NOTE: This determination confirms earlier orders prohibiting publication of certain confidential commercial information.

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2015] NZERA Auckland 337
5388486

BETWEEN	NOVA ENERGY LIMITED Applicant
AND	MICHAEL MITCHELL First Respondent
AND	NATIONAL ENERGY LIMITED Second Respondent
AND	ALAN MITCHELL Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Tony Stevens and Rob Cahn, Counsel for the Applicant Paul Wicks QC , Counsel for the Respondents
Investigation meeting:	30 and 31 March and 1 and 2 April 2015
Submissions:	8 May and 17 July 2015 from the Applicant and 10 June 2015 from the Respondents
Determination:	30 October 2015

DETERMINATION OF THE AUTHORITY (No. 6)

Employment relationship problem

[1] This determination has assessed evidence about what quantum of damages Michael Mitchell should be ordered to pay his former employer Nova Energy Limited (Nova) for losses resulting from his breaches of the terms of his former employment agreement. It has also considered what penalties Mr Mitchell and National Energy Limited (NEL) – a company he had registered and then, after leaving Nova, run as a

gas brokering business – should pay in relation to those breaches. Nova also sought further orders requiring Mr Mitchell to comply with those terms in future and to reinforce written undertakings he had already provided.

[2] An earlier Authority determination (referred to as "the liability determination") found Mr Mitchell liable to Nova for damages due to breaches by him of contractual and common law duties not to use confidential information obtained from his former employer.[1] His liability to penalties related to breaches of his duty of good faith and fidelity, while he was still working for Nova, as well as for his use of Nova's confidential information for his own business purposes after his employment with Nova ended.[2]

[3] NEL was liable, in the Authority's jurisdiction, for penalties for aiding and abetting those breaches.[3] Other issues between NEL and Nova are in the High Court's jurisdiction and are understood to be the subject of parallel proceedings there.

[4] Alan Mitchell, listed as the third respondent in the entitulement of this determination, is the father of Michael Mitchell and had worked for NEL. The liability determination found he was not liable to a penalty for abetting Michael Mitchell's breaches of his employment agreement. He played no part in the Authority's four day investigation meeting on quantum matters. He remains listed as a respondent because the Authority may yet have to address the question of costs on the totality of these proceedings (which began in 2012). Subsequent references in this determination to Mr Mitchell mean Michael Mitchell, the first respondent.

[5] Nova is an energy company. Its claim before the Authority concerned the effects of Mr Mitchell's actions (personally and through NEL) on Nova's revenue – and more particularly Nova's margin or profit on that revenue – from the sale of gas to some small and medium businesses in the retail commercial sector of Nova's customer base. One element of the evidence also touched on the sale of electricity to a small number of those customers.

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[1] *Nova Energy Limited v Mitchell & Ors* [2014] NZERA Auckland 94.
[2] *Nova*, above, at [135] and [144].
[3] Employment Relations Act 2000, s 134(2).

[6] The liability determination found Mr Mitchell liable to pay damages to Nova in respect of losses arising from the effects of his actions (and Nova's response to those actions) on three groups of its customers:

(i) Seven customers who left Nova for other retail gas suppliers following approaches from NEL ("the seven lost customers"); and

(ii) Eighty-one customers who signed new supply contracts with Nova at lower rates negotiated by NEL ("the 81 re-signed customers); and

(iii) 237 customers who signed new supply contracts with Nova on lower rates as a result of a counter campaign Nova launched – and called the Cranky Bear campaign – in response to NEL's canvassing of its customers ("the 237 counter-campaign customers").

[7] Mr Mitchell and, through him, NEL used margin information Mr Mitchell had kept when he left Nova. They identified customers on higher margins and near the end of the term of their supply contract. NEL then canvassed those customers on the basis that it could secure lower rates and better terms from Nova than such customers had on their current rate and the standard Nova supply contract. Once Nova became aware of NEL's activities it began the Cranky Bear campaign offering a selected sector of Nova's customers reduced gas prices in return for signing a new contract with Nova. Nova's campaign was intended to 'head off' approaches to those customers from NEL. The liability determination accepted the Cranky Bear campaign, resulting in lower revenue from 237 customers who signed new supply agreements, was a reasonable endeavour by Nova to mitigate losses arising from Mr Mitchell's misuse of its confidential information. Mr Mitchell was consequently liable to Nova for the cost of that lower revenue as damages.

