This determination includes an order prohibiting publication of the name of a person

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 94
5388486

	BETWEEN	NOVA ENERGY LIMITED Applicant
	AND	MICHAEL MITCHELL First Respondent
	AND	NATIONAL ENERGY LIMITED Second Respondent
	AND	ALAN MITCHELL Third Respondent
Member of Authority:	Robin Arthur	
Representatives:	Tony Stevens and Rob Cahn, Counsel for the Applicant Paul Wicks, Counsel for the Respondents	
Investigation meeting:	25, 26, 27 and 30 September and 1 and 2 October 2013	
Submissions:	18 October 2013 from the Applicant, 5 November 2013 from the Respondents and 12 November 2013 from the Applicant	
Determination:	18 March 2014	

DETERMINATION OF THE AUTHORITY (No. 5)

A. **Restraint of trade provisions in an agreement made between Michael Mitchell (Mr Mitchell) and Nova Energy Limited (Nova) prior to the end of his employment were not valid or enforceable.**

B. **Mr Mitchell is liable to pay damages to Nova for losses arising from his breaches of his obligations not to take and use its confidential information.**

C. Mr Mitchell is liable to pay further damages to Nova for losses it incurred in taking steps to mitigate the effect of his breaches.

D. The Authority may have jurisdiction regarding breaches of fiduciary duties by an employee, in certain circumstances, but Mr Mitchell owed no fiduciary duties to Nova as an employee.

E. Mr Mitchell is liable for penalties under s134(1) and s4 of the Employment Relations Act 2000 (the Act) for breaching terms of his employment agreement and the statutory duty of good faith.

F. The Authority has jurisdiction to determine a claim of unjust enrichment but Nova made no payment to Mr Mitchell whereby he was unjustly enriched.

G. National Energy Limited is liable for a penalty under s134(2) of the Act for abetting Mr Mitchell's breach of his employment agreement.

H. Alan Mitchell is not liable for a penalty under s134(2) of the Act.

Employment relationship problem

[1] The application to the Authority made by Nova Energy Limited (Nova) relied on obligations Michael Mitchell (Mr Mitchell) had during his nine-year employment relationship with Nova (and a predecessor commercial entity, Auckland Gas Limited).

[2] Those obligations endured after his employment ended on 12 January 2012. Some were contractual and common law duties about the use of a former employer's confidential information while others were said by Nova to arise out of restraint of trade provisions included in an exit agreement made with Mr Mitchell in late December 2011.

[3] This determination has addressed three broad issues arising from the claims made by Nova based on those obligations.

[4] Firstly, the Authority has considered whether restraint of trade provisions included in an 'exit agreement', made shortly before Michael Mitchell's employment ended, were valid and enforceable.

[5] Secondly, the Authority has considered what liabilities the three respondents – Michael Mitchell, the company he set up named National Energy Limited (NEL), and his father Alan Mitchell (who worked as a sales rep for NEL) – have as a result of Mr Mitchell taking and using confidential information about Nova customers and pricing. (In this determination Alan Mitchell is referred by his whole name and any references to "Mr Mitchell" mean Michael Mitchell.)

[6] Thirdly, the Authority has determined whether it has jurisdiction in respect of some of the causes of action pleaded and categories of remedy sought by Nova.

[7] By arrangement with the parties, the value or amount of whatever remedies are determined as available to Nova is to be investigated and determined separately at a later date, if that matter cannot be resolved directly by the parties.

[8] Nova has concurrent proceedings against some or all of the respondents on foot in the High Court. I have not read the pleadings in that action but was, in preparing this determination, aware through advice from the parties' counsel and their closing submissions to the Authority that conclusions on some jurisdictional issues reached in this determination may, in turn, affect the scope of claims Nova continued to pursue in the High Court.

Orders prohibiting publication of certain information

[9] The Authority has issued four earlier determinations in this matter, largely about limits on access to confidential business information in the pleadings, witness statements and documents lodged by the parties.[1] Although I have considered how orders prohibiting publication of some of that information might be adjusted, for the

[1] [2012] NZERA Auckland 429; [2013] NZERA Auckland 180; [2013] NZERA Auckland 226; [2013] NZERA Auckland 420.

time being those orders remain in place. To properly protect that business information the Authority file is sealed and may not be accessed by any other person without prior application to the Authority (and about which the parties' representatives would be consulted before any access was granted). The content of the Authority's determinations remains what is on the public record about the facts of the matter and the related business information.

[10] During the Authority's investigation meeting one further order prohibiting publication of the name of a person was made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). He is referred to as Mr B in this determination (a letter not related to his name).

[11] Mr B was the Nova manager who dealt with NEL over its inquiries, tender processes and customer contract matters from early February 2012. Mr B had worked under Mr Mitchell at Nova, had contact with him after Mr Mitchell left, and resigned on 9 August 2012 during an internal employment inquiry by Nova managers about his conduct and contact with Mr Mitchell on business matters. I considered it would be unfair that Mr B's real name become a matter of public record because the Authority would have to reach some conclusions about his conduct in order to determine certain issues in this matter but he was not asked to give evidence in the Authority investigation or given the opportunity, during it, to respond to allegations Nova made about him and his conduct. Accordingly, and with the agreement of both parties, I ordered his name not be published.

The Authority's investigation

[12] As permitted by section 174 of the Act this determination has not recorded all of the extensive evidence received – comprising many documents and sworn written and oral evidence heard and examined during the six-day investigation meeting – or summarised the 160 pages of very detailed and extensive closing submissions made by the parties. Rather it has stated relevant findings of fact and law and expressed conclusions on the issues requiring determination at this stage.

[13] In addition to reviewing the contents of nine volumes of background documents and the parties' submissions on the factual and legal issues, preparation of this determination included considering a Statement of Admitted Facts lodged by the

Respondents on 24 October 2012 and the sworn or affirmed written and oral evidence given by:

- Mr Mitchell;
- Alan Mitchell;
- Nova's Chief Executive Officer Babu Bahirathan;
- Nova's General Manager of Sales and Marketing Terry Barstead;
- Nova's Human Resources Manager Jenny Munro;
- Nova's Commercial and Industrial Sales Manager Stephen Troughton;
- Energy market consultant Toby Stevenson (as an expert witness).

Mr Mitchell's terms of employment

[14] Mr Mitchell's service with Nova, through a predecessor company, began in 2003. Nova is part of a larger corporate group, Todd Corporation, whose subsidiaries include a large producer of gas (Todd Energy) and its 'downstream' Nova business selling gas and electricity to commercial and residential customers nationwide.

[15] Mr Mitchell's job title was sometimes referred to Auckland Manager and sometimes as Commercial and Residential Manager. He worked in Nova's Auckland office and had various supervisory and reporting responsibilities for a team of employees working in sales and administrative roles.

[16] An employment agreement he signed in February 2005 provided the terms relevant in the present matter, including the following about confidential information:

> *You will have access to personal information concerning clients, customers, other employees and other types of Confidential Information during your employment. Any breach of confidentiality is serious misconduct.*
>
> *Confidential Information includes personal information and any trade secret, technical, financial or any type of information which if made known outside Todd Energy could place Todd Energy at a disadvantage.*
>
> *If you have access to, or are aware of any Confidential Information, you agree not to use Confidential Information for your own or any third parties' advantage or disclose Confidential Information to any external party without specific prior written approval from Todd Energy.*
>
> *In addition, you agree to take every precaution to safeguard Confidential Information, which includes taking appropriate action in dealing with directors, officers, agents and employees to ensure that the confidential and proprietary nature is maintained.*

[17] The terms also included a clause on return of company property that stated (in part):

> *Where your employment terminates, for whatever reason, you will, on your final day of employment, deliver up to Todd Energy any company property, including, but not limited to: …*
> *1. …*
> *2. …*
> *3. Files, documents or records (including copies) created or obtained by you during your employment.*

[18] A redundancy clause provided that (with my emphasis):

> *Redundancy occurs where your **position** is, or will be, terminated due to:*
> *1. A change in the size, **structure**, responsibilities or requirements of some or all of Todd Energy's operations or functions; or*
> *2. A change in the skills or attributes required of employees so that Todd Energy needs to reduce employee numbers or change some positions to those requiring different skills or attributes*
>
> *Where your **position** is redundant, Todd Energy will endeavour to find you a suitable alternative position within your employing entity or another entity within Todd Energy.*
>
> *In the event your position is made redundant you will be entitled to one month's notice and redundancy compensation as specified in your personal terms of employment.*

[19] In Mr Mitchell's case his personal terms of employment, set out in a separate schedule of his employment agreement, provided a redundancy compensation formula of six weeks remuneration for the first year of service and two weeks for each subsequent year of service.

[20] That separate schedule expressly stated no restraint of trade applied to him. However on 21 December 2011 he signed an 'exit agreement' with the following provision:

> *In recognition of your status as a long-serving senior manager of the business, you agree that you will not, without our prior written consent:*
>
> *a. For the period of six months after the Termination Date [12 January 2012] be directly or indirectly engaged, interested or concerned whether on your own account or as a shareholder, principal, director, executive officer, joint venture, employee, partner, agent, representative, consultant, contractor, lender of money, guarantor or in any other capacity, in a business or activity in New Zealand which is, or is likely to be in competition with any business activity carried out by Nova Gas Limited, Bay of Plenty Energy Limited, The Auckland Gas Company Limited or The Wellington Gas Company Limited (together "the Downstream Energy Companies") as at the Termination Date*

> *b. For the period of six months after the Termination Date, either by or on behalf of or for the benefit of yourself or any other person, firm or company directly or indirectly induce or solicit the custom of any person, firm or company which is or was at the time during the period of two years prior to the Termination Date, a customer or supplier of the Downstream Energy Companies and with whom you have had contact within the period of twelve months prior to the Termination Date. …*

[21] The exit agreement also included a statement confirming Mr Mitchell's confidentiality obligations and his understanding that Nova would seek full redress for any commercial damage if the obligations were breached. It added nothing to Nova's rights or remedies regarding its business information.

