IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA624/2023
[2025] NZCA 188

BETWEEN	PETER JONATHON BLIGHT Appellant
AND	MATHEW ROBERT COLVILLE First Respondent
	ADAM KEITH COLVILLE Second Respondent

Hearing:	12 February 2025
Court:	Cooke, Hinton and Woolford JJ
Counsel:	A D Marsh for Appellant A R B Barker KC and H P Short for First Respondent
Judgment:	23 May 2025 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Cooke J)

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[1] The appellant appeals from a judgment finding him liable to the first respondent for $126,000 and interest for inducing a breach of restraint of trade obligations given in favour of the first respondent by the second respondent.[1] The appellant challenges four findings of the High Court, namely:

(a) that he induced the second respondent to breach the restraint of trade;

(b) that he intended his actions to induce the second respondent to so breach the restraint;

(c) that the first respondent suffered loss as a consequence; and

(d) the quantification of that loss.

Background

[2] The primary factual findings of the High Court Judge are not in dispute.

[3] The first respondent (Mathew) and the second respondent (Adam) are brothers. For a number of years they operated a house building business on the West Coast of the South Island under a franchise agreement with Deacon Holdings Ltd, trading as G J Gardner Homes. This involved two companies, Housing West Coast Ltd which owned the building franchise, and Colville Developments Ltd, which was a separate

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1 *Colville v Colville* [2023] NZHC 2659 [judgment under appeal].

entity that owned the land on which the houses were built. The houses were then sold as a land and house package. In October 2020 Mathew purchased Adam's share of this business after they fell out. The falling out arose after Adam had personal difficulties which came to the attention of G J Gardner Homes.

[4] Housing West Coast Ltd was valued and under the sale and purchase agreement, Mathew purchased Adam's 50 per cent share for $1.062 million. The primary value of the business was assessed to be in its goodwill. The agreement included restraint of trade clauses in the following terms:

> 1. THE Vendor covenants with the PURCHASER that he will not directly or indirectly be engage, participate in or have any direct or indirect interest whether as an owner, partner, director, shareholder, officer, employee, agent, consultant, representative, contractor or sub-contractor or in any other capacity in the business detailed in the schedule in competition with Housing West Coast Limited.
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> 2. This restraint as outlined in point 1. above will relate to the area and until the end of the term detailed in the in the schedule and the schedule forms part of this deed.
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> 3. Notwithstanding the restraint the Vendor is permitted to be employed as builder's labourer and to build his own home.

[5] The relevant area of the restraint was defined as the Buller, Grey and Westland Districts. The relevant business involved the marketing, construction and sale of homes (as more elaborately defined), and the relevant period was 19 October 2020 until 1 February 2023. There has been no challenge to the reasonableness of the terms of the restraint.

[6] Peter, Mathew and Adam all knew each other. Between 2007 and 2014 Peter and his wife had owned and operated a Stonewood Homes franchise on the West Coast, and thereafter Peter ran his own building business. Around January 2021 Peter became aware that Adam was no longer working with his brother and was looking for work. Peter and Adam then discussed the situation. Adam told Peter that he had signed a restraint of trade but that he was allowed to work as a building labourer. Adam started working with Peter on 1 March 2021.

[7] On 3 March Adam sent Mathew a text requesting him to waive the restraint. Adam said that somebody else was trying to bring a housing company to the West

Coast, and that letting him do that himself would scare them off. Mathew did not agree.

[8] On 7 April Peter then sent the franchise manager of Stonewood Homes an email saying he was in the process of completing an application to be the West Coast franchisee. Included in Peter's email was the following:

> I trust that anything we say will also be treated with confidence.
>
> The reason being my business partner is going through a business buyout and if news of a new venture got out it could jeopardise that settlement.
>
> I trust you will understand this.

[9] There was no dispute that the business partner being referred to was Adam. But Peter and Adam argued that the partnership being referred to was a land subdivision business, not a building business competing with Housing West Coast Ltd.

