

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2018-485-509
[2019] NZHC 2959**

BETWEEN

**CREATIVE DEVELOPMENT
SOLUTIONS LIMITED**
Plaintiff

AND

CHORUS NEW ZEALAND LIMITED
Defendant

Hearing: 2-6 September; 9-13 September; 17 September 2019

Counsel: C L Elliott QC, M B Wigley and A Lenard for plaintiff
J B M Smith QC, V L Heine, T D Smith and S E Quilliam-Mayne
for defendant

Judgment: 13 November 2019

RESERVED JUDGMENT OF DOBSON J
[Public Version]

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Introduction

[1] The plaintiff (Creative) operates as an adviser and consultant on provision of telecommunications services. It has researched and developed proposals for providing of extended telecommunications services, including ultra-fast broadband (UFB), in more remote parts of the areas covered by the Marlborough District Council (MDC), including the Marlborough Sounds.

[2] The product of Creative's work is its "Smart Services Infrastructure" initiative (SSI), which it describes in its statement of claim as:

... an initiative that pivots around telecommunications broadband services to underserved rural and remote regions and end users, based on a broader

collaborative and partnership approach aimed at larger social and economic objectives.

[3] Creative has developed its SSI in collaboration with the MDC. MDC has contributed to the cost of its development, as well as providing information about the location and extent of potential end users of broadband services. Creative and MDC treat themselves as joint owners of the intellectual property reflected in SSI.

[4] The defendant (Chorus) is a telecommunications network operator, providing wholesale telecommunications services, predominantly via fibre and copper, to retailers of telecommunications services. Chorus was created by a separation of the wholesale component of the former Telecom New Zealand business, with the retail component becoming the telecommunications services provider now known as Spark.

[5] Creative, with MDC's concurrence and participation, shared confidential information about its SSI with Chorus, after Chorus had accepted obligations of confidence by signing a non-disclosure agreement (NDA). The essence of this proceeding is that Chorus then allegedly made use of the confidential information in breach of various obligations owed to Creative under the NDA. In addition, Creative has claimed that the relationship gave rise to fiduciary duties owed by Chorus to Creative which Creative has breached, and that there has been a breach of an equitable duty of confidentiality. Creative also claims that the course of dealings between the parties gave rise to an estoppel that prevented Chorus from competing on its own behalf in the bidding process for funding, which Chorus subsequently did.

[6] Approximately one month before trial, the parties agreed that the hearing should be confined to liability issues, with matters of quantum adjourned for a later hearing, depending on the outcomes on liability.

[7] Before considering the allegations in detail, it is appropriate to describe the broader context in which the dealings between the parties occurred, and their respective positions in the sphere of commercial activity that brought them into contact. The narrative includes references to numerous terms conveniently identified by abbreviations. A glossary of those abbreviations is added at the end of the judgment.

The telecommunications industry in New Zealand

[8] From the end of March 2008, Chorus became a separate operational division within Telecom, supplying voice and broadband data access network services to its parent company and other network operators, on terms set by the Commerce Commission.

[9] The Telecommunications Act 2001 had imposed a statutory obligation on Telecom to maintain voice telecommunications services to all end users having access to them in 2001. Part 3 of that Act provided for telecommunications service obligations to this extent and it is an obligation that has been inherited by Chorus.

[10] From December 2011, Chorus became a separately owned and operated company independent from the former Telecom organisation. That de-merger was a structural requirement for Chorus to compete for government contracts to provide UFB.

[11] Chorus is now a separate wholesale supplier of access network lines to the retailers of telecommunications services, together with the backhaul services required to convey signals back from end users and co-location services for other providers of telecommunications services to end users.

[12] The cost of the infrastructure required to provide broadband services in more remote areas in New Zealand is recognised to be greater than can feasibly provide an economic return to those providing that infrastructure. The progressive extension of broadband services has accordingly required significant government subsidisation.

[13] Chorus's preferred mode of conveying telecommunications signals is via fibre cables. These provide a higher level service than the alternative of copper wires, which have been used for much longer. Installing fibre cabling is more expensive than copper cabling.

[14] Government involvement in promoting the expansion of broadband services has been undertaken by a Crown entity formerly known as Crown Fibre Holdings Limited, but more recently known as Crown Infrastructure Partners (CIP). Despite

the former name being relevant at earlier points in the narrative, it will be uniformly referred to in this judgment as CIP. To the extent that the current government has also considered initiatives to extend broadband services that might be funded by the Provincial Growth Fund (PGF), CIP personnel have been used to assess such prospects.

[15] CIP sought tenders for a first round of its rural broadband initiative (RBI1), leading to the awarding of contracts to Chorus and others in 2011. In the same year, Chorus also successfully tendered for parts of the initial round of UFB (UFB1). Chorus was also successful for part of the subsequent rounds of UFB, namely UFB2 and UFB2+, in and after 2017.

[16] The government's priorities in extending UFB services were to provide connections for entities such as schools and medical centres in remote locations. More recently, marae have also been prioritised. The consequence is that the extension of UFB services has not necessarily occurred by incremental extension from the previous outer limits of coverage.

[17] Chorus was not successful in bidding for the second round of the rural broadband initiative (RBI2). Instead, CIP granted contracts to the value of \$105 million primarily to the Rural Connectivity Group Limited, a joint venture consortium between Spark, Vodafone and 2degrees, the three largest mobile operators in New Zealand. Parts of those contracts also went to nine wireless internet service providers (WISPs).

[18] The extent of coverage contracted for in the RBI2 round did not achieve CIP's goal of the most extensive coverage. After the RBI2 commitments were completed, there would still be some 16,735 end users that had originally been listed by CIP when it sought bids for RBI2, but who would not be covered. This group of the hardest to reach end users is loosely referred to as "the last one per cent".

[19] It was at this point in the progression of commitments to provide UFB to remote areas that relevant dealings between the parties occurred.

Creative/MDC initiatives

[20] In March 2016, Creative undertook a scoping and feasibility study for MDC to establish its requirements for delivery of region-wide digital technology infrastructure, including better and more extensive broadband and cellular coverage.

[21] Since then, MDC has spent approximately [Redacted] with Creative, developing SSI. The work has included an infrastructure trial in the Waihopai Valley, a rural area within MDC's territory. Substantial work has been undertaken in an attempt to deal with the particular difficulties in servicing various parts of the Marlborough Sounds.

[22] In March 2017, Creative and MDC responded to CIP's request for proposals for RBI2, proposing services for areas within MDC's territory. That bid to participate in RBI2 was unsuccessful. However, Creative contemplated making a bid for RBI2+, an extension of RBI2. Creative initiated contact with Chorus to advance its position with a view to having Chorus co-operate with it in an enhanced bid for RBI2+ services in the Marlborough region.

The witnesses, evidential objections

[23] Creative's principal witness was Mr Dayal Phillips, one of its shareholder directors, who has experience as a designer of telecommunications systems, among other skills. Mr Brendan Burns, another Creative shareholder director, also gave evidence. Mr Burns is a former journalist, media adviser and Member of Parliament who has skills in managing dealings with government. Creative's personnel include several people experienced in designing, and in some cases managing, various forms of telecommunications systems.

[24] In addition to Messrs Phillips and Burns, Creative called factual evidence from Mr Rohan MacMahon and Ms Stacey Young, both of whom filed briefs in reply to the content of briefs served for Chorus. Other evidence treated Mr MacMahon as a member of the Creative team, but in his brief he described himself as a consultant. He confirmed that the minutes prepared by MDC and Creative of two meetings with

Chorus in February 2018 at which he was present accorded with his recollection of the discussions at the meeting.

[25] Ms Young, the chief information officer at MDC, similarly supported the accuracy of minutes of meetings with Chorus. Her evidence also traversed the disappointment and hurt felt by MDC at having been let down by Chorus.

[26] Creative also called Mr Alan John Greenhough, an executive with CIP, who appeared under subpoena. The relevance of his evidence is explained at [130] to [131] below.

[27] Chorus called factual evidence from four of its executives who had been involved in the dealings with Creative. Mr Robert Broadbridge is the head of contract management for Chorus. He gave evidence of Chorus's interactions with CIP and of his involvement in assessing the terms of dealings with Creative.

[28] Mr Michael Lott was, at the time of relevant events, the head of innovation at Chorus. He was at the forefront of dealings between the parties.

[29] Mr William Murch is an engineer with 45 years' experience at Chorus and its predecessors, New Zealand Post Office and Telecom. He is currently employed by Chorus as its investment manager (physical networks). He gave evidence of his interactions with Creative, and of the work done by planners at Chorus, for whom he was responsible, in designing a network to meet what Chorus understood to be MDC's requirements.

[30] Mr Kurt Rodgers is a network strategy manager with 25 years' experience as a telecommunications engineer. He also gave evidence of his dealings with Creative and the contributions he made internally within Chorus to the work it did in responding to Creative and MDC.

[31] Each party called one expert with appropriate technical expertise. The expert for Creative was Dr Arasaratnam Sathyendran and the expert for Chorus was Mr John

Clive Emanuel. I describe later in the judgment their areas of expertise, and aspects of their evidence as it becomes relevant.¹

[32] Both parties filed notices of objection to the admissibility of relatively substantial portions of the evidence in briefs served for the opposing party. Prior to trial, Chorus sought a ruling on what was then a hearsay reference in a file note made by Mr Phillips of a discussion he had had with Mr Greenhough of CIP. I held the reference to be inadmissible hearsay on the basis that Mr Greenhough was not then being called by Creative. The outcome is that he was.

[33] In all other respects, counsel agreed that I would receive all the evidence on a *de bene esse* basis, with the parties agreeing that I should reflect, after hearing all the evidence, on the various grounds for objection to passages of evidence that might become material to my deliberations.

[34] In reviewing all the evidence, I have been mindful of the nature and extent of objections, which each party helpfully marked up in an additional set of the briefs served for witnesses of the opposing party. In the end, it has not been necessary to make any findings that depend on passages of the evidence where objections might arguably have been sustained.

Dealings between the parties

[35] The evidence for Chorus was that an employee, Mr Gerard Linstrom, had received a number of requests in 2017 from Creative and MDC. While Mr Linstrom did not give evidence, Mr Lott's evidence was to the effect that this was the first line of communication between the parties and he was not challenged on it.

[36] After Chorus executives had made presentations at a conference of WISPs in January 2018, Mr Linstrom arranged for Creative and MDC personnel to meet with Chorus personnel in their Wellington office. That initial meeting occurred on 8 February 2018.

¹ For Dr Sathyendran, see [161]–[163] and [173]–[179]. For Mr Emanuel, see [147]–[156] and [180].

[37] Mr Phillips was the main spokesperson for Creative/MDC at the meeting. Mr McMahon, who was previously an executive with CIP, also attended for Creative. MDC was represented by Ms Young. The attendees for Chorus were Messrs Lott and Linstrom.

[38] Mr Phillips was most concerned to receive an acknowledgement from Chorus that Creative/MDC would be making disclosures of confidential and commercially sensitive information to Chorus, and that Chorus would agree to receive it subject to the terms of an NDA, completion of which was required by Creative. His evidence was that, in reliance on the Chorus representatives' assurances that it would complete an NDA, he disclosed valuable information about Creative's approach to designing and analysing the financial viability of broadband services in the Marlborough region. Mr Phillips treated his contributions to the meeting as revealing to Chorus an innovative way of combining technologies and providers, in particular maintaining open and co-operative dialogue with WISPs. Creative treated its work as also applicable to devising solutions for extending coverage in other parts of New Zealand where similar challenges arose.

