

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

CIV-2007-404-3606

BETWEEN	DIANE ROSINA TOWAI DIVETT First Plaintiff
AND	REFOCUSSING TRUST Second Plaintiff
AND	PAULINE SKEATES First Defendant
AND	INSIGHT SERVICES LTD Second Defendant

Hearing: 2 and 3 February 2011

Counsel: C L Elliott and S McLaughlin for Plaintiffs
A E McDonald for Defendants

Judgment: 19 July 2011

JUDGMENT OF BREWER J

*This judgment was delivered by me on 19 July 2011 at 2:00 pm
pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

SOLICITORS

Ellis Verboeket & Terry (Wellington) for Plaintiffs
Hoffman Law (Auckland) for Defendants

COUNSEL

CL Elliott; AE McDonald

Contents

Background	[1]
Settlement agreement	[8]
The issues	[11]
(a) <i>Developer of Refocussing</i>	[13]
(b) <i>Ownership of intellectual property rights</i>	[16]
(c) <i>Use of Refocussing</i>	[20]
(i) <i>Continued use of 'Refocussing' within joint venture</i>	[23]
(ii) <i>Dissemination of materials containing 'Refocussing'</i>	[37]
(iii) <i>Confusingly similar branding</i>	[38]
(d) <i>Failure to transfer website</i>	[46]
(e) <i>Use of best endeavours</i>	[52]
(f) <i>Destruction of materials</i>	[61]
(g) <i>Production of own written materials</i>	[65]
(h) <i>Reproducing Divett's copyright works</i>	[68]
(i) <i>Using terminology coined or created by Dr Divett</i>	[90]
(i) <i>Knowings</i>	[99]
(ii) <i>Needs & unmet needs</i>	[104]
(iii) <i>Focus</i>	[107]
(iv) <i>Where is God for?</i>	[109]
(j) <i>Dissemination</i>	[113]
(k) <i>Destroy materials</i>	[118]
(l) <i>Public statement</i>	[120]
(m) <i>Negative or derogatory statements</i>	[126]
(n) <i>Refocussing trainees</i>	[140]
Summary	[148]
Remedies	[151]
Costs.....	[156]

Background

[1] Dr Divett (the first plaintiff) is a pastor and teacher/counsellor. In the course of her counselling work Dr Divett developed her own “holistic counselling and psycho-educational teaching theory and practice known as Refocussing”.¹

[2] Ms Skeates (the first defendant) was associated with Dr Divett from about early 1997 until about 2001. Within this period Ms Skeates received training in Refocussing from Dr Divett and for a time was a trustee of the second plaintiff whose affairs she assisted Dr Divett to manage and organise.

[3] In or about 2001 Ms Skeates set up her own counselling business and soon built up a following of like minded counsellors and teachers in New Zealand and overseas. The second defendant is Ms Skeates’s business entity.

[4] The plaintiffs issued proceedings in this matter in June 2007 alleging, inter alia, that Ms Skeates had breached Dr Divett’s copyright in Refocussing. The proceedings were resolved by mediation and a settlement agreement was entered into on 15 September 2008.

[5] On 22 September 2008 Venning J, by agreement, made an order staying the proceeding subject to leave being reserved to enforce the settlement agreement. An order such as this one is commonly referred to as a Tomlin Order.² It has the advantage to the parties of bringing a Court action to a conclusion while leaving open the ability of a party to enforce the settlement agreement without the need to issue fresh proceedings.

[6] Subsequently the plaintiffs apprehended that the defendants were in breach of the settlement agreement and applied to enforce its terms. In furtherance of the application the first defendant was cross-examined in July and August 2010. The plaintiffs filed an amended application for orders enforcing the settlement agreement

¹ Amended Statement of Claim, dated 21 April 2008, at [9].

² After the decision of Tomlin J in *Dashwood v Dashwood* [1927] WN 276. See Foskett *The Law and Practice of Compromise* (7th ed, Sweet & Maxwell, London, 2010) at [11-22]–[11-28].

on 20 August 2010 and argument on the amended application was heard before me on 2 and 3 February 2011. The plaintiffs seek, essentially:

- (a) Declarations that the defendants have breached the terms of the settlement agreement; and
- (b) An order restraining further breach; and
- (c) An order directing the defendants strictly to give effect to the terms of the settlement agreement henceforth; and
- (d) That leave be reserved for the plaintiffs to bring proceedings for damages.

[7] The amended application for enforcement of the settlement agreement particularises in detail the declarations and orders sought under the above headings.

Settlement agreement

[8] In very general terms, the settlement agreement contained an acknowledgement by Ms Skeates that Dr Divett owned copyright in the Refocussing theory and the various works describing it. Ms Skeates accepted that she was not entitled to use Dr Divett's material and she undertook that she would not do so in the future. Instead, she was free to develop her own theory and materials and could teach with reference to those. In addition, she would use her best endeavours to prevent or restrain others within her professional orbit to whom she had provided Refocussing training or materials from using Refocussing.

[9] The plaintiffs allege that Ms Skeates made superficial changes to the Refocussing theory and materials and continued very much on the same basis as she had previously. Further, far from using her best endeavours to cause her followers to cease using Refocussing, she poured vitriol on the name and reputation of Dr Divett and did all she could to frustrate the intent of the settlement agreement.

[10] Ms Skeates denies all of the above. Her case is that she has performed her obligations under the settlement agreement, although she does accept that some of her endeavours thereunder could not properly be described as “best endeavours”.

The issues

[11] The settlement agreement is a contract between the plaintiffs and the defendants. It’s interpretation is governed by the common law principles summarised by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*:³

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question.⁴ The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties’ minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.⁵

[20] Although subjective evidence would be relevant if a subjective approach were taken to interpretation issues,⁶ the common law has consistently eschewed that approach. The common law focuses strongly on the agreement in its final form as representing the ultimate consensus of the parties. Hence it is regarded as irrelevant how the parties reached that consensus. To inquire into that process would not be consistent with an objective inquiry into the meaning of a document which is generally

³ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) at [19]–[37].

⁴ Support for relevance being the basis and criterion for the admissibility of extrinsic evidence comes from *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 at [39] per Lord Hoffmann, explaining his reference to “absolutely anything” in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 913.

⁵ When Lord Wilberforce said in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) at 1384 that the reason for excluding evidence of prior negotiations was “simply that such evidence is unhelpful”, he must have been reflecting the underlying point that the evidence was unhelpful because it was irrelevant. Compare Lord Hoffmann’s statement in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [32] and his statement at [34] that “as Lord Wilberforce said, inadmissibility is normally based in irrelevance”. He added more controversially that inadmissibility can sometimes only be justified on pragmatic grounds.

⁶ Such as is taken in French law which treats what the parties intended as a question of subjective fact unaffected by any constructional rules. The French approach was heavily influential in the drafting of the Unidroit Principles of International Commercial Contracts (1994 and 2004 revision) which allow reference to prior negotiations (art 4.3). But that is not the common law way.

designed to be the sole record of the final agreement.⁷ A party cannot be heard to say – never mind what I signed, this is what I really meant.

