

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 497
3176668

BETWEEN PRECISION SOLUTIONS LTD
Applicant

AND PAUL HARDY
Respondent

Member of Authority: Helen Doyle

Representatives: Miles Davis, counsel for the Applicant
Anne Wilson and Giuliana Petronelli, counsel for the
Respondent

Investigation Meeting: 26 and 27 March 2024 in Christchurch

Submissions Received: 22 April and 24 May 2024 from the Applicant
14 May from the Respondent

Determination: 19 August 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Precision Solutions Limited (Precision) was incorporated on 9 January 2015 and has its registered office in Christchurch. It carries on the business of foundation construction. The current directors of Precision are Andrew Breward and Kelly Wood. At the material time Paul Hardy was also a director and Mr Breward, Mr Wood and Mr Hardy were equal shareholders.

[2] Mr Breward and Mr Wood are directors and equal shareholders of another company called Premium Homes Builders Limited (Premium Homes). Mr Hardy was the operations manager of Premium Homes from August 2014.

[3] During 2015 and 2016 Precision performed well with most of its work coming through Premium Homes.

[4] In or around July 2017, it was decided that Mr Breward and Mr Wood would focus their time on Premium Homes and Mr Hardy would be engaged as managing director of Precision and resign his operations manager role with Premium Homes. On or about November 2016, Precision had hired a contracts manager, Charles Porter who then worked under the supervision of Mr Hardy at Precision when he was managing director.

[5] On or about 25 August 2017, Mr Hardy entered into an individual employment agreement (the employment agreement) with Precision.

[6] In or about February 2019 the business relationship between Mr Breward, Mr Wood and Mr Hardy began to break down. On 22 February 2019 Mr Hardy sent an email to Mr Breward and Mr Wood suggesting that they buy him out of Precision or alternatively he purchase their shares in Precision.

[7] On 15 May 2020 the parties entered into a sale and purchase agreement for Mr Wood and Mr Breward to buy Mr Hardy's shares. Mr Hardy resigned on that date from Precision.

[8] On 21 May 2020, Mr Hardy incorporated Hardy Projects Limited (Hardy Projects). Hardy Projects undertake re-levelling. Mr Hardy is the sole director and one of two shareholders with his wife.

[9] Precision says that in the period between February 2019 and May 2020, Mr Hardy acted in breach of express and implied duties of loyalty, fidelity, confidentiality, and good faith. Precision say that the actions of Mr Hardy were intended to store up and divert business and opportunities away from Precision for his own benefit. Precision says that Mr Hardy was aware that it was possible, if not likely or even imminent, that he would be exiting Precision, and during this period, he improperly utilised confidential information to divert jobs that came to Precision to his future business.

[10] In the months leading up to Mr Hardy's resignation Precision say he provided Mr Wood and Mr Breward with a list of jobs and/or possible jobs that were lined up for Precision for the second half of 2020 worth about \$684,000.

[11] Following Mr Hardy's resignation Precision says that the forward-looking work it had been led to believe would be there had inexplicably disappeared. Further, that

there were numerous jobs that had come into Precision that were not included in the list of jobs or possible jobs provided to Mr Wood and Mr Breward and significant involvement on a number of jobs and projects was not disclosed.

[12] Precision says that Mr Hardy did not act in accordance with a longstanding arrangement that any prospective customer that comes to Precision without a builder and needs building work should be referred to Premium Homes. Premium Homes would manage the build and Precision would be assured of getting the relevel work. Instead, it says Mr Hardy directed Mr Porter in 2019 to recommend other builders to Precision's customers. Precision says that this resulted in it losing the re-levelling work after Mr Hardy resigned. Precision says that Hardy Projects thereafter secured the relevel work for the jobs.

[13] Precision seeks a declaration that Mr Hardy has breached express and implied terms of his employment and the statutory duty of good faith.

[14] Damages are sought. There is no claim for penalties.

[15] Mr Hardy does not accept that he has breached duties of loyalty, fidelity, good faith, or confidentiality in his employment and says that he acted in the best interests of Precision at all times.

[16] He denies storing up and diverting business away from Precision during his employment or colluding with Mr Porter to do so. Mr Hardy does not accept that he deliberately excluded jobs from any list of jobs or list of possible jobs, and says he was not responsible for preparing these lists and that responsibility was Mr Porter's. Mr Hardy says it was Mr Porter who kept track of ongoing and upcoming jobs and reported those to the directors of Precision including in January 2020.

[17] Mr Hardy says that it was Mr Porter who decided which builder to refer homeowners to and then referred them. He says there was a direct benefit to Precision to engage with builders other than Premium Homes because they in return would refer all their re-levelling or quoting work to Precision.

[18] Mr Hardy says that he was never instructed to provide all construction work to Premium Homes and there was no custom and practice of doing so. He says that such a direction would not have been in the best interests of Precision as it would have

resulted in Precision losing or simply not obtaining re-levelling work from builders other than Premium Homes.

[19] By agreement with counsel the issues of liability and damages are to be considered separately.

[20] This determination will only deal with issues of liability.

The Authority's investigation

[21] The Authority held a two-day investigation meeting on 26 and 27 March 2024.

[22] The original statement of problem was lodged on 22 June 2022 and there was attendance by the parties at mediation without resolution. Disclosure occupied a further period of time.

[23] The Authority heard sworn or affirmed evidence from Mr Wood, Mr Breward, Grant McSherry who is currently employed by Premium Homes as sales consultant, and Bill Ogg who is now the general manager of Precision.

[24] The Authority heard evidence from Mr Hardy, Mr Porter and Jian Zhang who is a structural engineer and was engaged in several re-levelling projects with Precision. The Authority heard evidence from Matthew Gorinski who previously owned a building and project management company called Cube Contracting Limited (Cube Contracting) and Mitchell James who is the director of WD Build Limited (WD Build).

[25] The evidence occupied two full days, and submissions were timetabled with the final reply submissions received on behalf of Precision, on 24 May 2024.

[26] Mr Davis referred in final submissions to breaches of fiduciary duty. Breaches of fiduciary duty are not alleged in the second amended statement of problem. The Authority offered an opportunity to Ms Wilson and Ms Petronelli to make any further submission. In an email dated 17 July 2024 Ms Wilson stated that Mr Hardy did not want to lodge anything further. Further, with reference to Supreme Court judgment in *FMV v TZB* she submitted that it was arguable that fiduciary duties were outside the employment jurisdiction.¹

¹ *FMV v TZB* [2021] NZSC 102 at [80] and [102].

[27] The Authority will not consider an alleged breach of fiduciary duties but will focus on resolving the employment relationship problems as set out in the second amended statement of problem. The alleged breaches are of the express and implied duties of fidelity, loyalty, confidentiality, and good faith.

[28] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received and considered but has stated findings of fact and law, expressed conclusions on issues necessary to dispose the matter and any orders that it has made as a result.

