

**Attention is drawn to the order  
prohibiting publication of certain  
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 205  
5352905

BETWEEN           TASMAN AUTO ELECTRICS  
                          LIMITED  
                          Applicant

AND                 GLENN COLDICOTT  
                          Respondent

Member of Authority:     David Appleton

Representatives:         Tanya Kennedy, Counsel for Applicant  
                              Stacey Daily, Counsel for Respondent

Investigation Meeting:   18 November 2011 at Nelson

Submissions received:   30 November & 5 December from Applicant  
                              30 November & 14 December from Respondent

Determination:           16 December 2011

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Coldicott breached his obligations of confidentiality to TAE during his employment. The application for an injunction against Mr Coldicott is refused.**
- B.     Mr Coldicott breached his obligation not to compete with TAE during his employment. There is insufficient evidence of loss to justify an award of damages against Mr Coldicott.**
- C.     A penalty of \$5,000 is awarded against Mr Coldicott.**
- D.     Costs are reserved.**

**Prohibition from publication**

[1] Due to the commercial sensitivity of the information I order prohibition from publication of the Trade Me listings of the respective parties' businesses put before the Authority, save to the extent that they have been referred to in this determination, together with the names of the parties' auto-electrical suppliers.

**Employment Relationship Problem**

[2] The Applicant, Tasman Auto Electrics Ltd (TAE) alleges that the Respondent (Mr Coldicott) breached express terms of his employment agreement during his employment (namely, clause 15, dealing with confidential information and clause 16, dealing in competition with his employer), as well as the implied term of confidentiality and the implied term of fidelity. Mr Coldicott is also alleged to have breached the statutory duty of good faith.

[3] The alleged breaches arise from actions of Mr Coldicott which are alleged to include:

- (i) diverting of TAE's business by Mr Coldicott while still employed;
- (ii) actively competing with TAE while still employed;
- (iii) failing to account to TAE in respect of his business activities while employed;
- (iv) misleading TAE;
- (v) seeking to disrupt TAE's business; and
- (vi) misusing confidential information.

[4] TAE seeks an injunction restraining further breaches of Mr Coldicott's employment agreement for a period of 6 months from the date of this determination, penalties in respect of each alleged breach of the employment agreement and in respect of each alleged breach of s 4 of the Employment Relations Act, damages and costs on an indemnity basis.

## Issues

- [5] The following are the issues to be determined:
- (i) Did Mr Coldicott breach the terms of clause 15 of his employment agreement or the implied duty of confidentiality?
  - (ii) Did Mr Coldicott breach the terms of clause 16 of his employment agreement?
  - (iii) Did Mr Coldicott breach the duty of fidelity and/or s4 of the Employment Relations Act 2000?
  - (iv) Is TAE entitled to an injunction?
  - (v) Is TAE entitled to damages?

## Facts

[6] TAE operates a business in Nelson carrying out auto-electrical servicing and selling auto-electrical parts. Until Mr Coldicott left the employment of TAE on 6 July 2011 following his resignation on 22 June 2011, Mr Coldicott was employed as an auto electrician.

[7] Mr Coldicott was employed under an individual employment agreement which he had signed and dated and which contained the following clauses:

### Clause 15 – Confidential Information

- 15.1 *The employee will treat all Tasman Auto Electric Operations information as strictly confidential and will not disclose any confidential information to any person, firm, company or other body unless previously and expressly authorised in writing by the employer.*
- 15.2 *All transactions, records and information pertaining to the business of Tasman Auto Electrics, to salary and to terms of employment, shall be held in strict confidence by the employee, both during the period of employment and also after its termination.*
- 15.3 *The employee will not use or attempt to use any confidential information in any manner and for any purpose other than the purpose of the business of the employer.*

Clause 16 – Competition with Employer

16.1 *Without the employer's written consent the employee agrees that during employment with the employer the employee will not be directed or indirectly interested, engaged or concerned in any other person, firm or limited company engaged in the business of the employer and further, the employee will not canvass or solicit orders for or from any person, firm or limited company which is in competition with the employer.*

16.2 *The employee will not be engaged in their own business for financial gain, that will give rise to competition with their employer.*

[8] The employment agreement contained no post termination restraint of trade clauses.

