

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 92
ARC 35/11**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

BETWEEN HALLY LABELS LIMITED
Plaintiff

AND KEVIN POWELL
Defendant

Hearing: 31 March-4 April 2014
2-12 February 2015
23-24 February 2015

Appearances: C T Patterson and A Halloran, counsel for plaintiff
C W Stewart and G Tanner, counsel for defendant

Judgment: 16 June 2015

JUDGMENT OF JUDGE M E PERKINS

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Introduction

[1] These proceedings involve claims by the plaintiff against the defendant arising out of the defendant's resignation from employment with the plaintiff in December 2010. Mr Powell was employed by Hally Labels Limited (Hally) for a total of 22 years. He held various positions during that time. At resignation he was Hally's Business Development Manager (New Zealand). He was based in Christchurch. He was offered a position with a competitor of Hally. The position was with Kiwi Labels Ltd (Kiwi), a division of Geon Ltd (Geon). Kiwi was a competitor of Hally in the adhesive label industry.

[2] On 8 April 2010 Hally and Mr Powell had entered into a written employment agreement. This was to come into effect retrospectively on 1 February 2010. It contained clauses restraining post-employment activities (for which a substantial payment of consideration was to be made if Hally invoked the clause) and covering obligations of confidentiality and duties of fidelity and good faith. Consideration for the restraint, if invoked, was to be the payment to Mr Powell of a sum equivalent to six months' base salary.

[3] When Mr Powell resigned, Hally invoked the restraint clause. Mr Powell endeavoured through legal counsel to reduce the restraint period and therefore the consideration payable. The circumstances and events that followed are set out in a judgment of Judge Travis in this Court following proceedings being commenced by

Hally in the Employment Relations Authority (the Authority) and removed to the Court.¹ Mr Powell was forced to observe the balance of the restraint. As that decision discloses, Mr Powell had purported to cancel the restraint clause. He then chose to commence employment with Kiwi and remained in such employment until the issuing of an injunction by Judge Travis in enforcement of the clause.

[4] In addition to invoking and seeking to enforce the restraint, Hally's proceedings sought remedies for breach of the contractual and statutory obligations of confidentiality, fidelity and good faith. These remedies included injunctions, declarations, damages and costs.

[5] The hearing before Judge Travis in June 2011 had been set down as a matter of urgency. The hearing was limited to the plaintiff's claims for a declaration that the purported cancellation of the restraint of trade by Mr Powell was invalid and for injunctions enforcing it. The application for a declaration that Mr Powell had breached the terms of the employment agreement by breaching the restraint of trade was also heard and upheld. As the judgment shows, in dealing with these issues, Judge Travis upheld an allegation that Mr Powell had breached the employment agreement by retaining confidential information and was therefore disentitled to cancel the restraint.

[6] Hally's proceedings seeking declarations that Mr Powell had breached his obligations of confidence, duties of fidelity and good faith and claims for damages were reserved for further hearing. This judgment deals with the hearing of those matters.

Pleadings issues

(a) The amendments

[7] Following the judgment of Judge Travis, leave was reserved to the plaintiff to file amended pleadings. The plaintiff, with further leave (having not complied with

¹ *Hally Labels v Powell* [2011] NZEmpC 60 (injunction); [2011] NZEmpC 63, [2011] ERNZ 233 (reasons).

timetabling directions issued by Judge Travis), filed a fourth amended statement of claim prior to the commencement of the resumed hearing. The defendant filed an amended statement of defence to that statement of claim and included a counterclaim.

[8] Just prior to the commencement of the resumed hearing, counsel for Hally gave notice of an application for leave to further amend the statement of claim and filed a draft fifth statement of claim. I heard briefly from counsel on this opposed application but reserved my decision as to whether leave should be granted until after the evidence was completed. Counsel were left to deal with this issue in their final submissions. During the hearing itself, counsel for Hally gave notice of an application for leave to make an even further amendment and a draft sixth amended statement of claim has been filed. This was also opposed and I took the same view on this. The hearing proceeded on the basis that the pleadings were not necessarily closed. Later during the course of the hearing Ms Stewart, counsel for Mr Powell, indicated that the applications for amendments were by then neither consented to nor opposed and Mr Powell would abide the decision of the Court as to whether or not the amendments would be allowed. In view of the difficulties to be faced by the plaintiff with the pleadings as they would stand if amended in the way finally sought, Mr Powell's modification to his earlier opposition was understandable.

[9] In order that the issues needing to be resolved in this judgment can be settled, I now deal with the applications for amendment to pleadings made by the plaintiff. Despite the earlier opposition to the applications, no real prejudice can be alleged on Mr Powell's part as the evidence proceeded on the basis that the pleadings had the prospect of being amended. The extent of the proposed amendments, apart from the final amendment to para 25, had been notified prior to the hearing with draft and tracked changes being filed and served. The various attempts made by the plaintiff to amend the pleadings are symptomatic of its inability to prove copying and use of the alleged confidential information and therefore breach of the employment agreement by the defendant, or to show that any commercial loss resulted to Hally. Ms Stewart in her closing submissions made a point of the fact that the plaintiff has filed six versions of its statement of claim as the proceedings have progressed.

[10] Following the hearing before Judge Travis and as the further hearing approached, the plaintiff's difficulties with its pleadings was apparent. Leave had to be sought to file an amended statement of claim outside the expiry of timetabling requirements. To be fair to counsel, Mr Patterson, counsel for the plaintiff, explained that the failure to file within time occurred as a result of his commitments in another court. However, after such leave was granted on the basis that no further amendments would be countenanced, an attempt was made for further amendment on the first day of the hearing. Later during the hearing itself, the further minor although significant amendment was sought. These amendments were perceived as necessary to enable the plaintiff's pleadings to respond appropriately to the anticipated and eventual evidence. Quite extensive amendments are also now included in view of the final resolution amongst the expert witnesses as to timing of alleged access by Mr Powell to documents forming the basis of the more substantial claim against him.

[11] As the amendments sought are not now steadfastly opposed, and Ms Stewart on behalf of Mr Powell is content to leave it for the Court to decide, it is not necessary to consider the matter at length. No fresh cause of action is added by the proposed amendments. However, there is an additional prayer for relief. The amendments to para 25 finally proposed are more appropriately directed to the eventual evidence and the major head of damages claimed, being the costs as damages claim relating to the costs and expenses incurred by Hally in contemporaneous High Court proceedings.

[12] The final amendments have been sought late in the piece. However, in *Shanton Apparel Ltd v Thornton Hall Manufacturing Ltd*, the Court of Appeal stated:²

A statement of claim may be amended without the leave of the Court at any time before trial and with the leave of the Court after the proceeding has been set down for trial (r 187(1) and (2)). The parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.

² *Shanton Apparel Ltd v Thornton Hall Manufacturing Ltd* [1989] 3 NZLR 304 (CA) at 309.

[13] Similarly in *Whakatane District Council v Bay of Plenty Regional Council*, Duffy J stated:³

It is clear from these cases that an application for leave to permit late amendments to a pleading requires the Courts to conduct a balancing exercise between the general concern the parties to litigation comply properly with procedural requirements and the particular interest in each case of ensuring that the case is justly determined.

[14] Those considerations apply in the present case. While the plaintiff's attendance to the final form of its pleadings has not been satisfactory, it is important for the Court to ensure that there is a final resolution of all issues between the parties.

[15] There is no suggestion of the defendant having to meet a different case. In view of the fact that I made a decision to reserve the question and commence the trial, there has been no delay in the matter proceeding. No issues of limitation arise.

[16] As this judgment must now see a final resolution at first instance of all issues remaining between the parties, I have decided to grant leave to the plaintiff to amend the statement of claim in the manner sought in the sixth amended statement of claim. That will form the basis upon which the issues to be resolved in this case can be put before the Court.

[17] Following the hearing of this matter being adjourned part-heard Mr Powell, upon resumption of the hearing, filed an amended statement of defence and counterclaim to the sixth amended statement of claim. This was filed in anticipation of the plaintiff's further applications for amendment being granted. This will be treated as the defendant's pleadings in view of my allowing the plaintiff's amendments.

(b) *Remedies*

[18] The plaintiff's pleadings as finally amended now seek the following remedies:

³ *Whakatane District Council v The Bay of Plenty Regional Council* (2008) 19 PRNZ 91 (HC) at [10].

- a) A permanent injunction restraining the defendant from breaching the confidentiality provisions as contained in his employment agreement and/or as implied by law.
- b) A declaration that the defendant has breached the employment agreement between the parties by breaching:
 - i His contractual obligation of confidence (clause 10); and
 - ii His contractual duty of fidelity (clause 2.1.2); and
 - iii His contractual duty of good faith (clause 2.1.4).
- c) A declaration that the defendant has breached his statutory duty of good faith pursuant to section 4 of the Employment Relations Act.
- d) An order requiring the respondent to pay special damages being the costs reasonably incurred by it in relation to the series of proceedings issued by it as a result of the respondent's breaches of contract and/or the respondent's breach of his statutory duty of good faith.
- e) An order requiring the respondent to pay general damages in such sum as the Court thinks fit having regard to the reduction in the benefit to the plaintiff for the cost of the Restraint of \$62,014.42; and
- f) An order requiring the defendant to pay the plaintiff's costs associated with this proceeding on an indemnity or uplift basis.

[19] The actual loss the plaintiff alleges it has suffered is set out in concluding paragraphs in the amended statement of claim as a prayer for relief. This includes now a further remedy claimed as additional general damages.

(c) *Factual allegations and anomalies*

[20] The factual pleadings upon which the alleged causes are based are then set out. The allegations as to breach of fidelity and good faith, which must be directed at Mr Powell's actions while the employment subsisted, in part relate to the actual resignation and Mr Powell's attendance at what are referred to as lead meetings. These factual allegations are also part of the overall circumstantial case relied upon by Hally in combination with Mr Powell's alleged post-employment behaviour as pleaded in the now substantially amended paras 25-27, which read as follows:

- 25. In mid-May 2011 after conducting an investigation the plaintiff formed a belief that a real and appreciable risk existed that, between September 2010 and December 2010 and prior to his resignation

from the plaintiff, the defendant accessed and copied the plaintiff's Confidential information for his own use and/or for that of Geon/or Kiwi Labels, and without the knowledge or authorisation of the plaintiff, in breach of the obligations of confidence, good faith and fidelity owed to the plaintiff. Specifically, the defendant, via the plaintiff's computer systems:

- (a) Accessed confidential files for which he had no authority to access and included the plaintiff's national sales and expense budgets and processing and costing systems files on 19 November 2010.

Particulars

- i. Accessed Hally's Nigel Tutty's file entitled "*Customer Sales History*" without Hally's knowledge or authority to do so at 2:23pm on Friday 19 November 2010;
 - ii. Accessed Hally's Nigel Tutty's file entitled "*NZ Sale History w Paper Margin*" without Hally's knowledge or authority to do so at 2:24pm on Friday 19 November 2010.
- (b) Accessed customer data and information for customers that he no longer had any direct responsibility and/or with whom he had not been involved for several months prior and/or had no need to access for his employment.

Particulars

- i. Accessed the file entitled "*Hally Competitive Advantage Model Aug*" at 10:22am on Tuesday 2 November 2010;
 - ii. Accessed the file entitled "*Copy of Foodstuffs Promo 2010 Estimate – NZ Master*" at 9.16am on Thursday 18 November 2010.
 - iii. Accessed Foodstuffs into Metfoods at 8:29am on Wednesday 3 November 2010 and accessed that file again at 8:17am on Monday 15 November 2010.
 - iv. Obtained then accessed the file entitled "*Foodstuffs Scale Labels*" at 12:46pm on Thursday 4 November 2010 then deleted it at 12:54pm.
- (c) Accessed commercially sensitive files about the plaintiff's budgets and business when there was no good reason for him to access the files at various times between 2 November 2010 and 3 December 2010;

Particulars

- i. Accessed the file entitled "Revenue 2008-09 Budget Template" containing commercially sensitive information about Hally's budgets at 7:50am on Wednesday 3 December 2010;
 - ii. Accessed the file entitled "Sales Budget FY20009-10" containing commercially sensitive information about Hally's budgets at 7:54am on Tuesday 2 November 2010; modified that file at 3:10pm on Thursday 18 November 2010; and accessed the file again at 7:25am on Friday 26 November 2010.
 - iii. Accessed the file entitled "Carton Seal Approval Notice 2007" containing commercially sensitive information about Hally's business at 4.58pm on Monday 1 November 2010;
 - iv. Accessed the file entitled "Generic Customer Agreement" containing commercially sensitive information about Hally's business at 8:03am on Friday 19 November 2010;
 - v. Accessed the file entitled "Olympic Survey" containing commercially sensitive information about Hally's budgets at 9:10am on Friday 26 November 2010;
 - vi. Accessed the file entitled "Base Salary Bands" containing commercially sensitive information about Hally's business at 8:59am on Friday 26 November 2010;
 - vii. Accessed the file entitled "Planning to Succeed – Compensation and Benefits" containing commercially sensitive information about Hally's business at 9:10am on Friday 26 November 2010;
 - viii. Accessed the file entitled "MMReports – KP – April" containing commercially sensitive market information gathered by Hally at 9:08am on Friday 26 November 2010;
 - ix. Accessed the file entitled "NZ Sales Exp 06-07" containing commercially sensitive information about Hally's budgets at 7:49am on Friday 3 December 2010;
 - x. Accessed and modified the file entitled "Sales Exp 08-09" containing commercially sensitive information about Hally's budgets at 7:50am on Friday 3 December 2010; and accessed that file again on Monday 6 December 2010.
- (d) Attached eight USB devices to his laptop computer between 20 September and 19 November 2010 at a time when some

of the files listed at paragraph (a) to ([d]) above were accessed when he had not been issued with any USB devices for his employment and subsequently failed to return and/or disclose the existence of the USB devices upon termination.

