contract. In this context, I accept Mr Billington's

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[20] See the comments of Lord Hope of Craighead in *Royal Brompton Hospital NHS Trust v Hammond (No 3)* [2002] 1 WLR 1397 (HL) at [44] which note the *ratio* of *Grunwald* without objection.
[21] At [14].
[22] [2002] 2 AC 329 (HL).
[23] At [10].
[24] Lord Rodger of Earlsferry and Lord Bingham of Cornhill both cite what Lord Bingham describes as the "clear and illuminating judgments" of the New Zealand Court of Appeal in *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 which criticise a House of Lords decision in *Jameson v Central Electricity Generating Board* [2000] 1 AC 455.

submission that the case demonstrates that a plaintiff can sue multiple defendants when respective contracts with each party have led to the same loss.

[27] In the United Kingdom, contribution between the defendants in both contract and tort is dealt with under the Civil Liability (Contribution) Act 1978 (UK). There is no such equivalent in New Zealand in relation to defendants who are being sued in contract. Thus, in a case like *Heaton*, the two defendants, each of whom was liable for the same loss, may seek contribution from each other in the United Kingdom. As was submitted by Mr Shamy, counsel for Mr Bartlett, the Law Commission in New Zealand has suggested statutory reform to deal with the whole issue of joint and several liability.[25]

[28] In Mr Billington's written submissions in closing he stated:

> 22. The plaintiff has suffered a discrete, identifiable loss as a result of the actions of all three defendants. They are responsible in law for that loss in materially identical respects, meaning that they are jointly and severally responsible for the loss. … Accordingly, the three defendants in this case must be held as jointly and severa(ly) liable for the entirety of the loss suffered by the plaintiff.

[29] In his oral submissions, Mr Billington sought to re-express his paragraph 22, by stating that the defendants were each individually responsible in law, for the loss, rather than jointly and severally, because that confused contract liability with the tortious concept. He amended the last sentence to read: "Accordingly, the three defendants in this case must be held individually liable for the entirety of the loss suffered by the plaintiff." He therefore submitted that each defendant was responsible individually for the loss they caused, including the losses caused by them acting in concert. He submitted that it had been open to the plaintiff to choose, from the liable parties, which one the plaintiff wished to recover from, but it was pursuing all three.

[30] In his supplementary submissions of 6 July 2011, Mr Billington observed that the combined statement of claim had been available to the defendants since 10 July 2010 and that I had granted leave to the defendants to lead evidence on any issues regarding the pleadings, mitigation and damages including the extent of the losses

[25] Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

alleged by the plaintiff at the quantum trial. None had chosen to do so. He submitted that the defendants were therefore not prejudiced and then stated:

> 12. Notwithstanding the above discussion, given the pleadings specifically invites the Court to consider apportionment it would be appropriate in this case for the Court to apply the test for contract damages as discussed in the closing submissions and determine and apportion the responsibility for the single loss claimed by the plaintiff against each defendant.
>
> 13. That is a basis on which the matter was put in paragraph 22 of the closing submissions for the plaintiff as amended in oral argument.

[31] In his supplementary closing submissions on behalf of the third defendant, Mr Shamy submitted that, as the plaintiff has pleaded apportionment between the three defendants, it would be appropriate for the Court to apply the test for contract damages, as discussed in closing submissions. The Court should then determine and apportion the responsibility for the single loss claimed by the plaintiff against each defendant. He repeated his earlier submission that the foreseeable loss of the third defendant must relate solely to the breaches of his individual employment agreement as found by the Court, and not the loss caused by the breaches of agreement of the other parties. He referred to the evidence of the expert called on behalf of the third defendant, Mr Bijl, who had worked through the global sum of the loss and considered each of the breaches as found by the Court. On that material, he submitted that Mr McTague was the principal offender at 50 percent and the other half should be then allocated against the other two defendants. Mr Shamy submitted that this was consistent with the plaintiff's original pleading. He also noted that the plaintiff's expert, Mr Hadley, had expressly declined to give evidence on the subject of apportionment.

[32] I accept Mr Shamy's submission that there may be difficulties for the defendants in the present case in making a cross-claim if they are held jointly and severally liable, or even each individually liable, for the whole loss in contract because of the absence in New Zealand of an equivalent to the Civil Liability (Contribution) Act 1978. I also accept Mr Shamy's submission that this Court would not have jurisdiction to determine such claims between the defendants as there is no employment agreement between the defendants themselves upon which this Court's jurisdiction could be based. This was the conclusion reached by Judge Shaw in

Andersen v Eastern Institute of Technology.[26] I do not accept Mr Billington's submission that High Court Rules 4.18-4.22, which deal with indemnity claims between parties, confer any jurisdiction on this Court to deal with such cross-claims. The absence of a right to seek contribution does not, however, prevent, as a matter of law, the defendants being held jointly and severally liable for the plaintiff's allegedly same loss.

[33] I accept Mr Shamy's submission that it has been recognised in New Zealand that the whole issue of joint and several liability, especially where there are claims in contract, needs to be addressed by Parliament. He referred me to the 1998 Report of the Law Commission dealing with the Apportionment of Civil Liability which included draft legislation.[27]

Concurrent Liability?

[34] Mr Shamy submitted that there is no authority in New Zealand which supports the proposition accepted by the United Kingdom authorities that, if more than one contracting party contributes to a single wrong, then joint and several liability may be imposed. This issue is, however, addressed in the Law Commission's Preliminary Paper No 19, also described as *Apportionment of Civil Liability*, which was released as a discussion paper in March 1992.[28] It appeared to form the basis of the Law Commission's Report 47 to which Mr Shamy referred.[29]

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[26] WC 57/00, 1 December 2000. The Supreme Court has recently confirmed in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11 that contribution in equity is available in New Zealand in courts of general jurisdiction when two or more parties are under a coordinate liability (that is a liability of the same nature and extent) to make good one loss and one of them pays more than his or her proportionate share of that loss. The overpaying party can recover a contribution from the other party or parties, provided all parties involved in the contribution issue are under a coordinate liability for the same loss. In addition, Elias CJ, McGrath and Anderson JJ also accepted that equitable contribution may be available where liabilities are in substance coordinate although the legal basis of the claim differs.

