IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-2609
[2019] NZHC 2211

BETWEEN	FOCUS CONSTRUCTION INTERIORS LIMITED Plaintiff
AND	SPACEWORKS DESIGN GROUP LIMITED First Defendant
	ELIZABETH MARY CHARLOTTE HINES (nee WHALEY) Second Defendant

Hearing:	27, 28, 39, 30, 31 May and 4 June 2019
Appearances:	L Ponniah for the Plaintiff M Harris and A Goodwin for the Defendants
Judgment:	5 September 2019

JUDGMENT OF GAULT J

This judgment was delivered by me on 5 September 2019 at 9:00 a.m.
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors:
Mr L Ponniah, Corban Revell, Henderson, Auckland
Mr M Harris, Gilbert Walker, Auckland

[1] The plaintiff, Focus Construction Interiors Ltd (Focus), is a construction company and part of the Focus Group providing interior fitout construction, joinery and project management services. Mr Plumpton is the managing director.

[2] The first defendant, Spaceworks Design Group Ltd (Spaceworks), is a commercial interior design company. The second defendant, Ms Whaley, is the owner, sole director and chief executive officer of Spaceworks.

[3] Focus claims that the defendants have breached their contractual obligation in a settlement agreement to make reasonable endeavours, acting in good faith, to achieve the referral of construction work to Focus having a gross value of $3 million (excluding GST).

Background

[4] Focus and Spaceworks' predecessor had a working relationship dating back to 2002 when the business of Spaceworks' predecessor changed to interior design. That relationship saw Focus recommended to do the build element of interior fitouts. The work was said to be of a negotiated tender nature, where only Focus was asked to provide a quote.

[5] In 2004 Ms Whaley joined Spaceworks' predecessor as an employee. In mid-2006 the previous owner wished to sell the business. Ms Whaley was interested in buying the business and discussed this with Mr Plumpton. They agreed to buy the business. The purchase took place in October 2006. It was structured with Mr Plumpton buying a one-third interest in the newly incorporated Spaceworks through an entity called Franklin Investment Holdings Ltd (Franklin), and Ms Whaley contributing two-thirds in a mix of cash and borrowings. A draft heads of agreement in October 2006 proposed that Focus would be the preferred contractor for all jobs. The arrangement was formalised in a shareholders' agreement between Ms Whaley and Franklin dated 7 September 2007, which included a provision in relation to Focus:

> The Company has for many years used the expertise of Focus in relation to many interior fitout contracts. It is anticipated that the Company will continue to work with Focus wherever possible in relation to interior design fitouts, and continue to foster the business between Focus and the Company.

[6] In 2008 the relationship broke down. The parties disagreed as to the cause. In any event, referral work diminished in 2008. In 2009 Focus alleged that Ms Whaley was in breach of the shareholders' agreement. Relevantly, Mr Plumpton was concerned about the lack of referral work and the use of other contractors. There was a series of letters between solicitors. Following a mediation in November 2009, the parties (and Franklin) executed a settlement agreement in February 2010 (the agreement). In the agreement Ms Whaley purchased Franklin's shares in Spaceworks and the parties agreed terms in relation to referral of work to Focus as part of a full and final settlement. The relevant terms are:

> 3. Spaceworks and [Ms Whaley] shall make reasonable endeavours, acting in good faith, to refer work to Focus having a total gross value of $3 million (excluding GST), it being anticipated that this can be achieved over a period of four years from the date of this agreement.
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> 4. Spaceworks, [Ms Whaley] and Focus shall make reasonable endeavours and act in good faith towards one another to achieve the referral of work as set out at clause 3 above. To this end, Spaceworks and Focus shall each appoint a liaison person acceptable to the other to liaise between them. In the event that any issues arise, Spaceworks and Focus shall negotiate in good faith to resolve them.
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> 5. For the purposes of clauses 3 and 4 above:
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> (a) 'work' shall consist of hard fitouts including subcontractors except where Spaceworks' clients require otherwise;
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> (b) 'work' shall be considered to have been referred to Focus only when it is actually undertaken by Focus or its subcontractors (for example it shall not include work for which Focus is invited to tender but does not undertake);
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> (c) Spaceworks, [Ms Whaley] and Focus shall make reasonable endeavours and act in good faith to put in place mutually acceptable invoicing and payment arrangements for each job, recognising Focus's wish either to contract directly with the client (where that is acceptable to the client) or to be properly secured for payment (whether by advance payment or otherwise);
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> (d) Spaceworks, [Ms Whaley] and Focus shall make reasonable endeavours and act in good faith to achieve referral work that is of a negotiated tender nature where Spaceworks invites only Focus to provide a quote for the work, subject always to the requirements of the client; and
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> (e) 'work' shall only be accounted for in terms of clause 3 above when it is paid for by the client or Spaceworks as the case may be and shall not include bad debts.

> 6. Spaceworks shall report annually to Focus regarding the work that Spaceworks has undertaken and what part of that work has been referred to Focus. This obligation shall continue until the $3 million figure set out in clause 3 above has been achieved.
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> …
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> 9. The parties agree to keep the terms of this agreement confidential to themselves and their advisors. Nothing in this clause is intended to prevent any party from making any disclosure required by law or to prevent Spaceworks from disclosing to its clients that it has a preferred supplier arrangement with Focus whenever it is appropriate to do so.

[7] Mr Plumpton considered that the confidentiality clause in the agreement meant that he could not disclose it to Focus staff, including Mr Dixon who he appointed as the Focus liaison person. This incorrect view may have contributed to staff frustration with ongoing tendering for Spaceworks projects despite a low strike rate.

[8] In August 2012 Mr Plumpton advised Ms Whaley that, with Mr Dixon away and current workload, Focus was currently only taking on negotiated contracts and not tendering. Soon after, Ms Whaley asked if Focus wished to be included in two tenders. Mr Plumpton wrote to Ms Whaley expressing concern that Focus was being invited to tender for projects rather than given preferential treatment in negotiating jobs. One of the proposed tenders was for a client with whom Focus had a history of negotiated contracts. Mr Plumpton asserted that Spaceworks' obligation was to refer work on a negotiated basis where Focus was the only party invited to provide a quote. Mr Plumpton said Focus had only been referred $390,000 of work in the two and a half years since the agreement, and asked Ms Whaley to review the current tender practice and consider the obligations under the agreement to provide $3 million in total gross value of work on a negotiated basis as the only party providing a quote for the work.

[9] In a further exchange in September 2012, Ms Whaley said: "I know you would prefer negotiated however the price conscious market has predetermined whether we tender or not." Mr Plumpton reiterated his view that the intention of the agreement was for negotiated work.

[10] In April 2013 Focus' solicitors alleged that Spaceworks was in breach of the agreement. Spaceworks' solicitors denied the breach and attached a schedule indicating projects that Spaceworks had attempted to refer to Focus over the preceding 14 months.