[10] On 13 May 2021 Peter incorporated West Coast Residential Ltd. Peter and his wife each held 50 per cent, and Peter was the sole director. This company purchased the Stonewood Homes franchise on 18 May 2021. On 20 May 2021 Adam and Peter then incorporated Hammer Down Developments Ltd. Each was a director. Adam owned 50 per cent and Peter and his wife owned the other 50 per cent. This company was used to acquire and subdivide land for the purposes of sale. Adam and Peter argued at trial that their ownership and operation of this entity did not breach the restraint of trade as it was not involved in building houses.

[11] There was some disputed evidence at trial as to Adam's subsequent involvement with Stonewood Homes in May and June 2021. A Snapchat message sent by Adam around this time included a photograph of the Stonewood Homes offices in Auckland with the narration "my new family". There was a dispute at trial as to when this message was sent. Peter said that he had visited those offices on 18 May to sign the Stonewood franchise agreement, and Adam's only visit to the head office was in June 2021.

[12] An email generated by Stonewood Homes head office to its preferred suppliers dated 3 June 2021 stated:

> We are delighted to welcome Peter & Adam as our newest Franchisee to the Stonewood family.

Similarly in an internal email in June, Stonewood Homes made arrangements for Adam to have access to the West Coast franchisee's mailbox within the Stonewood network. Moreover Adam attended Stonewood's Auckland offices at this time, and Adam received induction training. The following day Adam and Peter also attended a national suppliers' expo.

[13] The Judge described some of Adam and Peter's evidence about the interactions with Stonewood Homes as unsatisfactory,[2] and relied on the fact that no one from Stonewood Homes gave evidence to respond to the inferences that could be drawn from the Stonewood Homes material.[3]

[14] Adam also funded the new business. On 21 May Adam withdrew $300,000 from the bank account of Colville Developments Ltd, to which he still had access. Of that amount, $200,000 was then invested by Adam into West Coast Residential Ltd. The narration on the documents recording the deposit states "Owner A Funds Introduced". $50,000 of the funds so introduced was then used to pay for the Stonewood Homes franchise, and another $50,000 was used by Peter's pre-existing building company, Peter Blight Builders Ltd, for general operating costs. The advance was not documented. Peter and Adam gave evidence that the money was paid on a "handshake" because Peter needed operational funds for West Coast Residential Ltd. There were no documents recording security, interest rates or the timeframe for repaying.

[15] The Judge also relied on evidence given by Adam's mother, Ms Kathleen Thorn, and his former wife, Ms Maria Brown. In April 2021 Adam told his mother that he had bought two building companies, one of which was a Stonewood Homes franchise on the West Coast. Her evidence was that when she reminded Adam of his obligations, he responded that he "doesn't give a fuck about Mat and what he thinks of him". Adam's former wife visited him in April, and when he answered the front door Adam was wearing a Stonewood Homes jacket. Adam then told her that he had

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2 At [39].
3 At [49].

purchased a Stonewood Homes franchise on the West Coast. She also gave evidence that Adam rang her and asked if she would do the accounts for the Stonewood Homes operation. The fact that Adam made these statements was not disputed at trial.

[16] There was additional evidence from trade suppliers. Mr Stephen Riley, a former branch manager of a building supply firm in Westport, gave evidence that Adam had rung him in June 2021 saying that he was setting up a new Stonewood Homes franchise and inquiring about building suppliers and prices. Similarly, Mr Paul Jeffries, a roofing contractor, gave evidence that Adam called them in May saying he had started the Stonewood Homes franchise with Peter. A third person, Mr Cody Forsyth-Peterson gave similar evidence which was not challenged in cross-examination.

[17] The Judge also relied on communications between Adam and Peter that suggested a joint business endeavour.[4] One housing contract was also focused on.[5] Adam had some friends known as the Houstons. Between March and April 2021 Mathew and Adam's company, Housing West Coast Ltd, had marketed the G J Gardner product to them. Ms Houston then spoke to Adam, and as a result Peter sent through a proposal. Ms Houston accepted a building contract in July 2021.

[18] The Judge also made findings concerning inadequate discovery.[6] These included deletions from Adam's email account, as well as Adam's loss of his iPhone on a fishing trip which the High Court Judge described as "improbable or at the least represents an extraordinary coincidental occurrence as does the timing of the deletion of the [Gmail] account".[7]

[19] Against that background, the Stonewood Homes operation began competing in the market for building and selling homes from around this time, and secured 11 new house contracts in the 2022 calendar year.