[9] At some point prior to June 2010 Mr Coldicott suggested to TAE that it could increase its sales of auto electrical parts by opening and operating a Trade Me account, to run in conjunction with its showroom and workshop sales. TAE accepted this suggestion and Mr Coldicott was tasked with carrying out all the necessary research and preparatory work to achieve this. It is common ground that Mr Coldicott carried out the preparatory tasks with enthusiasm, and that once TAE's Trade Me account was up and running Mr Coldicott continued to devote significant time, with TAE's approval, to maintaining it. Monthly income steadily grew from TAE's Trade Me account from July 2010 until December 2010.

[10] Mr Coldicott's role with respect to setting up and maintaining of the Trade Me account included identifying auto-electrical parts to sell, suggesting a sales price by reference to TAE's purchase price for that part, and seeking approval for his suggestions from one of TAE's directors.

[11] In around January 2011, for a reason that was strongly in dispute between the parties, Mr Coldicott stopped spending as much time on TAE's Trade Me account. TAE's evidence is that Mr Coldicott simply lost interest in running the Trade Me account for the company, and could not be directed or persuaded to commence the work again other than in a cursory manner. TAE now believes that Mr Coldicott deliberately withdrew from carrying out such work in order to damage its Trade Me sales, and in order to facilitate the success of his own competing business which he was planning to start up.

[12] Mr Coldicott's evidence is that TAE instructed him not to do any more work on Trade Me. Mr Coldicott's evidence is that that instruction caused him dissatisfaction and disappointment because he believed that he had been promised commission in respect of TAE's Trade Me sales, an assertion strongly denied by TAE. Mr Coldicott also stated that he was busier in early 2011 and had been told that workshop work was a priority, which also accounted, in part, for him spending less time on Trade Me.

[13] Whatever the catalyst, Mr Coldicott's cessation of work on TAE's Trade Me account led to a decline in the level of activity on the account which led in turn to a reduction in TAE's income from that aspect of its business. By April 2011, the level of monthly income had diminished significantly.

[14] In January 2011, unbeknown to TAE, Mr Coldicott incorporated his own company called *Drive and Ride Electrical Limited*, and in February 2011 started selling auto-electrical items by way of a Trade Me account with the name *dandrelectrical*. The Trade Me profile name for *dandrelectrical* was given as *Matt*, rather than Mr Coldicott's name Glenn. The first items sold by *dandrelectrical* were a few personal items owned by Mr Coldicott but the volume increased from April 2011 as Mr Coldicott started to purchase items from a supplier specifically in order to sell them.

[15] On a date that was disputed, but which the Authority believes was 23 May 2011, TAE noticed that *dandrelectrical* was listing the same or similar parts as it was listing for sale in the Nelson and Nelson Bays area, the same area that TAE was trading in, and appeared to be undercutting TAE. TAE's director, Dawn Rameka-iti, mentioned this to Mr Coldicott, not knowing at the time that *dandrelectrical* was Mr Coldicott's business. Evidence conflicts as to exactly what was said during the conversation, but it is common ground that Mr Coldicott did not admit to owning *dandrelectrical*. TAE states that Mr Coldicott had said that "Matt" might be someone working "down the road" at a competitor of TAE, a statement which is denied by Mr Coldicott.

[16] TAE's evidence, which is accepted by the Authority, is that Ms Rameka-iti indicated during the conversation that she may buy something from *dandrelectrical*, as she had noted that it allowed pick ups, and that may enable them to identify who the trader was. Documentary evidence before the Authority suggests that on the same day as the conversation with Ms Rameka-iti, or shortly thereafter, Mr Coldicott changed his *dandrelectrical* Trade Me site so that pick-ups were no longer possible.

