

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 60/08
5078066**

BETWEEN BRADFORD TRUST LIMITED
Applicant

AND PAUL EDWARD ROEBECK
First Respondent

AND DAVID JOHN PAKIETO
Second Respondent

Member of Authority: Leon Robinson

Representatives: Philip Skelton and Emma Powell, Counsel for Applicant
Frank Godinet and John Ropati, Counsel for Respondents

Investigation Meeting: 23 October 2007
24 October 2007
13 December 2007
14 December 2007
21 December 2007

Determination: 26 February 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Bradford Trust Limited claims damages and penalties against its former employees the respondents Mr Paul Edward Roebeck (“Mr Roebeck”) and Mr David John Pakieto (“Mr Pakieto”). It alleges breaches by Mr Roebeck and Mr Pakieto of their contractual duty of fidelity and their statutory duty of good faith.

[2] Mr Roebeck and Mr Pakieto deny the applicant's claims against them and they pursue a counter-claim claiming arrears of wages and allege a breach of confidentiality by the applicant through its agent, contrary to section 148 of the Employment Relations Act 2000 ("the Act").

[3] Despite extensive and repeated attempts including during the investigation meeting, the parties have been unable to settle the differences between them by the use of mediation.

[4] The evidence relating to Interclean's pricing and costing structures is commercially sensitive and the Authority orders that evidence relating to Interclean's pricing and costing structures as given in the Investigation Meeting and as disclosed in the pleadings are prohibited from publication.

The facts

[5] Bradford Trust Limited is the sole trustee of the Industrial Services Trading Trust which trades as Interclean. I refer to the applicant hereafter as "Interclean". Interclean carries on business as a provider of industrial cleaning services to customers throughout New Zealand the pacific rim. Materially I find, it also provides graffiti management and protection services. Interclean was established by Mr Alan Clifford Hill, its managing director, in 1976 ("Mr Hill").

[6] Mr Roebeck and Mr Pakieto say Interclean was never involved in graffiti protection services and its core business was water blasting and suction. It may not have been core business, but it was in the business. That is clear enough from Mr Roebeck's own evidence that he submitted a quote to Fulton Hogan Limited ("Fulton Hogan") for such work on Interclean's behalf although Mr Hill is sceptical of that. I am satisfied and find that Interclean had been involved in coatings work for 25 years and in graffiti services since 2004. I accept this graffiti servicing work comprised roughly about 5% of Interclean's total revenue. This work included some \$800,000 from a recent central joint venture ("CJV"). Mr Roebeck's and Mr Pakieto's position on this critical aspect of matters is rejected.

[7] Mr Roebeck was employed by Interclean as its Sales Manager from July/August 2004 until 28 September 2006. After that time he was engaged to obtain orders from Interclean's customers and provide other services. Nothing turns on the nature of this subsequent engagement. Mr Roebeck invoiced Interclean for these services.

[8] Mr Pakieto was first employed by Interclean in July 2004. From late April or early May 2005 he was employed as its Operations Manager or Co-ordinator until his dismissal on 22 November 2006. He had resigned from the employment on 6 November 2006 but was dismissed for serious misconduct during the resignation notice period.

[9] The Authority accepts that by virtue of the seniority of their positions of employment with Interclean, both Mr Roebeck and Mr Pakieto were intimately acquainted with and had unrestricted access to Interclean's client contact details, pricing information, information relating to current and future tenders, information regarding Transit New Zealand's approval of graffiti protection subcontractors, information regarding Interclean's internal systems and Interclean's strategy and planning information.

[10] While he was employed by Interclean, Mr Roebeck was at the same time involved in another business PC Enviro Filters Limited. I find this involvement was not known or disclosed to Interclean. The business of PC Enviro Filters Limited evolved into the business of another limited liability company - PC Environmental Limited¹ ("Environmental") in April 2005 which was incorporated on 6 April 2005.

[11] Mr Roebeck, Mr Pakieto and one Mr Christopher Laurence Smith ("Mr Smith") were appointed directors of Environmental the day of its incorporation on 6 April 2005. I find this involvement by Mr Roebeck and Mr Pakieto was not known or disclosed to Interclean. At incorporation, Mr Roebeck and Mr Pakieto held one third each of Environmental's shares. These shares were transferred to Mr Smith in February 2006, inexplicably so according to Mr Pakieto.

[12] On 16 March 2006, another limited liability company PC Environmental Coatings Limited² ("Coatings") was incorporated. That same day its director and shareholder one Mr Jason Kane Case ("Mr Case") was appointed. Mr Case is Mr Roebeck's nephew.

¹ Company number 1618648

² Company number 1788224

[13] There is another connected company. On 15 November 2007, a limited liability company PC Environmental Coatings 2007 Limited³ was incorporated. Its sole director and shareholder is one Ms Leanne Maree Roebeck (“Ms Roebeck”). Ms Roebeck is Mr Roebeck’s wife.

Mr Roebeck’s terms of employment

[14] There is dispute about whether Mr Roebeck is bound by a 2006 individual employment agreement and Interclean does not rely on it. There is no dispute however that Mr Roebeck and Interclean entered into an individual written employment agreement signed by both parties on 16 July 2004 (“the Roebeck IEA”). Incorporated into that document is a schedule of employee’s responsibilities as follows:-

You will be responsible for the following tasks for all divisions within the Interclean Group

1. *to market and sell Interclean/Group services;*
8. *to grow the sales and enhance the operations;*
9. *to pursue and win new business opportunities*

[15] Clause 12.3 of the Roebeck IEA is as follows:-

The Employee shall not, for the duration of this contract, set himself/herself up or engage in private business or undertake any other employment which is in direct or indirect competition with the Employer.