[20] The High Court Judge ultimately held:

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4 At [67]–[79].
5 At [80]–[81].
6 At [89]–[91].
7 At [91].

> [92] On my analysis of the evidence, I am satisfied Adam and Peter at some stage in March 2021 decided to move forward in business together with a view to establishing a land and building operation comparable to the operation Adam had run with Mathew as a G J [Gardner] franchise. Both men were aware of the limitations placed on Adam's activities by the terms of the restraint which they sought to avoid by structuring their business relationship in a certain way. They attempted to silo Adam's involvement in Stonewood Homes franchise, at least to the outside world, from the balance of their joint venture by limiting Adam's formal business relationship with Peter to [Hammer Down Developments Ltd].
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> …
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> [95] While I do not think it can simply be inferred from that email that Adam was being put forward as a co-owner of the new franchise, I am satisfied that was the likely intention once Adam had completed the process of de-merging his old business interests from his brother and the restraint had expired. Adam's co-ownership of [Hammer Down Developments Ltd], his visits to Stonewood Homes NZ's head office in Auckland, the representations he made to family members and trade associates regarding his ownership of the new Stonewood Homes franchise, and the initiatives he took regarding relationships with suppliers and the engagement of contractors demonstrate how he was intended to be an integral part of the West Coast Stonewood Homes franchise and likely its co-proprietor. The way Adam and Peter communicated with each other also tends to confirm this was the position.
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> …
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> [97] The deployment of funds by Adam to allow Peter to proceed with the securing of the West Coast franchise and the timing of this advance is also telling. Whether categorised as a loan or viewed as an investment by Adam in a new business, the provision of this money at a time that is broadly contemporaneous with Adam's joint venture with Peter in [Hammer Down Developments Ltd] supports the proposition that their commercial plans went wider than simply buying and subdividing land together. I consider the subsequent apparent confusion within Stonewood Homes NZ concerning Adam's role and status in the new franchise was indicative of the deliberately opaque way in which Peter and Adam had to proceed in the circumstances and a strong indication that Adam was to play an important role in this new business.
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> [98] The necessity to maintain an appearance of compliance with the restraint necessitated Peter taking a lead role, and that need meant Adam's intended joint managerial or proprietorial role had to be cloaked. Having regard to Adam's situation, Peter was more than willing and capable of taking the lead with Stonewood Homes NZ. However, I consider there is sufficient evidence to conclude that, at least until Adam's activities came to the attention of Mathew, the initial intention the men shared was that this would be a joint business venture supported by Adam who had considerable experience of having successfully run a building franchise.

[21] Adam has subsequently been declared bankrupt and played no part in the hearing before us.

First issue: was Adam's breach induced by Peter?

[22] As this Court accepted in *Diver v Loktronic Industries Ltd*, the elements for establishing the tort of inducing a breach of contract were set out by the House of Lords in *OBG Ltd v Allan*, and comprise the following:[8]

> (1) There must be a legally enforceable contract in existence.
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> (2) The defendant must have engaged in conduct which in fact induced a breach of the contract.
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> (3) The defendant must have known that his or her conduct would induce the breach.
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> (4) The defendant's conduct inducing the breach must have caused loss or damage to the plaintiff.
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> (5) Even if elements 1 to 4 are satisfied, a defence of justification might arise, albeit only in exceptional circumstances.

[23] Mr Marsh's argument for Peter on the first issue is addressed to the second element. He argues that Mathew did not prove that Peter committed the tort of inducing a breach of the restraint of trade obligation. The fact there was a breach of the restraint by Adam is not challenged. But Mr Marsh argued that conduct that merely facilitated a breach of restraint is not sufficient. The act of encouragement or persuasion had to have a sufficient causal connection with the breach by the contracting party to attract accessory liability. Reliance was placed on the decision of the House of Lords in *OBG Ltd v Allan.* It was argued that it had not been proved that Peter had acted as more than a mere facilitator.