[11] In August 2013 Mr Plumpton and Ms Whaley had an email exchange about improving the business relationship. Mr Plumpton reiterated his concern about honouring the agreement. He also referred to the agreement being based on how the companies had previously worked together successfully.

[12] In June 2014 Focus' solicitors again alleged breach, this time threatening proceedings. The letter claimed that opportunities to tender were not within the agreement. Spaceworks' solicitors replied maintaining that Spaceworks continued to meet its obligation and noting that the market for negotiated work was improving.

[13] On 18 July 2016 Focus notified Spaceworks that it would no longer tender for any more Spaceworks work. In October 2016 Focus commenced this proceeding.

Claim

[14] Focus claims that the obligation in clause 3 of the agreement is to make reasonable endeavours, acting in good faith, to achieve the referral of work to Focus having a total gross value of $3 million (excluding GST) over the period of four years from February 2010 to February 2014.

[15] Focus also claims that the obligation relates to referral of work of a negotiated tender nature where Spaceworks invites only Focus to provide a quote for work. Focus claims that such work of a negotiated tender nature gives rise to a higher margin, as was achieved before Ms Whaley took over the business. Mr Plumpton described the Spaceworks-Focus contracting model as a quasi-partnership arrangement.

[16] Focus claims that Spaceworks and Ms Whaley failed to make the required reasonable endeavours. In the four year period Spaceworks referred $512,824 of work

to Focus,[1] of which only a proportion was of a negotiated tender nature. In the subsequent period until Focus gave notice in July 2016 that it would no longer tender, Spaceworks referred a further $739,431.90, bringing the total referred work to $1,252,255.96. Focus made a profit on the referred work of $192,089.09 (a profit margin of 15.34 per cent).

[17] Focus claims the profit margin for work of a negotiated tender nature is 24.27 per cent. Accordingly, it says that if $3 million worth of work had been referred, its profit would have been $728,100, resulting in a claimed loss of $536,010.91.

Issues

[18] The keys issues to be determined are:

(a) Whether the obligation under clause 3 is to make reasonable endeavours to refer work to Focus having a total gross value of $3 million (excluding GST) over a period of four years or whether the reasonable endeavours obligation continues after that period.

(b) Whether the reasonable endeavours obligation in clause 3 is for referral work of a negotiated tender nature where Spaceworks invites only Focus to provide a quote for the work, subject to the requirements of the client.

(c) Whether Spaceworks and Ms Whaley failed to make reasonable endeavours in breach of the agreement.

(d) If so, the quantum of loss.

Contractual interpretation principles

[19] It is common ground that the obligations of the parties depend on the meaning of the agreement, and there was no dispute as to the applicable principles of contractual interpretation. The aim is to ascertain the meaning which the document would convey to a reasonable person having the all the background knowledge which would

[1] It is common ground that work is only 'referred' to Focus when it is actually undertaken.

reasonably have been available to the parties in the situation in which they were at the time of the contract.[2]

[20] It is also common ground that this is a case where that meaning can be ascertained from the "natural and ordinary" or plain meaning of the words without particularly relying on relevant background material. It is therefore unnecessary to say much more about the dispute leading to the agreement.

The four year period

[21] Focus claims that the obligation in clause 3 of the agreement is to make reasonable endeavours, acting in good faith, to achieve the referral of work to Focus having a total gross value of $3 million (excluding GST) over the period of four years from February 2010 until February 2014. Mr Harris, counsel for the defendants, submitted that the four year period was an expectation held at the time, but not part of the promise.

[22] The nature of the obligation is to make reasonable endeavours. The reference to "it being anticipated that this can be achieved over a period of four years" informs the obligation but does not convert it into an absolute obligation to refer $3 million of work over four years. But nor was it an obligation to make reasonable endeavours for only four years expiring in February 2014 even if the anticipated $3 million had not be achieved. This is endorsed by clause 6 which provides that Spaceworks' annual reporting obligation continues until the $3 million figure set out in clause 3 has been achieved. I consider the obligation was to make reasonable endeavours to achieve the $3 million over a period which was anticipated to be four years but would extend for a reasonable time until achieved.

[23] As Spaceworks continued to refer work after February 2014 until Focus gave notice in July 2016 that it would no longer tender, and Focus has deducted from its claim profit made on that further referred work, the relevance of this issue is limited to the effect of the Focus notice in July 2016. I have found that the obligation

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2 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann.

continued beyond the end of the four year period. I consider it reasonably continued until July 2016 but Focus then elected to bring it to an end by giving notice that it would no longer tender. In those circumstances, I consider that Focus can only claim the loss resulting from a failure to make reasonable endeavours until July 2016.

Negotiated tender work

[24] A central contractual issue is whether, as Focus claims, the reasonable endeavours obligation in clause 3 is for referral work of a negotiated tender nature where Spaceworks invites only Focus to provide a quote for the work. Mr Ponniah, counsel for Focus, submitted that the general obligation in clause 3 is qualified by clause 5(d), which contains a reasonable endeavours obligation "to achieve referral work that is of a negotiated tender nature where Spaceworks invites only Focus to provide a quote for the work, subject always to the requirements of the client".

[25] Mr Harris submitted that clause 5(d) does not qualify clause 3 in that way. I agree. Clause 3 refers to "work", which is defined in clause 5(a) as consisting of hard fitouts, including subcontractors, except where Spaceworks' clients require otherwise. Work includes, but is not limited to, work of a negotiated tender nature. It includes work undertaken following a successful tender. This is consistent with the reference in clause 5(b) to tenders.

[26] Clause 5(d) requires Spaceworks, Ms Whaley and Focus to make reasonable endeavours and act in good faith to achieve referral work that is of a negotiated tender nature. However, this obligation is not quantified. Work of a negotiated tender nature that is referred counts towards the referral obligation in clause 3 but clause 5(d) does not limit clause 3 to such work. Rather, it is a separate obligation to make reasonable endeavours to achieve work of this nature (which may have an anticipated higher profit margin). But, as well as being unquantified, this obligation in clause 5(d) is expressly "subject always to the requirements of the client".

[27] Although some background material indicated that Mr Plumpton wished to limit referred work to that of a negotiated tender nature,[3] there was no material suggesting that was the parties' intention in the agreement. The printout from the whiteboard at the mediation did not refer to "negotiated work", contrary to Mr Plumpton's recollection.

Reasonable endeavours

Enforceability

[28] Mr Harris did not go so far as to submit that the "reasonable endeavours" obligation in the agreement was of no legal effect but he did submit that the lack of prescribed steps that need to be taken is problematic.