Mr Pakieto’s terms of employment

[16] It is not disputed that Mr Pakieto was employed under the terms of an individual employment agreement dated 6 July 2004 (“the Pakieto IEA”). Interclean tells the Authority that the original signed document has gone missing and produces to the Authority an unexecuted duplicate. Clause 3 of that document incorporates responsibilities set out in an annexed schedule materially as follows:-

You are charged to undertake the following

- To grow the sales and enhance the operations*
- To pursue and win new business opportunities*

[17] In addition to the express terms of both employment relationships, the common law implies a duty of fidelity, good faith and honesty. Mr Roebeck and Mr Pakieto

³ Company number 2056232

both owed a duty of fidelity, good faith and honesty to InterClean. That common law duty subsists with the statutory duty of good faith mutually owed by all parties to the other by virtue of section 4 of the Act.

[18] InterClean alleges that Mr Roebeck and Mr Pakieto colluded together while they were its employees to establish and run a business that was in competition with it and in doing so they thereby acted in breach of their duties of fidelity owed to InterClean as their employer.

[19] I am satisfied, and it is not denied, that both Mr Roebeck and Mr Pakieto were directors of PC Environmental Limited as from 6 April 2005 continuing contemporaneously while they were also employees of InterClean.

The State Highway 20 Project

[20] Fulton Hogan is contracted by Transit New Zealand to construct roading known as the State Highway 20 Mount Roskill Extension Project (“the State Highway 20 project”). This head contract was signed in July 2005. As part of that head contract, Fulton Hogan was required to carry out and complete works comprising the preparation and application of graffiti guard to concrete areas. Accordingly, Fulton Hogan sought tenders from various companies in respect of this graffiti work.

[21] The Authority accepts Mr Hill’s evidence that in August 2005 he asked Mr Roebeck to make enquiries with a view to submitting a tender by InterClean for graffiti protection work for the State Highway 20 project. Initially Fulton Hogan was considering the use of permanent graffiti coating. This involves coating with a long life acrylic urethane coating. Once used on a surface, it does not need reapplying if graffiti is subsequently removed.

[22] Mr Hill expected that any tender on InterClean’s behalf would have been in writing but that was apparently not the case. The Authority accepts evidence that Mr Roebeck submitted InterClean’s tender orally to Fulton Hogan in about January 2006 being priced at \$17.00 per sqm and \$1,500.00 per week for maintenance. Mr Hill says InterClean’s whole file re the State Highway 20 project is missing and that an oral tender was completely unsatisfactory and is corroborative of nefarious intent by Mr Roebeck. He says Mr Roebeck was always evasive when he subsequently enquired

about Interclean's tender. Mr Roebeck tells the Authority he never told Mr Hill at any stage that he had submitted a tender on Interclean's behalf. I prefer Mr Hill's evidence.

[23] Unknown to Mr Hill and never disclosed to him by either Mr Roebeck or Mr Pakieto, Environmental also submitted a tender in February 2006 at \$15.30 per sqm for Transit New Zealand approved guardian permanent graffiti with cleaning at \$240 for the first 10 sqm and \$160 thereafter. Its pricing for maintenance was \$4,750 per month. I find that Mr Pakieto more than likely had contact in either January or February 2006 with Mr Edward Hill, Fulton Hogan's site engineer ("Mr Edward Hill") first registering Interclean's interest.

[24] I further find that Mr Pakieto worked closely with Fulton Hogan to ensure that Environmental and its product would meet Transit New Zealand's requirements.

[25] Fulton Hogan eventually obtained approval from Transit New Zealand to use sacrificial coating, a cheaper alternative to permanent coating that requires reapplication after each removal of graffiti. Fulton Hogan approached the tenderers again for quotes for sacrificial coating.

[26] Mr Roebeck submitted a price on behalf of Interclean of \$12.11 per sqm sacrificial coating as confirmed in an email to Mr Edward Hill of 18 January 2006. This quote was made orally.

[27] I find that Mr Pakieto also, significantly, had contact with Mr Edward Hill around the same time, and more significantly, not on Interclean's behalf. This is corroborated by an email from Mr Pakieto of 17 July 2006 to Fulton Hogan but on behalf of Coatings and quoting a rate of \$11.10 per sqm. That price did not include any traffic management or access equipment. I accept that Fulton Hogan did not appreciate any distinction between Environmental and Coatings because the same personnel, Mr Roebeck and Mr Pakieto were involved and their contact details were identical.

[28] As a result of discussions commenced with Coatings from July and continuing through to August 2006, Fulton Hogan accepted Coatings tender at \$11.10 per sqm because it was lower than Interclean's quote, as communicated by Mr Roebeck of

\$12.11 per sq metre. Fulton Hogan in accepting Coating's tender, accepted that it was offering an approved product, was an accepted applicator by Transit New Zealand and that it had the best quote. The Authority accepts there is merit in Mr Hill's stated concern that Environmental and Coatings must have made use of InterClean's documented internal control systems to create their systems in relation to traffic management, and health and safety etc, to have received approval from Fulton Hogan and Transit New Zealand in such a very short time after their respective incorporations.

[29] Following Coatings' successful tender, on 14 August 2006 the Authority finds that Mr Roebeck and Mr Pakieto attended Fulton Hogan's offices and signed a Subcontract Agreement between Fulton Hogan and Coatings. That contract was executed for Coatings by Mr Pakieto and was witnessed by Mr Roebeck and I note that both were neither directors nor shareholders of Coatings. I find that both Mr Roebeck and Mr Pakieto left business cards with Fulton Hogan's Mr Anthony Dickens ("Mr Dickens") curiously stating the entity name only as "PC Environmental" without more and containing the marketing slogan "*for all your coating needs, sacrificial or permanent*". The cards disclosed identical contact details for each of Mr Roebeck and Mr Pakieto as shown in their marketing literature for Environmental. Mr Roebeck's designation was "*Sales and Marketing Mgr*" and Mr Pakieto's "*Project Manager*".