[12] I adopt the principles discussed in *Vector Gas* in interpreting the agreement between Dr Divett and Ms Skeates.

(a) *Developer of Refocussing*

[13] The plaintiffs allege that in contravention of clause 1(a) of the agreement, the defendants have continued to assert that Ms Skeates was a developer of Refocussing.⁸

[14] Clause 1(a) of the agreement is:

Skeates acknowledges that:

- a. Dr Divett is the creator, author, and developer of the original unique counselling theory and modality known as Refocussing/refocussing theory and practice (also known as RF, RFT, RT or simply Refocussing/refocussing) and its unique and original components of the God spaces, Seven Foci, Seven Foci integration theory, the adaptation and integration of Grove’s “clean language” and orienting questions to access the foci and unmet needs, and the concept of “focus/refocus” as used in Refocussing theory and practice.

[15] This clause is one of two “acknowledgements” upon which the balance of the agreement is built.

(b) *Ownership of intellectual property rights*

[16] The second of these acknowledgements is clause 1(b):

Skeates acknowledges that:

- b. Dr Divett is the owner of the intellectual property rights in the Refocussing and GodSpaces/God spaces names and brands as they relate to Refocussing theory and practice including all rights to the use of that name and brands and all rights to disseminate, train and accredit others in Refocussing theory and practice (whether as

⁷ The position is, of course, different if the contract is said to have been partly oral and partly written. It is not, however, different just because the ultimate consensus is recorded in an exchange of letters as opposed to a formal document executed by each party.

⁸ Plaintiffs’ amended application for orders, dated 20 August 2010, at [1](a).

professional counsellors and therapists, facilitators, teachers or laypersons).

[17] The plaintiffs allege that in contravention of this clause the defendants have wrongfully accredited others in Refocussing.⁹

[18] In my view clauses 1(a) and (b) alone are not capable of forming the basis of a cause of action against the defendants. Acknowledgement clauses form the background for interpreting an agreement. They are akin to recitals in deeds, which are subordinate to operative clauses.¹⁰ They set out the agreed premises, factual and legal, which give context to the operative clauses that follow and can aid in the interpretation of those clauses.¹¹ They are a shield not a sword; as they do not impose obligations, actions that are against the acknowledged rights are not breaches of the clauses.

[19] In any event, the allegations relating to these clauses are broadly subsumed by the succeeding pleadings in the plaintiffs' amended application alleging breaches of the operative clauses. I take into account the agreement as a whole in interpreting those clauses, including the acknowledgement clauses which are prescriptive of Ms Skeates's acceptance of Dr Divett's rights to the works in question.

(c) Use of Refocussing

[20] Clause 2 of the agreement provides:

Skeates shall within 28 days of the date of this Deed make no further use whatsoever of the name or indicia Refocussing, refocusing, RF, RT, or RFT, or GodSpaces/God spaces or any name or indicia confusingly similar thereto whether as a trade mark, trading or company name, domain name or otherwise.

[21] The plaintiffs contend that the defendants have contravened this clause in that:¹²

⁹ Ibid, at [1](b).

¹⁰ *Hill and Plummer Ltd v Pinchin Johnson and Co (New Zealand) Ltd* [1957] NZLR 758 (SC) at 764–765.

¹¹ *Re Michell's Trusts* (1878) 9 Ch D 5 (CA) at 9.

¹² Plaintiffs' amended application for orders, dated 20 August 2010, at [1](c).

- (i) they have continued to use, promote and provide links to and from domain names containing the word Refocussing.
- (ii) they have continued to teach, sell and disseminate materials containing the word Refocussing.
- (iii) Insight Focused Therapy¹³ or IFT is confusingly similar to Refocussing Therapy and RFT respectively.

[22] The plaintiffs' submissions, somewhat unhelpfully, do not address coherently these allegations. Instead they seek to draw together the threads of the dispute in an holistic way. This has left it to me to sift the submissions and the evidence to see what conclusions I can draw as to Ms Skeates's use of the specified names.

(i) *Continued use of 'Refocussing' within joint venture*

[23] Counsel for Ms Skeates, helpfully, does address each of the plaintiffs' particulars of claim. In respect to [1](c)(i), she submits:

No issue arises in respect of the application as to the defendants' entitlement to use the word "Refocussing" at any time prior to 14 October 2008. There is no evidence of the use of the word "Refocussing" on the defendants' website www.insightcounselling.co.nz following 14 October 2008. Aside from the use of historic promotional material which remained on the website www.refocussing.dk in the 8-day period between 14-22 October 2008 there is no evidence whatsoever of *any* use of the word "Refocussing" in breach of clause 2 of the agreement directly attributable to the defendants.

[24] I agree with that submission.

[25] The plaintiffs, however, point to the activities of persons within Ms Skeates's orbit of professional influence and say that they continued to use the name "Refocussing". The plaintiffs submit that these people (who they term "Ms Skeates's European network") operated a joint venture with Ms Skeates and are sufficiently proximate to her in legal terms that she is liable for their actions. They say that members of the European network have continued to advertise Refocussing as Ms Skeates's work or to describe Insight Focused Therapy as "formerly Refocussing".

¹³ Insight Focused Therapy is the name of the theory Ms Skeates says she developed to take the place in her business activities of Dr Divett's Refocussing theory.

[26] Joint venture does not have a settled common law meaning but in general it connotes an association of persons for the purposes of a particular financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property, or skill.¹⁴ It can take the form of a partnership, agency or joint ownership relationship. A fiduciary relationship is not a necessary element of a joint venture, but it will be found to exist if the relationship is characterised as agency or partnership.

[27] The plaintiffs submit that the joint venture relationship was either one of principal–agent or partnership. To establish this submission the plaintiffs bear the onus of satisfying the Court that there was a fiduciary relationship of agency or partnership between Ms Skeates and members of the European network, such that their actions can be attributed to Ms Skeates.

[28] Agency is the relationship which exists when one person has the authority or capacity to create legal relations between another person (the principal) and a third party.¹⁵ Because the principal is normally entitled to repose trust and confidence in the agent, this bilateral relationship is treated by the law as a fiduciary one.¹⁶ A relationship of agency may be created by express or implied consent between the parties to it.¹⁷ Where an agency relationship exists, or is regarded or presumed by the law to exist, the principal is bound by the act of his or her agent as if the principal had in fact personally done the act in question.¹⁸

[29] In a partnership the parties are agents for each other. Partnership is the relation which subsists between persons carrying on a business in common with a view to profit.¹⁹ An ordinary partnership is a partnership composed of individuals bound together by contract between themselves to continue combined for some joint

¹⁴ *Laws of New Zealand Partnership and Joint Ventures* (online ed) at [225]; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10.

¹⁵ *Laws of New Zealand Agency* (online ed) at [1]–[6]; *LC Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304 (HC); *Dowsing v State Insurance Ltd* [1996] 3 NZLR 622 (HC).

¹⁶ *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482 (HC).

¹⁷ *Mako v Land* [1956] NZLR 624 (SC); *Dowsing v State Insurance Ltd* [1996] 3 NZLR 622 (HC).

