IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 231
ARC 22/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	PREMIER EVENTS GROUP LIMITED First Plaintiff
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Plaintiff
AND	MALCOLM JAMES BEATTIE First Defendant
AND	ANTHONY JOSEPH REGAN Second Defendant
AND	PATRICIA PANAPA Third Defendant

BETWEEN	MALCOLM JAMES BEATTIE First Plaintiff
AND	ANTHONY JOSEPH REGAN Second Plaintiff
AND	PATRICIA PANAPA Third Plaintiff
AND	PREMIER EVENTS GROUP LIMITED First Defendant
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP)

Hearing:	30 April, 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15 and 16 May 2012 and by written memoranda filed on 17 May and 1 June 2012 (Heard at Auckland)
Appearances:	AJ Lloyd and V Hodgson, counsel for Premier Events Group Limited D Neutze and N Lord, counsel for BA Partners Limited (in liquidation and receivership) J Eichelbaum, counsel for Malcolm James Beattie, Anthony Joseph Regan and Patricia Panapa
Judgment:	17 December 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

A **Premier Events Group Limited's claims against Malcolm Beattie and Patricia Panapa for breaches of contractual restraints of trade are dismissed.**

B **Premier Events Group Limited's claims against Mr Beattie for breaches of contract and in equity for misuse of confidential information, and breach of duties of fidelity and maintenance of trust and confidence, succeed and questions of remedies are adjourned for subsequent hearing and decision if necessary.**

C **Premier Events Group Limited's claims for penalties against Mr Beattie and Ms Panapa for breaches of statutory obligations of good faith are dismissed.**

D **BA Partners Limited's claim against Anthony Regan for breach of contract is dismissed.**

E **Mr Beattie's claims against Premier Events Group Limited are allowed in part (salary reductions) but otherwise dismissed.**

F **All remaining claims against Premier Events Group Limited are dismissed.**

G **Costs are reserved.**

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REASONS

Introduction

[1] This judgment deals with issues of liability and remedies (except unliquidated damages)[1] in claims by all parties arising out of their former employment relationships. On occasions I will refer collectively to Malcolm Beattie, Anthony Regan and Patricia Panapa as "the individual parties" and to Premier Events Group Limited (PEGL) and BA Partners Limited (in liquidation and receivership) (BAPL) as "the corporate parties". At other times it will be necessary to refer to the parties individually by name. Although not a named party, Robert Gill is the personification of the corporate parties in this litigation.

Scope of proceedings

[2] As the number and content of interlocutory judgments and rulings testify to, the legitimate scope of the parties' claims and defences has been stretched and tested. That is unsurprising given that their relationships were not exclusively as employers and employees but, in addition and in some cases entirely, in differing combinations of company shareholder, company director, and company. These relationships were

[1] See Court's Minute of 28 February 2012.

also complicated by some people having what Mr Eichelbaum (as counsel) called 'interests'; that is, other legal entities (companies and trusts) which were involved inextricably in the parties' relationships. Examples of these included Mr Regan's trust (the Piccadilly Trust) which was a shareholder in PEGL, and Mr Gill's investment company, Bourne Street Investments Ltd (BSIL), and other corporate vehicles associated with, and funded by, PEGL.

[3] Messrs Beattie and Regan (but particularly the former) consider that they have been very hard done by in their different roles with PEGL, BAPL, and with Mr Gill. Mr Beattie, in particular, has faced and survived a number of challenging and adverse events in his business life which have left him less well-off financially than he would have wished and that he considers he deserves to be. Mr Beattie believes that Mr Gill has taken advantage of Mr Beattie's misfortunes by obtaining the benefits of his personal skills and contacts but has not only not rewarded Mr Beattie adequately for these, but has profited significantly himself. A constant theme of Mr Beattie's case, and its presentation in court by his counsel, was the unfairness of his treatment by Mr Gill over many years.

[4] It must be said, albeit briefly, that the role of litigation and the Court in it, is not to re-balance past inequalities or unfairnesses unless the law recognises these as wrongs to be righted or compensated for. In each case, also, Mr Beattie agreed to those business and employment arrangements with Mr Gill and his corporate entities and, therefore, the rights and obligations of the parties under those arrangements. While it is understandable that Mr Beattie in particular feels deeply aggrieved about his circumstances which he attributes in substantial part to Mr Gill's treatment of him, litigation in reliance on employment law is not the panacea to redress the unfairness Mr Beattie feels acutely.

[5] It has been necessary constantly to identify the employment elements of the proceedings and especially of the evidence given. That has been to ensure that, whilst a number of related events may have been the incentive for occurrences in the employment relationships, those related events are not proper causes of action in this Court warranting independent remedies. There are concurrent proceedings including the same (and other) parties in other courts.

[6] It is clear that all three men, Messrs Gill, Beattie and Regan, are in bitter conflict (Messrs Beattie and Regan against Mr Gill and vice versa) and have been for some time over a very wide range of issues. These are not only issues of legal liability but extend to criticisms of their opponents' commercial moralities and purely personal invective. In these circumstances it has been difficult to neatly delineate the employment related issues and evidence. This contributed significantly to the length of the hearing and its complexity. That has also contributed to the need to trawl carefully through the extensive evidence and voluminous documents put before the Court to try to ensure that this judgment deals only with employment related liabilities in contract, the Employment Relations Act 2000, or otherwise in justiciable employment law. That explains why I have had no need to refer to some of the evidence presented, including the expert accounting evidence. I mean no disrespect to witnesses whose evidence I do not mention for these reasons. I have to say also that the individual litigants' pleadings, evidence in chief and submissions have not assisted in clarifying the real and justiciable issues for decision. Those factors together, in addition to my other workload, have contributed to the long delay in issuing this judgment which I regret and for which I apologise to the parties.

[7] The proceedings are a combination of personal grievance, claims for penalties and common law actions in damages for breaches of employment agreements, statutory employment obligations, and in equity.

Structure of judgment

[8] Because of the multiple causes of action by and against several parties and the even more multitudinous but often repetitive affirmative defences, I propose to structure this judgment as follows. First, I will summarise the various plaintiffs' causes of action in their statements of claim. Next, I will summarise the relevant features of the employment agreements upon many, but not all, of which those claims rely. Then I will set out my conclusions of fact about relevant events. Next, the judgment will set out the various defences (general and affirmative) pleaded to those claims in light of the factual findings. Finally, the judgment will decide the outcomes of the various claims. It will conclude with any consequential directions.

The claims – PEGL and BAPL as plaintiffs (A)

[9] I will refer to this proceeding by the letter "A" and individual causes of action within it by consecutive numbers. So, for example, the first cause of action about to be described will be "A1" and so on. I will label the numerous affirmative defences advanced in proceedings using the abbreviations "AffD1" and so on. So, for example, the first affirmative defence to the first cause of action in this proceeding will be referred to as "A1/AffD1". Other proceedings will follow suit.

[10] The first proceeding is brought by PEGL as first plaintiff and BAPL as second plaintiff. The defendants are Mr Beattie (first), Mr Regan (second) and Ms Panapa (third). The operative pleading for PEGL and BAPL is its second amended statement of claim of 14 February 2012.

First cause of action (A1)

[11] PEGL's first cause of action against Mr Beattie and Ms Panapa is that, as employees of PEGL subject to contractual restraints of trade, they breached their post-employment obligations not to compete with PEGL, not to solicit its customers, and not to offer, or cause to offer, employment to PEGL employees.

[12] The particulars of the breach claimed against Mr Beattie include that he used his own corporate entities and those of the other individual defendants to conduct business in competition with PEGL and, also in breach of contract, solicited their customers including Toyota New Zealand Ltd (Toyota), Australia Post (AusPost) and the New Zealand Olympic Committee (NZOC). Further, PEGL alleges that Mr Beattie negotiated with another customer, National Australia Bank (NAB), to secure the novation of that customer's commercial arrangements with PEGL to the first and second defendants' new company, Parnell Partners Group Ltd (PPGL).

[13] PEGL also claims, in relation to North American corporation, Cartan Tours Inc (Cartan), that Mr Beattie secured the termination of its negotiations for a joint venture agreement between PEGL and Cartan; established substitute contractual arrangements in the name of, and for the benefit of, the defendants' companies; and

worked with major London hotels to secure accommodation contracts for the defendants' companies. It says Mr Beattie thereby ensured that PEGL could not secure those contracts and provide accommodation for its customers for the 2012 London Olympic Games. Mr Beattie's dealings with Cartan are also the subject of a separate contractual cause of action affecting his conduct during his employment and in equity, both during and after employment.

[14] PEGL's claim against Ms Panapa is that she breached her contractual restraint obligations by conducting business in conjunction with Messrs Beattie and Regan and assisted them to commit the breaches alleged by PEGL against Mr Beattie.

[15] PEGL claims that the consequence of the defendants' breaches of their restraints includes loss of profits resulting from the loss of the contractual arrangements and opportunity for such arrangements. Alternatively, PEGL claims that the individual defendants have been enriched unjustly by the unlawful conduct of Mr Beattie and Ms Panapa.

[16] The remedies sought include an inquiry as to damages for losses sustained directly by PEGL and an order that Mr Beattie and Ms Panapa be liable for such damages. Alternatively, PEGL seeks an accounting for the profits earned by the defendants as a consequence of Mr Beattie's and Ms Panapa's breaches of restraints and an order that such profits be paid by the first and third defendants to PEGL.

[17] The plaintiff also seeks penalties against Mr Beattie and Ms Panapa pursuant to ss 134 and 136 of the Employment Relations Act for those breaches. PEGL seeks interest on damages and costs and disbursements.

Second cause of action (A2)

[18] PEGL's second cause of action, against Mr Beattie, is for breach of obligations of confidentiality. It says that in the course of his employment by it, Mr Beattie obtained confidential information including about the terms of contractual arrangements between, or negotiations entered into by, PEGL and/or with a number of substantial customers. These included the joint venture negotiations being

conducted by PEGL and BAPL with Cartan. It claims that Mr Beattie misused this confidential information.

[19] I address the remedies claimed in cause of action A2 in conjunction with A3 below.

Third cause of action (A3)

[20] PEGL claims that Mr Beattie and Ms Panapa were subject to common law (I assume equitable) and contractual obligations to keep such information as is referred to in cause of action A2, confidential and not to misuse it. The company says that, following the termination of his employment and contrary to these obligations, Mr Beattie retained confidential information that he had obtained in the course of it, and the defendants misused this to effect the transfer of a significant amount of business with PEGL's major clients to Mr Beattie and his associated entities. It alleges he used confidential information to solicit and obtain business that would otherwise have gone to PEGL.

Remedies claimed for A1-A3

[21] Remedies sought in these causes of action include compliance orders requiring:

- Mr Beattie to return confidential information;
- an inquiry into damages sustained directly by PEGL as a result of Mr Beattie's and/or Ms Panapa's alleged breaches;
- an order that Mr Beattie and/or Ms Panapa be liable for the payment of such damages or, alternatively, an accounting for the profits earned by them as a consequence of their breaches;
- an order that such profits be paid by him/her to PEGL and BAPL;
- interest; and

- costs and disbursements.

Fourth cause of action (A4)

[22] PEGL's fourth cause of action is also against the first and third defendants, Mr Beattie and Ms Panapa. This alleges that they were parties to employment agreements with PEGL containing express and implied obligations of confidentiality, fidelity, and trust and confidence. PEGL says that Mr Beattie and Ms Panapa breached those contractual obligations in a number of ways said to have included:

- taking preparatory steps to incorporate the first and second defendants' companies;

- using those companies to conduct business in competition with PEGL;

- retaining confidential information obtained in the course of employment with PEGL;

- using that confidential information to effect the transfer of significant amounts of business from PEGL's major clients to the first and second defendants' companies; and

- in the case of Mr Beattie, offering or causing to offer employment to Ms Panapa in breach of the terms agreed with PEGL.

[23] The first and third defendants are alleged to have failed to keep PEGL fully informed about matters relevant to their employment and to have failed to advise it of any private concerns or interests which may have had a bearing on PEGL's business. PEGL says that Mr Beattie and Ms Panapa failed to serve the company honestly, faithfully and diligently. These breaches are said to have resulted also in damage to PEGL's goodwill.

Remedies claimed for A4

[24] Remedies for this cause of action include:

- an inquiry as to damages;
- an order requiring Mr Beattie and Ms Panapa to pay such damages;
- alternatively, an accounting for profits earned by the defendants as a result of the breaches;
- an order that these be paid to the plaintiffs by the first and third defendants;
- penalties under s 134 and 136 of the Employment Relations Act;
- interest; and
- costs and disbursements.

Fifth cause of action (A5)

[25] PEGL's fifth cause of action is for breach of statutory duties of good faith and encompasses the same acts or omissions specified in respect of the first three causes of action. PEGL says that Mr Beattie's and Ms Panapa's breaches of those good faith obligations were deliberate, serious and sustained. It claims remedies for these breaches under s 133(1) of the Employment Relations Act and says that, pursuant to s 136(2), such penalties should be paid to the plaintiff. Interest, costs and disbursements are also claimed in addition to those penalties.

Claim by BAPL against Mr Regan (B)

[26] This is essentially a claim for a relatively modest sum of money allegedly taken or received by Mr Regan in breach of contract. The facts are largely uncontroversial. While still employed as Group Chief Operating Officer of BAPL at

the relevant time, Mr Regan, arranged for two payments totalling $52,693 to be made to his solicitors' trust account. He has been the beneficiary of those monies. He says that they represented remuneration to which he was entitled contractually, but of which BAPL had deprived him unlawfully, or would have done so upon his resignation.

[27] Resolution of this claim turns essentially on the remuneration terms and conditions of Mr Regan's employment with BAPL, disputed holiday pay entitlements, and his entitlement to deal with the company's funds in the way he did.

[28] These monies were paid by Mr Regan, effectively to himself, on about 1 February 2010, some two months before his employment ended on 31 March 2010. The payments were both retrospective and prospective because Mr Regan's date of departure was known at the time of their payment. Others in BAPL, including Mr Gill, were unaware of these payments until after Mr Regan had left.

[29] BAPL's claim against Mr Regan for breach of contract alleges that on 29 January 2010 he diverted, or caused to be diverted, funds from BAPL's bank account into an account of a third party but for his benefit. BAPL says that Mr Regan was not authorised to divert those funds and that he used them for his personal benefit. BAPL says it was unaware that Mr Regan had caused funds to be so diverted until in or around April 2010.

[30] The sums claimed to have been diverted in breach of contract by Mr Regan were $34,231 and $18,462, making a total of $52,693. The remedy sought for this breach is a compliance order requiring Mr Regan to repay BAPL the sum of $52,693 together with interest and costs and disbursements.

The individuals' claims against PEGL (C)

[31] I turn now to the proceedings in which two of the individuals (Messrs Beattie and Regan) are plaintiffs and PEGL is now the effective sole defendant given BAPL's legal status (in liquidation and receivership) and absent any necessary

statutory consent to sue it. These plaintiffs' claims are set out in their two second amended statements of claim dated 5 October 2011.

First cause of action (C1)

[32] Mr Beattie alleges that, in breach of contract, PEGL reduced his salary by 20 per cent from 1 July 2009. He claims damages, quantified in submissions by counsel, of $12,000 for these losses. He also seeks compensation for alleged breach by PEGL of its duty of good faith to him comprising principally loss of bonuses by reason of the company's manipulation of its accounts. This included the unlawful removal of substantial sums of money from PEGL's funds under the false guise of management fees. Mr Beattie seeks compensation for breaches by PEGL of its duty of good faith by carrying out an asset stripping scheme by which Mr Gill sought to remove PEGL's valuable assets into his personal family interests.

[33] Mr Beattie relies on his second written employment agreement with PEGL entered into on 29 December 2006 (operative at the time of the deductions) which he alleges included terms that the company would attempt to treat all employees fairly and that his salary would be paid without deduction unless there was written agreement of both parties to do so.

[34] He claims that in breach of ss 4-6 of the Wages Protection Act, s 131 of the Employment Relations Act and/or cl 18 of his employment agreement, PEGL reduced his remuneration by 20 per cent from 1 July 2009 to 31 March 2010 without his agreement in writing, for which he seeks compensation and interest.

Second cause of action (C2)

[35] Mr Beattie's second cause of action (breach of statutory duty of good faith) relies on the good faith provisions of s 4 of the Employment Relations Act. He claims that in breach of those duties and in conjunction with Mr Gill and others, PEGL engaged in a series of "bad faith, jealous, intimidatory and harmful" actions against him and that it:

- attempted to remove the potentially most valuable assets of the defendant company into Mr Gill's own personal family investment company, BSIL;

- failed to pay Mr Beattie his agreed salary;

- sided with the Inland Revenue Department in a GST dispute with Mr Beattie;

- misappropriated funds of approximately $50,000 from a longstanding client whom Mr Beattie had brought to the defendants' business when it was founded in 2003, Toyota; and

- manipulated its accounts by removing excessive, unwarranted and ultra-contractual sums of money from its funds under the false guise of "management fees" paid to other entities in which Mr Gill had interests.

[36] Mr Beattie claims that his losses resulting from those breaches include a reduction in remuneration, loss of bonuses, and not being "rewarded fairly for his services". He claims that PEGL's breaches were deliberate, serious and sustained, or alternatively were intended to undermine the parties' employment relationship.

[37] Remedies sought by Mr Beattie for these causes of action include compensation under ss 4 and 123(1)(c)(ii) of the Employment Relations Act, calculated by applying the formula of 35 per cent or 50 per cent, as the case may be, to the amounts of "management fees" wrongly removed. Mr Beattie also claims various declaratory orders including that PEGL breached its obligations of good faith, acted inequitably towards him, and repudiated its contracts with him, meaning that it is not entitled in law to rely on the agreement's restraint of trade provisions.

Fifth cause of action (C5)

[38] The absence of what would otherwise have been causes of action C3 and C4 can only be explained by the individual parties having filed, at the same time and on the same day, two further amended statements of claim, in only one of which there were third and fourth causes of action. These purported to be causes of action brought by Mr Regan. They are not, however, justiciable because Mr Regan was not in an employment relationship with PEGL and was only permitted by the Court in an earlier interlocutory judgment, to proceed with set-off defences against BAPL. In these circumstances, there are no third and fourth causes of action by Mr Beattie and/or Ms Panapa, but I have continued to align the numbering system with the parties' description of their causes of action.

[39] Finally, Mr Beattie pleads another breach of contract cause of action. He says that PEGL owed him duties of fairness but breached these in the same manner as just particularised in relation to the breach of the statutory good faith cause of action. He seeks compensation that is also calculated similarly to that for his other causes of action.

The relevant employment agreements

Mr Beattie's employment agreements with PEGL

[40] Mr Beattie had two separate employment agreements with PEGL. I will refer to them as the 2004 and 2006 employment agreements. They covered a period of continuous employment with PEGL from 2004 but contained some different terms and conditions during their operative periods.

[41] Some background is necessary to understand how this employment relationship came about. From its establishment by him and Mr Gill in 2003 until late 2004, Mr Beattie was a director of, and shareholder in, PEGL but was not an employee of the company. In late 2004 Mr Beattie agreed to sell his shareholding in PEGL. The sale of his shares was to a company known as Corporate Partnership Group Ltd (CPGL), another of Mr Gill's companies. The sale of the shares is

recorded in an agreement dated 1 December 2004. Consideration for the sale of the shares was two-fold. First, Mr Beattie was taken on as an employee of PEGL under an employment agreement which was in fact executed on the same day, 1 December 2004. It was for a two year term. This agreement provided for annual remuneration of $150,000 and included a motor vehicle allowance. This is what I refer to as the 2004 employment agreement.

[42] The second element constituting consideration for the sale of shares was a separate arrangement by which Mr Beattie would be paid bonuses, or profit shares in PEGL, calculated in accordance with a complex formula contained in the share sale and purchase agreement. The 2004 employment agreement did not contain any bonus or profit share provisions. The only element of remuneration attributable to a bonus or other variable entitlement in Mr Beattie's employment agreements with PEGL related to earnings attributable to the 2008 Beijing Olympic Games, and then only under his subsequent 2006 employment agreement.

[43] Mr Beattie's 2004 employment agreement contained a covenant in restraint of trade which purported to prevent him from engaging in competitive economic activity within New Zealand for a period of five years after the agreement's termination.

[44] After the expiry of the first two year employment agreement in 2006, this was replaced by a similar, but not identical, employment agreement. The replacement is what I call the 2006 employment agreement. Mr Beattie's annual remuneration was increased from $150,000 to $180,000. The previous restraint of trade was varied by expanding it geographically (to cover Australia as well as New Zealand) but by reducing it temporally (from five years to one year). The share sale and purchase agreement, which continued to operate alongside the employment agreements, included a five year restraint.

[45] This second and last employment agreement with PEGL was executed on 29 December 2006. It provided that Mr Beattie was to continue to hold the position of Managing Director of PEGL. He was to devote the whole of his attention to the performance of all of his duties, was not to damage the goodwill and reputation of

PEGL, and was to keep the company fully informed on all matters arising out of his functions. He was to disclose to it any private matter that may have had a bearing on the business. As already noted, Mr Beattie's annual salary was to be $180,000 together with the potential to earn a Beijing Olympics sales incentive bonus detailed in Appendix C to the agreement (cls 3.1-3.2). This related solely to the company's sales performance in respect of the 2008 Beijing Olympic Games.

[46] Clause 4.1 of Mr Beattie's 2006 employment agreement provided:

> Performance review meetings shall be held annually from commencement of employment along with a review of remuneration. For the avoidance of doubt, the salary can be revised up or down depending on the financial circumstances of the company.

[47] I interpret cl 4.1 of Mr Beattie's agreement as dealing with both performance and adjustments of remuneration. Clause 4.1 provided that there were to be coincident annual performance and remuneration review meetings. The adjustment of Mr Beattie's annual remuneration was to be determined, at least in significant part, in accordance with his and the company's performance. Clause 4.1 goes on to clarify that salary revisions could be upwards or downwards and, as well as Mr Beattie's performance, the company's financial circumstances would also be taken into account.

[48] It follows that any downwards adjustment of Mr Beattie's annual salary with PEGL could only occur following his annual performance review and accompanying review of remuneration. Clause 4.1 did not contemplate or empower PEGL applying an across-the-board and unilateral reduction of staff salaries to Mr Beattie, even if the financial circumstances of the company may have been thought by it to warrant this. It was required to obtain his agreement and signature to such a variation in writing under cl 18.1 with which I deal shortly. Clause 4.1 was subject to cl 18.1.

[49] Clause 9.1 of the 2006 employment agreement provided that it would end on a specified date although there were provisions for its earlier termination by the employer in such events as serious misconduct by the employee, employee incapacitation and the like.