(“the defendant’s Computer Use”)

26. In mid-May 2011 the plaintiff learned that the amount of data used by the defendant via his mobile phone was exceptionally large during October and November 2010.

(“the defendant’s mobile phone use”)

27. The plaintiff, as a result of the defendant’s Computer use and as a result of the defendant’s Mobile Phone Use, was required to take all reasonable steps to investigate and satisfy itself that its proprietary and confidential information was secure and within its exclusive control.

[21] The sixth amended statement of claim then alleges that the defendant’s computer use, mobile phone use and retention of documents (referred to as the search yield) was evidence that the defendant took, copied and retained the plaintiff’s confidential information for his own use or that of Geon/Kiwi. Such retention, copying and use, without the knowledge or authorisation of the plaintiff, are pleaded to amount to breach of contractual obligations of confidence, fidelity and good faith. In addition or alternatively, it is pleaded that they amount to breach of the defendant’s statutory duty of good faith owed to the plaintiff. I note that whereas Mr Powell’s failure to disclose the Geon offer of employment and his attendance at the lead meetings are mentioned in the factual recitals, those matters are not pleaded in paragraph 32 in aid of the allegation as to breach of confidence, fidelity and good faith. The search yield issues have been disposed of in the earlier hearing before Judge Travis. However, the issue of any damages and costs arising remains extant. There is also the further head of general damages added to the prayer for relief to be considered.

(d) The allegations as to breach of implied undertaking

[22] Earlier and prior to the substantive hearing on the restraint of trade issue in which the plaintiff was successful, an attempt had been made for an interim injunction restraining Mr Powell from continuing employment with Geon/Kiwi.

This attempt was unsuccessful both in the Authority and on a challenge to the Court.⁴ Judge Travis, who also heard that application, held that on the basis of an implied warranty and undertaking by Mr Powell that in his limited period of employment with Geon/Kiwi he had not and would not in future compete with the plaintiff for a period of 12 months, an interim injunction would not be granted pending the substantive hearing.

[23] In the plaintiff's sixth amended statement of claim and upon the basis of documents recovered in the contemporaneous High Court proceedings against Mr Powell and Geon/Kiwi, it is now pleaded that Mr Powell breached the implied warranty and undertaking. The particulars of this breach generally include Mr Powell's own actions and in supporting, aiding and encouraging other Geon/Kiwi employees in attempts to procure business from the plaintiff's customers. No separate remedy or head of damages is claimed in the sixth amended statement of claim for this alleged breach. It is not considered in counsel's closing submissions under any other remedy or head of damages. Paragraph 42 reads "As a result of the defendant's actions as pleaded in paragraphs 11 to 36 above, the plaintiff has suffered loss". As the allegation of breach of implied undertaking is included in those paragraphs, it would appear that it is to be considered either as part of the special damages claim or within the remedies claimed for breach of the restraint of trade.

(e) *The counterclaim*

[24] The defendant Mr Powell has included a counterclaim in his statement of defence to the sixth amended statement of claim. The counterclaim relates to a short period in the total sequence of events after Mr Powell gave notice of his resignation and sought to get agreement from Hally as to a variation in the restraint of trade. It is alleged that by failing to communicate with Mr Powell and his legal advisers in a timely and constructive manner to resolve the issues with regard to the restraint of trade clause, Hally breached the statutory obligation of good faith pursuant to s 4 of the Employment Relations Act 2000 (the Act). In addition it is pleaded that Hally owed Mr Powell a duty of good faith pursuant to an implied term of the employment

⁴ *Hally Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532.

agreement. It is alleged that had the plaintiff not breached that duty of good faith, the issues between the parties could have been resolved at an early stage, thereby avoiding the need for proceedings in either the employment or the civil jurisdictions. The relief sought by Mr Powell in his counterclaim is a declaration that Hally breached its statutory and contractual obligations of good faith towards him and damages arising from the breach. The sum claimed is \$200,000. The nature of the damages sought is not specified. It is presumed that they are general rather than special damages.

(f) *General comments*

[25] As a result of the amendments now made to para 25-27 of the amended statement of claim, the factual foundation upon which the plaintiff can rely as forming the basis of its 'costs as damages' claim is narrowed in some respects. Whereas previously the firm allegation was that Mr Powell had accessed and copied confidential information, the allegation now is that the plaintiff only formed a belief that a real and appreciable risk existed that the defendant accessed and copied the defendant's confidential information for his own use or for that of Geon/Kiwi. This allegation can only relate to the access to documents by Mr Powell using his computer prior to his resignation. Indeed that is the way it is specifically treated, as it was only that information and the allegation of the spike in Mr Powell's mobile phone use that by then had come to Hally's notice that could justify it embarking on the High Court proceedings. Those proceedings were issued primarily to obtain search orders not available at the time within the jurisdiction of this Court. The search itself revealed the documents Mr Powell had retained at his home. These then formed the basis of Judge Travis' findings as to breach of contractual obligations and therefore the invalidity of the purported cancellation of the restraint. No documents belonging to Hally were located on Geon/Kiwi's premises. Some of the documents subsequently procured from Geon/Kiwi by general discovery formed the basis specifically for the claim of breach of undertaking but also generally in aid of the other causes.

[26] The problem with the pleadings now is that with the amendment there are complicated variations from previous pleadings and the sixth amended statement of

claim contains drafting complications mentioned earlier in this judgment. Whereas formerly it was firmly asserted in the factual allegations that Mr Powell had copied and misused the documents, the amendment now sought is a substantial ‘watering down’ of those positive assertions so that the allegation would remain as only a reasonable belief on Hally’s part, presumably to entitle it to initiate the High Court proceedings and to more strongly found the claim for the High Court costs as special damages. The pleadings, therefore, become more strictly focussed on the costs as damages issue. As indicated earlier, the sixth amended statement of claim now also includes a new head of general damages in the prayer for relief.

[27] Finally, when dealing with the plaintiff’s pleadings, I note that in para 32 of the statement of claim under the heading “Breach of Confidence, Fidelity and Good Faith”, it is asserted that the confidential information which Mr Powell is still alleged to have taken and retained, was for his own use and/or that of Geon. There is no mention of Kiwi in this crucial paragraph in the pleadings although that is presumably simply by oversight.

[28] The final form of the defendant’s counterclaim is not without difficulties either. There is a paucity of particulars as to the exact terms of the condition alleged to have been implied in the employment agreement. While the alleged breach of the statutory duty is briefly stated it is hard to tell whether this is also the breach of the alleged implied term. The only consequence of the alleged breaches pleaded is the claim that the parties would otherwise have resolved the issues between them at an earlier stage. There was very little evidence in support of this at the hearing. The majority of Mr Powell’s evidence in support of the damages he claimed was directed at his emotional suffering from the way he was treated by Hally. The pleading as to the substantial damages claimed in the relief sought by Mr Powell is similarly unaccompanied by adequate particulars to assist the Court.

Damages – the High Court costs judgments and Court of Appeal decision

[29] As the majority of the damages now claimed by the plaintiff consist of the costs incurred in the concurrent High Court proceedings, it is necessary to consider what transpired in those proceedings.

[30] Hally commenced proceedings in the High Court in 2011 against Mr Powell, Geon and Kiwi. The causes of action pleaded were in tort (inducement of breach of contract, both in respect of restraint of trade and express and implied contractual duties of confidence owed by Mr Powell to Hally) and equitable breach of confidence. The High Court would have had no jurisdiction to deal with any alleged direct breach of the employment agreement and the employment relationship between Hally and Mr Powell. Similarly, the Employment Court could not deal with any proceedings between Hally and Geon or Kiwi. As a result, the High Court proceedings were commenced in parallel with the proceedings in the Employment Court. It appears that initially the primary purpose of the High Court proceedings was to obtain a search order against Mr Powell and Geon/Kiwi (a procedure not then available in the Employment Court), and general discovery against Geon/Kiwi. Such general discovery against Geon/Kiwi could have been procured against them in the Employment Court as non-parties. No remedies could be procured against them in this Court. The Employment Court has subsequently been vested with the power to make search (Anton Piller) orders.⁵

[31] The investigation into Mr Powell's use of his laptop computer, retrieved upon his resignation, disclosed that prior to such resignation he had accessed a number of documents confidential to Hally in varying degrees. The search order and the discovery orders in the High Court proceedings uncovered the documents retained by Mr Powell at his home after his employment with Hally ended. Also uncovered were documents created by him and employees of Geon/Kiwi during his brief period of employment with them prior to this Court enforcing the restraint of trade. However, Hally could not prove use of any Hally documents by Mr Powell or Geon/Kiwi and could not prove the alleged causes of action or that any damages had been incurred. In addition, Hally could not prove that Mr Powell had copied any other document belonging to it apart from the documents located at his home. This was despite allegations to the contrary in the affidavits supporting the application for search orders and the pleadings. Therefore, Hally discontinued the High Court proceedings against Mr Powell and Geon/Kiwi.

⁵ Employment Relations Act 2000, s 190(3).

[32] The same difficulty faces Hally in the proceedings in this Court, in proving commercial losses arising directly from the alleged breaches of contract and duties. However, based on legal authority relating to the remedy of costs as damages, Hally seeks to enforce against Mr Powell as damages the entire costs incurred by it in the High Court proceedings and in particular procuring and pursuing the search order and the other discovery orders. This is in addition to seeking damages for the loss of the benefit to it of the restraint of trade and presumably arising from Mr Powell's alleged breach of undertaking, although there are no separate damages pleaded for the latter. Also, when Hally discontinued the High Court proceedings against Geon and Kiwi it was ordered to pay costs on a party-to-party basis to those two entities. Hally seeks to include those costs in the 'costs as damages' claim against Mr Powell.

[33] Once the High Court proceedings were discontinued against Mr Powell, Geon and Kiwi, issues of costs on the discontinuance were considered in two separate judgments by Associate Judge J G Matthews.

[34] In the first judgment Hally was ordered to pay party-to-party costs to both Geon and Kiwi in accordance with the scale (2C) under the High Court Rules.⁶ A filing fee of \$725 was also payable. In the second judgment Mr Powell was ordered to pay party-to-party costs and disbursements to Hally.⁷ In both cases the parties were left to calculate the total costs and disbursements payable under these awards.

[35] In its claim for costs as damages Hally would have needed to give credit for any costs awarded against Mr Powell on a party-to-party basis. However, the second judgment was set aside by the Court of Appeal;⁸ and in a subsequent judgment the Court of Appeal awarded Mr Powell costs on his appeal.⁹ The ultimate issue of costs on the discontinuance in the High Court proceedings was reserved pending the outcome of the proceedings in this Court. The Court of Appeal noted somewhat pointedly that had Hally confined the High Court proceedings to pursuing only the search order against Mr Powell and the search order and general discovery against

⁶ *Hally Labels Ltd v Powell* HC Christchurch CIV-2011-409-867 1 February 2013. (costs judgment).

⁷ *Hally Labels Ltd v Powell* [2013] NZHC 1760 (costs judgment No 2).

⁸ *Powell v Hally Labels Ltd* [2014] NZCA 572 (substantive appeal).

⁹ *Powell v Hally Labels Ltd* [2015] NZCA 11 (costs judgment).

Geon and Kiwi in aid of the Employment Court proceedings, the result may have been different. Instead, as the Court noted, Hally continued the pursuit of the parallel proceedings until it was forced to abandon them for lack of evidence. The Court stated:¹⁰

For the reasons already given we do not accept that Hally's objective in the High Court was limited to securing urgent search orders in aid of the Employment Court claim. Nor do we accept that Hally ought to have costs because it acted reasonably by carrying on with High Court discovery until, as Mr Patterson explained, it "decided that the best course of action would be to continue the balance of its claim in the Employment Court ...". As we explained earlier, the presumption that costs follow the result is not displaced so easily. Anyway, it is not possible on the material before us to say that Hally acted reasonably. Judged by results, the discovery exercise was a failure; Hally went in pursuit of a smoking gun, only to confirm what the search had already revealed: Mr Powell had not shared Hally's documents with Geon. That left Hally little choice but to abandon its claim against Geon, and with it the High Court jurisdiction.