Admissions

[22] The facts admitted by the Respondents, as supplemented by various concessions Mr Mitchell made in his oral evidence during the Authority investigation meeting and in summary form, were:

(i) Shortly before his employment ended (and before he signed the 21 December 2011 exit agreement) Mr Mitchell made electronic copies, on a USB 'stick', of Nova confidential customer and pricing information; and

(ii) Mr Mitchell kept that information when his employment with Nova ended on 12 January 2012; and

(iii) The information taken was effectively a "*kit book*" of what was needed to set up a brokerage; and

(iv) NEL began trading as an energy broker offering services to gas customers from 7 February 2012; and

(v) Mr Mitchell was employed as NEL's general manager and had responsibility for NEL's operations; and

(vi) Mr Mitchell did not personally sign any external NEL documentation or include his personal signature on any correspondence with Nova until 18 July 2012; and

(vii) Mr Mitchell used Nova's confidential information to identify certain Nova customers (particularly those paying high margins, without a recent contract or near the end of their present contract) in order to prepare lists of contact details of potential clients for NEL sales representatives (including Alan Mitchell) to approach and offer gas brokerage services; and

(viii) NEL and Alan Mitchell denied they knew the information provided by Mr Mitchell was unlawfully obtained confidential information; and

(ix) As a result of the use of the confidential information NEL got authorities from certain Nova customers to request gas supply information from Nova that was used in Request for Price (RFP) documents to retail gas suppliers (including Nova itself); and

(x) As a result of the use of the confidential information NEL was able to broker and send out new supply contracts to a number of Nova customers; and

(xi) NEL used the information to suggest pricing to Nova for some customers which was favourable to the customers and not based on a 'price match'; and

(xii) Mr Mitchell used the information to calculate prices for some customers which he gave to Mr B for use at Nova; and

(xiii) Mr Mitchell did not disclose to Mr B that he had Nova's confidential information or used it in material he submitted to Nova.

Issues for investigation

[23] Mr Mitchell's admissions about his breach of his duty of fidelity near the end of his employment (by taking or keeping business information) and his breaches of his confidentiality obligations after the end of his employment (by use of that information in the business he established and ran through NEL and the actions of sales representatives he employed, including Alan Mitchell) enabled the Authority to focus on particular issues for resolution.

[24] Mr Mitchell accepted he was liable for penalties under s134(1) of the Act for breaches of his employment agreement but denied there was any valid or reasonable restraint of trade on his activities.

[25] NEL and Alan Mitchell both submitted they lacked the requisite knowledge necessary to find they aided and abetted Mr Mitchell's breaches of his obligations of confidentiality to Nova and, consequently, they were not liable for penalties under s134(2) of the Act.

[26] The essence of Mr Mitchell's case was that he might be liable for penalties but he should not have to pay damages to Nova for its loss of revenue as a result of his use of its confidential information. He gave two reasons – firstly, that it was Mr B's

actions in his dealings with NEL and Mr Mitchell that were the real cause of those losses and, secondly, that Nova's actions after 9 June 2012 to minimise or avoid those losses were either not reasonable or were not all that it could and should have reasonably done in the circumstances.

[27] To resolve those arguments and Nova's claim for remedies I considered the following issues:

I. THE RESTRAINT OF TRADE

(i) Was the restraint of trade invalid because no sufficient or adequate consideration was given for it; and

(ii) Was the restraint of trade unreasonable because it merely stopped competition and was more than what was necessary to protect Nova's legitimate proprietary interest in confidential information; and

(iii) Was the restraint invalid because Nova used its unequal bargaining position to get Mr Mitchell to agree to it; and

II. LIABILITY FOR DAMAGES

(iv) Did any intervening actions of Mr B, acting on Nova's behalf, reduce or remove Mr Mitchell's liability for Nova's losses (being reduced supply prices paid by 81 customers and profits lost from 7 customers who moved to other retailers); and

(v) Was Mr Mitchell excused from liability for Nova's losses because the company did not take all reasonable steps to mitigate its loss (particularly by not seeking an injunction and by not using particular clauses in customer agreements to avoid changes); and

(vi) Were losses incurred by Nova as a result of its "*counter-campaign*" (being reduced margins in its supply agreements with 246 customers) too remote and not reasonably foreseeable for Mr Mitchell to be fixed with liability; and

III. JURISDICTION AND REMEDIES

(vii) Did the Authority have jurisdiction to consider a claim of a breach of a fiduciary duty by Mr Mitchell to Nova; and

(viii) If so, did such a fiduciary duty exist; and

(ix) Was Mr Mitchell liable for a penalty for admitted breaches of his employment agreement; and

(x) What remedies were available for Mr Mitchell's admitted breach of good faith (prior to the end of his employment); and

(xi) Did the Authority have jurisdiction to consider a claim of unjust enrichment; and

(xii) If so, was Mr Mitchell unjustly enriched by the payments made to him under the 21 December 2011 exit agreement; and

(xiii) Did NEL know enough about what Mr Mitchell had done to be liable for a penalty for aiding and abetting his breaches of his Nova employment agreement?

(xiv) Did Alan Mitchell know enough to be liable for a penalty for aiding and abetting Mr Mitchell in breaching his Nova employment agreement?

I. THE RESTRAINT OF TRADE

[28] Nova believed Mr Mitchell was subject from his last day of employment on 12 January 2012 until 12 July 2012 to a valid and enforceable restraint of trade that he agreed to in their 21 December 2011 exit agreement. Nova claimed his activities, personally and through NEL, breached the terms of that restraint. Those terms prohibited him from competing with Nova's business and activities and from any direct or indirect inducing or soliciting of custom from any person or firm that was a Nova customer and with whom he had contact in the year prior to 12 January 2012.

[29] Mr Mitchell asserted the restraint was not valid or enforceable because there was no adequate consideration provided to him by Nova for it, because it was more restrictive than necessary to protect Nova's confidential information (and was therefore unreasonable), and because Nova used its unequal bargaining position to make him agree to it.

[30] Because of the conclusions I have reached on those arguments I have not needed to make a determination on his alternative argument that his brokerage activity was complementary to rather than in competition with Nova's business activity. If required to I would not have accepted his argument.

(i) Was adequate consideration given for the restraint?

[31] For the following reasons I have found the restraint was not valid because no sufficient or adequate consideration was given for it at the time that it was entered into.

[32] The restraint of trade provisions, as part of the exit agreement, were sought by Nova while Mr Mitchell's employment by it was still on foot and consequently were a variation to his terms of employment. His employment agreement prior to that included a specific provision that he was *not* subject to a restraint of trade (as was expressly stated in a schedule headed 'Your Personal Terms of Employment' included in his 2005 agreement).

[33] As a variation to existing terms of employment, fresh consideration was required for the new restraint term to be valid and enforceable.[2]

[34] Nova submitted consideration was given because it agreed to Mr Mitchell's request that his employment end on the basis of paying him for bonds held under a Todd Group executive scheme that were not due until 2014 along with a "lump sum" calculated using the redundancy compensation formula in his employment agreement. The bond payment amounted to $324,429 and the lump sum was $77,946. Nova said these payments were made in settlement or compromise of its position that Mr Mitchell was neither redundant nor entitled to the bond payment at that time. That alleged compromise of its position was said to amount to consideration moving from Nova to Mr Mitchell. (In legal terms the alleged compromise could be said to be the detriment provided by Nova as its consideration for the benefit it gained from promise (of restraint) made by Mr Mitchell in the exit agreement.)[3]

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[2] *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58 at [17].
[3] *Fuel Espresso*, above, at [18].

[35] However Mr Mitchell submitted he did not receive sufficient consideration for the restraint because he got nothing other than what he was already entitled to. His position was redundant and, under the terms of his employment agreement and the Todd bond scheme, he was therefore due to be paid the amounts he got anyway. On that basis, he said there was no promise of any additional value or no compromise made by Nova to him in return for the restraint.

[36] To resolve that issue the Authority had to determine whether Mr Mitchell's position, in fact, was or was not made redundant and, in turn, whether that triggered an entitlement to the payments made to him under the Todd bond scheme.

[37] His employment agreement provided a redundancy compensation formula of six weeks remuneration for the first year of service and two weeks for each subsequent year of service. It included the following definition and terms on redundancy:

> *Redundancy occurs where your position is, or will be, terminated due to:*
> *1. A change in the size, structure, responsibilities or requirements of some or all of Todd Energy's operations or functions; or*
> *2. A change in the skills or attributes required of employees so that Todd Energy needs to reduce employee numbers or change some positions to those requiring different skills or attributes*
>
> *Where your position is redundant, Todd Energy will endeavour to find you a suitable alternative position within your employing entity or another entity within Todd Energy.*
>
> *In the event your position is made redundant you will be entitled to one month's notice and redundancy compensation as specified in your personal terms of employment.*

[38] On the evidence I have found the position held by Mr Mitchell was terminated through the 'Project Tahi" restructuring of its 'Downstream Energy Division' carried out by the Todd Group of companies in the latter part of 2011.

