

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 36
5359701

BETWEEN RCG LIMITED
Applicant
A N D GLENN ANTHONY BERCICH
First Respondent
A N D BERCICH MANAGEMENT
LIMITED
Second Respondent

Member of Authority: David Appleton
Representatives: John Burley, Counsel for the Applicant
Penny Shaw, Counsel for the Respondent
Investigation Meeting: 13, 14 & 15 November 2012 at Christchurch
Submissions Received: 7 December 2012 and 8 February 2013 from the
Applicant
18 December 2012 from the Respondent.
Date of Determination: 22 February 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Bercich breached express and implied terms of his employment agreement.**
- B. The Bush Inn management agreement with RCG would have been terminated at the time it was even if Mr Bercich had not breached those terms.**
- C. Bercich Management Limited did not incite, instigate, aid or abet Mr Bercich's breaches.**

D. Costs are reserved.**Employment relationship problem**

[1] The applicant (RCG) seeks damages against the first respondent (Mr Bercich) and penalties against Mr Bercich and the second respondent (BML) in relation to alleged breaches of Mr Bercich's employment agreement, section 4 of the Employment Relations Act 2000 (the Act) and common law duties owed by Mr Bercich to RCG during his employment.

[2] Mr Bercich and BML deny the alleged breaches.

Brief account of the facts leading to the employment relationship problem

[3] RCG is an Auckland-based company operating throughout New Zealand as retail consultants, planners and designers, development and project managers, shopping complex managers and architects. Mr Bercich, the sole director and shareholder of BML, is an experienced manager of retail and other property in New Zealand. In January 2009, Mr Bercich, through BML, entered into a contract for services with RCG to provide property management services on behalf of RCG to the owner of a shopping mall complex in Christchurch known as the *Bush Inn Shopping Centre* (Bush Inn). The owner of the Bush Inn is Mr Andrew Budge, through one or more corporate entities.

[4] During 2010, in order to give Mr Bercich a more certain income, Mr Bercich and RCG agreed that he would become a direct employee of RCG providing the same services. Mr Bercich's duties were divided between managing Bush Inn and another shopping mall in Sydenham, Christchurch. He was also expected to develop his South Island contacts on behalf of RCG to find other opportunities for RCG given its desire to expand its presence in the South Island.

[5] Mr Bercich was employed pursuant to an employment agreement which was signed by Mr Bercich on 4 June 2010 and by RCG on 8 June 2010. Material clauses of the employment agreement imposed the following obligations upon Mr Bercich:

5.3 *To comply with all proper and lawful instructions and policies of the Employer and otherwise to conduct himself during the contracted hours of service (and at all other*

appropriate times) in such a way as to promote, develop and extend the Employer's business interests and reputation in all dealings with clients, potential clients and all other persons with whom the Employee comes into contact with the course of his employment.

- 5.4 *To observe the hours of work stipulated in clause 6 and to devote his whole time and attention during these hours exclusively to his duties and obligations under this Agreement.*

...

- 5.6 *Not to disclose to any person (other than another employee authorised to use it) during the term of this Agreement or after its termination, any confidential information obtained in the course of employment, or to use or attempt to use such information to the Employee's own benefit or that of any other person or organisation unless necessary for the performance of the Employee's responsibilities under this Agreement and/or where required by law.*

In this clause, "confidential information" means any information relating to the business or financial affairs of the Employer and/or clients of the Employer which has come to the knowledge of the Employee or which has been disclosed or might reasonably be understood to have been disclosed to the Employee in confidence and which is not already in the public domain and which is obvious or trivial.

...

In addition, the Employee undertakes not to use or attempt to use any confidential information in any manner that may injure or cause loss whether directly or indirectly to the Employer and/or client(s) of the Employer.

...

- 5.8 *To declare any activities, which could be, considered a conflict of interest.*

...

- 5.13 *TO fully indemnify the Employer in respect of any or all losses caused to the Employer and/or the Employer's business and/or to any client or customer of the Employer resulting from any material non compliance by the Employee with his express or implied obligations under this Agreement including, but not limited to those contained in clause 5.*

CONFLICT OF INTEREST/RESTRAINT OF TRADE

- 14.1 *The Employee acknowledges that during the course of his employment he may have access to or be entrusted with confidential information concerning the Employer's business and clients and that such information forms a valuable part*

of the Employer's goodwill and assets which it is entitled to protect.