[36] It is not within the jurisdiction of this Court to deal with party-to-party costs in respect of those High Court proceedings. Once matters are resolved in this Court, one or other of the parties will no doubt return to the High Court to have the issue of costs there as between Hally and Mr Powell reconsidered. That will be partly assessed having regard to the respective merits of the parties' claims arising from this judgment. As matters presently stand, Hally seeks as damages in this Court its entire costs incurred in pursuing Mr Powell in the High Court, together with the costs it was forced to pay to Geon and Kiwi. This total is \$ 342,950.98. It would seem likely, in view of the Court of Appeal decision that the High Court will decide to award costs to Mr Powell in any event on the discontinuance. Amongst other difficulties facing Hally, that poses considerable conceptual difficulties in considering the present claim for costs as damages sought in these proceedings.

The restraint of trade

[37] On 13 June 2011, Judge Travis made a declaration that Mr Powell's purported cancellation of the restraint of trade against him was invalid and of no effect.¹¹ In addition, an injunction was issued restraining Mr Powell from entering employment in competition with Hally for a period of 12 months commencing on 8

¹⁰ *Powell*, above n 8, at [37].

¹¹ *Hally Labels* (injunction), above n 1.

February 2011. Mr Powell had been in employment with Kiwi between 28 March 2011 and 13 June 2011. That period was covered by the warranty and undertaking.

[38] There was also a declaration that Mr Powell had breached his employment agreement with Hally by breaching the restraint of trade. In reasons for the judgment given on 16 June 2011, Judge Travis held that the agreed consideration payable by Hally for the restraint should be reduced pro-rata for the balance of the term of the restraint.¹² While issues of damages for alleged breaches of obligations of confidence and duties of fidelity and good faith were reserved for a subsequent hearing, I did not understand Judge Travis to have reserved any issue as to damages arising from the breach of the restraint of trade. Indeed, I perceive that such restraint issues were finally disposed of in the judgment. This included the granting of injunctive relief, pro-rata reduction of the consideration and rejection of any remedy to Hally to take account of the “springboard doctrine” or “head-start” advantage.¹³

[39] Mr Powell completed his stand-down period as directed and received the balance of the consideration. After that period he returned to work for Kiwi and has remained there since.

[40] For the purposes of the hearing before Judge Travis, Mr Powell conceded that the documents alleged to have been in his possession and as a result of the search order located at his home were to be assumed to hold the status of confidential information belonging to Hally. However, “[t]hat concession by the defendant was made for the limited purposes of the enquiry into the enforceability or otherwise of the restraint provision and is not to be taken as an admission as to the confidential nature of the documents in question outside the limited scope of the present hearing.”¹⁴

[41] Other pertinent findings of Judge Travis were as follows:

[46] I find on balance that the documents were retained by the defendant in the full knowledge that he ought to have returned them and knowing that they could be of advantage to his new employer. The retention of those

¹² *Hally Labels* (reasons), above n 1.

¹³ At [103].

¹⁴ At [14].

documents I find to be a breach of the implied duties of trust and confidence and fidelity.

...

[48] I am not, however, satisfied, on the evidence at present, that the defendant disclosed any confidential information to any unauthorised person or used it for his own personal benefit, as distinct from the benefit of Hally, or used it in any manner that could injure or cause loss directly or indirectly to Hally. I accept the force of Mr Patterson's submission that it is difficult to see what other use the defendant may have had for those documents and that they were unlikely to have been retained for nostalgic purposes. However, breach of the confidentiality provisions in clause 10.3 because of their seriousness required compelling evidence on balance which was not presented to the Court. There was some evidence that a client of Hally unexpectedly put a supply contract out for tender and that documents relating to this client were part of the yield documents but I am not satisfied that this raises more than a mere suspicion that the documentation was put to unlawful use by the defendant.

...

[88] I accept Mr Patterson's submission that the breach of the implied terms of trust and confidence and fidelity and the express first provision of clause 10 as to the safekeeping of confidential information, disqualified the plaintiff from cancelling the contract because at that point he was not ready and willing to perform its terms. It is also arguable that he was not prepared and willing to perform the terms of the restraint at 12 months and that may also have amounted to disentitling conduct.

Categories of documents and behaviour which would amount to breach

[42] Amongst the allegations of breach of contract that have to be proved is that Mr Powell, when accessing confidential information, did so for his own use or the use of Geon/Kiwi. While an allegation remains that he copied confidential information, I find (and I note that now it is conceded) that there is simply insufficient evidence that the information was copied. Indeed a conflict arose during the course of evidence as to the basis upon which Derrick Kamins, Hally's Chief Executive Officer, was able to allege, in the affidavit supporting the application for a search order in the High Court, that Mr Powell had copied confidential information. Once the evidence of the experts was concluded, it was apparent that Mr Kamins had no basis, apart from his own personal belief, for making that statement.

[43] The category of documents held at Mr Powell's home (the search yield) is substantially different from the documents alleged to have been accessed by his pre-resignation computer use and what the plaintiff purports to be Mr Powell's excessive mobile phone use. The reason for this is that the search yield documents are the only evidence of Mr Powell being in possession of Hally's documents following the

termination of employment. On the basis of the evidence heard on an urgent basis by Judge Travis, he formed the view that the circumstances surrounding Mr Powell retaining those documents gave rise to suspicions as to what Mr Powell intended to do with them. Having heard further evidence from Mr Powell on the matter and also from other witnesses, some of whom did not give evidence before Judge Travis, it is feasible on the balance of probabilities that the documents, which originally were legitimately in Mr Powell's possession, were simply not returned to the Hally workplace because Mr Powell forgot about them. That explanation does not excuse Mr Powell from retaining them in breach of his contractual obligations to Hally at the termination of his employment. Nor in making that finding do I intend in any way to undermine the findings of Judge Travis used as the basis for holding that Mr Powell was not entitled to cancel the restraint of trade condition in his employment agreement and immediately take up employment with Kiwi. Their remaining relevance is to a consideration of the pleadings as to damages. However, in the context of the reasoning for the more limited nature of the damages now sought, it is pertinent to note that the fact that documents were uncovered may have retrospectively justified the application for search and discovery orders but, as the Court of Appeal has held, nothing really beyond that. Further and as discussed earlier, it is arguable that all issues and remedies surrounding the yield documents have been considered and disposed of in Judge Travis' judgment of 16 June 2011.

[44] I turn specifically to the pleadings relating to allegations that Mr Powell breached his obligations relating to Hally's confidential information. Such information is defined in the individual employment agreement between Mr Powell and Hally as follows:

10.0 Confidentiality

- 10.1 In this clause, and for the purposes of this Agreement, "confidential information" means any information relating to the Business or financial affairs of the Company which has come to the knowledge of the Business Development Manager or which has been disclosed or might reasonably be understood to have been disclosed to the Company in confidence, other than information that is already public knowledge or which is obvious or trivial.
- 10.2 Without limiting the generality of the foregoing, "confidential information" shall also include:

- any trade or business secrets, customer information, specialist know-how or practices in the industry or in any other industry in which the Company may from time to time engage in business; customer lists, customer requirements, performance reports, or profitability figures or reports;
- information pertaining to any other employee or customer of the company that is protected from disclosure under the Privacy Act 1993.

[45] The obligation on Mr Powell in respect of the confidential information, which he is alleged to have misused, and subsisting not only after termination of employment but during employment, is set out in clause 10.3 of the agreement as follows:

- 10.3 The Business Development Manager shall, during the continuance of his employment, and after its termination (from whatever cause):
- use the Business Development Manager's best endeavours to prevent the disclosure of any confidential information;
 - not disclose any confidential information other than to who has a proper need to know the confidential information, and who has been authorised by of the company to receive the confidential information in question;
 - not use any confidential information to the Business Development Manager's own benefit (whether direct or indirect) as distinct from the benefit of the company;
 - not use or attempt to use any confidential information in any manner than may injure or cause loss, whether directly or indirectly, to the Company; and
 - not turn or attempt to turn the Business Development Manager's personal knowledge of any confidential information to his personal benefit as distinct from the benefit of the Company.

[46] Once all the evidence is considered in light of these contractual provisions, the allegations of breach by Mr Powell cannot be elevated beyond mere suspicion because there is simply no direct evidence before the Court that Mr Powell retained any document or copy of any document which he might have accessed by his computer or mobile phone use during the course of his employment. The evidence relied upon, therefore, is circumstantial, requiring the Court to infer the alleged breaches have occurred. Any belief that there was a real and appreciable risk that prior to his resignation Mr Powell accessed and copied the plaintiff's confidential information for his own use, or that of Geon/Kiwi, cannot have been formed on the basis of the documents discovered in Mr Powell's home or those subsequently disclosed by Geon/Kiwi. Those documents were only uncovered after the search

orders were granted. Further documents created after Mr Powell commenced employment with Geon/Kiwi were also disclosed under the general discovery process in the High Court proceedings but they would not be sufficient to prove breaches of the clauses set out above. Embarking on the High Court proceedings could only have been based on the “computer use” and “mobile phone use”.

Documents accessed – discussion

(a) Tutty documents

[47] These consist of two substantial documents set out in a spreadsheet format. The first is headed “Customer Sales History” and the second is “New Zealand Sale History w Paper Margins”. The documents were created by Nigel Tutty, Hally’s Group Technical Marketing Manager, in two folders on his own computer drive. The evidence recovered from Mr Powell’s computer shows that these documents were accessed from that computer. This was while he was still employed by Hally, but was at a time close to his resignation. All the information contained in the two documents was legitimately available to Mr Powell who could have accessed it from other sources elsewhere in Hally’s computer drives. Obviously Mr Tutty had collated the information into a convenient form for his own use and apparently for the purposes of reporting to senior managers. To access the information from computer drives required a reasonably elaborate, although not difficult, procedure. Nevertheless, one would need to know the information was there to locate it purposely. The documents were not subject to any security lock and therefore could be freely accessed. Mr Tutty claimed that Mr Powell would have been disciplined for accessing the documents had he remained in employment. No basis for this assertion was given. While no security lock was put on the documents, Mr Tutty’s suggestion would imply that any access by an employee in such circumstances would come to the notice of senior management and be actioned. If so, it cannot have been an efficient process, as access to the documents from Mr Powell’s computer was not discovered until well after his resignation.

[48] Mr Powell’s access to these documents, if he was the one who did that, might have amounted to a disciplinary matter if that is what Mr Tutty claims. Mere access

could not be breach of confidence as all of the information was available anyway to Mr Powell. Nevertheless, of all of the documents which Mr Powell did access in the months leading up to his resignation, the access to the Tutty documents, if he was the one who accessed them, is the most troubling. However, there is no evidence that Mr Powell copied the documents or otherwise misused them. The plaintiff confirmed this by its discovery process in the High Court proceedings. It also confirmed by that process that the documents did not come into the possession of Geon or Kiwi. They were documents he would not be able to access after he had ceased employment. Mr Powell in evidence stated that he could not remember accessing these documents. The information is too voluminous to commit to memory so would only be of use if copied. There is insufficient evidence that he did so.

(b) Allegation relating to customer data and information which Mr Powell accessed from his computer for customers for whom he no longer had responsibility.

[49] This information relates to a customer of Hally for whom it is alleged Mr Powell no longer had any responsibility or need to contact. This was Foodstuffs. The allegation was made in the evidence of Mr Kamins and David Welch, Hally's National Sales Manager at the time of Mr Powell's resignation. It was, however, categorically refuted by the evidence of Ms Anne-Maree Truman (formerly Hay) of Foodstuffs. She confirmed Mr Powell's contact with Foodstuffs right up to the time of his resignation. She also confirmed Mr Powell's professionalism, loyalty to Hally and favourable comments about Hally, even after his departure.

[50] The evidence given at the hearing was overwhelming that Mr Powell did continue to have contact with Foodstuffs right up to leaving employment. He had a legitimate reason for doing so.

(c) Allegation that Mr Powell accessed sensitive files relating to Hally's budget and business records

[51] The documents accessed were substantial in number. A lot of this could be explained by Mr Powell cleaning out his computer prior to leaving or simply accessing them during the course of his duties. There is no evidence that he was not

entitled to have access to this information while he was in employment. Indeed the evidence was to the contrary. He would have been required to create or access this information as part of his duties. Some of the information was quite historic and there was debate amongst the witnesses as to its value to a competitor in any event. Mr Kamins and Mr Welch in their High Court affidavits confirm the level of seniority of Mr Powell and the requirements upon him in his position. These statements were to emphasise the urgent need to ascertain his post-employment activities by the search order. However, they have the added consequence of confirming the level of data and information Mr Powell would have been required to create and regularly access. There is no evidence that he copied the information and certainly no evidence that he misused it after employment.