[39] Nova said the position was not terminated and pointed to its correspondence to Mr Mitchell during the restructuring project. On 1 November 2011 he was told the restructuring proposal would "*amend*" his position as Commercial and Residential Manager to a "*substantially similar position of Manager Commercial Sales*". As a result of feedback from him – including his view that the position offered was significantly different and that the terms of the redundancy provisions now applied to

him – he was told on 28 November 2011 that his position title would be amended to "*National Sales Manager –Retail*" but again, Nova said, that new role remained substantially similar to his then-current role. He was to report to the Manager Sales & Marketing, a role to be held by Mr Barstead.

[40] I accept and prefer Mr Mitchell's evidence about the nature of the proposed change to his position. The duties expected of that proposed new role were focussed on running a sales division and removed significant operational management responsibilities for the Auckland office. The anticipated duties changed the status of the role by having him report to an intervening manager rather than directly to the Nova chief executive and reduced his involvement with and reporting to the board or senior executive team. The result was, as I considered Ms Munro properly acknowledged in answering questions at the Authority investigation meeting, that the position previously held by Mr Mitchell was disestablished by the restructuring proposal.

[41] Although the position was not needed, that was not to say that Mr Mitchell himself was no longer needed or wanted. Mr Bahirathan's evidence was to the effect that, at the time, he saw Mr Mitchell's personal skills and business experience as valuable and very much wanted him to keep working for Nova. However the definition of redundancy in Mr Mitchell's employment agreement referred only to the position. There was no provision for what is often described as a 'technical redundancy', where the employee will not be entitled to redundancy compensation if offered a substantially similar position in the business. The issue of substantial similarity could, nevertheless, have applied if the change to his position was really only one of title but I have found there was more to it than that. Accordingly Mr Mitchell's circumstances were caught by the contractual redundancy provisions.

[42] That, in turn, triggered Mr Mitchell's entitlement to payments under the Todd Bond scheme. The terms of the bond subscription deed provided that the value of the bonds would be paid on an anniversary date – in Mr Mitchell's case falling in 2014 – or could be paid out earlier in some specified circumstances that included "*redundancy*". That was clause 4.2(b).

[43] However Nova's position – as explained in Mr Bahirathan's evidence – was that the payment of the bond value was made to Mr Mitchell under another term of

the deed that allowed a payment in other circumstances at the "*absolute discretion*" of the Board. That was clause 4.3.

[44] I have not accepted Mr Bahirathan's evidence as accurate on this point because I have concluded that the position, at law, was that Mr Mitchell's situation was, in fact, covered by the redundancy provisions of his employment agreement and that, therefore, his circumstances met the bond deed criteria of the termination of his employment being due to redundancy. My conclusion was strengthened by Todd Group records about the basis on which the payment under the bond scheme was made.

[45] In an email dated 16 December 2011, with the subject heading "*Mike Mitchell redundancy & Exec bonds*", Todd Corporation's Group Financial Controller Chris Banks put this request to Mr Bahirathan:

> *"We just need your assurance or something in writing that Mike is being made redundant which then meets clause 4.2(b) of the Deed …"*

[46] Mr Bahirathan forwarded that email to Ms Munro on 21 December with a note saying "*once Mike M confirms his departure with a signature on the letter* [a reference to the exit agreement] *please inform Andrew & Chris which will trigger the redundancy*". On 26 January 2012 Mr Bahirathan sent an email to Mr Banks which included this statement:

> *"This email is to confirm that Mike Mitchell left the organisation on 23 December. Since his position was disestablished and he was made redundant, he is eligible to receive is (sic) entitlement of his bonds".*

[47] Mr Bahirathan's evidence was that those documents did not reflect the reality of the arrangements he had made and the basis on which he had secured approval with the Todd Group for the payment made under the bond scheme. He said (in paraphrased form) that, while he did not consider Mr Mitchell's position was genuinely redundant, he reluctantly decided it was better to let Mr Mitchell go with the payments made rather than having him remain as a disgruntled manager who might upset the environment after the restructuring. However Mr Bahirathan needed approval from Todd Group Chief Executive Officer Jon Young before payments under the bond scheme could be made and he sought that approval verbally from Mr Young. He said the approval subsequently given by Mr Young was a discretionary

decision – of the type provided for under clause 4.3 of the deed – and not under the redundancy provision included in 4.2(b). That evidence was at odds with what he and others wrote in the 'behind-the-scenes' administrative emails about the arrangements. Those emails, I considered, were better evidence about the reality of the situation than what has been said subsequently. The likelihood that the payment to Mr Mitchell under the bond scheme was triggered under the redundancy provision, rather than a separate 'discretionary' measure, is increased by the fact that two other employees also received payments under that scheme on the grounds of redundancy arising out of the Project Tahi restructuring.

[48] The result was that Mr Mitchell was paid what he was due on the termination of his employment and nothing more. What Nova did was nothing more than what it had to do so its 'promise' to do so contained nothing sufficient to amount to fresh consideration for the variation to Mr Mitchell's terms of employment.

(ii) Was the restraint unreasonable because it merely stopped competition and was more than what was needed to protect Nova's interests?

[49] If my conclusion regarding a failure of consideration for the restraint was not correct, the restraint was nevertheless not valid or enforceable because it was (at the time it was entered into) more restrictive than necessary to protect Nova's legitimate proprietary interests and was made for a purpose contrary to public policy.

[50] Nova submitted the six month restraint entered into through the exit agreement was reasonable because it had a legitimate proprietary interest in Mr Mitchell's knowledge of its confidential information and subsequent events showed the enduring confidentiality clauses of his employment agreement were not sufficient protection of that interest.

[51] Where an employment agreement already contains an express commitment to confidentiality, assessment of the reasonableness of an additional express term of restraint to protect confidential information depends on the particular facts rather than being accepted as a matter of principle.[4]

[4] *Allright v Canon New Zealand Limited* EC, AC 47/08, 3 December 2008, Judge Couch at [27].

[52] Reasonableness is to be measured at the time that the restraint was entered into although developments reasonably within the contemplation of the parties at that time can be taken into account.[5]

[53] The fact that Mr Mitchell subsequently breached his enduring duties of confidentiality to Nova does not mean the contractual term was inadequate protection for Nova and a restraint was therefore necessary and reasonable. Rather, as the outcome of this case on Mr Mitchell's liability for his admitted breaches of confidentiality shows, the term was adequate and is the basis on which Nova can claim damages from him without having to rely on the purported restraint.

[54] Nova's wish to have the restraint upheld was not really, in my assessment, to protect its rights in its confidential information but rather as a necessary element of its unjust enrichment claim – discussed elsewhere in this determination – for Mr Mitchell to be ordered to return the $324,429 paid out for the bonds and the $77,946 redundancy lump sum.

[55] Nova's argument that the restraint was necessary to protect the large amount of sensitive Nova information Mr Mitchell knew and remembered does not explain why it had not required such a term during the preceding six years of his employment when, throughout that period, his written terms of employment specifically *excluded* the restraint clauses written in the standard form employment agreement.

[56] However Mr Bahirathan's evidence revealed the real reason for seeking and imposing the restraint as a term of the exit agreement was concern about the prospect of competitive activity by Mr Mitchell once he left Nova. Mr Bahirathan said a former Nova executive, Hamish Tweedie, had told him in late November or early December that Mr Mitchell "*had ambitions of wanting to start an energy business*".

[57] Mr Mitchell's evidence confirmed he had spoken with Mr Tweedie but he said that it was Mr Tweedie, not him, who suggested setting up an energy business to compete with Nova.

[58] Mr Bahirathan said he was "*alarmed*" by what Mr Tweedie told him so he checked whether Mr Mitchell's employment agreement had a restraint. On finding it

[5] *M A Watson Electrical v Kelling* [1993] 1 ERNZ 9 (HC, Smellie J) at 13 citing *Bates v Gates* (1986) 1 NZELC 95,269 at 95, 273-274.

did not, Mr Bahirathan decided to make agreement to such a term a condition of agreeing to an exit package for Mr Mitchell. Mr Mitchell's existing terms already prohibited use of Nova's confidential information. The only effect the additional restraint could have was to keep him out of competitive activity. That was unreasonable for two reasons. Firstly, at the time of entering the restraint, it was more restrictive than was necessary to protect Nova's proprietary interest in its confidential information. Secondly, preventing competitive activity *per se* was contrary to public policy.

(iii) Did Nova use its unequal bargaining power to get the restraint?

[59] Mr Mitchell submitted Nova took advantage of its unequal bargaining position to get him to sign an exit agreement including a restraint. He said it did that by giving him the document for signature on what was effectively the last working day of the year, no advice about the opportunity to take legal advice, and by making payment of his termination entitlements conditional on signing the agreement.

[60] Ms Munro properly conceded Nova had not complied with the requirements of s63A(2) in having Mr Mitchell agree to what was a variation of his terms of employment while he was still in its employ (albeit that the variation was about the terms on which his employment would soon end). However Nova submitted s63A(4) of the Act confirmed the validity of the agreement was not affected by that compliance failure. Further it submitted Mr Mitchell's own evidence confirmed he was aware of his right to seek advice and he could have taken the issue of redundancy and his entitlements to the Authority (because Mr Mitchell had mentioned that possibility to Mr Bahirathan when discussing whether Nova would pay him the redundancy and bond amounts).