14.2 *Accordingly, and in consideration of the offer of employment made by the Employer to the Employee and the entering into by the Employer of its obligations under this Agreement, the Employee agrees not at any time during the continuance of his employment hereunder or for a period of 0 months [sic] after termination for any reason (other than unjustifiable dismissal) without the previous consent of the Employer to enter the service of or be employed in the capacity or for any purpose whatsoever by any person, firm or company or be engaged or interested in or carrying on any business of a similar nature to or completing [sic] with the employer's business within a radius of 0 kilometres [sic] of the Employer's business premises at Parnell, Auckland. The Employee will at all times and in all things use his best endeavours to promote the interests of the Employer in its business and to maintain and promote the good reputation of the Employer's business.*

...

14.4 *In addition, the Employee will not either during his employment with the Employer or for a period of 6 months after the termination of this employment with the Employer, for any reason, solely or jointly with any other person or company whether as principal, agent, employee, shareholder, director, partner, consultant or otherwise.*

14.4.1 *Canvass, solicit or endeavour to entice away from the Employer any person, firm or company who is client or customer of the Employer or who has been a client or customer of the Employer within a period of 6 months prior to the termination of the Employee's employment with the Employer.*

14.4.2 *Solicit, interfere with or endeavour to entice away from the Employer any other employee of the Employer, whether wholly or partly for the benefit of the Employee or any other person or company.*

14.5 *The Employee will not for a period of 3 months after the termination of his employment with the Employer for any reasons, solely or jointly with any other person or company whether as principal, agent, employee, shareholder, director, partner, consultant or otherwise, tender, bid or contract to carry out work in the name of any business in which he has been employed by the Employer.*

14.5.1 *At any site at which the Employer or any subsidiary of the Employer carries on business or has carried on business during the Employee's employment with the Employer; or*

14.5.2 *For any person who is a customer or client of the Employer or any subsidiary of the Employer or who*

has been a customer of the Employer or any subsidiary of the Employer during the Employee's employment with the Employer.

TERMINATION

20.1 The Employee's employment may be terminated by either party prior to the expiry date by the giving of not less than Four (4) weeks' notice in writing to the other. This shall not prevent the Employer from summarily dismissing the Employee for serious misconduct.

[6] RCG had entered into a management agreement with Ganson Limited, one of Mr Budge's companies, pursuant to which RCG carried out management functions at Bush Inn. The management agreement contained the following clauses:

10.1 Should RCG Limited desire to change the people who have been described as fulfilling the duties in clause 4.15, Ganson has the option to accept or decline the proposed new personnel. Should Ganson decline, the management agreement is cancellable by it on two months notice.

Clause 4.15 Des Wai [a director of RCG] to oversee all property management. Des is to be the primary RCG person involved in all rent reviews and lease renewals, must take the lead role for RCG, and be personally involved in all discussions and negotiations. Des Wai to oversee accounting and GST remissions. Check for accuracy. Glen [sic] Bercich is to be the on-site centre manager, but Des expected to attend the property on average twice per month.

[7] It was RCG's position that they had agreed what they called a very *skinny* management fee with Mr Budge on the understanding that they would also carry out development work under a separate agreement with Mr Budge at Bush Inn. To cut a relatively long story short, Mr Budge decided not to engage RCG for that development work and RCG then had concerns that the management agreement that was in place with Ganson Limited was producing a loss for it. As a result, RCG made it known to Mr Budge that they wished to negotiate a higher fee. RCG's position is that Mr Budge was a difficult client and it is fair to say that some of the directors of RCG felt frustrated at the lack of progress that was being made in convincing Mr Budge to agree a new management fee structure. In addition, Mr Budge felt that he was not being dealt with professionally by RCG in respect of some of the discussions.