[24] We do not accept these arguments. The difference between inducing a breach of contract, and merely facilitating it, is a question of fact and degree, and turns on whether the defendant's conduct had a causative influence on the contractual breach. We consider that the High Court Judge's finding that Peter and Adam's competing business was effectively a joint venture means that the causation element of inducing a breach was inevitable. Adam would not have engaged in conduct that involved competition in breach of his restraint without having Peter to shelter behind, or conceal

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[8] *Diver v Loktronic Industries Ltd* [2012] NZCA 131, [2012] 2 NZLR 388 at [30] citing John Hughes "Interference with Business Relations" in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) 601 at [13.2], and *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

his breach. And Peter's evidence was that Adam's approach to him, and the subsequent funding that Adam provided for the venture, were at least among the reasons why he engaged in restarting the Stonewood Homes operation in competition. So Peter's conduct clearly causatively contributed to Adam's breach.

[25] We are accordingly satisfied that the High Court Judge rightly found that Peter's conduct induced the breach of restraint by Adam.

Second issue: did Peter intentionally induce the breach?

[26] Mr Marsh's second argument goes to the next element of the tort. It is an intentional tort — the defendant must know or intend to induce or persuade the contracting party to breach the contract. It is insufficient merely to show a breach was caused. As Lord Hoffman said in *OBG Ltd v Allan*:

> [39] To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so. …

[27] In advancing this argument, Mr Marsh particularly relied upon the High Court Judge's indication that Peter at least started with the intention that the restraint not be breached, including by limiting Adam's involvement to Hammer Down Developments Ltd which was not involved in construction.[9] A comparison between the shareholding structure of that company compared with West Coast Residential Ltd, which was involved in construction, evidenced an intention not to breach.

[28] For Mathew, Mr Barker KC supported the analysis undertaken by the High Court Judge, emphasising that there is no challenge to the Judge's primary findings of fact.

Assessment

[29] Given its significance for the appellant's argument, we first address whether limiting Adam's involvement to the property development company, Hammer Down

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9 Judgment under appeal, above n 1, at [92].

Developments Ltd, avoided a breach of the restraint. We do not consider that it did. The business of Housing West Coast Ltd in which Adam sold his shares included not just building houses, but building houses on land owned by the associated company. That was an essential part of Housing West Coast Ltd's modus operandi. That was reflected in the restraint. The restraint broadly defined the business as:

> the design, sales, marketing, management, accounting, estimating and construction of any houses, commercial or industrial buildings, units or duplexes.

[30] The sales and marketing of houses constructed by Housing West Coast Ltd involved selling the land of Colville Developments Ltd on which the houses were built. So the activities of both companies were inherently interlinked. In the same way, Peter and Adam's competing operation involved West Coast Residential Ltd constructing houses on land owned by Hammer Down Developments Ltd. So Peter and Adam adopted the same business model. We are accordingly of the view that being involved in the business of Hammer Down Developments Ltd as the owner of the land on which the houses were to be built, marketed and sold, breached the restraint.

[31] The requirement to show that the defendant intended that the covenantor breach the restraint will likely depend on the state of the defendant's knowledge of the breach. Proving wilful blindness by such a defendant is sufficient. As this Court said in *Diver v Loktronic Industries Ltd*:[10]

> [47] As we read these authorities, the references to wilful blindness and "shut-eye" knowledge suggest that more is required in this case than the possibility of the existence of a contract and an associated failure to inquire into that possibility. Rather, the required state of knowledge involves a suspicion of sufficient strength that a contract exists and a deliberate choice not to make inquiries. The fact that the existence of a contract should have been obvious is not sufficient as that is negligence. A subjective, rather than an objective, inquiry is required. Such an approach accords with the fact that this is an intentional tort.

[32] It is not necessary to apply such an approach in the present case, however. We are satisfied that Peter knew that his business with Adam breached the restraint. Whilst the High Court Judge was prepared to give Peter the benefit of the doubt that limiting

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10 *Diver v Loktronic Industries Ltd*, above n 8 (footnote omitted).

Adam's involvement to the property development company could be taken to show an intention not to breach the restraint,[11] we consider it clear from the evidence overall that Peter knew the restraint was being breached.