The issues

[29] The Authority needs to determine the following issues in this matter:

- (a) What are the material provisions in the employment agreement?
- (b) What was involved in setting up Precision?
- (c) What is the Government on-sold process?
- (d) Was there a reciprocal referral arrangement between Precision and Premium Homes?
- (e) When did the relationship between Mr Hardy, Mr Breward and Mr Wood start to deteriorate?
- (f) Was there a change to the normal process for a job?
- (g) Who made the referrals?
- (h) Were there breaches of express or implied duties by Mr Hardy?

What are the material provisions in the employment agreement?

[30] In the employment agreement between Mr Hardy and Precision the following clauses are material to the present issues:

[31] Clause 6 contains the general obligations of both the employer and the employee. For Mr Hardy this included the obligation in clause 6 (d) to:

- (d) conduct his or her duties in the best interests of the employer and the employment relationship.

- (e) deal with the employer in good faith in all aspects of the employment relationship.

[32] Clause 9 contains the following clause:

Confidentiality and Intellectual Property

The employee shall not, whether during the currency of this Employment Agreement **or after its termination** for whatever reason, use, disclose, or distribute to any person or entity, otherwise than as necessary for the proper performance of his or her duties and responsibilities under this Employment Agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the employee in the course of performing his or her services under this Employment Agreement.

What was involved in setting up Precision?

[33] Mr Hardy's evidence was that he told Mr Breward he would leave and set up his own re-levelling company. He said Mr Breward then suggested he stay and they set up a re-levelling company.

[34] Mr Breward's evidence was that he had spoken numerous times with Mr Wood about setting up a re-levelling company due to issues with one of their sub-contractors. He said that Mr Hardy discussed starting a re-levelling company without Mr Wood's involvement. That was something Mr Breward would not agree to as Mr Wood was a lifelong friend and he considered him a great business operator.

[35] Ultimately Mr Hardy, Mr Wood and Mr Breward agreed to go into a re-levelling business together and Precision was incorporated in January 2015. Mr Hardy said that he put a lot of time and effort into the setting up of Precision. He accepted that he did not make any financial contribution to the startup costs for Precision. The evidence supported that the research and development costs were paid for by Premium Homes. Resources and systems such as contracts, human resource material and financial documents were able to be duplicated from Premium Homes. On occasion staff were shared between the two companies.

[36] Precision and Premium Homes shared premises until Precision leased its own office space in October 2018.

What is the Government On-Sold programme?

[37] In or about August 2019 the Government opened up the on-sold EQC programme (on-sold programme).

[38] The on-sold programme was established by the Government to enable homeowners who have purchased a property without knowledge of unscoped or defectively repaired earthquake damage to receive funds to repair that damage. Homeowners in the on-sold programme are entitled to a payment from the Government (EQC) based on the scoped repair of the earthquake damage to their property. Titles of the properties can be encumbered until the repairs are carried out. There was no dispute in the evidence that that the on-sold programme was homeowner driven.

[39] Mr Wood in his written evidence says that it is their belief that Mr Hardy saw the on-sold programme:

...as an opportunity for himself, a way out of being in business with Andrew & I and a way to divert the profits for his sole benefit....

[40] Mr Hardy in his written and oral evidence refutes that suggestion.

Was there a reciprocal referral arrangement between Precision and Premium Homes?

[41] Mr Hardy accepts that there was initially a close working relationship between Precision and Premium Homes but he does not accept that there was ever an exclusive referral relationship between the two companies. Mr Porter and Mr Hardy both denied the existence of any custom and practice of exclusively referring customers without a builder who needed a builder to Premium Homes or any instruction about the same.

[42] Precision say that if a homeowner came to the company and did not have their own builder and a builder's involvement was required then Precision always referred the homeowner to Premium Homes in the first instance. In turn, Precision would be assured of undertaking the relevel. Precision says that the consistent reciprocal referral relationship that it had with Premium Homes was never questioned or not followed until a point in 2019 after the relationship began to deteriorate.

Benefit to Precision in not referring building work to Premium Homes

[43] Mr Hardy and Mr Porter said in their evidence that it was not in the best interests of Precision to always refer construction work to Premium Homes.

[44] There may be situations where a client has an existing relationship with other contracting companies. Precision accept that referrals would not be made where the client had their own builder that they wanted to use.

[45] There may be situations where the client did not want to work with Premium Homes.

[46] Most relevant for present purposes was the evidence of Mr Porter and Mr Hardy about a benefit to refer homeowners to other builders than Premium Homes because they would in turn refer their re-levelling work to Precision. This would build relationships and ensure work from other builders.

Benefit to Precision if it refers work to Premium Home?

[47] Mr Kelly and Mr Breward say that Precision has always recommended Premium Homes to undertake the building and construction work and this had two advantages.

[48] The first is that when Premium Homes enters into a building contract it secures the relevel work for Precision. The evidence was not disputed that on each occasion when Precision referred building work to Premium Homes and a building contract followed, the relevel work was then undertaken by Precision.

[49] The second is that Premium Homes can take care of all the pre-contract works which can take months or years and that frees Precision up to work on forward work and sales. Mr Wood and Mr Breward said they had no idea that Precision was not continuing to refer homeowners where a builder was required, to Premium Homes, until after Mr Hardy left.

Evidence from Mr McSherry

[50] Mr McSherry is employed by Premium Homes as a sales consultant and joined the company on 25 June 2018. Mr McSherry gave evidence about the complimentary nature of the companies. Precision specialises in foundation re-levelling and Premium Homes provides building work necessary to repair earthquake damaged buildings to an insurable state. He said that he referred to Premium Homes and Precision as sister companies in his communications with customers.

[51] Mr McSherry said that it was always his understanding that Precision recommended homeowners without a builder to Premium Homes. He explained that if the client has come to Premium Homes from Precision, the re-levelling work is to be contracted out to Precision and that was the agreed process from the time he joined the company in mid-2018. This enabled Premium Homes to concentrate on the lengthy

and complex pre-contract process for the client and freed Precision up to obtain more re-levelling projects.

[52] Mr McSherry said that on-sold claims were identified as a significant work stream immediately on release of the programme in August 2019.

[53] Ms Wilson submits that the minutes of a meeting held on 14 July 2020 with Mr Porter, Mr Wood, Mr Breward and Mr McSherry, after Mr Hardy had resigned, confirms that this was not in fact the understood process and was only the process after Mr Hardy resigned:

All on-sold enquiries are to be handed over to Grant so Premium Homes can manage this process. Precision retains the re-level work.

[54] Mr McSherry said that he understood this system had always applied but there was a need to reinforce it to Mr Porter after Mr Hardy's resignation.

Value of work for Precision attributed to Premium Homes (Builder Comparison report)

[55] Ms Wilson submits the value of work undertaken by Precision that is attributed to Premium Homes from the builder comparison report only accounted for less than 25% of the total value of work from when Precision was incorporated in April 2016.²

[56] I am not satisfied that is what the builders comparison report provides, likely because the date of incorporation of Precision is not correct. Precision was incorporated in January 2015.