[50] Clause 11 of the employment agreement dealt with confidentiality as follows:

> 11.1 The Employee acknowledges that in the course of his/her employment, [he]/she will have access to and be entrusted with trade secrets and confidential information and he shall not disclose or use for any purpose other than that of the Employer (either during the continuance of or after the termination of his/her employment), such trade secrets or confidential information including (but without limitation) information concerning:
>
> 11.1.1 The clients of the Employer or any related party of the Employer and their practices, business dealings and affairs;
>
> 11.1.2 The practices, business dealings and affairs of the Employer or any related party of the Employer;
>
> 11.1.3 The products, techniques and methods of business used by the Employer or any related party to the Employer.
>
> 11.2 On termination of employment with the Employer, the Employee shall deliver to the Employer forthwith:
>
> 11.2.1 All documents then in his possession or power, prepared by or on behalf of the Employer or a related party of the Employer for use in the business of the Employer or related party, including technique manuals, corporate policy documents, lists of clients, presentation documents, client information etc.
>
> 11.2.2 All copies of extracts from such documents then in his/her possession or power.
>
> 11.2.3 All keys and passes belonging to the Employer or any related party of the Employer then in his/her possession or power.
>
> 11.2.4 All stock, products and samples belonging to the Employer.
>
> 11.2.5 All vehicles, computer, cell phones and/or associated equipment.

[51] Clause 13 of the employment agreement (the restraint of trade) provided:

> 13.1 In recognition for the remuneration and Sales Incentive bonus scheme, the Employee acknowledges and agrees with the Employer that the Employee's activities have a direct bearing on the Employers goodwill and therefore the Employee shall not in New Zealand or Australia be directly or indirectly interested, engaged or concerned or in any other way assist (whether as principal, partner, shareholder, director, agent, employee, contractor, consultant, trustee, beneficiary or otherwise) in any business that competes with the Employer for a period of one year commencing from the date on which either party gives or receives notice terminating this

Agreement and whether or not the Employee physically continues to work for the Employer thereafter.

13.2 The Employee acknowledges and agrees with the Employer that the Employee in New Zealand or Australia shall not

13.2.1 Directly or indirectly canvass, solicit or attempt to solicit, serve or act for any person, firm, or corporation who or which has been a client of the Employer in any work that is of the same or similar nature as that which the Employee undertook or performed for or was done by the Employer or by any other employee or contractor of the Employer for a period of one year commencing from the day after the Employee's employment actually ceasing or the day after any period of notice of termination as required by this Agreement has ended, whichever is the latter; nor

13.2.2 Employ or offer employment or cause employment or any other engagement or arrangement to be offered to any person who was an employee or contractor of the Employer at any time in the one year period prior to the Employee's employment actually ceasing or the day after any period of notice of termination as required by the Agreement has ended, whichever is the latter.

[52] Clause 18 (amendments) referred to earlier provided:

18.1 Amendments to this Agreement can be made during its currency by the mutual agreement of both parties. Any such amendment shall not have effect unless it is recorded in writing and executed by both parties.

[53] Finally, and despite the purportedly fixed term nature of the agreement, cl 19 (future employment) was as follows:

19.1 Provided the Company and the Employee mutually agree on the terms, the Company will offer the Employee continued employment in the Company for a further four years until 31 December 2012.

Ms Panapa's employment agreement with PEGL

[54] Ms Panapa's employment agreement with PEGL was dated 19 December 2006. For the purposes of this proceeding, it provided materially that she would be paid an annual salary of $80,000 and that PEGL would "devise an incentive scheme for the 2007 and 2008 years based on achievement of specific KPI's" which would be "determined by the end of Q1 2007". Termination of Ms Panapa's employment was to be on two months' notice (cl 9.1) and cl 11 of her agreement (confidentiality)

was in materially identical terms to Mr Beattie's 2006 employment agreement (set out above). So, too, was cl 13 (restraint of trade) of Ms Panapa's employment agreement, although the restraint was for a period of six months from the giving of notice of termination of employment and was "[i]n recognition for the remuneration and Incentive Payments paid …". Amendment of Ms Panapa's employment agreement required the agreement of both parties and "shall not have effect unless it is recorded in writing and executed by both parties" (cl 18.1).

Mr Regan's employment agreement with BAPL

[55] Mr Regan's employment agreement, signed by the parties on 29 June 2006, provided at cl 2 (Remuneration)

> 2.1 Commencing remuneration will be $200,000 per annum gross paid in monthly [instalments] by direct credit to a nominated account Any change in remuneration will reflect market rates, performance and the enhancement of profits/earnings for the Employer by the Employee's actions.
>
> 2.2 You will also be paid a gross Monthly Motor Vehicle lease payment of ($417.04 + GST = $469.17) on a monthly basis.

[56] Next, Mr Regan's agreement provided at cl 3:

> 3. **PERFORMANCE REVIEW**
>
> Performance review meetings shall be held annually from commencement of employment.

[57] Mr Regan's employment was terminable on six months' notice in writing (cl 8.2). It contained confidentiality and restraint of trade provisions which are not in issue in this case.

[58] Finally, I set out cl 17 (amendments) of Mr Regan's employment agreement which was as follows:

> Amendments to this Agreement can be made during its currency by the mutual agreement of both parties. Any such amendment shall not have effect unless it is recorded in writing and executed by both parties.

[59] In addition to being employed by it, Mr Regan in effect had a 20 per cent shareholding in BAPL although this was held by his family trust, the Piccadilly Trust, which was, and at the date of the hearing was still, the owner of the shares.

Mr Beattie's PEGL share sale agreement

[60] In addition to the relevant employment agreements, it is necessary to analyse this 2004 share sale agreement because it is arguably the source of disputed rights and obligations claimed in the case. On 1 December 2004 Mr Beattie signed an agreement to sell his shares in PEGL (50 per cent of the company's shareholding) to a company known as Corporate Partnership Group Ltd (CPGL), one of Mr Gill's 'interests'. Clause 3 (purchase price) and, in particular, cl 3.1 (amount), provided:

> The consideration for the purchase of the Shares [is] the purchaser offering employment under the term of the Employment Agreement and the amount paid the payments to be made in accordance with the Remuneration/Formula set out in the Employment Agreement.
>
> Any payment due under the Formula is to be made [within] 120 days of finalisation of the year end Financial Statements for the particular year concerned.

[61] Despite the wording of the consideration, Mr Beattie's employment was not with the shares' purchaser (CPGL) but, rather, with PEGL. It is now common ground that the first reference in cl 3.1 to the employment agreement, is Mr Beattie's employment agreement with PEGL of 1 December 2004.

[62] However, it is also now common ground that despite cl 3.1 of the share purchase agreement referring to the "Formula" set out in the "Employment Agreement", this was in fact reference to the formula set out in the definitions part of the share sale agreement and occupying almost four full pages of it. It is also agreed (and the share sale agreement confirms) that the consideration for the sale of Mr Beattie's shares was two-fold: first, employment of Mr Beattie by PEGL; and, second, a payment or payments for the shares according to the formula. What witnesses described colloquially as Mr Beattie's "earn-out" under the share sale agreement (calculated by reference to the formula), was part of the share sale transaction. It was not a term or condition of the employment agreement with PEGL evidenced by his employment agreements with that company.

[63] The purchase price of Mr Beattie's shares was determined on the basis of the commercial performance of PEGL, and in part of its Australian counterpart, for the financial years ending after the execution of the share sale agreement. For the year ended 30 June 2004,[2] and in relation solely to the performance of PEGL, Mr Beattie's earn-out was to be determined by whether PEGL's Net Profit Before Tax (NPBT) was above or below a specified figure. If it was below that specified figure, Mr Beattie's earn-out was to be two-thirds of one-half of PEGL's NPBT. If that was above the specified figure, then the formula became more complex according to a sliding scale of payments but, in any event, Mr Beattie would only be entitled to a maximum earn-out payment in that year of $500,000.

[64] For the two following financial years ended 30 June 2005 and 30 June 2006 the "Group's" NPBT, for the purposes of earn-out, was to include not only PEGL but also its Australian operation. For calculating Mr Beattie's earn-out during those financial years, the share sale agreement provided a more complex formula which included both combined and individual New Zealand and Australian operations' financial performances. The other entities in the "Group" included Premier Hospitality and Events Group Pty Ltd (PHEG) in Australia and "other overseas entities". The formula allowed for earn-out payments if the NPBTs of the different individual operations varied, as well as some calculations being on a group basis. As with the first financial year affected by the agreement, Mr Beattie's payments for the two subsequent financial years were still to be capped at $500,000 per year.

[65] These complicated formulae permitted Mr Gill, as the effective owner and controller of all the shares in PEGL and having effective control of the other associated entities, to adjust performance earnings between the companies in the Group. This included, theoretically and potentially, to minimise or eliminate any payment to Mr Beattie as the purchase price for his shares. Mr Beattie's case was that PEGL and Mr Gill did deliberately manipulate the relevant NPBT figures between the companies in the Group so as to minimise and indeed negate his entitlements in return for the sale of his shares. Unsurprisingly, PEGL's case denied that assertion and sought to show that the various accounts from which the NPBT figures were assessed were the product of conventional accounting practices and

[2] This was both retrospective and prospective to the signing of the employment agreement.

reflected accurately and reasonably the financial performances of the various entities.

[66] One of the other definitions in the share sale agreement of 1 December 2004 between Mr Beattie and CPGL was "Employment Agreement". This was said to mean "the agreement in schedule 2". Although the copy of the share sale agreement put in evidence contained schs 1, 8 and 9, there was no sch 2. There was an otherwise blank page headed "Schedule #9 - Signed copy of Malcolm Beattie Employment Contract" but this was not included or attached.

[67] However, it is common ground that despite the foregoing references in the share sale agreement, Mr Beattie signed an employment agreement with PEGL that began in the form of a letter to Mr Beattie dated 30 November 2004.

[68] The employment agreement's link to the share sale and purchase agreement was set out enigmatically in the first paragraph of that letter as follows:

> Upon transfer of your shares in Premier Events Group Limited (hereinafter all of them being collectively referred to as your ("Employer") hereby agree to enter into this employment agreement with you ("Employee") to hold the position of Chief Executive by the Employer, commencing on the day that you sign an Agreement for the Sale and Purchase of your shares in the Employer with Corporate Partnership Group Limited, at the Employer's premises in Auckland, upon the following terms and conditions.
> …

[69] Applying the foregoing analysis to the nature of the earn-out payments, I conclude that these were consideration for the sale by Mr Beattie of his shares in PEGL. It does not change their character that they were not fixed at the time of execution of the agreement or that they were payable conditionally in the future. There is nothing in principle which precludes a purchase price for shares to be set according to post-sale performance of the company and associated entities as was agreed to in this case. The shares were to be paid for over an extended period, and the amounts were to be determined by the financial performances of the group of companies of which PEGL was one. Although such payments may have appeared (including to Mr Beattie) to be in the nature of employee remuneration, they were not. Accordingly, those payments were not incidents of Mr Beattie's employment

agreement and so liability for them is not justiciable in these proceedings in this Court.[3]

Factual findings

[70] Mr Beattie had a long background in the field of event management and associated hospitality arrangements. This was initially and principally through the NZOC which was originally the only source of tickets to Olympic events but also, in the commercial world, as a result of his relationships with Toyota, AusPost and Australian mining and resources conglomerate, BHP Billiton (BHP).

[71] In June 2003 Messrs Beattie and Gill incorporated PEGL in which they (in Mr Gill's case through what was effectively his investment company, CPGL) were the initial equal shareholders. PEGL was to carry on the business previously conducted by Messrs Beattie and Gill.

[72] In December 2004 Mr Beattie sold his shareholding in PEGL to Mr Gill's CPGL. He did so in an attempt to raise money to pay for his defence of court proceedings then brought against him.

[73] I have already outlined the nature of his 2004 employment agreement and how it came about.

[74] After the end of June 2006 when Mr Beattie's 2004 first employment agreement expired, PEGL prepared a replacement agreement and offered this to Mr Beattie. PEGL proposed that this would be a four year fixed term agreement (as opposed to the previous two year agreement) with a right of extension for a further two years in specified circumstances. PEGL's proposed 2006 employment agreement included, for the first time in this relationship, a "sales incentive bonus" remuneration component set out in its Appendix C. This bonus related to what was described as the "Beijing 2008 Jet Set Sports product". The bonus was proposed to be payable to Mr Beattie upon successful sales of Beijing Olympic Games hospitality programmes to three named clients above specified minimum values.

[3] s 187 Employment Relations Act 2000.

The mechanism for triggering the bonus and the calculation of its sum were the subject of detailed formulae contained in the appendix to the draft agreement.

[75] Although the draft agreement was dated June 2006, Mr Beattie's second employment agreement was not signed by the parties until late December 2006. Despite the draft agreement's restraint's duration being only one year, it was accompanied by a letter from PEGL proposing to impose a five year restraint of trade on Mr Beattie under the share sale agreement. The letter said that consideration for that period of restraint was to be a loan to Mr Beattie of $250,000 together with an extension of the time permitted him under the 2004 share sale agreement to meet performance benchmarks.

[76] The December 2006 letter to Mr Beattie reiterating its offer of a new agreement came about in the following circumstances. By mid-December 2006 Mr Beattie had still not signed PEGL's proposed replacement individual employment agreement. As an incentive to persuade him to do so, Mr Gill wrote on CPGL letterhead, on behalf of that company and PEGL, an undated letter but which I find must have been sent between 11 and 29 December 2006. Mr Gill's letter to Mr Beattie proposed that if he signed PEGL's draft 2006 employment agreement, PEGL and CPGL would vary the 2004 share sale agreement. That proposed variation included an advance payment of his earn-out under the 2004 share sale agreement of $250,000 to Mr Beattie. This was to be an unsecured advance of earn-out entitlements, a loan which would be repayable either on demand or would be deducted from future earn-out entitlements under the 2004 share sale and purchase agreement. The terms of this share sale agreement variation also contemplated Mr Beattie's withdrawal from the business, at least in a full-time capacity, and his replacement as Managing Director by the end of 2008. The variation contemplated that Mr Beattie would continue to work part-time for PEGL until 31 December 2012. The share sale agreement variation was also conditional upon a specified level of profitability by PEGL and the documented securing of a partnership arrangement between PEGL and an organisation called Jetset. The variation contemplated that the earn-out advance of $250,000 would be deducted from performance earnings under the agreement for sale and purchase achieved by 30 June 2007, although if those performance targets were not met by that time, the advance of $250,000 was to

be repayable by Mr Beattie. The variation also included increasing the duration of the (employment agreement's) restraint of trade covenant from one to five years again.

[77] Mr Beattie's signature appears on that share sale agreement variation document, although it is undated. On 29 December 2006 Mr Beattie signed his 2006 individual employment agreement. I conclude that the new employment agreement and the variation to the share sale agreement were signed by Mr Beattie, if not contemporaneously on 29 December 2006, then in close temporal proximity.

[78] I turn now to relevant events affecting Mr Regan. He had also commenced employment, although with BAPL, in 2004. His final employment agreement evidencing his engagement as its Group Chief Operating Officer (GCOO) was concluded on 29 June 2006.

[79] In early July 2009 at Mr Gill's direction, BAPL reduced Mr Regan's salary by 30 per cent. This was at the same time as PEGL reduced Mr Beattie's salary by 20 per cent. Mr Gill advised Messrs Regan and Beattie that these reductions were to be for about two months whilst further funding of the companies was sought. Other employees also had a 20 per cent reduction and some of those worked a commensurately shorter week. Messer Beattie and Regan did not reduce their working time in consideration for their reduced incomes.

[80] By early September 2009 Messrs Regan's and Beattie's salaries had not been restored, although both asserted that the prospective, and even to some extent the actual fortunes of the companies, were then looking up as a result of increased business. From mid-October 2009 Mr Regan pressed for the restoration of his salary and, at the same time, complained to the group's accountant that the valuable assets of the group were being stripped out to Mr Gill's own entities.

[81] Mr Gill's response to Mr Regan's pressure to restore salaries, given on 10 October 2009, was that he was not considering doing so. On 23 October 2009 Mr Regan gave notice (six months) of his intention to resign from BAPL. On 20 October 2009, Mr Beattie had demanded that his salary be restored by PEGL.

[82] In common with other staff, Mr Regan's and Mr Beattie's remuneration was reduced at the insistence of Mr Gill although, unlike some of those other staff members, both were still expected to work as long and as assiduously as they had previously. Mr Gill's evidence was that Mr Regan and Mr Beattie agreed to these reductions in their income Both said, however, that they had no real choice but to accept the reduction that was imposed upon them by Mr Gill if they were to maintain their jobs and to continue to coexist in business with Mr Gill. Neither PEGL nor BAPL took any step to comply with clauses 18 or 17 (respectively) of the employment agreements (requiring any variation to be in writing and mutually signed) when those salary reduction were imposed.

[83] Concerned that his salary had been reduced by 30 per cent at the insistence of Mr Gill, Mr Regan anticipated that dividends amounting to some $265,000 owing to his Piccadilly Trust, which owned 20 per cent of the shareholdings in the group, would not be paid. He also anticipated that Mr Gill would not release him from a personal guarantee of a company loan. In these circumstances and although he had already given the required 6 months notice of resignation, Mr Regan engaged solicitors in December 2009 to press Mr Gill to release him from that guarantee. By letter dated 17 March 2010 Mr Regan's solicitors wrote to the solicitors acting for the companies and Mr Gill. This letter recorded Mr Regan's intention to make an orderly exit from the businesses as at 31 March 2010. The letter raised a number of points of inquiry by Mr Regan. These included whether steps had been taken by BAPL to determine his entitlement to payment of his accrued holiday pay; reimbursement for the difference between his original salary and the reduced salary that had been implemented by Mr Gill; and, in particular, whether sufficient funds would be available to make those payments to Mr Regan on 31 March 2010.

[84] By letter dated 9 April 2010, Mr Regan's solicitors confirmed that despite not having received a response to the issues raised in their letter of 17 March 2010, Mr Regan had successfully completed an orderly exit from the businesses on 31 March 2010. The letter advised, among other things:

> We confirm that Mr Regan has taken steps to secure his position with reference to his statutory entitlements, being holiday pay and reinstatement of his salary entitlement up to the 31st January 2010.

> Be that as it may, we are of the opinion that our client is entitled to recover from his employer a further $10,000.00, being unpaid wages that were due for the months of February and March 2010.

[85] On the salary reduction question, the companies' solicitors replied to Mr Regan's by letter of 22 April 2010 materially as follows:

> 4. Mr Regan agreed, as did the other directors to take a reduction in salary to assist the companies to continue to trade. This was the responsible thing to do. The companies are in no better position than they were when the reduction in salary was agreed. Mr Gill is quite frankly amazed that your client would even suggest that there should be any top up now of salary. Mr Regan has left the company with a huge number of issues to be resolved, some of which now appear to have been caused in part by accounting practices adopted by Mr Regan.
>
> 5. Our client has in the last few days become aware that your client, without Mr Gill's knowledge or approval on 1 February 2010 made unauthorised transfers to your trust account in the sum of $34,231 and $18,462. Furthermore, we are instructed that not only were no monies due to Mr Regan he was acutely aware at the time those payments were made that the companies were in financial difficulties, and perhaps technically insolvent. Please confirm that you still hold those funds and confirm that those funds $52,693) will be repaid immediately. …

[86] No money was repaid, whether immediately or otherwise. There is no question that if Mr Regan was entitled to recover short-paid salary, the amounts concerned are correct. Holiday pay was disputed but, I am satisfied, on the balance of probabilities, that Mr Regan's calculations of his entitlements were correct.

[87] By the end of November 2009 Messrs Beattie and Regan were continuing to press more frequently and stridently for the restoration of their salaries in view of their belief that PEGL's fortunes were improving as a result of hospitality business having been arranged with NAB, BHP Billiton and AusPost for the July 2010 FIFA World Cup Finals in South Africa. Mr Gill, however, declined to restore their salaries.

[88] On 10 December 2009 Mr Beattie's new draft employment agreement was presented to him but he did not ever sign it. On 24 December 2009 Mr Beattie resigned formally as a director of PEGL. On 20 January 2010 Mr Beattie gave notice of his resignation as an employee of PEGL.

[89] Mr Gill authorised restoration of Mr Beattie's salary on 22 January 2010 in response to Mr Beattie's notification of his resignation which had been conveyed to Mr Gill two days previously. This was part of a strategy by Mr Gill to persuade Mr Beattie to remain with PEGL. Mr Beattie did not withdraw or modify his notice of intention to resign. As the evidence now shows, he had committed to establishing himself in business with Mr Regan in competition with PEGL and had made important preparations for that.

[90] On 28 January 2010 Ms Panapa gave notice of her intention to resign from PEGL.

[91] The evidence suggests that on 9 February 2010 Mr Gill proposed to Mr Beattie an arrangement whereby the latter would work as a contractor to PEGL after ceasing as an employee. The proposal was that Mr Beattie would be paid $300,000 to deliver the 18 day AusPost hospitality programme for the London Olympic Games in July 2012. Mr Gill made the statement by email to Mr Beattie: "Silly for us to [not] work together on this and make some money rather than both of us not making any". This proposal was not taken up and AusPost (and Toyota) subsequently removed their business from PEGL.

[92] By early February the consequences of losing the services of his most valuable staff, Messrs Beattie and Regan and Ms Panapa, had become clear to Mr Gill. On 9 February 2010 documentation was generated recording an apparent agreement reached between Messrs Gill and Beattie for the latter to be released from his covenant in restraint of trade in respect of NAB and BHP and for Mr Beattie to be paid the contract sum of $300,000 to "deliver" the AusPost hospitality packages at the 2012 London summer Olympic Games.

[93] Mr Beattie's last day working at PEGL was 1 March 2010. On 11 March 2010 there was a meeting between Messrs Beattie, Gill, Regan and Kearney (the group accountant) where details of a programme to deliver hospitality packages at the July 2010 FIFA World Cup Finals were discussed as were some transitional arrangements made for post-employment contract work by Mr Beattie.

[94] On 18 March 2010 there was a further meeting between Messrs Beattie and Gill with a view to agreeing a basis on which Mr Beattie might continue to work as a contractor (albeit in the form of a new company) to PEGL to deal with ongoing business with BHP and NAB.

[95] Although there was evidence called about arrangements to wind up a contract between BAPL and Netball New Zealand, I do not propose to determine or even summarise it because the issue of Netball New Zealand's commercial relationship with BAPL is not justiciable in this employment litigation; neither are the allegations and counter-allegations about the commercial dealings between BAPL, Brand Advantage Measurement & Consulting Ltd (BAMCL), and Mr Regan. They are not justiciable in the limited context of the proceedings in this Court based on the employment agreement between him and BAPL. These proceedings involve only BAPL's claim in breach of contract against Mr Regan. Any connection between those events and the proceedings involving Mr Beattie is too remote and disconnected in law to affect them. Because of the conclusion I have reached about BAPL's claim against Mr Regan, those events do not arise for consideration now as part of his set-off defence. Likewise, I have decided that claims by Messrs Beattie and Regan in relation to BAPL's dealings with Nicola Wagner about the ownership of websites, is not justiciable or otherwise relevant to the litigation properly before this Court.