[61] I have accepted Nova's submission on that point. Mr Mitchell said he was put under pressure from 21 December 2011 to sign the exit agreement before he could attend a farewell lunch he planned with Nova staff on 23 December. However Mr Mitchell's evidence was that he had decided he wanted to leave Nova because he disagreed with the business direction set by the Project Tahi restructuring, he did not want the position offered to him, and he did not want to work under Mr Barstead. He had also overcome Mr Bahirathan's resistance to paying him more than $400,000 in

bond and redundancy entitlements. In that context, I have considered it more likely than not, that Mr Mitchell's decision to sign the exit agreement and 'take the money' was a matter of convenience for him, not a case of being overborne. While there are circumstances where a restraint can be found unreasonable due to misuse of superior bargaining power by the employer, this was not one of them.[6] The restraint was invalid and unenforceable for other reasons.

[62] One further important point needs to be made about the restraint. While the restraint was not valid or enforceable for the purposes of the claims made by Nova against Mr Mitchell in the present proceedings, it was a relevant factor to how various people acted, based on their belief that those restraint clauses were or might be considered by others to have legal effect. Specifically, because Mr Troughton and Mr Bahirathan believed Mr Mitchell was constrained in what business activity he could undertake, they were less alarmed than they might otherwise have been about the information in early April 2012 that a company called National Energy was registered with Mr Mitchell's wife named as a sole director and that another broker said Mr Mitchell had been in touch with one of that broker's clients about brokerage of its energy supply. Similarly, although Mr Mitchell may never have regarded the restraint as legally binding on him, his actions in keeping his name out of NEL correspondence with Nova were, I have found, most likely because he knew others regarded him as bound by the restraint and he wished to avoid arguments about it that might impede his brokerage activities. In short it may, as determined here, have been of no effect in *law* but it still had an effect in *fact* on what people said and did or did not say or did not do at various times relevant to other issues in this determination.

II. LIABILITY FOR DAMAGES

(iv) Did Mr B's actions change Mr Mitchell's liability for losses?

[63] The nature of the loss – revenue lost on retail margins – and the role of Mr Mitchell's business (through NEL and the activities of its sales representatives) in setting up the tendering and re-signing processes that resulted in those revenue reductions was not in dispute. What was disputed by Mr Mitchell was the extent to which express or tacit acceptance of those arrangements by Mr B, acting on Nova's

[6] *Kelling*, above, at 13.

behalf, may have amounted to intervening actions which reduced or removed Mr Mitchell's liability to Nova for the losses resulting from his use of its confidential information.

[64] For reasons that follow I have found that actions by Mr B did not break the chain of causation between the breach by Mr Mitchell of his duty (not to use Nova's confidential information for his own advantage) and the losses Nova consequently suffered in its revenue (as a result of how Mr Mitchell used that information in his brokerage business).

[65] The following passage from an English High Court decision summarises what is needed to establish whether intervening acts really caused the loss:[7]

> *[44] … For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In circumstances where the defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken.*
>
> *[45] … [I]t is difficult to conceive that anything less than unreasonable conduct on the part of the claimant would be capable of breaking the chain of causation. It is, however, also plain that mere unreasonable conduct on a claimant's part will not necessarily do so … By its nature, reckless conduct by the claimant would or would ordinarily break the chain of causation, though there is no rule of law that only recklessness on the part of the claimant will do so. …*
>
> *[46] … the claimant's state of knowledge at the time of and following the defendant's breach of contract is likely to be a factor of very great significance. For the chain of causation to be broken, the claimant need not have knowledge of the legal niceties of the breach of contract; nor, … will the chain of causation only be broken if the claimant has actual knowledge that a breach of contract has occurred – otherwise there would be a premium on ignorance. However, the more the claimant has actual knowledge of the breach, of the dangerousness of the situation which has thus arisen and of the need to take appropriate remedial measures, the greater the likelihood that the chain of causation will be broken.*
> …
> *[47] … [T]he question of whether there has been a break in the chain of causation is fact sensitive, involving as it does a practical inquiry into the circumstances of the defendant's breach of contract and the claimant's subsequent conduct. …*

[66] Mr Mitchell submitted Mr B "*must have known*" he was behind the NEL business but chose to keep dealing with NEL (and did so on the basis of the prices set by those tender prices or suggested by Mr Mitchell, through NEL, in order for Nova

[7] *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm) per Lord Justice Gross.

to win the tender). The evidence about Mr Mitchell's breach of duty was said in his submission to show, at most, that he provided the opportunity for the occurrence of a loss to Nova through inviting participation in the tender process. Mr B was said to have then broken the chain of causation by – as a senior employee and on behalf of Nova – taking up that opportunity, deciding to accept a particular price and offering a contract for the customer to sign (with the subsequent signing of a contract by a customer being beyond the control or direction of NEL).

[67] The key contention of Mr Mitchell's submissions, I considered, was this:

> *Neither does the fact that [Mr B] did not know Mike Mitchell had Nova's confidential information have any particular bearing on the intervening act of [Mr B]. That lack of knowledge did not in reality influence the tender process or the voluntary decision [Mr B] made as an employee of Nova to deal with National Energy knowing of Mike Mitchell's involvement.*

[68] In considering that submission findings were necessary about the conduct and extent of knowledge of Mr B in order to, in turn, determine whether or not his acts or omissions became the dominant or effective cause of Nova's losses.

[69] There was conflicting evidence on whether Mr B knew Mr Mitchell was involved with NEL's business and if so, when he first became aware of that. The main sources are Mr Mitchell's own direct evidence to the Authority investigation and the contents of Nova's employment investigation into Mr B's conduct (carried out between 12 June and 12 August 2012).

[70] The latter established that Mr B had contact with NEL by at least 17 February 2012 (when NEL's first RFP document was sent to him). Mr B also had telephone conversations with Mr Mitchell in February and March. During interviews for Nova's internal disciplinary investigation of him, Mr B disclosed he had suspicions that Mr Mitchell was involved with NEL but this was not until after 5 April and then he rang Mr Mitchell. He said Mr Mitchell claimed to have nothing to do with NEL and suggested Mr B talk to his wife, Katherine Mitchell. However Mr B said he also visited Mr Mitchell's house to drop off contracts around this time and he went there because that was the address given in Companies Office records as NEL's registered office. He also knew Alan Mitchell, whom he knew was working as an NEL sales representative, was Mr Mitchell's father. Mr B said he had spoken by telephone with

Alan Mitchell once in February and told him Nova would expect to be able to assert its 'right to match' provision in the tender process.

[71] However Mr B also said during Nova's employment investigation that he spoke with Mr Mitchell on several occasions about other Nova matters. This included telephoning Mr Mitchell in late February to say he had been appointed to the role of Commercial Manager-Retail (the role first offered to Mr Mitchell in the Nova restructuring) and at other times about various administrative queries (including how the billing system worked and how to access a database Mr Mitchell had set up prior to leaving Nova).

[72] Mr Mitchell's evidence was starkly different. He said he told Mr B in January that he was starting a retail energy brokering business and then met with Mr B at a bar in late February to discuss Nova's pricing levels. He said Mr B suggested a price (which was the retail cost price for Nova at the time) and asked to be told if that price was not competitive with other retailers participating in the tender. He also said he met Mr B at least four other times and spoke "*numerous times*" by telephone about tenders. Mr Mitchell also averred that Mr B knew he had a restraint of trade because he had "*made remarks*" to Mr B after seeing that term in the exit agreement Mr Mitchell was given on 21 December 2011.

[73] Alan Mitchell denied ever having spoken with Mr B about Nova using its 'right to match'. He said he had met Mr B once, at Mr Mitchell's office in his home, but did not talk to Mr B about work matters. That account contrasted with Mr B's story that he had visited the home only once to drop off some contracts but found no-one home.

[74] The documentary evidence about contact between Mr B and Mr Mitchell was sparse and equivocal. Phone records showed dates, times and length of calls between two mobile numbers used by the two men but revealed nothing of what was said in the calls so the differing accounts of both men could be true. Emails sent by NEL to Mr B between 17 February and 10 July 2012 were signed "*Administration team, National Energy*" with no names or other details that showed Mr Mitchell was the author or involved in the communication.

[75] The available email evidence supported Nova's contention that Mr Mitchell went to considerable efforts to stay 'under the radar' by not using his name in NEL correspondence with Nova. That did not change until 18 July 2012, when he included his name and contact phone number in an email to Nova. The 18 July email was after Nova's solicitors had written to Mr Mitchell (5 July) alleging NEL was using Nova's confidential information to run a targeted campaign on its existing customers and after Nova filed proceedings against him in the Authority and the High Court (6 July). It was also after 12 July, the day that, if effective, his restraint of trade period would have ended.

[76] There were some instances where Mr Mitchell had used his name in emails to prospective or confirmed NEL clients whom he had met in person and to one other retailer. However I was not persuaded by his rationale for anonymity in emails to Nova and others generally – that he did not want his involvement with NEL to become widely known to other brokers as they might then use that to undermine him with potential clients as someone who would not independently broker but would favour deals with Nova because of his past connection with the company. There was an equally strong commercial reason to be upfront about his Nova background – that he knew the ins and outs of the industry and could press for better deals. The more rational and likely reason for his low profile was to avoid attracting Nova's attention while NEL canvassed Nova's highest margin customers about running tenders to get them lower energy prices.