[8] At the same time, Mr Bercich was feeling that he was not being suitably remunerated for the work he was carrying out on behalf of RCG. Discussions between RCG and Mr Budge occurred between September and December 2010. One of the conditions that Mr Budge imposed for agreeing a new management fee structure was that Mr Wai and Mr Bercich should personally sign a new management agreement. (Mr Budge emailed Mr Wai on 29 November 2010 saying, *inter alia*, *You've achieved the most money out of me you can, the question is whether you and Glenn [Mr Bercich] sign up personally or not. If not, there's not a whole lot to talk about.*)

[9] Mr Bercich's account of the events is that he was prepared to take on what he believed was a significant personal commitment if a commission structure was put in place that would result in him receiving higher remuneration. Mr Bercich emailed Mr Wai on 5 December 2010 setting out the basis upon which he believed he should be incentivised and remunerated. The proposal was, essentially, what was referred to by the parties as *splits* or *allocations*; in other words, Mr Bercich would receive a proportion of leasing and property management fees received by RCG.

[10] Mr Bercich's evidence is that Mr Wai agreed to this on 6 December 2010 in a meeting in Auckland, amending slightly the proportion of the management fee proposed by Mr Bercich. Mr Bercich stated at this point that he believed that he had an agreement with RCG which would have resulted in more remuneration and security.

[11] Mr Bercich's evidence is also that Mr Budge believed that RCG had agreed that Mr Wai and Mr Bercich would personally sign the new management agreement and that, by the time the Christmas 2010 holidays arrived, Mr Budge believed that matters had been settled, including Mr Bercich being happy that he had received an assurance from RCG that he would be suitably remunerated. Mr Budge sent an email to Mr Wai dated 10 December 2010 stating, *inter alia*:

Bottom line as I understand it is that you Glenn and RCG have reached agreement amongst yourselves as to splits, and who gets what – and everyone is happy. That is great.

[12] The Authority was shown Mr Wai's email to Mr Budge in reply, copied to Mr Bercich, dated 13 December 2010, which did not contradict the above statement by Mr Budge and which also stated the following:

In a nutshell we would need to document in a fresh mgmt agreement as the signatures required need too [sic] be reflected accordingly however the terms as agreed should be outlined as follows;

:

4 *Glenn and myself will sign personally.*

[13] Mr Budge replied saying ...

I've left for the year which is why I pushed so hard in the past couple of weeks for you to get the internal RCG agreements, and agreements with Glenn re allocations in place, so hopefully it could be finalised before I left.

There's some new news in your note beneath, and a few changes needed – but it's not too bad and it shows you guys want to seriously work with me which is very good.

[14] However, on 21 December 2010 the Chairman and a director of RCG, Mr Keane, wrote to Mr Bercich in the following terms:

Dear Glenn

RE EMPLOYMENT – RCG CHRISTCHURCH

We have discussed internally your position at RCG regarding your recent request for a revised income stream that is linked to the income that RCG receives in respect of Bush Inn and Sydenham both now and into the future.

As you are well aware and as we have discussed in detail with you, the amount of revenue received from both Bush Inn and Sydenham both now and into the future do not cover our costs.

When we originally entered into an arrangement with you it was on the basis that you would use the RCG brand and develop a business base in Christchurch. This as you know has proved difficult however, the management contracts that RCG has secured for both Bush Inn and Sydenham has enabled us to take you on a salary and employee based arrangement. Given the circumstances relative to the income generated from the above centres we simply cannot extent [sic] this financial arrangement with you further than the current remuneration at the present time.

We are fully aware of the circumstances of the ownership of Bush Inn and the difficulty that you are faced with in managing the centre and ensuring that the centre is working to its maximum advantage. We have to emphasis [sic] however that you are an RCG employee and the company looks to you to fulfil its obligations including developing our brand in the South Island and increasing its business functions in that area. We acknowledge your efforts to achieve this however, we emphasis [sic] that the hours spent at Bush Inn and Sydenham must ensure that you have a capacity to further market our brand and the company to develop further opportunities, beyond just Bush Inn and

Sydenham, this will enable us to improve the revenue from Christchurch and reward accordingly.

We believe in 2011/12 the pioneering marketing work that has gone on will start to demonstrate some rewards additional to the workload that presently exists.

We support you in Christchurch as we continue to demonstrate, but we are not in a position to permit some sharing of revenue when we are already in a loss position and as you know we cannot make ground with Andrew Budge.