[29] The enforceability of endeavours clauses in New Zealand was considered by the Court of Appeal in *Fletcher Challenge Energy Ltd v ECNZ Ltd*.[4] The Court found that a heads of agreement was not a binding agreement but went on to consider the enforceability of a clause requiring "all reasonable endeavours" to negotiate contractual terms. Blanchard J for the majority stated:[5]

> Where the objective and the steps needing to be taken to attain it are able to be prescribed by the Court, a best endeavours or reasonable endeavours obligation will be enforceable. That may be possible in relation to some contractual obligations of relative simplicity and predictability (*Coal Cliff Collieries*). But a negotiation of complex contractual terms was such a variable matter, both in process and in result, and so dependent on the individual positions which each party may reasonably take from time to time during the bargaining, that it is impossible for a Court to define for them what they ought to have done in order to reach agreement. The Court neither knows the result nor is able to say how each offer should have been made, nor whether it should have been accepted. If ECNZ had sat on its hands and absolutely declined to bargain – which was not the case – it would have been necessary, in order to provide a remedy to be able to state what, as a minimum, it was obliged to do as part of the bargaining process.

[30] By analogy, Mr Harris submitted that, while the objective here may be sufficiently clear ($3 million of referred work), the pathway to it is "such a variable

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3 A 27 August 2009 proposal that Spaceworks refer work to a minimum value of $7,500,000 gross (excluding GST), which in Focus' view would not include work put up for tender where Focus was the successful tenderer.

4 *Energy Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] NZLR 433 (CA).

5 At [115].

matter", "so dependent on the individual positions which each party may reasonably take", that "it is impossible for a Court to define for them what they ought to have done" in order to achieve the objective. He submitted that, as in *ECNZ*, this is not a case where the defendants sat on their hands and absolutely declined to make any attempt to refer work to Focus.

[31] I consider the objective of the endeavour is sufficiently certain ($3 million of referred work). As Mr Harris submitted, the agreement does not prescribe the steps that need to be taken to attain that objective. But I do not consider the Court of Appeal in *ECNZ* was suggesting that prescribing the steps that need to be taken to obtain the objective is a separate requirement beyond certainty of objective for all endeavours clauses to be enforceable. *ECNZ* was a case where the clause's objective was entering into a further agreement between the parties. An agreement to use (all) reasonable (or best) endeavours to reach an agreement may be unenforceable as an agreement to agree. But in the case of an undertaking to use reasonable endeavours to enter into an agreement with a third party, the English High Court has recently said that it should almost always be possible to give sensible content to the undertaking.[6]

[32] Where the obligation is not in the nature of reaching a further agreement, certainty of objective may be sufficient – or at least certainty is to be considered in context. In *Jet2.Com Ltd v Blackpool Airport Ltd*, Moore-Bick LJ said:[7]

> In general an obligation to use best endeavours, or all reasonable endeavours, is not in itself regarded as too uncertain to be enforceable, provided that the object of the endeavours can be ascertained was sufficient certainty…

[33] Lewison LJ said:[8]

> I agree with the judge that the content of an obligation to use reasonable endeavours (or, for that matter, best endeavours) depends on the context in which that expression is used. But the most important part of the context is the objective towards which the endeavours are to be directed. If the endeavours are directed towards a result which can be identified with certainty, then whether the endeavours satisfy the obligation can also be decided, if necessary with the aid of expert evidence.

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6 *Astor Management AG v Atalaya Mining PLC* [2017] EWHC 425 (Comm) at 67. See also *Lambert v HTV Cymru (Wales) Ltd* [1998] FSR 874 (CA).

7 *Jet2.Com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 at [18].

8 At [41]-[50].

…

In my judgment the object of the endeavours and the range of possible endeavours must be considered together in order to decide whether there is a justiciable obligation.

[34] Longmore LJ said:[9]

> … an obligation to use best endeavours should usually be held to be enforceable obligation unless
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> i) the object intended to be procured by the endeavours is too vague or elusive to be itself a matter of legal obligation; or
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> ii) the parties have, in the words of Potter LJ in *Phillips Petroleum v Enron Europe Ltd* [1997] CLC 329 at 343, provided no criteria on the basis of which it is possible to assess with the best endeavours have been, or can be used.

[35] The role of the Court in a commercial dispute is to give legal effect to what the parties have agreed. To hold that a clause is too uncertain to be enforceable is a last resort.[10] I have already concluded this is not a case where the objective is uncertain. Nor is it a case like *P & O Property Holdings Ltd v Norwich Union Life Insurance Society*.[11] In that case, there was uncertainty inherent in the concept of reasonable endeavours because of the nature of the obligation, in that case to use reasonable endeavours to obtain a leasing of each lettable part of a development, where the issue between the parties was whether this obligation required the developer to pay reverse premiums to incoming tenants in order to maximise the passing or headline rent. I consider the objective of referring $3 million of work sufficiently informs the obligation to enable assessment, and I conclude that the reasonable endeavours obligation in clause 3 of the agreement is enforceable. Although clause 5(d) is unquantified, I also treat it as enforceable. Whether the defendants have made reasonable endeavours to achieve the objective is a question of fact to be determined.

Nature of the obligation

[36] Agreements can impose "endeavours" obligations of serious strictness – "best endeavours" and "reasonable endeavours" are but two examples. Of course,

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9 *Jet2.Com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 at [69].
10 *Astor Management AG v Atalaya Mining PLC* [2017] EWHC 425 (Comm) at [64]-[65].
11 *P & O Property Holdings Ltd v Norwich Union Life Insurance Society* (1994) 68 P & CR 261.

such an obligation is not an absolute or unconditional obligation.[12] The nature and extent of such an obligation is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect the obligor's business.[13] A reasonable endeavours obligation usually does not require the obligor to sacrifice its own commercial interests,[14] unless the contract specifies that certain steps have to be taken.[15] Also, a "reasonable endeavours" obligation may be contrasted with an "all reasonable endeavours" or a "best endeavours" one in that where a number of reasonable courses of action are available to achieve the desired outcome, the obligation probably only requires a party to take one reasonable course, not all of them.[16] Mr Ponniah acknowledged that an obligation to use "reasonable endeavours" is less stringent than one to use "best endeavours".

Breach

[37] In its pleading, Focus says that the small percentage of work referred by the defendants in the four year period "speaks for itself", but at trial Mr Ponniah did not rely on res ipsa loquitur. However, Focus still puts its case on the basis that the defendants are prima facie in breach of clause 3 because they referred only a proportion of the $3 million of work, only some of which was of a negotiated tender nature, in circumstances where the total amount of Spaceworks full project work (including a build element) was such that it was more than reasonable to have anticipated that $3 million worth of work could have been referred to Focus. Focus complains that Spaceworks had over 720 projects in the period from 2010 to 2016 – including 419 full projects in Auckland and 114 out of Auckland – but in respect of only approximately 44 projects was work referred to Focus or Focus invited to tender. It says much of the full project work was "turnkey" where the defendants could choose the construction contractor, but the defendants chose to tender the work and preferred

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12 *Electricity Generation Corporation T/As Verve Energy v Woodside Energy Ltd* [2014] HCA 7 at [41].