(d) Allegation that Mr Powell attached USB devices to his computer and failed to return or disclose these on termination of employment

[52] The evidence for Hally on this issue is somewhat contradictory. Two USB devices were located at Mr Powell's home when the search order was executed. The information contained on these USB devices was shown to be only personal information and certainly did not consist of what could be regarded as Hally's confidential information. The evidence from the Hally witnesses relating to the USB devices is difficult to accept. The assertion was that employees were not issued with or entitled to use USB devices; yet it is a modern inexpensive method of transporting information and has been in use for several years. Evidence from the previous CEO Mr Howarth was that from an early stage USB devices were issued to and in use by Hally employees. There is an allegation of a missing USB device, but even if such a device existed and is missing, there is no evidence that it contained or had downloaded onto it any confidential information belonging to Hally. There was some evidence presented that more than one USB device could be connected to Mr Powell's laptop computer at the same time but that it would require a special adaptor for this to be done. If the evidence of Hally witnesses is that staff were not issued with USB devices, it is difficult to ascertain how Mr Powell was under a duty to return such devices upon termination of employment as they would not belong to Hally. Finally, the use of USB devices is pleaded to have occurred between 20 September 2010 and 19 November 2010. Most of this period was well before Mr

Powell would have been contemplating leaving employment. I consider the inference that he was downloading confidential information for use in new employment as improbable. The evidence as it stands is inadequate and without further evidence it is not possible to draw any inference as to any downloading of confidential information and therefore any duty to disclose.

(e) Mr Powell's explanations for the access

[53] Mr Powell's work computer was examined some months after Mr Powell left Hally. The information from the computer was analysed and the decision made to seek search orders and discovery via the High Court proceedings. The allegation of Mr Kamins was that those proceedings were embarked upon because there was evidence Mr Powell had downloaded, copied and used information confidential to Hally. That has now been downgraded to a mere belief that Mr Powell had acted in that way. That is because Hally's expert evidence never substantiated the claim of copying and using the information.

[54] Mr Powell was confronted with these allegations some months after his departure. He had endeavoured to re-negotiate the terms of the restraint of trade. When he was unsuccessful, he brought matters to a head by purporting to cancel the restraint, and commenced employment with Geon/Kiwi.

[55] During the course of the hearing before Judge Travis, the concentration was upon the restraint of trade and the yield documents. As matters have progressed from there, the documents subject to closest analysis are the categories of documents found to have been accessed, downloaded, or deleted from Mr Powell's computer during employment with Hally. This computer belonged to Hally and was returned to it upon resignation. The search orders and discovery process did not reveal retention by Mr Powell of any of those categories of documents previously discussed. The total quantity of documents is substantial and those now relied upon by Hally are only a portion of the documents shown as accessed, downloaded or deleted by Mr Powell.

[56] I perceive that Mr Powell, over the years since these proceedings were commenced in 2011, has made a concerted effort to recall what, in each case, may have been the explanation for his use of the computer in the way alleged. It has to be emphasised that such access was confined to the period when he was employed at Hally. Both Mr Kamins and Mr Welch have confirmed that the information contained in the documents was legitimately available for access by Mr Powell and, indeed, he would be expected to make such access in pursuance of his duties as Business Development Manager (New Zealand).

[57] I can accept that, because of the manner by which Mr Powell was confronted with the allegations after the time which had elapsed following termination of his employment, he would have difficulty in retrospectively recalling the reasons for the access if in fact he did, in each case, access them himself. In that respect, there was evidence, not only from Mr Powell but other witnesses, that there were times when an employee's computer might be accessed by a person other than the employee.

[58] The assertions by Mr Kamins and Mr Welch and, for that matter also, Mr Tutty, that, in respect of some of the categories, Mr Powell had no need to access them at the time when he did, have been proved wrong by the evidence. Initial assertions in some cases have also been conceded as being wrong following proper testing of the evidence during the hearing.

[59] Mr Powell gave evidence of his recall as to why he might have accessed these documents during his employment: not an easy task. So far as the Tutty documents are concerned, he was able, following completion of a further discovery process during a lengthy break in the hearing, to recall the nature of his relationship with Mr Tutty while he worked for Hally. He provided and read a supplementary brief in this regard, which he used to explain why he or others may have accessed or downloaded those documents to his computer. That evidence certainly provided another perspective against which to assess the assertions of the Hally witnesses. Those witnesses rely upon innuendo and inference in respect of these documents as building a circumstantial case to assert that Mr Powell embarked on concerted behaviour, up to the time leading to his resignation, to deprive Hally of its confidential information for nefarious purposes.

[60] There is still the prospect that, in some cases of access, it was not Mr Powell himself accessing the documents from his computer, but other employees. However, that would not apply in the majority of instances. It is not possible to tell when it was that instances involving other employees may have occurred. However, that possibility is significant in weighing up the evidence to assess whether Hally has discharged the onus of proof upon it.

[61] Mr Powell's evidence on the allegations against him and as to the circumstances in which these documents were accessed can be summarised as follows:

- a) None of the documents was accessed without authority.
- b) He cannot recall each and every document.
- c) The access would have been done during the course of performing his duties.
- d) The Tutty documents may have been accessed by someone else having access to his computer – in any event, there may have been reasons associated with the performance of his own duties for logically accessing them or their being forwarded to his computer.
- e) The documents may have been opened by virtue of use of a search engine. (Mr Powell and the experts were questioned about this prospect and it was not regarded as the likely explanation).
- f) The information in the Tutty documents was all available to Mr Powell from other company databases.
- g) The Foodstuffs accounts were being worked on by Mr Powell up to his resignation.

- h) In some cases documents were accessed which were part of public records and therefore not within the definition of confidential information.
- i) Over the period of his employment he periodically accessed and deleted documents to keep his computer records clean. There was undisputed evidence that this was in fact a process which employees were encouraged to follow by Hally's IT Manager.
- j) Mr Kamins's, Mr Welch's and Mr Tutty's assertions that it was company policy that IT personnel had to be present when files other than personal files were being deleted, were wrong.
- k) USB device use was common. Mr Kamins's assertions in this regard were contradicted by other Hally witnesses. In any event, the USB connection to Mr Powell's computer was several months prior to his resignation.

The resignation and lead meetings

[62] It is difficult to ascertain exactly what has motivated Hally to pursue Mr Powell in the way it has beyond the enforcement of the restraint of trade condition. This is particularly so once it decided to discontinue the High Court proceedings for lack of evidence. Mr Powell was a longstanding loyal employee and evidence heard from Mr Powell and others during the course of the hearing of the matter, which I have no reason to disbelieve, indicates that he maintained that loyalty to Hally even after he took up employment with Geon/Kiwi. The allegations of Mr Kamins and others extend to allegations against Mr Powell that prior to and on the day of his resignation he breached his obligations to Hally by attending lead meetings. The evidence of Mr Kamins also included the suggestion that Mr Powell, while still in Hally's employment, was under an obligation to disclose the fact that he had received a job offer from Geon/Kiwi and was considering taking up employment with them. That amounts to a somewhat surprising assertion and would appear to be contrary to the clear notice provisions in the employment agreement. If that is being

pleaded as one of the grounds of breach of fidelity or good faith, it cannot succeed. In view of what has transpired in these proceedings, it is not difficult to predict the reaction of senior management at Hally if Mr Powell had notified them in advance of receiving a serious offer to take up a position with Geon/Kiwi.

[63] So far as the attendance at lead meetings was concerned, it was correctly submitted by Mr Powell that he had no obligation to notify Hally prior to the first lead meeting of the potential employment with Geon/Kiwi. His attendance at the meeting after his resignation, while perhaps unwise, was understandable. He could not predict at that early stage as to how Hally would require him to work his notice. He would not know at that stage that the company would require him to go onto gardening leave rather than remaining at work during his notice period. Perhaps it would have been wiser for him to clarify this but it is a stretch, in light of the evidence, to suggest that he attended the meetings for the purpose of gaining information which would be of use to him in his new position at Geon/Kiwi.

Mobile phone use

[64] Regarding the allegation of a spike in the use of Mr Powell's mobile phone, the evidence is completely speculative. Similar considerations apply to the standard of evidence relating to the spike in mobile phone use as apply to the allegations on the accessing of documents through Mr Powell's computer. It is unclear what the Court is required to make of this evidence. The Court appears to be being asked to draw an inference from what is essentially weak circumstantial evidence. The computer use and the spike in the mobile phone use are pleaded as the basis for the belief which Hally formed and in turn led to the High Court proceedings. However, it is, on its own, an inadequate basis to then plead that Mr Powell retained, copied and used the information in breach of his contractual and statutory obligations. Hally's allegation was that the spike was substantial, but on clarification by expert evidence the spike was only a moderate increase in his normal use and may be explained by the fact that Mr Powell had received a new mobile phone and that the increased use occurred after he was trained on how to use it. Whatever the explanation, it is inadequate evidence.

Search yield

[65] It is necessary to deal with the search yield briefly. As indicated earlier, the breach alleged and which Judge Travis has already held to be substantiated related to retention of documents belonging to Hally after the employment had ended. There is no evidence that Mr Powell used these for his own, or Geon/Kiwi purposes and indeed Judge Travis confirms this in his judgment. Nor was there any evidence of an intention to do so. There is some finding as to credibility on Mr Powell's part in Judge Travis' judgment. Mr Patterson put some emphasis on this in his closing submissions but it does not take the assertions as to copying and use much further. However, there was nothing about the way Mr Powell gave evidence at the further hearing before me on this particular part of the case which might affect Mr Powell's credibility.

Breach of confidentiality - principles applying

[66] With the claim as now amended, the pleadings become clearer as to the nature of the allegations made against the defendant on the basis of the evidence which has been heard. However, in view of the totality of evidence now before the Court a cause of action for breach of confidentiality, good faith, (contractual and under statutory duty) and fidelity has not been established. The plaintiff is required to prove the allegations of misuse based on the contractual provisions and legal principles.

[67] The requirements as to proof resting upon Hally in the present case were confirmed in *Premier Events Group Limited v B A Partners Ltd (in liquidation and receivership)*.¹⁵

[68] In that case the Court stated:¹⁶

The question for determination in these causes of action is not simply whether, in the course of employment, Mr Beattie obtained confidential information. ... That alone does not constitute a cause of action and there

¹⁵ *Premier Events Group Limited v B A Partners Ltd (in liquidation and receivership)* [2014] NZEmpC 231.

¹⁶ At [304].

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.

[69] The contractual provisions applying in both the present case and that which applied in the *Premier Events* case simply restate general legal principles applying to all employment agreements so far as the protection of an employer's confidential information is concerned. The foundation case for breach of confidentiality and the need to prove unauthorised or dishonest use is *Coco v A N Clark (Engineers) Ltd*.¹⁷ The three requirements enunciated in that decision are:¹⁸

- a) The information must have the necessary quality of confidence.
- b) It was received in confidential circumstances.
- c) There has been unauthorised use to the detriment of the communicator (of the confidential information).

[70] Other principles, which can be elicited from the reasonably complex authorities on the point, show that there are a number of factors to be taken into consideration such as how high the level of confidentiality of the information was, how senior (therefore fiduciary) the staff member was, how likely the person was to have gained the knowledge from his general knowledge and whether the information would equate to a trade secret.¹⁹ In *Walley v Gallagher Group Ltd*,²⁰ the Court pointed out that the standard of proof was to a high standard of probability; and in that case the allegations and suspicion of misuse of confidential information had not been proved. The case is similar to the present in that respect. In *Ravensdown Corp Ltd v Groves* it was confirmed that information in the nature of trade secrets will be protected even after termination of the employment where there is no express covenant preventing its use.²¹ Mere confidential information will be protected

¹⁷ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (Ch).

¹⁸ At 47.

¹⁹ *Faccenda Chicken v Fowler* [1986] 1 All ER 617 (CA Civ); *Wright v Gasweld* (1991) 22 NSWLR 317 (NSWCA), (1991) 20 IPR 481.

²⁰ *Walley v Gallagher Group Ltd* [1998] 3 ERNZ 1153 (EmpC) at 1173.

²¹ *Ravensdown Corp Ltd v Groves* [1998] 3 ERNZ 947 (EmpC) at 957.

during the employment, but not usually thereafter unless there are express covenants or an employee has during the course of employment, misused confidential information to endeavour to gain a head start after the cessation of employment – giving rise to what is described as a “springboard injunction” disabling the employee from taking advantage of the information wrongly obtained.²²

[71] To establish a cause, Hally has to prove not only that the documents were copied and retained by Mr Powell but that they were then utilised either for his own use after his employment ceased or for the use of Geon/Kiwi. As matters stand, the pleadings are in an odd form, but it is accepted that the amendments were necessary in view of what unfolded in the High Court proceedings, the evidence heard in this Court and the nature of damages now sought.