[8] The following three passages from the liability determination summarise how Mr Mitchell's use (either directly or through NEL) of confidential information he took with him from Nova – and particularly information about retail gas customers who were near the end of contract periods and were paying higher margins than some Nova customers – caused the losses and created the liability for damages:

> [82] Mr Mitchell's use of the margin information enabled him to target existing Nova customers who were paying rates significantly higher than the then-current market rates. If Mr Mitchell had not had the benefit of the confidential margin information, NEL's canvassing for clients would have been less likely to identify existing gas customers where significant 'savings' were virtually guaranteed. He was able to 'hit the ground running' and give contact lists to his sales

> representatives (that included his mother and Alan Mitchell) that meant they were not 'cold calling' potential clients for whom little or no saving might be generated … By using that confidential information to target existing Nova customers on the highest margins, Mr Mitchell ensured NEL would generate the highest potential savings for those signed up as clients, higher revenue for NEL (which received a percentage of the value of the reduction in cost achieved for the client) and – compared with an average or random sample of customers of Nova or in the market generally – had the effect of causing the biggest drop of revenue for Nova.
>
> …
>
> [86] … NEL's activities, based on using Nova's confidential information to target high return customers, remained the effective cause of the loss throughout.
>
> …
>
> [113] … Nova's counter-campaign was a reasonable measure to mitigate its exposure to further losses from Mr Mitchell's actions. He is consequently liable to Nova for the additional loss or damage that resulted from this mitigation measure, in addition to other loss.

Prohibition on publication of certain information

[9] The five earlier determinations of the Authority in this matter have placed certain limits on access to confidential business information in the pleadings, witness statements and documents lodged by the parties.[4] Orders made in those determinations prohibited publication of that confidential information and the name of one former Nova employee referred to in the evidence. Those orders are confirmed by this determination and remain in place. To protect that business information the Authority file is sealed and may not be accessed by any other person without prior application to the Authority (and about which the parties' representatives would be consulted before any access was granted). The limited but necessary financial information set out in this determination (and the liability determination) is on the public record and may be published about the facts of the matter and the related business information.

The Authority investigation and issues for determination

[10] Evidence provided for the Authority's investigation included:

(i) a 'quantum' brief of evidence, a reply brief and a supplementary affidavit from Stephen Troughton, Nova's commercial and industrial sales manager; and

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[4] [2014] NZERA Auckland 94 (18 March 2014, Member Arthur); [2013] NZERA Auckland 420 (16 September 2013, Member Arthur); [2013] NZERA Auckland 226 (5 June 2013, Member Dumbleton); [2013] NZERA Auckland 180 (9 May 2013, Member Dumbleton); [2012] NZERA Auckland 429 (Member Dumbleton, 30 November 2012).

(ii) expert evidence from Toby Stevenson, an economics consultant specialising in the energy market (briefed by Nova); and

(iii) expert evidence from John Small, an economics consultant with expertise in econometrics (briefed by Mr Mitchell and NEL); and

(iv) two reports from Mr Stevenson and Dr Small resulting from conferences they held at the direction of the Authority (described as the Preliminary Experts Report and the Final Expert Report); and

(v) Extensive background data and reports on Nova's business provided through a disclosure process and including what were described as 'snapshot updates' about quantum information – on 14 November 2014 and 12 March 2015 – after what was set for the purpose of evaluation in this investigation as a 'cut-off date' of 31 March 2014 for data about matters such as customer numbers, turnover and revenues from which losses (if any) were to be calculated.

[11] Mr Mitchell chose not to lodge any evidence prior to the investigation meeting on quantum but during the meeting he was given leave to lodge a short witness statement and provided some additional evidence orally in answer to questions from the representatives.

[12] Mr Troughton gave detailed evidence about the data Nova provided for the investigation (including for use by the experts in preparing their reports and conferencing) and explained some aspects of Nova's operation.

[13] A substantial part of the Authority investigation comprised extended examination, by counsel for both parties and me, of Mr Stevenson and Dr Small about their analysis of how any loss to Nova could and should be identified and quantified. They summarised their analysis in algebraic formulae comprising various factors discussed further in this determination.

[14] Both expert witnesses were present during the questioning of the other and also had the opportunity to directly exchange and explain competing views on various aspects of the evidence. Their evidence and engagement throughout the investigation meeting (both in answer to questions and in discussion) was robust, thorough and thoughtful.

[15] In addition to their extended examination of the expert witnesses, counsel for both parties provided extensive written submissions on the evidence and issues for resolution in this determination.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not set out a record of all the evidence and submissions heard or received. In part this has been done because extended descriptions and explanations of the data examined would be of little assistance to the parties (to whom the material was already well known) and in part to minimise disclosure of Nova's business information about which (although dated) there was still some commercial sensitivity. The determination has stated relevant findings of fact and law and expressed conclusions on the issues requiring determination in order to dispose of the matter.