[30] Coatings is not heard to resile from the Subcontract Agreement and quite the contrary, its initial performance of the three year contract with Fulton Hogan is cogent evidence of the ratification of the execution of the contract on its behalf by Mr Pakieto and as witnessed by Mr Roebeck. I find that Mr Roebeck and Mr Pakieto by the very act of executing the Subcontract Agreement, exercised effective management and control of Coatings. There is no evidence of any reference at all to Mr Jason Case Coatings' shareholder and director and quite the contrary confirmation by Mr Pakieto that he did not seek the same. As far as the Authority is concerned, the matter is put beyond doubt when the evidence that Mr Pakieto had signing authority on Coatings' bank account and paid employee wages is taken into account. Significant too is the evidence that both Mr Pakieto and Mr Roebeck were paid by Coatings after their employment with InterClean ended. I reject the assertion that Mr Roebeck and Mr

Pakieto were merely employees of Coatings. Their involvement was far more than that extending to management and control of it as de facto directors.

[31] Mr Hill learned of Mr Roebeck and Mr Pakieto's involvement with Environmental after Mr Roebeck was seen with a new motor vehicle in September 2006. It matters not whether the vehicle was seen in his driveway or whether he drove it to work at Interclean. The late model vehicle it was discovered was registered to be owned by Environmental. The debtor in respect of the said vehicle is disclosed as Coatings. Mr Hill phoned a contact he had at Fulton Hogan and eventually learned of Mr Roebeck's and Mr Pakieto's successful tender (through Coatings) for the State Highway 20 project, though understandably incorrectly by those involved to be through Environmental. Coatings' involvement was not discovered until High Court litigation for injunctive relief had been commenced. Interclean also learned of two other projects by Coatings, an Upper Harbour duplication bridge at Greenhithe for Fletcher Construction ("the Greenhithe Bridge project") and the Hewlett Road Flyover in Mt Maunganui, Tauranga ("the Hewlett Road project").

The Greenhithe Bridge project

[32] On 20 January 2006, Mr Pakieto on behalf of Environmental and while he was employed by Interclean, sent a facsimile to Mr Andrew Drummond at Fletcher Construction Limited ("Mr Drummond") providing information about a graffiti guard product that Environmental would use for the Greenhithe Bridge project if it secured that work following the calling for quotations.

[33] On 10 February 2006 Mr Drummond wrote to Mr Pakieto at "PC Environmental" in a document noted as "Subcontract Invitation to Tender" inviting Environmental to submit a tender for the project.

[34] On 16 February 2006, Mr Pakieto submitted by facsimile a tender on Environmental's behalf to Fletcher Construction's Engineering Division in respect of the Greenhithe Bridge project. The tender specified:-

Scope

(1) *To prepare surfaces and apply Transit approved Guardian Sacrificial Anti Graffiti Coating to an approximate area of 1020 sqm as described in the*

aforementioned contract. Coatings to be prepared, applied and manufactured as per the manufacturers recommendations.

(2) Maintenance, graffiti removal and reapplication of sacrificial coating to affected areas until formal handover of the bridge structure to Fletchers clients.

Pricing

(1) We submit a price of \$11.00/sqm to apply the sacrificial coating for the approximate area of 1020sqm as indicated in the contract.

(2) We submit a price for graffiti removal of \$250.00 when called out to do the first 10sqm of coated area and a price of \$180.00 for every sqm of coated area after the first 10sqm. We submit a price of \$11.00/sqm to reapply the sacrificial coating.

Project Management

Should this tender be accepted the Project Manager will be:

David Pakieto Mb: 021 336 722 david.pakieto@xtra.co.nz

[35] Mr Pakieto submitted this tender on Environmental's behalf. He and Mr Roebeck were directors of it. The tender is not denied by Environmental, Mr Pakieto or Mr Roebeck. The facsimile cover sheet attaching the tender noted Mr Pakieto's designation as:-

*David Pakieto
Sales and Marketing
PC Environmental Ltd
Coatings Division*

[36] Environmental was awarded this subcontract for the Greenhithe Bridge project to supply and apply anti-graffiti coating as evidenced by a letter dated 23 February 2006 from Fletcher Construction's Project Manager Mr Mark Evans to Mr Pakieto. A contract was signed between Coatings and Fletchers on 23 February 2006 and the work was completed from March 2006 to July 2006. The initial value of the work under this subcontract was \$11,220 but subcontract variation orders meant the work undertaken eventually totalled \$35,807.13. This completed work was invoiced by Coatings.

The Hewlett Road project

[37] Mr Pakieto received an email at his personal email address from Smithbridge Limited's Project Manager Mr Nic Hume on 6 April 2006. The email materially stated:-

David

We are seeking quotations to supply and apply an anti graffiti coating to the Hewletts Rd flyover in Tauranga. There is approximately 6000m2 of concrete surface to paint which is the band between ground level and 2.7m above ground level. The majority of this is on precast concrete retaining wall panels with the remaining being on 16 concrete columns which are 1600mm diameter and have vertical fluting.

...

The work will need to be completed by mid May. Traffic management is all ready in place for this project so this does not need to be allowed for. If you require to have a closer look over the job or require more information feel free to contact me.