[57] The analysis from the report provides that the total value of Premium Homes work for Precision, including that prior to April 2016, is overall the most valuable source of work from any building company. The report shows that the value of work from other builders increased from the early days of Precision when most of the work came from Premium Homes.

² Builder comparison report PSL 253.

Builders comparison job report – evidence of referral to other construction companies?

[58] Ms Wilson submits that the builders comparison report Precision provided shows jobs referred to other construction companies by Precision.³

[59] Precision accepts that it always did work for other building companies where the building company had an existing home repair job that needed a specialist re-levelling company. The building company then had a sub-contractor such as Precision carry out the work. Precision contrast this with the situation where it has been approached directly by the client and needs to refer a builder to a client in which case it says that referrals were always made to Premium Homes.

[60] The builder's comparison job report shows that the second most valuable source of work for Precision after Premium Homes was from Cube Contracting. Mr Gorinski did not recall in his evidence referrals coming to Cube Contracting from Precision. Rather it was Cube Contracting requesting a quote for re-levelling work from Precision. Mr Gorinski referred to the way Cube Contracting operated as almost "exclusively relational." He explained in his written evidence that Cube Contracting engaged with subcontractors it had a relationship with, or connections to, and that project delivery was more important than price. Mr Gorinski referred positively to Mr Hardy's competence and "hands on" and "on site" approach. He said about any reciprocal arrangement of work:

When Paul worked at PSL there was no reciprocal arrangement of work between PSL and Cube, however the regular workflow would be that Cube would onboard a client and Cube would then request a releveling quote from PSL.⁴

[61] Mr Gorinski and Mr James both said in evidence that they did not expect their sub trades such as Precision to give them work and that normally it was the other way around.

[62] The evidence did not enable the Authority to conclude that the builder's comparison job report shows that before 2019 and 2020 customers without builders were referred by Precision to building companies other than Premium Homes.

³ Above n 2.

⁴ PSL refers to Precision.

PSL quoted job report -1 May 2019 to 31 May 2020

[63] Ms Wilson submits that the list of jobs 1 May 2019 to 31 May 2020 shows that it was standard practice to refer properties to a number of different buildings companies.

[64] There are many jobs on that report that have “very little data” beside them. Mr Wood explained that this data was prepared from the pipeline spreadsheets and jobs in “Workflowmax” that had been prepared by Mr Porter and Mr Hardy and that some jobs were left off including jobs referred to WD Build. I do not conclude that the list of jobs is sufficiently detailed to support that submission.

[65] The report shows under a heading “new contractor appointed after Precision was engaged” three jobs were referred to Premium Homes and three to WD Build. Ms Wilson submits four jobs were referred to Premium Homes by Precision in the relevant period however Mr Hardy’s evidence was work on the Norwood Street property did not proceed for either company.

[66] Only one job was referred to Premium Homes from Precision after 22 August 2019 and that was on 1 November 2019. Both jobs were EQC jobs and not from the on-sold programme. Aside from the Norwood Street property work which did not proceed, no other referrals were made after 1 November 2019.

[67] I agree with Mr Davis’s submission that while the evidence of Mr Porter and Mr Hardy was that they did not stop referring work or decide to stop referring work to Premium Homes, the evidence supports that after 1 November 2019 referrals stopped altogether. There was no evidence about any discussion with Mr Wood or Mr Breward about this and no on-sold jobs were ever referred to Premium Homes by Precision at all.

Premium Homes not referring all its re-levelling work to Precision

[68] Ms Wilson submits that Premium Homes did not refer all of its re-levelling work to Precision which points away from the assertion of an exclusive cross referral relationship.

[69] Re-levelling was required on a Purchas Street property for which work commenced with Premium Homes. Precision did not undertake the re-levelling work on that property. This was the situation with one other property. The work was done

internally by Premium Homes. Although another quote was requested from another re-leveller, Mr Wood said this was only to demonstrate to Mr Hardy that his pricing was not competitive. From the evidence there was communication with, and an opportunity for, Precision to undertake the work if the relevel quote was reduced. Pricing had become a source of friction between the companies. I accept Mr Davis' submission that there was a level of transparency about Purchas Steet and another property with Mr Hardy.

Mr Porter's affidavit evidence

[70] Mr Porter affirmed an affidavit when he was a second respondent in these proceedings, on 17 February 2024. As set out earlier he was employed by Precision as a contracts manager in November 2016 and from July 2017 until May 2020 his supervisor was Mr Hardy.

[71] Mr Porter confirmed in his evidence that he provided the affidavit at a time when he knew its contents were important to the proceedings and the claims of Precision. He was represented by counsel at the time.

[72] The purpose of the affidavit in paragraph one is to set out what Mr Porter's evidence would be on certain issues if the matter proceeded to a hearing. In his affidavit Mr Porter stated that the main part of his job was sales and he would prepare re-level scopes and quotes for clients, follow them to get the quotes signed and confirm the jobs to try to keep the re-level teams busy.

[73] Mr Porter referred to both the relationship between Precision and Premium Homes and referrals to main contractors in his affidavit as set out below:

4. At the time of my employment, Kelly Wood and Andrew Beward (the current directors of PSL) ran another business named Premium Homes Builders Limited (PHB). There was a close relationship between PSL and PHB. PSL would frequently refer homeowners to PHB in the first instance when the project required a main contractor. PHB would manage and co-ordinate the repair process and PSL would do the re-level work.
5. Although I was not aware of it at the time I now know that in late 2019 and early 2020 the directors and shareholder of PSL had a breakdown in their relationship. The first respondent, Paul Hardy, was a director and shareholder of PSL at the time, and his relationship with Kelly and Andrew had broken down and the three of them were discussing buy out options.
6. Around this same time, when homeowners advised they wanted to engage PSL to do relevel work I brought in a number of different builders to be the head contractors on those jobs. This included [five builders set out]:

7. Whenever I referred a homeowner to a head contractor in this period, it was done at the direction and instruction of the first respondent, as the managing director of PSL at the time. I had a strong and trusting relationship with the first respondent and had no reason to doubt his instruction.

[74] Mr Porter's affidavit supports a close working relationship between Precision and Premium Homes but then bringing in at a later point, a different builder. That change is consistent with the evidence before the Authority about referrals that has been set out above. As Ms Wilson submits, Mr Porter does not use the words "exclusive" in the affidavit but uses "frequently".

Weston Road property

[75] An example of Mr Porter acknowledging the close relationship with Premium Homes is an email exchange before the on-sold programme was announced. Mr Porter had sent the owners of a Weston Road property emails, on both 17 and 20 December 2018 about their EQC issues.

[76] In the 17 December 2018 email Mr Porter stated "I can help by bring[sic] in Premium Homes they are very successful in completing these."

[77] In the 20 December 2018 email he stated amongst other matters:

We work closely with Premium Homes who provide these scopes, they also do a lot of work with IAG so they know how the process works and how to maximise your claim (with out being silly)...

[78] There did not from the evidence appear to be further activity on this property until after the homeowner was accepted into the on-sold programme and Mr Porter then referred this homeowner to WD Build.