The law on damages

[17] The objective of any damages award in this case was to put Nova, as far as an appropriately calculated sum of money could, in the position it would have been in if Mr Mitchell had not committed the various breaches of his contractual duties.[5] Losses arising from reasonable steps taken by Nova to minimise losses caused to it by Mr Mitchell's actions were also recoverable.[6]

[18] The Employment Court in *Medic Corporation Ltd v Barrett (No 2)* provided this summary of the analysis required:[7]

> The purpose of damages is to compensate a plaintiff for the loss it has sustained. … I recognise, of course, that any sum which [the respondents] are ordered to pay by way of compensation will inevitably act as a punishment in that they will be deprived of it but in law the doing of justice by way of compensation is not regarded as a punishment but as a restoration to a plaintiff of something that was always his and of which he has been wrongfully deprived.
>
> Compensation means an award of a sum of money which will place the plaintiff back in the position in which it can be supposed that it would have been if the defendants had acted correctly towards it. It follows that while the plaintiff is entitled to receive compensation, it is not entitled to a windfall. It may have sustained an injury at the hands of the defendants, but it has not won a lottery. It is entitled to no more than is necessary to compensate it for the injury for which the defendants are responsible but it cannot look to them to make good losses, the result of some unconnected reversal of fortune. But it is still entitled to such

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[5] Blanchard & Ors *Civil Remedies in New Zealand* (2003) 1.3.1. at 9.
[6] Burrow, Finn & Todd *Law of Contract in New Zealand* (3rd ed, 2007) 21.2.4 at 712.
[7] [1992] 3 ERNZ 977 at 983-984.

an amount as will put it back, so far as money can achieve that result, in substantially the same position financially as it would have been in if the defendants had not injured it by unlawful activity. That is the measure of the loss – no more and no less. Just as the Court may not exceed that amount in making its award, so it is not entitled to deprive the plaintiff of one cent of that recovery.

That statement needs, however, to be understood in a sensible way – as with any question of fact and degree. The law places limits on the consequences that may be laid at the door of a defendant. They must be consequences of which it can convincingly be said that they are the result of the defendant's conduct, in the sense that they would probably not have ensued but for the defendant's conduct. And … any award of damages must be sufficiently linked to the breach, whether of contract or of duty, to merit recovery in all the circumstances. Whether it is or is not is, of course, a question of fact and degree.

It is for the plaintiff to prove, not for the defendants to disprove, that loss has been sustained that is not too remote to be taken into account and the extent of that loss, but only on a balance of probabilities and not beyond reasonable doubt. While the plaintiff must prove the extent of its losses, in some areas it will be neither necessary nor possible to do so with great precision and the Court must then do its best, upon the material presented, to make an assessment using its general knowledge of human and business affairs and common sense. Some kinds of conduct are by their nature likely to cause certain types of loss; so that if the conduct has taken place and the loss has been sustained, it is not a large step to conclude that the one has occasioned the other without any more specific or concrete evidence to that effect. It is nevertheless necessary to keep in mind that other forces may operate to contribute to, or even cause independently of the wrongdoing, the harm that has been sustained.

In this context it is relevant to mention two categories into which compensatory damages are sometimes subdivided: general damages and special damages. Both can connote claims to recover actual pecuniary loss but special damages usually consist of items that are capable of being ascertained with great, almost absolute, precision such as loss of wages or of profits or expenses incurred; while general damages, although no less real, tend, by their nature, to be incapable of precise calculation or to tolerate wide variations of opinion in valuation such as general loss of custom, loss of a chance to make a profit, or diminution of goodwill. The only practical difference between the two kinds of damages is that a plaintiff is expected to give particulars in advance of the special damages claimed but is under no similar obligation in respect of general damages. ... It follows that the Court looks for rather more rigorous proof of special than of general damages. I also remind myself that damages are awarded once and for all. The plaintiff cannot come back to the Court on a later occasion and say that it underestimated or failed to foresee the extent of the damage it has suffered and ask for a further assessment. So the Court must today determine not only the past but also the likely future consequences of the defendants' actions and, if appropriate, award prospective damages.

[19] The following two observations by the Court in *Medic Corporation*, about actions taken by a former employer in mitigation of its losses, were also relevant:[8]

… [The plaintiff] was entitled to put money into protecting itself and bound to take reasonable steps to mitigate its losses occasioned by the defendants. That

[8] *Medic Corporation*, above n 7, at 987 and 990.

> was a duty it owed to the defendants if it was going to claim damages from them.
> …
> … It may be that some of the action and expense was not strictly necessary but the defendants must accept the consequences if, by unlawful activity, they threw the plaintiff into confusion, even panic.

Issues

[20] At issue in the competing arguments of the parties about the losses said to have been incurred by Nova was how to properly assess the differences between what was described as the factual scenario (what had happened) and the counter factual scenario (what would have happened but for the Mitchell/NEL activities, described in Nova's submissions as "the incursion"). Broadly this raised two overarching questions for answer – firstly, what was the value of the revenue lost over one year ("the annualised loss") and, secondly, for how many years should the loss be projected into the future ("the time horizon" or "the period of loss") for the purpose of making an award of damages.

[21] One item agreed between the experts was the annualised loss to Nova of the seven lost customers. It was $45,936. What remained at issue in respect of those seven customers was the time horizon for which an award should be made.

[22] The experts also initially appeared to agree about the level of the 'discount' that should apply in calculating the present value of money awarded as damages now in advance of the years in which the loss would occur – using a factor described as the Weighted Average Cost of Capital (WACC).[9] The appropriate WACC needed to be applied to the anticipated level of loss over the time horizon to generate a 'net present value' for use in the award of damages. Some dispute between the experts over the appropriate WACC appeared to be resolved during the investigation meeting. Dr Small accepted that the rate of 11.64 per cent, proposed by Mr Stevenson, was fair. I have accepted their view as the evidence suggested the rate was probably conservative, providing a relatively generous annual discount in calculating the net present value of losses for which Mr Mitchell would have to pay damages.