[72] On consideration of the evidence, it is clear that the plaintiff cannot prove to the required degree that Mr Powell copied the information or used any information for his own or Geon/Kiwi purposes. The speculative nature of the plaintiff’s assertions can be seen from Mr Patterson’s closing submissions on Mr Powell’s actions, which are alleged to amount to breach of the contractual obligations. Mr Patterson referred to these as:

- a) Retaining confidential documents of the plaintiff;
- b) Accessing the plaintiff’s electronic and confidential files prior to resignation.
- c) Sending pricing information to a third party. This relates to information being sent on 4 November 2010, well before Mr Powell’s notice of resignation to a person who was contracted to provide services to Hally. There was some dispute in the evidence as to whether the document forwarded to the contractor contained confidential pricing information or whether that was redacted. It is alleged, in any event, that the forwarding of this information by Mr Powell was in breach of his contractual obligations and in the

²² At 957.

circumstances the Court should infer that it was forwarded on for later use by Mr Powell when he took up his new employment.

- d) Attending two lead meetings when he knew he had accepted employment elsewhere.
- e) Failing to return all of the plaintiff's property at the end of his employment. This relates to an allegation that he did not return his work diary or a work-issued USB device. (Already discussed is the difficulty in this assertion in that it was alleged that Mr Powell was not given work-issued USB devices).
- f) Disclosing the plaintiff's confidential information to Geon. This related to the assertion that Mr Powell breached confidentiality by giving information in the public domain to officers of Geon about the seal applied to labels. It also contains an assertion that the Court should infer that it is more likely than not that Mr Powell also disclosed the plaintiff's confidential and proprietary information to Geon in discussions leading up to his employment offer from Geon, and later in his discussions and email exchanges with managers of Geon/Kiwi.

[73] I have dealt with these assertions earlier. The allegation relating to the information provided to the contractor is something which appears to have been introduced into the evidence somewhat late in the piece, as it is not referred to in any of the particulars pleaded. Nevertheless, I disregard it as evidence of breach by Mr Powell for the following reasons. If he included confidential pricing information rather than redacting it that may or may not be within the category of behaviour for which he could have been disciplined. The passing of the information to the contractor would have been in the course of Mr Powell pursuing his duties for Hally. It occurred a month before he received the offer of employment from Geon and resigned. The inference being proposed that Mr Powell was at that time forwarding information to a third party so that he could later retrieve it once he was in employment with Geon is not probable.

[74] As stated earlier, this case relies upon the Court drawing an inference from Mr Powell's behaviour in the time leading up to his resignation and termination of employment. The Court of Appeal held that the disclosure process confirmed Hally was left without adequate evidence and that was the reason for the discontinuance of the High Court proceedings. All that was uncovered were the so-called "yield documents", which had a part to play in the hearing before Judge Travis. The uncovering of those documents was the outcome of the search order granted by the High Court and as already discussed can have no part in the forming of any belief as pleaded in para 25. Nevertheless, the so-called search yield is pleaded in para 32 of the statement of claim to be evidence of Mr Powell's breach of contractual obligations and statutory duties. Again the plaintiff cannot prove that beyond mere retention, use for non-legitimate purposes occurred as pleaded in para 34 of the statement of claim. Judge Travis has already made that finding. There is a high standard of proof imposed upon the plaintiff to prove breach of the contractual terms or legal requirements relating to confidentiality. Mr Powell, in his own evidence and corroborated by his expert witness, has provided explanations for the access to documents and spike in mobile phone use, which appear consistent and cannot be discounted.

[75] There was some dispute in the evidence and disagreement between counsel as to the effect of Mr Powell's concession about the confidential nature of the search yield documents. While Mr Powell's concession was for the limited purposes of the hearing before Judge Travis, I now perceive that Mr Powell accepts that all the documents he had retained at home were confidential to Hally to varying degrees. He has already suffered a substantial penalty from this retention, as the consequence was the upholding of the restraint of trade against him. As the yield issue was effectively disposed of in Judge Travis' judgment when dealing with the restraint, there is no basis to revisit it.

Breach of implied undertaking

[76] The implied undertaking arose in the course of the unsuccessful application by Hally in both the Authority and the Court for an interim injunction restraining Mr Powell from continuing in employment with Geon/Kiwi. This was to last for the

period leading up to the substantive hearing. On the basis of statements made by Mr Powell and a senior employee of Geon/Kiwi in their evidence before both the Authority and the Court, which Judge Travis decided amounted to an implied undertaking, an interim injunction was declined. Another consideration was that the substantive hearing was set down for urgent hearing.

[77] The undertaking relied upon by Judge Travis is summarised in the pleadings contained in the sixth amended statement of claim. The form accepted by Judge Travis and the limits then applying in Mr Powell's performance of duties with Geon/Kiwi are contained fully in his judgment dated 13 May 2011.²³ The relevant paragraphs are set out as follows:

[67] I have taken the statements on oath in the defendant's affidavit, supported as they are by the affidavit of Mr Phillips, that he will not compete with the plaintiff in the interim as, in effect, an undertaking on the defendant's part. In light of that implied undertaking, and on the totality of the matters I have considered I find that the overall justice favours declining the interim relief in all the circumstances of the case.

[68] If however, the defendant resiles from that implied undertaking, he should so advise the Court within two working days from the date of this decision. This could influence me to find that the overall justice requires interim relief on the same limited basis on which I granted interim relief in the *Grey Advertising case*. The relief I could grant would be to preserve the current situation but would restrain the defendant from persuading or attempting to persuade any present client of the plaintiff to leave the plaintiff and join the defendant. It could go even further and prevent the defendant from communicating in any way with such clients unless they are already existing mutual clients of the plaintiff and Geon and then only strictly for the purposes of existing Geon work.

[69] However, on the basis that my assumption of an undertaking in the defendant's affidavits is correct, the interim relief application in this challenge would be declined. I reserve leave to refer the matter back to the Court if the defendant resiles from that implied undertaking.

[78] The plaintiff pleads the breach of the undertaking in the following way:

36. The defendant breached the Implied Undertaking by competing against the plaintiff and/or assisting others to compete against the plaintiff. Specifically:

²³ *Hally Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 (application for interim injunction).

- 3[6].1 On or about 27 April 2011 the defendant met with Geon's Business Development Manager Deborah Powell to formulate a list of new business targets; and
- 3[6].2 From about April 2011 until about 13 June 2011, the defendant supported other employees of Geon to attempt to win new business opportunities, including that business held by the plaintiff.

Particulars

- a) The other employees of Geon were Deborah Bunn, Steven Blackmore, Guy Phillips, Antony Morris, Mark Naish, Lauren Tulitt, Shane Bennett and Karen Brewster, being employed as members of Geon's sales team.
- b) The defendant supported the other employees with guidance and encouragement by providing details of Hally Label Limited's clients including details of those clients' key personnel, key preferences business practices and business history.
- c) The defendant provided this support to other employees of Geon from the commencement of his employment with Geon and until he was required by law to leave his employment by reason of the decision of the Employment Court dated 13 June 201[1].
- d) The defendant provided this support to attempt to win new business opportunity as those listed in the list provided to him and others by Deborah Bunn on 26 April 2011 with those in the honey, milk, water, produce and beverage sectors including clients such as Foodstuffs, Goodman Fielder, Tegel, Hellers, Wedderburn and Checkpoint.

[79] These allegations were the subject of considerable evidence and pedantic analysis in submissions at the hearing. The particulars contained in the sixth amended statement of claim refer to a certain number of Hally clients alleged to be the subject of Geon/Kiwi attentions. During the hearing the client Simply Squeezed was added to the list as a result of close analysis of email messages that had been uncovered in the discovery process in the High Court.

[80] Mr Patterson submitted that any reduction of the undertaking to direct competition would be meaningless given that the defendant, Mr Powell, was not in direct competition with Hally, whereas Geon/Kiwi, his new employer, was. I agree

that the undertakings have to be given a wider meaning in their context. Nevertheless, the approach to be taken must be to consider the undertaking against the kind of relief Judge Travis would be contemplating if Mr Powell resiled as set out in [68] of the judgment. Hally cannot simply rely on evidence of actions by Geon/Kiwi to prove in some way that Mr Powell was in breach of the undertakings. Geon and Kiwi were in direct competition with Hally. Employees of Geon and Kiwi would be required to develop strategies to increase the business of their employer and it would be understandable that people like Deborah Bunn, the Business Development Manager of Kiwi, were actively engaged in that. What Hally needs to prove, and again to a high degree on the balance of probabilities because the alleged breaches have serious consequences, is that Mr Powell was actively involved.

[81] Mr Powell was open about the basis of his new employment being to replace Guy Phillips, who was being promoted from Sales Manager to General Manager. Mr Powell was to continue his work with existing customers and even new customers, so long as that was not competing with Hally. The assessment as to whether Mr Powell was breaching the undertaking must be a realistic one. Geon/Kiwi was quite justified in competing with Hally. The assessment which needs to be made is whether Mr Powell's involvement in the duties which he took over from Mr Phillips was such as to cause a breach of the undertaking. On the evidence I have heard, I consider this to be unlikely, even though Mr Powell, up to the substantive hearing, would have regarded himself as free of the restraint. Nevertheless he knew that he was still subject to contractual obligations of confidentiality. It could be said that any activity of Geon/Kiwi in which Mr Powell was involved in the adhesive label industry is theoretically competing with Hally. However, there would have to be more than the somewhat nebulous instances relied upon by Hally in the evidence and submissions to justify the allegations contained in the pleaded paragraphs.

[82] Hally says Mr Powell was in breach because he provided information to Geon/Kiwi from knowledge gained while working at Hally regarding one of Hally's clients. The information he provided was almost totally a matter of public record. It is alleged that he was going to meet and did meet with Ms Bunn to discuss a potential list of clients she had prepared. The evidence of Ms Bunn and Mr Philips is that the meeting did not take place, an assertion upon which Mr Patterson

expressed some scepticism in his submissions. Again, the assertions of Hally are speculative and rely upon the Court drawing inferences from facts unproven. There is no evidence from any Hally witness to rebut the claim of Ms Bunn and Mr Phillips that the meeting did not take place.

[83] Mr Patterson in his submissions itemised alleged breaches, some of which went beyond the pleaded breaches. The first assertion was that Mr Powell provided Geon/Kiwi managers with key contact information. That information cannot be regarded as confidential as it was information in the public domain and therefore excluded by the definitions in the employment agreement in any event. The significance of that information in the allegation of breach of the undertaking has been exaggerated.

[84] The second assertion related to whether labels supplied by Hally had a sealer or thermal direct coating applied to them and that a manager of Geon discussed this with Mr Powell. This would again be information in the public domain, or so obvious as to be trivial in terms of the definition of confidential information contained in the employment agreement. Again, its significance has been exaggerated.

[85] The third assertion related to the alleged discussion of business targets with Ms Bunn, and discussion of the list which she sent to Mr Powell. The only evidence on this is a brief comment by Mr Powell to an email sent to him by Ms Bunn. The comment he made is so innocuous as hardly to amount to Mr Powell acting in competition with Hally. The contents of the list were prepared by Ms Bunn as she was entitled to do. If she included clients of Hally, then that was her prerogative. There is no evidence that Mr Powell prepared the list or gave any information to Ms Bunn to include, or to enable her to include, Hally clients on the list. As mentioned there was also the assertion that a meeting took place, and scepticism toward the evidence that it did not take place. That scepticism was not in evidence from Hally witnesses; it was scepticism expressed in the submissions of Mr Patterson as counsel and matters which were put by him to witnesses under cross-examination. The witnesses did not resile from their assertions in this regard. It is the answers given

not the questions posed which is evidence. I have no reason to disbelieve or find unacceptable the evidence which Ms Bunn and Mr Phillips gave.

[86] The next assertion was that Mr Powell provided information to a customer about labels supplied by Hally. These labels apparently would be labels supplied by Hally if Geon/Kiwi was unable to meet the requirements of the particular contract they already had with a customer for supply. Hally's assertions in this regard were also refuted in evidence by the representative of the customer concerned. I have difficulty in ascertaining how this would be an example of Mr Powell competing with Hally, when the contract was already in the hands of Geon/Kiwi and the duties which Mr Powell was performing would have been those which he took over from Mr Phillips.