A similar reciprocal relationship between Hardy Projects and WD Build Limited?

[79] In June 2020 after Mr Hardy had resigned from Precision, Mr Hardy and Mr James saw an opportunity to work together and secure as many on-sold jobs as possible whilst the on-sold programme was publicised. They explored advertising in a publication called Metropol together. Mr Hardy said that the first advertisement was on 1 September 2020. Mr Hardy in his evidence explained the reference in the advertisement about the on-sold programme "WD Build and Hardy Projects have been at the forefront of this process, helping homeowners get the correct repairs." He said

that he had worked with Mr James for a long time and the writer of the advertisement had used “artistic licence about how long they had been in the on-sold space.” He denied that this was evidence of some “side agreement” with Mr James whilst employed at Precision.

[80] Mr James said the following in his written evidence:

...Our advertising campaign was mutually beneficial to each of our respective businesses, any referral for re-levelling works I received, I passed onto Paul and vice versa any main contracting work was referred to me via Hardy Projects. This connection continues to this day and will remain until this line of work is no longer available.

[81] Ms Wilson submits that the reciprocity is limited to work derived from the joint advertising and that WD Build used multiple sub-contractors including different re-levellers. I am not persuaded that the evidence supports the reciprocal nature of the relationship between Hardy Projects and WD Build is necessarily limited in the way Ms Wilson submits.

[82] There is strength in Mr Davis’s submission that the sort of relationship described by Mr James in his evidence is very similar to that which Precision says it had with Premium Homes, but Mr Hardy denied existed, where two complimentary companies work in unison because it is beneficial.

Was Premium Homes properly viewed as a competitor?

[83] In or about October 2019 Premium Homes marketed its ability to carry out relevels. Mr Hardy in his evidence viewed this as Premium Homes competing with Precision. Mr Wood said in his oral evidence that the two companies advertised in “unison using “re-levelling” as a key word to get enquiries.”

[84] Premium Homes say that at the time of the advertising it was seen as a win/win for both Precision and Premium Homes because most on-sold clients have floor level issues and Precision would do those. The evidence supported that Premium Homes only did two-re-level jobs internally while Mr Hardy was managing director, which were the ones referred to above. The reason for not using Precision was that the pricing was not viewed as competitive. Mr Hardy was aware of both of these jobs at the time.

[85] I do not conclude the evidence supports that the purpose of the advertising by Premium Homes was to compete with Precision but rather it was seen as a benefit to

both companies at the time of the on-sold programme for their respective workflow. The on-sold programme was viewed by both companies as a valuable source of work.

Benefits of referring the work to Premium Homes

[86] When Precision referred a homeowner to Premium Homes as a main contractor and a contract was secured then the evidence supported that Precision undertook the releveling.

[87] Mr James set out in his written statement of evidence some risk for Precision offering their client to an outside main contractor as the main contractor is more than likely going to go to the open market for pricing advantages or to other re-levelers they have used on previous jobs.

[88] Mr Wood said in his evidence that Mr Hardy should have required WD Build to enter into a formal agreement to ensure the Precision would get the re-leveling work subject to WD Build getting a formal signed agreement with the homeowner. Mr James said that he would never sign up to this and “lock in one subcontractor as it made no business sense” and is “not reality.” Mr Gorinski also said this was not industry standard.

[89] Mr Wood and Mr Breward accepted that there was no written agreement with Precision along these formal lines. The evidence however was that if Premium Homes secured a contract from a referral from Precision, Precision always undertook the releveling and an agreement was not necessary.

Conclusions about reciprocal referral relationship

[90] The relationship between the Precision and Premium Homes was, at least until the relationship between the directors began to deteriorate in 2019, a close one. Precision and Premium Homes were complimentary in the work that they undertook.

[91] The initial startup costs of Precision were met by Premium Homes. Premium Homes shared resources with Precision and from time-to-time Precision and Premium Home shared each other’s staff. Mr Hardy said that the cost of this was always invoiced. Cross pollination of ideas is also evident in an email Mr Wood sent to Mr Hardy following a directors meeting dated 22 February 2019. He referred in his email

to a discussion at the directors meeting about things Premium Homes were doing that were beneficial and discussing if these could work in Precision.

[92] Mr Hardy had worked for both Premium Homes and Precision and was the managing director and equal shareholder in Precision with Mr Wood and Mr Breward. Mr Wood and Mr Breward were directors in both companies and together the majority shareholders in Precision.

[93] The two companies both operated out of Premium Homes offices until October 2018. The evidence supports referrals from Precision were made at that point to Premium Homes. Premium Homes, when compared to other building companies, was the most valuable supplier of work to Precision. Other building companies had also been valuable sources of work particularly after 2017 for Precision. The Authority has not been satisfied that work had been referred to these building companies by Precision rather than the building companies referring work to Precision as a sub-contractor. WD Build was not as valuable a source of work as Premium Homes and Cube Contractors for Precision.

[94] There was a benefit for Precision in referring homeowners to Premium Homes because if a contract was entered into the evidence supports Precision have always undertaken the re-levelling work. Premium Homes undertook work on the pre-contract process, freeing Precision up to do other work. Mr Wood said in his evidence that on some of the jobs referred to other builders, Mr Porter undertook work and engaged in excessive emails that Premium Homes would have taken control of.

[95] The evidence of Mr Gorinski and Mr James did not support an expectation that sub trades such as Precision would refer them work in return for Precision undertaking their re-levelling work. Mr Gorinski, owner of the second most valuable building company to provide work to Precision, referred to other reasons for referring work for a quote to Precision. The Authority is not satisfied that in order to obtain re-levelling work as a sub-contractor from other building companies it was necessary for Precision to also refer work to those companies.

[96] Counsel placed emphasis on an email dated 17 April 2020 from Mr Hardy to Mr Wood and Mr Breward. Mr Hardy said that this email was in the context of a phone call he had made Mr Wood and Mr Breward that if a price could not be agreed for Precision than he would start his own construction company and they would have to

get a project manager in to run Precision. Mr Wood in his written evidence says that the email shows that Mr Hardy had known that Precision leads got passed to Premium Homes to do the building works. Mr Hardy denies that.

[97] The material part of the email provides as follows:

As I said in the phone conversation we had, before I resign I would like to have the structure of the business in place and some trading agreements between Premium Homes and Precision Solutions worked out. I expressed to you that one of my concerns is that with Premium Homes undertaking re-levelling works and effectively being in a position to lead the contract I would want it written up that Precision Solutions leads that are passed to Premium Homes to do the building works, that the releveling works could not then be undertaken by Premium Homes. You agreed this was fair.

[98] Ms Wilson submits this email was written about Mr Hardy's genuine concern that Premium Homes would do referred re-levelling internally and says that was a concern that Precision did not have with other builders. She submits that the agreement sought was not that Premium Homes guaranteed it would engage Precision in a construction context to do the re-levelling work on a job, but was discussing a situation where Premium Homes would not agree to do the re-levelling work itself from Precision leads.