[39] Mr Phillips stated that the Chorus representatives responded appreciatively to these new insights, acknowledging the value of the concepts on which Creative and MDC had worked. He acknowledged that he advised Chorus that Chorus was one of a number of potential suppliers/partners with whom Creative and MDC intended to have discussions. The minutes of the meeting that Mr Phillips produced are consistent with his evidence about what transpired at it.

[40] Mr Lott took from comments made during the meeting that MDC had access to funding separate from any grants that might be obtained from CIP. In an internal email reporting to executives within Chorus dated 13 February 2018, Mr Lott referred to this understanding in saying:

They were not afraid of [Redacted] of dollars.

[41] Chorus's case was that its dealings with MDC were influenced by the perception that it represented a business opportunity where someone other than CIP would fund the construction or upgrade of network assets that it was not otherwise

financially viable for Chorus to install. Chorus's evidence was that it was subsequently disabused of this understanding about alternative funding at a meeting on 19 March 2018.

[42] Creative denied that it or MDC had given Chorus cause to believe that MDC had significant funding available, other than from CIP (or the PGF). However, in his reply brief, Mr Phillips did acknowledge making references to funds of up to [Redacted], without being specific as to when such statements were made.

[43] On 13 February 2018, Mr Lott signed the NDA for Chorus and returned it to Creative, without questioning any of its terms.² A second meeting between the parties was arranged for 21 February 2018.

[44] That second meeting occurred at Chorus's Auckland offices. The attendees were Messrs Phillips, Burns and MacMahon for Creative, with Ms Young for MDC. Messrs Lott, Linstrom and Rodgers and Murch attended for Chorus.

[45] At the second meeting, Mr Burns emphasised the importance of the political aspects of presenting a regional development proposal and collaborative approach. During the one and a half hour meeting, there were exchanges about the needs of the Marlborough region and the range of technologies that might possibly be deployed. In notes of the meeting prepared by Mr Phillips, he attributed Chorus representatives with acknowledgements of the importance of aspects emphasised on behalf of Creative and that Chorus recognised the possibilities for looking at different technologies. The notes recorded Mr Lott commending the approach of Creative as very thorough, saying that the whole-of-region approach was unique and not something he had seen before, and commenting that he needed to understand the design and the mapping of potential solutions.

[46] In an email on 23 February 2018, Mr Phillips advised Chorus that Creative were putting together a more detailed briefing note. He reiterated that MDC was seeking collaborative delivery partners who would be confirmed as part of a process

² I consider the effect of its terms at [144]–[146] below.

of requests for proposals (RFPs). There was to be an initial focus on the Marlborough Sounds project as it had been worked on by Creative.

[47] On 27 February 2018, Creative provided Chorus with a briefing note reflecting the matters that had been conveyed in the two earlier meetings. The note recorded that the accepted view that “rural and remote is not commercially viable” was flawed, and that existing thinking “like a telco” would be inadequate. It stated that if Chorus was happy to engage with MDC as a potential supplier and collaborative partner, then a range of information could be provided quickly.³

[48] Mr Lott responded on 2 March 2018 thanking Mr Phillips for the briefing note that had been forwarded on 27 February 2018. He said:

... we're keen to further understand what's possible. Really looking forward to getting your high level design so we can test it against our early thinking.

[49] On 12 March 2018, and prior to sending the more detailed information that had been foreshadowed, Mr Phillips emailed Messrs Lott, Rodgers and Murch at Chorus stating:

We confirm our understanding that Chorus has withdrawn from the RBI2 Crown Funding RFP bid process for a variety of reasons. If this is not the case, would you please advise immediately.

[50] Later on 12 March 2018, Mr Phillips emailed an electronic slide pack to Mr Lott, containing an initial tranche of Creative documents, comprising items 1 to 23 of a specified list of documents that is pleaded as containing the confidential information.

[51] On the same day as it was received, Mr Lott circulated the information to Messrs Rodgers, Murch and Linstrom, and also to Messrs Neville Warsaw and Rob Broadbridge, other relevant Chorus personnel.

[52] On 13 March 2018, Mr Lott confirmed that he and Mr Rodgers would attend a further meeting proposed by Mr Phillips and advised that they had high-level plans that they had prepared to discuss with MDC and Creative. Mr Lott's email did not

³ The briefing note is addressed further at [81]–[82] below.

respond to Mr Phillips' statement in his 12 March 2018 email that Chorus had withdrawn from the RBI2 bidding process.

[53] On 15 March 2018, Mr Phillips provided links to SmartMaps for the Marlborough region that were the product of work by Creative and MDC, and authorised access to the links for appropriate Chorus personnel.

[54] The following day, Mr Phillips provided an agenda for a further meeting on 19 March 2018, together with briefing notes which continued to emphasise work in advancing the SSI on the basis of collaboration between stakeholders and providers.

[55] Messrs Lott and Rodgers travelled to Blenheim on 19 March 2018 for the meeting with MDC. MDC was represented by the mayor, Mr John Leggett, chief executive, Mr Mark Wheeler, and Ms Young. Creative was represented by Messrs Phillips and Burns, with Mr Paul Roberts, a communications and systems engineer with Creative, also in attendance.

[56] Minutes of the meeting prepared by Creative record positive and complimentary observations by Chorus about Creative's network design, and an acknowledgement that Chorus had calculated a smaller number of economic end users (EEUs) than in the work done by Creative and MDC. Comments were attributed to Chorus such as:

- Council had developed an outstanding model which had created opportunities, not previously considered.
- We like the approach and benefits of what Council is proposing; it is a full regional economic development approach.
- Great initial design. Submit to CIP on what you have. Chorus had a different plan; MDC SSI more of a Regional development model. If Shane Jones says, What can I get in a year, let's do this.

[57] During the meeting, Chorus disclosed its own design and provided an explanation of it. Importantly for Chorus, the MDC chief executive advised at the meeting that MDC had spent [Redacted] sums developing their design, and that it would not be spending any more money on it.

[58] On 23 March 2018, Mr Lott provided Creative with a signed letter of support, intending it be used by Creative and MDC to support a bid to CIP. The letter expressed Chorus's support for delivery of the Creative/MDC project and stated that Chorus was keen to work with MDC in the future, especially with any future RBI extensions or PGF applications. The letter included the observation:

We think that the business case and rationale that you have developed for the greater economic benefit of better communications presents a compelling story for the region.

[59] On 26 March 2018, Mr Phillips requested some changes to the letter, which request was acceded to by Mr Lott the following day. The exchange between the two included a request by Mr Phillips for advice as to Chorus's internal database records on total number of premises/EEU counts. Mr Lott responded that the data could not be extracted in the time frame required but expressed the belief that the Chorus data set had used the same source data as Creative/MDC so they would be the same.

[60] On 28 March 2018, MDC lodged its response to CIP for RBI2+, including provision of Chorus's letter of support.

[61] A fourth meeting between the parties occurred on 10 April 2018 at Chorus's Auckland premises. Ms Young was present for MDC with Messrs Phillips, MacMahon and Burns for Creative and Messrs Lott and Rodgers for Chorus. Creative took statements made by the Chorus attendees as evincing an intention to use confidential information Chorus had learned from Creative for Chorus's own purposes, outside the SSI initiative on which Creative treated Chorus as working collaboratively with them.

[62] Minutes of the meeting prepared by Creative attributed to the Chorus representatives statements acknowledging the benefit Chorus had gained from accessing Creative's information and that Chorus would adopt a new approach in considering further infrastructure in the rest of the country.

[63] On 15 April 2018, Ms Young sent minutes of the last two meetings to Messrs Lott and Rodgers, asking for confirmation that they were correct. Her email was positive, thanking the Chorus personnel for their time, and stating that MDC was very

excited to be able to progress the matter further. On 28 April 2018, Mr Lott confirmed that the minutes were correct

[64] Promptly thereafter, on 8 May 2018, Creative’s solicitors wrote a warning letter to Chorus about misuse of confidential information. Further correspondence ensued in the months until commencement of the proceedings in July 2018.

[65] Meanwhile, on 18 May 2018, Chorus responded to what it says was a request initiated by CIP for information on infrastructure that Chorus could construct to provide services in the RBI2+ round. A contested factual issue is whether CIP initiated the request for Chorus to provide that response, or whether Chorus initiated the process that led to it.

[66] Neither Creative nor Chorus was successful in securing a contract with CIP for provision of services in the RBI2+ round.

Chorus’s internal conduct in the relevant period

[67] The case for Creative is that Chorus was a large-scale business under threat, or at least subjected to substantial pressures: newer technologies that bypassed its infrastructure were threatening its revenue base, some parts of its network were old and required updating or replacement, and it had been unsuccessful in its latest bid to have the government pay for extension of its network in RBI2. In its dealings with Chorus personnel, Creative contended that a successful solution for extending broadband services in the Marlborough area would not be achieved if their partner “just thought like a telco”.

[68] In cross-examination, Mr Broadbridge acknowledged that Chorus had weathered certain pressures on its business, but maintained that Chorus was meeting its financial targets. There was no concession that the terms of its dealings with Creative were affected by financial pressures.

[69] During 2017, Chorus’s approach to dealing with other than core providers of telecommunications services to end users that used Chorus’s network (principally Spark, Vodafone and 2degrees) evolved. The company recognised that it should be

more open to conducting business with other service providers, notably WISPs. To that end, Ms Kate McKenzie, Chorus's chief executive, and Messrs Lott and Broadbridge attended a conference for WISPs in Queenstown in January 2018. In Chorus's presentations to the conference, their theme was that Chorus was "open for business" with WISPs.

[70] That theme appears to have been topical with senior Chorus personnel early in 2018. For instance, Ms McKenzie emailed Mr Broadbridge and other senior executives on 1 February 2018 about discussions at a lunch she had attended that day with Mr Graham Mitchell, the chief executive of CIP. Ms McKenzie reported, among other things, that Mr Mitchell was "keen to see what we could do with WISPs". In early 2018, Mr Broadbridge was conscious of CIP's views that Chorus had to get closer to WISPs.

[71] Up to submission of Chorus's bid for RBI2, Chorus had been wary of close involvement with WISPs. Mr Lott described Chorus as historically perceiving them as "a bit rough and ready" and acknowledged that, for their part, WISPs could be very disparaging towards Chorus. Having failed to secure funding in the RBI2 round, Chorus witnesses described a change of approach thereafter, treating co-operative engagement with WISPs as a means of extending coverage to remote end users. From Mr Rodgers' perspective, WISPs gained credibility by being granted part of the funding from RBI2.

[72] Mr Lott's evidence was that he and the Chorus chief executive had met with the principal of Primo Wireless, a Taranaki-based WISP, in November 2017. By the beginning of 2018, trials were underway, or at least planned, with Primo Wireless and another potential provider of wireless and mobile services, Australian-based Aird Towers, which would provide facilities for WISPs to deliver wireless broadband.

[73] The discovered documents include a PowerPoint presentation dated 30 January 2018 on delivery of rural wireless, described as "WISPA solution concept". The slides in that presentation included examples of two possible solutions for Primo Wireless in rural parts of Taranaki, and another example of a possible solution in a coastal Hawke's Bay location.