¹⁸ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

¹⁹ *Laws of New Zealand Partnership and Joint Ventures* (online ed) at [6]; Partnership Act 1908, s 4(1); *Libra Developments Ltd v Clark* (2005) 2 NZCCLR 305 (HC) at [46].

object either during pleasure or during a limited time.²⁰ A partnership does not have to be formally registered.

[30] The evidence establishes that Ms Skeates had developed a mutually beneficial relationship with a number of people in Europe who have commercial interests in teaching Christian-based therapies. Prior to the agreement they certainly “co-operated to provide Refocussing seminars and training throughout Europe”.²¹ Ms Skeates accepted in cross-examination that she engaged in joint ventures with members of the European network.²² I also accept the submission in paragraph 50 of the plaintiffs’ submissions:

The evidence establishes that the leaders in Europe seek guidance, advice, direction and instructions from Ms Skeates regularly in relation to Refocussing and Dr Divett, in relation to matters of detail and substance regarding the Network, content of the websites, and the European joint venture operations.

[31] It is not the period prior to the agreement being entered into which is at issue for the purposes of this proceeding. It is what happened afterwards. Here the basic submission of the plaintiffs is that there is no evidence that there was any change in the relationship between the defendants and the “Network” following the entering into of the agreement. The plaintiffs, therefore, submit it can be presumed that the “partnership” continued.

[32] For the defendants, the submission is that the relationship between Ms Skeates and her European contacts was too informal to create the legal liability contended for by the plaintiffs.

[33] Whether a relationship of agency or partnership exists is a mixed question of fact and law.²³ In my view, having considered the evidence, the plaintiffs have not established on the balance of probabilities that there was such a relationship in this case. While it might be described as a joint venture, there is nothing that indicates to

²⁰ *Smith v Anderson* (1880) 15 Ch D 247 (CA) at 273 per James LJ.

²¹ Submissions on behalf of the plaintiffs, dated 26 January 2011, at [47].

²² Notes of Evidence, dated 8 July 2010, vol 5, at 4.

²³ *Gilmer and Maguire v Dwyer* (1908) 27 NZLR 744 (CA); *Studholme v Government Advances to Settlers Office Superintendent* (1899) 18 NZLR 257 (CA).

me that a relationship of a fiduciary nature existed between Ms Skeates and the European network.

[34] There is no evidence of any written agreement between Ms Skeates and any of the European network. The defendants' evidence is that Ms Skeates conducted seminars at conferences in Europe organised by Karin Roth, an Austrian counsellor and part of Ms Skeates's European network, in return for a fixed fee. There is no evidence of profit-sharing and Ms Skeates did not have information about the profitability of the events at which she spoke.²⁴ She did not have direct control over any of the websites owned by members of the European network.²⁵ Nor did she have access to the names or contact details of the persons who attended the conferences at which she spoke.²⁶ It seems clear that Ms Skeates did not personally believe that she was in a position to direct or control the actions of her European associates.²⁷ Finally, it is implicit from clause 3(b) of the agreement that members of Ms Skeates's European network are more properly described as "third parties" than agents or partners.²⁸

[35] In my view, Ms Skeates over a number of years formed co-operative relationships with a number of fellow travellers in the field of Christian-based therapy counselling. When it was convenient for them to do so, they would co-operate in commercial activities. It seems clear to me that these people were all individuals operating their own businesses and co-operating when it suited them. They were not in a position to bind each other by their actions or directions as partners can. Nor was Ms Skeates like a principal in a position of control over the members of the European network.

²⁴ Defendants' synopsis of argument, dated 28 January 2011, at [42]; Affidavit of Karin Roth, dated 23 September 2010, vol 6, at 296–297.

²⁵ Affidavit of Karin Roth, dated 23 September 2009, vol 2, at 346; Affidavit of Esther Jansen, dated 24 September 2009, vol 2, at 350; Affidavit of Gunhilde Aaen Madsen, dated 28 September 2009, vol 2, at 354; Affidavit of Ellen Merrild, dated 7 October 2009, vol 2, at 356.

²⁶ Affidavit of Karin Roth, dated 23 September 2010, vol 6, at 297.

²⁷ See the email Ms Skeates sent to the European network following the settlement, below at [57]–[58].

²⁸ See below at [52].

[36] Therefore, I do not find Ms Skeates liable for the actions of the European parties identified in this proceeding. The plaintiffs have not made out their claim in [1](c)(i).

(ii) *Dissemination of materials containing 'Refocussing'*

[37] The claim in [1](c)(ii) that the defendants continued to teach, sell and disseminate materials containing the word "Refocussing" is likewise not made out. There is no evidence that Ms Skeates herself continued to use the word "Refocussing" (except to the limited extent admitted at [23] above) and in respect of clause 2 I have held that she is not responsible for the actions of members of the European network.

(iii) *Confusingly similar branding*

[38] The claim in [1](c)(iii), however, relates directly to Ms Skeates. It is that she uses a name or indicia confusingly similar to "Refocussing" and RFT. As will be discussed later, the agreement did not require Ms Skeates to cease her activities in the Christian-based therapy world. Clause 6 of the agreement set out what she could do thereafter in terms of developing her own theory and materials, which could utilize certain theories not belonging to Dr Divett.²⁹

[39] Ms Skeates's evidence is that she produced her own original teachings and counselling modalities and labelled them "Insight Focused Therapy", often abbreviated "IFT". The issue is whether the term "Insight Focused Therapy" or the abbreviation "IFT" is confusingly similar to "Refocussing Therapy" and "RFT" respectively.

[40] The plaintiffs submit that the concept of "confusingly similar" is drawn from the common law relating to intellectual property, specifically trade mark law and the tort of passing off. It is, therefore, necessary to consider whether the services being represented are similar or identical such that there is a likelihood of confusion or

²⁹ See below at [65].

deception. All the surrounding circumstances must be considered.³⁰ The plaintiffs submit:

77. The defendants' change in indicia/name needs to be considered within the factual matrix of this particular dispute. Since 2005, Ms Skeates had been operating under the labels or names "Insight on Refocussing" and "Insight on Refocussing Therapy". These were the names the defendants were thus operating under at the time of the settlement Agreement and which the plaintiffs objected to. It is only a small step from "Insight on Refocussing" to "Insight Focused Therapy" and the similarity and potential for confusion is substantial. That is amplified by the joint venture partners marketing of Insight Focussed Therapy as being "formerly Refocussing" thereby even more overtly maintaining the link between the two.
78. In terms of clause 2 in the settlement Agreement, the obligation is to "make no further use whatsoever of the names or indicia...". The reference to "further use" clearly indicates that the new name needs to be considered against the way in which Refocussing was used in combination with "Insight on" at the time of the Agreement. The word "whatsoever" must have been intended to have a meaning and can only be construed as any form of colourable imitation, in any way shape or form. On this basis, the continued use of "Focused" in the new name is all the more confusing.