[99] Mr Hardy's written evidence refers to the email as below:

The reference in my email to getting an agreement between PHB and PSL was to ensure that we had an agreement as to how the work would be distributed between the companies and if the works came from PSL then PSL would get the opportunity to do the releveling works. Having an agreement of this nature in place would ensure that PHB would agree not to undertake the releveling. I wanted to try and safeguard the PSL work to the extent that I could.

[100] From Mr Hardy's written evidence he knew it was important to have an agreement to secure the re-levelling for Precision if the work was referred to Premium Homes. Premium Homes was prepared, from the email, to agree to a trading agreement that Precision undertake the re-levelling if referrals are made to Premium Homes. The evidence supported that wasn't the case with other building companies.

[101] Some emphasis is placed by Ms Wilson on the word "exclusive" and the fact that on two occasions the Authority heard evidence that Premium Homes did not refer work to Precision. I accept Ms Wilson's submission that businesses have formal and informal referrals that can change. The Authority would have expected if there had been changes to the longstanding practice which had clear benefits for Precision there would have been communication between the directors about this. There was no

evidence about that. Mr Wood's evidence was that if there was to be a change this would have to be agreed between the directors. The lack of communication can be contrasted with the Premium Homes properties referred to above where the re-levelling did not go to Precision. There was communication with Mr Hardy about the reasons for this and a level of transparency. Mr Hardy was unhappy and cross, but he knew about it.

[102] I conclude it is more likely than not that Precision and Premium Homes had a process for reciprocal referrals which although not reduced to writing was longstanding and understood by the directors of Precision and Mr Porter. It had benefits for Precision which have been set out earlier. The Authority is not persuaded from the evidence of any significant benefit to Precision in departing from this arrangement to secure work from other building companies unless the work for Precision, in the event of a contract being secured by another building company, could be safeguarded.

When did the relationship between Mr Hardy, Mr Wood and Mr Breward start to deteriorate?

[103] From February 2019 monthly director's meetings were implemented for Precision.

[104] Mr Wood sent an email dated 22 February 2019 to Mr Hardy following a directors meeting. Two paragraphs from the email are set out below.

I put a lot of time and effort into preparing the agenda for our Directors Meeting, putting together things that we have been doing within Premium Homes and seeing good benefits from. I am simply bringing to the table options to be considered that could help Precision.

What you did is bring nothing to the table except a negative attitude, you didn't supply any data as requested to enable an informed meeting, you had a very blase attitude to toward the current state of the business and how to improve and grow the business.

[105] Mr Hardy emailed back the same day to say that the recollection of the meeting is "laughable" and he wanted to catch up and set the record straight. After a further email from Mr Wood, he sent the following email:

Your email doesn't help. You say you found my attitude negative, interesting I found your guys attitude negative. We will have to agree to disagree on a number of points.

What I hope that we can all agree on though is that there has been a big breakdown in our working relationship and this is not constructive for the company
Im not prepared to work in this toxic environment.

You and Andrew are welcome to buy me out should you wish. Alternatively, I could look at buying you out or we sell the company.

I don't wish to get into any argument and risk my other business relationship with Andrew and see this as the best way forward for us all.

Basically the ball is in your court. I look forward to catching up next week to discuss this. Please bring an open mind and a positive attitude....

[106] The relationship continued to deteriorate after this point.

[107] There were concerns about the performance of Precision as Mr Wood and Mr Breward said in evidence the revenue had dropped considerably from about 2017 onwards.

[108] Mr Hardy said that he was "strong armed" out of his March 2019 bonus. Mr Wood and Mr Breward said that removing the bonus in the circumstances where profit and revenue was down amounted to good business practice.

[109] There were issues raised about Precision's pricing from in or about March 2019 impacting the ability of Premium Homes to win tenders. Mr Wood gave an example of both Precision and Premium Homes failing to obtain work on a property in his written evidence, as a result of pricing. Mr Hardy said he felt he was being asked to discount his price. Mr Wood in his evidence said that they were asking for better pricing so that Precision and Premium Homes could win more jobs, as if the main contractor Premium Homes did not win the jobs then neither would Precision. The evidence supported Precision pricing had become a sensitive topic.

[110] The relationship deteriorated further in June/July 2019 following an IAG tender process for work on the property at Purchas Street. WD Build and Premium Homes both tendered for the property. Precision had provided quotes for both companies. The evidence from Mr Breward and Mr Wood was that the homeowner preferred Premium Homes and asked them to reduce their price. Ultimately Premium Homes undertook the re-levelling inhouse. Whilst Premium Homes won the tender, it appeared IAG had unfortunately advised WD Build they were successful.

[111] Mr Hardy concluded there had been "underhanded tactics" to obtain the tender. A telephone conversation took place between Mr James and Mr Hardy at or about July/August 2019. It is likely from the evidence that Mr Hardy sought to distance himself from any perception Mr James may have had about the actions of Mr Wood

and Mr Breward being underhand and untoward. Mr James said that Mr Hardy advised Mr James that Precision did not alter its quote and Mr James was comforted by this.

[112] In his oral and written evidence Mr James was clear that he would never work with Mr Wood and Mr Breward again after the Purchas Street property because he could not trust them. I conclude from the evidence Mr Hardy would have understood from about that time that Mr James was unlikely to have wanted to work with Mr Wood and Mr Breward.

[113] For completeness, Mr Wood and Mr Breward explained what had happened with the Purchas Street tenders. They said the decision had been owner driven and based on Premium Homes being better resourced. I am not satisfied their behaviour was underhanded or wrong.

[114] On 9 August 2019 Mr Hardy was issued with a letter of concern with reference to discussions at monthly director meetings from 20 February 2019, including follow up meetings. The concerns included a lack of preparation for directors meetings, no business or sales plan presented, little or no documentation about planning, sales and marketing. Suggested ideas to grow the business were referred to as not being implemented and that there was a failure to load all of Precision's client data base into the active campaign and HubSpot.

[115] Towards the end of 2019 there were active buy out discussions involving the company accountant and respective lawyers.

[116] The evidence from Mr Wood and Mr Breward was that they told Mr Hardy they were not interested in selling their shares to Mr Hardy and maintained that position throughout.

[117] On 14 February 2020 Mr Hardy emailed Precision's accountants, copying in Mr Wood and Mr Breward, about options for them to buy Precision and options for Mr Hardy to buy Precision Solutions from them. The email specifically referred to on completion of the sale all parties would be free to undertake house levelling and repair work immediately. In other words, they could compete.

[118] On 26 February 2020 Mr Hardy offered to sell his shares giving two payment options.⁵

[119] Ms Wilson submits that Mr Hardy was still negotiating in April 2020 to buy Mr Breward's and Mr Wood's shares. She says that an email to Mr Hardy from Mr Wood dated 17 April 2020 is not consistent with Mr Wood and Mr Breward having no intention to sell Precision to Mr Hardy.