As circumstances change into the future we will review your financial rewards but until this becomes more certain and apparent, your salary structure and benefits have too [sic] remain as they are.

[15] Mr Keane's evidence is that he did not hear from Mr Bercich until he received an email from him on 17 January 2011 which stated:

I am sorry for sending you the attached but I can not handle things any more. I will call you tomorrow.

and attaching a letter addressed to Mr Keane which stated the following:

I refer to your letter dated 21 December 2010 which I received via email the following day from Des Wai.

I have been dwelling on this letter throughout the Xmas and New year period (trying at times not to think about it). I was disappointed to be advised that there would be no increase in salary nor any incentive for leasing that I generate for the future.

I believe that I have performed to a very high level since I have been employed by RCG, and I believed that my agreement with RCG contained review mechanisms where I could be fairly rewarded for generating additional income that I achieved on behalf of the company. It seems apparent now that I will not be rewarded.

With regard to Bush Inn, Des, myself and Andrew Budge were in the process of finalising a new management agreement prior to Christmas. In light of the above, I cannot commit myself to a fixed term under a new management agreement.

With the office re-opening today, I have had Andrew Budge on the phone reviewing leasing objectives/plans, requesting updates, and frankly with the background of your advice to me prior to Christmas this is now an environment that I am not used to, and cannot stand any more. I cannot continue being the meat in the sandwich. I know that there are other opportunities within the property industry paying at least \$110,000 plus incentives and bonuses – and currently I do not feel valued. There is a clear statement now that I will not be rewarded in the future in the manner I was led to believe, and I certainly am not happy.

I have had great respect for RCG and whilst difficult, I now hereby tender my resignation as Associate Director as of today's date, with

my required notice of 30 days starting from this date, and as is my practice I will fulfil my obligations to a high standard until 17 February 2011.

If your letter of 21 December 2010 was sent without the above understanding, I welcome you sending new terms of engagement for me to consider. However, my resignation and notice has been duly served.

At this stage I have not advised Andrew Budge nor [name omitted, the owner of the Sydenham Mall] with the contents of this letter, and assume you will do so in short course.

As a matter of courtesy I will call you tomorrow to check that you have received my letter.

[16] Mr Keane replied to Mr Bercich's email the following day saying that they should at least talk before Mr Bercich carried through his resignation. Mr Bercich replied to Mr Keane the same morning including the following text:

Obviously the few weeks over xmas and new years I have done a lot of thinking about what I would like to do... my brother from Philly was over for xmas and I was talking with him and a good friend of mine about residential improvements/developments and building on what I already have. They want to go in with me which is great, and the amount of times I've thought about this area over the past few years is a lot.

[17] On 19 January 2011, Mr Wai discovered some email traffic between Mr Bercich and Mr Budge sent prior to Mr Bercich's resignation. One email, dated 10 January 2011, sent to Mr Budge, attached a proposal proposing that Bush Inn be managed by BML with Mr Bercich as sole person responsible for the complete property management, development management and leasing of Bush Inn. The proposal stated that the part time office/marketing personnel would be a Ms Treleaven, who was at that time employed by RCG. It also proposed that financial and accounting functions relating to the property management of Bush Inn would be carried out by a Ms Falconer, who is Mr Bercich's wife.

[18] The proposal also set out the base property management fee which linked current net income with the fee on an escalating scale. It contained other elements including how Mr Bercich would be remunerated for introductions to new leases and that he would be appointed the sole agent for leasing of vacant sites within Bush Inn. This proposal document had been sent to Mr Budge by way of an email dated 10 January 2011, which included the words:

Attached is a proposal taking on board your comments to my initial proposal some time ago.

[19] This email had been sent in reply to an email from Mr Budge of the same day which indicated that Mr Bercich had sent a text to him the previous week indicating that he wanted to resign from RCG *if he tied something else up first*. Mr Budge's email stated the following:

If you want to work with me on an ongoing basis, then I'm prepared to finalise a property management agreement between you and me, if that then gives you the comfort to resign from RCG. So if that's the path you want to go down, and I understand your messages correctly, send me a final proposed agreement (not a negotiating platform). We have had lengthy and numerous discussions about an agreement between us. You know what I'll agree to and what I won't, so please make this process simple and straightforward as I think we all are fatigued over this. There also needs to be a plan that covers the 3 month restraint of trade clause too, tied into the notice periods considering that you give one months notice to RCG, and I give two months notice should you resign.