Nic Hume

[38] Mr Pakieto responded by email on Sunday 9 April 2006 thanking Mr Hume for the opportunity to quote. They continued to correspond between 26 April 2006 and 4 May 2006. Mr Pakieto emailed Mr Hume on Friday 5 May at 2.26pm submitting a quote of \$177,132.26 to apply Altex Devthane 379 light grey permanent graffiti coating to the specified area. This email was copied to Mr Roebeck at *s.roebeck@woosh.co.nz*. That same day at 5.24pm Mr Chris Hunt of Smithbridge Limited confirmed the order. Smithbridge Limited and PC Environmental Coating(sic) Limited signed a Sub-Contract Agreement on 12 May 2006. Mr Pakieto signed this document for Coatings.

[39] The work under the Sub-Contract Agreement ran from 8 May 2006 until 31 May 2006. The amount Coatings invoiced Smithbridge Limited was \$177,132.26.

The merits

[40] These issues arise for determination:-

- (i) did Mr Roebeck and Mr Pakieto breach their contractual duty of fidelity and/or statutory duty of good faith; &
- (ii) if so what loss has Interclean suffered as a result of that breach, and what other remedies should the Authority grant to resolve the problem?

Breach

[41] The boundaries of the common law duty of fidelity are a matter to be decided on the facts of each case. As employees with positions of responsibility, I regard the duty on both Mr Roebeck and Mr Pakieto to be elevated.

The State Highway 20 project

[42] In respect of the State Highway 20 project, I find that both Mr Roebeck and Mr Pakieto as directors of Environmental acted in breach of their duty of fidelity, good faith and honesty owed to Interclean their employer, because they pursued their own personal interests before their employer's. They exercised the management and control of Environmental as its directors. Their actions on Environmental's behalf were ratified and certainly Environmental is not heard to say otherwise. Their duty was to serve Interclean faithfully and competing with their employer Interclean through their tender on both Environmental's and later Coatings' behalf was not faithful service to their employer.

[43] Critically, I find that Mr Roebeck first submitted Interclean's quote and then Mr Pakieto submitted Coating's eventually successful quote. The chronology is significant. I regard it an irresistible inference that Coating's subsequent quote was made with knowledge of that made by Mr Roebeck as Interclean's. Accordingly and significantly, I find Mr Roebeck and Mr Pakieto acted to undercut their employer's tender for this work. I find that they deliberately underbid their employer's tender price to secure the project for their own benefit.

[44] Neither was the work they actually did competing with Interclean, having successfully tendered, faithful service to Interclean. The work/wage bargain between Mr Roebeck, Mr Pakieto and Interclean required Mr Roebeck and Mr Pakieto to devote all their efforts in their employer's best interests. Competing with their employer through their activities as agents of Environmental and Coatings did not further Interclean's interests in any way. Interclean did not pay them competitive salaries for them to compete with and harm it.

[45] Mr Roebeck and Mr Pakieto further conducted themselves dishonestly because they did not at any time disclose their activities and involvement with Environmental either generally or particularly in relation to their tenders through their involvement with Environmental and Coatings. Nor did they disclose their subsequent tender on Coating's behalf or their successful bid through Coatings. As I have said earlier, I find that both Mr Roebeck and Mr Pakieto exercised effective management and control of Coatings whatever the true nature of their connection was and by inference I find it more likely than not that they stood to benefit indirectly from Coatings'

activities personally even though they were not officers of that company. Mr Pakieto confirmed he did not ask Mr Case for authority to execute the State Highway 20 project on Coatings behalf.

[46] I do not consider it relevant to ascertain whether their various activities through Environmental and Coatings re the State Highway 20 project were carried out during work hours. It is enough in my view that they pursued those activities for their own personal benefit at the expense of their employer's irrespective of the time of day they acted. They were in any case salaried employees not waged workers paid for work during prescribed business hours.

[47] In Mr Roebeck's case in respect of his activities in relation to Environmental, Coatings and the State Highway 20 project, I find that he acted in breach of the employment agreement signed on 16 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[48] In Mr Pakieto's case in respect of his activities in relation to Environmental, Coatings and the State Highway 20 project, I find that he acted in breach of the employment agreement signed on 6 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[49] I consider it more likely than not that Mr Roebeck and Mr Pakieto as directors of Environmental and as effective management and control of Coatings, acted in concert colluding together in breach of their obligations to InterClean. I agree that it is inconceivable that Mr Roebeck did not know and was not kept informed of the tenders that Mr Pakieto was placing on Environmental's and Coatings' behalf. Indeed Mr Pakieto is not heard to disavow any knowledge of the same. I conclude that with respect to the State Highway 20 project, both Mr Roebeck and Mr Pakieto, through their activities and as officers or agents of both Environmental and Coatings, acted in breach of their common law duty of fidelity, good faith and honesty that they owed to InterClean. I find such breaches by Mr Roebeck and Mr Pakieto blatant and deliberate.

The Greenhithe Bridge project

[50] In respect of the Greenhithe project, I find that both Mr Roebeck and Mr Pakieto as directors of Environmental acted in breach of their duty of fidelity, good faith and honesty owed to InterClean their employer, because they pursued their own personal interests before their employer's. They exercised the management and control of Environmental as its directors. Their duty was to serve InterClean faithfully and competing with their employer through their tender on Environmental's behalf was not faithful service to their employer. Neither was the work they actually did competing with InterClean having successfully tendered. I have no doubt whatsoever that Mr Roebeck and Mr Pakieto could have and should have secured this business for their employer. On the evidence gathered, I infer that they made a calculated and deliberate decision not to further their employer's interests in this regard, but rather, decided they would divert the opportunity for their own personal benefit initially through Environmental but ultimately through Coatings which invoiced for the project.