[77] On the evidence available I considered I could not safely make findings, to the necessary standard of the balance of probabilities, that Mr B knew enough about the nature of Mr Mitchell's activities, or had deliberately colluded or tacitly co-operated with those activities, in a way that was sufficient to amount to break the causative chain. Nova's own employment investigation concluded Mr B's actions were "*grossly incompetent or negligent*" rather than deliberate and wilful, despite finding his responses "*inconsistent, incomplete and unconvincing*". I did not consider the Authority investigation had evidence before it that supported a conclusion on that point more far reaching than that drawn by Nova on the basis of its interviews of Mr B and examination at the time of its own telephone, email and other records.

[78] The scenario I have considered more likely than not is that Mr B was – as Mr Barstead alleged in his evidence – "*played*" by Mr Mitchell. It is not too pejorative a description in light of Mr Mitchell's admitted, deliberate use of Nova's confidential information for NEL's gain (and particularly the margin book with vital information on which Nova customers paid the highest rates). In doing so he intended to make the most of it. Dealing with Mr B – either directly, through Alan Mitchell or by anonymous emails – was a necessary part of achieving that plan. Mr Mitchell most likely knew that Mr B was, for the most part, the only member of the Nova gas sales team who dealt with brokers. He most likely knew Mr B's performance targets (KPIs) were focussed on gaining and retaining volume sales, without explicit reference to margins. As Mr Mitchell had been Mr B's direct manager in his previous role at Nova, Mr Mitchell was also well placed to offer advice and garner useful information from informal contact with Mr B (who had contacted him for advice). It was also quite likely Mr B was not aware of Mr Mitchell's restraint of trade (unlike Mr Bahirathan, Mr Barstead and Mr Troughton). Mr Mitchell would certainly have no reason or incentive to tell Mr B about such a restraint in any contact they had from January 2012 onwards. If Mr B knew anything of Mr Mitchell's terms of employment prior to the signing of the exit agreement, he may well have known that Mr Mitchell's agreement specifically did not include a restraint.

[79] However, whether Mr B's dealings with NEL (and possibly Mr Mitchell) were naïve or knowing was not relevant when considered against the nature of the actual breach of contractual duty committed by Mr Mitchell. Because there was no restraint of trade legally operative at the time (regardless of what some Nova managers may have thought), the breach of duty by Mr Mitchell was not the mere act of engaging in business with Nova (through the vehicle of NEL). The breach was using Nova's confidential information in his dealings with it and without Nova – in the person of Mr B – knowing that was being done.

[80] In the admitted facts Mr Mitchell accepted Mr B had not known NEL was using Nova's confidential information when he dealt with NEL on Nova's behalf. In the phrase used by the judge in the extract from the *Borealis* case cited earlier, Mr B's ignorance of that fact meant he did not know the "*dangerousness of the situation*" that resulted or of any need to take action in light of it.

[81] Contrary to Mr Mitchell's submission on this point, I have found the use of that information did have a 'particular bearing' on the cause of loss that was not displaced by Mr B's acceptance of lower prices for Nova as an outcome of the tender process.

[82] Mr Mitchell's use of the margin information enabled him to target existing Nova customers who were paying rates significantly higher than the then-current market rates. If Mr Mitchell had not had the benefit of the confidential margin information, NEL's canvassing for clients would have been less likely to identify existing gas customers where significant 'savings' were virtually guaranteed. He was able to 'hit the ground running' and give contact lists to his sales representatives (that included his mother and Alan Mitchell) that meant they were not 'cold calling' potential clients for whom little or no saving might be generated and finding only some where the pickings might be richer. By using that confidential information to target existing Nova customers on the highest margins, Mr Mitchell's ensured NEL would generate the highest potential savings for those signed up as clients, higher revenue for NEL (which received a percentage of the value of the reduction in cost achieved for the client) and – compared with an average or random sample of customers of Nova or in the market generally – had the effect of causing the biggest drop of revenue for Nova.

[83] As a result Mr B cannot be said, on Nova's behalf, to have knowingly accepted the breach of the confidentiality duties Mr Mitchell owed Nova. He was deceived as to the true basis of how the RFPs submitted for Nova's participation were prepared and the damage to Nova flowed from that deceit.

[84] There are, at law, circumstances were an employer must accept liability for the consequences of the actions or failings of its employee. However an employer cannot be taken to have allowed or accepted a loss resulting from, firstly, its employee being deliberately misled or deceived by the person or entity causing the loss and, secondly, neither that employee nor any other employee of equal or superior position knowing the true position.[8] In the present case, at the outset at least, neither Mr B nor any other Nova manager of equal or superior position had the necessary knowledge of the true nature of Mr Mitchell's surreptitious breach of duty through NEL.

[8] Based on a proposition accepted in *Regina v Roziek* [1996] 1 WLR 159 at 161H-162A as "cogent".

[85] A further point argued in the Respondent's submissions was that Nova's own disciplinary investigation of Mr B identified that his conduct rather than NEL's activities were the cause of its loss. Its investigation report included these conclusions:

> *[Mr B's] failure to disclose his on-going interactions with National Energy, and indeed the concealment of such, including in the course of this investigation, has caused and/or contributed to the company suffering considerable loss – not least because the company could not respond sooner and/or more decisively to the external attack on the existing customer base. …*
>
> *… [Mr B's] grossly incompetent or negligent acts have caused and/or contributed to Nova suffering substantial losses …*

[86] In light of other conclusions reached in this determination I have not accepted Mr B's actions could amount, at worst, to any more than what were referred to in the extract from the *Borealis* case cited above as 'concurrent causes'. NEL's activities, based on using Nova's confidential information to target high return customers, remained the effective cause of the loss throughout. Nova's disciplinary report accepted Mr B may have only contributed to its loss.

[87] However the Respondents submitted there were at least three points at which either Mr B or others in Nova knew enough about Mr Mitchell's activities that they could and should have taken steps to find out more about what was going on and to minimise or avoid losses of revenue as a result of those activities. The obligation to take reasonable endeavours to mitigate losses would arise from those points in time, if the Respondents' submission was accepted. My general conclusion on that submission, already set out above, is based on the following more detailed consideration of each of the instances to which it referred.

5 April 2012

[88] In early April a broker named Richard Gardiner telephoned Mr Troughton to ask what he knew about Mr Mitchell's involvement with a registered company called National Energy. The broker's question arose because NEL had approached one of his clients with an offer to broker gas and electricity supply. Mr Troughton included

the following comment in his weekly industrial sales email report (which, amongst others, went to Mr B, Mr Bahirathan and Mr Barstead):

> *News in from an energy broker ….. it appears Mike Mitchell's wife has registered New Zealand* (sic) *Energy as a limited company and that the company has approached at least one business offering to broker electricity/gas. I have not delved further and so cannot confirm this at this stage.*

[89] Later that day another member of Mr Troughton's team sent Mr Troughton, Mr Barstead and Mr Bahirathan an email saying that the Companies Office register showed "*a new company National Energy with Katherine Mitchell as sole director*".

[90] Mr Troughton knew Mrs Mitchell had neither the experience nor background to be involved in energy brokerage but he also knew that Mr Mitchell had a restraint of trade in his exit agreement. He knew that because Mr Mitchell told him he was upset about the restraint term written in the exit agreement letter Mr Mitchell got from Mr Bahirathan on 21 December 2011. Mr Bahirathan and Mr Barstead also knew Mr Mitchell had what they understood to be an effective restraint on his activities. Accordingly, I accept on their evidence and to the extent they did think about the point at the time, that they reasonably expected those activities were probably only preparation for the upcoming date in July 2012 when Mr Mitchell would be free of his restraint.

[91] But Mr Mitchell also alleged that in early April Mr Troughton rang him and said he had found out Mr Mitchell was involved in brokerage activities. He said Mr Troughton also suggested ways Mr Mitchell could work with or through Nova. Mr Troughton accepted he had some telephone conversations with Mr Mitchell during 2012, and had talked to Mr Mitchell when he called in to Nova's offices in February, but he denied saying he had said he knew Mr Mitchell was brokering or mentioning NEL. Given the 'he said, he said' nature of the evidence (uncorroborated by evidence from anyone else or diary notes or suchlike taken at the time), I was unable to prefer one account as more likely than the other. Accordingly I was not satisfied that the information about Mr Mitchell's rumoured activities in early April were sufficient to alert Nova to any need for further investigation or action at that time.

[92] Similarly I doubt a café conversation around that time involving Mr Barstead, Mr Troughton, Mr B and some others – during which Mr Mitchell and NEL were

mentioned – was sufficient to put Mr B on alert that Nova managers would be seriously concerned about any commercial activity by Mr Mitchell. Mr Barstead described the reference to Mr Mitchell during a "*casual*" discussion about retail competitors and brokers as coming up "*obliquely*".

5 June 2012

[93] The fact of NEL's commercial activity was squarely in front of Mr Barstead by 5 June. On that day Mr B provided Mr Barstead with a written proposal to create an additional job dealing with increased customer activity expected with the then-upcoming introduction of the Switch Me website (enabling energy users to more easily compare and change suppliers). The first two 'bullet points' of Mr B's paper referred to "*a significant increase in activity from Energy Brokers*", dealing with "*at least 28*", and listing National Energy as one of them. Mr Barstead appeared to have later said he could not remember receiving the proposal but in an email to Mr B on 5 June he thanked him for the paper, described it as "*very professionally presented*" and asked two questions about some details.