[74] From Chorus's perspective, it therefore approached the prospect of collaborating with Creative and MDC anticipating that options might include forms of co-operation with WISPs that Chorus might not previously have contemplated.

[75] After the initial meeting with Creative and MDC representatives on 8 February 2018, Mr Lott reported to a number of senior executives and others potentially involved at Chorus by email on 13 February 2018 headed "Opportunity with Marlborough District Council". Mr Lott treated the matters that had been raised with him as affording two opportunities for Chorus. One was to get something out of the next round of funding from CIP and the second was to work with MDC on a regional development that would be funded other than through the CIP process. Mr Lott treated the initiative raised by Creative and MDC as being different from the provision of infrastructure to WISPs that had been the theme Chorus representatives got from the WISP conference in Queenstown.

[76] Mr Lott reported that MDC had subsidised a local WISP to get connectivity in the Waihopai Valley, suggesting that had not been entirely satisfactory because inadequacies in capacity had required MDC to step in and support additional capacity for users in that area. Mr Lott perceived Creative/MDC to have "got to an interesting place", accepting that the business case of installing extended networks would not work for Chorus, and that MDC "were not afraid of [Redacted] of dollars". This reflected Mr Lott's perception of the amount they were prepared to commit to funding the project.

[77] Ms McKenzie was less than enthusiastic, treating the prospect as "a bit of a long shot". After a further negative response from another recipient – "Feels a bit like a deep regional rabbit hole to me" – Mr Lott circulated a further email suggesting that further discussions with Creative/MDC would not involve Chorus putting in much effort. He commented:

So I put this in the WISP category, but teasing out what might happen after we've helped the WISPs solve their immediate issues.

[78] Mr Lott attended the second meeting held on 21 February 2018 at Chorus's Auckland office. His evidence is that none of the Chorus attendees took notes, either

on paper or on a device, and he questioned the accuracy of some positive comments attributed to him in minutes prepared by Creative. Those minutes (as with notes taken of the earlier meeting) were not circulated at the time and have only been disclosed more recently in the course of the litigation. Mr Lott disputed that he was in a position to endorse Creative's work because at that stage he had not been given enough information to assess it.

[79] Mr Murch attended the 21 February 2018 meeting by videolink. In liaison with Mr Lott, he worked on a plan for the Marlborough Sounds, involving particularly a member of his network planning team, Mr Warsaw, who produced a plan for delivering broadband services to the Sounds under Mr Murch's direction. Mr Murch embarked on this work, having taken from the meeting an impression that MDC had access to funding to deploy a broadband network to serve the Marlborough region, with industry backing. Mr Murch recalled referring to a possible cost in the region of [Redacted], and that the Creative/MDC personnel did not react adversely to that indication.

[80] Mr Murch described the plan that Chorus then produced as being based only on information Chorus already had in NetMap,⁴ mainly from its work on proposals for RBI2.

[81] On 27 February 2018, Mr Phillips emailed a briefing note (dated 26 February 2018) to Messrs Lott, Rodgers, Linstrom and Murch at Chorus. The purpose of the briefing note was to "set the stage for further engagement with Chorus as a potential supplier under MDC RFP for RBI2 deployment in Marlborough". The note referred to analysis that had been undertaken and emphasised differences between the EEU count used by CIP and the work done by Creative/MDC, which suggested CIP's numbers appeared to be understated by two thirds. The tone was aspirational and largely at a level of generality that would not enable Chorus to identify precisely what was to be asked of it. It contained the following:

Request to Chorus to make available the most disruptive and innovative technologies and delivery approaches under development that will best leverage existing fibre investments by the Crown and existing assets, sites or

⁴ A software-based mapping system previously used, and kept updated, by Chorus.

spectrum. Opportunity for engagement and relationship building, leading to more comprehensive understanding between the parties.

[82] In referring to the work that Creative/MDC had undertaken, the briefing note stated:

Region-wide network design has been undertaken which is 3 way resilient, with a minimum of 3gb DMR backbones (pathed with 6gb or greater). Also included are Infill site designs, backhaul site designs, solar, emergency response deployment models, sites identified, and a regional approach to site acquisition and management. There is a regional approach to spectrum requirements, management and acquisition. ...

[83] On 28 February 2018, Mr Murch advised Messrs Lott and Rodgers by email that Mr Warsaw was close to finishing the first cut of how Chorus would serve the Sounds. He commented that the plan was based on the idea that “fibre is the final solution”, with the plan having a mixture of fibre and radio in some sites, which Chorus recognised were too small to be serviced by its infrastructure.

[84] In an internal email on 2 March 2018, Mr Lott commented that the next step was for MDC to tell Chorus what MDC had planned:

... so we can contrast it with what we would do. Bill [Murch] and the guys are looking at it and there is some good potential here.

[85] Mr Lott commented that:

At a high level it might end up looking like if you give us [Redacted] we'll build fibre to these parts of the sounds and upgrade these things and in return we'll sell our normal services – a little bit like a mini RBI1 contract I guess. However there is a lot of water to go under the bridge.

[86] The plan was provided by Mr Murch to Mr Rodgers on 6 March 2018. It included features that Chorus thought were important to MDC. In addition, it demonstrated Chorus's preparedness to work with a wider set of technology partners. In Mr Lott's evidence, he described this as going back to the attitude conveyed to the WISP conference and work that Chorus had done elsewhere with Primo Wireless.

[87] Mr Lott was pleased with the plan on the basis that it could be achieved with a grant of [Redacted]. That was within the range of the amounts he perceived at the time that MDC had available to commit to such a project.

[88] On 9 March 2018, Mr Lott updated other Chorus personnel in an internal email, referring to a discussion with Mr Phillips the previous evening about a further meeting on 19 March 2018. He reported that Mr Phillips had assured him the information Creative had previously referred to was to be provided either that day or over the coming weekend. Mr Lott commented:

I'm pretty pleased with where we have got to, but it will be the ultimate bluff call because we have a solution that could work and it just needs his money that he talked about.

...

I don't think we can make that call until we see the data and design they have done. That will give us a feel for if we're close or talking way past each other.

[89] In his evidence, Mr Lott described his use of the words "bluff call" as referring to previous comments on behalf of Creative/MDC about the availability of money, and once Chorus presented its plan it would be for them to commit to it.

[90] Mr Lott enquired of Mr Phillips on 12 March 2018 as to when the information might be provided, and that occurred later on that day. Chorus's internal reactions at the time suggest that they were not impressed. Mr Lott, in an email later the same evening, stated:

Ok so not exactly sure what to make all of this [sic]. And am not sure it's really decipherable, but it really depends if he's got any actual backing behind it. Which I guess he must if MDC are paying his bills.

...

I think the work that Bill [Murch] & Neville [Warsaw] has done, compared to this is pretty compelling.

[91] As a potential attendee at the proposed 19 March 2018 meeting, Mr Rodgers expressed his reaction in an email to Mr Lott the following day:

So how is this going to play out? We're basically going to say that we think his design sucks and would advise everyone to avoid it like the plague. AND we have done a high level design ourselves which is much better and can be contracted for immediately if MDC have the cash ...

To put it more politely we could say that we have adapted his design to factor in more use of our assets ...

[92] Mr Murch did not refer to any document recording his reaction to the Creative/MDC information at the time, but in his evidence he compared their proposal with that which he had prepared for Chorus. The Creative/MDC plan required a very large number of radio sites (one form of their plan suggested 195 sites). Mr Murch does not favour radio sites because of difficulties in obtaining easements for access, the requirement to build towers (which raises Resource Management Act 1991 issues), the need to access power for them, and maintenance requirements. Mr Murch was also concerned that if a network has too many radio sites in one area, there are likely to be difficulties because of limited frequencies available, which is a difficulty incurred in some North Island systems operated by Chorus. Mr Murch's evidence was that he considered the radio frequency planning for the Creative/MDC solution would be "next to impossible".

[93] The third meeting between the parties took place in Blenheim on 19 March 2018. Shortly after 5.00 pm that day, Mr Broadbridge reported by email to senior executives within Chorus that he had just had a call from Mr Greenhough at CIP. His email included:

They sent out a RBI2+ note to RBI2 participants for a second tranche of proposals. They left us out, apparently because we had declined to participate in RBI2. He is going to send it me [sic].

[94] Mr Broadbridge added that Chorus would either have to respond within a month or negotiate an extension. Ms McKenzie responded promptly that Chorus should try to participate on time if at all possible.

[95] The next day, 20 March 2018, Mr Lott reported to senior executives and numerous others at Chorus who had been involved. He referred to having talked about [Redacted] as a rough number for the Sounds, and that MDC was planning to present a revised bid with CIP, intending to ask for [Redacted] out of what they believed to be a [Redacted] pot to solve the whole of Marlborough. There was also said to be a possibility of MDC procuring funding from the PGF or even doing targeted rates or levies. Mr Lott was still positive about the prospect of Chorus being involved:

The real win is being able to present a solution for arguably one of the hardest regions in the country that is not stupid money, keeps us to our strengths and allows room for others. In reviewing the day yesterday, Kurt [Rodgers] and I

think that we have a good start for what a rural strategy could practically look like.

[96] Ms McKenzie's response to Mr Lott's report was less than enthusiastic:

I don't mean to pour cold water on this but I thought we had agreed Marlborough Sounds wasn't a priority? Need to talk to Rob [Broadbridge] though as there is a live opportunity to submit for Crown funding now via RBI@ [sic] ...

[97] Mr Lott responded to that email:

Yes agree it's not a priority, it's more just opportunistic – we've had two meetings and met them for a full day yesterday to see if they had [Redacted] which they talked about.

They don't, but it has given us a quick view of how we'd respond to Rob's new opportunity and a desktop study for Arid [sic] Towers, plus confidence about how we solve a [sic] for a mixed model where we just do what we're good at.

The outcome I think is that this just folds into Rob's piece of work.

[98] I take "Rob's piece of work" to refer to the work Chorus was then going to undertake in response to the indication that CIP wanted them to provide information in relation to RBI2+.

[99] On 27 March 2018, another manager within CIP emailed Mr Broadbridge, copying Mr Greenhough, inviting Chorus to supply further information to the RBI2+ process. The letter required information to be submitted to CIP by 20 May 2018.

[100] In his evidence, Mr Lott sought to place a different complexion on comments attributed to him in the minutes of the last meeting on 10 April 2018 in Auckland. He had accepted those minutes were correct after they had been copied to him at the time. There were references in the minutes that Chorus was now looking at how the approach (Creative's in Marlborough) could be used for the rest of the country, and that Chorus was picking up on the MDC model and work with WISPs. Further, the minutes attributed to Chorus representatives statements that Creative/MDC had stimulated Chorus into a wider regional economic development model.

[101] Mr Lott stated the minutes were wrong to suggest that Chorus would adopt a wider regional economic development model on account of what they had learned. That is because Chorus is unable to operate in that way when it can only charge a regulated price and is precluded from offering a retail solution since the demerger of the Telecom businesses. In responding to a question at the meeting from Mr Phillips as to whether Chorus had overlaid the SSI design on the Chorus design, Mr Lott had acknowledged that SSI “mostly replaced our fibre designs”. However, in evidence he explained that the overlaying of the SSI design was to enable an understanding of the differences between them, which were then discussed at the 19 March 2019 meeting in Blenheim.

[102] References to the “MDC model” were intended to be to the Chorus proposal for MDC, which Mr Lott treated as a product of Chorus’s own work. He was therefore not suggesting that Chorus would use Creative/MDC’s design for its other work.