[51] As I have said with respect to the State Highway 20 project, so too I say in respect of the Greenhithe Bridge project – that the work/wage bargain between Mr Roebeck, Mr Pakieto and InterClean required Mr Roebeck and Mr Pakieto to devote all their efforts in their employer's best interests. Competing with their employer through their activities as agents of Environmental and Coatings did not further InterClean's interests in any way. InterClean did not pay them competitive salaries for them to compete with and harm it.

[52] I find again that in respect of the Greenhithe Bridge project, both Mr Roebeck and Mr Pakieto further conducted themselves dishonestly because they did not at any time disclose their activities and involvement with Environmental either generally or particularly in relation to the tender made by Environmental and the invoicing by Coatings. They were both variously involved in the submission of quotes, supervising projects and even applying graffiti product.

[53] Again in relation to this project, I find that both Mr Roebeck and Mr Pakieto exercised effective management and control of Coatings and by inference I find it more likely than not that they stood to benefit indirectly from Coatings activities personally even though they were not officers of that company.

[54] I do not consider it relevant to ascertain whether their various activities through Environmental and Coatings re the Greenhithe Bridge project were carried out during work hours. It is enough in my view that they pursued those activities for their own personal benefit at the expense of their employer's irrespective of the time of day they acted. They were in any case salaried employees not waged workers paid for work during prescribed business hours.

[55] In Mr Roebeck's case in respect of his activities in relation to Environmental, Coatings and the Greenhithe Bridge project, I find that he acted in breach of the employment agreement signed on 16 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[56] In Mr Pakieto's case in respect of his activities in relation to Environmental, Coatings and the Greenhithe Bridge project project, I find that he acted in breach of the employment agreement signed on 6 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[57] Again I find that Mr Roebeck and Mr Pakieto as directors of Environmental and as effective management and control of Coatings, acted in concert colluding together in breach of their obligations to Interclean. I agree that it is inconceivable that Mr Roebeck did not know and was not kept informed of the tenders that Mr Pakieto was placing on Environmental's and Coatings' behalf. Mr Roebeck is not heard to deny this and I conclude that with respect to the Greenhithe Bridge project, both Mr Roebeck and Mr Pakieto, through their activities and as officers or agents of both Environmental and Coatings, acted in breach of their common law duty of fidelity, good faith and honesty that they owed to Interclean. Again, I find such breaches by Mr Roebeck and Mr Pakieto blatant and deliberate.

The Hewlett Road project

[58] In respect of the Hewlett Road project, I find that both Mr Roebeck and Mr Pakieto as agents of Coatings, acted in breach of their duty of fidelity, good faith and honesty owed to Interclean their employer, because they pursued their own personal

interests before their employer's. Their duty was to serve InterClean faithfully and competing with their employer through their tender on Coating's behalf in respect of this project was not faithful service to their employer. Neither was the work they actually did competing with InterClean having successfully tendered. I have no doubt whatsoever that Mr Roebeck and Mr Pakieto could have and should have secured this business too for their employer and it is irrelevant whether Smithbridge Limited was not an existing client of InterClean as Mr Roebeck protests. I infer that they made a calculated and deliberate decision not to further their employer's interests in this regard, but rather, decided they would divert the opportunity for their own personal benefit as agents of Coatings.

[59] The work/wage bargain between Mr Roebeck, Mr Pakieto and InterClean required Mr Roebeck and Mr Pakieto to devote all their efforts in their employer's best interests. Competing with their employer through their activities as agents of Coatings in respect of this project did not further InterClean's interests in any way. InterClean did not pay them competitive salaries for them to compete with and harm it.

[60] I conclude again that both Mr Roebeck and Mr Pakieto conducted themselves dishonestly because they did not at any time disclose their activities and involvement with Coatings either generally or particularly in relation to the tender and the invoicing by Coatings re this project. They were both variously involved in the submission of quotes, supervising projects and even applying graffiti product. Again, in respect of this project too, I regard it undisputed and significant that they acted as agents of Coatings.

[61] It matters not when they performed these activities either. It is enough in my view that they pursued those activities for their own personal benefit at the expense of their employer's irrespective of the time of day they acted.

[62] In Mr Roebeck's case in respect of his activities in relation to Coatings and the Hewlett Road project, I find that he acted in breach of the employment agreement signed on 16 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[63] In Mr Pakieto's case in respect of his activities in relation to Coatings and the Hewlett Road project, I find that he acted in breach of the employment agreement signed on 6 July 2004 and clause 12.3 thereof that he would not for duration of that contract, set himself up or engage in private business or undertake any other employment in direct or indirect competition with his employer.

[64] Once again I find that Mr Roebeck and Mr Pakieto as effective management and control of Coatings and as agents of it, acted in concert colluding together in breach of their obligations to InterClean. I agree that it is inconceivable that Mr Roebeck did not know and was not kept informed of the tenders that Mr Pakieto was placing on Coatings' behalf. Mr Roebeck is not heard to deny this. I conclude that with respect to the Hewlett Road project, both Mr Roebeck and Mr Pakieto, through their activities and as agents of Coatings, acted in breach of their common law duty of fidelity, good faith and honesty that they owed to InterClean. Again, I find such breaches by Mr Roebeck and Mr Pakieto blatant and deliberate.

The resolution

[65] Having found the above breaches by Mr Roebeck and Mr Pakieto, I now turn to the resolution of the Problem.

[66] I accept that general damages may be awarded for a breach of the statutory duty of good faith. Section 162 of the Act permits the Authority to make any order that a District Court or High Court may make in relation to contracts.