13 At [41].

14 *Phillips Petroleum v Enron Europe Ltd* [1997] CLC 329 (CA).

15 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577 at [35]. Will

16 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577 at [33]. Although I note that in *Electricity Generation Corporation T/As Verve Energy v Woodside Energy Ltd* [2014] HCA 7 at [40], argument proceeded on the basis that "reasonable endeavours" and "best endeavours (or efforts)" are substantially similar obligations.

other construction contractors over Focus. Of particular significance is the referral of work to Practec Interiors, which Focus says it could have undertaken. Mr Ponniah submitted that the defendants' first step should have been to say to clients: "We work with Focus, get a price from them." If that were not possible, Focus should have been invited to tender at every opportunity, regardless of the nature or location of the job, until the $3 million was achieved.

[38] Mr Plumpton said that Focus had a good tender strike rate especially with interior fitout projects, but the strike rate on Spaceworks projects was very low. He said there were instances where Focus would have been cheaper if its price had been analysed correctly. At trial, Focus went so far as to allege the defendants had deliberately avoided referring work to Focus, for example, by manipulating tenders. Focus also complains that the defendants failed to discover documents relating to all the projects that were not referred, precluding Focus from assessing them.

[39] The defendants say that converting the number of projects actually carried out by Focus into a percentage of the total number of projects Spaceworks undertook does not prove anything. They say some Spaceworks projects were limited to design or furniture supply, with no build element. Where there was a build element, Spaceworks did not control whether Focus actually worked on any particular project. The market changed after the 2008 financial crisis and Spaceworks' clients wanted the build element to go to a competitive tender and often Focus was outbid on price. The defendants recommended Focus when they thought Focus could be suitable. They say they attempted to refer over $6.5 million of work to Focus between 2010 and 2016. Of that, Focus completed $1,252,256. The rest it either did not win – usually because it was too expensive – or declined.[17]

[40] The evidence shows that Spaceworks undertook many full projects where work was not referred to Focus, such that lack of available work is not a complete answer to the complaint. Indeed, the defendants do not suggest that. But an abstract assessment founded on the proportion of work referred, absent consideration of the circumstances, would be meaningless. It is necessary to assess whether the

[17] Ms Whaley's spreadsheet indicated that Focus tendered unsuccessfully for work it priced at $2.153 million and declined projects valued at $2.723 million.

defendants' endeavours to refer work to Focus were reasonable in the circumstances. However, the evidence did not enable, and Mr Ponniah did not propose, a job by job analysis of the reasonableness of the defendants' endeavours. A job by job analysis may also be inapt since the reasonable endeavours obligation is to refer work to Focus having a total gross value of $3 million – not to refer all or any particular project to Focus, as Mr Plumpton acknowledged.

[41] The best that can be done on the evidence is to assess the reasonableness of the defendants' actions in the circumstances, distilled into the following topics in dispute:

(a) moving from negotiated tender to competitive tender;

(b) not inviting Focus to tender on all turnkey projects;

(c) work referred to other "preferred contractors";

(d) not inviting Focus to tender on retail projects;

(e) not inviting Focus to tender on out of Auckland projects;

(f) not inviting Focus to tender on joinery only or furniture only projects; and

(g) discovery.

[42] Before turning to these topics, I make some brief initial observations about the protagonists based on the documents and oral evidence. Mr Plumpton came across as a strong-minded operator. Ms Whaley could also be so. Their relationship clearly broke down in 2008/2009. The agreement then required their companies to try to continue to work together despite the differences. Mr Plumpton took something of a step back, appointing Mr Dixon as the Focus liaison person. There was a further $1.25 million of referred work between 2010 and 2016, but Mr Plumpton's evidence indicated he suspected from very early on after the agreement that Ms Whaley was not acting in good faith. A good deal of his concern, expressed vigorously on a number of occasions between 2010 and 2016, stems from an incorrect view of the reasonable

endeavours obligations in the agreement. Ms Whaley acknowledged she wanted to get the obligation completed as soon as possible, without detriment to her clients. This was not a happy working relationship.

Moving from negotiated tender to competitive tender

[43] Focus complains that Spaceworks moved away from a negotiated tender model to a turnkey model with competitive tenders for the build work. Mr Plumpton suggested this may have been aimed to achieve higher profits for the designer (Spaceworks). He also suggested that turnkey was a more expensive model for the client. He claimed turnkey was contrary to the intent of the agreement but did give Spaceworks more control over the appointment of the construction contractor.

[44] Mr Plumpton gave an example of a job for Woods in 2012, which went to tender despite Focus having a history of previous negotiated work with that client and Ms Whaley's initial indication that it was a good opportunity to negotiate, and where there were no documents indicating Spaceworks had suggested the client proceed by negotiation.

[45] Focus subpoenaed Mr Davies from Practec. He provided Practec invoices for its projects with Spaceworks. He confirmed that the projects were turnkey. Spaceworks would request a quote and, on most occasions, there would be some negotiation on price and adjustment of scope of work. Practec nearly always invoiced Spaceworks. Except on the occasions Practec was required to tender, he understood the decision to appoint Practec as contractor was made by Spaceworks under the turnkey arrangement. He acknowledged in cross-examination that he would not always know if another contractor had been asked to price for a job, and that Practec was not generally privy to communications between Spaceworks and its client about which contractor to use. He acknowledged that he would not know if the decision to appoint Practec was in fact made by Spaceworks or its client.

[46] Focus called Ms Wilkes, the owner of another design company, to give her opinion on who decides which contractor is used in a turnkey fitout project. She said in her experience the decision is the designer's and that in 90 per cent of her company's turnkey projects her design company has the discretion to select, nominate or

recommend a contractor and generally the client would run with it. She acknowledged that she works with Focus.

[47] Focus also called Mr Home as an industry expert. He said that for a large number of projects Spaceworks used a turnkey arrangement, which permitted the defendants to elect the contractor. Based on his review of the defendants' discovery, Mr Home concluded the defendants had a free hand in selecting the main contractor. Mr Home identified some 223 turnkey projects that Spaceworks undertook, of which only eight were referred to Focus.

[48] Ms Whaley's evidence was that before 2008/2009 much of Spaceworks' work was office fitouts with substantial six-figure budgets. Spaceworks was severely affected by the financial crisis that hit in 2008. Many of the businesses who were likely clients were struggling. Expensive office fitouts became luxuries they could not afford. Projects started and stopped. Clients became much more cost-conscious. Budgets were cut and tightly controlled. As the market contracted, it became more competitive and winning work became more challenging. In general terms, the mix of work changed between 2008 and 2010 from being predominantly larger office fitouts to smaller-scale retail projects. The number of projects increased but the average project was smaller and the margin tighter. Retail projects were often less reliant on the kind of construction work in which Focus specialised.