[103] From Mr Lott’s perspective, the 10 April 2018 meeting had been a constructive one and no further steps were agreed because MDC had to wait and see if it was successful in obtaining CIP funding.

Extent of the information conveyed

[104] Creative pleaded that it provided confidential information to Chorus in documents and information provided at the meetings, and as recorded in the minutes of those meetings. The second amended statement of claim annexed a schedule of 32 documents that were provided to Chorus between 9 February and 13 April 2018 and that were alleged to contain the confidential information.⁵

[105] The case for Creative is that analysis of the telecommunications needs and potential modes of delivery of telecommunications services to remote areas within the Marlborough district involved original and innovative work, the product of which had substantial value. When assessed as a package, this information had the necessary character of confidentiality that Creative was entitled to protect.

⁵ The listed documents included file notes of the 8 and 21 February 2018 meetings that were only seen by Chorus after the proceedings were commenced.

[106] Chorus denied that all of the information described was confidential in character, and pleaded that not all of the information was capable of protection, either in terms of the NDA or otherwise. Chorus disputed that the information was of any value to it.

[107] Creative and MDC's work identified the extent of potential end users of such services as being substantially larger than the number of EEUs that were specified by CIP. As a consequence, Creative developed plans on the basis of there being materially greater revenue-generating opportunities than would be the case on the basis of the CIP data.

[108] On the technology to be deployed, Creative proposed a mix of technologies but with an emphasis on fixed wireless access (FWA). An important part of the work was reflected in its series of SmartMaps, drawing on research and data available to MDC and Creative that identified the location of potential end users, such as marine farms and other businesses based in the Marlborough Sounds, together with maps reflecting the design of the infrastructure that it proposed to be used to provide the services.

[109] The specific items pleaded include notes or minutes from the meetings that occurred on 8 and 21 February, 19 March and 10 April 2018, as well as the briefing notes despatched by Creative to Chorus dated 26 February 2018 and 15 March 2018. The majority of the specific items were provided by Mr Phillips to Mr Lott in a slide pack emailed on 12 March 2018, and by providing links to mapping information accessible electronically on 15 March 2018.

[110] There was a difference between Messrs Phillips and Lott on the extent to which the detail provided in these documents had been conveyed earlier, during the meetings between the parties in February 2018. The effect of Mr Phillips' evidence was that he had shown the Chorus representatives certain diagrams and analysis models. It may be that Mr Phillips recalls describing greater detail of them than was absorbed by Mr Lott. It is certainly the case that none of the documents later supplied were provided for Mr Lott to take away from the February meetings.

[111] These documents also included a map and a schematic diagram of the infrastructure installed in the Waihopai Valley proof of concept undertaking. Maps of the same type were also provided for other parts of the Marlborough region showing the proposed mode of effecting broadband coverage. These details were provided, for example, on maps for the outer Pelorus Sound from a Rai Valley backbone and the outer Pelorus Sound from a Picton backbone, as well as for Department of Conservation sites and for the Queen Charlotte Sound and Tory Channel areas. The maps have endorsed on them different coloured pins and direct lines between connecting points marked in different colours to indicate the technology used to provide the proposed telecommunications services.

[112] Schematic diagrams provide somewhat more detail as to the various forms of technology used to achieve connections to and from various categories of user in the Waihopai Valley. The diagrams are enlivened with the logos of potential participants in the provision of the services. The schematic diagram for the Waihopai Valley proof of concept includes a box specifying the range of technologies for which the proof of concept was a “test bed”.

[113] The documents also include workflow diagrams for the planning approach that Creative and MDC would deploy to provide expanded broadband services. They include information on how various stages of the work would be funded, with two stages of “pilot wave”, an “early adopt wave”, “wave 3” and “wave 4 and beyond”, to expand the infrastructure to enable services to be provided more widely. Schematic diagrams of a similar type were also provided for delivering services to end users and identifying key factors to support delivery of “regional innovation and resilience”.

[114] A further schematic diagram was called “Maximising the Crown Broadband Investment”, illustrating how to make the best use of existing infrastructure, and extensions to it. Other diagrams identified the extent of urgent needs and the users that would achieve major gains from enhanced telecommunications services. Substantially greater detail was contained in a spreadsheet providing a detailed EEU analysis, adding to CIP data the greater levels of detail drawn from MDC and other sources.

[115] Given the amount of work that had been undertaken by Creative with support from MDC in analysing the broadband needs of the Marlborough region, and the development of a plan which Creative perceived as a preferable way of providing those services, it is understandable that Creative would treat the package of information and data that it had developed as valuable confidential information.

[116] Chorus was critical of the lack of a more specific definition of what was claimed as confidential information. However, in the core of the specific documents and the generalised abstraction of the plan that was discussed in the meetings between the parties, there is a body of information reasonably perceived by Creative as having value, at least to it, reflecting Creative's developed view as to how it would service remote parts of the Marlborough region with UFB services.

[117] The context in which Creative approached Chorus was that CIP had not achieved all of the coverage it had contemplated in RBI2, and was indicating to those who had bid in that round the availability of further funding for extensions to the areas of coverage that would be achieved with RBI2.⁶ Using a range of technologies, Creative and MDC had developed what they considered to be a preferable solution to reach the more remote areas where they had recognised a greater extent of user demand than CIP.

[118] Creative made progressive disclosures in a context where it was testing Chorus as a potential supplier of component parts of the services they hoped to create. It was clear from Mr Phillips' evidence that a lot of relevant details were not disclosed to Chorus:

You do not immediately lead with this level of detail or provide it to a supplier before you fully understand what they might seek to charge to meet your buyer defined requirements.

[119] Mr Phillips treated it as premature to provide all the information and work that Creative had undertaken:

They were being comprehensively tested as to their own abilities as a prelude to buyer engagement with supplier.

⁶ Chorus had withdrawn from the RBI2 round when not initially successful, so was not included in those CIP had gone back to.

[120] Mr Phillips accepted that more detailed information would need to be provided to Chorus for them to respond to an RFP.

[121] In approaching Chorus, Creative/MDC were dealing with the major wholesale provider of telecommunications services that was heavily invested in traditional technologies utilising fibre cables plus, on the periphery of its network, copper wires, which were being replaced in parts with higher performing fibre. Chorus was therefore highly experienced in the more established modes of providing UFB services.

Further factual disputes

Would MDC pay for new infrastructure?

[122] Two further factual issues need to be determined. First, whether Chorus's dealings with Creative until the meeting on 19 March 2018 were influenced by an impression that MDC had significant funding to pay for infrastructure that would extend the UFB services in its more remote regions.

[123] In the first of his internal emails reporting to others, Mr Lott stated on 13 February 2018 that "they were not afraid of [Redacted] of dollars".

[124] Mr Murch attended the meeting on 21 February 2018 by video conference. His evidence was:

I took away from the meeting that MDC had access to funding to deploy a broadband network to serve the Marlborough region, with industry backing. I recall that we mentioned what we thought this might cost (I think in the region of [Redacted]) and there was no flinching from them about this. I remember the woman from the Council talking like there was money available. Dayal Phillips also gave the impression that money was available from industry and he had the ear of CIP.

[125] Mr Rodgers was present in person at the 21 February 2018 meeting. He recalled Mr Phillips "referring to [Redacted] worth of funding".

[126] In cross-examination Mr Phillips recalled that there was some discussion around the Council having established “some budgets and funding”. In his reply brief he stated that references to money were never in terms of more than [Redacted].

[127] On all the evidence, I accept that Chorus dealt with Creative in the belief that MDC could contract with them to install additional infrastructure, and would either pay for it, or substantially contribute to paying. Chorus was disabused of this impression by Council representatives at the meeting on 19 March 2018. The relevance of that belief is that it provides a credible explanation for the Chorus representatives’ comments about Creative’s design concept in radically more complimentary terms than in their internal communications at the time. Offering the glowing support for Creative’s concept was to flatter Creative and MDC in the hope that MDC would provide funding for Chorus to install additional infrastructure.

[128] In challenging this explanation for Chorus’s inconsistent internal and external communications, Mr Elliott QC submitted that Chorus’s claimed belief in MDC having substantial funding was not credible. He argued that before embarking on such a substantial piece of work, if indeed it depended on the prospect of MDC funding installation of further infrastructure by Chorus, then Chorus representatives would have asked explicitly for clarification on the extent of funding that was available, and any terms applicable to it. However, Creative and MDC dealt with Chorus as one of a number of potential providers of infrastructure assets that they were assessing. I consider it understandable that a potential tenderer in Chorus’s position would not want to risk tension in the developing relationship by pressing the potential principal for clarification of how much they had to spend.

Who recommenced Chorus-CIP dialogue?

[129] The second issue with implications for the context in which relevant conduct occurred is whether, as Chorus claims, it was approached by CIP in March 2018 to participate in the RBI2+ round. Alternatively, as Creative contends, whether Chorus contacted CIP to participate, arguably because it had learned of the additional funding that CIP had available from Chorus’s confidential dealings with Creative.

[130] The most direct contemporaneous evidence is Mr Broadbridge's internal email of 19 March 2018 recording that he had just had a call from "John [Greenhough] at CIP". No suggestion was put to Mr Broadbridge that he had misrecorded the conversation which had just occurred, deliberately or otherwise. He was credibly emphatic in insisting that he was unaware of a further bidding round (RBI2+) being in progress until he was contacted by Mr Greenhough. Further, until he received that call, the prospects of such a further round were not sufficient for him to be in touch with CIP about such a prospect.

[131] In support of the opposite contention, Mr Phillips relied on a file note of a discussion with Mr Greenhough on 11 April 2018 in which he recorded that he had learned from Mr Greenhough that Chorus had initiated contact with CIP. Chorus objected to the hearsay reference to Mr Greenhough's alleged statement in the absence of his being called as a witness. Accordingly, Creative subpoenaed Mr Greenhough who gave evidence, including reading a brief originally prepared for him by Chorus's solicitors. Mr Greenhough had no recollection of either his call with Mr Broadbridge on 19 March 2018, or that recorded by Mr Phillips on 11 April 2018. Mr Greenhough's recollection was that CIP re-engaged with Chorus on its own initiative, rather than Chorus approaching CIP.

[132] Despite Mr Greenhough's evidence, and Mr Broadbridge not being moved on cross-examination on his evidence that CIP re-engaged with Chorus, Mr Elliott submitted in closing that there were numerous other channels of communication that existed between the two organisations. Accordingly, the evidence did not eliminate the prospect of Mr Broadbridge or others at Chorus having initiated the re-engagement with CIP. However, I find that more would have been required than was available to Creative to displace the quite credible evidence that re-engagement between the two was a CIP initiative and not Chorus's.

First cause of action: breach of fiduciary duty

[133] Creative pleaded that its relationship with Chorus was one involving trust and confidence. Creative was dependent on Chorus to respect and act in Creative's interests, in circumstances imposing fiduciary obligations on Chorus. The essence of

Creative's pleading of this first cause of action focuses on Creative's alleged "collaborative and partnering approach" to all aspects of its dealing with Chorus.

[134] Chorus denied that any aspect of its dealings with Creative could possibly create a fiduciary relationship that would oblige it to act other than in pursuit of its own commercial interests.