[96] Mr Regan's last day of work at BAPL was 31 March 2010.

[97] By mid-April 2010 at the latest, Messrs Beattie and Regan were undertaking business with Cartan (and AusPost) under the style "Cartan Global". This was business in the same field as PEGL operated: indeed, AusPost had, until then, been its client and Mr Gill had been intent upon Cartan becoming a joint venture partner with his company BSIL in association with PEGL.

[98] In early June 2009 Mr Gill had proposed a prospective event-ticketing business relationship with a substantial North American corporation, Cartan Tours Inc. Although not operating in precisely the same sphere as PEGL, Cartan had access to event tickets which PEGL did not, and it was discussed by Messrs Gill,

Beattie and Regan that there be a joint venture business relationship with Cartan to provide expanded and easier access to tickets to major events. Key people within Cartan were known to Mr Beattie and, to a lesser extent, to Mr Regan.

[99] Although Mr Beattie initially assumed that the prospective joint venture would be between Cartan and PEGL alone, Mr Gill's intention was otherwise. Mr Gill's evidence was that whilst he wished his own family entity, BSIL, to be the joint venture partner, he intended that elements of the returns would accrue to PEGL so that PEGL would share in the benefits of that prospective venture. When Mr Beattie became aware of BSIL's proposed involvement, he came to the view that, despite what Mr Gill said he was proposing, Mr Gill and BSIL would profit from it but that PEGL would not. Because of Mr Beattie's share sale earn-out arrangements, he foresaw that he would not share in the substantial benefits personally despite, in his view, the strength of the personal relationships with Cartan being his personally.

[100] Mr Beattie shared his disillusionment about these developments with Mr Regan. Together with their growing dissatisfactions with Mr Gill for a variety of other reasons (including the continued salary reductions), Messrs Beattie and Regan resolved to unhitch themselves from PEGL and, in Mr Regan's case, BAPL, and to establish themselves in competition with PEGL through a new corporate vehicle or vehicles.

[101] Because the discussions with Cartan had begun in mid to late 2009 and were progressing, Mr Beattie determined that if he was either to compete successfully with PEGL and Mr Gill, or to take over the majority of their business with customers that he regarded as his own, he would have to move promptly and decisively.

[102] Without disclosing to PEGL what he was doing in relation to Cartan, Mr Beattie arranged to travel to the United Kingdom in connection with other PEGL business but to stop off for a covert purpose on the journey. This was to attempt to commence negotiations directly with Cartan to obtain the prospective business that Mr Gill was intending would flow from the joint venture between Cartan and BSIL. Mr Regan joined Mr Beattie for some of those discussions with Cartan representatives in North America in the course of his own travels elsewhere, but

similarly concealed from Mr Gill, PEGL and BAPL, the true nature of their stop-over to meet with Cartan.

[103] I am satisfied that Mr Beattie's overtures to Cartan, whilst he was still employed by PEGL, enabled him and Mr Regan to launch their new business venture after concluding their employments with PEGL and BAPL in 2010. I have concluded, also, that to do so, Mr Beattie used confidential information (the property of PEGL) to augment the personal relationship that he had with Cartan management. He was able thereby to formulate competitive financial arrangements with Cartan necessary to persuade it to do business with him and Mr Regan and not with Mr Gill's BSIL, as happened.

[104] It is not insignificant that one of the first new corporate entities registered by Messrs Beattie and Gill when they established their business together after finishing work at PEGL and BAPL, included the words "Cartan Global" in the company's name although this was subsequently eliminated. That illustrated the initial importance of the Cartan business which Messrs Beattie and Regan obtained.

[105] Except for these events concerning Cartan, PEGL has otherwise failed to establish, or to establish sufficiently, any other acts or omissions of contract breach of this nature by Mr Beattie during the currency of his employment agreement.

Defences

[106] I now summarise the general, affirmative, and set-off defences to each of the claims, using the same letter/numeric identification code allocated to the relevant claims earlier in the judgment.

General defences to A1

[107] Mr Beattie and Ms Panapa deny the validity of operative restraints in their contracts and, alternatively, say that if they were restrained as PEGL claims, the Court should vary the duration of Mr Beattie's restraint from 12 months to six months, and estop PEGL from enforcing any restraint against Ms Panapa altogether.

[108] In addition to general denials of these breach allegations, the defendants also say that to the extent that they may have contravened the express terms of the restraints, by the time this occurred PEGL was no longer conducting business so cannot claim proprietorial interests in those customers. Mr Beattie also asserts that the customers were not PEGL's but were his in the sense that any value in the customer relationships was his personally and not PEGL's. In respect of Ms Panapa, her defence is that she was permitted expressly by PEGL to undertake work for specific customers after the termination of her employment and did so. In these circumstances, Ms Panapa says PEGL should be estopped from claiming that this work was in breach of her restraint.

General defences to A2

[109] Mr Beattie says that it was he who brought most, if not all, of the confidential information alleged to have been PEGL's when he co-founded the business. Mr Beattie asserts that he exercised his own personal skill, knowledge and know-how as an employee of PEGL and that these attributes were not its trade secrets. He says that such information that he had about business methodologies was personal to him as were the connections for obtaining tickets and securing hotel room bookings that constituted the majority of the information used by PEGL. Mr Beattie says that his personal business connections with clients were not confidential information and that most of the customers or clients were, in any event, his that he had brought to the business when it was founded.

General defence to A4

[110] The defendants deny the allegations of breach and assert that PEGL had decided, in the period between 26 January 2010 and 9 February 2010, to close its business down so that there were no losses and no goodwill to be damaged as alleged.

General defence to A5

[111] Mr Beattie and Ms Panapa deny generally any liability for breach of statutory duties.

[112] In addition to their general defences outlined above, including denials of these allegations made against them by PEGL, Mr Beattie and Ms Panapa raise a number of affirmative defences.

First affirmative defence - A1, A2, A3, A4, A5/AffD1

[113] First of all, the first and third defendants say that PEGL is not entitled to relief under s 4 of the Employment Relations Act and/or for alleged breaches of obligations of confidentiality, fidelity, trust and confidence, and misuse of confidential information and/or inequity. That is said to be because the Court should apply s 189 of the Employment Relations Act (equity and good conscience) to deal with those claims. More particularly, Mr Beattie and Ms Panapa say that it would not be equitable and/or in good conscience to grant the relief claimed against them because, at the relevant time, Mr Gill and PEGL engaged in an asset-stripping scheme designed to disadvantage them and others, and in other wrongful acts towards or affecting the defendants. They say that PEGL commenced this scheme in June 2009 whereby Mr Gill stripped or attempted to strip a number of valuable assets from PEGL and BAPL into his personal or family companies or entities controlled by him, his trusts, or his other interests. Those valuable assets are said to have included:

- a potential, and potentially profitable, joint venture with Cartan (diverted to Mr Gill's personal family company BSIL) for no consideration);

- the diversion of software tools and intellectual property into interests of, or associated with, Mr Gill;

- the diversion of a contract with Netball New Zealand, which generated income of $334,000 per year, to another Gill company, BAMCL; and

- steering website sales worth more than $450,000 into a new company owned entirely by Mr Gill or his interests, Digital Partners (NZ) Ltd (DPNZL).

[114] In addition to asking the Court to dismiss PEGL's claims against them on these grounds, Mr Beattie and Ms Panapa say the Court should award penalties against PEGL under ss 134(1) and 189 of the Employment Relations Act.

Second affirmative defence - A1, A2, A3, A4 and A5/AffD2

[115] The first and third defendants' second affirmative defence is breach by PEGL of its duties of good faith to Mr Beattie and Ms Panapa. These duties are said to have arisen under s 4 of the Employment Relations Act. In particular, they claim that PEGL manipulated its own accounts by removing unjustifiable or unwarranted sums of money improperly under the guise of 'management fees' in order to reduce bonuses due to Mr Beattie and to reduce the purchase price for the 50 per cent shareholding of the business acquired by Mr Gill's interests from Mr Beattie in 2004.

[116] Next, the defendants say that it was a breach of the statutory duty of good faith in employment for PEGL to attempt to divert a potentially valuable commercial relationship with Cartan, into Mr Gill's personal family company, BSIL.

[117] The next breach of good faith alleged is that PEGL "sided with Inland Revenue in a GST dispute" with Mr Beattie.

[118] Then the defendants say that PEGL made unauthorised and unlawful deductions from Mr Beattie's salary. This is the basis also of Mr Beattie's claim against PEGL. He also asserts that PEGL assisted in breaching the terms of the 2004 buy-out of his shareholding by treating him unfairly and in breach of contract.

[119] The next allegation of bad faith conduct by PEGL is said to have been its participation in the asset-stripping scheme referred to previously. Mr Beattie says that PEGL failed to treat him fairly as an employee, director and executive, and failed to treat Mr Regan fairly as a director. It is said to have failed in its duties of good faith to the first and third defendants by bringing about the demise of, or at least significant damage to, its own business. More specifically, the defendants say that PEGL:

- required the defendants to work for five or more days per week or the equivalent thereof but paid them only for four days;
- failed to give notice of company meetings and failed to obtain shareholders' approval for a major transaction (the removal of the potential Cartan business from PEGL into BSIL);
- failed to obtain a special resolution for a major transaction (the removal of the potential Cartan business into BSIL); and
- "cumulatively alienated the first defendant who was the key person/key revenue generator in the business".

[120] Affecting Ms Panapa (the third defendant), the defendants say that in breach of duties owed to her, PEGL alienated Mr Beattie as its key executive and Mr Regan as its director. This was by unreasonable actions including underpaying, or participating or conniving in a scheme to underpay, Messrs Beattie and Regan, and engaging in the asset stripping-scheme described earlier, thus bringing about the demise of, or damage to, PEGL's business. These breaches are said to have been deliberate, serious and sustained, warranting the imposition of penalties against the first plaintiff in addition to being a defence to the plaintiffs' claims

Third affirmative defence - A1, A2, A3, A4, A5/AffD3

[121] The defendants' next affirmative defence is said to be that they did not cause PEGL any loss because it decided independently, between 26 January and 9 February

2010, to cease or reduce significantly its business, and did so. Alternatively, the defendants say that PEGL was unable to carry on its former business in the absence of Mr Beattie whom it alienated or was unable to induce to remain with it. That is said to have been due to its own actions in underpaying him and/or in the asset-stripping scheme described above which had the effect of bringing about the demise of the plaintiff's business and causing its own loss (if any).

Fourth affirmative defence - A1, A2, A3, A4, A5/AffD4

[122] The defendants' fourth affirmative defence is that PEGL acted in breach of contract. The contractual (I assume implied) obligation is said to have been to treat its employees fairly. In respect of Mr Beattie, the defendants say that PEGL manipulated its accounts by removing unjustifiable or unwarranted sums of money unlawfully from the accounts of the first plaintiff "under the guise of "management fees" in order to reduce bonuses owed to the first defendant, and/or reduce the purchase price for the 50% of the shares in the business of the first plaintiff acquired from the first defendant in 2004.

[123] Next, the defendants say that PEGL attempted to divert the potentially valuable Cartan commercial connection to Mr Gill's personal family company, BSIL. The defendants repeat the allegations that PEGL sided with the Commissioner of Inland Revenue in a GST dispute with Mr Beattie; assisted in the breach of the terms of its 2004 buy-out of Mr Beattie's shares; and participated in the aforementioned unfair/bad faith asset-stripping scheme. Next, the defendants say that, in association with BAPL, PEGL maltreated PEGL's director Mr Regan; failed in its duty of good faith to Mr Beattie and Ms Panapa; and brought about the demise of, or damaged, its own business.

[124] The defendants repeat their allegation set out previously, that PEGL required them to work for five or more days per week, or the equivalent thereof, but paid them for four.

[125] Penultimately, the defendants reiterate the allegation that PEGL alienated cumulatively Mr Beattie who was a key person and key revenue generator in its business.

[126] Finally, the defendants reiterate the allegation that PEGL assisted, via Mr Gill, in the alienation of Mr Beattie and/or Mr Regan by participating in/orchestrating/assisting a bad faith/unfair asset-stripping scheme by which PEGL assets were removed for no consideration or at gross undervalue from companies in which Mr Regan's family trust (Piccadilly) owns shares. They say again that PEGL thereby brought about the demise of/terminated/damaged the business of PEGL.

Fifth affirmative defence - A1, A2, A3, A4, A5/AffD5

[127] The next defence pleaded by the defendants is a fall-back position in case the Court finds that the defendants' breaches caused PEGL losses. They say that in this event, PEGL failed to mitigate losses as it was obliged in law to do. It is said to have done so in a number of respects.

[128] First, the defendants say that PEGL's actions caused cumulatively the key employee/key revenue generator in the business (Mr Beattie) to resign, thus negating or eliminating prospects of the company carrying on future business activities. Next, the defendants say that PEGL failed to seek to replace Mr Beattie after his departure. They say that PEGL failed to pay for alternative transport arrangements for two key Australian clients when the clients expressed dissatisfaction about those arrangements made by PEGL for tours associated with the 2010 FIFA World Cup Finals in South Africa. The defendants say that PEGL alienated and lost the business of Toyota as a key client by misappropriating about $50,000 worth of funds belonging to that client. Finally, the defendants say that PEGL instigated and/or assisted with and/or encouraged a negative news media campaign in mid-2010 which was designed to and/or did damage the defendants' businesses.

Sixth affirmative defence - A1, A2, A3, A4, A5/AffD6

[129] As a sixth affirmative defence, the defendants plead acquiescence, estoppel and waiver. They say that, in November 2010, PEGL was required either to seek an injunction against the defendants and carry on the business itself, or to condone the defendants' breaches (if any) and to sue to claim a share in their profits. The defendants say that PEGL chose to condone the defendants carrying out aspects of its former business and, thereby, elected to seek to recover their profits by litigating against them rather than attempting to carry on the business itself. In these circumstances, the defendants say that PEGL acquiesced in their carrying on aspects of its former business and is estopped from seeking the relief sought against them.

[130] Alternatively, they say that PEGL is estopped from seeking relief for an amount more than a 9 February 2010 settlement offer by it of 50 per cent of their profits or, alternatively, is estopped from seeking compensation in respect of three named clients, NAB, BHP, and AusPost.

[131] Next, there is a plea of estoppel to prevent PEGL from claiming against Ms Panapa whom it agreed should continue to work for Mr Beattie in his new operations including in dealings with PEGL's former clients.

[132] Alternatively, the defendants say that on 9 February 2010 PEGL reached an agreement with Mr Beattie to continue to carry on aspects of his former business after March 2010. They say that, in doing so, PEGL waived, either expressly or impliedly, any pre-existing ability to enforce restraint of trade provisions; that it is estopped from doing so now; or that it should be found to have acquiesced in the defendants' subsequent actions.

[133] As a second alternative, the defendants say that the Court should infer an agreement, from the conduct of the parties, for Mr Beattie to deliver services to PEGL's clients, BHP and NAB, in respect of the FIFA World Cup event in July 2010 which was held more than three months after Mr Beattie had left the employment of PEGL.

[134] Turning to equitable defences for the third defendant, Ms Panapa, the defendants say that her involvement with Messrs Beattie and Regan was disclosed to PEGL at meetings on 11 and 18 March 2010 and the company waived any potential restraint of trade restriction against her at that time.

Seventh affirmative defence - A1, A2, A3, A4, A5/AffD7

[135] The defendants' seventh defence is styled "Repudiation of contract/s". The defendants say that PEGL, by breaching them fundamentally, repudiated its employment agreements by the acts or omissions just described so that it should not be entitled to enforce restraints of trade as a repudiating party.

Eighth affirmative defence - A1, A2, A3, A4, A5/AffD8

[136] The eighth pleaded defence is "Apportionment/contribution". The defendants say that PEGL, by its Chief Executive Officer and alter ego, Mr Gill, brought about its own downfall by alienating both Mr Beattie and its own director Mr Regan, causing both to resign. The particulars in support of this defence include those which have been summarised already, alleging asset-stripping instigated by Mr Gill, and the improper diversion of tools, intellectual property and agreements or potential agreements from PEGL to Mr Gill's personal family investment company BSIL, and other personal interests.

[137] To effect this defence, the defendants seek an apportioning of any losses between the parties in such percentages as the Court considers just.

Ninth affirmative defence - A1, A2, A3, A4, A5/AffD9

[138] The ninth and final affirmative defence is said to be "Failure of consideration in relation to first defendant's restraint of trade". The defendants say that assuming the restraint contained in Mr Beattie's 2006 employment agreement with PEGL was otherwise lawful, the consideration proffered for it was never paid to Mr Beattie. In these circumstances he says the restraint is void for want, failure, or absence of consideration and, in any of these instances, is unenforceable.

Set-off defences – Mr Regan (B/SO)

[139] These are the defences to BAPL's claim against Mr Regan. Although BAPL resisted Mr Regan's entitlement to these, they were allowed against BAPL, despite its being in liquidation and receivership. That is for reasons set out in the Court's interlocutory judgment of 21 February 2012.[4]

First set-off defence (B/SO1)

[140] Mr Regan's first ground of set-off defence to the repayment of this sum is that it was properly made by him as an independent company accountant and constituted monies due and owing or otherwise payable to him for salary and holiday pay. He asserts it was paid in accordance with properly kept company records in the ordinary course of business.

Second set-off defence (B/SO2)

[141] Mr Regan's second and alternative set-off defence alleges that BAPL acted in breach of its obligations of good faith towards him, so justifying him in doing as he did. Those obligations arising under s 4 of the Employment Relations Act are said to have been breached in the following respects. BAPL is said to have:

- attempted to "bully" Mr Regan into signing minutes of meetings which did not occur,

- attempted to "bully" Mr Regan into signing minutes of meetings which would have ratified unlawful dealings designed to disadvantage business partners and employees, had he acceded to such demands;

- attempted to enter or entered into major transactions without calling the necessary shareholder meetings;

[4] *Premier Events Group Ltd v Beattie* [2012] NZEmpC 26.

- attempted to enter or entered into major transactions without obtaining the required special resolutions;

- failed to give notice of company meetings;

- engaged in the backdating of documents in order to disadvantage Mr Regan and others;

- participated in the asset-stripping scheme summarised earlier in this judgment;

- made unlawful deductions from Mr Regan's salary; and

- required Mr Regan to work for five or more days per week or the equivalent thereof but paying him for four.

[142] The remedies for these breaches of duties of good faith include orders under s 189 of the Employment Relations Act that PEGL's conduct was unconscionable; that the employment agreement between the parties was repudiated thereby; and that the employment agreement was unenforceable.

Third set-off defence (B/SO3)

[143] Mr Regan's third alternative set-off defence also alleges breach of contract. He says that BAPL was obliged under their contract of employment to treat him fairly. The same allegations that support the claim for breach of the duty of good faith just summarised also apply to this defence.

Fourth set-off defence (B/SO4)

[144] Mr Regan's fourth alternative set-off defence asserts breach by BAPL of the Wages Protection Act 1983 and/or express terms of his employment agreement by failing to pay him his agreed salary and other remuneration. In particular, Mr Regan says that BAPL reduced his salary by 30 per cent between 1 July 2009 and 31 March 2010 in breach of ss 4-6 of the Wages Protection Act, s 131 of the Employment

Relations Act, and/or cl 18 of his employment agreement. Mr Regan asserts that the salary deductions were not agreed to in writing by him and that he suffered loss and damage in the amount of his salary wrongfully deducted.

Fifth set-off defence (B1/SO5)

[145] Mr Regan's fifth alternative set-off defence is identified as a personal grievance claiming compensation for humiliation, loss of dignity and injury to feelings. Mr Regan claims that BAPL, via Mr Gill, engaged in "oppressive, overbearing, bullying, threatening, tyrannical and unfair [behaviour]" towards him during the latter part of his employment in 2009-2010. Particulars of these general allegations include that BAPL attempted to remove, and/or actually removed, assets from the group of companies in which Mr Regan's family trust held shares as part of his employment arrangements. Mr Regan says:

- that a potential joint venture with Cartan was diverted unlawfully by Mr Gill into the latter's family company, BSIL, for no consideration;

- that software tools and intellectual property were diverted to Mr Gill's interests or those associated with him;

- that a contract with New Zealand Netball worth $1.6 million was diverted from BAPL by Mr Gill into a new company, Brand Advantage Measurement & Consulting Ltd (BAMCL), for no consideration; and

- that websites sales revenues worth more than $900,000 were diverted from DPL into a new company formed by Mr Gill, DPNZL, in which Mr Gill and/or associated interests held 100 per cent of the shares, the consideration for such a transfer being the sum of $1.

[146] In respect of this defence, Mr Regan reiterates his allegations about:

- "overbearing, bullying, threatening, tyrannical & bullying and unreasonable" behaviour;

- unauthorised salary reductions;

- attempts to bully him into signing minutes of meetings which did not occur;

- attempts to bully him into signing false minutes;

- attempts to bully him into signing backdated minutes;

- attempts to bully him into signing minutes which would purportedly ratify unlawful actions by Mr Gill;

- claims that such behaviour, in breach of the Employment Relations Act, caused Mr Regan humiliation, loss of dignity and injury to feelings; and

- a requirement that he work five or more days per week or the equivalent thereof but being paid four.

[147] Being claims for compensation under s 123(1)(c) of the Employment Relations Act, I categorise these complaints as an unjustified disadvantage grievance under s 103(1)(b) of the Employment Relations Act.

BAPL's defence to Mr Regan's counterclaims/set-offs (B/SO/D)

[148] The following are BAPL's defences to Mr Regan's set-off defences.

First defence (B/SO/D1)

[149] BAPL's statement of defence to Mr Regan's set-offs makes the following assertions. It says that Mr Regan signed minutes of meetings in the capacity of a director and shareholder of BAPL and not as an employee, so that his allegations fall

outside this Court's jurisdiction. A similar defence is invoked in respect of Mr Regan's claims about discussions concerning business decisions with fellow directors and shareholders. These are said to have been in their capacities as directors and shareholders but did not occur in the context of the parties' employment relationship, so that these allegations also fall outside the Court's jurisdiction. So, too, do the allegations about attempting to enter or entering into major transactions without calling shareholder meetings or obtaining the required special resolutions.

Second defence (B/SO/D2)

[150] Alternatively, in respect of Mr Regan's claim that BAPL failed to give notice of company meetings, it says that Mr Regan had knowledge of where and when those meetings were held.

[151] On the same grounds of lack of jurisdiction, BAPL says that Mr Regan's allegations that the company backdated documents to disadvantage him and others cannot be for decision in this case for essentially the same reasons as are set out in relation to B/SO/D1.