So you know exactly where you stand and so I am very fair to you, I also want to make you aware that regardless of the above, whether you pursue other opportunities, whether you and I reach agreement over a management agreement or not, I will be removing RCG as managers.

[20] As part of Mr Bercich's response, in the email to which he had attached his proposal, Mr Bercich had said the following:

RCG are adamant that you cannot remove them/terminate the contract, regardless of whatever was said or done. And you seem adamant that you are able to. Regardless I believe it will end up being a shit fight which no one needs. Yes the "cleanest way" is if I was to resign and you can give the 2 mths notice etc.

...

In saying the above I believe I still owe it to RCG and feel I want to stress my disappointment with the letter I received pre-xmas, and maybe I give them one final chance to reconsider. I was planning on doing this when Paul returns next Monday.

[21] A further email from Mr Budge to Mr Bercich dated 17 January, sent prior to Mr Bercich emailing his resignation letter to Mr Keane stated as follows:

Form of Agreement

1. *The following exchange of emails forms a binding agreement between Conneronner Limited [another company owned by Mr Budge involved in Bush Inn] and your management company and you personally.*

2. *This email shows my agreement that you have requested.*
3. *You need to forward this email back to me with your agreement.*
4. *This agreement amongst us is conditional only upon:*
 - 1) *You providing notice to RCG which you will do today, and*
 - 2) *Conneronner providing notice to RCG under its management agreement which it expects to do in about 2 weeks.*
5. *It is expected that formal documents will follow in due course.*

[22] Following Mr Wai's discovery of the emails between Mr Budge and Mr Bercich, Mr Keane advised Mr Bercich that he was to attend a disciplinary meeting the following day in Auckland on the basis that there appeared to have been a collusion between Mr Bercich and Mr Budge to terminate the current management agreement between RCG and Mr Budge's company so that Mr Bercich could be engaged directly as Centre Manager in place of RCG. This communication with Mr Bercich from Mr Keane advised him that, unless he could provide an acceptable explanation for his conduct there would be a very high possibility of his employment being terminated with immediate effect. Mr Bercich declined to attend the disciplinary meeting in Auckland but it took place in Christchurch on 27 January 2011 following which Mr Bercich was summarily dismissed from his employment with RCG. Mr Bercich has not brought any proceedings against RCG in respect of that dismissal.

[23] Mr Budge gave notice of terminating the management agreement with RCG on 24 January 2011 and, on the same date, sent an email to Mr Wai which stated, inter alia:

I am absolutely livid as a result of the commercial position you and RCG have placed me in.

:

6. *You advised me that you were making the decisions as to these income allocations. You even came to my house, sat on my lounge and told me you would do the deal between Glenn, yourself and myself because of the complete stuff up you acknowledged RCG made of the development proposal. You also confirmed to me via email prior to Christmas that the new deal was done, and that you and Glenn would also sign up*

personally to the new agreement – and I took that at face value given you signed the original management agreement on behalf of RCG.

7. *Two days before Christmas, you then forwarded a letter from Paul Keene to Glenn Bercich that completely torpedoed that deal – but you did not disclose that to me, and you left me in no-mans land to discover this sometime in the New Year when the offices re-opened that I had no management agreement in place for the Centre – had I not found out about it from Glenn directly. I needed to keep my mortgagee advised of developments through this whole process of many months, needless to say it was a totally unacceptable situation, and that any chance of an agreed base for RCG to perform the management of 2011, evaporated before Christmas in 2010.*

The issues

[24] The following issues need to be determined by the Authority:

- a. Did Mr Bercich breach his employment obligations owed to RCG, including his duty:
 - i. of good faith,
 - ii. of fidelity,
 - iii. of trust and confidence;
 - iv. not to disclose or misuse RCG's confidential information; and
 - v. not to compete with RCG's business;
- b. Did Bercich Management Limited incite, instigate, aid or abet Mr Bercich to breach his employment obligations?
- c. Would the management agreement between RCG and Mr Budge's company have continued if Mr Bercich had not entered into a separate agreement with Mr Budge?