[87] The assertion that Mr Powell was being copied in to emails relating to tendering for new work with Simply Squeezed, an existing Hally customer, is insufficient evidence that Mr Powell was assisting in this venture. It has to be considered against the clear denials of witnesses who were managers at Geon/Kiwi, whom again I have no reason to disbelieve. Only two emails were copied to Mr Powell. He was on an email list with other employees. In the context of the evidence as a whole on Simply Squeezed the evidence is so weak that I am not prepared to infer from it that Mr Powell was breaching his undertaking.

[88] The same applies to the assertion that Mr Powell was being asked to create new business opportunities. In fact there is evidence in the emails created that Mr Powell indicated how limited his involvement could be in this regard in view of the constraints he was under following the interim injunction and in the period leading up to the substantive hearing before Judge Travis. These comments also cover the next item that Mr Powell was being asked to list potential clients he had in his pipeline with value data and likelihood of getting them. Mr Powell had been open about the nature of the work he was required to do in replacing Mr Phillips. This was also corroborated by Mr Phillips himself in his evidence before both the Authority and the Court. The suggestion being made is that he was not permitted to deal with business development in his new role. To claim that as a category of competition, without further definition or specifics, is unrealistic.

[89] The assertions about Mr Powell being copied in to emails on Tegel, a customer of Hally, can be subject to the same comments made about Simply Squeezed. There is insufficient evidence upon which to infer a serious finding of breach of undertaking.

[90] Overall, even if Geon/Kiwi managers were trying to persuade Mr Powell to participate in client development matters, which might be categorised as competing with Hally, there was no evidence that Mr Powell had so participated. The evidence is quite to the contrary and contemporary documents disclose that Mr Powell was being careful; and that this was accepted by and agreed to by Geon/Kiwi managers.

[91] Regarding the assertion that Mr Powell breached the undertaking by assisting account managers, again the attempt by Hally to elevate this into competitive behaviour is unrealistic. All Mr Powell was agreeing to do was give support to lower-ranking account managers with their attempts at bringing in new business. It is unclear from the evidence whether this was even related to the type of printing business carried on by Hally. Mr Patterson stated in his submissions that Mr Powell working for Geon/Kiwi in areas totally outside the adhesive label industry would not have been objectionable in the context of the restraint of trade. I have doubts that such concession would be valid in view of the rather wide restriction in cl 9.4.1 of the employment agreement. Perhaps what Mr Patterson was meaning was that so long as an assurance was given as to which side of the Geon/Kiwi business Mr Powell was going to work for, his employment with Geon/Kiwi in that way might have been an agreed variation to the restraint.

[92] An attempt has been made under this head of breach of the implied undertaking to gather together, from minute examination of the discovered documents, instances where with some scepticism and considerable conjecture it might be alleged Mr Powell was competing. It was conceded that on their own, the pieces of evidence might not provide proof, but in combination they give rise to a circumstantial case. I do not agree with that assertion and do not accept the claim that Mr Powell breached the undertaking in the period leading up to the substantive hearing, and following and taking up employment with Geon/Kiwi.

[93] The instances which have been seized upon and referred to in the evidence are all minor instances when considered against the somewhat wide-reaching accusations of alleged breach contained in the sixth amended statement of claim. An allegation of breach of an undertaking to the Court is a serious matter. The evidence falls far short of sustaining those pleadings and fails to prove them adequately. They fall short of what Judge Travis clearly contemplated as restrainable behaviour if the undertaking had not been given.

[94] The conclusions which I have made also deal with the submission of Mr Patterson as to half-truth in the context of the undertaking given in concert with the statements of Mr Phillips on behalf of Geon/Kiwi. I do not need to deal with those further.

Conclusions and findings on Hally's claims

[95] It is not possible in this judgment to deal with every intricacy in the plaintiff's claims as to what Mr Powell did both before and following his resignation from employment with Hally. The position presented at the conclusion of all the evidence including the expert evidence, which I have carefully considered and taken into account, can be categorised and summarised as follows:

- a) Mr Powell, during the course of his employment, accessed from his computer a large number of Hally documents easily categorised into degrees of confidentiality to Hally.
- b) Hally has formed suspicions that in the context of Mr Powell's actions up to and following his resignation and commencement of employment with Geon/Kiwi, Mr Powell copied and misused the documents accessed. These suspicions apparently arose in the minds of senior management at Hally despite the fact Mr Powell had for many years, been a loyal, senior employee of the company.

- c) Hally cannot prove that Mr Powell accessed the documents other than during his employment with Hally and for the purposes of carrying out his duties as employee.
- d) In assessing matters on the basis of the balance of probabilities, Mr Powell's explanations for the documents disclosed following an analysis of his computer use prior to resignation, are feasible and indeed in keeping with his obligations as business development manager, as confirmed in affidavits from Mr Kamins and Mr Welch. This also includes the Tutty documents, even though problematic.
- e) The access is not sufficient to prove breach of the confidentiality conditions of the employment agreement or generally, nor the contractual breaches of the good faith and fidelity provisions, nor the statutory obligation, if that is in any event actionable in the way claimed.
- f) The judgment dealing with the first part of the claim relating to breach of restraint of trade makes findings in respect of the yield documents retained; but equally finds that there is insufficient proof that the yield documents were misused. Those findings confirm the high standard of proof imposed on the plaintiff in alleging breach of confidentiality.
- g) In view of the uncovering of access to documents, Hally (marginally) may have believed it needed to take matters further by way of search orders and general discovery but it unreasonably took the matter further in the High Court proceedings. If discovery was the sole motive, which in reality it was not, there was no need to seek general discovery against Geon/Kiwi in the High Court as that was available against the non-parties to the proceedings, by virtue of the procedures of this Court. That goes to the issue of mitigation of damages.

- h) The acceptance of the implied undertakings by Judge Travis was a convenient method of preserving the status quo (and enabling Mr Powell to continue earning a living in keeping with the policy of the law), instead of issuing an injunction restraining Mr Powell from remaining in employment with Geon/Kiwi for the short period before the urgent substantive hearing.
- i) Such a situation was bound to create tensions, particularly in view of Hally's unfounded suspicions. However, the mere assertions to found a claim that Mr Powell breached the implied undertaking are simply inadequate proof that he did so. They also ignore the fact that the senior employees in Geon/Kiwi with whom Mr Powell was working were entitled to have, and indeed I would suggest had, duties and obligations to Geon/Kiwi to expand the business in ways which might deprive or take away business from Hally. That is the context in which the evidence as a whole in that regard is to be considered.
- j) The obligations of fiduciary duty and good faith subsist only as long as Mr Powell's employment with Hally continued. The statutory duty of good faith is the same. The contractual obligations relating to restraint and confidentiality are solely or primarily post-employment obligations. Because of the serious consequences, compelling evidence is required to prove breach of confidentiality; mere suspicion is not enough. In the case of alleged breach of confidentiality (that being defined in the agreement), proof of disclosure or misuse is required and that is not present in this case.

[96] Even though the matters are pleaded in a somewhat difficult way, the claim remains that Mr Powell copied and used the documentation alleged and therefore breached contractual duties of confidentiality and duties of fidelity and good faith. The only way it could prove such claims, in view of the paucity of direct evidence, is by the Court taking the adverse inference from the evidence and on Mr Powell's credibility and integrity. It is not possible, upon the basis of the evidence heard, to draw such an inference. The allegation of breaches of fidelity and good faith can

only relate to Mr Powell's behaviour prior to the eventual termination of his employment. The claims must fail.

[97] The overriding assertion against Mr Powell is that his accessing of documents, telephone use and possession of documents at home, in combination with his activities around the time of his resignation, predominantly attendance at the lead meetings, give rise to a clear inference that once he knew he was leaving Hally, he did everything he could to gather together whatever information was available on Hally's business. Further, the gathering of this information was to use in competition against Hally once he took up employment with Geon/Kiwi. Despite all of its investigations following Mr Powell leaving employment, Hally is unable to prove such copying and use. It is also unable to prove any commercial loss arising from Mr Powell's use of the documents as it alleges he did. As a result of this it now seeks the 'costs as damages' award which is, in effect, the only possible head of damage arising under that part of the pleadings. Hence perhaps the need for the final amendment sought to plead the reasonable belief as founding the initial issuing of the High Court proceedings and the applications which accompanied it.

Costs as damages

[98] Even if I had drawn the inferences sought, the claims must fail on the ground that there is no basis for the costs as damages claim in this case. Therefore, there is no provable loss. I shall deal with that, even though in view of my findings that is not strictly necessary. I am bound to say that the pleaded paragraphs as to relief cause difficulties. I note that the loss pleaded for costs as special damages is alleged in paras 41 and 42 of the sixth amended statement of claim, to have arisen from not only the causes of breach of confidentiality, fidelity and good faith, but also the breach of the implied undertaking. There is a further head of general damages claim, which I perceive relates not only to the alleged breach of undertaking connected to the restraint of trade but also to the earlier occurring and wider allegations which were the subject of the High Court litigation. The causes of action are separated but the remedies attached to them are not particularly clear. Some clarification has been provided in closing submissions.

[99] In any event, the costs as damages claim has no substance in this case. The Court had already received some submissions in respect of this head of damage during an interlocutory hearing. Mr Patterson dealt with the issue somewhat briefly in his closing submissions. However, in view of the earlier hearing, the principles upon which the plaintiff relies have been clearly established. The primary authorities relied upon by the plaintiff arose from an article²⁴ which was used by Heath J in *Peters v Peters*.²⁵

[100] The pleadings specifically relating to this particular part of the claim are contained in the following paragraphs of the sixth amended statement of claim:

The plaintiff, by filing this sixth amended statement of claim, is amending its action against the defendant in which it seeks from the Employment Court:

...

- (d) An order requiring the respondent (sic) to pay special damages being the costs reasonably incurred by it in relation to the series of proceedings issued by it as a result of the respondent's (sic) breaches of contract and/or the respondent's (sic) breach of his statutory duty of good faith.

...

Loss

- 41. The steps taken by the plaintiff in order to investigate and satisfy itself that its proprietary and confidential information was secure, caused it to incur costs.
- 42. As a result of the defendant's actions as pleaded in paragraphs 11 to 36 above, the plaintiff has suffered loss.
- 43. Wherefore the plaintiff claims:
 - A. Special damages in the sum of \$274,374.67 being the costs reasonably incurred by it in relation to the series of legal proceedings issued by it against both the defendant and Geon from 15 December 2010 to 14 February 2013 being:
 - i. Legal fees and disbursements of \$222,318.25; and
 - ii. Computer forensic fees of \$38,964.65; and
 - iii. Fees rendered by the supervising solicitor in the High Court proceedings of \$13,091.77;

but less any sum required to be paid by the defendant pursuant to the Powell Costs Order.

²⁴ Louise Merrett "Costs as Damages" (2009) 125 LQR 468.

²⁵ *Peters v Peters (No 2)* [2013] NZHC 1061.

[101] Mr Patterson in his submissions has referred to authorities dealing with the availability of the remedy of special damages in the Employment Court. In particular he referred to statements of the Court of Appeal in *Binnie v Pacific Health Ltd*²⁶ that legal expenses may be classified as special damages in employment matters. The present case, however, does not cross the blurred margins referred to in the *Binnie* decision between costs incurred when dealing with issues at the time of the employment relationship problem arising and party-to-party costs having as their focus the issuing of proceedings. The ‘costs as damages’ claim in this case falls clearly within the category of litigation costs.

[102] On the basis of the proposition enunciated in Louise Merrett’s article and its adoption in the *Peters* case, Mr Patterson submitted that this is a case falling within the two exceptions to the general rule that costs can only be claimed on a party-to-party basis when the costs of litigation are being considered: the general rule being that the costs of litigation cannot be recovered as damages. These two exceptions were submitted as being:

- (a) Where the proceedings involve a third party;
- (b) Where a separate cause of action is involved.

[103] This submission overlooks that both Ms Merrett and Heath J in *Peters* refer to the second exception as being where a separate *and independent* cause of action is involved.²⁷ That is an important distinction in this case. Also implicit is a requirement that in addition to there being a third party or a separate and independent cause of action involved, there must have been some breach that has occurred upon which the injured party claiming the costs as damages has been put to such costs in the earlier proceedings; and that costs would never have been available in those proceedings.

²⁶ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [17]-[18].
²⁷ Merrett, above n 24 at 476 ; *Peters* at [95].

[104] When dealing with the claim to costs as damages in the *Peters* case, Heath J appeared to accept the article by Ms Merrett as persuasive in the following statement and attached footnote:²⁸

Generally, there are two exceptions to the rule that costs cannot be recovered as damages.²⁹ The first is where costs were incurred in proceedings involving a third party. That is the case here, as Scott and his parents were sued by Angela and the trustees of the Chamberlain Trust. Second, even where the claim is between the same parties, where the claimant is relying on an independent cause of action, costs as damages may also be recovered. That aspect is also present because the substantive proceeding rested on proof of the character of the \$800,000 advance, whereas the third party claim is based on breaches of contractual or tortious duties of care owed by a solicitor to a client.