[49] Ms Whaley said the market dynamics made it difficult for Spaceworks to invite only Focus to price a job. Clients usually wanted to see more than one price before committing to a contractor. On larger jobs for larger clients there were usually formal tender processes. On smaller projects, where clients were particularly price-sensitive, Spaceworks usually had to get at least two prices so that clients could get a sense of what the market was charging, although she acknowledged in cross-examination that Spaceworks sent small jobs to Practec only. The requirement to get more than one price was often covered off informally in meetings or discussions at the point where the client was ready for the job to be priced. Sometimes the client would select a single contractor from an initial multi-party tender round, and from there Spaceworks would be in a "negotiated" tender situation with only one contractor. Inviting only Focus to price a job from the outset was seldom an option. Caltex was an example

where Focus was initially asked to price on a negotiated tender basis, but withdrew after the client said it wanted a 20 per cent reduction or would go to market. Spaceworks also found that the prices of Focus were often higher than those of other contractors, which made it difficult to present Focus as the only contractor for the client to consider.

[50] Ms Whaley also said she did not change Spaceworks' business model in order to disadvantage Focus, and the business model did not change after the agreement. Spaceworks could not select a client without the client's approval. Spaceworks aims to be a single point of contact for the client, but the client still makes the decisions. Spaceworks does not run turnkey projects in the way that Focus claims. Spaceworks put up subcontractors on many jobs, but in the end the selection of a contractor is usually made by the client, and the client selection usually comes down to price. When two or more contractors' prices are within 2-3 per cent of each other, Spaceworks is able to make a recommendation that often carries the day.

[51] I accept Ms Whaley's evidence about the market and Spaceworks' business. Mr Plumpton was not really in a position to dispute it. It is consistent with Ms Whaley's email to Mr Plumpton in September 2012, where she said: "I know you would prefer negotiated however the price conscious market has predetermined whether we tender or not." That same month, Mr Dixon of Focus acknowledged that many clients in the market want a competitive tender, following a meeting with Ms Whaley to provide feedback on tender pricing given the low success rate. In another email to Mr Plumpton in October 2012, Ms Whaley said:

> Clause 5(d) says we will make reasonable endeavours to achieve referral work that is of a negotiated tender nature, always subject to the requirements of the client – where possible we have done this. However it has frequently been our clients' requirements to have an open book tender.

[52] In the Woods example from about the same time in 2012, Ms Whaley said they endeavoured to make it a negotiated tender. While the documents do not confirm whether Spaceworks sought to dissuade the client from going to competitive tender in that instance, the evidence does not establish that the defendants failed to make reasonable endeavours to refer work of a negotiated tender nature. Focus ultimately withdrew from the tender, disappointed that it transpired there were more tenderers

than it had been told and that the project had been placed on the Building Tender Services website. Mr Plumpton characterised this as Spaceworks wasting Focus time, but there is no evidence that Spaceworks was responsible for those developments. Indeed, Spaceworks tried to get Focus to change its mind.

[53] I consider the plain meaning of the agreement and Ms Whaley's evidence answer the complaint that the defendants failed to make reasonable endeavours to refer work of a negotiated tender nature. That obligation was "subject always to the requirements of the client". The client's requirements may be an explicit direction to tender a particular project but may also be a more general requirement for competitive pricing. In that context, Spaceworks' reasonable view as to whether recommending a single contractor, and Focus in particular, for a negotiated tender was in the client's interests for the job would be relevant. I deal with the "preferred contractors" allegation further below. Also, the reasonable endeavours obligations did not require Spaceworks to sacrifice its own commercial interests. I do not overlook clause 5(c) which recognises Focus' wish to contract directly with a client or be secured for payment. The reasonable endeavours obligations did not preclude Spaceworks from operating a turnkey model, subcontracting the build element.

[54] The evidence from Focus' witnesses did not substantiate its allegations in relation to negotiated work. Mr Plumpton resisted examples where the documents indicated that the client, rather than Spaceworks, had made the decision.[18] I did not find helpful Mr Home's opinion that Spaceworks had a "free hand" to "elect" Focus as the contractor, nor his conclusion that he "could not find any clear evidence that the defendants referred any work directly to Focus or made any effort to". Those opinions (and others) were based on limited documentation from which he advocated unwarranted adverse inferences. Counsel did not have Ms Wilkes address the code of conduct for expert witnesses at all and I did not find her general opinions substantially helpful.

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[18] Caltex in July 2011 and another instance in December 2013 (trying to avoid decision to tender); William Buck (decision to eliminate Focus from tender).

Not inviting Focus to tender on all turnkey projects

[55] Focus also complains that it was not invited to tender on all turnkey projects. The defendants accept that Focus was not always invited to tender when it could have been. Ms Whaley said that where they were able to nominate a contractor to tender for a job, or recommend a contractor to a client, they always chose contractors who were best suited to the particular job. She said that where they felt that Focus could be suitable for a job, they would recommend Focus. She regularly encouraged Focus to participate in tenders for jobs where she believed they were a good option for the client. Ms Whaley pointed out to Focus that projects could move from open tender to negotiated tender after the first round if the client was happy to work on that basis. I note this is also consistent with her email to Mr Plumpton in September 2012 referred to above.

[56] In general terms I accept that it was reasonable in the circumstances not to invite Focus to tender where it was unsuitable. As to the reasonableness of the defendants' view that Focus was unsuitable, I accept that the defendants could base their view on experience of Focus' pricing. But part of the complaint is that Spaceworks had other "preferred contractors", which needs separate mention.

Work referred to other "preferred contractors"

[57] Focus alleges that Spaceworks referred work to others, particularly Practec, Black Interiors and Plum Construction, treating them as "preferred contractors" in breach of the agreement. Mr Plumpton and Mr Home attempted to analyse work referred to Practec instead of Focus. For a number of these, Mr Plumpton disputed the reason given by Spaceworks in its annual reports.[19] Mr Plumpton said that of Spaceworks' 64 projects with Practec, Focus tendered for six and declined four. Mr Home concluded from his document review that the defendants had a preferred contractor relationship with Practec for a couple of years and then moved to Black around the time of the Griffins project in 2016.

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[19] In cross-examination Mr Plumpton withdrew a number of his examples disputing the reason given: Frucor, Arnotts, AWT Water, Travel Managers and Juken where Focus was outbid on price. Mind Lab Christchurch and Tomuri were withdrawn for other reasons.