[135] Both parties cited the Supreme Court's decision in *Paper Reclaim Ltd v Aotearoa International Ltd* for a description of the circumstances in which fiduciary obligations might arise in a relationship otherwise regulated by some form of commercial contract:⁷

... When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement, express or implied, to act on behalf of another and thus to put the interests of the other before one's own is a frequent manifestation of a situation in which fiduciary obligations are owed. ...

[136] Mr Elliott sought to equate the present circumstances to those considered in the earlier Supreme Court decision in *Chirnside v Fay*.⁸ That litigation involved two property developers who had previously been in a joint venture. They identified a potential development site, with Mr Chirnside assuming primary responsibility for progressing the project, with the expectation that Mr Fay would contribute by raising capital. Mr Chirnside pursued the development on his own, to the exclusion of Mr Fay. The Supreme Court considered whether the circumstances of the dealings

⁷ *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31] (citation omitted).

⁸ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.

constituted the parties joint venturers in circumstances where Mr Chirnside owed fiduciary obligations to Mr Fay. The Supreme Court observed:⁹

... A joint venture will come into being once the parties have proceeded to the point where, pursuant to their arrangement or understanding, they are depending on each other to make progress towards the common objective. Each party is then proceeding on the basis that he or she is acting in the interests of all or both parties involved in the arrangement or understanding. A relationship of trust and confidence thereby arises; each party is entitled to expect from the others loyalty to the joint cause, loose as the formalities of the joint venture may still be. ...

[137] I am not satisfied that any of the relevant indicia of the assumption of fiduciary obligations arose in the dealings between the parties. Creative, for itself and MDC, approached Chorus as a potential supplier of infrastructure assets to enable an expanded UFB service in the Marlborough region. The approach was overtly on a non-exclusive basis so that Chorus knew it would be competing with other potential providers of the assets to enable the services MDC sought to provide. To obtain any meaningful response from Chorus, Creative and MDC had to provide their concept of how various technologies would be deployed. Before providing any level of detail, Creative insisted on Chorus completing the NDA, the terms of which committed Chorus to non-disclosure of the confidential information and regulated the use that Chorus might make of it.

[138] Communications from Creative were laden with references to a collaborative and partnership approach to progressing MDC's aims. That puffery can have no relevant impact on the character of the nascent commercial relationship between the parties. At all times, each party's contribution to the dealings between them was legitimately pursued in their own best interests.

[139] In response to Mr Murch's evidence that the planning documents provided by Creative to Chorus were of no use to it, Mr Phillips stated in his reply brief that:

... the documents we sent were set at an appropriately general level so that we could test Chorus's innovative capacity as a potential supplier. It was also unclear to us whether they were able to be trusted with the full design information at this stage.

⁹ *Chirnside v Fay*, above n 8, at [91].

[140] That acknowledgement of the lack of trust of Chorus exemplifies the tenor of Mr Phillips' evidence in cross-examination. Throughout their exchanges, Creative was deliberately keeping Chorus at arm's length. The relationship was quite distinct from one in which each depended and trusted the other, as would develop in a joint venture or certain forms of partnership.

[141] The terms of the NDA included a relationship disclaimer that negated the implied existence of any form of partnership or joint venture, or authority for one of the parties to make commitments for the other. It was in the following terms:

9. Relationship Disclaimers

SUPPLIER and Creative Development each acknowledge that nothing contained in this Agreement seeks to represent or imply that a partnership or joint venture or other such commercial relationship exists between them; neither party is authorized to assume, create or incur any liability or obligation of any kind, express or implied, against or in the name of or on behalf of the other party, nor to act as the agent or representative of the other; there is no commitment by either party to purchase acquire develop or use the products or services of the other; and nothing contained herein seeks to encourage the other party to expend funds or other resources in the development of products or services on behalf of the other.

[142] Commitment to a contractual arrangement on those terms is antithetical to a relationship involving the recipient of the information assuming fiduciary obligations to the provider of it. The only vulnerability Creative sensed that it had in dealing with Chorus was that Chorus might use Creative's intellectual property, once disclosed to Chorus, for purposes other than supplying infrastructure pursuant to a contract with MDC. That vulnerability was appropriately addressed in the NDA as an aspect of what was a commonplace commercial relationship.

[143] I do not accept submissions for Creative that there were elements of trust reposed in Chorus that went beyond constraints on use of its confidential information. No fiduciary obligations can be attributed to Chorus, so the first cause of action cannot be made out.

Second cause of action: breach of the NDA

[144] Copyright in the form of the NDA is claimed by an entity that has not otherwise featured in the proceeding. I infer it has been used by Creative as a standard form

required of each of the potential suppliers to whom it divulged confidential information. The agreement is in prolix terms, reciting that the purpose of disclosures by Creative would be to inform Chorus sufficiently for it to decide whether it was interested in any further involvement with Creative. The obligations assumed were to not disclose the confidential information and to maintain its confidentiality, and not to use or allow the use of any of the confidential information for any reason other than the defined purpose. Access within Chorus was to be limited on a “need to know” basis.

[145] In a separate clause specifying the scope of what was confidential information, the NDA specified that information received would not be deemed confidential or proprietary if the receiving party could conclusively prove that such information:

- a) was in its possession at the time of receipt or disclosure and was not acquired directly or indirectly from the other party;
- b) was at the time of disclosure by the other party lawfully in the public domain as evidenced by printed publication or otherwise;
- c) at any time after its disclosure by the other party becomes part of the public domain by publication or otherwise through no fault or act of the receiving party;
- d) was obtained from a third party with good legal title thereto and without breach of this Agreement;
- e) was independently developed by it without any utilization whatsoever of the Confidential Information.

[146] In addition to the disclaimer of any relationship being created by entry into the agreement, the NDA included a whole agreement clause specifying that it represented the entire agreement between the parties with respect to its subject matter.

[147] Mr Emanuel, the expert called by Chorus, undertook an extensive analysis of the information conveyed by Creative to Chorus. Mr Emanuel is a qualified engineer who has spent his working life since the early 1970s in various parts of the telecommunications industry. After employment with the Post Office and Telecom, Mr Emanuel has mostly, since approximately 2000, been an independent consultant in the telecommunications industry. He has provided advice on telecommunications services to the Commerce Commission, the Ministry of Economic Development and

now the Ministry of Business, Innovation and Employment (MBIE), as well as the State Services Commission. His work for MBIE includes RBI policy and RFP development, as well as contract negotiation and administration, and he worked on policy development for RBI2.

[148] Mr Emanuel assessed much of Creative's information to have been in the public domain, or comprised information that would already have been known to Chorus at the time. Where information was not in the public domain, Mr Emanuel assessed it as having no commercial value to Chorus.

[149] Mr Emanuel considered the information provided by Creative, having divided it into the following categories:

- business proposition;
- service description;
- end user data;
- Creative-supplied network plan;
- proof of concept plans; and
- implementation approach.

[150] Mr Emanuel summarised the SSI initiative as recognising that access to good broadband services brings economic benefits to communities, with limits on the prices that can be charged to end users, meaning that a role arises for government and local councils to facilitate their funding. Mr Emanuel treated these concepts as not new and provided examples of previous initiatives of a similar type. He considered Creative's business proposition to lack specificity in that it did not provide any commercial details he might expect, such as cost and revenue forecasts, funding arrangements, network ownership or key business structure and contract principles. As a business proposition, he assessed it as having very limited, if any, value.

[151] In terms of the service description, each of the elements provided by Creative were considered by Mr Emanuel to be in the public domain.

[152] As to the end user data, Mr Emanuel considered that the sorting undertaken by Creative was its own work resulting in a data set that was not in the public domain. He questioned the reliability of some aspects of it and opined that it did not have commercial value because, for a prospective investor or government funding agency, it included customers who currently had access to a reasonable broadband service, and for network planners the locations identified were insufficiently specific. Mr Emanuel cited an example that a local hill might block the signal to a particular end user, whereas an end user 100 metres further along the same road may be able to achieve clear line-of-sight path to a hilltop radio site which would afford good broadband service.

[153] Mr Emanuel was critical of Creative's concept network plan for not including the specific components that would be required to deliver either an internet service or a cellular network service. He accepted that the design could be used to extend the range of an existing network operator's coverage. However, as the plan did not contain any information that is not within the public domain, having taken into account both the description of the network elements and the way they were configured, Mr Emanuel considered it did not have commercial value.

[154] In terms of the proof of concept plans, Mr Emanuel confirmed that the SmartMaps, and the spreadsheet provided by Creative containing base station site location and radio system data specific to the project, were not in the public domain. Mr Emanuel reconstructed the steps he perceived would have been undertaken by the Creative network planners but considered they still omitted site-by-site data he would expect to see in a fully developed network plan. Specifically analysing the Pelorus network plan, relevant features that were missing from it led Mr Emanuel to the view that it had no commercial value.

[155] As to the planning approach conveyed by Creative on how it would implement its proposed SSI initiative, the overall scheme was treated by Mr Emanuel as drawn from a management institute guide. The approach to planning and implementation

was one Mr Emanuel considered to be frequently used in the software industry. However, it had been specified for this project and was therefore not information in the public domain.

[156] Assessed overall, Mr Emanuel likened what Creative provided to Chorus to similar accumulations of information he had seen prepared as local or regional solutions for other areas in New Zealand. His overall assessment was that the combined impact of the information had little or no value. In particular, he considered that, because of Chorus's pre-existing industry knowledge, it had no value to Chorus.

[157] In closing, Mr Elliott submitted that claims for breach of confidence have been established, even where the information sought to be protected had no value. The authority he cited for that proposition involved complicated changes of allegiance between a number of persons who contributed over time to developing an industrial design for teats for feeding milk to piglets.¹⁰ In that litigation, the entitlement of the claimant to a judgment, with the prospect of quantification of any damage suffered, arose in very different circumstances.

[158] In the present case, where there is no direct evidence, such as of copying the claimant's design, or direct application of confidential information conveyed, it is relevant in testing Chorus's denial of use to consider whether the information received had value to it.

[159] I am satisfied that is an appropriate approach here in determining whether Creative can make out liability. I am mindful of Mr Elliott's further submission to the effect that the value of information misused is to be assessed either objectively or from the plaintiff's perspective.¹¹ That proposition may have been relevant in assessing the quantum of damages on the facts in *Nichrotherm*, but it also does not detract from the validity of analysing the potential value of the information received by Chorus, as a means of testing the competing claims as to whether Chorus made use of the information.

¹⁰ *Nichrotherm Electrical Co Ltd v Percy* [1956] RPC 272.

¹¹ *Pharand Ski Corp v Alberta* (1991) 122 AR 395 (QB).

[160] In closing submissions, Mr Elliott questioned Mr Emanuel's impartiality and submitted that he had exhibited difficulty in not advocating for Chorus's interests. In cross-examination, Mr Emanuel was clear in acknowledging the aspects of his experience that he was calling upon to express the opinions that he did. Some more recent assignments on behalf of the government as funder of new infrastructure were acknowledged. I do not accept that I should discount the opinions, which were otherwise substantially helpful in weighing the character of the information provided by Creative, on account of any concern that Mr Emanuel lacked impartiality or inappropriately identified with Chorus's interests.

[161] The expert called by Creative was Dr Sathyendran, a consultant with a PhD in electrical and electronic engineering and a graduate diploma in business administration. Dr Sathyendran has involvement in developing the business cases for significant investment decision-making in the telecommunications industry. He acknowledged a greater familiarity with wireless telecommunications but expressed sufficient familiarity with fixed networks to undertake the assignment asked of him. No letter of engagement by Creative's solicitors was provided.