[120] The first part of the email from Mr Wood dated 17 April 2020 sets out what Mr Hardy has indicated which includes buying Mr Wood and Mr Breward out of the business. The balance of the email however contains an offer to buy Mr Hardy out of the business. I do not conclude the email is inconsistent with Mr Breward and Mr Wood having no intention of selling their shares in Precision.

[121] The first draft sale and purchase agreement was provided to Mr Hardy on 10 March 2020. There was the intervening COVID-19 lockdown on 24 March 2020.

[122] On 15 May 2020 the sale and purchase agreement was signed in which Mr Hardy sold his shares, resigned as a director of the company and as an employee. A restraint of trade covenant in Mr Hardy's employment agreement was waived.

Was there a change to the normal process for a job?

[123] Precision says that the normal process for a job followed a sequence as set out below:

- (a) Precision would receive an initial enquiry, scope the site, take photographs, and complete an inspection form;
- (b) Create a client file and upload the photos and supporting documents to Precision's Google Drive;
- (c) Prepare a repair plan;
- (d) Provide a re-level quote;
- (e) Present the quote to the client;
- (f) Add the job to the monthly job report;

⁵ Whilst referred to in final submissions on behalf of Mr Hardy as including an offer to buy shares the email in fact contained offers to sell with two options as to payment.

- (g) Get quote signed by the client;
- (h) Create a job in Precision's internal workflowmax system;
- (i) Confirm the job on Precision's job boards;
- (j) Engage PS1 engineering design;
- (k) Apply for exemption/full consent; and
- (l) Hand the project over to the re-level team.

[124] Precision provided documents for four properties that it says illustrate this process. Mr Hardy and Mr Porter say that these four jobs which refer to the standard process were EQC jobs and not on-sold programme jobs.

[125] With the on-sold programme the repair solution and the quotes from the head builder and all the sub-contractors need to be approved by EQC which can be a lengthy process. Precision say that referring the jobs to Premium Homes was in its best interests to secure the re-levelling work for Precision if approval by EQC was delayed.

[126] Mr Porter in his written evidence referred to the general process set out above and addressed what he said were the differences for on-sold properties. Mr Porter did not disagree that there was initial contact and initial quick visual appraisal. He agreed there was creation of a client file and uploading of all relevant documentation and photos to Precision's google drive. He thought most leads would be saved to Workflowmax but maybe not those that were not going anywhere.

[127] Mr Porter said a repair plan would only be undertaken if required. Preparation of a relevel quote would depend on the type of issue and circumstances. He said by the time the quote was to be presented a head contractor was usually involved so the quote would go to them.

[128] Mr Porter agreed the job would be added to the monthly report but said that was his responsibility not Mr Hardy's. He said if the house was in the on-sold programme they would never get a signed quote from the homeowner.

[129] There was agreement that once quoted the jobs would be added to Workflowmax, but Mr Porter said this process does not allow for considerable delays and rework occasioned. He agreed the job would be confirmed on the "jobs board" but there could be a lag in doing this if the job was not confirmed by EQC. Mr Porter said

that main contractor engaged the PS1 engineering design and the exemption and full consent was always coordinated by the builder and not Precision.

[130] Mr Porter said that the project was handed over to the relevel team once consented and started by the builder.

The Jobs

[131] The jobs that were alleged to have been stored up and diverted were referred to in the statement of problem and statement in reply and evidence before the Authority as “the Jobs.” There was a lot of evidence about each of the Jobs and the Authority is in possession of several thousand pages of documents. The documents for each job provided by Precision include those obtained through its own client file systems.

[132] After Mr Hardy left, the evidence of Mr Wood and Mr Breward said that Mr Porter could not really explain what had happened with the Jobs. I accept that is likely. There was no dispute that it was a difficult time for the company and Mr Wood and Mr Breward had to work hard to keep Precision going. They could see Hardy Projects working on sites and from council files could see that some of these jobs had originated from Precision and then looked to see what could be found in the Precision systems about them.

[133] As this determination is focussed on liability I intend to briefly refer to some aspects of the jobs that are different to the usual referral process but not all. Mr Wood attached a very detailed and extensive assessment of all the jobs and deviations from the usual process in an extensive manner. I do not intend to repeat that here but have considered very carefully that extensive document and the different views of Mr Hardy and Mr Porter.

[134] As I have done with other properties I intend to refer only to the street and not the address.

Northaw Street

[135] Mr Porter says that he had assessed this job in 2018 and had suggested WD Build then to the homeowner. I cannot be satisfied of that from the documents obtained by Precision from Workflowmax. They show the first contact was made to Precision via its website on 10 January 2020 when the homeowner wanted a quote for re-

levelling. There is an email from Mr Porter to Mr James from WD Build on Sunday 19 January 2020 advising that he has “another on-sold” for Mr James to scope when he gets back from holiday. The job was not put on a job list and Mr Wood and Mr Breward were not advised about the job. It was not referred to Premium Homes but referred to WD Build.

[136] For this job and others there was reference to the amount of work Mr Porter has done which would not have been required if Premium Homes had been referred the client. Mr Hardy did not disagree that some of Mr Porter’s involvement in the Jobs appeared excessive. On some Jobs Mr Porter had sent up to 100 emails. There was a concern with the Northaw Street property that when the job was entered into Workflowmax it had WD Build as the client so it was not clear that in fact it had been referred to WD Build. The homeowner should have been referred to as the client.

[137] Consent was granted on 22 April 2020 for this property. Precision say that this shows the client as Precision. A council inspection report dated 25 June 2020 shows photos of the engineer’s inspections addressed to Hardy Projects. Examples in the bundles about other jobs show locking in jobs by the main contractor with Hardy Projects took between six weeks and three and four months. The evidence from Mr Hardy and Mr James was that there was no knowledge by Mr James that Mr Hardy was leaving Precision until he actually left. Mr James said he could lock in subcontractors with only days’ notice.

[138] Objectively assessed it is more likely than not that there would have been some discussion between Mr James and Mr Hardy whilst Mr Hardy was still at Precision, about scheduling. Hardy Projects started work on this property only a few weeks after Mr Hardy left Precision. This homeowner was used as a testimonial for the Metropol advertising for WD Build and Hardy Projects.

Westminster Street

[139] This job was included in the monthly reports. It had been initially scoped and there was a repair plan and quote in March 2018 which was revised on 29 September 2018. The file was in Workflowmax. It became an on-sold job and was referred to WD Build on 3 December 2019. Mr Wood said in his evidence that he had referred the homeowner to Precision in 2018 as he was the son of someone he knew well and that

was probably why this job was on a list. This Job was not referred to Premium Homes but to WD Build.

[140] A job was created in Workflowmax at a point in 2020 with WD Build as the client but the homeowner was in fact the client. Mr Wood and Mr Breward were not therefore alerted to the fact that this was a referral to WD Build from Precision rather than the other way around. There were concerns with this job and others that there was no short form agreement ensuring the Precision would get paid for costs it had incurred. This was contrasted by the short form agreements WD Build and the engineers required to be signed but there were none in place to secure payment for Precision. An invoice was also viewed as unusual as it was addressed in Workflowmax to WD Build and in Xero to the homeowner.