[58] Ms Whaley acknowledged that Spaceworks worked a lot with Practec (51 unique projects rather than 64, totalling $5.5 million of work) but said she would not describe them as a "preferred contractor". She disputed Mr Plumpton's analysis of Practec projects. Spaceworks frequently instructed Practec to provide budget pricing (indicative pricing with no promise of a contract). She said Practec provided a good service with quick turnaround, which Focus could not do.

[59] Ms Whaley said Spaceworks invited Focus to price for a number of the jobs that went to Practec, almost always because Focus was more expensive. Sometimes that led to follow-on work, for example with Frucor. Ms Whaley said Spaceworks only began working with Black in March 2016 following an introduction on an overseas project. She acknowledged they were having some issues with Practec by this time. Black was nominated for the Pie Funds project in June 2016, but that followed Focus' withdrawal due to lack of subcontractor interest and Ms Whaley's question internally "Who else do we have?"

[60] Ms Whaley also said Spaceworks did a handful of jobs with Plum, but stopped using them. Ms Whaley gave an example of an opportunity she tried to create for Focus by telling Mr Plumpton that Plum had priced it but she wanted Focus to do it.

[61] Ms Whaley gave examples of attempts to refer work to Focus where Focus was outbid by other contractors on price. She also responded to complaints about specific projects that Focus did not secure. My Food Bag was an example. Mr Plumpton said this project caused frustration to Focus and showed a lack of will by Spaceworks. Mr Dixon provided an estimated cost of $93,875 and preliminary drawings in November/December 2014. Despite time pressure for the job, Focus did not hear back, but heard from another contractor in the new year that Practec was undertaking the work. Ms Whaley said that the successful bid was $71,035.

[62] In cross-examination Ms Whaley said it was up to Spaceworks to determine the best fit for the project. Spaceworks would often ask the client to put someone forward they wished to use and Spaceworks would choose one or two more contractors to put into the mix to price. She indicated Focus was first in line. They would go out to tender, review the tenders, go back to the contractors to get them to price "apples

for apples", and discuss with the client before a decision was made. She said there were two to three tenderers for most Practec jobs. On small projects, as a lot of Practec jobs were, Spaceworks sent them to Practec only. In terms of price competitiveness, she found Focus was better suited to bigger projects. She explained that the reference in a Spaceworks email to Practec being more costly on smaller jobs and competitive for larger jobs meant compared with another very small contractor.

[63] The evidence indicates that the defendants had a working relationship with Practec that resulted in Practec working on many projects at least until the defendants had issues with Practec in late 2015 and early 2016. Around the same time, the defendants started working with Black. Ms Whaley was quick to recommend Black as a great option in March 2016 due to her experience of having them price on other projects. As Ms Whaley said to that client, this industry is very relationship based. Also in March 2016, an email from Ms Whaley to Black indicates that her staff were assuming the relationship Spaceworks had with Practec was going to be the same with Black. Soon after, Spaceworks asked Black to assist with budget pricing for a Griffins tender, agreeing to pay Black $800.

[64] There was particular dispute about this fitout of Griffins' head office in 2016, which ultimately led Focus to say it would no longer tender for any more Spaceworks work. Mr Plumpton said it appeared Spaceworks was intentionally setting Focus up to fail. Mr Home considered that Spaceworks had preferred Black, paying it to assist with budget pricing and disclosing to it other confidential tender information.

[65] Ms Whaley said she was asked by Griffins to seek budgets and told there would be a formal tender for contractors. In relation to seeking a budget, she said she contacted Black because she knew Focus had made it clear they did not want their time wasted, so she felt it was better to bring them in at tender time. In relation to the tender, she said she was allowed to nominate candidates but not influence the decision. She sent out invitations to tender for the fitout work to Black, Practec and Focus. In the first round, Focus was the middle bidder. At that stage, the client was looking at Practec (the lowest bidder) and Focus. Spaceworks was then asked to ensure that the three tenderers all costed exactly the same work and offered some savings opportunities. In the second round of bidding, Focus' bid was higher than the other

two. The client met the two lower contractors, Black and Practec, and awarded the contract to Black.

[66] When Focus was advised, Mr Dixon responded expressing surprise that they were the dearest. He expressed concern at the work put in that had not turned into anything tangible, noting the work that proceeded was only ever tender work. He said: "We are aware of your strong relationship with other contractors, and therefore for commercial reasons we will be declining to tender any more of your work."

[67] Ms Whaley acknowledged in cross-examination that on 5 July 2016 she sent Black a tender analysis, saying: "it's closer than I thought, but is attached for information. Please keep confidential, however the project / client and other tenderer is not named." She said the other tenderer was Practec not Focus, but acknowledged it was not fair. She said it was not common for Spaceworks to disclose its tender analysis. She also said Spaceworks gave Focus a whole lot of options to price that neither of the other two tenderers had the option to price because Spaceworks wanted Focus to win the job. It was not clear exactly what tender information or analysis attachment Ms Whaley provided to Black, but it appears to have included another tenderer's price. I consider it likely her motive was to get the best price for the client. Even if she favoured Black, the Focus bid was a distant third in this tender. This email does not show that she failed to make reasonable endeavours to refer work to Focus.

[68] Ms Whaley also explained that an email she sent to Black on 12 July 2016 saying only "Call me" and attaching a tender spreadsheet was likely sending to Black Spaceworks' analysis of Black's own tender and saying "give us a call so we can show you where the numbers sit". She said this was quite regular. Sometimes they have to split out or break down the contractor's price in the tender analysis. Although Mr Home was suspicious, I do not consider this email indicates anything improper. That same day and a couple of days later, Spaceworks was also asking Focus to update its final pricing.

[69] The last tender analysis for Griffins indicated that Practec was the lowest tenderer, followed by Black, but Spaceworks recommended Black on the basis that it would work with them to get a further reduction. Focus was substantially higher.

[70] A good working relationship with other contractors is not necessarily inconsistent with the obligations owed to Focus or Spaceworks' "preferred supplier arrangement" with Focus. The issue is whether a relationship with one or more other contractors (whether or not described as "preferred") meant that Spaceworks was not making reasonable endeavours to refer $3 million of work to Focus or to achieve referral work of a negotiated tender nature. Reasonable endeavours did not require the defendants to recommend Focus for negotiated work on, or invite it to tender for, every project. For example, the defendants could decide, acting reasonably and based on experience, that a project was not suitable for Focus. As the agreement did not require the defendants to refer work to Focus if that was not in the client's interest, the issue requires assessment of whether Spaceworks was recommending Focus for negotiated work (subject to the client's requirement to tender) and inviting Focus to tender, and whether Focus declined or was outbid on price. I say outbid on price because I do not consider there was sufficient evidence for Spaceworks to rule out Focus on performance. I accept Mr Plumpton's evidence in this regard.