[23] In respect of the formula to apply for assessing any loss in relation to the 81 re-signed customers and the 237 counter-campaign customers the experts (and the

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[9] The weighted average of the cost of debt and the cost of equity.

parties' submissions) diverged on which elements should properly be included in the comparative analysis to establish the annualised loss and what discount factors should be applied in assessing the value of that loss over subsequent years. This included the issue of how to account for loss of a proportion of those customers over time due to various market and business factors, referred to in the evidence as customer 'churn', and for 'temporary vacant sites' and 'vacant sites' due to events such as business sale or failure, that would otherwise have resulted in a proportion of those customers being lost by Nova in the normal course of events anyway. Although apparently agreed in the final experts' report, there proved to be considerable dispute during the Authority investigation about the appropriate churn rate to apply in discounting the losses over time.

[24] Also at issue was the potential effect of market activity as a result of changes in the price of gas, the cost of supplying it and competition from other suppliers (including as a result of activity by brokers seeking to secure better prices or terms for customers). There were also differences, either as a matter of the experts' analysis or in the parties' submissions, about the ability of Nova to offset an apparent loss of revenue by using the terms of its contracts with such customers to increase prices and also to have customers meet increased costs resulting from increased transmission or other third party charges.

[25] As they emerged from the investigation and the parties' submissions, the issues for resolution in this determination, were:

(i) Should one of the competing assessments and formula proposed by the expert witnesses be preferred over the other in assessing any loss incurred by Nova?

(ii) What churn rate should be applied?

(iii) Were other price effects sufficiently allowed for?

(iv) Should Mr Stevenson's model be adjusted for the cost of gas?

(v) For what "time horizon" or period should losses be awarded?

(vi) Was any adjustment required for gains made through electricity supply agreements made with customers approached in Nova's counter-campaign to re-negotiate their gas contracts?

(vii) What level of penalties should be awarded against Mr Mitchell and NEL and how should any penalties awarded be apportioned between Nova and the Crown?

(viii) Were any other orders for compliance by Mr Mitchell and NEL required?

The competing expert analyses – what formula best calculated the losses?

[26] I concluded the formula or methodology advanced by Mr Stevenson enabled a sufficiently robust calculation of Nova's annualised losses for the 81 re-signed customers and the 237 counter-campaign customers. It met what I considered was the necessary standard of proof, avoided some flaws identified in an alternative formula advanced by Dr Small, and still enabled analysis (and conclusions) on some factors raised in Dr Small's critique of Mr Stevenson's approach.

[27] The standard of proof for assessment of losses was to the balance of probabilities, that is what was more likely than not to be the case, as best as could be calculated or predicted from available evidence. The overall thrust of the defence of Mr Mitchell and NEL to Nova's argument about the level of its losses was to cast doubt on the reliability of the information and the suitability of available data – particularly when averaged or generalised – to the specific circumstances of the customer groups involved and the market forces at work (on pricing and completion for customers) over the coming years. Establishing some doubt was however not sufficient to conclude a shortfall in the required standard of proof. While – as noted in *Medic Corporation* – some precision is sought in the measure of loss (so no more or less is awarded in damages than necessary), the standard of probability rather than certainty allows for some margin in that assessment.

[28] Crucially, and I concluded compellingly, Mr Stevenson's analysis made demonstrably conservative assessments – specifically regarding churn, a neutral rather than upward price effect over the longer term, and the WACC rate – that likely underestimated some factors that were in Nova's favour and overestimated other factors in favour of Mr Mitchell and NEL in measuring the loss. The margin for error consequently built into Mr Stevenson's assessment of loss made it more likely the damages award would be for an amount that was not more than necessary.

[29] The formula initially advanced by Dr Small led to the counter-intuitive conclusion that the Mitchell/NEL actions would ultimately not result in losses to Nova but, rather, gains of more than $5 million. It was based on what was

subsequently conceded to be an incorrect assumption about 'churn' following the expiry of the current contract term of the various re-signed customers and treating subsequent revenue from such customers as a net gain. It did not accord with the commercial reality of significant continuity of such customer relationships (and revenue from them). Importantly other issues raised in Dr Small's critique – concerning whether costs of gas supply should be included in the calculation and the likely overall trends in prices – could be adequately addressed within the framework proposed by Mr Stevenson for addressing the calculation of loss.

[30] Mr Stevenson's methodology for assessing the loss incurred in respect of the re-signed customers was summarised in this algebraic formula: $(p^2 - p^1)\ q$. It was based on comparing the price of gas sold to the customer before and that price after the Mitchell/NEL 'incursion' at a comparable volume. The p^2 value is the re-sign price. The p^1 value is the initial price. The value q is the volume of gas sold.