[94] As Mr Barstead was aware of the early April email and café discussion where Mr Mitchell's name was linked to National Energy, he arguably could and should have 'joined the dots' and made further inquiries at that point.

8 June 2012

[95] However from 8 June Nova senior managers did begin to make inquiries about the impact of National Energy on margins in their business. Mr Troughton received a complaint from Tiana Ah Fook, a sales representative, about "*some odd happenings*" with NEL. She had already raised the issue in an email to Mr B on 7 June but he was out of the office and she spoke to Mr Troughton the next day. Her email reported that "*Mike*" had approached a Nova customer with a price offer and that the contact with the customer appeared to be based on "*site company information and past pricing*". Her email included the following comments:

> *Regardless of this customer being in* (sic) *contract Mike is also aware of our position when it comes to enforcing this which we have never done. …*

> *This is not a large volume customer or one that you would waste your time approaching unless you knew that you could save them money being on new tariffs or that you would get a win by switching them due to their* (sic) *being no contract.*
>
> *… Mike is aware and did have access to uncontracted sites prior to leaving and this customer was on the November list.*
>
> *He is also aware on where we stand when it comes to holding customers to there* (sic) *contract. …*

[96] Mr Troughton promptly researched Nova records of activity involving NEL and alerted Mr Barstead the following day to what appeared to be targeted canvassing of Nova customers. In the following week Mr Troughton was involved in an internal investigation of what contact there had been with NEL, Mr Barstead started a disciplinary investigation of Mr B, and Nova took legal advice and considered its legal and commercial options.

[97] From that point Mr Troughton also oversaw Nova's on-going dealings with NEL which included responding to information requests where NEL had provided customer authority forms and three further tender processes initiated by NEL (referred to as RFP 9, RFP 10 and RFP 11).

(v) Were Nova's measures to mitigate its loss sufficient and reasonable?

[98] From 9 June 2012 Nova had enough information about what was happening so that, if it wanted to pursue a claim for damages for its losses, the law required it take reasonable steps to mitigate those losses.

[99] The issue for determination was whether the steps it took from that point were sufficient – that is whether there were actions which it reasonably should have taken but did not, or actions that were taken that were not reasonable. I considered the issue in relation to these two questions arising from the parties' submissions:

A. *Should Nova have taken immediate action to seek an interim injunction against Mr Mitchell and NEL?*

B. *Did Nova make sufficient use of the 'right to match' term in its customer supply agreements?*

[100] A third question – whether the counter-campaign launched by Nova was reasonable, and if so, whether Mr Mitchell liable for the additional reductions in Nova revenue that resulted from that campaign – is dealt with under a separate heading.

A. Should Nova have sought prompt injunctive relief?

[101] The Respondents submitted Nova had sufficient evidence from 9 June to act on its legal rights and apply for orders enjoining Mr Mitchell. Such proceedings were said to be viable by relying on the restraint of trade and not needing direct evidence of the taking of confidential information. From 9 June Nova knew from the immediate analysis undertaken by Mr Troughton that its highest margin customers were those being targeted by NEL.

[102] Nova argued that the evidence about Mr Mitchell's activities at that time remained largely circumstantial and a suspicion rather than confirmed. It was also still carrying out a disciplinary investigation of Mr B's activities and could not rule out that he or some other employee was the connection with NEL.

[103] I have accepted Nova's argument that the prospects for a successful injunction appeared more likely with the benefit of hindsight, and what has been discovered since, rather than from what was known at the time. And hindsight is not the measure of whether a reasonable step in mitigation should have been taken. It was what was reasonably known at the time that was relevant.

[104] Nova's solicitors did write to Mr Mitchell and NEL on 5 July raising the claim that Nova's confidential information was being used in breach of contractual obligations. Proceedings against the Respondents were filed in the High Court and the Authority on 6 July. In the circumstances, including the inquiries that needed to be made about Mr B's role, I considered the period between 9 June and that date was not so long as to be unreasonable or a failure to mitigate by taking suitable legal steps.

B. Did Nova make sufficient use of its 'right to match'?

[105] In the Respondents' submission Nova was able to avoid or minimise its losses by relying on "*black letter contractual provisions*" requiring customers to give Nova

the right to match any lower prices offered by other suppliers and to stay with Nova unless those customers complied with certain notice provisions.

[106] It was a point relevant both to the Respondents' argument that Nova's failure (or more particularly Mr B's failure as its commercial manager) to do so was an intervening action which broke the chain of causation and to whether Nova did sufficient to mitigate its losses.

[107] Nova's standard terms for supply at the time provided that the agreement terminated on expiry of the agreed supply period, provided either party gave three months' notice of termination (clause 9). In the absence of notice the supply agreement automatically extended for a further period of the same length as the first supply period – referred to in evidence as the 'rollover' clause (clause 10). However if the customer intended purchasing its gas from another supplier (either by breaking the term of its contract with Nova or by giving notice of termination), the terms also included a requirement for the customer to give Nova "*a right to match the terms of supply (including price)*" of the other supplier. Where Nova then offered terms as favourable as or more favourable than the other supplier, the customer was required to remain with Nova as its supplier (clause 11(b)). Another clause allowed Nova to charge an early termination fee for customers who left before the supply period ended (clause 44).

[108] I have preferred the evidence of Nova's witnesses on this issue generally. While Mr Mitchell's evidence suggested there were some situations where Nova had previously enforced contract rollovers and rights to match, the Respondents' submissions properly acknowledged there was "*logically an element of commercial unattractiveness about enforcing terms*". I agree. A strict requirement to do so (in respect of mitigation) would have been unreasonable in the circumstances of Nova's business and its usual practice. To enforce such provisions widely, as a matter of business common sense, would be too expensive and time consuming amongst the many thousands of small-scale retail customers (typically small to medium size commercial and retail businesses and public facilities such as individual schools and rest homes) and also unproductive as such customers, if forced to stay by what they would regard as a legal technicality, would be more likely to change providers at a later stage anyway.

[109] The reality of Nova's actual business practice on this point was reflected in part of Ms Ah Fook's email, set out earlier. Her comment – in a context where it was meant only for those 'on the inside' in Nova's sales team – was that Mr Mitchell knew Nova did not generally enforce contractual terms against customers seeking changes. If that were not the case, his use of the confidential information to target high margin customers and put their supply prices to tender (with most re-signing to Nova on lower prices) would have been a fruitless exercise for him and NEL.

[110] For reasons already given I have not considered Mr B had the necessary level of knowledge to seek to enforce such terms in response to the NEL RFPs he dealt with earlier on so that failure to do so was not an intervening action in the cause of Nova's loss and was not a failure to mitigate such loss.

[111] However following Ms Ah Fook's complaint on 8 June, and the resulting internal inquiries, Nova did take some steps to assert right to match and rollover provisions in the contracts of customers who were involved in tender processes (the RFPs 9, 10 and 11) initiated by NEL. NEL immediately resisted Nova's use of its right to match, describing it in an email to Nova on 19 June 2012 as "*ugly*" and leaving "*a bitter taste in the customer's mouth*". In its responses to RFPs 10 and 11, on 17 July, Nova asserted rights to match that Mr Mitchell (in his first open and signed email to Nova on behalf of NEL on 18 July) queried and described as a disappointing stance that was detrimental to competition.

[112] I was satisfied that those steps, after 9 June, were appropriate measures by Nova in mitigation of potential or actual losses in its revenue.

(vi) Was Nova's counter-campaign reasonable mitigation?

[113] For reasons that follow I have accepted Nova's counter-campaign was a reasonable measure to mitigate its exposure to further losses from Mr Mitchell's actions. He is consequently liable to Nova for the additional loss or damage that resulted from this mitigation measure, in addition to other loss.[9]

[9] Burrow, Finn & Todd *Law of Contract in New Zealand* (3rd ed, 2007) 21.2.4 at page 712 and *McGregor on Damages* (18th edition) at 7-092.

[114] The extent of that liability is, however, subject to one limit relating to time. Mr Troughton's witness statement said the re-signing of agreements under the counter-campaign was undertaken from late June to mid-August but it was not formally ended until 5 November.

[115] Mr Mitchell is not liable for reduced revenue from arrangements with customers that Nova initiated after 15 August 2012. On that date he and NEL's sole director Katherine Mitchell provided undertakings not to breach the confidentiality of Nova's information and that they no longer had copies of the information. While there were subsequent arguments about whether all the business information he had taken or kept in December 2011 was in fact given up by the time the undertakings were lodged (with a USB stick containing extensive customer information and Nova's 2011 margin report not handed over until 22 August), Nova had those undertakings as a legal lever to enforce and protect its rights from 15 August 2012. From then there was no need for Nova to approach high margin customers with its own discount offers and its counter-campaign ceased to be a reasonably necessary means of mitigation.

[116] On 22 June 2012 Mr Barstead had approved what was described as a "*National Energy close-out strategy*" developed by Mr Troughton. It identified Nova's top 500 customers in terms of the margin Nova was earning from them for supplying gas. They were to be offered a discount in their rate in return for signing a new supply agreement with Nova. It was a measure designed to make customers less receptive to potential approaches from NEL. At the point of its planning Nova executives did not know whether the client authority forms and RFPs submitted by NEL up to mid-June were the "*tip of the iceberg*". Canvassing by Nova sales representatives resulted in some 246 existing customers being 're-signed' – largely, according to Mr Troughton between late June and mid-August – with the reductions offered planned to retain about three-quarters of its retail margin. However those reduced margins remained significantly higher than whatever margin (if any) was left for Nova in the customer agreements NEL achieved through the RFPs completed prior to 8 June in its dealings with Mr B.