[27] Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998). The Law Commission has recently announced, on 13 September 2011, a new review into joint and several liability in civil proceedings. See also the comments of Blanchard and Tipping JJ in *Altimarloch* at [77] and [128] which call for Parliament to address this area of law.

[28] Law Commission *Apportionment of Civil Liability* (NZLC PP19, 1992). See the discussion, without disapproval, of the Law Commission's work on civil liability in the judgments of Tipping and McGrath JJ in *Altimarloch*.

[29] See also the recent report assessing joint and several liability in the building and construction sector for the Department of Building and Housing which relies on and confirms the Law Commission's analysis of joint and several liability: Buddle Findlay and Sapere Research Group *Final Report to the*

The discussion paper was said to concern cases where there are multiple defendants (D1, D2, etc) and where the dispute relates to a single loss suffered by a plaintiff (P). The paper states at paragraph 16:

> … It is not concerned with situations where different causes of action or different defendants are involved in different kinds of loss.

[35] It then defines joint concurrent liability as:[30]

> …a situation where the P can claim on the same cause of action (arising from the same facts) against both D1 and D2. This might occur where D1 and D2 as partners contract with P and one of the partners breaches the contract.

[36] It observes that in contract the test for joint liability depends on the existence of a common liability for common obligations, such as where D1 and D2 are co-contractors or co-guarantors.[31] That may be contrasted with the field of tort where there is often joint and concurrent liability because there have been combined activities to a common end, for example, some form of conspiracy for which joint tortfeasors may be liable.

[37] The paper also refers to "several concurrent liability" as describing where "P has, in respect of a single loss, one claim against D1 and (whether by reason of a separate cause of action or of different facts) an *independent* claim against D2."[32] It then goes on to describe that situation in the following terms:[33]

> D1 and D2 are both wrongdoers whose acts have caused loss or damage to P. They are called *concurrent wrongdoers* (a global term which refers to both joint concurrent wrongdoers and several concurrent wrongdoers) and their liability is *in solidum*: that is, each is responsible to P for P's entire loss, subject to the limit that P can never recover more than the total loss suffered.

[38] The paper goes on to note the difference between joint concurrent liability and several concurrent liability which had important consequences at common law,

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Department of Building and Housing: Review of the Application of Joint and Several Liability to the Building and Construction Sector (Department of Building and Housing, April 2011).

[30] At [17].

[31] At [17].

[32] At [18]. Emphasis original.

[33] At [19]. Emphasis original.

some of which have been abrogated by statutory intervention in New Zealand, at least in relation to joint tortfeasors. It then states:[34]

> In both situations, however, the concurrent wrongdoers were said to be liable *in solidum*: each of the wrongdoers was responsible for the *whole* of the damage. The plaintiff could therefore enforce judgment against whichever defendant the plaintiff chose. In practical terms one defendant might be made to pay the entire award while another escaped scot-free. This rule has not been abolished and remains a fundamental of the law of civil liability. For the purposes of the present review it will be necessary to decide whether or to what extent concurrent wrongdoers should continue to be liable *in solidum*, or whether the rule should be changed in favour of separate or *several* liability so that each concurrent wrongdoer should bear only the proportion of the plaintiff's loss which the court allocates to that wrongdoer.

[39] After noting that in New Zealand, the Law Reform Act 1936 only allowed contribution between joint tortfeasors and not between co-defenders accused of breaching individual contracts,[35] the discussion paper under the heading "THE RIGHT TO CONTRIBUTION" states:

> 68 A familiar shared liability problem in New Zealand can be illustrated as follows:
>
> > P wishes to build a house and engages an architect to draw up plans and supervise the project, and a builder to carry out the construction. Periodic inspections are made by the local authority (in the exercise of its statutory role) during the building process. Some years later, P notices cracks in the exterior walls and, on consulting an engineer, discovers that these are due to foundations which are inadequate because they do not make allowance for the filled site on which the house is built. P will need to strengthen the foundations to prevent the damage getting worse, and seeks to recover the cost of carrying out that work from whomever was to blame.
>
> In this situation it is entirely possible that the "blame" for the building failure rests to some extent with all the defendants. If the builder was careless, that should have been noticed by the architect who was paid to supervise construction, or, in the last resort, by the local authority when fulfilling its statutory obligation to carry out inspections of the work in progress. In that

[34] At [25]. Emphasis original.

[35] At [49]. A conclusion which Thomas J in *Dairy Containers Ltd v NZI Bank Limited* [1995] 2 NZLR 30 appears to reject at 120, where he holds that the auditor general who was not sued as a tortfeasor but in contract, was still allowed contribution from persons who would have been held liable for the damage, if that person was sued as a tortfeasor even if that person was sued in contract. This was notwithstanding the lack of an equivalent to the United Kingdom Civil Liability (Contribution) Act 1978 and the recommendation contained in the Law Commission's Discussion Paper. However, see Tipping J's conclusion in *Altimarloch* at [125] that the High Court was right to rule out the application of the Law Reform Act because the vendors' liability under s 6 of the Contractual Remedies Act did not make them tortfeasors.

> case, P would have a claim against each of the builder and the architect under their separate contracts with P, and a further claim against the local authority in tort.
>
> 69 If P sues the local authority in tort for negligence, and a court finds that the authority bears partial responsibility for the loss, P can recover the entire loss from the local authority. *Similarly, P can recover the entire loss from either the builder or the architect, if they are found to be in breach of their respective contracts of engagement.*[Emphasis added] Proof of partial responsibility against any one of the potential defendants would be sufficient to give P a complete remedy (assuming that the defendant is able to pay a judgment).
>
> 70 If, in the example above, P chooses to sue only one of the potential defendants or sues more than one but enforces judgment against one only, under the present law that defendant is unable to force the others to pay their share of the loss. The chosen defendant cannot join the others as third and subsequent parties to the action under r 75 of the High Court Rules: as we have already seen, a right to contribution arises only under the terms of the Law Reform Act 1936 (in respect of joint tortfeasors) or at common law in respect of co-obligors. In the present example, the local authority is liable in tort, but the other two parties are liable under their separate contracts. There are no joint tortfeasors and no co-obligors. Therefore there is no right of contribution or indemnity as required to invoke r 75. Similarly, D1 will be unable to bring a subsequent separate action for contribution. The entire loss falls upon the defendant whom P elects to sue (or, if P sues more than one, the one against whom P executes the judgment). That seems plainly unfair.[36]

[40] Subsequent leaky homes litigation has produced similar results.[37] Local authorities have complained that they are regarded as the "deep pockets" where the other parties are either not insured or have gone into liquidation. The discussion paper and the later report both recommend the passing of an equivalent to the United Kingdom Act.