[41] The defendants submit that the issue is not whether Insight Focused Therapy is confusingly similar to Insight on Refocussing. The defendants contend that they have established a reputation and goodwill in the European market in the "Insight" brand and there is nothing in the agreement which precludes the defendants continuing to use that mark. They submit further:³¹

67. The defendants' evidence is that 'focus' or 'refocus' is an industry standard word that describes the human capacity to focus on something³² and is used in the context of numerous other therapies.³³ The defendants' expert, Dr Leah Holford, said that the word 'Refocussing' is widely use in an ubiquitous manner similar to 'reframe' or attentional strategies.³⁴ In other words, in the counselling area the term 'refocus' is not highly distinctive. This is a factor which is appropriately taken into account in assessing confusing similarity.

³⁰ *Pioneer Hi-Bred Corn Company v Hy-Line Chicks Pty Ltd* [1978] 2 NZLR 50 (CA).

³¹ Defendants' synopsis of argument, dated 28 January 2011, at [67].

³² Affidavit of Pauline Skeates, dated 16 November 2009, vol 2, at [22].

³³ Solution Focused Therapy, Emotion Focused Therapy, Focusing Therapy, Dual Focus Schema Therapy, Trauma Focus Group Therapy, Resource Focused Therapy.

³⁴ Affidavit of Pauline Skeates, dated 16 November 2009, vol 2, at [30].

[42] The basic issue in determining similarity is whether or not the respective marks have the necessary degree of resemblance to give rise to likely confusion or deception in the course of trade.³⁵ This involves a comparison of the respective services provided by the parties, the respective marks, and finally a determination on whether they are confusingly similar. There must be evidence that people are or are likely to be deceived into mistaking Refocussing Therapy for Insight Focused Therapy.

[43] I agree with the defendants that the comparison is between “Insight Focused Therapy” and “Refocussing Therapy”, and “IFT” and “RFT” respectively. That prior to the agreement Ms Skeates used the mark “Insight on Refocussing Therapy” is relevant only to the surrounding circumstances which assist the Court in determining whether the former phrases are confusingly similar.

[44] While there are various similarities between Dr Divett’s and Ms Skeates’s respective theories, in my view, there is sufficient difference in the two descriptions to differentiate them in the marketplace. I accept the defendant’s submission that:

71. Here, as a matter of fact, the services concerned are highly specialised and delivered to a sophisticated and well informed audience familiar with a range of therapies. The visual and phonetic differences between Refocussing Therapy and Insight Focused Therapy include that:
 - (a) in the former, the name is comprised of two words while in the latter it is comprised of three;
 - (b) the first word in the former is “Refocussing” while in the latter it is “Insight”;
 - (c) the verb “focused” (to have brought into focus) has a different tense and meaning to “Refocussing” (to change the focus).

[45] The marks are not “confusingly similar” in terms of the principles relating to infringement of trade mark or passing off. The same can be said when comparing “RFT” and “IFT”, as use of those acronyms is inextricably linked to the phrases they represent. I am therefore not satisfied that the defendants have breached clause 2 of the agreement.

³⁵ *Anheuser-Busch Inc v Budweiser Budvar National Corp* [2003] 1 NZLR 472 (CA) at 494; Paul Sumpter *Intellectual Property Law: Principles and Practice* (CCH, Auckland, 2006) at [416].

(d) *Failure to transfer website*

[46] Clause 3(a) of the agreement provides:

Skeates shall within 28 days of the date of this Deed take all necessary steps to:

- a. transfer any name or indicia referred to in the immediately preceding paragraph whether applied for, registered or reserved in any manner whether as a trade mark, trading or company name, domain name or otherwise, including www.refocussing.dk to Divett.

[47] In the plaintiffs' amended application they plead.³⁶

In contravention of clause 3(a) of the Agreement, the defendants failed to transfer the website www.refocussing.dk to the plaintiffs within 28 days of the agreement.

[48] The defendants accept that they failed to comply with clause 3(a). They consent to a declaration to that effect. The evidence is, however, that the domain name was transferred to the plaintiffs in February 2010. They submit, therefore, that the injunction sought by the plaintiffs in relation to the domain name is unwarranted.

[49] The plaintiffs also apply for a mandatory injunction in reliance on clause 3(a) in relation to the defendants as follows:

Immediately transfer the domain name www.refocussing.eu and any other names using the words referred to in clause 2 of the agreement that were within the control of the defendants on 15 September 2008 in accordance with clause 3(a) including:

- (i) www.refokusering.dk controlled by Gunhilde Madsen;
- (ii) www.refocussing.nl controlled by Esther Jansen.

[50] The defendants submit that neither of those domain names are within their ownership or control, nor were they at any time before or after the agreement.

[51] Having reviewed the evidence, I accept the defendants' submission. As I held at [33] above, Ms Skeates does not share a relationship of agency or partnership with members of the European network. The position that I am left in is that while the

³⁶ Plaintiffs' amended application for orders, dated 20 August 2010, at [1](d).

defendants acknowledge that they breached clause 3(a) in the particulars set out above, they have also demonstrated that they complied subsequently. I will consider this later when I look at the overall position relating to remedies.

(e) *Use of best endeavours*

[52] Clause 3(b) of the agreement provides:

Skeates shall within 28 days of the date of this Deed take all necessary steps to: ...

- b. use her best endeavours to procure the transfer any of the names or indicia referred to in the immediately preceding paragraph whether applied for, registered or reserved in any manner whether as a trade mark, trading or company name, domain name or otherwise by a third party.

[53] It is immediately apparent that this provision applies not to matters within Ms Skeates's legal control but to matters that are within her influence.

[54] In the plaintiffs' amended application they plead in respect of this clause:³⁷

In contravention of clause 3(b) of the Agreement, the defendants failed to procure the transfer of active Refocussing domain names and have failed to use their best endeavours. Ms Skeates has in particular failed to fulfil her obligations and continued to use, associate with and/or benefit from the Refocussing domain names and other indicia, inter alia, by advertising and promoting the defendants' business, directly or indirectly by reference to Refocussing.

[55] I accept the plaintiffs' submission that clause 3(b) required Ms Skeates to use all her efforts and skills to the extent that it was reasonable to do in the circumstances in order to achieve the ends referred to.³⁸

[56] It is clear to me from the evidence that Ms Skeates did not use her best endeavours (no matter how that phrase is translated) to satisfy the requirements of clause 3(b) of the agreement. She admitted as much in cross-examination.³⁹ It

³⁷ Ibid, at [1](e).

³⁸ Submissions on behalf of the plaintiffs, dated 26 January 2011, at [132]–[136].

³⁹ Notes of Evidence, dated 8 July 2010, vol 5, at 7–8.

might be convenient if I here set out my view of Ms Skeates's attitude towards the agreement.