[17] On 3 June 2011 Mr Coldicott changed the name of his company to NZ Auto Electrical Limited. On 22 June 2011 Mr Coldicott wrote a letter to TAE's directors resigning. The text of the resignation letter was as follows:

*Dear Alan and Dawn*

*I wish to advise you that I am resigning my position at Tasman Auto Electrics. My last working day will be Wednesday 6th July 2011.*

*I would appreciate a reference, as well as the record of service. This week could you please also provide details in writing of holidays owed to me until 6th July.*

*I want to thank you for the opportunity that you have given me to start out in the auto-electrical industry. I wish you both all the best for the future.*

[18] In early July, Ms Rameka-iti discovered that it was Mr Coldicott who had been selling auto-electrical parts via Trade Me via his company under the trading name *dandrelectrical*.

[19] Ms Rameka-iti wrote to Mr Coldicott by way of a letter dated 5 July 2011 alleging that he had been acting in breach of his employment agreement and inviting him to an investigation meeting the following day (Mr Coldicott's last day of employment). By way of a letter dated 5 July 2011 Mr Coldicott replied in the following terms:

*In reply to your letter dated 5th July 2011.*

*I have sought advice and am comfortable that I have not breached the terms of my employment agreement, as you have suggested in your letter. I believe I have always acted in good faith in relation to my employment.*

*I decline the invitation to attend a meeting at 2pm Wednesday.*

*As Wednesday is my final day of employment I am entitled to my last weeks pay and my outstanding and accrued holiday pay. You have still not provided me with the holiday pay records requested in my resignation letter dated the 22nd June 2011. You are required to provide these under section 82 of the Holidays Act 2003 and I request that they be provided to me on Wednesday 5th July.*

*I also require a payslip detailing the hours and calculation of the holiday pay. Please ensure the PAYE calculation is based on 5 weeks for my final pay.*

[20] Mr Coldicott failed to attend the meeting, as foreshadowed in his letter, and TAE shortly afterwards engaged their solicitors to pursue the matter.

[21] At a later date, after his employment had ended, TAE obtained evidence to suggest that Mr Coldicott had been approaching its customers to solicit auto electrical work. TAE alleges that Mr Coldicott had misused confidential information to enable him to identify and contact these customers.

[22] TAE has also alleged that Mr Coldicott had taken away a folder of information relating to batteries sold by TAE, although this had been returned by Mr Coldicott during his employment when its whereabouts was queried. Mr Coldicott states that he had taken the folder out of the workshop simply to quote for a job on behalf of TAE.

[23] TAE has also alleged that Mr Coldicott had taken away a USB memory stick containing information about TAE's Trade Me listings which has never been found. Mr Coldicott denies he had taken the USB memory stick.

[24] TAE has also alleged that Mr Coldicott had ordered a part at the end of his employment but had failed to follow the usual ordering protocols, suggesting that he had intended to steal the part.

[25] TAE also alleged during the Investigation Meeting that Mr Coldicott had stolen a torch worth around \$70.

### **Was confidential information misused by Mr Coldicott?**

[26] It is TAE's position that Mr Coldicott misused the following information during his employment:

- (i) the identity of TAE's suppliers;
- (ii) the terms on which TAE traded with its suppliers;
- (iii) details relating to TAE's Trade Me activities;
- (iv) details relating to the parts sold by TAE;
- (v) the identities and contact details of TAE's customers.

[27] Mr Coldicott admits that, during his employment with TAE, he opened accounts with three suppliers, all of which were also used by TAE. The first account was opened with a supplier with a retail shop in Nelson which is open to the public. Mr Coldicott subsequently opened trade accounts with two other suppliers which are not known by the general public.

[28] Although these two trade suppliers are not widely known by the general public I am satisfied that they are widely known to the auto-electrical trade in Nelson and that Mr Coldicott's knowledge of them derived from his know-how, or "stock in trade", rather than from his work for TAE per se. The suppliers' identities do not therefore constitute confidential information and so Mr Coldicott approaching the three suppliers does not amount to a breach of an express or implied term of confidentiality.