Oxford Street

[141] This Job was not on a job list or in Workflowmax. Mr Hardy said that the owner was a friend. Emails showed the job was referred to WD Build in December 2019. There was no knowledge about this job by Mr Wood and Mr Breward and there were similar concerns as with the other jobs that it had not been referred to Premium Homes.

Weston Road

[142] There was an initial enquiry from homeowner in July 2018. The file was entered into Workflowmax. Mr Porter recommended Premium Homes as main contractor in 2018. In November 2019 the homeowner advised that they are in the on-sold programme and they wanted to work with Precision. Mr Porter emailed Mr Hardy on 4 November 2019 about this property saying "Might be a good job for Mitch?" It is then added to the monthly report but with WD Build as the client.

Mairehau Road and Petrie Street

[143] There was no evidence that properties at Mairehau Road and Petrie Street were on job lists or in monthly reports. Mr Porter appeared to be undertaking work on these properties after Mr Hardy had resigned even though Hardy Projects ended up undertaking the relevel work.

Gloucester Street and Fisher Ave

[144] Ms Wilson submits that Gloucester Street and Fisher Avenue properties had existing builders. The evidence from Mr Wood suggested that this not clear-cut. The homeowner at the Gloucester Street property for example emailed Mr Porter on 30 March 2020 about EQC recommending a complete relevel of his property rather than Mr Porter being contacted by Mr James. Although Mr James thought this referral had come from him I did not conclude he was as certain about that in his oral evidence. Mr Porter forwards the email to Mr Hardy later on 30 March 2020 stating, “Lets discuss and put on the list.” There was no evidence this was put on any of the Precision lists. WD Build was then more clearly involved from that point.

Conclusion

[145] The Jobs where the homeowner did not have a builder were referred to a builder other than Premium Homes. That was a change and departure from the usual process.

[146] Most of the Jobs were not included on job lists or in monthly reports. That was a departure from the usual process. I do not conclude this can be sensibly explained on the basis that they were not at a stage where they would be recorded on a list for the other directors to see. They were all possible jobs when they were still with Precision. Possible jobs are recorded in other job lists from Precision. As Mr Davis submits, the Authority can see that the re-levelling from the Jobs was all subsequently performed by Hardy Projects.

[147] Ms Wilson submits it was Mr Porter’s job to make sure job lists and monthly schedules were correct and completed and that any omission was without Mr Hardy’s knowledge. Mr Hardy was the managing director and Mr Porter’s supervisor. He had ultimate responsibility to ensure that the other directors were made aware of the possible jobs. The letter of concern in August 2019 to Mr Hardy referred to concerns about information provision.

[148] Ms Wilson submits that all of the Jobs were entered in the CRM. I heard evidence about putting information in Workflowmax and google drive but not CRM. I could not be satisfied that all information was entered. There was no evidence of anything for Oxford Street. There is strength in Mr Davis’s submission that Mr Breward and Mr Wood would not know what to look for as most of the jobs were not disclosed to them. The two Jobs that were on job lists showed the client was WD Build

when in fact they had been referred by Precision to WD Build and that would have confused matters. There were likely some other deviations in respect of the usual sequence for repair plans and quotes for some of the jobs.

Who made the referrals to builders?

[149] Mr Hardy's evidence was that he was not directly responsible for making referrals to builders and that it was Mr Porter who made the contact with and referrals to builders. Mr Hardy said in evidence that his role was quoting and being on site. Mr Porter's role was to follow up with new clients, respond to new inquiries from homeowners and builders and handle the relationship from beginning to end. Mr Porter was working for Mr Hardy at the time of the investigation meeting.

[150] Mr Porter in his oral and written evidence said that he worked under the supervision and direction of Mr Hardy but that Mr Hardy did not direct him to refer to each homeowner's job to a particular head contractor. Ms Wilson submits that Mr Porter provided context to the statement about referrals to a head contractor, rather than changing his affidavit evidence.

[151] The oral and written evidence of Mr Porter on the matter of referrals is somewhat difficult to reconcile with his affidavit evidence. The affidavit provides that "whenever" Mr Porter referred a homeowner to a head contractor it was at the direction and instruction of Mr Hardy.

[152] There is an email from Mr Porter to Mr Hardy on 4 November 2019 about a property at Weston Road St Albans that provides as follows:

Hey Mate,

Might be a good one for Mitch? Thoughts..This is the house that's about 200mm out.

[153] Ms Wilson submits that this email confirms that Mr Porter was the one primarily responsible for the referral and that there is no evidence to suggest that Mr Hardy responded or agreed to his suggestion. Equally this could support that Mr Porter checked which main contractor to make referrals to with Mr Hardy.

[154] On 7 November 2019 Mr Porter emailed the homeowner at Weston Road about a booking and advises "I will bring Mitchell James from WD Build along also."

[155] It is less likely that Mr Porter would ask for Mr Hardy's thoughts about referring to Mr James and then proceed to do so without an affirmative response. No email responding to this was found but the evidence supported Mr Hardy and Mr Porter worked in the same building and shared an office space and they could have discussed this. The evidence supported that the builders to whom work was referred were ones that Mr Hardy and Mr Porter would want to work with.

[156] In his written evidence Mr James states at paragraph 52 about the referral of a homeowner property to act as the main contractor:

...He did this as WD Build were using PSL as their re-levelling contractor over re-levelling works that WD Build had obtained through the OSP. Likewise, PSL were offering WD Build the opportunity of being involved as the main contractor to any OSP jobs that PSL encountered, a mutual arrangement that allowed the growth of work between each company...

[157] When cross-examined Mr James said that the offer of getting the on-sold work jobs Precision encountered came from Mr Hardy. When re-examined Mr James agreed that the referrals came from Mr Porter. In an administrative sense of communication that is likely so. Making a decision about who to refer a homeowner is a different matter.

[158] I conclude it is more likely that Mr Hardy as a managing director and supervisor of Mr Porter made the decision about which main contractor to refer a homeowner to and instructed Mr Porter accordingly as Mr Porter affirmed in his affidavit.

Were there breaches of express and implied duties?

[159] Mr Hardy owed express and implied duties of fidelity, loyalty, good faith and confidentiality whilst an employee of Precision. There is an express term in the employment agreement that Mr Hardy act in the best interests of Precision and there is an express confidentiality obligation.