Third defence (B/SO/D3)

[152] Turning to the second plaintiff's affirmative defence to Mr Regan's third alternative set-off defence for breach of contract, it pleads similarly that the conduct complained of by Mr Regan took place not in the context of an employment relationship but, at best from his point of view, as a director and/or shareholder so that the defence is not justiciable in this Court. In response to all of the differently pleaded asset-stripping allegations, BAPL says that these are not justiciable and were indeed struck out of the pleadings by this Court's interlocutory judgment delivered on 21 February 2012.[5]

[5] *Premier Events Group Limited v Beattie*, above n 3, at [31].

Fourth defence (B/SO/D4)

[153] Addressing Mr Regan's affirmative defence of breach of the Wages Protection Act and of his employment agreement by failing to pay his agreed salary, BAPL enters a bare denial and, alternatively, says that any salary reduction was made with Mr Regan's express agreement. It adds that from on or about 1 July 2009 staff employed with the group of companies, including Mr Regan, had their salaries reduced, this being necessary for the survival of the business, and such staff (including Mr Regan) were invited to work reduced hours in return for their reduced salaries and agreed to do so.

Fifth defence (B/SO/D5)

[154] As to Mr Regan's fifth alternative set-off defence (personal grievance), BAPL says that Mr Regan did not raise any grievance with it within the statutory period of 90 days from which the action or actions alleged to give rise to the grievance occurred or came to his notice. Further, BAPL says it is not required to plead to these allegations because they relate to asset-stripping which has already been excluded from the case by the Court's interlocutory judgment.[6] It says that provisions for Mr Regan's shareholdings, or those of his family and associates, were not terms and conditions of his employment with BAPL and the allegations generally do not relate to its actions as employer. Finally in this regard, it says that even if Mr Regan's allegations are substantiated, they did not give rise to humiliation, loss of dignity and/or injury to his feelings.

Sixth defence (B/SO/D6)

[155] BAPL pleads finally that even if Mr Regan was disadvantaged unjustifiably in his employment and this warrants compensatory awards, they should be reduced to reflect his contributory fault under s 124 of the Employment Relations Act.

[6] Above n 4.

PEGL's defences to Beattie claims (C)

Defence to first cause of action (C1)

[156] PEGL admits reducing Mr Beattie's salary by 20 per cent from 1 July 2009 but asserts that this was agreed to by him in the financial circumstances that then faced the company.

[157] PEGL denies breaching its obligations of good faith to Mr Beattie and, in particular, his claims that it did so by preventing him from earning bonuses as a result of its manipulation of its accounts and by the alleged asset-stripping scheme described elsewhere in this judgment. It says that even if it did so, such actions would not constitute an absence of good faith or other breach of Mr Beattie's employment agreement and are not justiciable in these proceedings.

[158] PEGL denies that the reduction of Mr Beattie's salary was in breach of the Wages Protection Act or was otherwise unlawful.

Defence to second cause of action (C2)

[159] PEGL denies breaching its statutory good faith obligations under s 4 of the Employment Relations Act. Additionally, it says that any breach of s 4 is not compensable by damages for breach of contract and that Mr Beattie has not met the high threshold required for the imposition of a penalty for a breach of s 4. It denies Mr Beattie's allegations of bad faith, jealous, intimidatory, and harmful actions against him, including those particularised in his statement of claim. In particular, it says that it did not act contrary to Mr Beattie's interests in his GST dispute with the Commissioner of Inland Revenue or that, had it done so, this would have amounted to a breach of their employment agreement. It denies again Mr Beattie's allegations of asset-stripping and misappropriation of funds and reiterates that, in any event, such are not justiciable issues in these proceedings.

Defence to third cause of action (C3)

[160] PEGL denies Mr Beattie's allegations of manipulation of its accounts under the guise of management fees. It says that, in any event, any claimable losses by Mr Beattie are not losses of entitlements as an employee because any bonuses of "earn-out" payments claimed by Mr Beattie could only have arisen under his share sale agreement which cannot be for decision in these proceedings. As to Mr Beattie's claim that he was not rewarded fairly for his services, PEGL says that it is not for the Court to determine what would have been a fair reward for services: rather, that was determined by the parties themselves in their contract, breach of which PEGL denies. PEGL denies repudiating its employment agreement with Mr Beattie.

Defence to fourth cause of action (C4)

[161] PEGL denies that it owed Mr Beattie any additional implied duty of "fairness" and says that in any event it met its contractual, statutory, and implied obligations in law, and denies treating Mr Beattie unfairly to the extent that there may have been any such obligation on it.

Discussion

[162] In addition to the facts relating to each cause of action and defence to it, there are a number of legal questions and factual issues common to multiple causes of action or defences that I now decide compendiously.

Credibility of the main protagonists

[163] Although each of the three major protagonists has sought to portray his opponent or opponents as untruthful, I have not reached a clear universal view about their credibility. Rather, at different times and on different issues, I have doubts about their veracities so that determining disputed credibility has had to be on an issue-by-issue basis. Contemporary written or electronic records assist in this exercise, as well as the traditional range of disputed fact finding tools employed by judges.

[164] Messrs Beattie and Regan sought to portray Mr Gill as a Dr Jekyll and Mr Hyde character; that is, someone who exhibited the most egregious characteristics in his dealings with them, yet left no traces of this side of his character to corroborate their allegations. Their cases are that he sought to portray himself falsely in the role of witness as a fair, reasonable and moderate man, the antithesis of his portrayal in evidence by Messrs Beattie and Regan. So, one of the issues that needs to be confronted in deciding a number of aspects of the case is who or what was probably the true Mr Gill to whom the relevant acts and omissions of PEGL and BAPL are attributable?

[165] Because the majority of the criticism of witness veracity was directed against Mr Gill, and because the majority of the disputed factual issues in the case concern what he did or did not do as the personification of PEGL and BAPL, it is necessary to assess Mr Gill's credibility and character. In general, I do not accept the wholly dishonest, manipulative, greedy, unscrupulous, and ruthless characteristics ascribed to him by Messrs Beattie and Regan in evidence and by Mr Eichelbaum as their counsel in submissions. That is not to say that Mr Gill was not very astute, opportunistic, and promotional of his own personal interests in his various dealings with those two other protagonists. All three men share to a greater or lesser degree those characteristics in their business and personal dealings with each other. I have concluded, however, that, in general, when Messrs Beattie and Regan considered that they were being treated unfairly and inequitably (although not necessarily unlawfully) in their business relationships with Mr Gill, each of them exaggerated those originally justifiable assessments of Mr Gill. They elevated and portrayed those senses of unfairness and disadvantage about their own positions, to ones of unlawful manipulation and egregious immorality by Mr Gill. Messer Beattie's and Regan's cases were that Mr Gill took advantage of circumstances that he knew trapped the employees in their financial arrangements with PEGL and BAPL having no alternative but to continue to endure these privations whilst they watched Mr Gill apparently profiting significantly from their misfortunes. I do not accept that absolute victim-oppressor characterisation of these relationships. When these blanket assertions of dishonesty, untruthfulness, and manipulation about Mr Gill are cross-checked objectively, I have concluded they are not sustainable, at least as absolutely

and egregiously as Messrs Beattie and Regan would have it, and as Mr Eichelbaum as their counsel presented their case in submissions.

[166] One example of many of these allegations about the 'real' Mr Gill is the following. When being cross-examined about the content of emails to and from Mr Gill regarding the Inland Revenue Department's investigation of him and Mr Gill's role in this, it was put to Mr Beattie by Mr Lloyd (counsel for PEGL) that the emails did not support his account of Mr Gill undermining him during and at the conclusion of that investigation. Mr Beattie's response was:[7]

> … See what you miss is all the verbal stuff that goes on at work, the threats, the bullying the pushing, the banging, the threatening staff. Mr Gill is a past master of putting things in writing, then going out and smashing the wall, and afterwards fortunately that doesn't go in emails. So his practice at the time was what upset me, his practice, and that's why I raised it, nothing more, nothing less.

[167] The same general topic provides another example of Messrs Regan's and Beattie's accounts of Mr Gill's conduct. It related to his treatment of Mr Beattie during a long-running and difficult Inland Revenue Department investigation of Mr Beattie's personal GST records. Messrs Beattie and Regan portrayed Mr Gill as not merely unsupportive of Mr Beattie. They claimed that Mr Gill sought to undermine Mr Beattie, delighted in the difficult predicament in which Mr Beattie found himself, and then was enraged when the Commissioner of Inland Revenue exonerated Mr Beattie on this issue.

[168] Mr Beattie complained that when he first told Mr Gill face to face that the Commissioner of Inland Revenue had discontinued his investigation of him (Mr Beattie) in connection with GST matters, Mr Gill harrumphed and left the room peremptorily. Mr Beattie said this indicated to him that Mr Gill was at least very disappointed about hearing of an outcome that was favourable to Mr Beattie. The inference was that the Court should conclude likewise. Mr Lloyd put to Mr Beattie an email sent by Mr Gill to a number of people including Mr Beattie, announcing the successful cessation of the Inland Revenue Department investigation of him. Its tone and content were supportive of Mr Beattie. Counsel suggested to Mr Beattie that

[7] Transcript of evidence, p357, lines 30 and following.

this was the true reflection of Mr Gill's response to the conclusion of the investigation and which had been provided by email by Mr Beattie to Mr Gill rather than at a face-to-face meeting as described above, which meeting Mr Gill denied took place. Mr Beattie was adamant that he had advised Mr Gill in person as well as by email, in response to which Mr Gill subsequently wrote his email, and said that this was an example of what I have termed the Dr Jekyll (email) and Mr Hyde (the face to face meeting) phenomenon.

[169] I consider Mr Beattie's explanation for this improbable, at least if, as the evidence suggested, the email announcement to Mr Gill of Mr Beattie's exoneration came first. The veracity of Mr Beattie's account of his meeting with Mr Gill depended upon the novelty of what he told Mr Gill. If the latter had received the email by that stage, I do not consider that he would probably have reacted as Mr Beattie alleged. In these circumstances, the existence of the email assists in determining a disputed account of events between Messrs Beattie and Gill, and in Mr Gill's favour, at least in that instance. Other contemporaneously generated documentary records tend to contradict other more extreme claims of Mr Gill's egregious behaviour which were not corroborated, as they presumably could have been, by the evidence of other employees or former employees of Mr Gill's companies.

[170] Messrs Beattie and Regan, when giving evidence, made widespread and serious allegations about Mr Gill's conduct towards them and towards other staff of the various businesses operated by Mr Gill. These included that he was bullying, intimidatory, threatening, manipulative, and sought always to aggregate his own wealth and to reduce that of others including Messrs Beattie and Regan. Although specific allegations involving other named persons were made, none of those others who might have been able to confirm or deny those allegations was put forward as a witness to these events. It was, therefore, the word of Messrs Beattie and Regan on the one hand, and Mr Gill on the other, against each other for the most part.

[171] There were, however, contemporaneously generated documents (including numerous emails) touching on those events complained of by Messrs Beattie and Regan in this regard. Generally, neither the content nor the tone of any of this

documentation tends to confirm those allegations against Mr Gill. Indeed most contradicted, sometimes starkly, the evidence of Messrs Beattie and Regan about the incidents to which those emails and other contemporaneous records related.

[172] There is, I suppose, the theoretical possibility that Mr Gill was so far-sighted, fastidious in his deception and cunning, that he consistently covered his tracks with apparently bona fide documentary records which consistently misrepresented the truth of what he said and did. Messrs Beattie and Regan were driven to contend that this was so. I consider that is improbable however. Messrs Beattie and Regan have elevated unduly their earlier dissatisfactions which were then not sufficient to cause them to either leave (in the case of Mr Beattie and PEGL) or to leave and assert his rights as a shareholder and director (in the case of Mr Regan), at least until they did so later. I do not accept their cases that they were, in effect, trapped victims of Mr Gill and had no alternative but to ride the treadmill driven by Mr Gill on which they were doomed to remain while being increasingly disadvantaged.

Whose customers?

[173] An issue in this case is the intellectual proprietorship in customer relationships. It is an important issue because PEGL's case is that Mr Beattie in particular (but, to some extent, the other individual defendants as well) exploited, for his own benefit and that of the other defendants, commercial relationships with customers or clients which were in law the property of PEGL.

[174] The question arises where an employee brings to a new employment relationship valuable personal contacts which are an integral part of the customer relationship with the new employer. An associated question relates to the property in customer relationships established, built, and maintained by an individual employee during employment. One example of the same phenomena in the case law in this jurisdiction can be found in the Court's judgment in *BFS Marketing Ltd v Field*.[8] In that case, the Court concluded that it was the former employer rather than the former

[8] *BFS Marketing Ltd v Field* [1992] 2 ERNZ 1105 (EmpC).

employee who had the legal proprietorial interest in those customers which a restraint purported to protect. The Court concluded:[9]

> Although I accept that in his former employment … [the former employee] had done business with the two commercial entities principally at issue in this case, [they] cannot have been regarded then or during his period of employment with the plaintiff, as [the former employee's] own clients in which he had a recognised proprietorial interest. Although on a day to day basis [the former employee] no doubt thought of these customers as his and the representatives of those companies with whom he dealt on an almost daily basis regarded [the former employee] as the person with whom they had a commercial relationship, the reality is that they were customers of the plaintiff. There is no question but that [the former employee] was an employee. He was not an independent contractor to the plaintiff. It would have been open to the plaintiff to have directed its marketing sales representatives to have relinquished customers in favour of [others] and although, in the case of [the former employee] at least, such may not have been a prudent commercial decision had it been taken, there is no doubt that it would have been a lawful direction given by an employer to an employee. It was the plaintiff which was responsible, in a contractual sense, to those customers. [The former employee] was paid both his base salary and commissions irrespective of whether such customers paid [a financial entity related to the plaintiff] whose responsibility it was to collect accounts. [The former employee] was provided by the plaintiff with a motor vehicle and with the backup support which enabled him to effectively service these customers' needs. That relationship was indeed recognised by [the former employee] in the execution by him of his employment contract and, in particular, by the reference in the restraint part of that document to those organisations being customers of the plaintiff. I therefore find that it was the plaintiff which had a proprietorial interest in those customers which the restraint purported to protect.

[175] I accept that Mr Beattie brought or introduced many of the major clients or customers of PEGL to that company (or to its predecessor entity) when he joined it first as a shareholder and director at the time of its formation. It was only later that he became an employee. His personal relationship with those organisations, and relevant key personnel within them, was the principal advantage that Mr Beattie brought with him to his role and relationship with, including his directorship of, and subsequently employment by, PEGL. Others (Messrs Gill and Regan) brought other strengths and attributes to that relationship, although Mr Gill did also bring a customer base. In the cases of those previous commercial relationships and in other cases, Mr Beattie nurtured and maintained customer relationships while an employee of PEGL.

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[9] At 1116-1117.

[176] Despite bringing those customers to PEGL, I have concluded that they were not Mr Beattie's customers at law. At no relevant time did Mr Beattie conduct business with those clients in a personal capacity. Before the incorporation of PEGL, he and Mr Gill did so through the vehicle of another company, Sportsworld, in which they were equal shareholders. Even if those customers or suppliers (not to mention Mr Beattie himself) may have regarded themselves as doing business with Mr Beattie personally, the legal arrangement that was set up and in which he participated for that purpose meant that it was the legal entitities of Sportsworld and, subsequently, PEGL, which held these commercial relationships. PEGL was entitled to their proprietorship in law. Although Mr Beattie was and remains convinced that the customers were 'his' (and so too might some of the customers), that is not the position in law.

Manipulation of management fees?

[177] This allegation arises in two contexts in the case. First, Mr Beattie says that by paying excessive management fees from PEGL to his own personally associated companies, Mr Gill deprived Mr Beattie of bonuses or profit share in PEGL. With one possible exception, whether that is so in the case of Mr Beattie, however, is not a matter within the scope of his claims or defences in this Court. That is because, except for the Beijing Olympics bonus arrangement in his 2006 employment agreement, Mr Beattie's remuneration under his employment agreement with PEGL consisted only of a fixed salary and motor vehicle allowance.[10] Any other profit share or bonus entitlements arose only under his 2004 agreement for the sale of his shares which was a commercial transaction between shareholders and not, in law, between an employer and employee as an incident of their employment agreement. It follows that Mr Beattie can have no claim in this Court to recover such losses, or use this as a defence to the claims against him. It may be, however, that this is a claim covered by other litigation between the parties and, in these circumstances, I do not propose to make findings of fact on that part of Mr Beattie's claims or defences.

[10] Mr Beattie's case did not encompass a specific claim that PEGL deprived him improperly of an entitlement to a bonus arising out of the Beijing Olympics entitlement pursuant to his 2006 employment agreement. In any event, such a claim could not have been established on the evidence.

[178] The only other potential claim based on manipulation of management fees has been by Mr Regan against PEGL and/or BAPL. Such claims are likewise not justiciable in this Court. That is because Mr Regan's relationship with PEGL was not one of employment but, rather, as a director and, indirectly through his family trust, as a shareholder. And, although there was an employment relationship between Mr Regan and BAPL, the fact of its liquidation and receivership means that, without the necessary consents, Mr Regan is precluded in law from suing his former employer for breach of contract. Such consent has not been given.

[179] Therefore, despite having heard evidence, including expert evidence, on the question of the appropriateness of such management fees, I decline to make any findings about what now transpires to be a non-issue in these proceedings.

'Salary splitting' and gross remuneration issues

[180] Each of Messrs Gill and Regan 'split' their salaries received from BAPL between themselves and their respective wives to incur an overall lower incidence of tax on these amounts. In the case of Mrs Regan, who was also an accountant, there was evidence that she sometimes worked on the financial affairs of BAPL and other companies in the group in justification for her notional share of Mr Regan's salary. At other times, when there was a particular need, Mrs Regan was also a part-time employee of BAPL who was paid as such for financial work that she performed at the company's office. Those latter earnings are not in issue in this case.

[181] For the purposes of determining BAPL's claim for reimbursement of the sums that Mr Regan arranged for the company to pay him, I do not propose to take account of the salary-split arrangement that was in place for him. I am satisfied that it was substantially, if not completely, a fiction created and perpetuated to lower the incidence of taxation payable by Mr Regan.

[182] In this regard, also, the sums that Mr Regan paid to himself from BAPL's funds, the subject of this proceeding were the gross amounts of his annual remuneration without any deduction of tax or other deductions. The evidence establishes that in Mr Regan's case, as well as Mr Gill's, his salary was always paid

to him as a gross amount with the responsibility for the payment of tax resting on Mr Regan as if he were self-employed. The holiday pay component of that payment was similarly a gross amount without actual or notional deduction for tax or accident compensation levies. The responsibility for any incidence of income tax on those payments lies with Mr Regan, consistently with the pattern of remuneration payments between these parties.

Effect of repudiatory breach on restraint of trade

[183] It is a fundamental plank of the cases for Mr Beattie and Ms Panapa that PEGL's unilateral and sustained reduction of their annual salaries of 20 per cent was a fundamental breach by the company of the contract of employment. Next, if that is so, Mr Eichelbaum submitted that the common law of employment is that an employer in these circumstances is precluded from relying on a covenant in restraint of trade such as forms the basis for a number of PEGL's claims against Mr Beattie and Ms Panapa. The common law of employment relied on by counsel on these questions is as follows.

[184] The principle on which Mr Eichelbaum relies was stated first in the United Kingdom more than 100 years ago in *General Billposting Co Ltd v Atkinson.*[11] That was a case of wrongful dismissal from employment of an employee which, the House of Lords affirmed, precluded the former employer from enforcing a covenant in restraint of trade against the former employee.

[185] The present case is, of course, not one of wrongful or unjustified dismissal but, allegedly, of other breaches of contract, so that it will be necessary to determine also whether, if *General Billposting* is still good law in New Zealand, it extends beyond cases of wrongful (now unjustified dismissal) to other fundamental breaches. It will also be necessary to determine whether, in all the circumstances, PEGL's unilateral and unlawful non-payment of 20 per cent of Mr Beattie's remuneration to him for a period of approximately six months without apparent prospect of change before Mr Beattie gave notice of his resignation, amounted to a fundamental breach of the contract of employment by PEGL.

[11] *General Billposting Co Ltd v Atkinson* [1909] AC 118, (1908-10) All ER 619 (CA & HL).

[186] In *General Billposting* the House of Lords affirmed that the true test of a fundamental breach is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract."[12] In that case the employee's dismissal "in deliberate disregard of the terms of the contract" meant that he was "justified in rescinding the contract and treating himself as absolved of further performance on his part".[13] That absolution of the former employee's contractual obligations included those under his covenant not to engage in another similar business within a certain proximity and for a period of two years after the termination of his employment.

[187] The issue of repudiation and continuing obligations was again considered by the English Court of Appeal in *Cantor Fitzgerald International v Callaghan*[14] in which the remuneration package of several employees included a loan to be forgiven after four years of employment. Subsequently, uncertainties about tax liabilities arose and the employees raised concerns with the employer, which were ignored. Six months later an employee resigned to work for a competitor and the former employer attempted to enforce a non-solicitation covenant. It was alleged that the employer had effectively repudiated the employment agreement by failing to comply with tax liability arrangements. At first instance, the High Court found that although the employer had breached the employment contract, this did not amount to a significant breach going to the root of the contract of employment when account was taken of the proportionate size of the tax liabilities in issue as against the overall salary package. This decision was, however, set aside by the Court of Appeal which emphasised the question of importance of remuneration in employment agreements. Judge LJ said:[15]

> In my judgment the question whether non-payment of agreed wages, or inference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected

[12] At 122.
[13] At 122.
[14] *Cantor Fitzgerald International v Callaghan* [1999] All ER 41, [1999] ICR 639.
[15] At 649.

> events. If so it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory.
>
> Where however an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined. Therefore an emphatic denial by the employer of his obligation to pay the agreed salary or wage, or a determined resolution not to comply with his contractual obligations in relation to pay and remuneration, will normally be regarded as repudiatory. …
>
> I very much doubt whether de minimis has any relevance in this field. If the amount at stake is very small, and the circumstances justifying a minimal reduction are explained to the employee, then the likelihood is that he would be prepared to accept new terms by way of mutual variation of the original contract. However an apparently slight change imposed on a reluctant employee by economic pressure exercised by the employer should not be confused with a consensual variation, and in such circumstances an employee would be entitled to treat the contract of employment as discharged by the employer's breach.

[188] Dealing with a further contention that the employees concerned had affirmed their contracts by continuing to work for several weeks after rejection of their claims to tax liabilities and only resigned after that period had elapsed, the Court of Appeal relied on the observations of Browne-Wilkinson J (as he then was) in *WE Cox Toner (International) Ltd v Crook*[16] as follows:[17]

> Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation … such further performance does not prejudice his right subsequently to accept the repudiation.