[25] At the conclusion of the three days of evidence I indicated that I would determine the issue of liability only as, in my view, I had not heard enough evidence on the applicant's claimed losses to be able to make a sensible and just assessment. The issue of quantum would be investigated at an additional investigation meeting if liability was established. Accordingly, this determination deals only with the matter of liability.

[26] However, a significant amount of evidence was heard from Mr Budge and the applicant's witnesses over how likely it was that the management agreement with Mr Budge's company would have terminated in any event (and whether it actually did terminate before the respondent's resignation) and, although that does impact on the issue of quantum, I shall address that matter in this determination as it will define the scope of damages claimed arising out of the loss by RCG of the management agreement.

Did Mr Bercich breach his employment obligations owed to RCG?

[27] RCG alleges that Mr Bercich did this by the following actions:

- a. Colluding with Mr Budge to secure the management of the Bush Inn away from RCG in favour of himself;
- b. Disclosed confidential information belonging to RCG to Mr Budge;
- c. Acted deliberately to undermine RCG's business by misleading and deceiving RCG as to the real reason for his resignation;
- d. Misleading RCG over his relationship with Mr Budge;
- e. Soliciting an employee of RCG away from her employment to commence employment with his company, BML.

[28] My analysis of the events that occurred between November 2010 and January 2011 is that Mr Bercich found himself unwillingly caught up in the sometimes bad tempered negotiations that were on going between his employer and Mr Budge, so that Mr Bercich genuinely began to wonder about his future with RCG. Of key importance, in my view, is the understanding that Mr Bercich came to that he was to receive a more rewarding remuneration once he had agreed to enter into the renegotiated management agreement personally. Although this agreement by Mr Bercich does not entirely make sense from a commercial or contractual point of view, I am entirely satisfied that that is what Mr Budge required, what RCG understood him to require and, crucially, what RCG agreed to.

[29] Mr Wai's evidence is that he had never agreed on 6 December 2010 to change Mr Bercich's remuneration because it required the full consideration and approval of the Board. I do not accept that evidence. First, I found Mr Wai's evidence to be

evasive at times, whilst finding Mr Bercich's evidence to be candid and credible. Secondly, Mr Wai was a director of RCG and Mr Bercich was entitled to assume that Mr Wai had the authority to agree his proposed terms. No evidence was presented to show that Mr Wai replied to Mr Bercich's email of 5 December 2010 to say that he needed to discuss with the Board Mr Bercich's proposal regarding splits.

[30] Of further importance is Mr Keane's letter of 21 December 2010 effectively reneging on the agreement that had been put in place between Mr Bercich and RCG through Mr Wai. In my view, this unilateral act by RCG amounted to a repudiatory breach of the employment agreement between the parties and, if he had chosen to have done so, Mr Bercich could have accepted the breach and resigned then and there. I suspect he did not do so because he wanted to secure the management agreement with Mr Budge for himself first, to ensure he had a smooth transition without any loss of income.

[31] Mr Bercich did not accept RCG's repudiatory breach and resign until 17 January 2011 and, between 21 December 2010 and 17 January 2011, his employment therefore remained on foot, as did his obligations to his employer. During this same period, Mr Bercich also undertook secret negotiations with Mr Budge in which the two men eventually agreed that Mr Bercich would take over the management of Bush Inn. In doing so, I am satisfied that Mr Bercich did breach both express and implied terms of his employment agreement.