[71] In relation to recommending Focus for negotiated tender work, I accept that the defendants were constrained by the market. But two aspects require further consideration:

(a) Small jobs where Ms Whaley acknowledged she sent them to Practec only – this was consistent with Ms Whaley's view that Focus was better suited to larger office fitout projects. I do not consider that the defendants were obliged under the agreement to recommend only Focus on a negotiated tender basis for jobs where they considered that the client required competitive pricing and that, based on experience, Focus was likely more expensive than other contractors, such as Practec, who may well, as Mr Ponniah put it, have been more malleable.

(b) Requests for budget pricing – Spaceworks frequently instructed Practec to provide budget pricing and then in 2016 offered to pay Black $800 for budget estimates. Of course, Spaceworks had no legal obligation to pay Focus for budget estimates. But Ms Whaley acknowledged in cross-examination that they would often say to clients: "whilst we need

> to get a tender, our preference is always to go with the budgeted contractor". Requesting budget pricing, and paying for it, therefore put that contractor in a favourable position. However, the circumstances may have dictated that. Ms Whaley said Practec provided a good service with quick turnaround, which Focus could not do. She also said she contacted Black in 2016 because she knew Focus had made it clear they did not want their time wasted. That is consistent with Spaceworks being aware, at least in 2012, that Focus was frustrated at the cost of $2,000-$3,000 each time and the low tender strike rate. This may be an aspect where each party was responsible for the difficult relationship.

[72] In relation to invitations to tender, the evidence does not show that the defendants failed to make reasonable endeavours to invite Focus to tender for projects. While the defendants did not always invite Focus to tender, the explanation was that the project was not suitable in the sense that the defendants considered, based on experience, that Focus would be more expensive. The evidence of tenders where Focus was outbid was consistent with this explanation of the defendants' experience. There was also one occasion where the defendants could recommend one contractor in addition to the client's choice and recommended Practec as it had done work for the client previously.

[73] In relation to tender outcome, the allegation that tenders were manipulated to favour another contractor was not made out. I have dealt with the Griffins tender. The other examples worth noting are Metro Caltex in 2011 and Canon in April 2012. Focus claims its Metro Caltex quote was lower than Plum's if you remove joinery. It is not clear why Focus did not win the Canon tender as its price appeared slightly lower than Practec's ($154,225 versus $157,224). The evidence did not sufficiently address differences in scope and I do not infer from this that prices were manipulated. Also, as indicated, the reasonable endeavours obligation is to refer work to Focus having a total gross value of $3 million, not to refer every possible job.

[74] Overall, I consider that the evidence in relation to work referred to other contractors does not show that the defendants failed to make reasonable endeavours

to refer work to Focus – just as I do not consider that the obligation on Focus to make reasonable endeavours and act in good faith to achieve the referral of work required it to tender for every project or reduce its profit margin to make its bids more competitive. Focus was entitled to decline to tender for example if it lacked capacity (even if it was prioritising negotiated work) or considered it a waste of time – as Mr Plumpton said he did in relation to a Grey Lynn warehouse project, for example. But doing so meant it was going to take longer to achieve the objective of $3 million of referred work. Even on Mr Plumpton's adjusted numbers,[20] Focus declined projects valued at $1.60 million and tendered unsuccessfully for work it priced at $2.01 million.

Not inviting Focus to tender on retail projects

[75] Mr Plumpton said that Focus was not considered for many retail projects, meaning fitouts in a retail environment, even though it had previously carried out many retail projects, including for Spaceworks. He complained about Whitcoulls as an example of retail work (which also involved nationwide work), saying that Focus provided advice and budgets, but it turned out to be a waste of time. He said Spaceworks' initial feedback was that Focus was too expensive but later changed to Whitcoulls wanted to use their own contractor.

[76] Ms Whaley said Spaceworks referred some House of Travel work to Focus. That client expected more than one price before awarding work and Focus missed out on other House of Travel work on price. In cross-examination she said that she classified retail projects as those heavily fitted out with fixtures, gondolas and the like, so she did not classify House of Travel as retail.

[77] Ms Whaley also said Spaceworks attempted to refer Whitcoulls work to Focus in 2012 even though Spaceworks had done design-only work for Whitcoulls and they had their own contractors. Focus was interested albeit Mr Dixon of Focus acknowledged that Focus did not have its own joinery shop which could make Whitcoulls' existing contractors slightly more cost effective on smaller projects. Focus submitted tenders directly to Whitcoulls for some Whitcoulls refits but missed out on price. Focus also tendered on the Clash store fitout but did not win. Ms Whaley

[20] Adjusted from Ms Whaley's spreadsheet referred to above at [39].

referred to Caltex where Focus was asked to price a retail project on a negotiated tender basis but withdrew, as indicated above. Ms Whaley considered that Focus found it hard to compete on price for retail projects. She acknowledged in cross-examination that she thought Focus had shown on their retail project pricing that they were not fit for the work, so she looked to find jobs where they had a good past history, which was office fitouts.

[78] This indicates that Ms Whaley chose not to invite Focus to bid for other retail project work. But the evidence does not show that the defendants acted unreasonably.

Not inviting Focus to tender on out of Auckland projects

[79] Focus says that full projects outside of Auckland could and should have been referred to Focus, but in breach of the agreement Focus was never offered the opportunity. Focus had a Wellington office and did some Wellington work. Mr Home identified 114 full projects out of Auckland. Mr Plumpton acknowledged there would be isolated instances where Focus was unable to undertake the work.

[80] The evidence indicates that Focus worked on the Wellington Tunnels Alliance project and then Spaceworks attempted to refer another Wellington-based project to Focus in late 2010, which Focus turned down in January 2011 because its labour in Wellington was already committed elsewhere. Mr Dixon of Focus told Ms Whaley that its Auckland-based staff were not interested in travelling and that even if Focus could get staff from Auckland, the complexity and coordination involved meant he could see problems a local contractor would not have and did not want to commit when there was a high chance of letting Spaceworks down. This one instance did not necessarily mean that Focus was not available for Wellington referrals. But Focus later shut its Wellington office. Ms Whaley considered that out of Auckland work was generally only feasible where the client was prepared to pay a premium to have an Auckland contractor who would charge additional travel and accommodation costs.

[81] Also, out of Auckland projects were included in the annual reports provided under the agreement with a note of the location explaining why they were not referred. Focus did not raise that it was willing and able to undertake them. This suggests it was not. Indeed, the letter on behalf of Focus alleging breach in June 2014

acknowledged that projects in Wellington, Christchurch or Samoa might be expected not to generate opportunities for Focus. Focus also had an obligation to make reasonable endeavours and act in good faith to achieve the referral of work.

[82] In the circumstances, I consider the evidence does not show that the defendants acted unreasonably in not referring out of Auckland projects.