[33] Peter's evidence was that he knew there was a restraint of trade. He did not obtain a copy of the restraint and then focus on its terms by seeking to devise an approach that did not breach it. Rather, the evidence was that Peter understood from what Adam had told him that Adam could only be involved in the building business as a builder's labourer. It is clear that Adam's involvement was more extensive than this — Adam funded the new operation, he was held out by Peter as his partner in his dealings with Stonewood Homes (who treated them accordingly), Adam then dealt with third parties on the basis he was involved in the Stonewood Homes enterprise, and Adam was joint shareholder in the company owning the land on which Stonewood Homes houses were to be built. Peter clearly knew of this activity, and that it involved Adam being more than a labourer. We agree with the Judge's finding that it is not tenable for Peter to say he did not know the restraint was being breached.

[34] There is a further factor that demonstrates Peter's knowledge. Peter and Adam sought to keep Adam's involvement in this endeavour concealed. Adam's loan was undocumented, he was not a joint shareholder in West Coast Residential Ltd, and a request was made by Peter to Stonewood Homes that Adam's involvement be kept confidential. We consider that the High Court Judge was correct to conclude that these measures were deliberately opaque and established to maintain an appearance of compliance. As the Judge put it:

> [98] The necessity to maintain an appearance of compliance with the restraint necessitated Peter taking a lead role, and that need meant Adam's intended joint managerial or proprietorial role had to be cloaked. Having regard to Adam's situation, Peter was more than willing and capable of taking the lead with Stonewood Homes NZ. However, I consider there is sufficient evidence to conclude that, at least until Adam's activities came to the attention of Mathew, the initial intention the men shared was that this would be a joint business venture supported by Adam who had considerable experience of having successfully run a building franchise.

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[11] See judgment under appeal, above n 1, at [92]–[93] and [136].

[35] We consider that this strategy evidences that Peter knew that what he and Adam were doing breached the restraint. We accordingly do not accept this ground of appeal.

Third issue: was loss proved?

[36] The appellant's remaining issues related to the identification and quantification of the loss found by the High Court. There was no need for any injunctive relief in this case as Adam's conduct in breach of the restraint ceased as soon as Mathew formally raised the issue. The only issue is the award of damages for the period while the restraint was breached.

[37] Mr Marsh first argued that the proper approach to loss and the award of damages is that the plaintiff is entitled to recover the loss actually sustained as a result of the breach. But here Mathew's expert witness said it was difficult to make any meaningful or accurate assessment of the loss caused as a result of the competition arising from the entry of the Stonewood Homes franchise. An alternative basis for assessing loss — based on Mathew's payment to Adam for the goodwill of the business when the restraint protecting that goodwill was not honoured — was accepted by the Judge. This was said to be an erroneous basis on which to identify and calculate damages. In *Skids Programme Management Ltd v McNeill* this Court noted that awarding damages on this sort of basis would be rare.[12] Mr Marsh argues that there was no basis to do so here. Moreover, the Judge had accepted Peter's evidence that he would have entered the market in any event.[13] It could not be shown that any of the 11 new build contracts that West Coast Residential Ltd acquired during the period of competition would or could have gone to Housing West Coast Ltd.[14]

[38] For Mathew, Mr Barker supported the Judge's assessment.

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12 *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1 at [73], n 15, citing *Denaro Ltd v Onyx Bar & Cafe (Cambridge) Ltd* HC Hamilton CIV-2010-419-777, 7 February 2011 at [28].

13 Judgment under appeal, above n 1, at [176].

14 See discussion at [154].

Assessment

[39] For the reasons we will address below, we accept that the proper measure of damages for inducing a breach of a restraint requires an assessment of the loss actually occasioned to the plaintiff, measured by a reduction in revenues from the increased competition occasioned from breach of the restraint. But we do not accept that Mathew failed to prove that such losses occurred, or that the Judge failed to make the required assessment. The Judge reviewed the evidence and held:

> [153] I consider it inevitable that the introduction of a new competitor in the marketplace, which has successfully secured business that it is otherwise reasonable to assume would have potentially been obtained by a competitor be it [Housing West Coast Ltd] or another building company, must be considered to be to the detriment of that business and represents a form of harm or loss. In the present case, the evidence was that the Stonewood Homes franchise secured 11 new house builds for the 2022 calendar year. It is reasonable to assume that some of those builds would otherwise have been business that [Housing West Coast Ltd] could have obtained. Mr Dobson was satisfied there had been a loss to the business of [Housing West Coast Ltd] and Mr Carey accepted that, at least in 2022, Stonewood Homes' building activity must have impacted on the local housebuilding market.