[29] The terms on which TAE purchased parts for sale, including the prices, were however confidential, as was acknowledged by Mr Coldicott in his evidence. It is not clear, however, how Mr Coldicott may have used this information to his advantage or in a way that damaged TAE. Mr Coldicott sold parts which were the same or similar as those sold by TAE at a price that gave him a margin of profit that was satisfactory to him. Although he knew what TAE's margin of profit was, I accept that that information did not assist Mr Coldicott or give him a "springboard" advantage over TAE. There has not, therefore, been a misuse of this category of confidential information.

[30] A more vexed question is the extent to which details of TAE's Trade Me activities were confidential information. Clearly, much of that information would be in the public domain. However, I am satisfied that the totality of the work carried out by Mr Coldicott from June to December 2010 on TAE's Trade Me account gave

Mr Coldicott an insight into the overall saleability of certain parts over others, and the likely selling prices, which would not easily have been accessible by members of the public. I am satisfied that this detailed knowledge, which had the necessary quality of confidentiality to merit protection, gave Mr Coldicott an unfair advantage in knowing what sold and what did not.

[31] In light of this, I am satisfied that Mr Coldicott used this aspect of TAE's confidential information as a springboard to gain an advantage over TAE in accordance with the doctrine expounded in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 135.

[32] The next category of information asserted as confidential by TAE is product information published by both TAE and Mr Coldicott in their respective Trade Me entries. I am satisfied, however, that this category of information was not confidential and either resided in Mr Coldicott's head as part of his know-how, or was readily available to a wide circle of people working in the auto-electrical trade, or was derivable from packaging and product descriptions supplied with the parts which Mr Coldicott purchased.

[33] The final category of confidential information asserted by TAE as having been misused by Mr Coldicott is customer information. It is commonly accepted that customer lists and contact details are capable of being protected. However, I am satisfied that there is no evidence that Mr Coldicott wilfully misappropriated customer information, and whilst there is evidence that he approached two of the customers of TAE, I believe Mr Coldicott's evidence that the first is a family friend of Mr Coldicott and that Mr Coldicott did not know that the other company was a customer of TAE.

### **Did Mr Coldicott act in unlawful competition with TAE?**

[34] Mr Coldicott admits that he set up his business because he was thinking of leaving and wanted to plan for the future, and so he would be ready to trade when he left. When he incorporated Drive and Ride Limited, Mr Coldicott had intended to sell motorcycle parts sourced from overseas, which would not have competed with the business of TAE. Mr Coldicott states that he was trying to think of things to sell that would not have competed. However, the motorcycle parts plan did not prove to be

viable, and so he decided to sell light kits which he thought did not compete with his employer. He then moved into selling other auto-electrical parts.

[35] Mr Coldicott now concedes that, although he was checking regularly to ensure he was not selling the same items as his employer, he did sell on his business Trade Me account a small number of the same items as TAE was selling at the same time. Mr Coldicott made pains to point out that he would often sell different types of product (such as different jumper leads with a different ampage from those of TAE) and that, whilst he sometimes listed the same or similar items as TAE, he would strive to do so at a time that TAE's Trade Me account did not list them. Mr Coldicott gave evidence that he would watch TAE's Trade Me listings and would have removed items from his Trade Me listing if TAE had listed the same item so as not to compete.

[36] This evidence from Mr Coldicott made clear that he knew that his activities were in danger of competing with TAE's Trade Me activities, but that he felt he was on the right side of the line most of the time. I believe, however, that Mr Coldicott took deliberate steps to avoid being detected in his own business activities (such as calling himself "Matt" in his Trade Me profile and changing from "allows pick ups" to not allowing pick ups the day he had the conversation with his employer about the mysterious new competitor). Mr Coldicott therefore knew that his activities would not have been acceptable to his employer, and this suggests that his explanation of the care he took not to compete may be an ex post facto one.