[31] For the purpose of the economic loss valuation q had to be adjusted on an annual basis to allow for 'churn'. This likely loss of a certain percentage of customers for various reasons – in the normal (that is the counterfactual) course of events – meant the relevant volume of gas sold to the remaining group of re-signed customers would fall by at least that rate of churn each subsequent year.

[32] Other factors in assessing the annualised loss and then its application in subsequent years included an allocation for a proportion of what would become 'vacant' sites, other changes in the "headline price" (referred to as "price attrition") such as changes to price outside of contract re-signs, and for CPI or PPI adjustments allowed under contract terms.

What churn rate should be applied?

[33] Mr Stevenson's assessment of loss applied a churn rate of 7.49 per cent for the 81 re-signed customers and the 237 counter-campaign customers – that is an allowance for the likelihood that proportion might have switched retailers in the future anyway. It was a figure drawn from data compiled by the gas market regulator, the Gas Industry Council (GIC) on customer 'switches'. One volume-consumption category used in reporting that data, labelled AG4, was said to be sufficiently

analogous to Nova's commercial customers.

[34] The 7.49 per cent AG4 churn rate was based on data from all retailers. Mr Stevenson's analysis suggested Nova's actual churn rate for customers in the AG4 commercial category (and a lower volume category labelled AG6) was in fact lower – at around 5.6 per cent. The use of the 7.49 per cent rate for loss valuation likely overstated rather than understated Nova's actual churn rate.

[35] The critique of that rate, in Dr Small's analysis and the submissions of Mr Mitchell and NEL, focussed on the suitability of the AGC4 rate as a general industry average to the specific characteristics of the two groups of 81 and 237 Nova customers at issue in the assessment. It was an argument that speculated those customers were on higher prices (or at least paying a price that included a higher margin for Nova) and were close to the end of their contract periods, so were more likely to have 'churned away' to another retailer in the competitive market, and therefore a higher churn rate should be allowed for in any calculation of loss. Dr Small's earlier argument of a 100 per cent churn rate was abandoned but he maintained the applicable rate was still somewhere between the AG4 rate and some higher amount.

[36] The argument relied on a notion that those customers' susceptibility to switching was increased by factors such as higher levels of broker activity in the gas retail market and assumptions on sensitivity to price. I was not persuaded either factor was established to a degree of likely variance greater than that provided by the conservative margin of the 7.49 per cent AGC4 rate.

[37] The limited evidence about broker activity did not establish such brokers could have so successfully contacted as many 'susceptible' Nova customers. NEL only contacted such customers because it had the benefit of inside information about margins Mr Mitchell had gleaned and taken with him when he left Nova. Brokers generally would have required more effort and more luck in canvassing customers, with a lower degree of success. Similarly the notion of increased price sensitivity for customers paying a rate that included a higher margin for Nova assumed gas costs for the customers in the targeted groups would be sufficiently important in their business cost structures to look for change without (as the witnesses described it in their oral evidence) "having their cage rattled" by NEL's (or another broker's) activities. I was

not persuaded a general theory about market activity generated by price sensitivity explained what would likely have happened in the commercial reality being assessed in this particular matter.

[38] Mr Stevenson's analysis also applied a further deduction to account for customer sites that became vacant or temporarily vacant as a result of factors such as a customer going out of business or the use of a site changing. I have accepted those rates were established as appropriate for the assessment of loss.

[39] The adjustment for churn and vacant sites totalled 8.71 per cent – being the proportion of the 81 re-signed customers and the 237 counter-campaign customers that would likely have ceased to be Nova customers – so the deemed loss of revenue would reduce by that percentage each year in the calculation of the value of the loss over subsequent years.

Were other price effects sufficiently allowed for?

[40] Further adjustments were required in the assessment of loss to allow for other factors that, as a matter of commercial reality, would have affected the income that Nova might otherwise have expected to receive from the 81 re-signed customers and the 237 counter-campaign customers.

[41] Those price effects – described as change or 'attrition' in the 'headline price' for units of gas sold – included considering if Nova would likely have agreed to price adjustments for customers by negotiation (when the term of their supply contract expired or by an approach from the customer or customer's agent at some other time during it) and the ability of Nova to use terms in its supply contract to either increase prices or control the degree to which they might otherwise be reduced.

[42] There was detailed evidence, and conjecture, about the effect of terms in Nova's supply contract that gave it an at least nominal "right to match" offers from competing retailers, the ability to pass on to customers increases in third party costs (but no obligation to pass on reductions), the ability to automatically increase prices in line with CPI and PPI movements, and the prospect that prices were falling in the gas market so reductions of revenue would have resulted anyway (and were therefore arguably not losses caused by NEL and Mr Mitchell's actions).

[43] Each element considered under this heading traversed the difficult line between what could be reasonably inferred – as a matter of extrapolation or deduction from the available data and analysis of it – and what was speculative, meaning conjecture without firm evidence or knowledge. Each party argued they were on the correct side of that line while the other party had crossed over into speculative error.