[162] Dr Sathyendran described his initial engagement as being to confirm the view Creative had come to that Chorus had copied its network design for UFB in the Marlborough region. Dr Sathyendran's analysis led him to the view that Chorus had not copied Creative's network design. His evidence was that after advising that opinion, he was instructed to review the extent to which Chorus had made use of the information provided to it by Creative.

[163] Dr Sathyendran started from the premise that Creative/MDC's information was confidential and valuable. He did not undertake the same topic-by-topic analysis as Mr Emanuel because his initial instruction involved a comparison of Creative's concept design with that produced for the area by Chorus. Dr Sathyendran's evidence did not provide an alternative opinion to that expressed by Mr Emanuel on the extent to which the alleged confidential information constituted such in the hands of Chorus, an entity with deep understanding of at least substantial parts of the subject matter.

[164] Chorus's challenge to the claimed extent of confidential information invited an analogy with the Chancery Division decision in *de Maudsley v Palumbo*.¹² In that case, the plaintiff had confided to others five distinctive features for a proposed nightclub. One of those confided in, and a company in which he was a shareholder, applied the ideas in establishing a new nightclub. The plaintiff claimed that the discussions between them created a contract, or alternatively that the plaintiff had revealed his ideas in circumstances of implied confidence. The decision analysed the ideas, deciding that there was not sufficient in them to reflect a concept that could be realised.

[165] For Chorus, Mr Smith QC invited an analogy with the lack of detail in the present case, characterising the information conveyed to Chorus as inadequate in its detail so that it was insufficient to enable Chorus to apply it in the realisation of a new business initiative.

[166] Mr Elliott distinguished the analysis in *de Maudsley* on the facts. I accept that there was a completely different level of detail in Creative's information conveyed to Chorus in this case. The fact that it was not enough to enable Chorus to apply it in providing new infrastructure does not mean that the same result necessarily applies.

[167] In this case, the obligations of confidence are governed by the terms of the NDA, which contains specific definitions of what is, and importantly what is not, to be treated as confidential information.

[168] In applying the contractual terms, I have regard to the prospect that a collocation of information or ideas reflecting individual items, some of which are in the public domain or were known to Chorus prior to its dealings with Creative, but which in combination are not publicly available, may result in such a collocation being recognised as confidential information.¹³

[169] Chorus's engagement with Creative and MDC exposed it to their definition of the needs Creative/MDC sought to address, and the network design they had

¹² *de Maudsley v Palumbo* [1996] FSR 447.

¹³ *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 (CA) at 525.

developed to deliver on the identified needs. The interaction stimulated Chorus to revisit work it had previously done for RBI2, with the intention of demonstrating to MDC how Chorus would deliver the services MDC sought, within the budget that Chorus then perceived MDC had, or could procure, to develop the network.

[170] Creative perceived its confidential information as reflecting smarter and more innovative technologies than Chorus would use, but I accept the evidence for Chorus that the so-called innovative solutions were not news to it. Much of the information came within the exclusions cited at [145] above, and therefore fell outside the definition of confidential information in the NDA. To the extent that the collocation of information facilitated Chorus in revisiting its previous work on design of infrastructure for broadband in the Marlborough Sounds, that collocation was capable of providing a springboard for Chorus's next round of that work. The real issue is to what extent Chorus used it as such.

Extent of use of confidential information by Chorus

[171] In assessing whether Chorus made use of Creative's confidential information, it is unnecessary for Creative to prove use in the direct sense that Chorus has directly applied an idea or information in an identifiable instance. It will be sufficient if I find Chorus has taken a material advantage from exposure to the confidential information, using it as a springboard to advance its work in a way that it could not have done at that time, without undertaking further work of its own.¹⁴

[172] Creative pleaded 14 particulars of Chorus's alleged unauthorised use of the confidential information. These included:

- using knowledge of CIP seeking RBI2+ proposals, having learned that from Creative's confidential information;
- developing an approach that enabled Chorus to enter RBI2+ and PGF bidding;

¹⁴ *Aquaculture Corp v New Zealand Green Mussel Co* (1985) 5 IPR 353 (HC) at 384.

- applying the approach learned in respect of Marlborough to services outside Marlborough;
- asking and assessing how to get the right infrastructure to develop a plan for all of Marlborough and using it to develop its own plan for delivery of infrastructure in Marlborough;
- altering its approach to the provision of services in rural New Zealand.

[173] On the basis of the changes in corporate behaviour Dr Sathyendran attributed to Chorus in its conduct respectively before and after exposure to Creative's information, he considered it likely that Creative's information used by Chorus included:

- (a) the network design, approach and methodologies;
- (b) the SSI model as a solution to the last one per cent and as a solution for seeking RBI2+ and PGF funding;
- (c) that the addressable markets are substantially larger than Chorus EEU counts.

Observed change in Chorus's behaviour

[174] Dr Sathyendran compared the terms of Chorus's unsuccessful bid for RBI2 in 2017 with its response to CIP's March 2018 invitation to provide information on RBI2+. He analysed some at least of the detailed working files that had been produced by Chorus in doing this work, and which were provided on discovery. Dr Sathyendran discerned that something had happened during the period in which Chorus had access to Creative's information to bring about changes in the approach Chorus adopted to bidding for funding from CIP. He likened this research on his part to searching for a needle in a haystack.

[175] Dr Sathyendran discerned that Chorus's approach changed in that its later proposal was to extend its existing network to an extent that reflected the anticipated

levels of demand. That differed from prior bids, which he characterised as Chorus advising CIP of the distance it could extend coverage for a given amount of funding in areas where CIP wanted it.

[176] Dr Sathyendran contrasted Chorus's stance in its RBI2 bid, which was in effect that Chorus could not service the "last one per cent", with a different attitude in its RBI2+ bid, where it did treat extensions into some parts of the most remote areas as now being viable. Dr Sathyendran inferred that the change in approach to Chorus being able to viably service the more remote areas with fibre was because of innovative means of doing so that had been suggested from its work with Creative.

[177] Chorus's response was that the acknowledgement in RBI2 was that fibre could not be extended within the constraints of the funding then available. In contrast, the premise of its response on RBI2+ was that more grant funding was available, to an extent that the Crown was prepared to fund a greater cost per EEU than it had previously.

[178] Dr Sathyendran was also inclined to agree with Creative's case that, after exposure to Creative's confidential information, Chorus was more open to dealing with WISPs, so that its solution for servicing an area would more readily provide for WISPs to fill in gaps for which Chorus would not itself provide infrastructure.

[179] Mr Smith's cross-examination of Dr Sathyendran proceeded from the premise that the witness accepted that Chorus's plan for provision of UFB services in the Sounds did not copy Creative's plan. Accordingly, any confidential information used by Chorus had necessarily to have been available to it prior to Chorus producing its own plan, which was more or less settled by 6 March 2018. Dr Sathyendran was inclined to agree.

Use of confidential information made out?

[180] Mr Emanuel could not opine on whether Chorus had made use of particular items of Creative's information. Instead, he assessed the value of the information from Chorus's perspective. I am satisfied that he was well-qualified to do that, given that his previous assignments, in particular in relation to RBI1 and RBI2, enabled him to

assess relevant information that was independently available to Chorus, and whether Chorus gained value from the form in which the information had been collated for presentation to it by Creative. Mr Emanuel's conclusion was that no information of material value to Chorus was conveyed to it by Creative.

[181] Mr Murch was in charge of the production of the Chorus plan. His evidence was that his plan, completed by 6 March 2018, did not depend on information conveyed to Chorus by Creative. The core of the work had been done in preparing Chorus's bid for RBI2 in 2017. I found Mr Murch a straightforward and honest witness, and accept his unequivocal evidence that Chorus's work in producing its own plan for the Marlborough Sounds did not rely on any confidential information provided to Chorus by Creative.

[182] I accept Messrs Murch and Emanuel's evidence that the detail in the disclosures up to 12 March 2018 would have been of little utility for Chorus in designing a network any differently than it would have done from its own accumulated knowledge and experience.

[183] What Chorus had done was produce a plan showing how it would build the infrastructure for the area, which it knew from initial discussions that MDC wished to service. It maximised the use of fibre, which Chorus saw as playing to its strength, having been designed on the understanding or in the hope that MDC would contribute significant capital to its cost, thereby removing or reducing the extent of reliance on CIP for funding. Chorus's design extended fibre cabling further than its previous proposals, but that was because Mr Murch and others anticipated that new funding (beyond that available for RBI2) would be available to pay for it.

[184] When the more detailed information pack was provided on 12 March 2018, Chorus's internal reaction to it was negative.¹⁵

¹⁵ See [90] and [91] above – Mr Rodgers suggested “his design sucks and would advise everyone to avoid it like the plague”.

Analysis of EEU numbers

[185] Creative placed substantial value on the number of EEUs its analysis revealed, bringing with it the prospect of generating much greater revenues than would be the case from the smaller number of EEUs cited by CIP. Chorus, however, denied that the projections of greater revenue-earning potential were of any use to it. This is because the cost per end user of providing the infrastructure Chorus offered was much greater than the maximum cost on which Chorus projected it could make an economic return. Therefore all of Chorus's offers in relation to extending the infrastructure in the Marlborough Sounds area, both before its dealings with Creative (in RBI2) and thereafter (in its non-compliant RBI2+ response to invitation), depended on government funding of 100 per cent of the costs to be incurred.

[186] Chorus also disputed the utility of Creative's EEU analysis. First, Chorus usually treated the CIP projections of EEUs as extremely conservative, and in previous work it had made similar assumptions. Secondly, the evidence was that Chorus had the same sources of data available to it as were applied by Creative and MDC in their enhanced calculations. Chorus also had some doubts as to the reliability of Creative's analysis because it included identified addresses (as distinct from EEUs), which were likely to include a material number of rateable properties on MDC's records with no regular inhabitants, such as undeveloped sections and holiday baches in the Sounds.

[187] I accept Chorus's argument that the detail supporting Creative's view of much larger numbers of EEUs was not information used by Chorus because its subsequent dealings with CIP still required 100 per cent funding, by way of grant, for Chorus to add to its infrastructure. If there had been reliance on Creative's EEU count, and it persuaded Chorus that it was economic for it to make a contribution to the cost of installing infrastructure in order to get a government grant for the balance, then that would have been reflected in the terms it conveyed to CIP in May 2018.

Focus on regional development co-operation with WISPs

[188] Dr Sathyendran also discerned a new focus on regional development rather than specific extensions of infrastructure, as well as a greater willingness for Chorus to co-ordinate extensions to its infrastructure with WISPs.

[189] Given the evolution in Chorus's thinking in 2017 and 2018, and its statements at the WISPA conference in Queenstown in January 2018 that it would deal more co-operatively with WISPs, I am not satisfied that the change in attitude towards co-operation with WISPs reflected use of Creative's confidential information. It appears that the logic of filling gaps in coverage that could be achieved economically by WISPs was becoming more apparent in this period.

[190] To the extent that Chorus's response to CIP's request to provide information on RBI2+ reflected a greater degree of services on regional bases than had been proposed previously by Chorus, it is equally likely that such progression in its approach resulted from the reduction in extent of the areas not already provided for, and the greater amount of funding available per EEU, than from any revelation provided by Creative that a bid would be more attractive to CIP if it reflected a regional development analysis.