[40] We do not consider it is necessary for a plaintiff to prove loss on a contract-by-contract basis. Loss can be proved, on the balance of probabilities, by a broader analysis. As the Judge held, there was evidence that Housing West Coast Ltd had a significant share of the new house building market held by the larger building companies on the West Coast.[15] Statistical evidence showed that of the consented new builds to be constructed by such larger scale builders it had secured 26 of the 43 between March 2018 and February 2019, 8 of 18 between February 2019 and January 2020,[16] and 28 of 34 between February 2020 and January 2021. Whilst there are clearly uncertainties associated with this evidence, given that Housing West Coast Ltd had secured a high proportion of the work being undertaken by the larger building operators on the West Coast, we consider that the Judge was right to find that it was reasonable to assume that a proportion of the 11 new builds that Stonewood Homes franchise secured was at the expense of Housing West Coast Ltd. Mathew was the beneficial owner of the company. We agree with the High Court

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15 See discussion at [149]–[150].

16 The figures for Greymouth are not available for this period.

Judge that Mathew accordingly proved that loss arose from the breach of the restraint, and from Peter inducing the breach of the restraint.

[41] We do not accept that the Judge's observation concerning Peter's evidence that he would have progressed the business himself — namely that this "may have been the case, but it is a difficult counterfactual to assess" — means there was no loss proved.[17] This scenario could not be regarded as any more than a possibility, and it does not provide evidence that a competing business would have been established during the period of the restraint. We consider that any alternative entry into the market by Peter would have been at a later time, outside the period of the restraint.

[42] This ground of appeal accordingly fails.

Fourth issue: measure of damages

[43] Notwithstanding the Judge's conclusion that loss arose because of the detrimental effect of the illegitimate competition, damages were not sought or awarded by calculating that amount.[18] Rather Mathew sought, and the Judge awarded, damages based on the notional value of the restraint that Adam had failed to honour, assessed by the value of the goodwill associated with that promise.[19] Adam had been paid for his 50 per cent shareholding based on him honouring the restraint, and a calculation could be made of the amount of that payment that was attributable to the restraint. The Judge said:

> [154] As is apparent from this review of the available statistics concerning the number of consented new house builds and the market share of the building companies operating on the West Coast, particularly in the context of an expanding building market, it is difficult to assess what loss may have accrued to [Housing West Coast Ltd]'s business as a result of the entry of the Stonewood Homes franchise. There are too many factors in a rapidly growing housebuilding market to accurately be able to assess the impact of another building company competitor. Because of that difficulty, Mr Dobson took the view the appropriate approach in assessing likely harm caused to [Housing West Coast Ltd]'s business as a result of the impact of the breach of the restraint was to examine the value of the restraint that Adam had effectively sold to Mathew and which Mathew paid for when purchasing Adam's share but did not receive.

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17 At [176].
18 At [153].
19 At [156] and [180].

[44] In doing so, reliance was placed on the decision of Allan J in *Denaro Ltd v Onyx Bar & Cafe (Cambridge) Ltd* where damages were awarded on this basis.[20] The Judge considered this approach accorded with general principle, including as articulated by Elias CJ in *Marlborough District Council v Altimarloch Joint Venture Ltd* and other decisions.[21]

[45] The Judge relied on the evidence of Mathew's expert accountant, Mr Dobson, who valued the restraint element of the value of the shares sold to Mathew by Adam at $420,000. The Judge reduced that figure to 60 per cent or $252,000, to reflect that part of the restraint for which Mathew did not receive the benefit.[22] The Judge then decided that the liability should not be joint and several, and that Peter should only be liable for half of this, namely $126,000. This was the amount of damages that the Judge ordered.[23]

[46] Mr Marsh argued that this approach was manifestly wrong, and that Mathew had simply failed to prove that any loss had occurred. Mr Barker argued that damages were "at large" and he supported the approach of the High Court Judge on the basis it was more appropriate on the facts of this case.[24] He drew an analogy with awards of damages in breach of warranty or misrepresentation claims.