[117] The Respondents submitted Nova's counter-campaign was an unnecessary and unreasonable "*pre-emptive strike*" on customers who may not have even been approached by NEL or at least not in the numbers that Nova canvassed.

[118] They submitted the losses claimed as a result of the reduced margins incurred by the counter-campaign were not reasonably foreseeable as likely to result from the breach of confidentiality and those losses were therefore too remote to be claimed in damages (or mitigation costs). Mr Mitchell had acknowledged in his evidence that common sense dictated that Nova would do "*something to preserve customers*" but no counter-campaign of the type undertaken had been carried out during his years of service with the company.

[119] I have not accepted Mr Mitchell's submission that because Nova's counter-campaign was not reasonably foreseeable by him, the losses resulting from it were too remote for him to be liable. The measure of foreseeability is not entirely subjective. That would simply reward a form of wilful blindness. In this case foreseeability did not need to rely on special knowledge of the industry or Nova. Any ordinary consumer could reasonably foresee that a business might respond to a campaign targeting its customers by contacting them and offering 'special deals' to keep their custom. It is a regular feature of the modern retail market in not only energy supply services but areas such as telecommunications and banking.

[120] That is so even accepting his argument that a campaign he himself had been involved in at Nova two or three years earlier – targeting customers of another retailer (and which Nova suggested should have made the prospect of its counter-campaign foreseeable to him) – was about getting new customers and not retaining existing customers on reduced terms.

[121] Mr Mitchell said that Nova had never commenced a counter-campaign during his time with the business. However there was no evidence Nova had, during that time, ever had a former manager use its information to contact its customers and make arrangements that reduced its revenue to its disadvantage and to the advantage of that manager. It may have been a novel situation for Nova but that did not make its reaction any less reasonably foreseeable in those circumstances.

[122] The following passage from *Banco de Portugal v Waterlow* assisted in considering the Respondents' argument that the counter-campaign measures Nova took were not reasonable steps in mitigation:[10]

> *Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.*

[123] Nova submitted its counter-campaign, as one of the 'remedial measures' it adopted, was carefully matched to the perceived threat by targeting its 500 "*most vulnerable*" (by which it meant valuable) customers.

[124] The Respondents' submissions criticised the number of customers Nova approached as out of proportion to those NEL had approached during the four months or so of its activities. They suggested reasonable mitigation would have been for Nova to use any further RFPs lodged by NEL as the means of identifying customers to talk with rather than undertaking a "*pre-emptive strike*". I was not persuaded by that view. A wait-and-see approach would have required Nova to then rely on the rollover clause which, for reasons already noted earlier, was commercially unrealistic.

[125] The Respondents argued the numbers Nova approached was based on a "*purely speculative*" fear that a flood of RFPs for other customers was imminent. NEL had gained new contracts for fewer than 100 of Nova's customers during four months of activity but Nova's counter-campaign targeted more than five times that number (and 're-signed' more than 200 of them). However Nova's analysis of the scale of the commercial threat it faced cannot be weighed in such 'nice scales'. It did not know then what Mr Mitchell knew about what he was doing and his plans. It could not know how many other client authority forms NEL had in its 'pipeline'. If Nova's reaction, with the full benefit of hindsight, was wider than necessary, that was

[10] [1932] AC 452 at 506.

a situation of NEL's making, not Nova's fault. On what Nova knew at the time I could not say its counter-campaign was an unreasonable measure.

[126] The 500 customers identified by Nova for its counter-campaign were said to be just over five per cent of its retail gas customers. They were rationally selected on the basis of the factor that made them most likely to be the target of approaches from NEL – the level of margin. Nova did not simply go to its entire retail gas customer base and offer everyone discounts in response to NEL's activities. It submitted the counter-campaign was "*sacrificing a little to preserve a lot*". It also wound down the campaign when the threat abated.

[127] On that basis I have accepted the counter-campaign was proportionate and the additional costs incurred by Nova were the result of reasonable steps in mitigation.

III. JURISDICTION AND REMEDIES

(vii and viii) Jurisdiction and liability for breaches of alleged fiduciary duties

[128] In its amended second statement of problem Nova stated its relationship with Mr Mitchell gave rise to fiduciary obligations "*as to … loyalty, during the course of the employment relationship; and … confidentiality, on a continuing basis*". The Respondents submitted the Authority had no jurisdiction to consider a claim of a breach of fiduciary duty, relying on a line of decisions in our High Court and one from the English High Court.[11] Alternatively, if there were jurisdiction, they sought a finding that Mr Mitchell's relationship with Nova did not give rise to fiduciary obligations. Nova, in reply, said it would not resist a "*clarifying determination*" that the fiduciary duty claim was outside the scope of the Authority's jurisdiction.

[129] As is apparent from the careful analysis of the case law on this point given by the Employment Court in *Newick v Working In Limited* and, most recently, by the High Court in *The Hibernian Society Benefit Society v Hagai*, the question is not settled as to whether or how a claim concerning alleged breaches of fiduciary duty

[11] See *RPD Produce Holdings Limited v Miller & Shaw* [2013] NZHC 705 and the cases cited therein for the High Court cases and *Lonmar Global Risks Limited v West* [2010] EWHC 2878 (QB).

could be brought in the Authority.[12] Many of the cases discussed concern circumstances where there was split jurisdiction because one or other of the parties was not within the employment relationship or was the subject of claims in another forum because one or more of them was also acting in some other capacity, such as a director or a trustee.

[130] Although the High Court has twice[13] reached decisions differing from the court's earlier conclusions in *Aztec Packaging Limited v Malevris*[14] I take – as did the Employment Court in *Newick* – this statement from *Malevris* to be consistent with the statutory focus on the substance of a claim rather than its form:[15]

> *The facts giving rise to an employment relationship problem may give rise to a variety of causes of action, which may fall under different heads of the law of obligations. For example, the misuse of confidential information received from an employer in the course of employment might be in breach of an express or implied term of the employment agreement, might be in breach of the statutory duty of good faith … might be in breach of an independent duty of confidence in equity, and might also be considered to be a form of tort … Where there are concurrent causes of action available for one employment relationship problem, it cannot be the case that the Employment Relations Authority has jurisdiction only for some causes of action, but not for others. If a given matter is within the exclusive jurisdiction of the Employment Relations Authority, the Authority has the jurisdiction to hear the matter, no matter how the cause of action is formulated. To allow otherwise would defeat the Authority's exclusive jurisdiction.*

[131] Accordingly I accept that, in certain circumstances, the Authority would have jurisdiction to investigate and determine a claim that a present or former employee had breached fiduciary obligations to a present or former employer. However, as submitted by the Respondents, care must be taken in considering any such claim not to equate and confuse special obligations of a fiduciary nature with the duties of fidelity and good faith that are owed by every employee.

[132] Some relationships – trustees and beneficiaries, directors and companies – require the imposition by law of fiduciary duties that arise because the essence of the relationship is such that one party is obliged to act for the benefit of another.[16] However the employment relationship is not fiduciary in that classic sense. As stated

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[12] [2012] NZEmpC 156 (Judge Christine Inglis) and [2014] NZHC 24 (Associate Judge Bell).
[13] *Property IQ NZ Limited v Vicelich* [2012] NZHC 2016 (Justice Duffy) and *RPD Produce Holdings Limited v Miller* [2013] NZHC 705 (Justice Duffy).
[14] [2012] NZHC 243 (Associate Judge Bell).
[15] At [12].
[16] *Lonmar Global Risks Limited v West* [2010] EWHC 2878 (QB) at [150].

in *Nottingham University v Fishel* by Justice Elias (as he then was, and who later served as a President of the English Employment Appeal Tribunal before his elevation to the English Court of Appeal):[17]

> *The essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place an employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed upon the employee are conferred by the employer himself. … That is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship.*

[133] Neither are fiduciary obligations imported into the ordinary employment relationship because the statutory duty of good faith (which is wider than the implied mutual obligations of trust and confidence) arguably makes the nature of the employment relationship in the New Zealand jurisdiction more than merely contractual.[18] Some other specific circumstance of dependency and trust would need to be established to make the nature of the relationship such that the employee had fiduciary obligations to the employer rather than only the 'ordinary' duties of fidelity and good faith. The "*essence*" of the claim about an alleged breach of such fiduciary obligations would then need to be related to or arising from the employment relationship for the Authority to have jurisdiction to determine it.[19]

[134] The evidence about Mr Mitchell's role, responsibilities and the information he had access to as an employee – albeit a relatively senior manager – did not indicate that the circumstances of his relationship with Nova included or generated any obligations of a fiduciary nature. Accordingly, not having any fiduciary obligation to Nova in his capacity as an employee, he cannot have breached such an obligation. Whether he had any such obligation to Nova in any other capacity is not within the jurisdiction of the Authority to determine.