[16] *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823 (EAT).
[17] *Cantor Fitzgerald International* at 652-653.

[189] As Judge LJ observed in *Cantor Fitzgerald*, "the ultimate question is one, not of law, but of fact"[18] including in circumstances from which the Court is invited to draw inferences about whether the contracts of employment were affirmed.

[190] Finally, in the United Kingdom, the principle was for consideration again in *Rock Refrigeration v Jones.*[19] That was a case of employee dissatisfaction resulting in resignation and whether a restraint of trade covenant for 12 months after termination of the contract, "however occasioned", was necessarily unreasonable and therefore unenforceable.

[191] The Court of Appeal in *Rock Refrigeration* largely followed the rule in *General Billposting* although Morritt LJ acknowledged that not all breaches by an employer will constitute a repudiation:[20]

> It is true that a breach of contract by the employer may not constitute a repudiation or if it does may not be accepted by the employee. In either of these cases the contract of employment will continue to bind both parties. But in such a case there is, in my view, no reason why the restrictive clauses should be invalidated merely by reason of the breach of contract by the employer which for one reason or another did not have the effect of terminating the contract.

[192] Phillips LJ also questioned the application of the rule in *General Billposting* in every case where an employer has repudiated an employment contract.

[193] Finally, Phillips LJ said:[21]

> In my judgment negative restraints agreed to apply after the termination of employment should not be equated with the primary obligations that are discharged when a contract of employment is terminated consequent upon repudiation…. Such restraints are not 'one of the purposes of the contract'. … I think it at least arguable that … [n]ot every restrictive covenant will be discharged upon a repudiatory termination of the employment.

[194] How has *General Billposting* been applied in New Zealand?

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[18] At 653.
[19] *Rock Refrigeration v Jones* [1996] EWCA Civ 694, [1997] 1 All ER 1.
[20] At 950.
[21] At 959.

[195] The most extensive recent treatment of this subject was in *Grey Advertising (New Zealand) Ltd v Marinkovich.*[22] In *Grey*, an employee, threatened with disciplinary action, resigned and claimed he had been dismissed constructively. He also established a rival company that used the former employer's staff and did business with its clients. Judge Travis, in *Grey*, said that *General Billposting* had been accepted by a number of leading British texts as authority for the proposition that an employer's repudiatory breach releases the employee from a restraint. The Judge cited passages in *Chitty on Contracts*,[23] *Halsbury's Laws of England*,[24] *Employment Covenants and Confidential Information*[25] and *Harvey on Industrial and Employment Law.*[26]

[196] In *Grey*, the description of the reason for the termination of employment which triggered the restraint was "for whatever reason". As the Judge noted: "In some cases this form of drafting has resulted in a finding that the restraint was unreasonable and therefore unenforceable because it would permit the restraint to be enforced even if the termination of the contract was unlawful." The Judge acknowledged the authorities to opposite effect including *Rock Refrigeration* although, ultimately, the English Court of Appeal in that case considered itself bound to follow the House of Lords in *General Billposting.*

[197] Subsequently, in *Hally Labels Ltd v Powell*[27] Judge Travis noted again that *General Billposting* was accepted as authority for the view that a repudiatory breach of contract by an employer releases the employee from a restraint.

[198] It appears that Judge Travis in *Grey* may not have had his attention drawn to a number of earlier New Zealand cases in the Supreme (High) Court because he noted that neither his researches nor those of counsel were able to discover any cases in which *General Billposting* had been applied in New Zealand. However, in

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[22] *Grey Advertising (New Zealand) Ltd v Marinkovich* [1999] 2 ERNZ 844 (EmpC).
[23] *Chitty on Contracts* (27th ed, Sweet & Maxwell, London, 1994) at 16-080.
[24] *Halsbury's Laws of England* (4th ed) 1998 at 71.
[25] K Brearley and S Bloch *Employment Covenants and Confidential Information* (Butterworths, London, 1993).
[26] *Harvey on Industrial Relations and Employment Law,* Butterworths, London, 5 1972, vol l, section A (Contracts of Employment), at 595.
[27] *Hally Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [34].

Bartlett v Graham,[28] for example, the Supreme Court held that "the breach of one stipulation does not carry in it an implication of intention to repudiate the whole contract".[29]

[199] I conclude that even in the more restrictive form in which it has been interpreted and applied, especially in the United Kingdom , *General Billposting* is still good law for the proposition that repudiation of an employment contract by an employer, accepted by the employee, will preclude the employer from subsequently relying on a covenant in restraint of trade given by the employee as a term of the contract.

[200] Although not advanced in submissions for the individual defendants, there is another way of analysing the effect of PEGL's conduct in unilaterally reducing, failing to pay, and then refusing to restore the employees' remuneration. In *Williams v The Malthouse*[30] the Employment Court dealt with the case of an employee who believed that her employer had declared its lack of trust in her by deciding, at least impliedly, that the employee was stealing from it. The employee claimed constructive dismissal. Chief Judge Goddard wrote:[31]

> It seems to me that under ss 7 and 8 Contractual Remedies Act 1979 the plaintiff must be taken to have cancelled the employment contract on the ground that the defendant had repudiated it by making it clear that it did not intend to perform its obligations or all its obligations under it. When that happens s 8(3) applies and no party is obliged or entitled - and I stress the word entitled - to perform the contract further. But this does not affect the right of a party to recover damages in respect of the repudiation by the other party to the contract.
>
> This is in accordance with my understanding of the common law which was replaced by the Contractual Remedies Act 1979 but not changed and which is that where an employer repudiates the contract by refusing to honour its terms or all of its terms, the employee has a choice between holding the employer to the contract and insisting on compliance with all its terms, or cancelling, or as it was said in those days rescinding, the contract by accepting its repudiation and the cancellation of future obligations under it but reserving the right, of course, to sue for damages for the breach.

[201] Sections 7-8 of the Contractual Remedies Act 1979 provide materially:

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[28] *Bartlett v Graham* [1921] NZLR 345 (SC).
[29] At 353.
[30] *Williams v The Malthouse* [1993] 2 ERNZ 1075.
[31] At 1079.

7 Cancellation of contract

(1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

(2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

(3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if—

(a) he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or

(b) a term in the contract is broken by another party to that contract; or

…

(4) Where subsection (3)(a) or subsection (3)(b) … applies, a party may exercise the right to cancel if, and only if,—

(a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or

(b) the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) substantially to reduce the benefit of the contract to the cancelling party; or

…

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

(5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

…

8 Rules applying to cancellation

(1) The cancellation of a contract by a party shall not take effect—

(a) before the time at which the cancellation is made known to the other party; or

(b) before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, if—

(i) it is not reasonably practicable for the cancelling party to communicate with the other party; or

(ii) the other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract.

(2) The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. It shall not be necessary to use any particular form of words, so long as the intention to cancel is made known.

(3) Subject to this Act, when a contract is cancelled the following provisions shall apply:

(a) so far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further:

(b) so far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

(4) Nothing in subsection (3) shall affect the right of a party to recover damages in respect of a misrepresentation or the repudiation or breach of the contract by another party.

Are the Beattie and Panapa restraints unenforceable because of a fundamental breach?

[202] Was PEGL's failure and subsequent refusal to pay Mr Beattie and Ms Panapa their full salaries a fundamental breach of their employment contracts amounting to a repudiation by it of those contracts? The following factual findings are relevant to deciding this question.

[203] The decision to reduce these salaries (and those of other employees) by 20 per cent was taken by PEGL alone. It was taken in an attempt to deal with adverse financial circumstances in which the company then found itself. The employees were not asked to agree to that reduction but, by the same token, they did not object, at least initially and strongly. They acquiesced in the initial decision, no doubt because the explanation for it was accompanied by an assurance that it would only be for a couple of months and until PEGL's financial position recovered sufficiently and Mr Beattie at least understood that any shortfall for that limited period would be made up. Their acquiescence may also have reflected Mr Gill's strong personality and the apparent futility of opposition. For some, but not the individual parties in this litigation, there was a corresponding reduction in working days.

[204] This unilateral reduction nevertheless amounted to a variation of the contracts of employment of the employees and, to be effective, this required their consent which was not sought or obtained. The reduction was, in that sense, in breach of contract and therefore unlawful.

[205] In the case of Mr Beattie, his annual salary was, although respectable by average New Zealand standards, decidedly modest for the work that he put into

PEGL and the earnings produced by his efforts. In comparison to the other principal of the company, Mr Gill (although also a shareholder), Mr Beattie was poorly remunerated. In these circumstances, one-fifth of his salary was a significant reduction to him.

[206] In the case of Ms Panapa, there is no evidence of the effect of a 20 per cent reduction in her salary which I infer took place as it did across the board of PEGL's staff. Ms Panapa's employment agreement applicable at the time of the salary reduction (from mid-2009) provided her with an annual salary of $80,000. Ms Panapa was a longstanding, loyal, vital and very productive member of the staff of PEGL and was adequately, but not handsomely, remunerated for her efforts. A 20 per cent reduction in salary was, in the circumstances, also significant for her.

[207] It was reasonable for the employees to rely upon PEGL's assurance that the reduction would be temporary. As I have already noted, it was Mr Beattie's belief that when restored, that would apply retrospectively so that the arrears would be delayed in payment but not lost.

[208] After about three months without restoration, Mr Beattie began to agitate for the reinstatement of his full salary after he believed that PEGL's fortunes had improved significantly by the bringing in of some substantial work which was attributable in large part to his own efforts. Others were also expressing their dissatisfaction at the continued reduction in incomes but Mr Gill's response was to either ignore these complaints and requests for restoration, or to fudge the issue and forestall them.

[209] I consider that by late December 2009, Mr Beattie was correct that, despite his repeated pressure on Mr Gill and PEGL to do so, it was increasingly apparent that there would be no change. It was in these circumstances, and in significant part as a result of this breach, that Mr Beattie gave notice of his resignation early in the New Year of 2010. Although, within two days, this prompted Mr Gill to advise Mr Beattie that his remuneration would be restored, it was by then too late for Mr Beattie: the die was cast.

[210] In these circumstances, I conclude that PEGL's acts and omissions affecting Mr Beattie's salary from July 2009 until his employment ended, constituted an ongoing breach of the contract of employment and that this was such a fundamental breach that it constituted PEGL's repudiation of that contract. Mr Beattie's resignation, notice of which was given on 20 January 2010, was his acceptance of that repudiation.

[211] Applying the rule in *General Billposting*, therefore, PEGL is not entitled to rely upon Mr Beattie's covenant in restraint of post-employment trade contained in the same employment contract which it had repudiated. It follows that PEGL's causes of action which rely on the terms of the covenant, must fail.

[212] Turning to the circumstances of Ms Panapa, the evidence is less clear. That is the consequence of both PEGL and Ms Panapa electing not to call much, if any, evidence in support of or in opposition to the causes of action against her. PEGL nevertheless continued to bear the onus of establishing its case against her.

[213] In these circumstances, if, as I have inferred, Ms Panapa's salary was reduced in breach of her contract by 20 per cent from mid-2009 and not restored before she gave notice of her resignation, such breach was a fundamental breach by PEGL which amounted to a repudiation of Ms Panapa's employment contract and disentitles PEGL to rely upon the covenant in restraint of trade contained in it.

[214] Alternatively, applying the Contractual Remedies Act to these factual findings in respect of Mr Beattie and Ms Panapa, I would conclude as follows.

[215] The giving of their notices of resignation to PEGL by Mr Beattie and Ms Panapa constituted the cancellation of their employment contracts with it under s 7(2). That was because PEGL, through Mr Gill, had by words and conduct, repudiated their employment agreements by making it clear that the employer did not intend to perform its salary payment obligations under them. Alternatively, their notices of resignation were cancellation under subs (2) following PEGL's breaking of a term (payment of remuneration at the agreed rate) of each of their contracts pursuant to subs (3)(b).

[216] Applying s 7(4)(a) I have concluded that, in each case, the parties to those employment contracts agreed impliedly that the performance of the salary payment term by PEGL was essential to each employee. Alternatively, pursuant to subs (4)(b)(i), the effect of PEGL's breach was substantially to reduce the benefit of the contract to each of the employees.

[217] Finally, under s 7(5) I do not consider that the employees were disentitled from cancelling their contracts, by affirmation of them in full knowledge of the employer's repudiation. That is because, initially, the employees were entitled to rely on PEGL's assurance that the salary reductions would be for a period of a few months until its financial fortunes improved. Then, following the expiry of that period, I conclude that it was not an affirmation of the contract that Mr Beattie sought first to appeal to Mr Gill's sense of fair play by requesting restoration of his remuneration. This was in a business to which Mr Beattie had committed everything over a long period and in which he still held out hope of an equitable return for his participation. Notice of the resignations of Mr Beattie and Ms Panapa was not given to PEGL so long after it became clear to Mr Beattie in late 2009 that PEGL did not intend to be bound by the employment contract, that they must be considered to have affirmed the contracts. Although, if the position had continued much longer than it did, this would have amounted to affirmation by Mr Beattie and Ms Panapa, that point had not been reached in my assessment of the particular circumstances of their employments.

[218] So, pursuant to s 8(3)(a), from the dates on which the employees gave notice of cancellation of their employment agreements by resignation, provisions of their contract remaining unperformed at the time of cancellation (including their covenants in restraint of trade) were unenforceable.

Other consequences of fundamental breach

[219] Although Mr Beattie's and Ms Panapa's affirmative defences do not express it in quite so simple a form, they do nevertheless amount to saying that fundamental breaches by PEGL of their employment agreement mean that the company is not

entitled in law to enforce other rights and obligations arising under their employment agreements which it repudiated.

[220] I have already found that PEGL's failure/refusal to pay agreed remuneration was a fundamental breach of their employment agreements which amounted to repudiation of them by the company. I have concluded that this repudiation caused the covenants in restraint of trade in those agreements to be unenforceable by PEGL. That is not the end of the claim, however, because other causes of action rely upon breaches allegedly committed during employment, and, in the case of misuse of confidential information, after it ceased.

[221] Two further questions arise as a consequence. First, were there other breaches of the employment agreements by the company that may also have amounted to a repudiation of those agreements? The individual parties allege multiple breaches by PEGL. Second, did the employer's repudiation of the employment agreements make unenforceable other rights and obligations arising under those agreements as are encompassed by the other contractual and equitable causes of action invoked by PEGL against its former employees?

[222] I deal, first, with whether the other relevant affirmative defences raised by Mr Beattie and Ms Panapa to the contract-based causes of action against them, amounted to fundamental breaches by PEGL. If so, the associated question is whether these may have amounted to repudiation of their employment agreements on other grounds than the salary payment breaches.

[223] The individual defendants' first affirmative defence (A1, A2, A3, A4, A5/AffD1) invokes allegations of breaches by PEGL of its obligations of confidentiality, fidelity and trust and confidence. It also invokes s 189 of the Employment Relations Act. More particularly, Mr Beattie and Ms Panapa rely on the alleged asset-stripping scheme described elsewhere in this judgment which they say was designed to disadvantage them and others. Further details of this affirmative defence are set out in my more detailed description of it at [110] of this judgment.

[224] For reasons elaborated on already, I have concluded that even if the individual defendants' allegations in these regards were correct factually, they would not have amounted to a breach by PEGL of its employment agreements with the employees. Such acts, if committed by PEGL, could not therefore have amounted to fundamental breaches or to repudiatory conduct by either company.

[225] Next are the individual defendants' second affirmative defences (A1, A2, A3, A4 and A5/AffD2). These allege breach of statutory duties of good faith under s 4 of the Act by PEGL. They allege manipulation by the company of its own accounts by the unlawful removal of unjustified or unwarranted sums under the guise of "management fees" to reduce bonuses due to Mr Beattie and to reduce the sale and purchase price for his shareholdings in PEGL disposed of in 2004. Then there is Mr Beattie's assertion that it was a breach of the statutory duty of good faith for PEGL to divert a potentially valuable commercial relationship with Cartan from PEGL to BSIL. The next allegation of breach of good faith is that PEGL acted antagonistically towards Mr Beattie in his GST dispute with the Commissioner of Inland Revenue. Penultimately, the defendants say that PEGL acted in bad faith by engaging in the asset-stripping scheme described elsewhere in this judgment. Mr Beattie says more generally that PEGL failed to treat him fairly as an employee including by itself bringing about the demise of, or at least significant damage to, its own business. Also alleged by Mr Beattie to be breaches of bad faith are the company law failures/breaches already noted, including failures to give notice of meetings, to obtain shareholder approvals, to obtain special resolutions and the cumulative alienation of Mr Beattie.

[226] Finally in this regard, and affecting Ms Panapa as third defendant, the defendants reiterate the key-person-alienation allegations set out above but, in this case, also extending to Mr Regan as a director of PEGL. In the case of Ms Panapa, there is also an allegation that PEGL acted unreasonably towards her. That is said to be by: underpaying or participating or conniving in a scheme to underpay Messrs Beattie and Regan; its engagement in the asset-stripping scheme; and the bringing about of its own demise, or at least significant damage to it. Ms Panapa alleges that these breaches were deliberate, serious and sustained.

[227] For a variety of reasons, I have concluded that none of the second affirmative defence assertions summarised above, constituted such a fundamental breach of the defendants' contracts of employment that PEGL can be said thereby to have repudiated them.

[228] If PEGL wrongly manipulated its own financial accounts by assigning unjustifiable or unwarranted sums under the guise of management fees to reduce bonuses to Mr Beattie and/or the sale and purchase price of his shareholding in the company, this could not have been a breach by PEGL of Mr Beattie's employment agreement. Any entitlements to "earn out" arose under the share sale agreement which was independent of the parties' employment agreement and their employment relationship. Mr Beattie's only potential justiciable bonus claim (relating to the 2008 Beijing Olympics) has not been proven in evidence.

[229] Any attempt by PEGL to divert a valuable commercial relationship from itself to Mr Gill's family company BSIL, would likewise not have been a matter affecting the employment relationship in law. Any arguable adverse consequence to Mr Beattie could not have affected his legitimate expectations of PEGL under their employment agreement.

[230] I have determined, as a matter of fact, that PEGL did not act unreasonably towards either Mr Beattie or in favour of the Commissioner of Inland Revenue in relation to Mr Beattie's GST dispute. Therefore, there could not have been any breach of their employment agreement by PEGL in this regard.

[231] I have likewise concluded that any asset-stripping scheme engaged in by the employer could not have amounted to a breach of Mr Beattie's employment agreement.

[232] As a finding of fact, I have concluded that PEGL did not bring about, or contribute to, either its corporate demise (which did not occur) or even serious damage to itself.

[233] The alleged breaches of the company's obligations in relation to Board meetings, shareholder approvals and the like, could not have been breaches of Mr Beattie's employment agreement with PEGL.

[234] As to the allegation that PEGL "cumulatively alienated [Mr Beattie as] the key person/key revenue generator of the business", he has not established that the company's acts or omissions amounted to a breach of his employment agreement. However unfair Mr Beattie may have regarded the level of his remuneration by the company in comparison to what he considered was the enormous revenue and value generated by his work, that cannot be a complaint of breach when his remuneration was a matter of contract.

[235] That conclusion must apply even more strongly in the case of Ms Panapa in the sense that an alleged alienation by PEGL of Mr Beattie (and of Mr Regan as its director) cannot have amounted to a breach of PEGL's employment contract with her.

[236] The next affirmative defence to be considered is the defendants' third (A1, A2, A3, A4, A5/AffD4). The breach of contract alleged by the individual defendants is said to have been of PEGL's implied obligation to treat its employees fairly. The same particulars as just outlined support the broad allegation of unfair treatment. For the reasons just set out, however, I find that any unfair treatment by PEGL of Mr Beattie cannot be said to have amounted to a fundamental breach of its employment agreements with him and Ms Panapa, so that it could not be said to have repudiated their employment agreements.

[237] The defendants' seventh affirmative defence (A1, A2, A3, A4, A5/AffD7) pleads repudiation of contracts expressly. My findings in this regard have already been set out. The refusal/failure to pay the defendants' salaries amounted to repudiation of their agreements but the other allegations of conduct by PEGL, said to amount to repudiation, do not.

[238] The remaining affirmative defences do not invoke alleged repudiatory conduct by PEGL.

[239] I now move to the next question, whether PEGL's repudiation of the employment agreements based on its fundamental breaches of contract (by failing or refusing to pay the defendants' remuneration) mean that it is not entitled to sue for breach by the defendants of obligations in equity or under the their employment agreements other than on the covenants in restraint of trade.

Consequence of contract repudiation by PEGL other than affecting covenants in restraint of trade

[240] This is the effect of PEGL's repudiation on the causes of action dealing with Mr Beattie's acts and omissions during the periods of his employment, both before and after giving notice of his intention to resign. There are no allegations levelled against Ms Panapa for breach of her employment agreement whilst she was employed, so that the following conclusions relate only to Mr Beattie.

[241] Mr Beattie's covert discussions with representatives of Cartan, conducted after he had given notice of his resignation from employment with PEGL but whilst still so employed, constituted a breach or breaches of his contract of employment: see cl 11.1 set out at [50]. As a senior employee of the company, Mr Beattie was under an express obligation to act in its best interests and, more particularly, not to act in his own interest or that of others where to do so conflicted with his duty to act in his employer's best interest. Mr Beattie's actions in negotiating with Cartan to develop a business relationship between it and a new business entity to be formed by him after he left PEGL, amounted to a clear and serious breach of his obligations to his then employer.

[242] In doing so, Mr Beattie was able to negotiate with Cartan representatives in the knowledge of PEGL's confidential information including pricing, margins, know-how and the like. Mr Beattie had to persuade Cartan that he (including as a part of a new commercial entity to be formed) would be able to provide a better deal than would PEGL, whether alone or in association with Mr Gill's other interests. It is irresistible to conclude that to do so, Mr Beattie must have had recourse to, and used, PEGL's confidential information to which he was privy, in formulating his proposals to Cartan, whether before or after his employment ended.

[243] Following the rule in *General Billposting*, whilst PEGL's repudiation of its employment contract with Mr Beattie precludes it from enforcing subsequent obligations (in this case the post-employment covenant in restraint of trade), it did not act retrospectively to disqualify PEGL from suing Mr Beattie in respect of the latter's breaches of contract committed during its term.

[244] As already noted and referred to, s 8(4) of the Contractual Remedies Act reinforces the conclusion I have reached on the causes of action pleaded at common law about the consequences of PEGL's repudiation of the employment agreements for Mr Beattie's breaches committed before cancellation of it by him. Subsection (3)(a) has the effect, as I have already decided, of cancelling any obligation or entitlement to perform remaining elements of the contract unperformed at the time of cancellation. Subsection (4) provides, however, that this does not affect the right of a party to recover damages in respect of a breach of the contract by another party. That encompassed a pre-cancellation breach and subss (3)(a)-(4), read together, mean that PEGL is not precluded from suing Mr Beattie for his pre-cancellation breaches of his employment contract. Nor does PEGL's repudiation of contract preclude its recourse to equitable obligations in relation to misuse of confidential information.