[57] It is my view that Ms Skeates resented having to sign the agreement. Her view was that she was "closely involved in the development of the theory"⁴⁰ and that she was "a significant contributor to the development of Refocussing Therapy".⁴¹ In my view, Ms Skeates signed the agreement because she felt that she had no choice. However, she felt the agreement to be unjust and forced upon her by a stronger foe. She had no interest whatsoever in giving effect to its terms other than grudgingly and where she could not otherwise fail to do so. In this instance, for example, where to comply with the agreement she had to reach out in the best way she could to her European associates, she instead sent an email which effectively undermined clause 3(b). The email, sent on 1 October 2008, began:⁴²

Dear valued colleagues

As you have been aware, Diane Divett and the Refocussing Trust last year issued legal proceedings in New Zealand against me personally and against Insight Services Limited claiming, amongst other things, that she had the sole right to control the copyright in Refocussing Therapy and many of its constituent parts. I did not agree and defended those proceedings.

[58] The email explained that the proceedings had been settled and set out some of the terms of the settlement. Ms Skeates then continued:

You are of course free to continue with "Refocussing" as such, and if you do that it would need to be either on your own or through Diane Divett direct (her contact details can be found via her web site).

You may also continue with me in my new work. I sincerely hope that you do. I am currently formulating a name for my therapy which I will release to you as soon as I can, but in essence its content is completely consistent with the overview that I conveyed at the last International Conference. All significant Refocussing work that has already been done with me will be completely credited toward the new therapy and there is a natural seamless progression between the two. New manuals will be produced before the beginning of next year. The name will change and there will also be some organisational structural changes; but I will elaborate on that at a later date.

⁴⁰ Affidavit of Pauline Skeates, dated 8 September 2010, vol 6, at [20].

⁴¹ Affidavit of Pauline Skeates, dated 24 December 2009, vol 1, at [1].

⁴² Affidavit of Pauline Skeates, dated 18 February 2010, vol 3, at 23.

Meanwhile, please proceed as you have been doing up until now. Diane Divett has requested (but cannot legally require) that the names of websites and organisations change to no longer incorporate the word “Refocussing”.

[59] I will return to this theme when considering subsequent claims by the plaintiffs as to whether or not Ms Skeates complied with the agreement, but under cross-examination Ms Skeates was frustratingly evasive. It seems to me that she was resentful and combative. I am sure that attitude mirrored the manner in which she approached her obligations under the agreement.

[60] In terms of the plaintiffs’ claim under this point, I am satisfied that the defendants breached clause 3(b) of the agreement.

(f) Destruction of materials

[61] Clause 5 of the agreement is as follows:

Skeates shall hand over to Divett or destroy within 28 days of the date of this Deed any existing materials, other than her personal notes, containing any name or indicia referred to above⁴³ within her power, possession or control.

[62] The plaintiffs plead:⁴⁴

In contravention of clause 5 of the Agreement the defendants failed to destroy all existing materials and have continued to use materials that the first and second defendants utilised prior to the agreement.

[63] The plaintiffs’ submissions do not address this ground directly other than in conclusionary fashion. However, in the table of evidence accompanying the submissions, the plaintiffs make reference to materials found on a Danish website, www.haabogudveje.dk.⁴⁵ That is a website hosted and operated by Ellen Lind, a therapist in Denmark. She is not an agent or partner of Ms Skeates.⁴⁶ The evidence appended in support makes no mention of Ms Lind’s website. It refers instead to materials on www.refocussing.dk as at 14 October 2008 which is said to be “Copyright Pauline Skeates – 2008”. I have already dealt with this matter.⁴⁷

⁴³ I take this to mean the name and indicia referred to in clause 2.

⁴⁴ Plaintiffs’ amended application for orders, dated 20 August 2010, at [1](f).

⁴⁵ Table of evidence to plaintiffs’ submissions, dated 26 January 2011, at 28.

⁴⁶ See above at [33].

⁴⁷ See above at [23]–[24], [46]–[51].

[64] The defendants' position is that they have complied with their obligations under clause 5. In the absence of evidence to the contrary I find against the plaintiffs on this point.

(g) *Production of own written materials*

[65] Clause 6 of the agreement provides:

Skeates will produce her own written materials which present her own original teachings and counselling modalities or to use third parties' materials and in doing so may utilize:

- a. David Grove's theories
- b. Interactive drawing therapy
- c. Gestalt figure and ground
- d. Awareness
- e. God Awareness

[66] The plaintiffs in their amended application plead:⁴⁸

In contravention of clause 6 of the Agreement, Ms Skeates has failed to produce her own original materials and continues to use content substantially derived from or based on Refocussing, and to reproduce the plaintiffs' copyright works.

[67] In my view, clause 6 is permissive rather than mandatory. It does not require Ms Skeates to produce her own written materials. It permits her to produce her own written materials and if she does so in accordance with clause 6 she will not be in breach of the agreement. The complaints made in this pleading are relevant to the pleadings in respect of clause 7 but do not need to be dealt with separately here.

(h) *Reproducing Divett's copyright works*

[68] Clause 7(a) of the agreement is as follows:

Skeates shall not:

- a. Use or reproduce the whole or a substantial part of Divett's Copyright Works as defined in paragraph 16 of the Amended Statement of Claim dated 21 April 2008 and without limiting the generality of the above, in particular that terminology specifically

⁴⁸ Plaintiffs' amended application for orders, dated 20 August 2010, at [1](g).

coined or created by Divett used in the context of Refocussing therapy, as listed in paragraph 29(e) of the Amended Statement of Claim as follows:

- i. Knowings
- ii. Refocussing
- iii. Refocussing Therapy
- iv. God Space/s
- v. Focus and refocus
- vi. Seven foci, including God Focus and Demonic Focus
- vii. Where is God for...?
- viii. Locating, accessing and developing
- ix. Safety checking questions
- x. Need, unmet need

[69] Clause 7(a) sets out two prohibitions. The first is a general prohibition on Ms Skeates from using or reproducing the whole or a substantial part of Dr Divett's works listed in the amended statement of claim. The second is a particular prohibition from using specified terms "coined or created by Divett used in the context of Refocussing therapy". I address the general prohibition first.

[70] The plaintiffs plead at [1](g) that Ms Skeates:

... continues to use content substantially derived from or based on Refocussing, and to reproduce the plaintiffs' copyright works.

[71] My determination under this claim directly affects the plaintiffs' claims in respect of clauses 7(b) and 8 also. Some points need to be iterated. First, this pleading can only relate to Ms Skeates's use of works, and not to use by other people such as members of the European network.⁴⁹ And it is only use that post-dates the settlement agreement which was signed on 15 September 2008.

[72] Secondly, I note that there is no admission of liability by Ms Skeates in the settlement agreement in respect of copying Dr Divett's works.

[73] Thirdly, it is not the role of this Court to determine whether Dr Divett does in fact retain copyright in the works described at paragraph 16 of the amended statement of claim. The parties settled before that issue was determined in court. This is a proceeding to determine the enforcement of a contract under a Tomlin order; the issue is not whether there has been an infringement of copyright.

⁴⁹ See above at [33].

[74] Nevertheless, the agreement was made in “full and final settlement of all disputes between the parties arising from or relating to” the breach of copyright proceedings brought by Dr Divett against Ms Skeates. The issue for the Court in this application is whether Ms Skeates has breached clause 7(a) of the agreement by reproducing the whole or a substantial part of the works the subject of the copyright proceeding. Copyright principles will guide that determination.