Assessment

[47] While the measure of the loss for Adam's breach is contractual, and for Peter's breach is tortious, the different approaches should lead to the same award in this kind of case. We also accept that the award of damages is "at large", which means that a pragmatic approach to quantifying damages is called for.

[48] We nevertheless agree with Mr Marsh's argument that the wrong test was applied to calculate the damages awarded. In *One Step (Support) Ltd v Morris-Garner*

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20 At [157], citing *Denaro Ltd v Onyx Bar & Café (Cambridge) Ltd*, above n 12

21 Judgment under appeal, above n 1, at [158]–[162], citing *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [24]; *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 2 NZLR 385 (PC) at 388; *Dangerous Goods Compliance Ltd v Farquhar Lelean Holdings Ltd (in liq)* [2022] NZHC 3041 at [226]; and *AAM Ltd v Exotica Enterprise Ltd* [2019] NZHC 1482 at [131].

22 At [180].

23 At [182].

24 See *Rookes v Barnard* [1964] AC 1129 (HL) at 1221 per Lord Devlin.

(*One Step*) the United Kingdom Supreme Court addressed the proper approach to damages in cases of this kind.[25] Lord Sumption SCJ in his concurring judgment said:

> [105] The ordinary measure of damages for breach of a non-compete covenant is the value of the business profits which the claimant would otherwise have made but which it has lost as a result of the defendant's unlawful competition, discounted in the case of future profits for accelerated receipt. As with many problems in the law of damages, difficulty arises in identifying the counterfactual by reference to which their loss falls to be measured. How many customers who contracted with the Morris-Garners would have contracted with One Step if the Morris-Garners had complied with their contract? When and for how long? For what volume of business? On what terms, especially as to price? And how profitable would the additional business have been for One Step? The economic effect of the breaches is inherently incapable of being precisely estimated, and may be incapable of even imprecise measurement. None the less it is practically inconceivable that One Step has not suffered significant losses in this relatively small field of business. The law would be failing in its economic purpose if it confined One Step to the fraction of the business lost which was capable of being demonstrated with the necessary degree of confidence, or if it resorted to guesswork as an alternative to evidence. Because of the inherent uncertainties of the exercise, the claimant is normally awarded the value of the lost chance of doing more business: … But even a chance must be valued by something better than guesswork.

[49] We agree with this approach. It was not necessary for Mathew to calculate the loss by undertaking a contract-by-contract assessment. The assessment can be made on the basis of reasonable assumptions that have an evidential foundation. As Lord Shaw said in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*, the assessment of loss when issues are uncertain can involve "the exercise of a sound imagination and the practice of the broad axe".[26] It would be wrong to deprive a plaintiff of a remedy because of difficulties in calculation if the court is satisfied that loss has been occasioned. The court nevertheless needs to be satisfied that the assumptions are reasonable, and that the award is fair.

[50] It was reasonable for the High Court Judge to proceed on the basis that a portion of the 11 contracts that Peter and Adam's operation secured was at Housing West Coast Ltd's expense. We do not accept Mr Marsh's submission that there was no evidence to support that conclusion. It could readily be drawn from the established facts. Whilst the proportion of contracts so lost would have to be assumed, a

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25 *One Step (Support) Ltd* v *Morris-Garner v* [2018] UKSC 20, [2019] AC 649. See also the majority reasons at [95] and [98]–[100] per Lord Reed.

26 *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* 1914 SC (HL) 18 at 29–30.

calculation could then have been made of the loss occasioned to Housing West Coast Ltd, and accordingly to Mathew as a consequence, given he owned the business. The evidence before the Court was that the company's profit to the year 31 March 2022 was $1.1 million. The statistics in relation to the building contracts showed that the company secured up to 28 contracts yearly at this time.[27] Given the level of the company's profit, and the number of contracts involved, reasonable assumptions could be made to assess the loss based on a pro-rata share of the 11 contracts Adam and Peter's operation secured during the restraint period.