[245] That is consistent with the position at common law as confirmed by the following passage from *Chitty on Contracts* in relation to the judgment in *Rock Refrigeration*:[32]

> What is clear … is that the survival of such restraints is not necessary to protect the proprietary interests of the employer as these will be protected by the normal common law doctrines.

Decision of BAPL v Regan cause of action

[246] I deal first with what is the least complex cause of action in these proceedings. To determine whether BAPL can recover the money that Mr Regan paid himself shortly before the end of his employment, the first question is whether BAPL lawfully reduced Mr Regan's agreed salary, in his case by 30 per cent. That is

[32] *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 1994) vol 1 General Principles at 16-101.

because part of Mr Regan's claim to those monies covered deductions he says BAPL made unlawfully from his remuneration so that he was entitled to recover these sums as he did.

[247] Mr Neutze advanced a range of arguments for BAPL in support of its claim to recover this sum. Similar, if not the same, legal and contractual issues arise in Mr Beattie's claim against PEGL in respect of the 20 per cent reduction in Mr Beattie's remuneration from 1 July 2009 to 31 March 2010 and it will be convenient to deal with the substance of both arguments here because the contractual provisions in each of the employment agreements of Messrs Beattie and Regan were materially identical.

[248] I deal first with Mr Regan's circumstances. It might be argued for BAPL that cl 2.2 of Mr Regan's employment agreement contains an express and specific entitlement for the employer to change remuneration unilaterally to which the more general provisions in cl 17 (variations to be signed in writing) do not apply. That arises from the words in cl 2.1: "Any change in remuneration will reflect market rates, performance and the enhancement of profits/earnings for the Employer by the Employee's actions."

[249] I conclude, however, that the intention of this sentence was to allow for periodic changes to Mr Regan's remuneration reflecting those specified considerations. So, for example, if Mr Regan had approached his employer seeking an increase in his remuneration, consideration would have had to be given to "market rates" (being what employees in similar positions were being paid elsewhere), "performance" (being Mr Regan's performance of his duties), and "the enhancement of profits/earnings" of the employer attributable to Mr Regan's action (which is self-explanatory). Clause 2 did not contemplate or permit what occurred to Mr Regan in this case, that is a unilaterally determined reduction calculated as percentages across all relevant staff irrespective of the other cl 2.1 factors including individual performance. BAPL could not have relied on cl 2.1 to effect this unilateral variation by significant reduction to an essential term of Mr Regan's employment.

[250] Such a reduction would have amounted to an amendment to the agreement and thus have required, under cl 17, mutual agreement, a recording of it in writing, and the execution of that writing by both parties.

[251] The initiative for the proposed reduction in Mr Regan's salary came from the company rather than from Mr Regan as its employee. It did not comply with the employment agreement by varying it lawfully as the agreement required be done. In these circumstances, BAPL is wrong to say that Mr Regan's remuneration was varied by agreement, and it follows that it was, in law, a unilateral variation which was in breach of that agreement. Mr Regan was entitled to continue to receive his agreed salary and, in the circumstances, to recover arrears of short-paid salary from the company. Whether the method of its recovery was lawful, the self-help exercised by Mr Regan, is a separate question.

[252] The issue of Mr Regan's entitlement to his full salary has been determined as one of breach of contract by the employer, I will nevertheless examine it from the alternative point of view also advanced for Mr Regan, as a breach of the Wages Protection Act 1983.

[253] Section 4 of the Wages Protection Act provides that "… an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction." The Act provides for exceptions to this general rule. The first is where an employee has provided his or her written consent for the employer to make deductions for any lawful purpose (s 5). None of the other three exceptions is in issue in this case.

[254] The only controversial question here is whether a reduction in remuneration is a "deduction" under the Wages Protection Act. The legislation's genesis lies in a practice that was known colloquially as 'truck'; that is, paying an employee in goods or services provided by the employer or by another in an arrangement with the employer. As long ago as 1831, Parliament in the United Kingdom passed the Truck Act of that year to consolidate a number of earlier enactments. Its purpose was to outlaw the practice of workers being paid in the form of credit for goods redeemable in what was known as the 'Tommy Shop' (often run by the employer at or near its

premises and where goods were sold at inflated prices). More recently in New Zealand, the Employment Court emphasised that the Wages Protection Act outlaws impositions on employees about the manner in which they spend their wages.[33] This followed a similar conclusion and statement of principle by the High Court in *Davies v Dulux NZ Ltd*.[34]

[255] There is arguably (albeit barely) a discernible distinction between deductions and reductions, the former being to subtract or take away from the total, whereas to reduce is to make or become smaller or less in amount. So, in a sense, it may be said technically that to deduct is to take some away from the whole, but not to reduce the total. In this sense, a unilateral reduction of an employee's wages is arguably not the same as deducting an amount from them. That is because the latter contemplates that this will be disbursed or expended otherwise than to or on the employee directly and that the total wage remains the same, at least from the employer's point of view.

[256] The emphasis, however, should be on the whole of s 4 of the Wages Protection Act rather than the phrase "without deduction" or even the word "deduction". The primary obligation on an employer is to pay the entire amount of wages to an employee when those wages become due. So viewed, the phrase "without deduction" means not only without deducting a proportion of them and paying that money to someone else, but also without deducting any amount at all for whatever reason including in circumstances such as in this case where the employer has made a unilateral decision to reduce the agreed remuneration of the employee. Although such a situation is usually considered, as it has been in this case, primarily as a breach of contract, there is no reason in principle why, alternatively, it is not also a breach of s 4 of the Wages Protection Act.

[257] So, although it is unnecessary to decide the case on this basis, having already concluded that the BAPL's reduction of Mr Regan's income was in breach of contract, I would nevertheless also find that this was in breach of s 4 of the Wages Protection Act. BAPL did not have Mr Regan's consent in writing to pay him less than the parties had agreed it would.

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[33] *New Zealand Dairy Workers Union v NZMP Ltd* [2002] 1 ERNZ 361 (EmpC) at [58].
[34] *Davies v Dulux NZ Ltd* [1986] 2 NZLR 418.

[258] The next question is whether the means by which Mr Regan recovered wrongly unpaid remuneration were such that he is entitled to retain that money and to resist BAPL's claim to it. This is said by BAPL to have included breaches by Mr Regan of his employment agreement.

[259] Mr Regan was, in effect, the company's financial controller and paid the money to himself without reference to Mr Gill. Mr Regan was authorised to pay other staff their remuneration without approval by anyone else, but BAPL says there was an expectation that his payments to himself and Mr Gill of their salaries would each be approved by the other. However, even if that could have been Mr Gill's 'expectation', it neither occurred in practice nor was it a term or condition of Mr Regan's employment.

[260] Although unorthodox and even opportunistic, I do not think that what amounted to Mr Regan paying himself both arrears and final holiday, and other wash-up payments, in light of his known imminent departure from the company, was wrongful or unlawful. Someone had to pay the paymaster. It might have been better for Mr Regan to have advised Mr Gill of what he was doing, and this might even have been required as an element of good faith under s 4 of the Employment Relations Act even though I am sure that would have provoked additional disharmony between them. However, I do not consider that any element of subterfuge on the part of Mr Regan in the circumstances disqualifies him in law from receiving those payments. Mr Regan has established his entitlement to those sums he paid himself. BAPL has not established that Mr Regan was not entitled to those payments as would be required for their return to BPAL in damages.

[261] As to the question of Mr Regan's entitlement to compensation for untaken leave (which formed part of his defence to the proceeding by BAPL to recover the monies taken by Mr Regan from it), I find that the second plaintiff has not established, on the balance of probabilities, its allegations that Mr Regan took three weeks' leave during his final two months with the company. This was an assertion made by BAPL only very belatedly in the course of the proceedings and I have concluded that the sums claimed by BAPL from Mr Regan include compensation for all untaken holidays.

[262] In these circumstances, BAPL's claim for their reimbursement or for damages equivalent to those amounts plus interest, fails. Mr Regan is entitled to costs on this unsuccessful claim against him.

Decisions of PEGL v individuals by cause of action

PEGL v Beattie and Panapa – Breach of contractual restraints (A1)

[263] These claims address the permissible competitive conduct of Mr Beattie and Ms Panapa after their employment by PEGL ended. In Mr Beattie's case that was after 5 March 2010 and, in the case of Ms Panapa, after 1 April 2010. They rely principally upon breaches of covenants in restraint of competitive activity by the former employees. Other causes of action deal with Mr Beattie's conduct whilst still employed by PEGL and a cause of action in equity addresses post-employment conduct by Mr Beattie other than in breach of his restraint. There is no claim that Ms Panapa acted in breach of her contractual obligations while employed by PEGL.

[264] The restraints of trade in each of these defendants' employment agreements are, prima facie, void at common law being in breach of public policy.[35] They can, however, be legitimised by application of s 8 of the Contractual Remedies Act 1979 but only to the extent that is necessary and reasonable in all the circumstances. There is, however, a more fundamental defence advanced which, if successful, would make the restraints unenforceable even if they are not void.

[265] Affirmative defence 1 (A1/AffD1) refers to the conduct of Mr Gill and PEGL in what is described as the asset-stripping scheme designed to disadvantage Mr Beattie. This affirmative defence cannot, however, avail Mr Beattie because the conduct he alleges against PEGL and Mr Gill affected his entitlements to the consideration for the sale of his PEGL shares in 2004. I have concluded that these financial arrangements were not incidents of the employment relationship between the parties. Further, the share sale and purchase agreement contained an independent restraint on Mr Beattie's engagement in competitive commercial activity against

[35] *Transpacific Industries Group (New Zealand) Ltd v Harris* [2013] NZEmpC 97, [2011] ERNZ 267 at [65].

PEGL and the new owner of his shares[36]. That separate restraint was continued in a variation to the share sale agreement on 1 December 2006. That restraint was tied to the share sale price, the value of which Mr Beattie alleges was reduced by these activities by PEGL, but is not for consideration in this case.

[266] Mr Beattie's affirmative defence does not refer to the only non-salary remuneration provision contained in his 2006 employment agreement which related to earnings in respect of the 2008 Beijing Olympic Games. The asset-stripping exercises relied on by Mr Beattie did not include any allegation that his employment contract remuneration provisions (the Beijing Olympics bonus) were affected adversely.

[267] The next affirmative defence (affecting both Mr Beattie and Ms Panapa) (A1/AffD 2) relies on alleged breaches by the company of its duties of good faith under s 4 of the Employment Relations Act. This affirmative defence cannot succeed because, although it relies on duties that are statutorily required in an employment relationship, the particulars relied on relate to the commercial relationship between the parties as vendor and (in effect) purchaser of Mr Beattie's shares in PEGL.

[268] I reach the same conclusion in relation to the next particular of this affirmative defence addressing, in particular, the allegation of diversion of a potentially valuable commercial relationship with Cartan into Mr Gill's personal family company, BSIL. The consequences of such an act would not have impacted on Mr Beattie's employment rights or entitlements because his employment agreement contained no provision which could have been adversely affected by the conduct he alleges against Mr Gill.

[269] The next particular in support of this affirmative defence is that it was a breach of good faith by PEGL towards Mr Beattie that it "sided with Inland Revenue in a GST dispute" with him. This affirmative defence fails on its merits. I am satisfied that, at best from Mr Beattie's point of view, PEGL acted neutrally in that

[36] Although the purchaser of Mr Beattie's shares was not PEGL, it was one of Mr Gill's associated companies, one of his "interests".

personal dispute affecting Mr Beattie's own tax liabilities. PEGL had good reason to do so because of the potential flow-on consequences to it as a separate legal entity. In particular, I do not accept Mr Beattie's case that Mr Gill and PEGL worked actively to undermine Mr Beattie's position with the Commissioner. In any event, there is no sufficient nexus between such conduct by PEGL and the lawfulness of the covenant in restraint of trade in his employment agreement.

[270] The next particular of this affirmative defence is Mr Beattie's assertion that PEGL was responsible for its own losses (if any) because its asset-stripping activities not only meant that Mr Beattie was not treated fairly as an employee, but was the real cause of any losses suffered by PEGL. For reasons outlined elsewhere, I reject this affirmative defence. Asset-stripping by Mr Gill and/or PEGL could not have affected Mr Beattie's employment contract entitlements or rights. Even if the asset-stripping allegations had been a justiciable defence, the "no loss" defence fails on its merits.

[271] The next particular relied on by the defendants in support of this affirmative defence is what was described as PEGL's requirement of them to work for five or more days per week, or the equivalent thereof, but to pay them for only four days' work. Although, as I conclude elsewhere, this amounted to a breach of contract in Mr Beattie's case at least, I do not agree that it also constituted "bad faith" conduct, the antithesis of good faith behaviour as defined in s 4 of the Employment Relations Act. The emphasis of good faith conduct in employment relationships is on not misleading or deceiving other parties. Breaches of employment agreements per se, may or may not be bad faith conduct. The emphasis in good faith is on such elements of productive employment relationships as being active and constructive, responsive and communicative. PEGL's reduction of Mr Beattie's remuneration was done openly and, although both unlawful and unwelcome to Mr Beattie who both opposed it and pressed Mr Gill for the restoration of his salary, was not deceptive or misleading of Mr Beattie.

[272] The remaining particulars in support of this affirmative defence relate to allegations of failure to give notice of company meetings; failure to obtain shareholders' approval for a major transaction; and failure to obtain a special

resolution for that major transaction. Those allegations pursued in evidence related to the company's dealings with Mr Regan. They are allegations of non-compliance by PEGL with its obligations to Mr Regan and were not incidents of the company's employment relationships with Mr Beattie and/or Ms Panapa. They cannot amount to instances of bad faith by PEGL towards Mr Beattie as its employee. This affirmative defence must fail.

[273] The penultimate particular alleged against PEGL in relation to Mr Beattie was that it "cumulatively alienated [Mr Beattie] who was the key person/key revenue generator of the business". While it is correct that Mr Beattie became progressively disillusioned with PEGL and Mr Gill's actions in respect of the company, that is not the same thing as the company or its Managing Director (Mr Gill) so treating Mr Beattie that this amounted to a constructive dismissal of him or even that it disadvantaged him unjustifiably. I am not satisfied that Mr Beattie has established that allegation of "cumulative alienation" against PEGL, and this element of the affirmative defence does not succeed.

[274] The final aspect of this second affirmative defence to the first cause of action relates to Ms Panapa alone. It repeats the allegation of cumulative alienation of Mr Beattie. It claims that PEGL's unreasonable actions included underpaying, or participating or conniving in a scheme to underpay, Messrs Beattie and Regan and PEGL's engagement in the asset-stripping scheme. Given my findings against Mr Beattie on these same grounds, it is impossible to say that they can succeed in respect of Ms Panapa who was one step removed again from Mr Beattie's circumstances. This defence does not avail Ms Panapa.

[275] Next is the defendants' third affirmative defence (A1/AffD3). This asserts that any losses suffered by PEGL, as a result of breaches by Mr Beattie and Ms Panapa of their restraints, were caused as a result of PEGL's own decision taken between 26 January and 9 February 2010 to cease or reduce significantly its business, and the putting into effect of that resolution. I do not accept that assertion. Faced with a significant potential reduction of its customer base and the loss of key personnel in Messrs Beattie and Regan, PEGL made what I assess to be prudent commercial decisions to cut its cloth and to attempt to continue to operate the

business on a necessarily and significantly reduced basis. That was a decision and a strategy that was commercially prudent and well available to PEGL It has not been shown to have been so ill-advised or negligent that it should disqualify the company from recovering its losses.

[276] Addressing the alternative argument advanced in support of this third affirmative defence, I do not accept that PEGL was unable to carry on its former business in the absence of Mr Beattie whom it had alienated or was otherwise unable to induce to remain with it. The evidence establishes that PEGL did continue in business, albeit in a significantly reduced fashion, but commensurate with the loss of Mr Beattie and substantial custom which attached itself to him.

[277] The fourth affirmative defence to this first cause of action (A1/AffD4) asserts that PEGL acted in breach of contract by not treating its employees fairly. This particular also invokes the assertion that PEGL manipulated its accounts under the guise of management fees in order to reduce bonuses owed to Mr Beattie and/or to reduce the purchase price of his shares sold in 2004. Again for reasons set out earlier, I do not accept that such conduct is justiciable by this Court as a matter of fair treatment in an employment law context.

[278] The next particular advanced by Mr Beattie relates again to PEGL's attempt to divert the Cartan commercial connection from itself to BSIL. It also repeats the allegations that PEGL sided with the Commissioner of Inland Revenue in the GST dispute, that Mr Gill assisted in breaching the terms of the 2004 sale and purchase of Mr Beattie's shares, and participated in the unfair/bad faith asset-stripping scheme. Again and for reasons set out elsewhere, these defences cannot be called in aid by the defendants. Nor, too, can the repeated assertions that, in conjunction with BAPL, PEGL maltreated Mr Regan and, thereby, failed in its duty of good faith to Mr Beattie and Ms Panapa. I have also reached a similar conclusion as elsewhere about the assertion that PEGL brought about its own demise or at least damage to its own business so that any losses are not attributable to the defendants. This cannot avail Mr Beattie or Ms Panapa in this cause of action.

[279] My same conclusions apply to the repeated allegation about PEGL's partial payment to the defendants of 80 per cent of their salaries for full-time work and the allegation that PEGL alienated cumulatively Mr Beattie as a key person and revenue generator in its business. The former is decided in favour of the employees and, for reasons already set out, negates the application of the covenants in restraint of trade. The latter is not a valid defence for reasons already set out.

[280] The same conclusion is also applied to the final particular relied on the defendants in this affirmative defence, that PEGL and Mr Gill alienated Messrs Beattie and Regain by participating in/orchestrating/assisting a bad faith/unfair asset-stripping scheme by which PEGL's assets were removed either for no consideration or at gross undervalue from companies in which Mr Regan's family trust owned shares. Here, too, I do not accept the assertion that this conduct, even if it was justiciable, brought about the demise of, or otherwise damaged, the business of PEGL so that the company should not be entitled to hold Mr Beattie liable for his breaches.

[281] The next affirmative defence (A1/AffD5) addresses an alleged failure by PEGL to mitigate its losses as it was obliged in law to do. The defendants particularise this defence as follows.

[282] First, the defendants say that PEGL caused cumulatively Mr Beattie, as a key employee and key revenue generator in the business, to resign, thereby negating or eliminating the prospects of PEGL carrying on future business activities. I have already decided this contention against the employees.

[283] Next, the defendants say that PEGL elected not to, or failed to, replace Mr Beattie after his departure. Associated with this, the defendants say that PEGL failed to support, by not paying for, alternative transport arrangements for two key Australian clients, who were dissatisfied about those arrangements, for tours associated with the 2010 FIFA World Cup Finals in South Africa. The defendants repeat that PEGL alienated and lost the business of Toyota by misappropriating approximately $50,000 worth of funds the property of that client. Finally, in support of its affirmative defence, the defendants say that PEGL instigated or assisted with,

or encouraged, a negative news media campaign in mid-2010 designed to damage, and which did damage, Mr Beattie's businesses. At the risk of tedium, it is necessary to set out my findings on each of these issues.

[284] First, I reiterate my finding that any conduct by PEGL which may have caused Mr Beattie to resign did not amount to such that it was responsible for the loss of its own business and nor did its conduct of its business consequent upon receiving advice of that resignation

[285] Next, PEGL's decision not to replace Mr Beattie was, in my assessment, a justifiable and prudent commercial decision given the significant prospective downturn in business after his departure. That decision was not responsible for, and did not contribute to, PEGL's losses themselves resulting from Mr Beattie's departure to the extent that no liability should attach to Mr Beattie. Nor am I satisfied on the evidence that these losses were caused, or contributed to, by any failure by PEGL to provide for alternative transport arrangements for clients as alleged. I have reached a similar conclusion about the reasons for the loss to PEGL of the Toyota business. It was the consequence of a dispute between Toyota and Mr Gill/PEGL about a significant amount of money alleged by Toyota to have been overcharged or not returned to it by PEGL. There was also Toyota's preference for dealing with Mr Beattie, that I am satisfied led to Toyota terminating its commercial relationship with PEGL.

[286] Finally, in this regard, I am not satisfied that PEGL instigated and assisted with and/or encouraged a negative news media campaign designed to damage Mr Beattie's business. Although there was reporting of High Court litigation between these parties in the business news media, Mr Beattie has not established to the requisite standard of proof that this was as a result of a campaign designed or participated in by PEGL to damage his business. In any event, the connection between any such campaign and PEGL's losses, as a result of matters which are the subject of this litigation, is tenuous, and insufficiently proximate in time to the events at issue here. It would fail for that reason also.

[287] The sixth affirmative defence (A1/AffD6) pleads acquiescence, estoppels and waiver. I do not accept that, after their departures as the defendants plead, PEGL was required in law either to seek an injunction to prohibit the defendants from pursuing any unlawful course of business dealings and carry on the business itself or, alternatively, to condone such breaches and to sue for a share of profits. Nor do I accept, on the facts, that PEGL did not attempt to carry on the business itself. It did so and it was not obliged either to seek injunctive relief against the defendants, or be estopped for acquiescing in any breaches by them. PEGL did not acquiesce in the defendant's carrying on aspects of its former business and was entitled to sue them as it has.

[288] Next, and alternatively, the defendants say that PEGL is estopped from seeking relief for any amount exceeding an offer of settlement, made by it on 9 February 2010, of 50 per cent of its profits; or, alternatively, is estopped from seeking compensatory damages in respect of three named clients, NAB, BHP, and AusPost. I do not consider that a bona fide attempt to reach a pragmatic solution to service clients with shortly forthcoming travel, accommodation and event arrangements, should also constitute an estoppel against PEGL's pursuit of damages for the losses of that business. Those discussions and any agreements that may or may not have been reached in them, were undertaken to avoid innocent parties from being left in the lurch. They were also exercises in loss mitigation by PEGL from which the individual defendants should not benefit beyond a limitation of the damages for which they may be liable. This affirmative defence fails.

[289] The next plea of estoppel relates to PEGL's claims against Ms Panapa. She claims, and the evidence establishes, that PEGL agreed that she could continue to work for Mr Beattie in dealing with the business of former PEGL customers so as to ensure that those customers received the service for which they had earlier contracted, albeit subsequently from Mr Beattie's new entity rather than PEGL. In this respect Ms Panapa was permitted to engage in work for PEGL's former clients and, therefore, prima facie in breach of her contractual restraint. This is a different situation to that pleaded by Mr Beattie immediately above. In the case of Ms Panapa, I conclude that PEGL was prepared to waive its restraint, not only as a loss mitigation exercise, but importantly to enable her to continue to earn a living. In

these circumstances, PEGL is estopped from claiming against Ms Panapa in respect of post-employment work performed by her for NAB, BHP, and AusPost.