[44] I was satisfied from reviewing Mr Stevenson's evidence – in light of the critique made of it in Dr Small's evidence and the closing submissions of NEL and Mr Mitchell – that his assessment had reasonably allowed for those price effects and reached the conclusion that the valuation could conservatively apply a neutral outcome on likely price changes. In short his conclusion was that reductions in price (from matters such as having to offer some customers lower prices) were more than offset by likely protection of prices and margins Nova would otherwise have achieved across these groups of customers by applying CPI and PPI increases as allowed in its contract terms. Without setting out the detail I have accepted the Nova submission that even if Dr Small's analysis of price attrition issues (to do with average price reductions for customers signing new contracts and some re-signing customers being excluded from CPI/PPI calculations) was preferred, the net combined effect of the adjustments still showed a modest positive gain for Nova. In that light Mr Stevenson's conclusion that those price changes should be excluded from the assessment of loss remained conservative and could fairly be applied without overstating the quantum of loss to Nova.

[45] A further point concerned whether a fall in the price of gas between the second quarter of 2012 (when NEL's activity was at its peak) through to the end of 2014, as described by Dr Small, required some adjustment to the counterfactual assessment. Mr Stevenson's evidence, during the experts' joint session at the Authority investigation, was that the price fall was a one off event and not a trend applicable through the full time horizon (of 10 years) in his assessment of loss.

[46] I have accepted Nova's submission that Mr Stevenson's evidence further established that the price drop was particular to circumstances in the third and fourth quarters of 2013 and was likely to be a one off event, partly offset by increases in other quarters from 2012 to 2014. It was an insufficient basis to assume one price

drop would have a lasting effect through the forty quarters (that is 10 years) for which Nova claimed damages.

Should Mr Stevenson's model be adjusted for the cost of gas?

[47] Mr Mitchell and NEL submitted Mr Stevenson's model for assessing Nova's losses was flawed because it did not account for Nova's cost in supplying the gas. They argued Mr Stevenson's formula disproportionately benefited Nova by extrapolating a short-term lost revenue over a long term. This was said to avoid proper assessment of factors, such as price, that affected margin through the future period.

[48] Having considered the arguments of both parties on this point – including hypothetical examples showing differences in margins and suggested alternative algebraic formula to describe the analysis – I concluded Nova was correct that the necessary assessment should assume costs remained the same between the factual (p^2) and counterfactual (p^1) scenarios. It was not an assumption that costs remained constant over time. Rather, whatever the cost was at a particular time, it was cancelled out if the same factor was inserted on both sides of the formula.

[49] In doing so I did not accept, as a matter of either logic or commercial reality, the submissions of Mr Mitchell and NEL that the element for the volume of gas – rendered as q in the formula – would necessarily change over time according to cost or that, in one of the hypothetical examples discussed, an increase in margin (due to a drop in cost) would logically result in reduced prices due to market pressure. Both points were conjecture rather than reasonably extrapolated from the evidence.

[50] As Nova submitted, whatever changes happened in terms of future costs, the costs would "be the same in relation to the delivery of the same gas to the same customer at the same time" in the factual and counterfactual scenarios. Consequently "the loss caused by the unlawful incursion [was] still the difference between the price paid pre incursion and post incursion, irrespective of cost".

For what "time horizon" or period should losses be awarded?

[51] Nova proposed ten years as the appropriate period for losses to be awarded. Taking the annualised loss for the three groups of customers, and applying the various annual discount factors (such as churn, vacancy and the WACC) under the formula developed by Mr Stevenson, Nova calculated a damages award on the ten year time horizon would total more than $4.5 million. Mr Stevenson said the ten year period was "conservative and realistic".

[52] Mr Mitchell and NEL submitted ten years was excessive and not properly founded. Their final submissions did not propose a specific alternative period for calculation but Dr Small, in his evidence, had suggested three years was sufficient.

[53] The submission from Mr Mitchell and NEL rested on the notion that there was no loss at all to Nova and, rather, Nova had gained or retained ground it would otherwise have lost before the expiry of 18 month and 36 month agreements signed with the 81 re-signed customers and the 237 counter-campaign customers. It was a notion not accepted in this determination.

[54] Dr Small accepted his proposal for a three year horizon was partly put forward for the sake of argument, although that suggested length of time had its root in the 36 month contracts signed by counter-campaign customers.

[55] Mr Stevenson's explanation for a 10-year period had a similarly notional aspect to it. It was described as orthodox or usual in business valuation exercises but there appeared to be no inherent, rational basis such a period should be ten years rather than, say, six or 12.

[56] Mr Stevenson's calculations for application of the loss formula over 120 months – applying the base adjustment for churn and vacancy for each of those ten years – showed just over 43 per cent of the customers covered by the assessment would remain at the end of that period.[10] On that basis it could be argued the actual period over which the discounted loss would occur was even longer, until the remaining 43 per cent 'churned away' entirely.

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[10] "DCF, adjustments and price effects" page in NOVE loss valuation 190814.xlsx.