[51] Such an approach necessarily involves significant assumptions. But making such assumptions is appropriate if they are reasonable and have a factual foundation. We also do not agree with the view that approaching the assessment of loss by estimating the portion of the consideration initially paid for Adam's shares attributable to the restraint, avoids or meaningfully addresses, the inherent uncertainties involved in calculating loss. Calculating loss on the notional value of that promise may actually increase the uncertainties. The value of the shares was based on forecast future profits of the company, which is inherently less certain than the actual revenue that was earned in the relevant period. The assessment would also need to be based on other assumptions, such as the portion of the goodwill attributable to the restraint. We do not see this approach as creating a more certain basis for calculating the loss. We also consider it unusual to assess the loss as an element of the tort on one basis, but not apply that basis when awarding damages.

[52] That does not mean that the notional calculation of the value of the restraint is irrelevant. In *One Step*, the United Kingdom Supreme Court considered a further alternative basis for calculating an award in such cases, being the notional amount that the covenantor would have had to pay to be released from the restraint. But the Court noted such alternative calculations can be considered when assessing the reasonableness of the damages calculated on the correct basis.[28] Such calculations can be a way in which the fairness of the award can be tested.

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27 Complications arise from the fact that these statistics were available on a calendar year rather than financial year basis, and some data was not available.

28 *One Step (Support) Ltd v Morris-Garner*, above n 25, at [94] per Lord Reed SCJ, and [106] per Lord Sumption SCJ.

[53] Whether loss could ever be calculated by adopting a notional value of the restraint is a matter we do not address. In *Skids Programme Management Ltd v McNeill* this Court said that awarding damages on this approach would be rare, and noted the approach that had been applied by the High Court in *Denaro* without reaching a conclusion.[29] We do not exclude the possibility of such an approach being available, particularly if an award on the usual basis is not possible. But we do not accept it was appropriate here.

[54] Although we accept that the wrong test was applied to calculate the damages, we consider that, particularly in the circumstances of this case, Peter needed to do more than demonstrate that the wrong approach has been applied to calculating damages, however. He needed to show that the award was excessive as a consequence. The High Court found that loss had arisen on the correct basis, the evidence demonstrates that an award of $126,000 was proportionate given the number of contracts involved and the level of the company's profits, the Court was permitted to take into account the notional value of the promise when assessing the reasonableness of the award, and the final award is modest. These factors suggest that the award was a fair and reasonable one, even taking into account that the period of the restraint was limited as Mr Marsh emphasised. We consider that it would be unjustified to require the parties, their experts and the High Court to engage in a further damages calculation exercise for an award limited to $126,000 and interest when that award appears reasonable.

[55] There are two further complications that are appropriately addressed.

[56] First, the plaintiff in this case was Mathew personally, and not Housing West Coast Ltd. This was one of the reasons why it was said that Mathew's loss could not be easily calculated by assessing the company's loss. But we consider that this factor is more hypothetical than real. Mathew was the beneficial owner of Housing West Coast Ltd, which was a profitable company. For the purposes of identifying and quantifying the loss, we consider that the company's loss equates to Mathew's

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[29] *Skids Programme Management Ltd v McNeill*, above n 12, at [73], n 15 discussing *Denaro Ltd v Onyx Bar & Café (Cambridge) Ltd*, above n 12, at [28].

personal loss, as it reflected the reduction in the value of his shares and the profits he would otherwise have been able to enjoy.

[57] The second complication arises from the fact that the Judge concluded that Peter and Adam were not jointly and severally liable and he divided the amount of the damages award in half so that Peter was liable for only half of the damages so assessed.[30] Although there is no cross-appeal on this point, we consider this approach wrong in principle. The consequence is that Peter has only been held liable for $126,000. But given the factors we address in [40] above, this reduction in the amount awarded increases the certainty in our conclusion that Peter has failed to show on appeal that the award of damages was excessive.

Result

[58] For the above reasons the appeal is dismissed.

[59] The appellant must pay the first respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
Hill Lee & Scott, Christchurch for Appellant
Boyle Mathieson, Auckland for First Respondent

[30] Judgment under appeal, above n 1, at [180].