[105] As a starting point in her article, Ms Merrett considered justification for the rule that litigation costs cannot be claimed as damages. She considered that the only justification having merit was the one based on policy considerations and in this respect she stated:³⁰

It can be seen that the policy justification for the rule has two limbs. First, the rules on the assessment of costs reflect the fact that there are good policy reasons for encouraging parties to exercise restraint which is to the benefit of all those who need to resort to litigation; and secondly, it would undermine the costs rules and, therefore, the policy behind those rules, if the party claiming costs in an assessment could seek to recover any unrecovered costs as damages.

[106] She dismissed other reasons which have been suggested for the rule: first, that assessed costs are equal to damages; and, secondly, *res judicata*; she pointed out that assessment of costs and assessment of damages are different exercises. She also justified the more limited basis for the rule being based in policy by emphasising the fact that two exceptions to the basic rule have developed. These exceptions are as already stated and adopted in *Peters* where costs were incurred in proceedings involving a third party; and secondly, where the other proceedings involved a separate and independent cause of action. In the latter case she noted that the scope is not entirely clear, but that the test should be whether there is any chance of undermining the costs regime.

²⁸ *Peters v Peters*, above n 25, at [95].

²⁹ See the authorities collected in Louise Merrett “Costs as Damages” (2009) 125 LQR and 476-478. (Footnote 50 in *Peters*.)

³⁰ Merrett, above n 24, at 474-475.

[107] Having put forward the theory as to the two exceptions to the basic rule, she goes on to discuss in her article the difficulties that are then associated with actually assessing the quantum of the damages. In this regard she deals with issues of mitigation, causation and remoteness. These issues are neatly summarised in her conclusions which are worth stating in full:³¹

Special rules apply to the recovery of “litigation costs”. Those rules are strict in order to encourage parties to show restraint in litigation, to the benefit of all those who need to resort to the courts. Once a sum is shown to be a “litigation cost” it cannot generally be claimed as damages. Such a claim would undermine the costs regime. But the recovery of costs incurred in proceedings against *third parties* or where the claimant can rely on a *separate cause of action* (and no costs were recoverable in the other proceedings) is allowed because in such cases the costs regime will not be undermined.

The quantum of damages in such exceptional cases will depend on two principles. The first, normal rules of causation, remoteness and mitigation must be satisfied. Secondly, there may be policy reasons to limit such claims. The two exceptions must be considered separately. Where damages are claimed in relation to proceedings against *third parties* in England, any damages will be limited to what could have been recovered on the basis of the standard assessment of costs. Even if the sums claimed would satisfy the normal rules for the assessment of damages, allowing any more costs to be claimed would encourage parties to spend freely on litigation knowing that the costs could be passed on to the third party. However, where damages are claimed on the basis of a *separate cause of action*, damages will be assessed on the normal basis. This exception only applies where the proceedings are abroad, or if in England, are not subject to the normal civil costs regime (as in *Berry*). In such cases, allowing full recovery of damages (or at least recovery on an indemnity basis), does not undermine the policy behind the English costs regime.

[108] These further issues were not considered at any length in *Peters* nor in submissions in the present case where they certainly have relevance. Even if the High Court proceedings in the present case were separate, they could not be regarded as separate and independent. Quite apart from that, when Hally’s actions in respect of the High Court proceedings are analysed, serious issues of mitigation, causation and remoteness arise. I am of the view that to allow the costs which Hally incurred in the High Court proceedings to be claimed as “special damages” would seriously undermine the costs regime. In any event they do not fit one of the basic criteria discussed by Ms Merrett in her article; and that is that to qualify, the separate

³¹ At 490.

proceedings would have been conducted under a regime where costs were not claimable.

[109] The costs regime in this case would be seriously undermined because Hally as the plaintiff in the High Court proceedings would, by the principle if it applied, simply be encouraged to incur costs on a profligate basis assuming that it would be able to recover those costs as damages against Mr Powell in the Employment Court regardless of the outcome in the High Court proceedings. To allow Hally also to levy against Mr Powell the costs incurred in pursuing discovery against Geon/Kiwi in the High Court would also appear seriously to offend against its obligation to mitigate by virtue of the fact that the very same remedies were available to Hally in the Employment Court proceedings; I venture to suggest on a far more economic basis. Finally, on the issue of causation, there seems to be a conceptual difficulty in applying the exceptions; in every case where the exceptions have been applied the parties seeking to recover the costs as damages have been pursued successfully as a defendant in the separate proceedings and suffered substantial costs as a result. In the present proceedings, Hally was the plaintiff in the High Court action. It chose to pursue Mr Powell and Geon/Kiwi. It was unsuccessful and had to abandon the proceedings on a discontinuance and is now seeking to avoid the costs consequence of such actions with a claim for special damages in the present proceedings in the Employment Court.

[110] Policy considerations feature strongly in the application of this principle as Ms Merrett has stated. That would seem to militate against what the plaintiff in this case is trying to achieve. Hally is the plaintiff in both sets of proceedings. As a matter of policy, to allow Hally to seek indemnity from Mr Powell for costs incurred in suing him unsuccessfully in the High Court is wrong in principle.

[111] The exceptions therefore do not apply in the present case for a number of reasons. First, the proceedings do not involve a third party in the same situation as in *Peters* and the cases mentioned by Ms Merrett in her article. Secondly, while of necessity different causes of action were pleaded in the High Court proceeding, that was simply to vest the High Court with jurisdiction in what was effectively the same dispute that exists in this Court. As the Court of Appeal made plain in its decision,

the High Court proceedings were issued primarily to entitle Hally to avail itself of interlocutory remedies not then available in the Employment Court. Thirdly, in respect of the Geon/Kiwi discovery, Mr Patterson submitted that the only way Hally could force Geon to submit to discovery and inspection was by issuing proceedings in the High Court. That is quite wrong;³² and goes to the issue of failure to mitigate. Besides that, Mr Patterson has by this submission revealed one of the true reasons behind the High Court proceedings. It fortifies my view that the High Court proceedings were so closely connected to the present proceedings that it would be proper simply to regard them as an extension of these proceedings, not in reality involving a third party of the kind in *Peters* or those authorities referred to by Ms Merrett. Nor do they involve a separate cause of action, but simply alternative causes of action based on the same facts. In this case, while the causes between the Employment Court and the High Court are different – one in contract and the other tort – that was merely a contrivance to ensure the availability of interlocutory remedies. If the rule were to be construed otherwise it would mean a plaintiff could issue contemporaneous proceedings based on the same matrix of facts, safe in the knowledge that it had a full indemnity for costs incurred in one of the sets of proceedings, even if unsuccessful. That would be totally contrary to the principles discussed.

[112] Therefore, the claim for special damages in this case would have failed. The plaintiff's initial success in claiming costs on the discontinuance has of course been reversed in the Court of Appeal decision. As an aside, there is also some tension arising now from the Court of Appeal decision precluding the plaintiff from claiming costs on the discontinuance and this Court being asked to reinstate such costs to the plaintiff effectively on an indemnity basis by virtue of the special damages claim. The costs regime should not be so readily undermined. There is no need to deal further with that in view of my findings but there are wider policy issues which could not have been excluded from the consideration had it needed to be undertaken.

³² See cl 13, sch 3 of the Employment Relations Act 2000.

Damages for breach of restraint of trade

[113] The claim to loss of the benefit paid to Mr Powell for the restraint of trade relates to the two and a half months Mr Powell was in employment with Geon/Kiwi before the restraint was enforced. The enforcement occurred by way of the injunction issued by Judge Travis in his judgment in June 2011. Mr Patterson submitted that the pro rata adjustment ordered by Judge Travis was inadequate to compensate Hally for the breach, as the value of the restraint was greater at the beginning than in the later months of the period when Mr Powell was not permitted to compete. The submission appears to be only anecdotally based on a belief of Mr Kamins. No expert or corroborative evidence was led on this point.

[114] Related to this issue of damages for breach of the restraint of trade is the alleged breach of the undertaking. No separate damages are claimed for the alleged breach of the undertaking and that matter was not dealt with in closing submissions. The prayer for relief would seem to imply that any damages for the alleged breach of undertaking are included in the claim to special damages or costs as damages. If that is the position, then the issue has been covered in the previous paragraphs of this judgment. It would have to be assumed that as post-employment conduct it would be covered by the assertions of breach of confidence, although it is pleaded in the statement of claim separately from that cause of action. It could be linked to the claim for general damages for reduction of the benefit to the plaintiff of the consideration paid for the restraint of trade. Alternatively, it could be linked to the general damages claim now identified as user damages, which also relates to the restraint.

[115] In addition to the claim for general damages under this head, which in effect is a request to the Court to order Mr Powell to pay back a portion, or all, of the consideration paid to him, there is the user damages claim. In his closing submissions Mr Patterson, in reliance on authorities dealing with restitutionary or restorative damages, stated that the plaintiff seeks such user damages as a punitive measure. The claim is based on the benefit Mr Powell obtained from knowingly retaining the search yield documents and working for Geon/Kiwi during the restraint period. The sum of \$20,000 is sought for the benefit he obtained from the retention

of the yield documents. The sum of \$90,000 is sought for the benefit Mr Powell received while working unlawfully for Geon/Kiwi. This is approximately three times what Mr Powell earned for the period and is not explained except by the earlier submission that such damages are punitive in nature to provide a deterrent for unlawful behaviour. If such damages were now being considered, the figures claimed would have to be regarded as over-inflated and unreasonable.

[116] These claims are in any event undermined by employment law principles where restraints of trade are being considered and injunctive relief is being granted. The underlying reason why restraints of trade against employees are prima facie unlawful is grounded in public policy. It is to ensure that only for good reason, based on the protection of an employer's proprietary interest, will there be a departure from the protection of an employee's right to earn a living. If the restraint is upheld, the Court requires satisfaction that the ambit of the restraint is reasonable. Steps may be taken in upholding the restraint to modify its terms for this purpose. In deciding whether to uphold the restraint, the assessment regarding whether to do so is reasonable or not will include matters such as the period of its application, its geographical parameters, any consideration which the employee may have received for it and other similar factors.³³

[117] All of these principles are well established. They were factors taken into account by Judge Travis in his declining the interim injunction sought.³⁴ This was on the basis that the undertakings, which he considered were implied in the evidence before the Authority, were adequate to protect the position pending the substantive hearing and to ensure Mr Powell indeed had the ability to earn a living. The fact that Hally received the benefit of the undertaking (which has now been held not to have been breached) and the eventual injunction enforcing the restraint, cause a further conceptual difficulty for Hally in now seeking further damages beyond the pro-rata reduction of the consideration payment. One of the bases for an interim injunction and the subsequent granting of the permanent injunction for the balance of the restraint period would have been that damages were shown to be an inadequate

³³ Illegal Contracts Act 1970, s 8; *Grey Advertising (New Zealand Ltd) v Marinkovich* [1999] 2 ERNZ 844 (EmpC) at 857.

³⁴ *Hally Labels Ltd*, above n 23, at [22]-[23].

remedy for Hally. This factor is taken into account in the balancing exercise undertaken by the Court in considering whether injunctive relief should be granted. Damages for breach of confidentiality, fidelity and good faith are notoriously hard to prove, as is indeed evidenced by this case. It is for this reason the Court, notwithstanding the prima facie position, is ready to uphold restraints of trade; in this case to ensure a remedy to the employer to keep the employee totally away from the competing employer's workplace for the time necessary to protect and fortify its interests. Injunctive relief is granted upon the assertion that the plaintiff is unlikely to be adequately protected by damages. Hally, in its claim for damages in these proceedings, is attempting to have it both ways.

[118] The damages now sought in addition to the injunction enforcing the restraint are not so much damages for contractual breach but damages partly in lieu of the injunction and damages of a punitive kind. While it is not impossible to argue for damages in addition to the injunctive relief, in this case there are conceptual difficulties in the way of granting damages in addition, where the injunctive relief has been granted on the basis that damages would not be an adequate remedy and no other remedy is available. Further, Hally has received a financial benefit in the reduction of the contractual consideration.

[119] Hally has not led evidence of any specific loss occasioned by the period when Mr Powell temporarily took up employment with Geon/Kiwi. There is inadequate evidence before the Court to substantiate the claim for general damages. Assessing such damages anyway would be a difficult exercise without evidence, including that relating to mitigating factors such as the benefit Hally received from the undertaking of Mr Powell in the interim period and the permanent injunction enforcing the restraint for the balance of the period. These issues were not dealt with in the evidence and not addressed in submissions.

[120] The total period when Mr Powell was in employment with Geon/Kiwi and subject to the undertaking and conditions set out in Judge Travis' judgment was relatively short. Mr Powell's possession of the yield documents after he had commenced such employment was for a shorter period as they were recovered under the search order. Judge Travis has confirmed that there is no evidence Mr Powell

misused those documents. Further, the issue of the yield documents was finally resolved by Judge Travis in his judgment and it is no longer appropriate to consider them in the context of user damages as now sought. These are all further matters which would need to be taken into account.