[67] I agree with the submission that the Authority must determine what award of damages will put InterClean back into the position it would have been had Mr Roebeck and Mr Pakieto not breached their contractual employment obligations. The award of damages is compensatory in nature, not punitive. A party is not entitled to recover more than what it has lost. The crucial exercise is to assess what is the true loss suffered.

[68] I am satisfied that InterClean has suffered loss occasioned by Mr Roebeck's and Mr Pakieto's various breaches outlined above. Having found that Mr Roebeck and Mr Pakieto undercut their employer's bid to secure the State Highway 20 work in their

own interest, I state unequivocally that conduct was outrageous, contumelious and completely unacceptable.

[69] It is right and proper that Interclean be compensated. I consider it appropriate to award damages on the basis of restoring Interclean back to the position it was in had it not been for the breaches by Mr Roebeck and Mr Pakieto. Mr Roebeck and Mr Pakieto should have acted to secure the three business contracts in question for Interclean's benefit and not their own. I accept absolutely that if Mr Roebeck and Mr Pakieto had carried out their duties faithfully as they were contractually bound to do, they would have secured the three business contracts for Interclean. It is on that basis I award Interclean damages.

Recovery of half of Mr Roebeck's and Mr Pakieto's salary from 1 January 2006

[70] I am not persuaded that Interclean should recover half of Mr Roebeck's and Mr Pakieto's salary for the period from 1 January 2006. I am not persuaded that Interclean suffered loss in the sense that their performance, as it was known to Interclean, was defective. There is no evidence of any actual dissatisfaction for their known efforts and indeed, by way of example, Mr Roebeck was re-engaged. That is cogent evidence that his performance was satisfactory. As well having regard to the orders which follow, it would seem to me to be "double dipping" to make such an award. Accordingly, I decline to resolve the problem by such an order.

[71] Mr Hill gives evidence of loss and in particular, Interclean's pricing and costing structures. Mr Hill's evidence is wholly confirmed by Interclean's General Manager Mr Anil Singh ("Mr Singh") previously Interclean's financial controller.

Loss in respect of the Greenhithe Bridge project

[72] Interclean claims damages of \$12,000.00 on this project. Mr Hill outlines to the Authority in particular detail the methodology involved in job costing comprising preparation, material, and application costs leading to the ultimate profit margin.

[73] Mr Roebeck responds generally that the profit margin claimed is too high because costs have been understated. Specifically he says the margin is more like \$1.75. But he agrees that one man can prepare 30 sq metres per hour.

[74] I accept the weight of evidence and lament Mr Roebeck's and Mr Pakieto's lack of preparation and assistance on this particular aspect of matters. I accept Interclean's calculation of costs and the resulting margin as \$4.35 per sq metre.

[75] The total surface area prepared and coated with Transit New Zealand approved sacrificial coating is apparent from the actual invoices rendered by Coatings. The total is 2,830 sq metres. Applying a profit margin of \$4.35 per sq metre yields a total profit of \$12,310 excluding GST. Mr Hill says this is conservative. I accept it. I am satisfied that there is no reason why this job could not have been secured by Mr Roebeck and Mr Pakieto for Interclean, they having ultimately successfully tendered for it in the own interest. It was not secured for Interclean as a direct result of breach by Mr Roebeck and Mr Pakieto.

[76] I order Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services Trading Trust and trading as Interclean, the sum of \$12,000.00 as damages in respect of the Greenhithe Bridge project.

Loss in respect of the Hewlett Road project

[77] Interclean claims damages of \$73,911 on this project. Mr Hill outlines to the Authority in particular detail the methodology involved in job costing comprising product cost of \$38,000, labour cost of \$26,400, access equipment \$12,000, and other plant \$8,000, yielding the ultimate project profit of \$73,911.

[78] Mr Roebeck says "we pay \$32 per litre for product". He says labour cost is \$40.00 per hour together with the supervisor's cost yielding a total labour cost of \$48,000. He also says there are mobilisation costs in transporting labour to Mt Maunganui as well as accommodation. He says this adds a cost of \$100 per man for seven days for four weeks. Mr Hill says Interclean has its own local labour. Mr Roebeck also says there is ACC and administration costs for this labour. But he agrees with Mr Hill's other equipment cost.

[79] The Authority prefers Mr Hill's evidence as confirmed by Mr Singh and having been notified to the respondents in advance and in the absence of verifiable and credible challenge by them. The Authority also accepts Mr Hill's rebuttal evidence. I

am satisfied that there is no reason why this job could not have been secured by Mr Roebeck and Mr Pakieto for Interclean, they having ultimately successfully tendered for it in the own interest. It was not secured for Interclean as a result of breach by Mr Roebeck and Mr Pakieto. I round an award of damages to \$75,000.00.

[80] I order Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services Trading Trust and trading as Interclean, the sum of \$75,000.00 as damages in respect of the Hewlett Road project.

Loss in respect of the State Highway 20 project

[81] Mr Roebeck and Mr Pakieto say that Interclean would not have secured the State Highway 20 project in any event. My immediate response to that is that because of their conduct we will never know. They suggest that Interclean did not have a good reputation in the marketplace and would not have secured such a contract. Ms Andrea Williamson a traffic manager from Fletcher Construction Limited, gives evidence to the Authority of problems with Interclean at the CJV. When she was asked if Fletcher's would use Interclean again, she stated her personal opinion was "with trepidation". She explained there were a few problems, for example workers not showing up and Interclean not having a full commitment to the project.