Unauthorised disclosure to Aird Towers

[191] Chorus witnesses acknowledged that after their engagement with Creative, aspects of Chorus's work in producing the plan it had for MDC were used in the context of Chorus's possible co-operation with Aird Towers to provide infrastructure in Northland. Creative argued that the disclosures to Aird Towers amounted to further misuse of its confidential information. This depended on the premise that the work Chorus did to produce the plan it presented to Creative and MDC involved the application of Creative's confidential information so disclosure to any third party of the product of that work amounted to a breach of the NDA.

[192] There was no detail in the evidence of the information disclosed by Chorus to Aird Towers. To the extent that it reflected the approach, rather than the detail, of the work supervised by Mr Murch up to 6 March 2018, then I am not satisfied that it involved any material use of Creative's confidential information.

Use of Creative's confidential information in seeking PGF funding, re-entry into RBI2+

[193] Creative also alleged that Chorus had made use of its confidential information in representations seeking funding from the PGF. Mr Broadbridge was questioned about the origins of a strategic review used for a meeting with Minister Shane Jones on 19 February 2018. He explained that the document in question was based on one he had prepared in November 2017 and it had thereafter been through an iterative process. Creative did not make out use of any of its information as influencing the iterations of the document since its first creation. Similarly, there was no evidence that subsequent exchanges with those responsible for decisions about funding by the PGF relied on Creative's information.

[194] A further element of confidential information claimed by Creative is that it conveyed to Chorus the new terms on which CIP was inviting bids for RBI2+. Chorus – supported by Mr Emanuel – denies that this was confidential information that it could only have learned from Creative and I accept that.

[195] There may have been variations between Chorus personnel as to whether and, if so, when another round of bidding with CIP might occur. However, as noted at [130] above, I accept Mr Broadbridge's evidence that he was unaware that a further round was underway until contacted by Mr Greenhough on 19 March 2018. This, combined with the absence of any evidence of initiatives by Chorus to pursue any bidding with CIP before then, means there is no basis for a finding that Chorus used knowledge about a further round of bidding with CIP that it had gained from Creative. Internal Chorus emails suggest that Mr Broadbridge's advice to others of the telephone call from Mr Greenhough was the catalyst for new work to provide a timely response.

Re-purposing Chorus assets

[196] At a more technical level, Creative contended that its exchanges with Chorus gave Chorus the idea to repurpose isolated Chorus assets known as "CMAR" sites. These are cabinets that are connected to antennae and typically located on hills in the vicinity of end users such as farms. Chorus accepts that they utilise relatively long-standing technology and are candidates for updating, or possibly replacement.

[197] Creative's case was that its innovative thinking introduced to Chorus new prospects of incorporating more recent technologies at CMAR sites. In particular, Creative claimed that it suggested Chorus repurpose CMAR sites for FWA, which Chorus had not done previously.

[198] This idea was not reflected in any technical analysis provided to Chorus, and appears to arise out of acknowledgements by Chorus personnel during meetings with Creative that incorporating the upgrading of CMAR sites was a good idea.

[199] Mr Murch was clear that there was nothing new to Chorus in such proposals. He instanced upgrading of CMAR sites that has been undertaken for years and that exploring various means of prolonging the life of Chorus's CMAR assets has been an on-going topic since before any contact with Creative. Mr Lott was also unequivocal in confirming a pattern of upgrades to CMAR sites undertaken before, and independently of, any ideas gleaned from dealings with Creative. From his personal experience, Mr Emanuel confirmed the practice of Chorus to reuse CMAR sites.

[200] I am not satisfied that there was any unauthorised use of confidential information on this topic. Repurposing CMAR sites for FWA was not technologically so different from what Chorus had done as to be beyond its own contemplation, given the extent of such assets it had at stake.

Summary on Chorus use of Creative's confidential information

[201] In preparing its own plan for new infrastructure, Chorus was responding to what it saw MDC – as a potential customer – wanted to achieve. The network design it provided to Creative was its own work, but that work was done in response to disclosures by Creative/MDC of what MDC sought to achieve as a facilitator of UFB services within its territory. In denying any resort to Creative's information, Mr Murch overlooks that Chorus was responding to indications from Creative/MDC as to where they wanted extended services to be made available. In the context of this relationship, I am not satisfied that Creative can claim that MDC's wish list of what it would want Chorus to provide has status as confidential information protected by the NDA.

[202] As Mr Phillips acknowledged,¹⁶ a better outline of where MDC was hoping to provide services is distinguishable from the substantial work that had been done on how Creative recommended that could be achieved. The latter category of information is entitled to protection, but in the circumstances of this relationship I am satisfied that the former was not. I do not accept that the process of Chorus producing its own design of how it would provide infrastructure to meet MDC's needs, and then sharing that design with them, gave Creative/MDC any right to claim that Chorus's design became their joint property.

[203] Standing back, as Mr Elliott urged me to do, I accept that the exchanges of information between Creative and Chorus between February and April 2018 did contribute to the evolution of Chorus's mode of responding to CIP. In a minor incremental way, Chorus used the work it undertook in dealing with Creative as an influence on the evolution of its own thinking and its mode of dealing with CIP. However, the inarguably dominant influences on that evolution in thinking were independent of any use of Creative's confidential information. It was not sufficient to characterise any use as a springboard. Accordingly, it is not use that breaches the terms of the NDA.

Third cause of action: equitable duty of confidentiality

[204] Equity will enforce against a recipient of confidential information an obligation to respect its confidentiality and use it only consistently with the intentions of the owner of that information. Classically, such obligations arise in pre-contractual commercial negotiations, such as in *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd*.¹⁷ In that case, there was disclosure of a combination of simple manufacturing steps in the production of a health food bar containing fruit or nuts that was applied by the party to whom disclosure had been made, without obtaining a licence to use the process from the owner of that information.

[205] Here, Creative pleaded breach of an equitable obligation of confidence, which it alleges arose independently of the contractual obligations of confidence reflected in

¹⁶ See [139] above.

¹⁷ *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd*, above n 13.

the NDA. Mr Elliott cited the decision in *Dodson Motor Sport Ltd v Logiical Performance Ltd* as recognising the prospect of both contractual and equitable obligations of confidence being made out.¹⁸ In that case, such an equitable obligation was imputed to the recipient of confidential information who was an ex-employee of the owner of the information where previous employment agreements had contained confidentiality obligations.

[206] In the present circumstances, Chorus argued that the NDA precluded any equitable obligations. If any could be imputed, they would necessarily be of the same extent and enforceable on the same terms as the parties explicitly agreed in their NDA.

[207] In the circumstances of this case, I can see no justification for equity to intervene by imposing any additional obligations on Chorus when, from the outset, Creative insisted that disclosures would be governed by an NDA. That was required in what Creative envisaged as the preliminary period prior to Chorus submitting a tender and entering a substantive contract with Creative/MDC. Certainly, it would be contrary to equitable principles for the Court to invoke equity to impose an obligation in respect of confidential information inconsistent with the explicit terms of an NDA. That is particularly the case where the terms of the NDA stipulated that it represented the exclusive expression of obligations assumed by the parties.

[208] For instance, if the equitable obligations were claimed to extend to wider categories of information than items that would be excluded by the definition in the NDA of what was deemed not to be confidential, how could it be said to adversely affect the conscience of Chorus personnel if they failed to respect the confidentiality of such information? I am satisfied that anything other than obligations on the same terms would be untenable. It follows that the existence of, and reliance on, the NDA excludes the prospect of any different obligations of confidence in equity.

Fourth cause of action: estoppel

[209] Creative pleaded that Chorus had made statements that it had withdrawn from bidding for RBI2 funding, thereby creating a belief and expectation that it would not

¹⁸ *Dodson Motor Sport Ltd v Logiical Performance Ltd* [2019] NZHC 918 at [349]–[351].

bid for RBI2+ funding. Creative pleaded that it reasonably relied on those statements in providing confidential information to Chorus and continuing an involvement with it when it would not otherwise have done so. Creative further pleads that its supply of confidential information to Chorus in those circumstances and Chorus's re-entry into bidding for RBI2+, contrary to the alleged representation that it would not do so, has led to Creative suffering loss. It claims loss of the types pleaded on its other causes of action, along with loss of the economic value of the relaxation of the estoppel that allegedly prevented Chorus from bidding for RBI2+.

[210] Although not explicitly pleaded as an alternative to Creative's claim for breach of the NDA, this claim to an actionable estoppel could avail Creative if Chorus was found not to be liable for use of confidential information in breach of the NDA.

[211] The effect of Creative's pleading is that it divulged its confidential information to Chorus in reliance on two factors:

- Chorus's commitment to the NDA; and
- representations by Chorus to the effect that they would not compete with Creative/MDC by submitting a bid to CIP on their own.

[212] There is a question as to the relative importance to Creative of the second constraint. Creative's NDA register included 63 potential partners, and there is no suggestion that it required all of them to commit to not making competing bids, as well as completing the NDAs.

[213] In closing submissions for Creative, Mr Elliott criticised the requirements for estoppel as contended for on behalf of Chorus as an "archaic approach". In 1998, the Court of Appeal observed:¹⁹

The judgments in *Gillies v Keogh* disclose a tendency to depart from strict criteria and to direct attention to overall unconscionable behaviour. It nevertheless remains clear that before judgment can be given against a defendant on the grounds of estoppel, some action, or representation, or

¹⁹ *Goldstar Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86 (citation omitted).

omission to act, must have been carried out by, or on behalf of, that defendant causing the plaintiff to have acted in a manner causing loss.

[214] As with other aspects of Creative's case, Mr Elliott relied heavily on what Creative portrayed as the unconscionability of Chorus's conduct. He cited the more recent Court of Appeal decision in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*.²⁰ The Court treated the elements required to establish the estoppel pleaded in that case as not being in dispute. They were expressed as:²¹

- (a) A belief or expectation by [the plaintiff] has been created or encouraged by words or conduct by [the defendant];
- (b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed;
- (c) [The plaintiff] reasonably relied to its detriment on the representation; and
- (d) It would be unconscionable for [the defendant] to depart from the belief or expectation.

The representation

[215] As to the relevant representation, Creative relied on a statement made by Mr Lott during a discussion with Mr Phillips on 12 March 2018 that Chorus had withdrawn from bidding for RBI2. In an email sent that day by Mr Phillips to Mr Lott and others at Chorus, confirming that access to Creative's confidential information would be provided, Mr Phillips stated:

We confirm our understanding that Chorus has withdrawn from the RBI2 Crown Funding RFP bid process for a variety of reasons. If this is not the case would you please advise immediately.

[216] The absence of a response is reasonably relied on by Creative as confirmation of its understanding.

[217] Creative argues that it was important to it that Chorus would not be competing with Creative/MDC, and that Creative relied on that understanding in deciding that it would share confidential information with Chorus. It is Creative's case that the references to non-participation in the "RBI2 ... bid process" included RBI2+, the

²⁰ *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567.

²¹ At [44].

extension part of RBI2 that was then on foot. I accept that is a reasonable implication when there would be no relevance in merely confirming the historical circumstance that Chorus had indicated to CIP in August 2017 that it would not further negotiate on the prospect of being allocated funding in the original RBI2 funding round.

[218] It is common ground that after 19 March 2018, Chorus took steps to provide information to CIP in relation to possible participation in the RBI2+ round. Chorus received an information request from CIP on 27 March 2018 and responded to it on 16 May 2018.