[41] I confess I had not been aware of the expression *in solidum* and could find no reference to it in Words and Phrases Judicially Defined. In Black's Law Dictionary, 9th ed, the following is found:[38]

> ***in solido*** … [Latin "as a whole"] (Of an obligation) creating joint and several liability. The term is used in most civil-law jurisdictions, but no longer in Louisiana. – Also termed *in solidum*. See SOLIDARY.

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[36] The report gives the following reported examples *Bowen v Paramount Builders* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; and *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548.

[37] However, see *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [38]-[43] for an example of a building contractor and the local authority being held liable *in solidum* for the same damage caused by the Council's negligence and the builder's negligence or breach of contractual duty.

[38] Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, West, St Paul, 2009) at 867 and 1521.

…

> **solidarity**. (1875) The state of being jointly and several liable (as for a debt).
>
> **solidary** … (Of a liability or obligation) joint and several. …
>
> "It is a single debt of £100 owing by each of them, in such fashion that each of them may be compelled to pay the whole of it, but that when it is once paid by either of them, both are discharged from it. Obligations of this description may be called solidary, since in the language of Roman law, each of the debtors is bound *in solidum* instead of *pro parte*; that is to say, for the whole, and not for a proportionate part. A solidary obligation, therefore, may be defined as one in which two or more debtors owe the same thing to the same creditor." John Salmond, *Jurisprudence* 462-63 (Glanville L. Williams ed., 10th ed. 1947).

[42] *Jowitt's Dictionary of English Law* defines solidum as:[39]

> To be bound *in solido* is to be bound for the whole debt jointly and severally with others; but where each is bound for his share, they are said to be bound *pro rata parte*.

In solido is also defined as "in the whole, applied to a joint contract."[40]

[43] The Court of Appeal, in the recent decision of *JB Aubin Realty Ltd v Hinton*,[41] had to examine the exercise by a High Court Judge of the powers under s 9(2)(b) of the Contractual Remedies Act 1979 which allow for an order to be made directing any party to the proceedings to pay to any other party, such sum as the Court thinks just. The Hintons were purchasers of motel units as a result of advice received from the vendors (the Smiths) and the vendors' land agents (JB Aubin Realty Ltd). The land agents were sued under the Fair Trading Act 1986, the vendor under the Contractual Remedies Act. The High Court found that the purchasers were contributorily negligent and then apportioned the loss under the provisions of the Act between the real estate agents, the purchasers and the vendors.

[44] The Court of Appeal stated in relation to one of the vendors:[42]

> It is plain Mrs Smith's conduct has had a materially causative effect. The Judge was entitled to put that into the mix. This proposition was, broadly speaking, that Mrs Smith's conduct was too remote because of the intervening act of Mr Donnithorne [an employee of the real estate agent] in

[39] D Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Sweet & Maxwell, London, 2010) at 2130.
[40] At 1154.
[41] [2011] NZCA 465.
[42] At [68].

> sending the facsimile. The question is of a factual nature. It is whether Mrs Smith's action was a material or substantial cause of the Hintons' loss and not merely part of the history which created the opportunity for that loss.

[45] Two cases were cited in support, *Fleming* v *Securities Commission*[43] and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd.*[44] In the latter case, Fisher J discussed causation and remoteness and confirmed that it would not be sufficient for a plaintiff to show that "but for" the breach, the loss would not have been suffered. In reliance on the *Fleming* case, Fisher J held that the breach must have been a material or substantial cause, not merely a part of the history which created the opportunity for loss. He went on to state:[45]

> The other irreducible requirement is that of reasonable foreseeability. Whether foreseeability forms part of the cause of action itself (as in tortious negligence) or merely a principle limiting damages (as in contract), it appears that at common law damages will normally be payable only for those heads of loss the kind (although not the extent) of which was reasonably foreseeable on the part of the defendant.

[46] In the *Fleming* case, Cooke P said that he subscribed to the view that "within the broadest of conceptual frameworks, whether the damage and fault are sufficiently connected for liability is a question of fact and degree."[46]

[47] I consider these New Zealand decisions and the statement of the law in the Law Commission preliminary paper are consistent with the House of Lords judgments in *Heaton,* allowing plaintiffs to sue multiple defendants based on their respective contracts when the breaches have led to the same loss. I further consider that the Scottish cases and *Heaton* can be understood as examples of what the Law Commission has described as "several concurrent liability". That is, in each case, there were separate causes of action against different defendants whose actions had materially and substantively caused the same loss. In such cases, the defendants will each be liable for the entire loss if it can be shown that their actions were material and substantial causes of the single loss.

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[43] [1995] 2 NZLR 514 (CA).
[44] [1999] 1 NZLR 213 (HC).
[45] At 241.
[46] At 523.

[48] On the findings I have already made, in the passages from the liability judgment set out above, I found that each of the defendants, by the steps they took in breach of their individual employment agreements to solicit staff and clients of REL, were able to set up BMW and ensure that it traded profitably and substantially from the outset, at the expense of the plaintiff. The plaintiff has pleaded a single loss resulting from the activities of BMW.

[49] I confirm my view, expressed in the liability hearing, that BMW would not have been able to have commenced business on 1 June 2004 and the three defendants would not have left REL by that date and have been available to work in BMW, but for their individual breaches of their individual agreements and their actions in concert. The actions of each of the defendants were therefore the material and substantive causes of the same loss and each defendant is liable for the whole of that loss. To use the words of the Law Commission preliminary paper, the defendants were all concurrent wrongdoers and are liable *in solidum*.