[160] Mr Hardy was a senior employee. He was the managing director of Precision. The Court of Appeal in *Morris v Interchem Agencies* has held that:

...the more senior the employee, the more onerous is the duty of fidelity.⁶

⁶ *Morris v Interchem Agencies* [2003] 1 ERNZ 93 at [45]

[161] Ms Wilson referred the Authority to the Court of Appeal judgment in *Big Save Furniture v Bridge*.⁷ It was stated in that judgment which was concerned with an appeal about bonuses and wrongful dismissal that:

...the duty of fidelity and loyalty which an employee owes to his employer is broken when there is conduct which undermines the relationship of trust and confidence which must exist between an employer and employee.⁸

[162] The stockpiling of work opportunities pending the establishment of a competing business and resignation has been recognised by the Employment Court as an example of competing by unlawful means and a breach of duty.⁹

[163] A helpful statement is set out below from Rooney about the nature of the duty of fidelity:

Whilst the observations of Chief Judge Goddard may be apposite for employees at the bottom of the hierarchy, when dealing with managers or supervisors, depending on the circumstances the position may well be different. As Chief Judge Goddard in a reserved judgment in *Ongley Wilson Real Estate Ltd v Burrows* stated at 242, in reliance on *Walden v Barrance*:

“Rule 1: During the employment the employee is under a duty (called the duty of fidelity) to do nothing deliberately that is likely, by ordinary standards of foresight, to injure the employer's business. The prohibition includes competing with the employer directly or by working at the same time for a competitor. Competing for this purpose can in turn include hostile acts during the employment and preparation for competing after it has ended. Common examples are removing, copying, memorising, or compiling for the employee's as opposed to the employer's purposes a list of customers or any other information, soliciting clients prior to departure, and any other acts by the employer that involve an actual incompatibility in important respects that the employment relationship or a conflict with the interests of the employer, to serve which it remains the employee's duty so long as the employment subsists: *Blyth Chemicals v Bushnell* (1933) 49 CLR 66. In short, any use of its property that a reasonable, prudent employer would be likely to oppose if its informed consent had been sought beforehand. This rule is strictly enforced: see Schilling for a stark reminder of the possible consequences.”¹⁰

[164] Ms Wilson submits that Precision has not provided strong or compelling evidence that Mr Hardy acted intentionally and dishonestly to breach his obligations to Precision when he was a managing director. She submits that Precision's claims would require Mr Hardy's action to be highly premeditated. This would involve Mr Hardy knowing from February 2019 that he was leaving, knowing that certain builders would

⁷ *Big Save Furniture v Bridge* [1994] 2 ERNZ 507 at 517.

⁸ Above n 6 at pg 517.

⁹ *Rooney Earthmoving v McTague* [2009] ERNZ 240 at [144].

¹⁰ Above n 9 at [140].

not work with Precision if he was to leave and colluding with Mr Porter to refer work only to those builders and deliberately concealing the jobs from the other directors.

[165] With respect to the submission about dishonesty being a required ingredient to establish a breach of fidelity the Court of Appeal in *Big Save Furniture Ltd v Bridge* per Tipping J stated:

... it is impossible to lay down a fixed test applicable to all circumstances and I do not consider that dishonesty or fraud are a necessary ingredient of a breach of the duty of fidelity which an employee owes to his employer. Dishonesty may well be a breach of the duty but it does not follow that there can be no breach without dishonesty ...¹¹

[166] Ms Wilson refers to the absence of a forensic examination of Mr Hardy's computer showing misuse of confidential information, emails to Mr Porter with directions about leaving jobs off a list and directions to refer on-sold work to particular builders. The Authority has been able to make finding about the job lists and referrals without forensic examination.

[167] From the earlier findings there was a longstanding and mutually beneficial reciprocal relationship of referrals between Precision and Premium Homes. The Authority has not been persuaded from the evidence that it was in the best interests of Precision to depart from this arrangement unless there was some ability to secure the re-leveling work in a similar way to the arrangement with Premium Homes.

[168] It was in Precision's best interests to refer the homeowner in the on-sold programme to a builder loyal to Precision. That is because it was within the control of the builder as to what sub-contractor they would then use once a homeowner was referred. The decision who to refer to is a critical one.

[169] The relationship between Mr Hardy and the other two directors deteriorated from February 2019.

[170] Mr Hardy knew from in or about August 2019 it was unlikely that Mr James from WD Build would want to work with Mr Breward and Mr Wood because of his view of their conduct about the Purchas Street property. Mr Hardy had told Mr James he would get all the on-sold work from Precision and ensured he secured the loyalty of Mr James and WD Build.

¹¹ *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 at 517 (CA) per Tipping J.

[171] Although argued to the contrary it would have been clear to Mr Hardy that Mr Wood and Mr Breward did not want to be bought out of Precision at an early stage of the negotiations. The evidence supports no movement from that position from Mr Wood and Mr Breward. Mr Hardy made it clear that he intended to remain in the construction industry undertaking house re-levelling, from his email of 14 February 2020, even though his evidence was that he only decided to incorporate Hardy Projects at or about the time he left.

[172] By November 2019 it was likely, if not very likely, that Mr Hardy would be leaving Precision. The longstanding practice of referral of work from homeowners without builders to Premium Homes changed and work was referred to other builders and in particular to WD Build. There is no evidence of any communication about this to Mr Wood or Mr Breward who would very likely have opposed referral to builders other than Premium Homes unless the re-levelling work for Precision was secured in the event of a contract. The failure to discuss and communicate the change was inconsistent with good faith obligations and particularly so when viewed with the active buy out discussions.

[173] Mr Hardy in his evidence suggested that Mr Porter had both in omitting to put most of the Jobs on lists and making referrals to builders acted alone. I have not been satisfied of that. Many Jobs were effectively concealed from Premium Homes and subsequently undertaken by Hardy Projects.

[174] The duty of fidelity includes an employee not being permitted to profit from a position of trust or to allow a conflict of interest or duty to arise.¹²

[175] I accept Mr Davis's submission that Mr Hardy would have known, or should have known, as managing director and a senior employee that on-sold jobs referred to WD Build and other builders loyal to him were unlikely to remain with Precision if Mr Hardy resigned from Precision. Indeed they did not remain with Precision and went to Hardy Projects.

[176] The evidence supported the decision to refer work to other builders was intentional and likely to impact and injure the business of Precision because the work would not be retained if Mr Hardy resigned. The referrals were more likely to benefit

¹² *Guardall Alarms v Paul* [1994] 1 ERNZ at 265.

Mr Hardy. A conflict of interest and duty arose at the time when referrals were made. There was a lack of openness and communication, not only about the change to a longstanding referral arrangement but also about the Jobs that had been referred, with Mr Wood and Mr Breward.

[177] Mr Hardy breached the express duties he owed to Precision to act in its best interests and his implied duties of fidelity, loyalty, and good faith. I do not conclude the evidence establishes a clear breach of the duty of confidentiality on the part of Mr Hardy.

[178] If loss is established from the breaches of duty established, then Mr Hardy may be liable for damages.

Conclusion and next steps

[179] Breaches of duty have been found and liability is established.

[180] The issue of whether there are damages as a result is still to be investigated.

[181] The Authority will hold a case management conference shortly to discuss the progress of this aspect.

Costs

[182] Costs are reserved.

[183] The parties are encouraged to resolve any issue of costs between themselves.

[184] If unable to do so, and an Authority determination on costs is needed, Mr Davis may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Ms Wilson and Ms Petronelli would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[185] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Helen Doyle
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-.