[32] Specifically, I find that Mr Bercich breached the following express terms of his employment agreement:

- a. Clause 5.3 as, by negotiating with Mr Budge to take over management of Bush Inn, Mr Bercich failed to promote, develop and extend RCG's business interests;
- b. Clause 5.4, as Mr Bercich did not devote his whole time and attention during his working hours to his duties and obligations under the agreement, but rather spent time negotiating his own management agreement with Mr Budge;
- c. Clause 5.8, as Mr Bercich did not declare his activities (namely, negotiating with Mr Budge for his own benefit) which were, without

doubt, a conflict of interest. Indeed, I find that Mr Bercich knowingly misled RCG in respect of his reasons for resigning;

- d. Clause 14.4.1, as I am satisfied that Mr Bercich did canvas, solicit or endeavour to entice away from RCG the business of Mr Budge. The significance of the fact that these efforts by Mr Bercich were the equivalent of pushing at an open door will be considered when the scope of any remedies are contemplated;
- e. On balance, I also believe that Mr Bercich did act in breach of clause 14.4.2 by soliciting or enticing away from RCG Ms Treleaven, an administrator.

[33] I do not believe that Mr Bercich breached the first limb of clause 5.6 of his employment agreement as I do not believe that he disclosed to Mr Budge any information that Mr Budge did not already know (such as the income for Bush Inn or of specific tenants), nor had a right to know (namely, that Mr Bercich was not to receive the *allocation* he had previously understood he was to receive, which seriously impacted upon one of Mr Budge's fundamental conditions for renegotiating the management agreement with RCG; that is, that Mr Bercich would sign up personally).

[34] It is arguable that Mr Bercich did breach the second limb of clause 5.6 by using confidential information for his own benefit, namely to negotiate a management agreement with Mr Budge. However, as such information was already legitimately known to Mr Budge, I do not accept that it had the necessary quality of being confidential because it was disclosed to someone who already knew it. Therefore, I am not satisfied that the second limb of clause 5.6 was breached by Mr Bercich.

[35] I am not satisfied that clause 14.5 was breached by Mr Bercich, as this deals with a prohibition for a period of three months after he ceases to be employed by RCG on Mr Bercich tendering, bidding or contracting to carry out work in the name of any business in which he has been employed by RCG. Specifically Mr Bercich did not do this, as he was tendering, bidding or contracting to carry out work in his own name or in the name of BML.

[36] As for the alleged breaches of the implied terms of his employment, I accept that his actions in negotiating with Mr Budge for his own benefit, and misleading

RCG as to his actions and reasons for resigning, amounted to breaches of his duty of good faith, fidelity and trust and confidence.

Did the second respondent incite, instigate, aid or abet the breaches of contract by Mr Bercich?

[37] Section 134(2) of the Act provides that every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[38] The second respondent is a company wholly owned by Mr Bercich which was incorporated in November 2002. Mr Bercich is its only director. In such circumstances, where Mr Bercich is clearly the sole controlling mind of the company, I do not accept that it is capable of inciting, instigating, aiding, or abetting Mr Bercich to commit breaches of his employment agreement as that would amount to him inciting, instigating, aiding, or abetting himself, which is clearly nonsensical. I therefore decline to find that the second respondent acted in breach of s. 134(2) of the Act.

Would the management agreement between RCG and Mr Budge have continued if Mr Bercich had not breached his employment obligations?

[39] I find that Mr Bercich did breach both express and implied terms of his employment with RCG. I now turn to the scope of any damages that may be due to RCG, without assessing the quantum of those damages.

[40] I have found that Mr Bercich's resignation followed a unilateral, repudiatory withdrawal by RCG from the agreement that it had entered into with Mr Bercich that his remuneration would be improved by way of *splits* or *allocations*. RCG knew that Mr Bercich required this agreement with respect to his remuneration before he would agree to personally sign the renegotiated management agreement with Mr Budge. RCG also knew that Mr Budge wanted Mr Bercich's personal signature before he would agree to the new management terms.

[41] I am satisfied that Mr Budge would have lawfully terminated the management agreement when he knew that Mr Bercich had resigned, even if Mr Bercich had not breached any terms of his employment agreement. Mr Budge had already purported to have terminated the agreement (unsuccessfully in my view) some months earlier

when he had been very dissatisfied with RCG, and numerous emails from Mr Budge to Mr Wai and occasionally to Mr Keane show clearly that the business relationship between the parties was very tenuous. However, Mr Budge's email dated 10 January 2011, in which he states that he will be removing RCG as managers whatever Mr Bercich decided to do, convinces me, together with other evidence, that the relationship between RCG and Mr Budge's companies had effectively come to an end when Mr Budge had learned of Mr Keane's letter to Mr Bercich withdrawing the agreement regarding splits.