Not inviting Focus to tender on joinery only or furniture only projects

[83] Mr Plumpton complained that Focus did not get invited to do joinery only or furniture only projects. He accepted that Focus did not get involved in supply of furniture, which I consider is not within the scope of "work" to be referred. But Mr Plumpton said that Focus could have undertaken joinery only work, meaning installing, for example, kitchen cabinets and utilities around them.

[84] The defendants did not suggest that they sought to refer such projects to Focus. Consistent with Ms Whaley's general approach, she may have felt that Focus was not suitable for joinery only or furniture only jobs and not recommended them. Mr Harris referred to Mr Dixon's acknowledgement in 2012 that Focus did not have its own joinery shop, which could make others slightly more cost effective on smaller projects. Mr Plumpton did not accept that or that a Focus margin would necessarily make Focus more expensive than if the client went direct. He said Focus had small joinery facilities from 2014.

[85] If Spaceworks doubted the suitability of Focus in terms of price rather than its interest in these projects, the best way to test its competitiveness would have been to invite it to tender. However, joinery only or furniture only projects were also included in the annual reports provided under the agreement with a note such as "joinery only" explaining why they were not referred. Focus did not raise that it was willing and able to undertake them, suggesting it was not. Also, the letter on behalf of Focus alleging breach in June 2014 acknowledged that projects which involved only joinery or furniture might be expected not to generate opportunities for Focus.

[86] I consider the evidence does not show the defendants acted unreasonably in not seeking to refer joinery only or furniture only projects to Focus.

Discovery

[87] Finally, I am not prepared to draw any adverse inference against the defendants based on their discovery in relation to Practec or otherwise. Standard discovery was ordered in the proceeding, followed by particular discovery in relation to out of Auckland full projects, and projects where Spaceworks' involvement related to joinery and/or furniture supply. Spaceworks did discover some documents in relation to almost all of the Practec projects. While I accept that the proportionate discovery ordered did not enable Focus to review every aspect of all of Spaceworks' projects that were not referred to Focus, the expectation that this claim should require that level of discovery or be prosecuted on the basis that it is for Spaceworks to prove the reasonableness of its conduct in relation to every project not referred to Focus was misconceived. Mr Ponniah submitted the defendants had at least an evidential burden in relation to their clients' requirements. I consider the defendants discharged any evidential burden. Similarly, although Mr Ponniah submitted Ms Whaley accepted at one stage that all documents indicating client requirements and reasonable endeavours were in evidence, I do not consider that was really her evidence nor infer that there are no undiscovered documents that may support the defendants' case. There were omissions from Spaceworks' discovery but I do not infer that the defendants withheld any documents that adversely affected their case or supported Focus' case. Further, the defendants offered to make all of their files available to Focus' counsel and expert on the giving of suitable undertakings, an offer that was not taken up.

Conclusion

[88] I consider that Focus has failed to show that the defendants breached their reasonable endeavours obligations.

Loss

[89] I should nevertheless deal briefly with causation and loss. The defendants raised a causation issue as it emerged at trial that Focus ceased taking new fitout work from April 2013 following a group restructuring. Mr Harris submitted that Focus can only sue for its own loss, which ceased after it ceased taking on work. I do not consider the internal restructuring is a bar to recovery. Focus remains in existence and the entity

entitled to the benefit of the obligations in the agreement. If the effect of the restructuring was that from April 2013 the defendants agreed to refer work to another company in the Focus group, Focus must be taken to have accepted that such work was referred for the purpose of the agreement. Equally, the defendants must be taken to have accepted that Focus could claim for failure to refer work to that other company.

[90] Even if Focus had established a failure to make reasonable endeavours to refer work to Focus, as indicated above at [23], I consider Focus can only claim the loss resulting from Spaceworks' failure to make reasonable endeavours until July 2016 when Focus gave notice that it would no longer tender. The parties agreed this is a lost opportunity case. Spaceworks' expert, Mr Lazelle, considered any loss was more appropriately calculated on the basis of the additional profit foregone at the point of "termination" by Focus in July 2016. He considered a 40 per cent discount was appropriate to reflect uncertainties. Conceptually, I would describe the loss as the profit foregone during the period before July 2016, but I agree with Mr Lazelle that a discount is appropriate reflecting uncertainty that $3 million of work would have been referred prior to July 2016 if Spaceworks made reasonable endeavours to refer work, including negotiated work. That includes uncertainty that if Spaceworks had referred more work, Focus may have had capacity constraints or more profitable work elsewhere at times. I am willing to assume Focus would otherwise have accepted referral work despite its argument in this litigation that it was entitled to higher margin work. I also would not have discounted for future uncertainties. A broad estimate is required. I consider a 20 per cent discount would have been appropriate, reducing the lost revenue to $1,398,195.20.

[91] I would not have accepted Focus' loss calculation based on a margin of 24.27 per cent across all sales (including the tenders it won at lower margins), which was based on the average margin earned by Focus on Spaceworks referred projects from February 2002 to December 2007. That margin may have excluded wages. Mr Plumpton acknowledged the average margin reduced to 15.19 per cent in the period from February to May 2008 (which he said reflected Spaceworks' switch to tender rather than negotiated work). Focus' average achieved margin on Spaceworks referral projects for the period of the agreement (2010-2016) was 15.34 per cent. Mr Basrur, Focus' quantum expert, considered that the margins had been calculated

on the same principles in the periods before and after the agreement. But his evidence did not establish that a margin of 24.27 per cent was achievable in the period from February 2010 onwards. I infer it is more likely that the reduced margin from 2008 reflected market conditions. Mr Davies confirmed that in interiors most of the GFC was an incredibly hard period. He also said that margins were extremely thin in 2012. In any event, given my interpretation of the negotiated tender obligation, I would not have applied the higher margin to all referrals.

[92] Focus did not disclose its financial statements for the period from 2010 but the evidence indicated that Focus derived a margin on Spaceworks' work of 15.34 per cent during the period of the agreement. Mr Lazelle considered that margin did not reflect all variable costs and discounted it by 3 per cent. The reasonable endeavours obligation included negotiated work, but I do not consider the evidence establishes that an upwards adjustment should be made to the average profit margin. Even if Spaceworks failed to refer negotiated work to Focus, because it referred it to another "preferred" contractor such as Practec, the evidence of Practec's margin does not show a higher margin. Therefore, I would have calculated the loss based on a margin of 12.34 per cent.

[93] Accordingly, if Focus had established a breach of the agreement, I would have calculated its loss as $172,573.20.

Result

[94] The plaintiff's claim is dismissed.

[95] The defendants are entitled to costs. As they sought to be heard on costs, I direct that, if costs cannot be agreed, the defendants are to file and serve a memorandum within 15 working days, and the plaintiff is to file a memorandum in response within 10 working days thereafter. I will deal with costs on the papers.

Gault J