(ix) Mr Mitchell's liability for a penalty for breaching his employment agreement

[135] In the Respondents' statement in reply Mr Mitchell admitted he had breached obligations in his employment agreement and at common law as to confidentiality and his implied duty of fidelity by taking Nova's confidential information before his

[17] [2000] ICR 1462 at page 1491C-D.
[18] Employment Relations Act 2000 s4(1A)(1)(a).
[19] Following *Newick v Working In Limited* [2012] NZEmpC 156 at [55] and *Pain Management Systems (NZ) Limited v McCallum* HC Christchurch CP 72/01, 14 August 2001 at [22].

employment ended and then using it for the benefit of himself, NEL and Alan Mitchell.

[136] For the admitted breaches Nova sought penalties under s134(1) of the Act.

[137] Mr Mitchell's actions in taking or keeping Nova's confidential information was deliberate and calculated. His evidence was that at the time he decided to keep the various items of information that were on a USB stick, including Nova's 2011 margin book, he did not have a specific purpose. However it was clear that he did so with the intention of using it to benefit himself. It was a breach of express terms of his employment agreement requiring him to return company property (including files and documents) and not to use confidential information for his own advantage.

[138] Mr Mitchell is liable for a penalty for those breaches. The amount of such penalty, and whether the amount is to be paid solely to the Crown, or in whole or part to Nova, is to be dealt with by separate determination in due course.

(x) Remedies for a breach of the statutory duty of good faith

[139] Nova's claim sought damages and a penalty against Mr Mitchell for breaching his statutory duty of good faith under s4 of the Act not to mislead or deceive Nova. Mr Mitchell's actions, while still employed by Nova, of taking confidential information and negotiating the exit agreement without disclosing what were said to be his intentions to set up a business contrary to the restraint of trade in that agreement, were identified as the relevant breaches of that duty.

[140] Mr Mitchell accepted that his actions may have been in breach of his good faith obligations but submitted damages could not be awarded.

[141] While the parties' respective submissions debated whether an award of damages was open as a remedy for a breach of the duty of good faith, I have not considered it necessary in this case to resolve that issue.[20] The damages that flowed from Mr Mitchell's actions, both before his employment ended and subsequently, can be fully measured and compensated for under the contractual heads of Nova's claim.

[20] *Baguley v Coutts Cars Limited* [2000] 2 ERNZ 409 at [64].

[142] Rather what is available, and I have found Mr Mitchell is liable for, is a penalty under s4A of the Act. His decision to take or keep Nova's confidential information was a deliberate, serious and sustained failure to deal with Nova in good faith prior to the end of his employment on 12 January 2012.

[143] He took the information on a USB stick prior to or around the time of signing the exit agreement. Alan Mitchell's oral evidence was that his son suggested working for him in a new business "*at Christmas time*" or "*at a BBQ in January*". It was more likely than not that Mr Mitchell had hatched his plan to set up his brokerage business by that point at the latest, when he was still nominally Nova's employee, if not even earlier. An essential part of the plan he developed in that time was use of the confidential information he had already taken or kept for his use.

[144] It was a plain breach of the duty of good faith and Mr Mitchell is liable for a penalty for it. However the actions of Mr Mitchell that gave rise to liability for a penalty under s4 of the Act are the same as those that gave rise to his liability for a penalty under s134(1) of the Act for, among other things, his breach of the implied duty of fidelity. As penalty breaches should be dealt with globally, the overlap and any issue of double penalty can be dealt with by the anticipated later determination on the quantum of damages and penalties.[21]

(xi and xii) Unjust enrichment

[145] Nova sought an order that Mr Mitchell pay "*special damages*" of $402,376, being the amounts paid to him under the exit agreement based on the redundancy compensation formula and under the Todd Group bond redemption scheme. The claim was expressed to be in restitution for "*unjust enrichment*".

[146] The Respondents submitted the Authority had no jurisdiction for such a claim but accepted the Authority may come to a different view on the basis of *New Zealand Fire Service Commission v Warner* and *Newick v Working In Limited*, along with the expansive interpretation of the phrase 'relates to' in s161(1)(r) of the Act.[22] As anticipated I have agreed those cases and that analysis supports the existence of jurisdiction for such claims. However I have also accepted the Respondents' further

[21] *Credit Consultants Debit Services NZ Limited v Wilson (No 3)* [2007] ERNZ 252 at [92].
[22] See *Warner* [2010] NZEMPC 90 at [37] and *Newick*, above, at [46]-[47] and [52].

submission that, in this instance, the unjust enrichment claim must fail on the basis that the payments made to Mr Mitchell were what he was entitled to receive due to his position being redundant. My reasons for that conclusion were stated earlier in this determination. The Respondents' concluding submission on this point correctly stated the appropriate outcome in the circumstances of this case:

> *That Mike Mitchell may have breached his employment obligations at the time he received the payments he was entitled to receive in any event does not enable a recovery of those back from him in restitution. The remedy available to Nova, subject to findings as to liability for any breach, lies in claims in contract.*

(xiii) Liability of NEL

[147] Nova sought a penalty against NEL under s134(2) of the Act for abetting Mr Mitchell's breaches of his employment agreement by using Nova's confidential information for its business.

[148] Aiding and abetting a breach of an employment agreement can include situations where the employment has ended and a former employee has ongoing obligations concerning use of confidential information or restraints on competition.[23] The person (or entity) alleged to have aided and abetted a breach of such obligations must know of the agreement (but not necessarily the exact term) and deliberately intend to interfere with it.[24]

[149] The Respondents submitted NEL lacked the knowledge necessary for it to be liability for such a penalty.

[150] Mr Mitchell's evidence, set out in his written witness statement, was that he decided in January 2012 to set up and run a brokerage business named National Energy. On 1 February he registered National Energy Limited with the Companies Office. He arranged for his wife, Katherine Mitchell, to be listed as the sole director, but she was to have no involvement with the day to day operation of the business.

[151] There was no dispute over that evidence or the notion that Mrs Mitchell played no real or significant role in the business.

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[23] *Aarts v Barnados NZ Limited & Ors* [2013] NZEmpC 85 at [26].
[24] *Credit Consultants Debt Services NZ Ltd v Wilson (No3)* [2007] ERNZ 252 at [76].

[152] Mr Mitchell was said to be employed by NEL as its general manager and the reality was that NEL was a vehicle for him to establish and run a brokerage business. He also employed his mother, his father (Alan Mitchell) and a third person as sales staff. They were, according to Mr Mitchell's evidence, to work solely at his direction. He trained them in the selling process and NEL began trading from 7 February 2012.

[153] The Respondents submitted NEL lacked "*the requisite knowledge*" and there was no proper basis for the company to incur a penalty for abetting Mr Mitchell's breaches of his confidentiality obligations to Nova. They submitted NEL was merely a vehicle for Mr Mitchell and his knowledge could not be imputed to NEL. In their submission no penalty could be imposed in the absence of another person involved at a senior level in NEL having knowledge of Mr Mitchell's contractual position with Nova and the knowledge of that other person then being imputed to NEL.

[154] I have not accepted such a highly artificial distinction between the knowledge of Mr Mitchell, in his self-appointed role as general manager of NEL, and that of the company.

[155] In answers to questions during the Authority investigation Mr Mitchell accepted that he was effectively the mind or the brain of the company. In his written statement he put it this way: "*In reality I was National Energy*".

[156] Even if he had not made those appropriate concessions in his evidence, his actions would nevertheless have been within the scope of the longstanding and well-known principle of corporate knowledge summarised by the Employment Court in this way in one case:[25]

> *The directors of a company, as well as its senior managers, constitute the human mind of an inanimate corporate entity. So, when one asks what a company intended or thought or believed, it is the minds of those human officers of the company that have and perform those human elements ascribed to it and, in particular, as an employer. In practice, such actions and decisions are delegated to senior managerial employees …*

[157] It follows from this that what Mr Mitchell did and knew as NEL's general manager was also 'known' by the separate legal entity of NEL as a registered limited liability company. In that way NEL knew what Mr Mitchell knew – that he had taken

[25] *Farmers Holdings Limited v Faber* [2006] ERNZ 208 at [32].

information he was not entitled to take and was using it in NEL's business in a way that was in breach of his obligations. On that basis NEL is liable for penalties under s134(2) of the Act for abetting his breaches. The amount of such penalty, and whether the amount is to be paid solely to the Crown, or in whole or part to Nova, is to be dealt with by separate determination in due course.

(xiv) Liability of Alan Mitchell

[158] Nova sought a penalty against Alan Mitchell under s134(2) of the Act for abetting Mr Mitchell's breaches of his employment agreement by using Nova's confidential information for its business.

[159] The Respondents submitted Alan Mitchell lacked the requisite knowledge and Nova conceded that, if the Authority accepted Alan Mitchell's oral evidence, he was not a "*knowing participant*".

[160] Alan Mitchell left a small business he had worked in for 22 years to join his son's business venture as a sales representative. I accepted his oral evidence that he did not know much about Mr Mitchell's business plans, where Mr Mitchell got the information about potential clients that he provided to Alan Mitchell and NEL's two other sales representatives, and he had no real understanding of the confidentiality obligations that his son, as a former Nova manager, might be under. Accordingly I have accepted he did not have the knowledge or intention necessary to be liable for a penalty under s134(2) of the Act.

Next steps

[161] It may be that the parties can now resolve between themselves what amounts are owed by Mr Mitchell and NEL to Nova in the light of this determination on liability for damages and penalties. If they are not able to do so, Nova should advise the Authority if it wishes to have the quantum of damages and the level of penalties investigated and determined.

Robin Arthur
Member of the Employment Relations Authority