[37] Mr Coldicott has sought to argue that he often sold different items from that of his employer. Whilst the Authority accepts that TAE sought to sell high quality parts, and Mr Coldicott sold some items which TAE probably would not have stocked, the Authority is satisfied that many items sold by Mr Coldicott were either exactly the same as those sold by TAE (either through its Trade Me account or in its showroom or workshop) or very similar.

[38] As for Mr Coldicott's putative attempts to avoid unlawful competition by listing items at a time when he says he believed that TAE was not listing the same items, I do not accept Mr Coldicott's rationale that this did not make them in competition. The mere act of actively selling the same parts as his employer during his employment constitutes a breach of his obligations of good faith and the express

term in his employment agreement not to compete. In any event, his attempts not to list at the same time as TAE were not always successful.

**Was there a breach of good faith?**

[39] I am satisfied that TAE has proven that Mr Coldicott acted in breach of the duty of good faith by:

- (i) competing with his employer during his employment, and
- (ii) failing to disclose to TAE during his employment that *dandrelectrical* was his company trading on Trade Me,

**Were there other breaches of the employment agreement and/or the duty of good faith?**

[40] I accept Mr Coldicott's explanation that he did not take away the folder of battery information for the purposes of copying or misusing the information in it. I have not seen any proof that the USB memory stick that went missing had been stolen by Mr Coldicott. Similarly, I have not seen any convincing proof that the part ordered by Mr Coldicott at the end of his employment had been intended to have been used by him unlawfully, in particular as it arrived at TAE's premises after his employment had ended. Similarly, I have seen no evidence that the torch had been taken by Mr Coldicott.

[41] TAE has also alleged that Mr Coldicott deliberately stopped his work on TAE's Trade Me account in order to run down its business. Mr Coldicott is adamant that he wanted to continue the work as he believed that he would be allowed commission on the sales, and that it was the stopping of his activities that led him to set up his own business. The likely truth is that there was a misunderstanding between the two parties. Both agreed that chargeable work took precedence over the Trade Me account, and as Mr Coldicott had taken on extra responsibilities at around the same time, it seems that neither party gave the Trade Me activities much attention from December 2010.

[42] Furthermore, TAE was fully aware of the decrease in income from the Trade Me account between January and June 2011, and could easily have attributed this to fewer listings being made. Indeed, TAE accepted that it was aware that Mr Coldicott was not working on the Trade Me account to the same extent as he used to, and could have directed Mr Coldicott to continue to list items on its Trade Me account on pain of disciplinary action, but chose not to do so. TAE could also have taken other steps to maintain the level of its Trade Me listings itself, but did not do so.

[43] Therefore, I do not find that there was a deliberate intention by Mr Coldicott to run down TAE's business by not continuing his work on its Trade Me account.

[44] Finally, TAE claims damages in respect of time spent by Mr Coldicott on his own Trade Me account during work hours. Mr Coldicott gave evidence that he carried out his own Trade Me activities in his own time. There is some evidence to suggest that Mr Coldicott did do some of his own Trade Me activities in his employer's time, although this does not appear to be extensive, TAE having identified only 6 occasions in a period of six months. No evidence has been tendered to show that these activities took any more than a few minutes each time, and I am unable to conclude that, if Mr Coldicott did carry out some of his own Trade Me account activities during work hours, it was to an extent that it clearly put Mr Coldicott in breach of his duty of good faith.

## **Remedies**

[45] TAE seeks the following remedies:

- (i) an injunction restraining Mr Coldicott from acting in breach of his employment agreement in terms of confidential information for 6 months from the date of this determination;
- (ii) damages in respect of the diversion of sales;
- (iii) damages in respect of the loss of a chance caused by Mr Coldicott listing increasingly more items for sale;

- (iv) damages for a loss of work time and resources which TAE spent setting up its account on Trade Me;
- (v) damages for work time spent by Mr Coldicott on his own TradeMe account;
- (vi) special damages in respect of legal fees of \$2,000 plus GST arising from TAE's need to seek legal advice prior to lodging proceedings;
- (vii) general damages for general inconvenience caused to TAE following Mr Coldicott's breaches;
- (viii) loss of opportunity for sales arising from Mr Coldicott deliberately not carrying out Trade Me duties for TAE; and
- (viii) penalties in respect of each breach.