[50] In addition, I am satisfied that it was within the reasonable contemplation of the plaintiff and each of the defendants that such actions as they took in breach of their individual contracts would cause loss to REL. As I found in my liability judgment, each of the defendants acted in breach of contract to lure staff and clients away from the plaintiff and to BMW. It was certainly within the contemplation of the parties that the poaching of REL's clients and staff would cause significant loss of business and profit to REL.

[51] Had I been able to apportion the losses between the defendants, a process which I do not consider is appropriate in light of authorities I have canvassed, I would have been sympathetic to Mr Shamy's submission, based on Mr Bijl's evidence, that the principal contractual offender was Mr McTague who probably started the process. However, the actions of Mr Bartlett in relation to the staff and clientele of REL and of transferring quotations from REL to his own computer so they could be used by BMW probably had equal effect. I accept Ms Shakespeare's submissions that Mr Whiting had a much lesser role than the other two. But without the concerted effort of all three, BMW would not have been able to have commenced trading in the way that it did, at the time that it did, thereby causing the losses to

which I now turn. On balance, I consider that Messrs McTague and Bartlett contributed equally, and I would have apportioned 40 percent of the proven losses to each of them, totalling 80 percent, and the balance of 20 percent to Mr Whiting.

Causation

[52] I accept Mr Billington's submissions as to what Cooke P said in *McElroy Milne*:[47]

> … the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

[53] Mr Billington also cited *EIL Brigade Road Ltd v Brown*[48] in which Fogarty J noted that the test was whether the plaintiff's proved losses were attributable to or caused by the defendant's acts or omissions. International Cargo Express Ltd (ICE) in the *Brigade Road* case appeared to be in the equivalent position of BMW in the present case, and it was to BMW the defendants went having unlawfully taken clients and key staff from REL.

[54] Fogarty J divided the causation task into two parts:[49]

> The first question is whether the plaintiff has proved in a sufficiently material way that the defendants' breaches were a substantial factor in causing the plaintiff to lose the customers and their revenue?
>
> The second question, where the onus is firmly on the defendants, is to examine whether the defendants have shown that the plaintiff would have lost the customers anyway? This is a question of fact to be decided by inference and not speculation. And it is not a hypothetical examination of whether the defendants could have joined ICE and achieved the same result by acting lawfully.

[55] I did not understand there to be any argument by the defendants that this was not an appropriate description of the first task. There was an issue over the second: Mr Shamy submitted that the third defendant did not necessarily accept there was a reverse onus. If there was, this is decided by inference and not by speculation and is

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[47] At 41.
[48] HC Christchurch CIV-2001-409-733, 5 August 2004.
[49] At [203]-[204]. Emphasis original.

not a hypothetical examination of whether the defendants could have achieved the same result acting lawfully.

[56] The central plank of the plaintiff's case is that the defendants cannot prove that BMW would have obtained the REL clients in any event because it is alleged that, without the breaches by the three defendants of their legal obligations, BMW would not have come into existence in a way that would have materially impacted upon the plaintiff's market share. This is based on the proposition that UDC or any other finance company would not have financed BMW to the level required for it to be a competitor of REL in major earthmoving work without BMW having first secured the staff and the work from REL's clients. It is alleged this was the spring board which allowed BMW to enter the market and to immediately obtain a turnover in excess of that which was estimated for the purposes of the UDC loan.

[57] Mr Billington relied on the evidence of Mr Rooney, the Managing Director of REL, that there were substantial barriers to a new company entering into the earthmoving industry in the mid-Canterbury region on a scale to provide competition for REL.

[58] I accept the plaintiff's evidence that, for BMW to have been able to operate in competition with REL as it did and to perform the specialised work for REL clients, it needed to have significant capital equipment. BMW needed that equipment in order to carry out the particular work which REL had been carrying out. That work involved the construction of border dyke irrigation schemes and farm storage irrigation systems for farms in the mid-Canterbury area. BMW required that equipment so that it could be operated by nine skilled machinery operators, including the second and third defendants, all of whom had come from REL. Until BMW commenced trading on 1 June 2004, REL had no other direct competitor in the region for work on the same scale as that being carried out by BMW Ashburton. REL had purchased Doug Hood Limited for a substantial sum in order to obtain that work.

[59] I also accept Mr Billington's submissions, based on the findings I made in the liability judgment, that BMW would never have been formed when it was, or would

have been in a position to compete successfully with REL, without the concerted actions of the three defendants. Whilst the first defendant may have left REL with or without the second defendant, as he was approaching retirement, I have already found that the third defendant would not have left if he had been offered $70,000. It is unlikely that the second defendant would have left for some time before taking up the position he later did with a dairy farm operator.

[60] For these reasons, I find that the plaintiff has proved, in a sufficiently material way, that the defendants' breaches were the sole factor which caused REL to lose its customers and their revenue.

The quantum of loss

[61] The plaintiff in the damages hearing called Paul Allott, who was the Group Administration Manager of REL, based in Waimate. His duties had included being the Chief Financial Officer for the Rooney Group and the production of financial statements, including those for the Ashburton Branch. His evidence was that in the eight months prior to June 2004, when REL was running the Ashburton business it had acquired from Doug Hood Ltd, the actual revenue figures were very closely in line with the budget he had prepared on the basis of the actual performance of Doug Hood Ltd during the previous twelve months. The average monthly turnover in the seven month period from September 2003 until March 2004 for the Ashburton Branch of REL was $677,000. Their evidence satisfies me that Messrs Allott and Rooney were comfortable with the direction that the Ashburton branch was going in and confident that it would achieve the anticipated monthly turnover of $1 million in the near future. That later confidence may have been misplaced.

[62] REL's Ashburton turnover, excluding GST, for the month of January 2004 was $633,067; for February, $550,172, and for March, $674,656. In April 2004, it dropped to $373,045, and in May to $234,099. In June, after BMW commenced trading on the first of the month, REL's turnover was $392,349. REL's monthly turnover, with few exceptions, remained at close to that level until April 2007. The figures provided by Mr Allott for the period commencing 1 July 2004 and concluding on 31 March 2007 only exceeded the previous average monthly turnover

of $677,000 on five occasions and came close on only two occasions. During that period, the anticipated monthly turnover increase to $1 million dollars was never achieved.