[75] In *Henkel KGaA v Holdfast New Zealand Ltd* the Supreme Court explained the requirements for proof of copying and what is meant by a substantial part:⁵⁰

Proof of copying

[43] The ultimate issue in a breach of copyright case concerns derivation, not similarity, albeit the degree of similarity between the copyright work and the allegedly infringing work has evidentiary significance. Proof of copying will seldom be direct; in most cases the Court will rely on inference. The closer the similarity between the two works the stronger the inference is likely to be that the one was copied from the other. If the alleged infringer has had access to, and therefore an opportunity to copy, the copyright work, and the similarity between the works supports an inference of copying, it may well be appropriate for the Court to conclude, on the balance of probabilities, that there was indeed copying. This, of course, is subject always to the evaluation of any evidence there may be that no copying actually took place.

Substantial part

[44] It is not necessary for the plaintiff to show that the defendant copied the whole of the copyright work or that the copying was exact. It is enough if the plaintiff demonstrates that the defendant copied a substantial part of the copyright work. This can sometimes be a difficult matter of evaluation and is usually the most difficult question which arises in copyright cases. What amounts to a substantial part in an artistic work case depends more on qualitative visual impression rather than on quantitative analysis. As it has helpfully been put, what must have been copied is the essence of the copyright work. This is a subject upon which, in borderline cases, minds can reasonably differ, and it is appropriate for appellate Courts to give to the trial Judge’s assessment the degree of latitude that conventionally applies to appellate review of a discretion.

[76] The plaintiffs submit that Ms Skeates improperly took the essential components of Refocussing theory and practice, which are integral to it, and continues to use them in her materials and teaching. The plaintiffs’ evidence of

⁵⁰ *Henkel KGaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC) (footnotes omitted).

copying is set out in Dr Divett’s affidavit.⁵¹ The affidavit cites to a bundle of evidence disclosed by the defendants, in which is contained *inter alia* extracts from three workbooks marked “© Pauline Skeates and Sandy Fabrin”, entitled:

- (a) “Self-awareness and Personal Growth” — © 2005, 2009;⁵²
- (b) “Insight on Self-awareness” — © 2007, 2009;⁵³
- (c) “Self-awareness” — © 2007, 2009.⁵⁴

[77] Much of the allegedly infringing materials cited in and attached to Dr Divett’s affidavit pre-date the settlement agreement. Others are undated.⁵⁵ They will be relevant only if the plaintiffs can prove that the defendants have continued to use or reproduce those materials after the settlement date.

[78] The only evidence attached to Dr Divett’s affidavit that cites material post-dating the agreement is seven slides compiled by the plaintiffs, which compare extracts from Ms Skeates’s workbooks to extracts from Dr Divett’s works.⁵⁶ These extracts are exercises headed:

from “Self-awareness and Personal Growth”:

- (i) “First God encounter” — page 34 of the vol 4 bundle;
- (ii) “God encounter Exercise” — page 42;

from “Insight on Self-awareness”:

- (iii) “God and I (part 1)” — page 51;
- (iv) “God and I? (part 2)” — page 52.

[79] The exercises are not identical to Dr Divett’s equivalent exercises but I am satisfied that they are clearly substantially similar.

⁵¹ Affidavit of Diane Divett, dated 20 August 2010, vol 6, at [25]; Submissions on behalf of the plaintiffs, dated 26 January 2011, at [92].

⁵² Defendants’ documents for hearing 5 August 2010, undated, vol 4, at 20.

⁵³ Ibid, at 49.

⁵⁴ Ibid, at 54.

⁵⁵ Affidavit of Diane Divett, dated 20 August 2010, vol 6, at 83–101.

⁵⁶ Ibid, at 102–105.

[80] Dr Divett also refers to an undated slide used by Ms Skeates headed “Names and Character of God”.⁵⁷ It contains exactly the same names of God and interpretations as used in Dr Divett’s workbook and they are presented in the same order. I accept that the slide is substantially similar to that passage of Dr Divett’s workbook.

[81] The defendants submit that Ms Skeates has complied with the agreement and has not used since the date of the settlement agreement materials substantially derived from or based on Refocussing or reproduced the plaintiffs’ copyright works. In relation to the works just mentioned, the defendants concede that Ms Skeates mistakenly failed to remove those exercises from her materials but she subsequently undertook to do so.⁵⁸

The defendants’ memorandum of 8 October 2010 paragraphs 8-9 addressed answers to questions put to the first defendant in cross-examination in which Ms Skeates accepted that she overlooked the need to remove three exercises (first God encounter defining moments God and I exercises) which she described as having Refocussing aspects from workbooks. By that memorandum Ms Skeates undertook not to publish or distribute any workbooks in which the highlighted portions of the exercises (together with a further exercise entitled discovering resources for dangerous situations) appeared. Ms Skeates also undertook (paragraph 9 of the memorandum) not to reproduce the “names and character of God” PowerPoint slide referred to at paragraph 18(f) of her affidavit of 8 September 2010.

[82] I am therefore satisfied that the defendants breached clause 7(a) in relation to the materials set out at [78] and [80] above. They have however admitted the breach and have undertaken to remedy it.

[83] At paragraph 25(g) of her affidavit, Dr Divett sets out a list of examples of Ms Skeates’s work which she says include key components of Refocussing therapy. Unfortunately, the plaintiffs have compiled and cited evidence in hodge podge fashion. The list points to relevant pages in the defendants’ document bundle and references back to the list of alleged copyright materials set out at paragraph 16 of the amended statement of claim. It also points to pages in Dr Divett’s various workbooks, but it does not identify where in the evidence those pages are to be found. It appears to me that at least some have not been produced in evidence.

⁵⁷ Defendants’ documents for hearing, dated 5 August 2010, vol 4, at 95–96.

⁵⁸ Defendants’ synopsis of argument, dated 28 January 2011, at [92].

Paragraph 25(g) also cites to the slides compiled by the plaintiffs and attached to Dr Divett's affidavit but, as I have said, most of these slides pre-date the agreement.

[84] I am left in the position where I am unable to conclude on the balance of probabilities that there has been continued use by the defendants of a substantial part of the works as claimed by the plaintiffs in paragraph 25(g).

[85] In my opinion there is not sufficient evidence to determine whether the copying is of a *substantial* part. Certainly the evidence suggests that materials created prior to the settlement agreement were substantially similar to Dr Divett's materials. But the claim in respect of those materials was settled by the agreement. The evidence (such that it is) indicates that various concepts that make up Refocussing appear to some degree in passages in the defendants' post-settlement materials. But in my view the evidence is not sufficient to establish that there has been copying of a substantial part (aside from that described at [81] above). Because the respective parties' workbooks were not presented in evidence in their entirety, I cannot gain an appreciation of the relative proportion of each workbook that is alleged to have been copied, or its significance to the works as a whole.

[86] In respect of materials cited that pre-date the settlement agreement, the plaintiffs have not proved that Ms Skeates continues to use or reproduce those materials in her teaching or otherwise. Her evidence was that after the settlement agreement she created new materials in accordance with its terms. I am unable to disagree.