[57] Against that background various factors favoured either shortening or lengthening or accepting Nova's proposed ten years as the time horizon over which the total award of damages should be calculated and awarded.

[58] As noted by the Court in *Medic Corporation* damages awarded now for future losses are made on a 'once and for all' basis and Nova cannot come back later for a further assessment. The conservative nature of the discount factors in the formula, particularly on churn and WACC, arguably gave room for more confidence that the longer period Nova advocated should be applied.

[59] Despite those factors, there was an inherent uncertainty in any business forecast for a period as long as ten years. However carefully the discount factors were calibrated, using past data for predictive purposes, their likely accuracy must be less reliable the further out the period of their application extended. As a broad assessment I was not satisfied that a period of more than seven years had sufficient reliability in the context of general economic or specific dynamic market factors. Seven years was within the range canvassed by the experts' evidence and arguments but favoured a longer period – but not as long – as that proposed by Mr Stevenson.

Electricity adjustment?

[60] During the investigation meeting a question arose as to whether Nova had gained some new electricity customers through its counter-campaign approach to selected gas customers and, if so, whether some allowance or offset should be made in any award of damages.

[61] Mr Troughton helpfully provided further evidence by affidavit that identified four new electricity supply agreements resulted from gas customers approached in that campaign. His evidence was that the margin gained on those new agreements amounted to an annualised amount of $2,242.

[62] While Nova submitted the amount should not be included as an offset in any assessment of its losses, Mr Mitchell was entitled to have it included in the reckoning as a benefit accruing to Nova from its mitigation activities.[11]

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[11] Burrow, Finn & Todd *Law of Contract in New Zealand* (3rd ed, 2007) 21.2.4(b) at 713.

[63] As a result the sum of $2,242 needed to be subtracted from the annualised loss calculated in respect of the 237 counter-campaign customers.

The award of damages

[64] For the reasons given in this determination, Nova was entitled to an award of damages calculated from the following annualised losses:

(i) $45,936 for the 7 lost customers; and

(ii) $471,306 for the 81 re-signed customers; and

(iii) $503,967 for the 237 counter-campaign customers (which includes a reduction for four customers who also signed electricity agreements).

[65] The total award of damages is to be calculated from applying the annualised losses (totalling $1,021,209) over a 'time horizon' or period of seven years.

[66] The required calculation includes applying the relevant discount factors and WACC under the formula put forward by Mr Stevenson. Those factors mean it is not a simple exercise of multiplying the annualised loss by seven years. Completion of the arithmetical exercise is left to the parties (in consultation with the experts), with leave to revert to the Authority if they consider it necessary to do so or Nova requires a certificate of determination stating the fully calculated amount.

[67] By order under clause 11 of the Schedule 2 of the Act Mr Mitchell must also pay Nova interest at the annual rate of five per cent on the total amount now due as damages from the date of this determination until payment is made.[12]

Penalties

[68] Nova submitted that separate and cumulative penalties of $7500 a piece should be imposed on Mr Mitchell for breaches of his contractual obligations in respect of each of the seven 'lost' customers and each of the 81 're-signed' customers, amounting to a total of $660,000. It sought an order of the same level against NEL for aiding and abetting Mr Mitchell's breaches.

[12] Judicature (Prescribed Rate of Interest) Order 2011, cl 4.

[69] I have not accepted the total amounts sought in those submissions were appropriate to the circumstances. Instead I concluded orders should be made for Mr Mitchell to pay a penalty of $30,000 and for NEL to pay a penalty $50,000 for the following reasons.

[70] Firstly, Mr Mitchell had admitted his breaches of his terms of employment were deliberate. Those breaches were not technical or made inadvertently and a penalty was required.

[71] Secondly, application of the totality principle or global approach was appropriate for multiple breaches of the same type, namely taking and misusing confidential information, in this case. The activity made Mr Mitchell liable to penalties under s 134(1) of the Act (for breach of contractual terms of fidelity and forbidding use of Nova's confidential information for his personal advantage) and under s 4A for breaching his statutory duty of good faith when still employed by Nova.[13]

[72] Thirdly, there would have been – from a common sense point of view – an element of 'double counting' if the high level of penalties sought by Nova were awarded against both Mr Mitchell and NEL. While Mr Mitchell, a person, and NEL, a registered company, are two separate legal entities, NEL's activities aiding and abetting his breaches of duty to Nova resulted, "as the night follows day", from the deeds and guiding mind of Mr Mitchell himself.[14] He was NEL's director, general manager and employer of its staff (comprising his mother, his father and a friend) whom he instructed to contact customers and make sales pitches based on information he had taken about those customers from Nova. While NEL had to pay a penalty (for aiding and abetting Mr Mitchell's misuse of Nova's confidential information), its wrongdoing as a separate legal entity were actions directed by Mr Mitchell, who must also pay a penalty in his personal legal capacity. The wrongs had to be punished but not by setting penalties at such a high level for both entities that it amounted to double punishment.