[290] Next, and alternatively, the defendants say that on 9 February 2010 PEGL agreed with Mr Beattie that he could continue to carry on aspects of his former work for PEGL affecting some of its customers after March 2010. The defendants say that in doing so, PEGL waived, either expressly or impliedly, any liability Mr Beattie may have had under his restraint following the end of his employment. They say that PEGL should now be estopped from seeking damages based on breaches in which it either acquiesced or agreed expressly that Mr Beattie could commit.

[291] Alternatively and again, the defendants say that even if there was no express agreement between the parties as set out above, the Court should infer from their conduct the existence of an agreement for Mr Beattie to deliver services to BHP and NAB in respect of the FIFA World Cup Finals event in South Africa in July 2010.

[292] I find against the two foregoing claims to estoppel. Even if the inference was open to the Court to draw, which I find it was not, these could only have been loss mitigation strategies by PEGL from which Mr Beattie may have been able to benefit accordingly. He should not, however, be relieved of any liability in these circumstances. They fail as affirmative defences accordingly.

[293] Finally, in respect of this affirmative defence, the third defendant Ms Panapa asserts that it would not be equitable for the Court to find her liable for her post-PEGL employment with Messrs Beattie and Regan. That is because this was disclosed to PEGL at meetings between the parties on 11 and 18 March 2010 and the company then waived restraint of trade restrictions against her at those times. For the same reasons set out in [286] I accept that this affirmative defence succeeds in the case of Ms Panapa.

[294] The defendant's seventh affirmative defence (A1/AffD7) relies on their contention that PEGL repudiated its employment agreements by the acts and omissions described in the earlier summaries of the affirmative defences, so that it should not be entitled to enforce the defendants' restraints of trade. The only

repudiatory conduct established being the breach by PEGL of its obligations to pay the defendants their contractually agreed salaries, I have concluded that other acts and omissions of PEGL were not repudiatory breaches.

[295] The defendants' eighth affirmative defence (A1/AffD8) relies on apportionment or contribution. To succeed in this defence, the defendants must persuade the Court that the losses suffered by PEGL were a consequence of Mr Beattie's resignation which was, in turn, brought about by Mr Gill's alienation of Messrs Beattie and Regan. Again in substantiation of this defence, the defendants rely on the allegations of asset-stripping, the improper diversion of intellectual property and agreements, or potential agreements, from PEGL to BSIL and others of Mr Gill's personal interests. Yet again for reasons set out elsewhere in this judgment, the justification for those acts or omissions are not matters for decision by this Court in an employment law context. That is particularly so in relation to the allegations about Mr Regan who was never an employee of PEGL. But even in the case of Mr Beattie, his allegations of improper conduct by PEGL relate to issues not governed by their employment relationship. Rather, Mr Beattie's claims in this regard concern the sale of his shares in 2004 and the fixing and payment of the sale price for these over subsequent years. This conclusion means that there cannot be any apportioning of any losses between the plaintiffs and the defendants on the grounds advanced by Mr Beattie in such proceedings as the Court concludes are justiciable.

[296] The ninth and final affirmative defence (A1/AffD9) addresses what is said to be the failure of consideration for Mr Beattie's covenant in restraint of trade. This relates to the 2006 employment agreement's restraint if it was otherwise lawful. Mr Beattie says that the specified consideration for the restraint was not paid to him and, in these circumstances, the restraint should be held to be void for want of consideration, failure of consideration, or absence of consideration, and so unenforceable.

[297] Clause 13.1 of that employment agreement began:

> In recognition for the remuneration and Sales Incentive bonus scheme, the Employee acknowledges and agrees with the Employer that the Employee's activities have a direct bearing on the Employer's goodwill and therefore the Employee shall not in New Zealand or Australia be directly or indirectly interested, engaged or concerned or in any other way assist … in any business that competes with the Employer for a period of one year commencing from the date on which either party gives or receives notice terminating this Agreement …

[298] The 2006 employment agreement's restraint differed effectively from Mr Beattie's 2004 employment agreement's restraint only in its geographic expansion from New Zealand to New Zealand and Australia, and in its reduction from a five year to a one year term. More broadly, the 2006 employment agreement contained two other relevant differences: First, Mr Beattie's annual remuneration was increased from $150,000 to $180,000; and, second, for the first time in the employment relationship, the employment agreement contained a remuneration bonus scheme based on sales (in Appendix C) which related to sales of "Beijing 2008 Jet Set Sports products". The sales incentive bonus was a conditional arrangement in the sense that for its payment, PEGL had to sell "packages" above certain specified monetary levels. Both of what were described as Parts 1 and 2 of the sales incentive bonus scheme related only to the Beijing Olympics event although the employment agreement allowed for a reworking "to create a further bonusing programme for the 2012 Games".

[299] Consideration for the 2006 restraint (or at least those elements of it that were more beneficial to Mr Beattie than those contained in his 2004 agreement) included his increased salary and the reduction in its term from the 2006 agreement's restraint term. There was also the ability to earn a sales incentive bonus which, despite Mr Beattie now saying that the threshold was set impossibly high for him to earn anything, he did agree to. Receipt of a bonus depended upon a number of other factors including Mr Beattie's performance of his work, PEGL's performance in relation to the Beijing Olympics event and, potentially, a number of contingencies affecting the hospitality programme for that event that were beyond the immediate control of either Mr Beattie or PEGL. I am satisfied that there was consideration for the 2006 agreement's restraint.

[300] The only other question is whether there was a failure of consideration, that is whether PEGL did not pay or otherwise afford Mr Beattie the consideration provided for the restraint. As to the Beijing Olympics bonus, there is simply no evidence that PEGL made it difficult or impossible in practice for Mr Beattie to receive the bonus for which he contracted in 2006. His complaint relates to the terms of the bonus scheme and, in particular, to its high threshold to which he agreed. As to the increased salary, the evidence is that until mid-2009, Mr Beattie was paid this. That PEGL's failure and refusal to continue to do so after that date was a fundamental breach and repudiation of the contract does not mean that there was a failure of consideration for the restraint. This affirmative defence relating to the restraint's consideration fails.

[301] There is insufficient evidence to arrive at a conclusion on the same arguments advanced about consideration in the pleadings for Ms Panapa. This being an affirmative defence advanced by her, it must fail.

[302] Although not now required because of my conclusion of unenforceability of their restraints because of PEGL's repudiation of their contracts, I would not have found in favour of Mr Beattie's and Ms Panapa's general defences to PEGL's claims against them. Also for reasons which are set out elsewhere in this judgment, I would not have accepted Mr Beattie's defence that the proprietorial interests in those customers were his rather than PEGL's.

PEGL v Beattie – Breach of confidentiality (A2)

[303] Causes of action *A2* (breach of confidentiality), *A3* (breach of contract by misuse of confidential information post-employment), and *A4* (breach of express and implied contractual obligations of confidentiality, fidelity, and trust and confidence) differ in this case essentially only in their legal categorisation. The Court's conclusions on each mirror its conclusion on the other causes of action. Although closely allied to the confidentiality/confidential information causes of action, I will deal separately with the allegations of breach of fidelity and trust and confidence causes of action.

[304] The question for determination in these causes of action is not simply whether, in the course of employment, Mr Beattie obtained confidential information. This included about the terms of contractual arrangements between, or negotiations entered into by, PEGL and/or with a number of customers including, in particular, about at least the preliminaries of PEGL's and BAPL's joint venture negotiations with Cartan. That alone does not constitute a cause of action and there is little doubt that in his role with PEGL Mr Beattie did know its confidential information about all aspects of its business. It is the misuse of such information that is significant.

[305] I am satisfied that Mr Beattie was privy to PEGL's information about its own business generally, about its contracts with other service providers and in particular about the prospective negotiations with Cartan. His knowledge of what was happening between Mr Gill, PEGL and Cartan was the trigger for what he (and Mr Regan) did to try to persuade Cartan to place its business with them. There can be very little argument that such information was confidential in respect of PEGL's competitors and the primary thrust of Mr Beattie's case appears to have been his belief that he had a proprietorial interest in that confidential information. I have already concluded, however, that this was PEGL's property and not Mr Beattie's.

[306] Both Messrs Regan and Beattie, in collaboration with each other, set out to exploit their existing contacts with Cartan for their own commercial purposes and to attempt to ensure that PEGL (and Mr Gill in particular) were unaware of what they were doing. By the time that they arranged to meet with Cartan's key persons, they had decided to establish themselves in business in competition with PEGL and Mr Gill. The Cartan business was seen by them as a major element of their launch. Those contacts between Messrs Regan and Beattie, and Cartan, were established for the purpose of seeking to do business subsequently and, in Mr Beattie's case, after his resignation from PEGL, instead of that potential business going to or through PEGL. That misuse of PEGL's confidential information during the currency of Mr Beattie's employment with PEGL constitutes a breach of these contractual and equitable obligations not to misuse PEGL's confidential information, and of the prohibition on the promotion of his own business interests at his employer's expense whilst Mr Beattie was employed by PEGL. Those same actions also constitute breaches of Mr Beattie's obligations of fidelity to PEGL, of his obligation to disclose

his own conflicted interests, and of the expectation that it could have trust and confidence in him as its Managing Director.

[307] Do any of Mr Beattie's affirmative defences negate those prima facie conclusions of liability for breach of contract and in equity?

[308] The first general defence mounted by Mr Beattie to this claim is that the confidential information came about from a combination of Mr Beattie's founding of the business of PEGL and the subsequent exercise of his personal skill, knowledge and know-how as an employee of the company. Mr Beattie says that the reflection of those attributes in the confidential information, means that it was not PEGL's exclusive trade secrets or other intellectual property. Mr Beattie says that such information that he had about business methodologies was personal to him as were his connections for the obtaining of tickets and the securing of hotel bookings which constituted the majority of that confidential information. Further, Mr Beattie says that his personal business connections with clients (including with key persons in Cartan with whom he liaised whilst still in PEGL's employment) did not involve confidential information. He says that most of the customers or clients to whose benefit a future liaison with Cartan as another provider may have accrued, were his because he had brought them to PEGL when it was founded.

[309] Mr Beattie advances the same affirmative defences to this claim in *A2* as have already been examined as affirmative defences to the claims in *A1*. The causes of action are, however, quite different: the *A1* claims relate to the lawfulness of a post-employment restraint purportedly contained in Mr Beattie's employment agreement. These claims under *A2* relate to activities undertaken by Mr Beattie (in conjunction with Mr Regan) while still employed by PEGL and their post-employment consequences.

[310] I have already concluded that property in customer relationships and therefore in customer information was PEGL's as employer and not Mr Beattie's personally. There is really no argument that much of this information was confidential to PEGL and the employer was entitled in law to prohibit by contract its disclosure by employees to competitors. It was also misuse of such confidential

customer information for Mr Beattie to use it in promoting his own business or other interests. That included using this confidential information in negotiations with those actual or other potential customers of PEGL with whom it was in negotiation, and to pitch for their business knowing the terms on which PEGL would have done business with them. Mr Beattie did so in respect of Cartan.

[311] A1/AffD1 pleads s 4 (good faith) and s 189 (equity and good conscience) of the Employment Relations Act 2000. In particular, Mr Beattie says that Mr Gill's and PEGL's asset-stripping scheme, and other wrongful acts committed by them, should disentitle PEGL to any success in this cause of action that it might otherwise have.

[312] Section 4 is headed "Parties to employment relationship to deal with each other in good faith". In addition to the prohibitions on misleading and deceiving conduct in subs (1), subs (1A) expands those obligations by requiring parties to employment relationships to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative. The expanded definition of good faith conduct also requires an employer proposing to make a decision that will, or is likely to have, an adverse effect on the continuation of an employee's employment, to provide the affected employee with access to information relevant to the continuation of that employment, about the decision to be made, and an opportunity to comment to the employer about the information before the decision is made.[37] The employment relationship between Mr Beattie and PEGL was subject to those good faith requirements pursuant to s 4(4)(bb).

[313] Although any asset-stripping by Mr Gill of PEGL may have affected the value of Mr Beattie's share sale price, that was not remuneration or other benefit earnable by him pursuant to an employment relationship. The payments, the value of which may have been affected by Mr Gill's impugned conduct, were matters of commercial arrangement (share sale) rather than the employment contract and arose out of the 2004 agreement whereby Mr Beattie sold his shares in PEGL. However egregious (or not) may have been any asset-stripping of PEGL by Mr Gill, the

[37] Employment Relations Act 2000, s 4(1A)(c).

consequences of this, if it occurred, are not justiciable in these proceedings. So it follows that ss 4 and 189 of the Employment Relations Act cannot avail Mr Beattie as a defence to these claims by PEGL.

[314] Next, Mr Beattie relies again on s 4 of the Employment Relations Act in his affirmative defence which I have labelled A1/AffD2. Mr Beattie says that PEGL manipulated its own accounts by removing wrongfully sums under the guise of "management fees" for the purpose of reducing bonuses due to him and for the purpose of reducing the purchase price of the 50 per cent of its shareholding in PEGL acquired by Mr Gill's interests from Mr Beattie in 2004.

[315] For the same reasons as I have decided above that Mr Beattie's affirmative defence invoking ss 4 and 189 is not available to him, I have concluded that any manipulation by Mr Gill and PEGL of the company's accounts by extracting unwarranted and excessive management fees, cannot operate as a defence for Mr Beattie in these proceedings. That is because the consequences to Mr Beattie of those actions could only have been a reduction of the purchase price of his shareholding in PEGL acquired by Mr Gill's interests in 2004.

[316] Mr Beattie also says that it was a breach of PEGL's statutory duty of good faith for it to attempt to divert a potentially valuable commercial relationship between PEGL and Cartan, to Mr Gill's personal family company, BSIL.

[317] Again in this instance, the alleged misconduct by PEGL would not have affected Mr Beattie's rights under his employment agreement but, rather, his ability to derive a return under his share sale agreement which is not a justiciable claim in this jurisdiction. Mr Beattie had no remunerative or other beneficial entitlement to the value of PEGL's business under his employment agreement.

[318] Next, Mr Beattie says that PEGL should not be entitled to succeed in this cause of action because of its conduct in supporting the Commissioner of Inland Revenue and undermining Mr Beattie in his GST dispute with the Commissioner. I find against Mr Beattie on this issue. PEGL (and Mr Gill) may not have been the enthusiastic and do-anything-to-help supporter that Mr Beattie appeared to expect.

However, PEGL not only did not undermine Mr Beattie's position but acted appropriately in relation to this dispute in which it had its own interests to safeguard and on which it took legal advice. Mr Beattie relied significantly upon what he said was Mr Gill's spontaneous reaction to Mr Beattie's eventual success in the dispute with the Commissioner but, for reasons already set out, I have not been persuaded that this was as Mr Beattie portrayed it. Rather, Mr Gill's written communications on this issue have persuaded me on balance that Mr Gill was not enraged about Mr Beattie's exoneration. Mr Gill did not respond in a way that may have indicated not only an absence of support for Mr Beattie during the dispute but, indeed as Mr Beattie claimed, that he was undermined by Mr Gill. This affirmative defence must fail.

[319] The next element of Mr Beattie's affirmative defence is to determine whether, as he claims, PEGL's unauthorised deductions from his salary should mean that he is not liable to it for misuse of confidential information. I find against Mr Beattie on this issue. Although PEGL did breach, and fundamentally, the parties' employment agreement by reducing unilaterally Mr Beattie's remuneration, the remedy for this breach lies in damages for the loss. Mr Beattie was not justified in misusing PEGL's confidential information in response to that breach. Looked at in this way, Mr Beattie's breach was substantially disproportionate to the wrong that had been done to him by PEGL. The employer's breach does not afford Mr Beattie a defence to his breach.

[320] Addressing each of the other acts or omissions said to have constituted bad faith conduct by PEGL bringing about either its demise or serious damage to it, Mr Beattie says first that he was required to work for five or more days per week (or the equivalent thereof) but paid only for four. I agree that this was the effect of PEGL's unilateral reduction of Mr Beattie's remuneration for which he is entitled to recover underpaid remuneration as damages for breach of contract by PEGL. It does not, however, amount to an independent act of bad faith. Mr Beattie initially acquiesced in that reduction and although it was not lawful because it was not in compliance with the contract or the Wages Protection Act, it does not amount to PEGL acting in bad faith, as that is defined in the Act.

[321] Next, Mr Beattie says that PEGL failed to give notice of company meetings or to obtain shareholders' approval for a major financial transaction, being the removal of the potential Cartan business from PEGL to Mr Gill's personal company, BISL. Associated with this is Mr Beattie's assertion that PEGL failed to obtain a special resolution of the company for this major transaction.

[322] The employment relationship between PEGL and Mr Beattie is the only relationship over which this Court has jurisdiction and I conclude that it is not open to Mr Beattie to advance as an affirmative defence, alleged failings by the company pursuant to the law of corporations governing it (but not its employment relationships). Any such failings would not have been ones of bad faith by PEGL towards Mr Beattie in their employment relationship in all the circumstances and these affirmative defences fail accordingly.

[323] Next is Mr Beattie's claim that he was "cumulatively alienated" as PEGL's "key person/key revenue generator". Even if that caused his resignation, I would conclude that this was Mr Beattie's response to the circumstances in which he found himself, and not a breach of their employment contract by PEGL.

[324] In respect of the causes of action which would otherwise have been established against Ms Panapa as third defendant, she says that the same breaches of duties owed to her should afford her a defence to these claims. Those breaches are said to have included PEGL's alienation of Mr Beattie as its key executive and its alienation of its director, Mr Regan; its unreasonable underpayment of her or conniving in a scheme to underpay Messrs Beattie and Regan; and engaging in the asset-stripping scheme, thus bringing about the demise or damaging of PEGL's business. I do not accept, however, that acts or omissions allegedly undertaken in relation to other persons provide Ms Panapa with an affirmative defence in these circumstances.

[325] The third affirmative defence raised by the individual defendants (A1/AffD3) is that even if the defendants may have been in breach of contract, they did not cause PEGL any loss because it decided, between 26 January and 9 February 2010, to cease business and did so. Alternatively, the defendants say that PEGL was unable

to carry on its former business in the absence of Mr Beattie whom it had alienated or whom it was unable to induce to remain with it, due to its own actions in underpaying him and/or in the asset-stripping scheme described in this judgment, which had the effect of bringing about the demise of PEGL's business and causing its losses, if any.

[326] On the evidence, I do not accept that PEGL decided to cease business or did so. Although Mr Gill's initial reaction to the prospective and actual loss of three key staff may have been to doubt PEGL's survival and he may have said so to others, that is not what he strategised or what happened. As a consequence of a number of events including the departure of Mr Beattie and other key personnel, PEGL had to, and did, make a number of substantial changes to its business and the way it conducted this. These included moving to new premises (with consequent changed telephone numbers) and realignment of how it did business and with whom. This was not, in my assessment, abandonment or a closing down of PEGL's business. Significant contributors to those changes were the consequences of Mr Beattie's breaches of confidentiality in relation to Cartan and the more immediate effect of his resignation (and those of Mr Regan and Ms Panapa). I do not conclude, as the defendants submit, that any losses incurred by PEGL in these circumstances were attributable to itself and not to Mr Beattie. This affirmative defence does not avail Mr Beattie on questions of liability.

[327] Turning to Mr Beattie's fourth affirmative defence (A1/AffD4), this alleges that PEGL acted towards Mr Beattie in breach of its implied contractual obligation to treat him fairly. This is said to have been manifested by PEGL's manipulation of its accounts by removing unjustifiably or unlawfully sums of money from those under the guise of "management fees" in order to reduce bonuses otherwise payable to Mr Beattie and/or to reduce the purchase price of the shares in the business that Mr Gill's interests acquired from Mr Beattie in 2004. For reasons already set out, I have found that such defences are not justiciable. This affirmative defence does not succeed.

[328] Next, Mr Beattie says that he should be relieved of liability to PEGL in respect of his breaches because of its attempts to divert the potentially valuable

business relationship with Cartan to Mr Gill's personal family company, BSIL. The particulars in respect of this contention are a repetition of others with which I have dealt already, including PEGL's role in Mr Beattie's GST dispute with the Commissioner of Inland Revenue, for breach of the terms of the 2004 buyout of Mr Beattie's shares and participating in the alleged asset-stripping scheme. The defence must fail in this instance for the same reasons that it was rejected otherwise.

[329] Next, Mr Beattie says that PEGL's maltreatment, in association with BAPL, of its director Mr Regan meant that it failed in its duty of good faith to Mr Beattie (as well as to Mr Regan) bringing about the demise of, or damage to, its own business. Also repeated are the same allegations about short-payment of remuneration, cumulative alienation of Mr Beattie by PEGL, and the asset-stripping scheme. Whether individually or cumulatively, I find that any wrongful conduct on the part of PEGL in these respects does not afford Mr Beattie an affirmative defence to his breaches in this employment litigation.

[330] The next and fifth affirmative defence (A1/AffD5) alleges that PEGL failed to fulfil its obligation to mitigate any losses suffered by it which the Court may find attributable to Mr Beattie's breaches. In particular, Mr Beattie says, first, that PEGL's actions which caused him to resign, negated or eliminated prospects of the business carrying on future activities. For the reasons already set out, I do not accept this gloomy prognosis of PEGL's situation absent Mr Beattie.

[331] Next, the defendant's claim is that PEGL failed to seek to replace Mr Beattie after his departure. That it did not replace him was, I find, a consequence of the reduced volume of business for PEGL which resulted from Mr Beattie's conduct (and similarly as a result of Mr Regan's and Ms Panapa's departures), so that it is not open to him to advance this as an affirmative defence negating the consequences of those breaches.

[332] The next particular pleaded is that PEGL failed to pay for alternative transport arrangements for two key Australian clients which expressed dissatisfaction about PEGL's transport arrangements associated with the 2010 FIFA World Cup Finals in South Africa. I am not satisfied, however, that any such failure by PEGL

caused any loss of revenue to it, at least predominantly. The losses of business to PEGL were caused substantially by Mr Beattie's breaches for which he has been found liable. They were not contributed to, at least significantly, by PEGL's subsequent conduct of longstanding arrangements. In addition, I have found that PEGL did attempt to mitigate these consequences, including by negotiating with Mr Beattie to conclude such projects on contract to it.

[333] Nor am I satisfied that Mr Beattie has established to the appropriate standard of probability that PEGL misappropriated approximately $50,000 worth of funds of Toyota New Zealand Ltd, so that the loss of the Toyota business to PEGL can be said to have been attributable to its own acts rather than Mr Beattie's breaches. I conclude that PEGL's loss of the Toyota business is not attributable to Mr Beattie's breaches. Rather, it was a combination of Toyota's dissatisfaction with PEGL and Mr Gill, and its long-standing attachment to Mr Beattie personally. The business of Toyota followed Mr Beattie and he was entitled to pick it up in the absence of an enforceable post-employment restraint prohibiting him from doing so.