[82] Interclean rebuts these allegations. Mr Hill says that if Mr Pakieto had submitted a quote at \$11.10 per sq metre on Interclean's behalf rather than Coatings, Interclean would have secured the contract. He says this with absolute certainty citing his extensive industry experience but also pointing to Mr Dickens' affidavit evidence that this project was awarded simply on the basis of price. He also informs the Authority that Interclean was already doing work for Fulton Hogan and refers the Authority to various invoices evidencing the same.

[83] I accept Mr Hill's evidence on both these points. Mr Dickens' evidence is absolute and unqualified in this regard. Accordingly I accept that if a tender had been made on Interclean's behalf at the price Mr Pakieto tendered on Coatings behalf, Interclean would have been successful. It is for this reason, I adopt an all or nothing approach in respect of damages and reject a discounting approach as inappropriate.

[84] Interclean claims damages of \$205,740 on this project. Mr Hill outlines to the Authority in particular detail the methodology involved in job costing comprising preparation, material, and application costs leading to the ultimate profit margin. He gives evidence of profit per sq metre of \$4.45. I accept this evidence as earlier stated in relation to the Greenhithe Bridge project and reject Mr Roebeck's rebuttal for the same stated reasons.

[85] Mr Hill says he estimates the total surface area of this job as 35,000 sq metres. The Authority has been assisted by Mr Dickens of Fulton Hogan. There is no objection to Mr Dicken's information to the Authority. He informs the Authority Fulton Hogan made an allowance for the application of 27,721.7 sq metres graffiti protection.

[86] I accept the weight of evidence and say again that I lament Mr Roebeck's and Mr Pakieto's lack of preparation and assistance on this particular aspect of matters. They offered nothing by way of challenging evidence in the form of documentation even from their own activities in response to Mr Hill's notified evidence. That said, I now quantify loss.

[87] A total 27,721.7 sq metres under the contract at a profit margin of \$4.45 would yield total profit of \$123,361.56. This I regard as the loss to Interclean because I am satisfied that there is no reason why this job could not have been secured by Mr Roebeck and Mr Pakieto for Interclean, they having successfully tendered for it in their own interest and the Authority having concluded that they undercut their employer's bid. It was not secured for Interclean as a direct result of breach by Mr Roebeck and Mr Pakieto. I round the award of damages to \$120,000.00.

[88] I am not persuaded that Interclean would have generated \$50,000 profit over the three year contract in respect of the removal and recoating of graffiti. I decline to award such damages. Instead I substitute \$16,500 which I understand from Mr Dickens' assistance is the allowance made by Fulton Hogan for the removal of graffiti once it was applied, by taggers.

[89] **I order Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services**

Trading Trust and trading as Interclean, the sum of \$136,500.00 as damages in respect of the State Highway 20 project.

Breach of the statutory duty of good faith

[90] On 11 October 2006 following the discovery of Mr Roebeck's and Mr Pakieto's involvement with Environmental, Mr Singh informed Mr Pakieto that Interclean was concerned about how he was using his company vehicle during working hours and his involvement with Environmental. I find that Mr Pakieto told Mr Singh that he was only an investor in Environmental and he had confirmed with his solicitor that his involvement was not a conflict of interest.

[91] Later that day Mr Roebeck approached Mr Singh about Mr Singh's earlier conversation with Mr Pakieto. Mr Roebeck told Mr Singh there was no need to worry about Environmental as it was not in competition with Interclean. He said Environmental sold environmentally friendly products and services.

[92] On 12 October 2006 Mr Roebeck handed Mr Singh an Environmental brochure. He told Mr Singh the brochure confirmed that Environmental was not in competition with Interclean. Mr Singh then showed the brochure to Mr Hill.

[93] On 6 November 2006 Mr Pakieto gave notice to Interclean that his last day of employment with Interclean would be Friday 1 December 2006.

[94] Mr Singh and Mr Hill met with Mr Pakieto the following day on 7 November 2006. They handed Mr Pakieto a letter formally outlining Interclean's concerns about his involvement with Environmental and Environmental's tender for graffiti protection services on the State Highway 20 project. When he read the letter Mr Pakieto said he had no knowledge of a tender by Environmental re the State Highway 20 project. He has sworn an affidavit deposing that he said Environmental "does not have anything to do with allegations laid out in the letter". He said again that he was only an investor in Environmental and that he had received legal advice that he was not in breach of his obligations to Interclean. Mr Pakieto was stood down from his duties while Interclean investigated.

[95] A further meeting was scheduled for 10 November 2006 but was rescheduled to 15 November 2006. That meeting did not proceed because Mr Pakieto's solicitor advised Mr Pakieto had nothing further to add, amongst other reasons.

[96] Interclean's counsel wrote by letter of 15 November 2006 to Mr Pakieto's solicitor seeking answers to particular questions. Mr Pakieto did not answer the questions at any stage.

[97] Mr Pakieto was obliged to act towards his employer in good faith and to be active, communicative and responsive. He failed to meet this obligation in failing to answer the questions Interclean had put to him. He was dishonest with his employer on multiple occasions. He was dishonest in respect of his involvement making tenders in all three of the projects the subject of this investigation. I find that he was dishonest and failed to disclose his full knowledge when he was confronted by Mr Singh on 11 October 2006. I do not accept that he knew nothing of Interclean's tender for the State Highway 20 project as he told Mr Singh on 27 October 2006. I find that he was further dishonest when he met with Mr Hill and Mr Singh on 7 November 2006 disavowing any knowledge of Environmental's tender for the State Highway 20 project. He never disclosed at any time his involvement in the Greenhithe Bridge project or the Hewlett Road project. He has sworn an affidavit deposing that he said Environmental "does not have anything to do with allegations laid out in the letter". I find that to be wholly untrue and Mr Pakieto knew it to be so. There is evidence he had significant correspondence with Mr Edward Hill of Fulton Hogan in relation to Environmental's initial tender on the State Highway 20 project. I also reject Mr Pakieto's evidence that he secured the Greenhithe Bridge project work for Environmental as part of a "cold call". I find it more likely than not that Mr Roebeck passed on Mr Drummond's contact details to Mr Pakieto for Mr Pakieto to then follow up. He initially gave evidence he had no involvement with Coatings until after November 2006. That was untrue and he knew it to be so. He was later less equivocal.