[63] The plaintiff called as its expert Barry Hadlee, an experienced consulting accountant who had carried out specialised services in the area of damages assessment valuation. The third defendant called as his expert, Robert Bijl, also a chartered accountant, experienced in matters of general accountancy, taxation and litigation support, who has regularly given evidence before the Court. The defendants did not call any other evidence at the damages hearing. Messrs Hadlee and Bijl are both expert forensic accountants who gave their evidence by way of briefs and held a meeting to discern what matters could be agreed or were disputed. They were then called to give their evidence together so that they could be examined and cross-examined in each other's presence, a process which has been described as "hot-tubbing". I found it to be most helpful in discerning the areas of agreement and disagreement between the experts. Their expertise was not in issue.

[64] Because of the time which has elapsed since the events in 2004 that gave rise to this litigation, the plaintiff has been able to base its claim for damages on historical events rather than on speculating on possible future losses. The plaintiff has substantially increased the amount of its claimed losses from its first claim. I accept the force of Mr Shamy's submission that although the plaintiff was entitled to change its evidence and its pleadings, the Court should take into account the reasons for such change. He submitted that the real intention of REL was to remove BMW from the market and the Court should not be used as a vehicle to effectively prevent lawful competition.

[65] However, the damages claim was presented on the basis of the financial material that was provided by REL and BMW as to their actual trading. BMW's figures were not available during earlier stages of this litigation and this, plus REL's continuing losses has satisfactorily explained the changes in the quantum of REL's claims.

[66] In their pre-hearing meeting, Messrs Hadlee and Bijl were able to agree on the appropriate methodology for assessing REL's losses. It was agreed that the plaintiff's claim was appropriately calculated as the loss of gross margin comprising "lost sales", less the operating expenses the plaintiff would have incurred in producing those sales. Lost sales can be calculated by two points of reference. One is the actual sales that BMW achieved. The other is the lost revenue of REL Ashburton, being the sales gap between the pre-damage level of sales and what was achieved after the damage took place.

[67] What could not be agreed was the duration of the loss. The plaintiff, supported by Mr Hadlee's evidence, was seeking to recover losses over a period of some three years, ending on 31 March 2007. Mr Bijl's approach was that the maximum loss period should be three to six months, or, at most, to 31 March 2005, a period which would have allowed REL to take appropriate steps to mitigate its loss. Mr Bijl also contended REL would not have retained all its clients in any event and that those clients who would, in his view, have left REL, should be deducted from BMW's sales. The experts differed as to the expenses to be deducted. Mr Bijl also wanted to factor in several other contingencies and was of the opinion that the Rooney Group, as a whole, which had traded profitably in that period, had therefore suffered no loss as a result of what had happened in Ashburton.

[68] Mr Hadlee produced a schedule (schedule A12) assessing damages for the years ending 31 March 2005, 2006 and 2007 using BMW's actual sales, less his calculation of operating expenses. Those damages totalled $4,494,000. In another schedule (B4) he used the gap approach showing how REL's sales had dropped during the three years damage period in comparison to the pre-March 2004 period, less his calculation of operating costs. These damages totalled $3,785,000. The difference between schedules A12 and B4 was $709,000. Mr Hadlee explained the gap approach left REL's sales static at the pre-damage average of $677,000 per month and factored in no upwards growth at all. As the BMW sales included an increment for actual growth, Mr Hadlee supported schedule A12.

[69] Mr Hadlee indicated that if the Court accepted the schedule A12 loss for three years, without deductions of any significance from the revenue figures for other

reasons, he could accept Mr Bijl's proposition that there should be a fifty percent deduction for operating expenses, inclusive of wages. That would reduce the loss Mr Hadlee calculated from $4,494,000 to $4,351,000, a difference of $143,000. This was close to Mr Hadlee's own calculations.

[70] On the basis of Mr Hadlee's evidence, I therefore assume that the plaintiff's final claim would be $4,351,000, without further deductions.

[71] If, however, the figure contained in schedule A12 was to be significantly reduced by the Court, it was Mr Hadlee's opinion that the deduction for operating expenses ought to be significantly reduced because REL's existing staff during the three year period could have coped with the extra sales that were achieved by BMW. This was contested by Mr Bijl.

[72] In reaching his conclusion, Mr Hadlee also took into account a comparison with the substantial increase in sales at the Waimate branch of REL during the same three year period. Mr Hadlee's approach, however, did not accept Messrs Rooney and Allott's belief that the Ashburton branch would have achieved an average of $1 million a month during the relevant period. He preferred to work on established figures rather than to speculate in other areas which might be controversial.

[73] A rough way of checking whether a $1,000,000 monthly turnover would have been achieved in the three year period was to add the figures achieved by BMW and REL in each of the three years. At no point did they exceed $10 million in a 12 month period. The hoped for average was therefore never actually reached. This supports Mr Hadlee's analysis.

Did the plaintiff suffer a loss?

[74] Mr Shamy submitted that there had not been any loss to the plaintiff. He contended that the plaintiff was the employer of Mr Bartlett, not the plaintiff's branch at Ashburton. He submitted that although there were two branches operated by the plaintiff, there was only one legal entity and the decision as to which branch, either Waimate or Ashburton, tendered for particular work, was made by a contract

management group operating out of Timaru. He compared the sales made by the plaintiff in 2004 and 2005 as a group, with the sales made by BMW in the same period. BMW's sales were 10 percent of the total Rooney Group sales. He submitted that because the plaintiff, as a group, was highly profitable, it had made no losses and indeed its revenue had increased during that two year period. He submitted that the sales made by BMW during that period had not caused a drop in sales for the plaintiff and therefore there was no loss. Mr Shamy submitted that BMW was doing little more than nipping at the heels of REL.

[75] I do not accept those submissions. The plaintiff's case has been put on the basis that it has lost revenue that it would otherwise have obtained, but for the actions of the defendants. The fact that the REL Group made a profit from its other operating divisions and that the turnover of the Waimate branch increased may be relevant to show that there was no downturn in the rural economy which could have produced the reduction in revenue in the Ashburton branch. Beyond that, I find it has no relevance. Provided the plaintiff can prove that the loss of revenue it would have otherwise have earned was attributable to the unlawful acts of the defendants, it is entitled to be compensated for that loss.