[334] Finally, there is no or insufficient evidence to support Mr Beattie's claim that PEGL instigated and/or assisted and/or encouraged a media campaign in mid-2010 designed to damage Mr Beattie's business. It is doubtful whether, even if this had been established, it could have provided a defence in law. This allegation likewise fails to provide an affirmative defence for Mr Beattie.

[335] Next is Mr Beattie's sixth affirmative defence (A1/AffD6). Mr Beattie says that, in November 2010, PEGL had to elect either to seek to prohibit by injunction the defendants from competing with it; or, alternatively, to condone them doing so and to sue for damages for breach. Mr Beattie says that PEGL having chosen the latter course, it thereby condoned his obtaining of PEGL's former clients and their business and so acquiesced, and is estopped from seeking relief against him. Alternatively, Mr Beattie says that PEGL is estopped from seeking relief for more than the equivalent of a 9 February 2010 settlement offer made to him of 50 per cent of his profits. As a further alternative, Mr Beattie says that PEGL is estopped from seeking damages in respect of three named customers, NAB, BHP, and AusPost.

[336] Mr Beattie says that on 9 February 2010 PEGL agreed with him that he could carry on some elements of its former business after March 2010. He says that by doing so, PEGL waived, either expressly or implicitly, any pre-existing ability to enforce its restraint of trade provisions and that it is estopped from doing so now or, alternatively, it should be found to have acquiesced in Mr Beattie's subsequent actions.

[337] I consider that PEGL's proposal for Mr Beattie to perform post-employment work for those entities was sufficiently necessary in the interests of those customer companies, and clearly limited to the completion of existing contracts, that his agreement to do so should not constitute an estoppel of PEGL. Nor should it amount to an acquiescence by it in Mr Beattie's conduct in dealing with those entities beyond the parameters of that limited permission.

[338] However, given my conclusion that the restraint in Mr Beattie's employment agreement with PEGL was unenforceable, it is unnecessary to determine this affirmative defence, at least in respect of his post-employment conduct.

[339] Mr Beattie's seventh affirmative defence (A1/AffD7) is described as "Repudiation of contract". Mr Beattie says that PEGL repudiated his employment agreement by the acts or omissions described above so that it, as a repudiating party, should not be entitled to enforce its restraint of trade against him. I have already found for Mr Beattie on this issue, so that his restraint is unenforceable. This affirmative defence has succeeded.

[340] Mr Beattie's eighth affirmative defence (A1/AffD8) is summarised as "Apportionment/contribution". Mr Beattie asserts that PEGL's demise was brought about by Mr Gill's alienation of both Mr Beattie and, as another PEGL director, Mr Regan, which situation caused both defendants to resign from their roles with PEGL. Particulars in support of this defence include those which have been summarised already alleging asset-stripping instigated by Mr Gill and the improper diversion of assets of PEGL including software tools, intellectual property, and agreements or potential agreements which were transferred from PEGL to Mr Gill's personal family investment company, BSIL, and other Gill personal interests. If this affirmative

defence is successful, Mr Beattie seeks an apportionment of any losses incurred by PEGL between Mr Beattie and PEGL in such percentages as the Court considers just.

[341] No submissions were made on the question of apportionment and, in particular, on what, if any, contribution to its losses PEGL might bear, In these circumstances, I will reserve decision of this question to the hearing on remedies in respect of those limited causes of action on which PEGL has succeeded.

[342] The ninth and final affirmative defence (A1/AffD9) alleges a failure of consideration for Mr Beattie's restraint of trade. This affirmative defence assumes that the restraint is otherwise lawful. I reiterate also my earlier findings in respect of this affirmative defence on its merits.

[343] Although, by agreement, remedies are for subsequent consideration, I doubt that the claim for a compliance order requiring Mr Beattie to return confidential information to PEGL will still be at issue given the length of time since the breach. However, the remaining remedies for PEGL's successful causes of action against Mr Beattie, including an inquiry into damages or, alternatively, an accounting for profits and consequent damages awards, are still viable and the directions contained at the conclusion of this judgment will allow those elements of the case to progress.

PEGL v Beattie and Panapa – Breach of contract while still employed (A3)

[344] This cause of action relates both to Mr Beattie's preparations, undertaken whilst he was still employed, for competing against PEGL after his resignation and alleges that he misused confidential information that was PEGL's property in undertaking those preparations for competition including, in particular, in respect of the prospective business of Cartan.

[345] Mr Beattie, whilst employed by PEGL, did prepare, in conjunction with Mr Regan, for competing against his employer. The question is whether he crossed the line that the law draws between, on the one hand, being able to prepare legitimately for commercial life after a planned termination by resignation or, on the other, by

engaging in competitive activity to the employer's detriment whilst the contract of employment is still in place.

[346] I have concluded that Mr Beattie overreached unlawfully in preparing himself for competitive economic activity against PEGL whilst still employed by it and, as its Managing Director and a senior employee, owing it duties of fidelity, trust and confidence and associated express and implied obligations. Mr Beattie went further than taking such legitimate steps as registering a new company identity, investigating and negotiating about new premises, arranging new communications systems, and similar preparatory acts which the law recognises are not incompatible with ongoing employment with the entity intended to be competed with.[38] His actions, especially those relating to Cartan, amounted to breaches of those obligations in the last months of his employment which ended on 5 March 2010.

[347] Did PEGL suffer any losses at all attributable to this breach? It is necessary to address this general question because Mr Beattie's case is that it did not, or at least that all such losses as it incurred resulted from its own flawed strategies and not Mr Beattie's breaches.

[348] As from mid-March 2010, that is a few days after Mr Beattie's employment concluded, PEGL began to respond to the loss of its clients and business. It did not do so by attempting to replace Mr Beattie, by seeking to persuade businesses that Mr Beattie was wooing to stay with it, or by attempting immediately to generate new replacement business. The evidence shows that PEGL adopted a conservative or defensive stance to both the prospective and then actual loss of business. It moved its office, diverted telephone communications systems to the office of a sibling company and, at least at an early stage, told responsibly some customers that it might not remain in business although it would attempt to assist them to fulfil current hospitality arrangements. I have concluded that PEGL cannot be criticised for those

[38] An employee's permissible conduct to prepare for post-employment competition has been expressed in terms of the employee's freedom to seek alternative employment or to set up independently in business. See, for example, J Burrows, J Finn and S Todd, *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington, 2012) at 13.9.8(c); and *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153, [2013] ERNZ 581 at [88].

strategies it adopted in response to Mr Beattie's resignation and they do not absolve Mr Beattie from liability to make good relevant losses that flowed from his breaches.

[349] However, I consider that, on the balance of probabilities, PEGL would not have retained a proportion of its previous business following Mr Beattie's departure, even if he had acted properly and not in breach of his contractual and other lawful obligations to his employer although still resigning when he did. Such was the strength of Mr Beattie's personal relationships with many clients and their senior management, and their concomitant disconnection from PEGL and (especially) Mr Gill, that many of those clients would not have remained with PEGL in the event of compliance with his obligations by Mr Beattie and a lawful departure from PEGL by him. That finding also will affect damages that may be recoverable against Mr Beattie consequent upon his breaches whilst still employed by PEGL.

[350] PEGL's financial losses in these circumstances are probably not as substantial claimed, although their extent will be a matter for decision at a later time and will be dependent upon the further evidence called about them.

[351] Do Mr Beattie's breaches by engaging in preparatory competition with the plaintiff warrant a statutory penalty under s 134 of the Employment Relations Act as PEGL claims? These proceedings being, in essence, ones for damages at common law, I do not consider that Mr Beattie should be subjected to a sanction in the form of a penalty payable to the Crown, in addition to making good PEGL's provable losses. PEGL's claim to the imposition of a penalty in addition to damages is refused.

[352] I deal finally in this regard with the situation of Ms Panapa. Although she was engaged in work for Mr Regan's and Mr Beattie's new entity and for clients who had previously been with PEGL, there is no or at least no sufficient evidence of breaches of her contract of employment by Ms Panapa during or after her employment. This cause against Ms Panapa fails and is dismissed.

PEGL v Beattie – Breach of obligations of confidentiality (A3)

[353] These relate principally, but not exclusively, to Mr Beattie's actions both during and following his employment in negotiating commercial arrangements with the American supplier of event tickets and similar goods and services, Cartan. The prospective business arrangements with Cartan were undertaken initially for PEGL (including by Mr Beattie) with the intention that PEGL would be a beneficiary of any business relationship with Cartan. During his employment with PEGL, Mr Beattie, in conjunction with Mr Regan who was a director of PEGL, took a number of steps to advance a personal business relationship with Cartan. They set out to ensure that this relationship would not be with PEGL (or Mr Gill's own corporate entity, BSIL) but would be with the new competitive business entity to be set up by Messrs Regan and Beattie after their exit from PEGL. Information confidential to PEGL was used to their advantage by Mr Beattie in the negotiations that he and Mr Regan held with Cartan in securing an important commercial relationship for their new business venture to be conducted in competition with PEGL.

[354] The remedies sought against Mr Beattie for the misuse of PEGL's confidential information include, primarily, a compliance order under s 137 of the Employment Relations Act requiring him to return the confidential information to PEGL. However, this is not now a viable remedy and indeed it was not really pursued by the plaintiff at trial. The time that has now elapsed since Mr Beattie's misuse of confidential information means that the value of that information relating to PEGL when he was employed by it and relating to events which are now long past, must be minimal or non-existent. Any confidential information would now be of little or no use and, on the evidence heard by me, there is little or no prospect of Mr Gill attracting back the business that may have been obtained by Mr Beattie by misusing that confidential information. In these circumstances, the plaintiff is entitled to pursue its monetary remedies against Mr Beattie including by an inquiry into damages or, alternatively, an accounting for profits. PEGL's application for a compliance order for the return and non-use of historical confidential information is dismissed.

PEGL v Beattie and Panapa – Breach of express and implied obligations of confidentiality, trust and confidence and fidelity (A4)

[355] This cause of action is very closely aligned to that of misuse of confidential information in which I have found Mr Beattie liable. It addresses PEGL's alleged loss of its goodwill amongst both suppliers and customers as a result of the defendants' breaches of express and implied contractual obligations of trust and confidence, prohibiting misuse of confidential information, and of fidelity.

[356] Although Mr Beattie is liable to PEGL for these breaches, Ms Panapa is not for reasons previously set out. The more difficult issue is first, whether PEGL lost valuable goodwill and, if so, whether that loss is attributable to Mr Beattie.

[357] Mr Beattie says that any loss of goodwill (which he denies in any event, saying that this was personal to him and not PEGL's) was attributable to Mr Gill's decision to wind down PEGL's business from late January 2010 so that PEGL was the author of its own misfortune rather than Mr Beattie. The defendants' case is that Mr Gill elected not to continue with the sports hospitality business, at least through the vehicle of PEGL, although he did so by other companies in his group. It is, however, PEGL which is the claimant in these proceedings and only it can recover its losses under its employment agreement with Mr Beattie.

[358] For the reasons set out supporting my conclusions that Mr Beattie misused confidential information in breach of his employment agreement, I find, alternatively, that he breached express and implied obligations of confidentiality, trust and confidence, and fidelity arising out of his employment agreement with PEGL. PEGL cannot of course claim its losses twice but it is entitled to proceed to an assessment of damages or other remedies in respect of these alternative causes of action arising out of Mr Beattie's breaches committed whilst in PEGL's employment.

[359] As a general obligation of good faith under s 4 of the Employment Relations Act, expressly under his contract of employment, and impliedly as Managing Director of the company, Mr Beattie was under an obligation to keep PEGL fully informed about matters relevant to its business and his employment. He did not discuss his private concerns or interests which may have had and, as it transpired,

did have, a bearing on PEGL's interests about future business opportunities with Cartan. By making unlawful preparations to compete with it whilst still employed by PEGL including using PEGL's confidential information for this purposes, Mr Beattie failed to serve PEGL honestly, faithfully and diligently. I am satisfied that these breaches did result in a loss of business to PEGL which it would otherwise not have lost had Mr Beattie acted lawfully, and may have resulted in damage to PEGL's goodwill in the marketplace.

[360] In respect of this cause of action, the plaintiff is entitled to an inquiry as to damages with a view to requiring Mr Beattie to pay such damages as may be assessed or, alternatively, to an accounting for profits earned by Mr Beattie as a result of his breaches, and a payment of these to PEGL by Mr Beattie. For reasons also set out elsewhere in this judgment, I likewise decline to impose any statutory penalties on Mr Beattie under ss 134 and 136 of the Employment Relations Act as claimed by PEGL.

PEGL v Beattie and Panapa – Breach of statutory good faith obligations (A5)

[361] First, I am satisfied that there is no case established against Ms Panapa of breach of statutory good faith obligations let alone one to the high standard required for the imposition of a penalty.

[362] As to Mr Beattie's breaches, I accept that his misuse of confidential information, his infidelity to PEGL and his breaking of the trust and confidence that PEGL was entitled to have in him, constituted bad faith conduct by Mr Beattie. He mislead or deceived his employer about his actions concerning Cartan during his employment. Whilst they were deliberate and serious breaches of his statutory obligations of good faith, I consider they were not sustained. They occurred over a relatively short period after Mr Beattie had resolved to end his association with PEGL for understandable and valid reasons. They were also breaches by Mr Beattie of his agreement with an employer which was itself very arguably in breach of a number of its obligations of good faith to him, so that whilst this should not be treated as a tit-for-tat exercise, the Court is nevertheless required to stand back and

have regard to the whole of the conduct between the parties to determine whether one should be penalised for its breaches of good faith towards the other.

[363] In these circumstances, and as concluded elsewhere in respect of penalties, I decline to impose penalties on Mr Beattie for these breaches in addition to compensating PEGL for its losses attributable to that conduct by Mr Beattie.

Decisions of individuals v PEGL by cause of action

Beattie v PEGL – Breach of contract (C)

[364] This is Mr Beattie's claim in respect of the reduction of 20 per cent by PEGL of his salary for the period 1 July 2009 to 31 March 2010. Mr Beattie claims the sum of $12,000, plus interest.

[365] Mr Beattie's salary reduction was imposed upon him by PEGL. He agreed to what amounted to a variation of his employment agreement only in the sense of acquiescing temporarily in what was imposed unilaterally by Mr Gill, and he did so unwillingly. The salary reduction was not agreed in writing and the contract variation executed by the parties as required by the employment agreement. At best from PEGL's point of view, Mr Beattie accepted that reduction reluctantly or acquiesced in it because the alternative would have been worse for him. Furthermore, Mr Beattie was not one of those employees for whom there was a corresponding reduction in required work time, that is from a five day to a four day working week. He was expected to work full-time (which was in reality significantly more than five days per week) but to be paid effectively for four days' work. Put another way, Mr Beattie was expected by PEGL to work as hard and as long (if not more so) for 20 per cent less remuneration.

[366] For the same reasons as BAPL's claims against Mr Regan have failed, Mr Beattie's claim, for damages for breach of contract by PEGL reducing unilaterally his salary, succeeds. Mr Beattie is entitled to interest on that sum of $12,000 at the relevant Judicature Act rate or rates, calculated from the date of the filing of his

statement of claim (5 October 2011) until the date of payment of the principal sum to him.

[367] Although Mr Beattie makes a vague claim that PEGL did not pay an incentive bonus under his 2006 employment agreement for sales achieved in respect of the 2008 Beijing Olympic Games, that has not been established on the evidence. Mr Beattie's assertion was that Mr Gill had profited significantly from this event at Mr Beattie's expense, but that was denied by Mr Gill. Mr Gill's unchallenged evidence was that PEGL's returns from Beijing Olympic sales did not meet the minimum bonus criteria under Mr Beattie's 2006 employment agreement. When this assertion was dealt with in his evidence by Mr Beattie, his complaint was not that he had met the requirements for payment of a bonus but, rather, that the un-met criteria triggering a bonus were unrealistically excessive. They were, nevertheless, the criteria to which Mr Beattie agreed in December 2006, so that his only justiciable claim to a payment, other than to reduced base salary, is not sustained.

Beattie v PEGL – Breach of statutory good faith obligations (C2)

[368] Mr Beattie also applies for penalties to be imposed on PEGL (and paid to him) for what he says were his former employer's breaches of statutory obligations of good faith under s 4 of the Employment Relations Act. It is important to distinguish those duties which PEGL owed to Mr Beattie as its employee (which are covered by the statutory good faith obligations) and those contractual and other obligations which it owed to him as a former shareholder and director of the company. Mr Beattie's case tended to merge all of these allegedly egregious misconducts by PEGL. As I have been at pains to point out however, only employment-related conduct is justiciable in these proceedings.

[369] At paras 11(3), 12 and 13 of his statement of claim filed on 5 October 2011, Mr Beattie also claims compensation which in submissions he specified as $500,000, for breach by PEGL of its obligations of good faith under s 4 of the Act. Those breaches are said to have been PEGL's asset-stripping and financial accounts manipulation.

[370] That claim is unsustainable for a number of reasons.

[371] First, the obligations relied on are statutory obligations for which the statute also provides a remedy but are not contractual obligations even if there may be similar or associated implied contractual obligations.

[372] Next, the s 4 obligations which may conceivably be encompassed by this cause of action are those set out in subs (1) which requires parties to an employment relationship to deal with each other in good faith and, without limiting those obligations, to neither directly nor indirectly do anything to mislead or deceive the other or that is likely to mislead or deceive the other. The requirement under subs (1A)(b) to be "responsive and communicative" would not encompass the asset-stripping and financial account manipulation allegations. Section 4(1A)(c) relating to an employer proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment of an employee, is not engaged in this case.

[373] At their best from Mr Beattie's point of view, and assuming that he could establish those asset-stripping and financial account manipulation allegations, they may have affected adversely not his employment relationship with PEGL but, rather, his commercial relationship as a vendor of shares with the company, Mr Gill or Mr Gill's other entities.

[374] Isolating the employment-related conduct of PEGL towards Mr Beattie, I am not satisfied that the cumulative and onerous standards of proof of bad faith conduct under s 4 of the Employment Relations Act have been established to the level which makes PEGL liable to a statutory penalty. This claim fails and is dismissed.

Beattie v PEGL – Breach of contract (duty of fairness) (C5)

[375] This cause of action alleges that PEGL breached its contractual obligations of fairness towards Mr Beattie. It differs from the previous cause of action only in that it alleges a contractual rather than a statutory basis. Again isolating for consideration only the employment agreement justiciable issues, I am likewise not satisfied that Mr

Beattie has made out sufficiently an independent cause of action of breach of contract and it is dismissed.

Beattie v PEGL – Personal grievance

[376] Although not claimed, at least in a conventional way, as a personal grievance, Mr Beattie's remedy in compensation, said to arise under s 123(1)(c)(ii) of the Employment Relations Act, can only be available to him if he establishes a personal grievance. Having resigned from PEGL and not contending that this was a constructive dismissal, the only personal grievance that might be available to Mr Beattie is an unjustified disadvantage grievance under s 103(1)(b) of the Employment Relations Act. Mr Beattie did not raise a personal grievance with PEGL within the period of 90 days after the alleged disadvantage or after that had become known to him pursuant to s 114 of the Employment Relations Act. On this ground alone, this claim in the nature of compensation under s 123(1)(c)(ii) of the Employment Relations Act must fail at the outset. I will, nevertheless, consider the merits of the claim. Did PEGL disadvantage Mr Beattie in his employment and, if so, unjustifiably?

[377] Again, the distinction needs to be made between acts or omissions by PEGL which are justiciable in these proceedings in this Court, and the wider context in which Mr Beattie was initially a shareholder in, and a director of, PEGL and, more latterly, when he was a director as well as an employee of PEGL.

[378] Particulars relied on by Mr Beattie in this cause of action are said to be PEGL's unjustified manipulation of its accounts with the purpose and having the effect of depriving Mr Beattie of bonuses which he would have received had PEGL applied orthodox and reasonable accounting practices and procedures.

[379] What is known colloquially as an unjustified disadvantage grievance is defined in s 104(1)(b) of the Act as any grievance that an employee may have against the employee's former employer because of a claim:

> … that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer ….

[380] For the reasons set out elsewhere in this judgment, I do not accept that PEGL's impugned actions in this regard were justiciable elements of the employment relationship between the parties which might support a personal grievance. They are matters which relate to the calculation of the sale price of Mr Beattie's shares in 2004 so that the remedies cannot be sought by Mr Beattie in the context of a personal grievance. His application for compensation under the Act's personal grievance provisions is dismissed.

Beattie v PEGL – Breach of duty of fairness

[381] It is difficult to understand how this separately pleaded cause of action differs much, if at all, from others claimed by Mr Beattie. It is also arguable whether there may be a separate implied contractual obligation of "fairness" by an employer towards an employee which is not already covered by other recognised obligations including trust, confidence, fair dealing and, statutorily, good faith.[39]

[382] I do not think that this additional cause of action adds anything to Mr Beattie's claims and any relief to which he might be entitled under it will be covered in respect of other causes of action. It is most justly dealt with by being dismissed in these circumstances.

The future of the proceeding

[383] Mr Regan has defended successfully BAPL's claims against him so that no further hearing is required in those proceedings.

[384] Mr Beattie has been successful in his claim for recovery of unpaid salary but has failed on his other causes of action as plaintiff. No further hearing is necessary in those proceedings where Mr Beattie is plaintiff.

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[39] Employment Relations Act 2000, s 4.

[385] PEGL's claims against Ms Panapa have failed so that no further hearing is necessary in respect of them.

[386] PEGL has succeeded in causes of action for breach of contract and in equity against Mr Beattie. Its losses covered by these successful causes of action have yet to be quantified and a decision made about how Mr Beattie should compensate PEGL for them. A further hearing will be necessary for those purposes unless the parties can resolve between themselves who pays how much to whom.

[387] I have already commented on the obvious enmity between Messrs Beattie and Gill and that these proceedings are only some of the litigation between these two businessmen who had hoped once to work together to their mutual advantage.

[388] If nothing else, the financial cost of this and other litigation must make its continued pursuit questionable for both, not to mention the distraction it brings from doing business to which they are both better suited.

[389] For these reasons, I urge Messrs Gill and Beattie to consider, probably not for the first time, whether mediation or other alternate dispute resolution mechanisms can even now be deployed to avoid further destructive litigation between them.

[390] If that is not possible, the Registrar should arrange a directions conference with counsel after the forthcoming legal vacation to determine how the remaining aspects of the case are to be heard.

[391] On those causes of action that have been determined finally by this judgment, the successful parties are entitled to costs. If those costs cannot be settled directly between the parties, the forthcoming directions conference can also deal with how that is to occur.

[392] Costs are reserved on the proceedings determined so far.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 17 December 2014