[73] Fourthly, an aggregation of penalties to the level sought by Nova would be disproportionate in two other respects. The amount would be significantly higher than

[13] *Nova Energy Limited v Mitchell & Ors* [2014] NZERA Auckland 94 at [144]
[14] *Medic Corporation Ltd v Barrett (No 2)* [1992] 3 ERNZ 977, 981 (per Goddard CJ).

penalties awarded by the Authority in other cases.[15] Also the amount would be excessive in light of the damages award. While the damages award is for a different purpose – to put Nova, as best as could be assessed, back in the position it would otherwise have been – and not, as penalties are, to punish wrongdoing, the very high amount awarded as damages and its effect cannot be ignored in assessing the appropriate level for penalties in this case. A damages award of this type has been described as "inevitably act[ing] as a punishment" (without confusing it with another measure or type of damages referred to, at law, as punitive).[16]

[74] Fifthly – as part of that practical assessment – the degree of harm caused to Nova, relevant in setting the level of penalty, was ameliorated to some extent by the damages award, as was the deterrence factor. Another employee in Nova or elsewhere who was considering doing anything like Mr Mitchell did – to the extent she or he might subject that notion to rational forethought – would likely be put off doing so by the risk of incurring a very big bill for damages so the additional role of penalties in sending that message was less important.

[75] Nova sought an order under s 136(2) of the Act for any penalties imposed on Mr Mitchell and NEL to be paid to Nova rather than the Crown. I have agreed that was appropriate in this case. It was more likely Nova would pursue and collect the penalties awarded. It also avoided a potential – although perhaps more theoretical than likely – contest between the Crown and Nova over the apportionment of the resources of Mr Mitchell and NEL to meet orders for penalties and damages. Although there was no substantive evidence on the resources of Mr Mitchell and NEL to meet those orders, they quite likely might not have enough to meet the full payments required (at least as a result of this determination of the Authority) for both categories of remedy awarded.

Other orders

[76] In its closing submissions Nova sought further orders restraining Mr Mitchell and NEL from using any of its confidential information that had been at issue in the

[15] See, for example, *Tag Oil (NZ) Limited v Watchorn* [2014] NZERA Wellington 58 – penalty of $12,000 awarded for four breaches of taking (but without proven disclosure or use of) confidential information and *Zeald New Zealand Limited v Bernard* [2013] NZERA Auckland 402 – penalty of $50,000 awarded for 263 identified instances of breaches of employment agreement terms.

[16] *Medic Corporation Ltd v Barrett (No 2)* [1992] 3 ERNZ 977, 983 (per Goddard CJ).

proceedings and on the same terms as undertakings provided to the Authority.

[77] The application for such orders is declined because, as submitted by Mr Mitchell and NEL, it seemed unnecessary to make the orders sought as they have already given comprehensive undertakings, which remain binding on them. Further Mr Mitchell's obligation not to misuse Nova's confidential business information endures, for as long as that information remains confidential. There was no need for orders of compliance in the absence of any evidence of ongoing breaches of them.

Costs

[78] Costs are reserved. Typically, if asked to determine costs, the Authority starts from its notional daily tariff adjusted for any particular relevant factors, such as the complexity of the case (which likely applies in this matter), to reach an award that is reasonable yet modest.[17]

[79] The parties are encouraged to resolve costs between themselves but if they are unable to do so, Nova may within 28 days of the date of this determination lodge and serve a memorandum on costs. The respondents (all three to the original proceeding) would then have 14 days to lodge and serve a reply memorandum.

[80] The earlier liability determination is already on challenge to the Employment Court and, realistically, this quantum determination is expected to be joined to that application. In such circumstances the Authority typically sets a costs award for the investigation (if not agreed by the parties and a costs determination has been sought) so that its costs determination is also before the Court, either as a result being added to the matters under challenge or – if agreed or at least undisputed – as a part of the outcome of the Authority investigation when the Court comes to consider costs issues itself in due course.

Summary of findings and orders

[81] This determination has made the following findings and orders:

(i) The annualised loss in respect of the seven lost customers was $45,936.

[17] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

(ii) The annualised loss in respect of the 81 re-signed customers was $471,306.

(iii) The annualised loss in respect of the 237 counter-campaign customers was $503,967.

(iv) The total annualised loss was $1,021,209.

(v) Damages are to be calculated by applying various discount factors to the annualised losses over a period of seven years.

(vi) Mr Mitchell must pay interest on the amount of damages awarded at the rate of 5 per cent a year from now until they are paid.

(vii) Mr Mitchell must pay a penalty of $30,000 for breaches of his duties of fidelity, confidentiality and good faith.

(viii) NEL must pay a penalty of $50,000 for aiding and abetting breaches by Mr Mitchell of his employment agreement.

(ix) Mr Mitchell and NEL must pay the whole of the penalties awarded to Nova.

(x) Nova's application for further orders about future use of its confidential information by Mr Mitchell and NEL has been dismissed.

(xi) Costs are reserved (with a timetable for memoranda if necessary).

Robin Arthur
Member of the Employment Relations Authority