[87] Finally, the plaintiffs submit that the defendants' failure to produce "Insight Focussed Therapy modules 1 – 5", which are referred to in correspondence involving Ms Skeates, indicates copying from the Refocussing modules.⁵⁹

[88] There is no direct evidence that any physical modules used by Ms Skeates exist or have ever existed. Her explanation is that there are no modules; that the word module was used to delineate between different IFT training weekends, rather

⁵⁹ Ibid, at [98].

than physical documents.⁶⁰ Again, the plaintiffs have produced no evidence to the contrary.

[89] In summary, I find that the defendants have breached clause 7(a) only to the extent that they conceded at paragraph 92 of their submissions. The plaintiffs have not discharged the burden of proof in respect of their other claims under this head.

(i) *Using terminology coined or created by Dr Divett*

[90] The plaintiffs plead:⁶¹

In contravention of clause 7 of the Agreement, the defendants continue to use the proscribed terms “knowings”, “needs & unmet needs”, “focus”, “where is God for?”

[91] In their table of evidence the plaintiffs set out references to the evidence that they say prove this pleading.⁶²

[92] Ms Skeates’s evidence in reply is that although she has continued to use some of the terms listed in clause 7(a), she has not used the specified terms “in the context of Refocussing therapy”. Rather, she submits, she uses the terms in the context of her own original teachings or in a manner as used by other writers. In her affidavit she states:⁶³

I also observe that clause 7 of the DOS means that I cannot use the words listed in that clause in the same manner and way that Diane uses them within the context of Refocussing. The clause does not prohibit me using those words in a context where they are found in third party material and using them in the manner that third parties use them. When I agreed to settle the original proceedings and gave the acknowledgements in clause 1 of the DOS it was specifically on the basis of the whole “package” of the DOS and we had strong discussion when writing up the DOS about the fact that I was not agreeing not to use words that were used by others in the counselling field and the words “used in the context of Refocussing therapy” were specifically added as a result of that discussion.

⁶⁰ Notes of Evidence, dated 8 July 2010, vol 5, at 11.

⁶¹ Plaintiffs’ amended application for orders, dated 20 August 2010, at [1](h).

⁶² Table of evidence to plaintiffs’ submissions, dated 26 January 2011, at 40–43.

⁶³ Affidavit of Pauline Skeates, dated 8 September 2010, vol 6, at [17].

[93] Ms Skeates maintained in cross-examination that she believed that the settlement agreement did not ban her from using industry terminology so long as it was not related to Refocussing therapy.⁶⁴

[94] While Ms Skeates's subjective intention is not relevant to the interpretation of the agreement, in my view her evidence is relevant as to what the parties intended by the phrase "in the context of Refocussing therapy" in clause 7(a). It is part of the background context in which the agreement was made and sheds light on the ultimate consensus that the parties reached in forming the agreement.

[95] Applying to that phrase what I consider to be its intended meaning, both on the plain words and from the parties' intention in including it in clause 7(a), I reach the conclusion that Ms Skeates was only prohibited from using the specified terms in the manner as they are used in Dr Divett's work. It is not a blanket prohibition from using the words altogether. This interpretation is also consistent with my reading of acknowledgement clause 1(a). In my view, a reasonable and properly informed third party would not take clause 7(a) to mean that Ms Skeates cannot use the words focus and refocus at all in her work. She is only prohibited from using them in the context of Refocussing therapy.

[96] The onus is on the plaintiffs to prove on the balance of probabilities that Ms Skeates has used the specified terms "in the context of Refocussing therapy", thereby breaching clause 7(a).

[97] The defendants submit that Ms Skeates has not used the terms in the manner alleged because she does not use or teach Refocussing therapy. In her affidavit of 8 September 2010, Ms Skeates explains how and why she has used certain terms and what distinguishes her use of the terms from Dr Divett's use in Refocussing therapy. In a number of instances she aligns her use of the terms with the work of other authors, contrasting it to the use by Dr Divett. For instance, in paragraph 18(f)(vi) of her affidavit Ms Skeates acknowledges that she is prohibited by the agreement from using the terms needs and unmet needs in the same manner as they are used in

⁶⁴ Notes of Evidence, dated 5 August 2010, vol 5, at 21.

Refocussing therapy. She then sets out her view on how they are used in RFT and distinguishes that use from her own use. She concludes:

My therapy is not designed to refocus the client's attention on God as a central therapeutic measure. In my teaching on Self Awareness, I merely teach and observe that unmet developmental needs are going to give rise to individuals failing to realise their potential as postulated by Maslow; and that, as part of self awareness, people need to be aware of that – which is not a breach of the terms of the DOS.

[98] There is no evidence from the plaintiffs contradicting this assertion. In fact, the plaintiffs' witness Annette Dubbert, whose affidavit I will return to later, stated that she observed teaching by Ms Skeates that "was very similar to Refocussing" but also had notable differences.⁶⁵

(i) *Knowings*

[99] Turning to the plaintiffs' individual claims, Ms Skeates in her oral evidence and in her affidavit accepts that she continues to use the term "knowings". However, she says that she is entitled to do so because she uses it in a context used by other authors and not in the context devised by Dr Divett.

[100] The defendants rely on the explanation for the derivation of the use of the term by Ms Skeates as provided in her affidavit sworn on 8 September 2010. This is as follows:⁶⁶

"Knowings" – Knowing (singular) is an industry term to describe things that someone knows about themselves. Knowings (plural) is merely the plural of that. They use "implicit knowings" (meaning the unknown known – what you know but don't know you know). The terms are used by Toomey and Ecker in their work on Coherence (2007). I am particularly interested in neuroplasticity in psychotherapy and when I use the terms I use it in the sense that they use them in and in relation to brain science and as such I am using "third party materials" as permitted by the DOS...

⁶⁵ Affidavit of Annette Dubbert, dated 16 August 2010, vol 6, at [21]: "However, from my perspective she [Ms Skeates] did not really lead the person into a safe place, that is into God's presence. I felt at the time that what she did was lead the person to herself, what for some of us could be the most frightening place." See also Affidavit of Karin Roth, dated 23 September 2010, vol 6, at 304–305.

⁶⁶ Affidavit of Pauline Skeates, dated 8 September 2010, vol 6, at [18](g)(x).

[101] Extracts from an article by Toomey and Ecker are annexed to the affidavit to demonstrate the authors' use of knowings.⁶⁷ There is also evidence of a document headed "Insight Focused Therapy — The Coherence Edge", which discusses knowings and is stated to be "adapted by Skeates from Toomey and Ecker, 2007".⁶⁸

[102] The plaintiffs assert that the word "knowings" was used by Ms Skeates in a similar way to its use in Refocussing first in Dr Divett's PhD thesis of 2004. They suggest that Toomey and Ecker may have drawn on Dr Divett's work and the defendants are criticised for not supplying with the extracts from the Toomey and Ecker article its bibliography. Nevertheless, after locating a copy I observe that the bibliography appended to the article in the Journal of Constructivist Psychology does not cite Dr Divett at all.