[76] Mr Shamy also fairly accepted that a plaintiff doing well in other areas must still be able to claim a loss that it had suffered over a particular contract as a result of a breach and that it would be wrong in law to suggest otherwise.

[77] Mr Bijl had contended that the Ashburton sales should be placed alongside the sales of REL's main branch at Waimate and not treated separately. He argued that REL had made decisions that Waimate would tender for large jobs, which therefore did not go to Ashburton, inflating the losses REL was now seeking to recover. I have heard Mr Rooney's evidence to the contrary which I found to be credible and acceptable. The decisions made by the contracting committee at Timaru as to which branch should tender for particular work were made on geographical lines and not made for the purpose of inflating the losses of revenue being experienced at Ashburton.

Duration of loss - springboard

[78] Mr Shamy submitted that the length of the damage period must equate to the alleged springboard or head start that BMW obtained through the defendants' breaches of contract. He submitted that this cannot last forever and that the duration will be limited in accordance with whatever period the Court finds is reasonable to deprive the defendants of the benefit of the head start. The duration of the disabling period will be a question of fact and will be determined in each case, he submitted, citing *Aquaculture Corporation v New Zealand Green Mussel Co Ltd and ors*.[50]

[79] I accept those submissions and did not understand Mr Billington to argue to the contrary. In the *Aquaculture* case, information provided in confidence later became publicly known but the Court found that the confidential information had given the defendants an exploited advantage not shared by the general public.

[80] Mr Shamy referred to Mr Hadlee's first brief of evidence, dated 1 August 2008, which sought damages over a 15 month period, ending in June 2005. Mr Hadlee in cross-examination could not remember why that date was selected but said that the period was reconsidered by REL and he was invited to have another look at the damages assessment because of continued losses being experienced by REL. He was then asked to calculate damages for the period up to and including 31 March 2007.

[81] Mr Shamy contrasted the longer period with the evidence of Mr Bijl which was much closer to the time period first selected by the plaintiff in the statement of claim that was extant at the time of the liability hearing. He contended that there was no basis put forward as to how the three year period was justifiable in terms of the limited nature of the springboard advantage.

[82] Mr Shamy submitted that the principal plank of the plaintiff's case, that BMW should never have existed, should be rejected. Instead, the Court should say what springboard was given to BMW by the defendants' breaches. He relied on Mr Bijl's contention that it should be a period based on the life cycle of quotations

[50] (1985) 5 IPR 353 (HC).

which was 30 days and that within the first six months after BMW started trading, the plaintiff had had the opportunity to talk to customers. After that, he submitted, there was then a level playing field. He submitted the maximum period should be no more than 12 months to 31 March 2005. That, he argued, was also consistent with the forward work that BMW had secured in early 2004, which formed the basis of UDC's agreement to provide it the necessary finance to commence trading.

[83] Mr Billington, in his opening for the damages hearing, noted that Mr Hadlee's analysis extended to the year ending 31 March 2007, being the period up to which Mr Hadlee had had access to the BMW sales records. He submitted that the figures demonstrated that the plaintiff never recovered its sales to the level they had been prior to the defendants' misconduct. There was evidence that later in 2007, the Ashburton branch of REL obtained a substantial contract which greatly increased the monthly turnover. On the completion of that contract, REL's Ashburton figures fell again to what they had been in the previous three year period for which damages are sought. Arguably, REL could have sought damages for a longer period, provided they were still caused by the defendants' breaches.

[84] The defendants have been unable to point to any credible evidence that BMW would have been a substantial competitor to REL in the mid-Canterbury market during the first three years without the head start obtained as a result of the defendants' breaches. I have not been given persuasive evidence that other financial sources would have been available to enable BMW to have purchased the heavy equipment necessary. I do not accept Mr Bijl's suggestion that, had finance not been available, BMW could have changed its terms to improve its cash flow. Without the heavy equipment, the specialised and substantial work simply would not have been available to BMW.

[85] Further, without the finance, Mr Whiting would have been unlikely to have left when he did. If Mr Whiting had not left, it is even more unlikely that Mr Bartlett would have left, especially if he had obtained the pay increase he claims to have sought. If Messrs Whiting and Bartlett had remained with REL, there was little or no prospect of BMW ever being formed. Their relationships with farmers in the mid-Canterbury area would have ensured that work remained with REL as long as

they did. Their departure to form BMW as a result of their breaches was part of the head start. Without them BMW would most likely have never been formed and would not have been a competitor of REL in the following three years.

[86] Subject to issues such as mitigation, to which I will return, I am satisfied that there was no break in the chain of causation over the three year period over which the plaintiff now seeks to recover its losses from the defendants. The evidence of Messrs Allott and Rooney satisfied me that the revenue lost as a result of BMW's trading continued for the three year period ending 31 March 2007. It even continued after the completion of the large Ashburton contract in the year ending 31 March 2008 but no compensation for the later period is sought.

[87] Having found, for the reasons I have given, that the defendants' breaches were the sole factor which caused REL to lose its customers and its revenue and accepting as I do Mr Rooney's evidence of the substantial economic barriers to BMW being formed as a substantial competitor of REL but for the defendants' breaches, I am satisfied that there is no compelling factor which explains REL's losses over the three year period other than the unlawful head start that BMW was given. I find, on balance, that the plaintiff has proved its losses extended over the three year period.

Deduction of BMW's clients

[88] Mr Bijl accepted that the focus with respect to quantum should start with the actual sales achieved by BMW but that a deduction should then be made for any clients of BMW which were not clients or had never been clients of REL. He analysed BMW's sales and deducted from them the sales of 19 clients of BMW who had provided affidavits in support of the defendants. These affidavits, he submitted, had provided reasons why those clients had not chosen to be clients of REL. Those reasons, Mr Bijl contended, included the personal relationship the clients had with Mr Bartlett or Mr Whiting and the fact that Mr Rooney was part of the Fish and Game Council which had opposed new irrigation schemes, possibly adversely affecting local farmers. He also referred to their awareness, from BMW's advertising, that there was a new contractor available. He contended that a

deduction from the sales should be made for the clients who had proffered their own reasons for dealing with BMW. That deduction in his view totalled $670,810.