**A six month injunction against Mr Coldicott.**

[46] The only breach of the obligation of confidentiality found to have occurred is in respect of the springboard advantage given to Mr Coldicott from his knowledge of the auto-electrical parts sold by TAE via Trade Me. Mr Coldicott has ceased his Trade Me activity since these proceedings came on foot, although Mr Coldicott stated in evidence that he may commence them again when he had time. The springboard advantage that I have found occurred was of assistance when Mr Coldicott first started trading in earnest in April 2011, but I believe that sufficient time has now elapsed in the ensuing seven months for any advantage to have dissipated. I believe that to impose an injunction at this stage would amount to a de facto stifling of competition which would be against public policy.

[47] For this reason, the application for an injunction against Mr Coldicott is declined.

[48] Turning to the issue of damages, the jurisdiction of the Authority to award damages in this case derives from s 162 of the Employment Relations Act 2000, which empowers the Authority, in any matter related to an employment agreement, to

make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts. The Authority must therefore ascertain what, if any, foreseeable loss flows from the breaches of the employment agreement that have been found to have occurred.

### **Damages in respect of the diversion of sales**

[49] There is no doubt that TAE's Trade Me income declined significantly from January to June 2011. However, this reduction in income seems to be due to arise directly from the decrease in listings posted by TAE on its Trade Me account during the same period rather than from Mr Coldicott's competing activities. As explained above, I have found that the decrease in listings does not give rise to a breach by Mr Coldicott.

[50] Even if I am wrong that TAE's decrease in Trade Me income in the first half of 2011 was due to a decrease in listings, it is not possible in my view to disentangle the effect of the diminution in listings from the effect of Mr Coldicott's competing activities. I therefore decline to award damages under this heading.

### **Damages in respect of an attempt to divert more sales from TAE by way of the number of listings made by Mr Coldicott**

[51] TAE claims that by Mr Coldicott increasing the number of listings on his Trade Me account he effectively caused TAE to suffer a loss of a chance to sell those same items.

[52] The difficulty with this argument, as I see it, is that it is by no means clear that, even if Mr Coldicott had not been listing items in competition with TAE, TAE would not still have suffered a decline in the number of listings, and would not have taken up the chance that it says it lost, due to the probable misunderstanding between the parties as to what Mr Coldicott's priorities were with respect to TAE's Trade Me account and TAE's failure to list items for sale in any event. For this reason I decline to award damages under this heading.

**Damages for a loss of work time and resources which TAE spent setting up its account on Trade Me**

[53] This head of claim can be disposed of in short order. TAE clearly derived value from the time spent by Mr Coldicott setting up TAE's Trade Me account and maintaining it, and from the purchases made, as is demonstrated by the income derived from TAE's Trade Me activities from July 2010. Accordingly, this claim must fail.

**Damages for work time spent by Mr Coldicott on his own TradeMe account**

[54] I have been unable to find that there was a breach by Mr Coldicott in this respect, and so I decline to order damages under this head.

**Special damages**

[55] TAE claims special damages in respect of legal fees of \$2,000 plus GST arising from TAE's need to seek legal advice prior to lodging proceedings. TAE's counsel refers me to the Employment Relations Authority case of *Auckland Regional Council v Tilialo* AA368/09.

[56] It would be prudent to start with the Court of Appeal case of *Binnie v Pacific Health Ltd* [2004] 1 ERNZ 438 (CA) which considered the awarding of legal costs other than party and party costs.