[121] Hally received the benefit of the undertaking in lieu of an interim injunction for the short period leading to the substantive hearing. Judge Travis carefully set out the consequences if Mr Powell did not comply or did not wish to comply with the undertaking he had given. Policy factors were adequately factored in by the enabling of Mr Powell to remain earning a living in the interim period. It must also be remembered that he was not at this time in receipt of the consideration Hally had agreed to pay. When the permanent injunction for the balance of the restraint period was issued, Hally received the benefit of a pro-rata reduction in the total contractual consideration payable. It had already been substantially protected following Mr Powell's resignation by being able to require him to stay away from the workplace on gardening leave during the lengthy notice period. Not only did Hally have the protection of the implied undertaking in lieu of an interim injunction, but it then got the benefit of having Mr Powell restrained from working for Geon/Kiwi at all for the balance of the 12 month period. In the event that Hally's claims had not been rejected and the Court was considering the claims for damages, Hally would be regarded as having been adequately protected and compensated already for any breaches relating to the restraint of trade. Certainly an award of further user damages is not appropriate.

Counterclaim and plaintiff's claim to breach of statutory obligation of good faith

[122] The brief particular pleaded as to the breach of the obligations alleged in the counterclaim is that Hally failed to communicate in a timely and constructive manner to resolve issues with regard to the restraint of trade. It is alleged this amounted to breaches of the statutory duty and an implied term of the employment agreement. It would appear to be a reliance upon the duty imposed by s 4(1A)(b) of the Act. This breach is alleged to have occurred after Mr Powell's resignation but

while he was still in employment and working out the period of notice. Paragraph 46 of the counterclaim states:

Had the plaintiff not breached their duty of good faith the issues between the parties could have been resolved at an early stage, thereby avoiding the need for proceedings in either the employment or the civil jurisdiction.

[123] The relief sought is a declaration that the plaintiff breached its obligations of good faith towards Mr Powell. As indicated, damages of \$200,000 arising from the breach are also sought together with costs on an uplifted or indemnity basis.

[124] As it has been held that Hally has failed to prove its claims, it is not strictly necessary to consider its causes of action further. However, Hally also sought a declaration in the sixth amended statement of claim that Mr Powell breached his statutory duty of good faith pursuant to s 4 of the Act. Substantial damages were claimed against Mr Powell as already mentioned. As this cause of action is also raised in the counterclaim it is appropriate to consider both together. Mr Patterson submitted orally in reply on the counterclaim that as damages for a statutory breach are in the form of an action in tort, the Employment Court has no jurisdiction to deal with such a claim. Mr Patterson also pointed out that public law authorities dealing with breach of statutory duty, relied upon by Ms Stewart in her closing submissions, have no place in what is in this case a private law claim. Both of those submissions must apply also to Hally's claim.

[125] Ms Stewart in her closing submissions referred to the Employment Court decision of *Baguley v Coutts Cars* where a full bench of the Employment Court stated that:³⁵

It may be that in an appropriate case, damages can be recovered for a breach of s 4 of the Act.

[126] While the Court of Appeal did not disagree with that statement as to the law at the time, it observed that the good faith obligation under s 4 (as then enacted) was not so much a standalone obligation as a qualifier of the manner in which dealings were to be conducted.³⁶

³⁵ *Baguley v Coutts Cars* [2000] 2 ERNZ 409 (EmpC) at [64].

³⁶ *Coutts Cars v Baguley* [2001] ERNZ 660, [2002] 2 NZLR 533 (CA) at [39].

[127] Statutory amendment followed the *Baguley* decision with the introduction into the Act of substantial modifications to the good faith provisions and the introduction of s 4A which introduced penalties for certain breaches of the duty of good faith, thereby precluding the possibility of damages.

[128] The obligation, of course, only subsists while the employment relationship is in force and that is confirmed in s 4 and was reiterated in *Balfour v Chief Executive, Department of Corrections* where Judge Shaw noted:³⁷

... for good faith as defined in s 4 of the Act to apply, the employment concerned must be current.

The statutory obligations of good faith end when the employment ends.

[129] While damages for breach of the duty may have been in contemplation prior to the amendments, that can no longer be the position. Certainly Ms Stewart's attempts in her submissions to rely by analogy upon public law remedies of damages for breach of statutory duty cannot have application in a private law case such as this.

[130] A breach of statutory duty is a recognised tort in New Zealand. This is confirmed by John Burrows in *The Law of Torts in New Zealand*.³⁸ The text writer notes, however, that the scope has been reduced since 1972 because of the virtual demise of the entitlement to sue for personal injury damages. The Employment Court does not have jurisdiction to hear claims in tort except as related to strikes or lockouts and within the limited scope provided in the Act. The text writer also confirms that if the claimant were in any way able to claim damages for a breach of a statutory duty the claimant needs to be able to establish that the statute in question creates a duty enforceable by private action. Showing this is important and difficult:³⁹

An action in damages does not automatically lie upon the breach of every statute: The question is whether the legislature intended the Act to confer a civil right of action for its breach.

³⁷ *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808 (EmpC) at [30]-[31].

³⁸ John Burrows, "Breach of Statutory Duty" in Stephen Todd, (ed) *The Law of Torts in New Zealand* (6th ed, Brookers NZ, 2013) at 8.1.

³⁹ At 8.2.01, referring to *Atkinson v The Newcastle & Gateshead Waterworks Co* (1876-77) LR 2 Ex D 441 (CA).

[131] This involves ascertaining Parliament's intention as expressed in the particular statute. As the text writer further states:⁴⁰

Relevant to the enquiry are the whole range of circumstances relevant to a question of statutory interpretation, that is the working of the statute, its purpose and scope... the evil it was designed to remedy, the circumstances in which it was passed and the scheme of the Act as a whole.

[132] This view was confirmed by *Gorringe v Calderdale Metropolitan Borough Council* where the House of Lords stated:⁴¹

... the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy.

[133] Burrows goes on to state that there are two further tests to apply in ascertaining the intention of Parliament. The first relates to whether there is a class of persons it applies to. That test is not so relevant in the present case. The second test is "the alternative modes of enforcement" test. This refers to "whether the statute provides expressly for its own enforcement". If it does so by a mode other than a damages action, "this is some evidence that no damages action was intended."⁴²

[134] Applying these principles to the present case, it is clear that claims by both parties to declarations and damages for a separate cause of a breach of statutory duty are untenable. First, even if such a cause were available it would be tortious in nature and therefore outside the jurisdiction of the Employment Court. Secondly, statements made in *Baguley* have now been overtaken by the amendments to s 4 and in particular the introduction into the statute of a specific remedy by way of penalty for breach of good faith. The Act therefore provides expressly for its own enforcement other than by way of a remedy for damages.

[135] Mr Powell also relies upon breach of the duty of good faith as breach of an implied term of his employment agreement. With respect to both causes of action in the counterclaim the period of employment to which the question relates is a very

⁴⁰ At 8.2.02.

⁴¹ *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, 1WLR 1057 at [3] per Steyn LJ.

⁴² Burrows, above n 38, at 8.2.03(2).

short period following Mr Powell's resignation and while he was working out his notice on gardening leave. By virtue of the application of s 4 of the Act, the nature of the alleged breach and the expiry of the agreement, the claim in respect of both causes of action can only relate to that period. The allegation is that Hally breached the obligations of good faith by failing to engage adequately with Mr Powell and his legal advisors in endeavouring to renegotiate the restraint of trade and presumably thereby enable him, within a shorter period, to take up his new employment with Geon/Kiwi. The assertion is that Hally treated them with disdain by periods of delay in answering correspondence. Initially, one would wonder why there was such pressure in any event, in view of the fact that Mr Powell was at the time working out his notice, but it transpired that pressure had been put on him by Geon/Kiwi by the nature of the offer of employment made to him. This required him to be free of the restraint before he could commence the new employment. In any event, Hally had made it clear that it intended to rely upon the restraint but in correspondence with Mr Powell's legal advisers, it always left it open for alternative proposals to be put for negotiation.

[136] The pleading that the issues between the parties could have been resolved at an early stage thereby avoiding the need for proceedings in either the employment or the civil jurisdiction is somewhat speculative in the circumstances. There is no evidence to suggest that if Hally had engaged at an earlier stage with him and his legal advisers that it would have taken a different stance than it did in respect of enforcing the restraint. If what Mr Powell is claiming is that had he known of Hally's attitude earlier he would simply have abandoned any attempt to vary the restraint and complied with it, there is no evidence to support that. Mr Powell was required to work out his notice on gardening leave. Once that expired it was clear that Hally intended to enforce the restraint and that Mr Powell intended to take up employment with Geon/Kiwi.

[137] With the introduction of a penalty remedy into the Act for breach of the duty of good faith such a penalty will only be levied for an egregious breach.⁴³ This would also inform on a damages claim for contractual breach. I do not regard the delay occasioned by Hally and its legal advisers in responding to Mr Powell to be

⁴³ Employment Relations Act 2000, s 4A(a).

such that a prospect of a penalty for breach of the statutory obligation of good faith would be engaged. Similarly I do not regard it as breach of an implied condition of good faith in the employment agreement. In any event Mr Powell in his own evidence under cross-examination virtually conceded that for substantial periods of the delay he personally was not concerned. That is not to say that Hally and its legal advisers are immune from criticism for the way that they dealt with Mr Powell and his legal advisers at that time.

[138] There was some delay on the part of Hally and its legal advisers in responding to correspondence. Any alleged breach of good faith obligations needs to be considered in the context prevailing at the time. In this case Mr Powell's employment with Hally had, for all intents and purposes come to an end even though the employment agreement was still in force. Mr Powell was working out notice on gardening leave. He had indicated that he was not prepared to accept the restraint of trade condition as it stood. He had acquired knowledge of a substantial amount of Hally's intellectual property over his many years of employment. He was intending to take up employment with a competitor. It is understandable that Hally would wish to take time to consider all of the circumstances and consequences before responding to Mr Powell's proposals. The allegations of breach of good faith need to be assessed in that light.

[139] When dealing with the nature of the damages by way of emotional harm which Mr Powell claims to have suffered as a result of the alleged breaches of good faith, Ms Stewart in her submissions referred to actions which are well outside the narrow period of employment to which the cause relates. Even if damages were being considered they could only be nominal, or at best in keeping with the likely level of penalty which might be considered under s 4A.

[140] Of course Mr Powell did not choose to seek a penalty against Hally. By the time he commenced his counterclaim, the time limit for doing so had well expired. The general provisions as to good faith contained in s 4 are also relevant in claims in pursuit of remedies within the confines of Part 9 of the Act. Mr Powell did not pursue any such claims or remedies.

[141] In summary, with regard to the plaintiff Hally's claim to breach of the statutory duty of good faith, I have already found against it on the factual allegations it has used as the basis for that cause of action. Even if the cause of action was tenable no damages would be awarded for the reasons discussed.

[142] For the reasons now stated the counterclaim by Mr Powell also fails.

Conclusion and disposition

[143] In conclusion and summary both the claim by Hally and the counterclaim by Mr Powell do not succeed and are dismissed. While both have fallen short of discharging the onus of proof so far as the evidence is concerned, there are substantial impediments in principle to an award of damages of the kind claimed by each of them.

[144] During the course of this judgment some criticism has been directed at Hally and the actions it has taken in pursuit of Mr Powell. Mr Powell, however, is not immune from criticism. The difficulties associated with the restraint of trade were largely of his own making. The evidence has shown that the nature of the employment agreement he undertook with Geon/Kiwi placed considerable pressure upon him to resolve the period of the restraint within the shortest possible time.

[145] Mr Powell would have been quite happy no doubt to have originally accepted the terms of the employment agreement with Hally as Business Development Manager containing the restraint condition. He would have been in receipt of a good salary and had the security of valuable consideration in the event the restraint was enforced. The restraint would have been in recognition of the substantial quantity and value of Hally's proprietary information Mr Powell had acquired over his many years of employment. The level of his remuneration and the consideration for the restraint itself should have made him aware that the contractual provisions were likely to have been upheld.

[146] Both parties have had partial success in the proceedings which include those coming before Judge Travis and dealt with in the earlier judgment. Accordingly,

costs will be reserved. If no agreement can be reached then memoranda dealing with the issue of costs will need to be filed. Accordingly, Hally will be required to file its memorandum on costs on or before the expiry of 28 days. Mr Powell will have a similar period thereafter to file his memorandum in answer and Hally will have the right of final reply, to be filed within seven days of receipt of Mr Powell's memorandum in answer.

M E Perkins
Judge

Judgment signed at 3.30pm on 16 June 2015