[89] Mr Bijl also deducted a further $429,248 for BMW clients he claimed "were not on Rooney's client list," a list to which I will return.

[90] Mr Bijl set out his calculations in a table described as appendix 6 to his brief of evidence. These deducted from BMW's actual sales of $2,270,859, excluding GST, for a period of thirteen months, a total of $1,100,058 for what he described as "clients not on Rooney's list and clients who have provided affidavits". This reduced the total sales to a figure of $1,170,801. From this figure, Mr Bijl deducted "direct operating expenses of $585,400, tax of 30 percent of $175,620." This left what he described as "Post tax damages" of $409,780 for a 13 month period. This he described as "the core period". It was not, however, conceded by Mr Bijl that 13 months was the appropriate duration over which damages should be considered and I have determined that three years is the proven period.

[91] Mr Bijl, in his oral evidence, stressed the need to closely scrutinise the BMW sales as some of those sales were to clients that were never clients of either REL or Doug Hood Ltd. He contended that personal friends and family of the defendants would have used BMW and not REL. Mr Shamy, in his submissions, observed that seven of the 19 deponents of the affidavits stated that they had used the services of BMW because of their personal relationship with one of the defendants. He submitted that a further eleven had referred to previous working relationships with one of the defendants. Other reasons included BMW giving the best quote for a particular job or having appropriately skilled expertise.

[92] Mr Bijl also considered the remaining BMW sales which might have been from former clients of REL also needed to be further reduced to reflect his perceived lack of any guarantee that, but for the defendants' breaches, those clients would have chosen REL to perform their work. He suggested they may have used another contractor or may have chosen BMW based on perceptions of skill or price or a preference for a local owner. To allow for the uncertainty surrounding the remaining sales as to where the client may have placed the work, he settled on a 50 percent

reduction, on the assumption that some of the sales would have gone to REL and some to BMW.

[93] Mr Shamy, in reliance on Mr Bijl's calculations, submitted that one cannot say, on the balance of probabilities, that all of the clients of BMW would have gone to REL had BMW not existed. Mr Shamy, like Mr Bijl, relied on Mr Rae's evidence at the liability hearing. Mr Shamy also analysed the 19 affidavits. He submitted eight of these had appeared on the list of 30 clients compiled by Mr Rae. He submitted that seven out of the 19 clients stated they used BMW because of their personal relationships with one of the defendants. A further eleven referred to previous working relationship with one of the defendants. Six mentioned Mr Rooney's association with the Fish and Game Council and two did not use REL to undertake any of their work. He therefore submitted that the 19 should be subtracted as Mr Bijl had done, not as speculation but as clear factual evidence.

[94] In Ms Dalziel's supplementary closing submissions on behalf of the third defendant, it was contended that the burden of proof was on the plaintiff to establish that the 19 farmer witnesses would have remained with REL if BMW had not existed. It is observed that, despite the opportunity to ask all the witnesses that very question, the plaintiff had not done so. The plaintiff had then asked the Court to draw an inference that they would have stayed with REL because they had either used REL in the past or have since used it in the future. She submitted that that inference cannot be drawn, particularly as the witnesses were never given an opportunity to answer it.

[95] Mr Billington, in his final oral submissions, had asked Mr Brown to check the affidavits that were referred to in Appendix 6 in Mr Bijl's evidence and it was agreed that he could provide a memorandum for references following the conclusion of the hearing. This Mr Brown duly did.

[96] I have now examined each of those 19 affidavits, Mr Rae's evidence and the client list, with the benefit of counsel's submissions, and summarise my views as follows.

[97] The client list relied on by Mr Bijl and Mr Shamy was prepared by Mr Rae, who had replaced Mr McTague as the manager of the Ashburton branch of REL. Mr Rae gave evidence at the liability hearing of the efforts made to recover the clients lost. He had provided Mr Hadlee with material including what was described as the REL "client list" which consisted of clients billed in the past. The document was headed "Accounts Receivable – Customer Report". Although it commenced with the REL takeover from Doug Hood Ltd, it is not clear what subsequent period was covered. It did not cover client prospects or clients who had requested quotes but for whom work had not yet been performed and charged. I do not therefore accept Mr Bijl's approach of assuming that if a BMW client was not on that list, it was not a potential client of REL for whom work would have been performed by REL if BMW had not taken that business.

[98] The evidence I heard at the liability trial satisfied me that the client loyalty shown to the three defendants would have ensured that those clients who went to BMW would have stayed at whatever company the defendants were then employed, providing that company could perform the work at an acceptable price.

[99] The finding that I have made, that BMW would not have been a substantial competitor of REL during the three year damages period sought, had it not been for the defendants' breaches, undermines the defendants' argument that the relationship the defendants had with certain of the clients would have guaranteed them the work at REL's expense. If BMW was not able to provide the substantial earthmoving work during the three year period, that would not have been an option for the clients. Some may have gone elsewhere although, with one possible exception I shall refer to later, it is not clear who, in the mid-Canterbury region, would have been able to provide the necessary work. I note Mr Bilj conceded in cross-examination "If there was no BMW then Rooney had the market available barring other competitors coming in".

[100] I accept the careful analysis conducted by Mr Brown for the plaintiff of the 19 affidavits and the transcript evidence from the liability hearing of those deponents who were cross-examined. Thirteen of those farmers had previously used REL prior to the formation of BMW and, in some instances, continued to use REL as well as

BMW. One of the two suppliers confirmed in his affidavit that he continues to use the services of REL. I therefore accept the plaintiff's submission that the vast majority of deponents had been more than happy to provide work to REL prior to the departure of the defendants in May 2004. It is also notable that some of those deponents provided work to REL subsequent to the departure of the defendants.

[101] For these reasons, I reject Mr Bijl's contention that I should deduct from BMW's turnover a total sum in excess of $1,100,058 for a thirteen month period. If that figure had been projected forward over the remainder of the three years, a far greater deduction would have been necessary if I had accepted Mr Bijl's analysis.

[102] I find that the plaintiff has proved its loss on balance. I reach that conclusion without having to adopt Fogarty J's description of the second task in causation, based on the judgment of Tipping J in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd.*[51] This has the factual onus reversing to the defendants. I also record my view that if the factual onus had moved it has not been discharged by the defendant.