*[17] We offer an additional observation on this aspect of the present case. Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself*

*[18] If the proportion of Dr Binnie's total costs which might have been classified as special damages were treated as such, the amount of party and party costs would be materially reduced. This would have a significant effect on the proportionality issue. In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party*

*and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionments in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.*

[57] Counsel for Mr Coldicott points out that the time record submitted by TAE's counsel to justify the claim of special damages in the sum of \$2,000 includes the drafting of proceedings, a matter properly relevant to party and party costs. The descriptions of many entries in the time record are too imprecise to ascertain whether they also related to preparation for the proceedings (such as taking instructions on the proceedings or seeking TAE's approval of draft proceedings).

[58] Furthermore, in a case such as this, where legal action is often threatened early, there will be actions taken by counsel which serve more than one purpose, encompassing both advice to the client and the gathering of facts for the preparation of proceedings.

[59] Therefore, I am not satisfied that this is a case where a proper line can be drawn to use the *Binnie* test and I decline to award special damages.

### **General damages for general inconvenience**

[60] There was no evidence placed before me by TAE in respect of loss of executive time, general inconvenience and interruption to TAE's business as a result of Mr Coldicott's breaches. In the absence of such evidence, and without any means suggested of quantifying any such loss, I am unable to award damages under this head.

### **An account of profits?**

[61] Mr Coldicott's counsel has submitted that, if competition were to be found, an account of profits may be an appropriate remedy. An account of profits is an equitable remedy and is granted in three cases; to fully restore property unconscientiously withheld; to provide full compensation for breach of an equitable obligation; or in exceptional circumstances as an alternative to damages for breach of

contract. (*Equity and Trusts in New Zealand, 2<sup>nd</sup> edition, pub Thomson Reuters, page 895*).

[62] The first category does not apply here and, as Mr Coldicott was not in the position of a fiduciary in respect of TAE, that second category does not apply either. The third category could apply in theory, but this remedy has not yet been granted in New Zealand for breach of a contract which does not expressly or impliedly provide for the remedy. Mr Coldicott's employment agreement cannot be said to provide for such a remedy, and so I decline to award an account of profits.

### **Penalties**

[63] TAE seeks a penalty of \$5,000 in respect of each breach which the Act allows. S 134 of the Act provides that *every party to an employment agreement who breaches that agreement is liable to a penalty under this Act*. I am satisfied that Mr Coldicott knowingly acted in breach of two separate duties which were clearly expressed in clauses 15 and 16 of his employment agreement and which Mr Coldicott admitted he was bound by.

[64] TAE seeks penalties in respect of each breach. However, the breaches arose out of the same set of actions by Mr Coldicott, and so, whilst I agree that a penalty is appropriate, I believe that the breaches should be treated globally by applying the *totality* principle, applying *NZ Timber Industry Employees IUW v Waimate Timber Co Ltd and Ors* (1990) 3 NZELC 97,890.

[65] I fix that penalty at \$5,000, or 50% of the maximum penalty able to be imposed since 1 April 2011, since which date most of the acts amounting to the breaches occurred. In doing so, I take no account of Mr Coldicott's personal circumstances as agreed by the parties at the investigation meeting. Mr Coldicott is to pay 75% of the penalty to TAE, the balance to the Crown.

[66] I do not consider that the test in s 4A of the Act justifies a separate penalty in respect of Mr Coldicott's breach of his duty of good faith.

**Costs**

[67] Mr Coldicott's counsel has indicated that Mr Coldicott has been granted legal aid. TAE is reminded that S.40(2) of the Legal Services Act 2000 provides that: *No order for costs may be made against an aided person in a civil proceedings unless the court is satisfied that there are exceptional circumstances.* In *Wadley v Salon D'orsay Ltd* [1998] 1 ERNZ 369 the Employment Court construed the expression "*exceptional circumstances*" as meaning *quite out of the ordinary*.

[68] Costs are in the meantime reserved. Any claim for costs by TAE should be made by lodging and serving a memorandum within 28 days of the date of this determination. TAE's memorandum should address the issue raised by S.40(2) of the Legal Services Act 2000 and *Wadley v Salon D'orsay Ltd*. Mr Coldicott will have a further 14 days to lodge and serve any reply.

David Appleton  
Member of the Employment Relations Authority