[98] Mr Roebeck was obliged to market and sell Interclean's services "for all divisions". Through his various activities as found by the Authority, he was actively engaged in private business or other employment in direct competition with his employer. Those activities were directly contrary to the express terms of his

employment. They were also breaches of the statutory duty of good faith he owed to InterClean. I find he was dishonest when he spoke to Mr Singh on 11 October 2006 and he did not disclose his actual involvement with Environmental or any other of his activities to date. I accept that when he resigned his employment, he assured Mr Hill he was not going to work for a competitor of InterClean. That was dishonest and I infer Mr Roebeck knew it was. I also accept Mr Roebeck was also dishonest in relation to InterClean's State Highway 20 bid and Mr Hill's requests of him for information. I accept that he was evasive. His involvement in the undercutting of InterClean's tender was blatant and deliberate. He never disclosed at any time his involvement in the Greenhithe Bridge project or the Hewlett Road project.

[99] I have no hesitation whatsoever in finding that both Mr Roebeck and Mr Pakieto failed to act in good faith towards their employer InterClean. Neither of them disclosed their various interests and particular activities. They did not seek consent from Mr Hill at any stage. Through their various activities, they were deceptive, dishonest and underhanded. I agree with the submission that it is difficult to imagine a more serious breach of fidelity than deliberately undermining a tender price submitted by an employee's employer in order to secure a contract for the employee's own personal gain.

[100] Such conduct is not to be condoned and I intend to soundly denounce it by imposing penalties. These penalties are not compensatory towards InterClean but rather, directed at underscoring the objectives of the legislation by punitive sanction. There is considerable public utility in doing so in this instance so as to proscribe such conduct as wholly undesirable and additionally as a deterrent so as to discourage others from contemplating and/or undertaking similar behaviour.

[101] I am satisfied that the claim for penalties is raised within the prescribed time in terms of when each of the various breaches of the statutory duty of good faith first came to InterClean's attention. I adopt a totality approach taking into account all the particular and improper conduct by Mr Roebeck and Mr Pakieto as established by the Authority. For such egregious dishonest and disloyal conduct, I award penalties of \$5,000.00 against both of Mr Roebeck and Mr Pakieto. I do not understand InterClean to make multiple claims for penalties.

[102] **I order Paul Edward Roebeck to pay the sum of \$5,000.00 as a penalty in respect of his breach of the statutory duty of good faith payable to the Authority to be paid into the Crown Bank account.**

[103] **I order David John Pakieto to pay the sum of \$5,000.00 as a penalty in respect of his breach of the statutory duty of good faith payable to the Authority to be paid into the Crown Bank account.**

Other matters

[104] Having heard from the witnesses, I record here that I did not find Mr Roebeck or Mr Pakieto to be reliable witnesses. Their evidence was notable for what they did not say as much as what they did say.

[105] Their prepared evidence was far from satisfactory. Their briefs are very brief indeed. They say nothing of what has now been established as to their actual conduct and as is clear by documentation. As a result I permitted extensive questioning of them. Their evidence was particularly and spectacularly deficient in terms of responding to Interclean's claims for damages. I record that I had to invite and implore Mr Roebeck and Mr Pakieto to respond to these matters. I record there was objection to my intervention in this regard, but I made it clear that I would not be making the orders for damages sought without their full input on the matter. I also record that I suggested to the respondents their lack of evidence in this regard could be perceived as indicating a "head in the sand approach", or at worst, as discourteous of the Authority.

[106] When the parties were asked what particular sources of enquiry the Authority should make the respondents did not make any suggestions.

[107] The respondents did not comply with the Authority's direction made on 14 September 2007 that they provide to the Authority within 14 days all tender documents in relation to the Greenhithe Bridge project.

Counterproblem

[108] I decline to make any orders in respect of the counter-problem raised by Mr Roebeck and Mr Pakieto. There is no penalty prescribed in the Act in respect of alleged breaches of section 148. I make no findings or orders.

Costs

[109] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Skelton is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Godinet is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not exercise my discretion outside that timeframe in the absence of leave.

Leon Robinson
Member of Employment Relations Authority

SUMMARY OF THE AUTHORITY'S ORDERS

- (A) The Authority orders Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services Trading Trust and trading as Interclean, the sum of \$12,000.00 as damages in respect of the Greenhithe Bridge project.**
- (B) The Authority orders Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services Trading Trust and trading as Interclean, the sum of \$75,000.00 as damages in respect of the Hewlett Road project.**
- (C) The Authority orders Paul Edward Roebeck and David John Pakieto jointly and severally to pay to Bradford Trust Limited as sole trustee of the Industrial Services Trading Trust and trading as Interclean, the sum of \$136,500.00 as damages in respect of the State Highway 20 project.**
- (D) The Authority orders Paul Edward Roebeck to pay the sum of \$5,000.00 as a penalty in respect of his breach of the statutory duty of good faith payable to the Authority to be paid into the Crown Bank account.**
- (E) The Authority orders David John Pakieto to pay the sum of \$5,000.00 as a penalty in respect of his breach of the statutory duty of good faith payable to the Authority to be paid into the Crown Bank account.**