[42] Even if Mr Bercich had not breached his duties and not entered into a separate agreement with Mr Budge, it is more likely than not in my view that Mr Budge would have been in a position to replace RCG within the period of two months that it was required to give notice under clause 10.1 of the management agreement. I do not therefore believe that, but for the breaches, RCG would have earned fees from the management agreement beyond the expiry of the two months' notice.

[43] Furthermore, although I believe that Mr Bercich did unlawfully solicit Ms Treleaven, her employment was terminated by Mr Wai a few weeks later in any event, so that any loss potentially to be suffered by RCG in respect of that breach was curtailed when her employment came to an end by way of that termination.

[44] Mr Wai stated in his brief of evidence that there were various heads of loss that he believed flowed from Mr Bercich's breaches, as follows:

- a. Loss of potential profit for four years from managing Bush Inn of \$130,000;
- b. Loss of potential profit from managing three other sites, amounting to \$700,000.

[45] In respect of the loss of potential profit from Bush Inn, in light of my finding that Mr Budge would have terminated the agreement with RCG in any event when Mr Bercich resigned, even if Mr Bercich had not breached his employment obligations, I cannot see how any loss can be attributed to these breaches. Clearly, Mr Bercich was lawfully entitled to resign under the terms of his employment agreement; that resignation triggered the right for Mr Budge to terminate the management agreement, and this he chose to do.

[46] It is worth exploring another avenue by way of which RCG may be able to claim that losses flow from Mr Bercich's breaches. Counsel for RCG has drawn my attention to the Employment Court judgement in *Rooney Earthmoving Limited v McTague and others*, [2009] CC 21/07 24 August 2009. At paragraph [141] His Honour Judge Travis states:

If a manager or senior employee observes actions that are harmful to the employer it is no great extension of the duty of fidelity or trust and confidence to require that employee to report that conduct to the employer. That must be equally so when the conduct in question is being performed either by the employee or at that employee's instigation or where he or she is complicit in the conduct.

[47] I believe that Mr Bercich was under a duty, deriving from the duty of good faith and from clause 5.8 of his employment agreement, to disclose to RCG that Mr Keane's letter had caused him to consider leaving (given that he knew this could trigger Mr Budge terminating the management agreement) and, separately, his negotiations with Mr Budge to take over the Bush Inn management contract. It is possible that, if Mr Bercich had disclosed these facts to RCG, RCG would have reconsidered its stance on splits and to have honoured the agreement originally reached with Mr Bercich via Mr Wai. That, in turn, could have persuaded Mr Bercich to have withdrawn his resignation which, in turn, may have persuaded Mr Budge not to have terminated the agreement. However, having heard the evidence of Mr Keane, Mr Bercich and of Mr Budge in particular, I am not at all convinced that this series of happy events would have eventuated. I believe that Mr Bercich would still have been dismissed by RCG and my clear impression from Mr Budge was that he had lost any remaining confidence he had had in RCG, and so would have terminated the management agreement when the termination of Mr Bercich's employment would have occurred. This is confirmed by his email of 10 January referred to above. One way or the other, I believe that the management agreement between RCG and Mr Budge would have terminated.

[48] Therefore, I believe that, even if Mr Bercich had honoured his duty to disclose to RCG his breaches, it would not have resulted in the management agreement being retained.

[49] As for the other claimed heads of loss of profit, these are all based upon Mr Bercich leaving the employment of RCG, which he was clearly entitled to do, rather than from any breaches committed by Mr Bercich.

Submissions on penalties

[50] Although I had originally directed that I wished to receive submissions on liability only, having concluded that the management agreement between RCG and Mr Budge would have terminated even if Mr Bercich had not breached his employment duties, submissions on damages flowing from those breaches would be nugatory. However, the parties have not had the opportunity to make submissions on whether a penalty should be imposed against Mr Bercich for having committed breaches of his employment agreement, and if so, the amount. Directions shall be issued in respect of that issue shortly.

Costs

[51] Costs are reserved until after the Authority's determination on the imposition of a penalty against Mr Bercich.

David Appleton
Member of the Employment Relations Authority