[103] However, there is force in the view that had BMW not commenced business, not all its work would necessarily have gone to REL as the only major contractor in the area. How much may have gone to the other contractors is a matter of conjecture. I do not, however, accept that REL would have shared the new clients 50/50 with BMW or other contractors if BMW had not been formed, as Mr Bijl contended.

[104] I have obtained some guidance from a somewhat equivocal passage from the evidence of Mr Rae, part which Mr Toogood, who was then counsel for REL, invited me not to read, which suggested that in the case of one potential client, a job worth $100,000 was quoted for by REL but apparently did not go to either REL or BMW but to another contractor in the area. Thus if BMW had not been on the scene, it is more likely than not that a percentage of the customers who were not on REL's client list, and had work performed for them by BMW, would have gone to a contractor other than REL. I find there should be an allowance for that possibility.

[51] [1999] 1 NZLR 664 (CA) at 686-687.

[105] From the work of BMW performed for what Mr Bijl described as "their own clients" a deduction needs to be made to deal with the contingency that if BMW had not been formed successfully that work may have been shared by REL with other contractors. I consider that a 10 percent reduction should be allowed to deal with that contingency. I have projected that 10 percent for another 23 months using the figure of $430,000 Mr Bilj allowed (rounded up) for the first 13 months. This averages out at $33,000 per month for 36 months which totals $1,188,000. Ten percent of that is $118,800 which I round up to $120,000. I deduct this from Mr Hadlee's total BMW sales figure for three years of $8,700,000 to produce a total sales figure of $8,580,000 before deduction of operating expenses.

Deduction for expenses

[106] The next issue between the parties is the question of the overhead expenses to be deducted from the sales figure, to produce a net loss before tax.

[107] As I have outlined above, Mr Hadlee was prepared to agree with Mr Bijl's figures of 50 percent for overhead expenses and wages, provided the gross sales figure was not substantially reduced from the $8,700,000 he had calculated.

[108] I do not consider the contingency that I have allowed for customers that may have gone elsewhere substantially alters the figure in a way which would introduce Mr Hadlee's concept that REL could have performed the work without any increase in overheads.

[109] At least 7 operators left BMW in or shortly after May 2004 and some additional staff were employed by REL over the next three years. That suggests to me that Mr Bijl's calculations of expenses are reasonable. Indeed, Mr Hadlee noted that there was not a substantial difference between the two of them, provided that the starting figure of gross sales was in excess of $8 million.

[110] I therefore deduct from the gross sales figure of $8,580,000, fifty percent for operating expenses to produce a figure for the loss of gross margin of $4,290,000 for the three years to 31 March 2007. That is $61,000 less than Mr Hadlee's adjusted

figures which I have assumed were the plaintiff's final claim, without further deduction, excluding interest.

Taxation

[111] Mr Bijl deducted from the gross margin taxation on the assumption that an award against an employee would be punitive if tax was not deducted as an employee is not entitled to any tax deductions against income from wages. The issue of taxation was addressed by Mr Billington, who filed a memorandum dealing with the issue of the taxation and referred to the two leading Court of Appeal cases, both arising out of the employment area. The first was *North Island Wholesale Groceries Ltd v Hewin*[52] which was followed in *Horsburgh v New Zealand Meat Processors Industrial Union of Workers*,[53] both of these have been cited with approval in later cases.[54] As part of his submissions, Mr Shamy also accepted that taxation is not a consideration. I therefore make no allowance for taxation on the figure I have found proved.

[112] It is also common ground that goods and services tax is not payable on any damages awarded.

Mitigation

[113] Although the issue of mitigation was not addressed in any detail in final submissions, I am satisfied that a plaintiff must take all reasonable steps to mitigate the loss and cannot recover losses that can be avoided. This is sometimes described as the duty to mitigate.

[114] To determine whether the plaintiff has taken all reasonable steps to mitigate its loss, I have gone back to the evidence principally of Messrs Rooney, Rae and Johnson. Their evidence was supported by other witnesses called on behalf of the plaintiff. The departure of the three defendants and the other staff that they induced

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[52] [1982] 2 NZLR 176 (CA).
[53] [1988] 1 NZLR 698 (CA).
[54] *Anderson v Davies* [1997] 1 NZLR 616 (HC) at 625 and *Equiticorp Industries Group Ltd (In Statutory Management) v The Crown (no 3) (Judgment no 51)* [1996] 3 NZLR 690 (HC) at 704.

to leave created damage to the morale of the staff left behind. Further, the efforts of the defendants, which have been referred to in the liability judgment, ensured that there was very little information left behind at Ashburton relating to the current work or upcoming work. I am satisfied that initial efforts were made to deal with existing clients' work demands with the reduced expert staff and to try to ascertain what prospective work had been quoted for. Whilst it was not until September 2004 that Mr Johnson was engaged to carry out an extensive prospecting of potential clients in the area, there is no evidence that suggests that the delay in starting that extensive exercise would have stemmed the losses that were being suffered. I am satisfied from the evidence that the plaintiff discharged the onus of establishing that it had taken reasonable steps to mitigate the damage caused by the defendants.

The award

[115] I award the plaintiff the total sum of $4,290,000 against the defendants.

Interest

[116] The second amended combined statement of claim and further particulars, dated 30 July 2010, does not seek interest. If interest is sought, that should be dealt with in submissions to be lodged by the plaintiff together with its submissions on costs. The claim may well be defended.

Costs

[117] If the parties cannot agree on costs, they may be addressed by way of an exchange of submissions. Because the matter may not be without complication, in view of the length of time these proceedings have been extant, I will not, at this stage, place a time limit on the filing of submissions. I suggest, however, that they should be addressed within the next three months.

Suppression orders

[118] As I indicated in paragraph [1] of this judgment, the parties are to have the opportunity to seek to redact from any passages in this judgment any financial information that they do not wish to have disclosed publicly. These matters should be addressed within the next 28 days, pending which this judgment will not be released except to the parties and to the other judges of the Employment Court. A further extension of time may be sought before the expiration of the 28 days.

B S Travis
Judge

Judgment signed at 4.30pm on 23 April 2012