[219] I have found against Creative's contention that the new contacts between Chorus and CIP are likely to have been initiated by Chorus, and instead have accepted Chorus's evidence that it was responding to an invitation from CIP. That finding is not directly relevant to Creative's complaint that, however initiated, Chorus's conduct in making a submission to CIP breached Creative's reasonable expectation of non-involvement by Chorus.

Representation adequately precise?

[220] Chorus challenges the existence of a relevant representation. It argues that Creative has made more of the claimed representation than it is entitled to. Treating the content of Mr Phillips' 12 March 2018 email as a statement of present fact that Chorus had withdrawn from the original RBI2 bidding round, that arguably could not be interpreted as any representation binding Chorus as to its future intentions. Clearly, given Chorus's extensive history of consistent participation in previous rounds of bidding for funding for UFB infrastructure, statements by Chorus representatives of the position pertaining up to 12 March 2018 could not be taken as any open-ended commitment that it would never participate in the future.

[221] I accept that the representations could not reasonably be interpreted as indefinitely committing Chorus to not participating in all subsequent CIP bidding processes. However, as a matter of context, both parties were focused during that period in March 2018 on the prospects of obtaining funding from CIP in its next round. I consider it was reasonable for Creative to treat the statements from Chorus representatives, and the absence of an answer to the 12 March 2018 email enquiry on

the topic, as a representation that Chorus would not be submitting its own bid for RBI2+ funding. The relevant context included the prospect of Chorus providing critical components of the infrastructure that Creative/MDC were intending to bid for, to service more remote parts of the Marlborough region. The Chorus representatives dealing with Creative can reasonably be expected to have appreciated that as being the reason why Mr Phillips sought clarification about the point, and ought also to have given them an appreciation of the relative importance of their answer to Creative.

Scope for equitable constraint

[222] Chorus argued that equity is cautious about interfering in commercial relationships, and arguably particularly so where sophisticated parties in a pre-substantive contractual relationship have committed themselves to a contract governing the terms on which confidential or commercially sensitive information will be exchanged. Arguably, the Court should be wary of overlaying equitable obligations in such circumstances. Ms Heine invited analogy with the observations of Kirby P in an appeal before the New South Wales Court of Appeal involving developers of a supermarket property and the intended supermarket proprietors.²² Incomplete negotiations between the parties were disputed in circumstances where an estoppel was raised against the property developer, contending it could not deny the existence of a leasing arrangement. The observations included:²³

If courts do not show caution here they will effectively force on commercial parties terms which the court may think to be reasonable and as ought commonly to govern such a contract but which the parties have themselves held back from concluding. ...

... courts should, in my view, be wary lest they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges. Such consciences, as the case show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it.

[223] The response to this is that reliance on the representation founding an estoppel is an alternative basis for Creative to seek relief for the harm it alleges was caused by Chorus, irrespective of whether Creative can make out misuse of confidential

²² *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

²³ At 586.

information. Creative embarked on the relationship to the extent it did, and exposed itself to the risk of misuse of its confidential information about the design of UFB services for Marlborough, believing that Chorus would not compete with it. The reality is it subsequently found that Chorus has done so. I do not accept that orderly regulation of commercial relationships is harmed by recognising the prospect of equitable claims in these circumstances.

Would the representation found an anti-competitive arrangement?

[224] Next, Chorus submitted that interpreting the representation as an agreement or arrangement between potential competitors not to compete in seeking government funding would risk actionable breach of the Commerce Act 1986. Chorus characterises the Creative personnel as well-versed in such matters of business law, so they would have appreciated that both parties risked breaking the law if they reached any form of anti-competitive arrangement. Once that reality of the legal position was acknowledged, it would make it unreasonable for Creative to treat the representation as any more than a present statement of fact at the time any representation was made.

[225] I do not accept that the risk of breaching provisions in the Commerce Act would have loomed sufficiently large to remove the justification for Creative to attribute the meaning to the representation that has been asserted. A number of hurdles would need to be cleared before an anti-competitive arrangement contrary to the Commerce Act could be made out.

[226] I am accordingly satisfied that there was a representation in terms sufficiently clear to found an estoppel, arising in circumstances where it was reasonable for Creative to rely on it.

Detriment suffered?

[227] As to the next element, Chorus strongly disputed that Creative could make out any detriment suffered by it as a result of relying on the representation attributed to Chorus. Creative's subsequent discovery that Chorus had responded to CIP with a bid for RBI2+, perceived by Creative as competing with its own bid, was treated by Creative as the ultimate affront to its aspiration that they would pursue CIP funding as

collaborative partners. An aspect raised in all of Creative's causes of action is the failure by Chorus to honour what Creative claimed to be a shared understanding as collaborative partners. The complaint has not availed Creative on any of the earlier causes of action. It was an aspect of puffery, and I do not see it as constituting a relevant form of detriment to make out an actionable estoppel.

[228] From all the evidence, I am satisfied that Creative's focus at the time was on securing Chorus's signature on the NDA, and that the provision of confidential information proceeded primarily in reliance on that contractual constraint. If breach of the NDA was made out, that ought to have been adequate to address any loss. Where Chorus is found not to have breached the contractual constraint, there is a discrete analysis required as to detriment arising from Creative's reliance on Chorus's representation.

[229] Had Chorus succeeded in any aspect of its bid with CIP for RBI2+ in relation to the Marlborough region when Creative/MDC were unsuccessful, then there may have been a basis for assessing detriment flowing from reliance on the representation. However, the position is that neither party enjoyed any success in the RBI2+ round of bidding with CIP. On Chorus's analysis, this means that Creative suffered no detriment from any reliance on a representation allegedly not complied with by Chorus in its subsequent conduct. There is no basis for Creative to claim that Chorus's participation harmed Creative's chances of succeeding in RBI2+. In commercial terms, it is no more than a disappointed expectation of non-competition where attempted competition did not harm Creative/MDC's prospects.

[230] Creative has pleaded detriment by way of "loss of the economic value of relaxation of the estoppel".²⁴ Its proposition invites analogy with what are generally referred to as *Wrotham Park* damages.²⁵ That is, had Chorus sought release from the constraint it had acknowledged in favour of Creative as representee, then an objective assessment assuming reasonable approaches to valuation of the constraint would lead

²⁴ These terms are not used in Creative's second amended statement of claim dated 26 June 2019, but appear at para 94 of the merged pleadings document used at trial, prepared by Chorus's solicitors.

²⁵ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch).

to a quantification that would compensate Creative for releasing Chorus from the constraint created by the estoppel.

[231] In a recent appeal to the United Kingdom Supreme Court considering the remedy for breach of a contractual constraint on vendors of a business against competing with it, the majority undertook a review of various alternative approaches to quantification of damages. On the prospect of *Wrotham Park* damages for breach of contract, Lord Reed for the majority stated:²⁶

Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

[232] In referring to this authority, Ms Heine submitted that the critical element here was that objective valuation of the constraint had to be recognised as something of value. She postulated that reasonable and objective participants in a notional negotiation of the value to Chorus of being freed of a constraint not to participate in RBI2+, in the circumstances it did, would not attribute anything more than nominal value to being released from that constraint. That was advanced on the premise that Chorus was intending to bid, without resort to any of Creative's confidential information. So the constraint was simply to stay out of the bidding, or perhaps, more narrowly, the bidding in respect of Marlborough.

[233] On the facts, Chorus supported this submission by reference to Mr Emanuel's evidence that Creative had no realistic prospect of securing funding for network deployment because of what he perceived as deficiencies in their design. Mr Emanuel has been a consultant to CIP in assessing bids in previous rounds and was not effectively challenged on this opinion, which I accept as reasonable.

²⁶ *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [95].

[234] An objective valuation of the constraint might also have regard to the circumstances in which the representation had been made, and the extent to which Chorus, in responding to Creative's original invitation, undertook its own work to design a different infrastructure for providing UFB services to remote areas in the Marlborough region.

[235] Creative did not present any evidence as to how a notional negotiation of the value of relaxing the constraint would occur. The hearing was limited to liability issues, but making out detriment was a contested element of this cause of action. In the end, I am persuaded that relaxation of the constraint would not attract any more than a nominal value. The consequence is that Creative is unable to make out any material detriment from reliance on the representation as a necessary element in making out its cause of action in estoppel.

Result

[236] The outcome is that Creative has failed to make out any of its causes of action, and the proceeding is accordingly dismissed.

Costs

[237] I did not hear from the parties on costs, beyond indications that each would seek costs from the other if successful and, in Chorus's case, raising the prospect that it might seek costs orders against other parties in the event it could not satisfy any claim for costs ordered against Creative.

[238] I have reflected on the full range of considerations that might apply to competing positions on costs, given the outcome on each of the causes of action, and the circumstances both during the relationship and when the proceedings were commenced. In the perhaps vain hope of achieving finality with all aspects of the dispute, I intend making an order as to costs without affording counsel an opportunity to address the issue. I acknowledge I would need to reconsider the costs issue if there have been any *Calderbank* offers of which I am unaware.

[239] The conduct of both parties was characterised by substantial posturing. For Creative, Mr Phillips exaggerated the “collaborative partnering” character of the relationship that Creative and MDC considered they were fostering with Chorus. Once the relationship soured, Creative made more than it was entitled to of self-serving assertions about the character of the relationship to assert fiduciary and equitable obligations owed by Chorus in what was an exploratory, non-exclusive, pre-substantive contractual commercial relationship.

[240] For Chorus, Mr Lott and others engaged in grossly misleading flattery to encourage MDC to contract with Chorus, during the period in which Chorus was under the impression that MDC had substantial funding (“ [Redacted] ”) to commit to the cost of extending infrastructure.

[241] A consequence of Chorus’s flattery is that Creative would have assessed its prospects for these proceedings by treating Chorus as having confirmed its own belief in the substantial value to Chorus of Creative’s intellectual property. Because I have found that Chorus was not genuine in the assessments it conveyed to Creative of the value of Creative’s intellectual property at the time, those expressions of view have not been determinative in assessing Creative’s causes of action. However, they provide a substantial measure of justification for Creative to embark on proceedings, articulating claims in the terms that it has.

[242] Chorus might argue that such misapprehensions as Creative may have been given by Chorus’s highly complimentary assessments during negotiations could not justify continuation of the proceedings after discovery had been completed. However, that is not a sufficient answer. There remained a measure of justification for the tone of moral indignation that infused all of Creative’s case. Whilst it is not enough to overcome the various deficiencies I have found which preclude it succeeding, the misleadingly flattering tone of approval of Creative’s intellectual property throughout a period when Chorus’s genuine view was negative and dismissive is a most unusual dynamic that I treat as dominating the competing positions on costs, given the outcome.

[243] I have decided that the appropriate outcome is that there be no order for costs and each party is to bear their own.

Dobson J

Solicitors:
Wigley and Company, Wellington for plaintiff
Chapman Tripp, Wellington for defendant

Glossary of Abbreviations

CIP	Crown Infrastructure Partners
EEU	Economic end user
FWA	Fixed wireless access
MDC	Marlborough District Council
NDA	Non-disclosure agreement
PGF	Provincial Growth Fund
RBI1	Rural broadband initiative – first round
RBI2	Rural broadband initiative – second round
RBI2+	Rural broadband initiative – second round extension
RFP	Request for proposal
SSI	Smart Services Infrastructure
UFB	Ultra-fast broadband
WISP	Wireless internet service providers