[103] In view of the evidence produced by the defendants that the term is also used similarly by other published authors, I cannot conclude on the balance of probabilities that the use complained of by Ms Skeates breaches this provision of the agreement.

(ii) *Needs & unmet needs*

[104] The plaintiffs submit that Ms Skeates was fully aware that the teaching of Maslow's hierarchy of needs was important to emphasise concepts of needs and unmet needs fundamental to Refocussing. They submit that it is emphasised in relation to the developmental process alongside Erikson's Psycho Social Stages of Development and the deficiencies that can arise from inadequate parental role models.⁶⁹

[105] The plaintiffs submit that the evidence is that Ms Skeates continues to teach Maslow's hierarchy of needs in exactly the same way as she has always done. They submit that this means she is in breach of this aspect of the agreement.

⁶⁷ Ibid, at 262; Brian Toomey and Bruce Ecker "Of Neurons and Knowings: Constructivism, Coherence Psychology and their Neurodynamic Substrates" (2007) 20 Journal of Constructivist Psychology 201 at 204–206.

⁶⁸ Defendants' documents for hearing, dated 5 August 2010, vol 4, at 64.

⁶⁹ Table of evidence to plaintiffs' submissions, dated 26 January 2011, at 41.

[106] In view of Ms Skeates's response as set out at [97] above, I am left in the position of not being persuaded on the balance of probabilities that Ms Skeates's work is in breach of the agreement.

(iii) *Focus*

[107] The plaintiffs submit that Ms Skeates admits that the term "focus" is an important concept in Refocussing because it is an essential part of the process which is about helping people shift their focus from trauma to God. It is submitted that Ms Skeates also admits that to move your focus from one thing to another is a part of Refocussing. Nevertheless, it is submitted, Ms Skeates continued teaching these same concepts as part of self awareness after the agreement was entered into.

[108] Again in her affidavit Ms Skeates answers this criticism.⁷⁰ She says it is a common industry term and she appends extracts from the works of several authors who write on focusing. It is unnecessary for me to refer to them in detail. Again, Ms Skeates distinguishes her use of the word from the way Dr Divett uses the word. She also points out that she does not use the complementary "refocus" technique mentioned in clause 7(a). In the absence of expert evidence to the contrary, I am again left in a state where I cannot find that the plaintiffs have proved their case on the balance of probabilities.

(iv) *Where is God for?*

[109] The plaintiffs submit that Ms Skeates was fully aware that this question ("Where is God for?") is a key question to facilitate the Refocussing process. It can be used in a variety of ways with drawing, self awareness exercises, and the teaching of the theory with counselling practice. It is submitted that Ms Skeates attributes this question to Dr Divett on her website, www.refocussing.dk, and later disseminated it to her European colleagues in the guise "God space question". Ms Skeates continues to use the question in the same way as she did prior to the agreement.

⁷⁰ Affidavit of Pauline Skeates, dated 8 September 2010, vol 6, at [18](g)(viii)–(ix).

[110] The plaintiffs do not clarify whether the protected phrase is “Where is God for?” or “Where is God for...?” (the latter could be used as part of a sentence). However, on my reading of the evidence it makes no difference.

[111] The defendants simply submit that there is no evidence that Ms Skeates has used that term at all. There is evidence only of the use of an exercise entitled “Where is God?” I agree. In the absence of evidence to the contrary I find for the defendants on this point.

[112] To summarise, after considering the plaintiffs’ submissions, the evidence placed before the Court and the defendants’ responses, I am not satisfied on the balance of probabilities that Ms Skeates has breached the particular prohibition under clause 7(a) of the agreement.

(j) *Dissemination*

[113] Clause 7(b) of the agreement provides:

Skeates shall not: ...

- b. Teach, train, publish, disseminate or deal in any way with Refocussing as defined above in para 7(a) or something substantially and/or confusingly similar to.

[114] The plaintiffs plead:⁷¹

In contravention of clause 7(b) of the Agreement, the defendants since the date of the agreement have:

- (i) continued to sell and disseminate and/or deal in Refocussing materials or parts thereof until at least 14 May 2009 but as late as July 2010.
- (ii) continued to disseminate or deal in course or training materials which are “confusingly similar” in terms of name, purpose and content.

⁷¹ Plaintiffs’ amended application for orders, dated 20 August 2010, at [1](i).

[115] The plaintiffs' submissions in respect of this complaint point largely to the activities of Ms Skeates's European associates.⁷² An exception is an allegation that Ms Skeates has included Refocussing PowerPoint slides on her website. Similarly, that Refocussing materials, slightly changed, remain on Ms Skeates's website, www.insightcounselling.co.nz.

[116] The defendants deny that they have breached this prohibition. They say that the evidence, such as it is, points to Ms Roth teaching material similar to Refocussing but not substantially or confusingly so. However, no reference is made to Ms Skeates doing so.

[117] My conclusion in respect of this claim depends upon my findings under clause 7(a) above. I am satisfied that there has been dissemination of materials in breach of clause 7(b) only in respect of the materials described at [78] and [80] above. I will consider the effect of this breach when I come to look at remedies.

(k) *Destroy materials*

[118] Clause 8 of the agreement provides:

Skeates shall hand over to Divett or destroy within 28 days of the date of this Deed any existing materials, other than her personal notes, referred to above.

[119] Again, the defendants' obligation to destroy materials relates only to those materials substantially derived from or based on Refocussing or reproduced from the plaintiffs' copyright works. The defendants have already undertaken to remove and no longer to use the exercises described at [78] and [80] above.

(l) *Public statement*

[120] Clause 10 of the agreement sets out the text of a public statement which the parties agreed "that they may make".

⁷² Table of evidence to plaintiffs' submissions, dated 26 January 2011, at 43.

[121] The plaintiffs allege in their amended application:⁷³

In contravention of clause 10 of the Agreement the defendants failed to issue the agreed public statement, issuing an alternative statement that was inaccurate and misleading and encouraged and counselled the defendants' agents, associates, employees and others to undermine and thwart the outcome agreed by the parties and recorded in the Agreement.

[122] The defendants submit that the clear wording of clause 10 is that the parties *may* make the quoted public statement. There was no obligation that they do so. The defendants accept that Ms Skeates did send an email that did not comply with her obligations to use best endeavours to secure the transfer of the domain names in terms of clause 3(b) of the agreement.⁷⁴ However, this is not the same thing as breaching clause 10.

[123] Ms Skeates deposed that:⁷⁵

Directly following the execution of the agreement, one of Ms Divett's first actions was to breach its terms. Within a day of the execution of the settlement agreement Ms Divett had (at 4 am NZ time) electronically distributed the whole Statement of Claim to contacts of the defendants in Europe in breach of clause 17 of the settlement agreement. This breach, which I regarded at the time (and still do) as extremely damaging to my reputation, is referred to and acknowledged in the correspondence annexed marked "B"- "E".

[124] The email that was then sent by Ms Skeates was, the defendants submit, an attempt to remedy "the harm done" by the plaintiffs' alleged breach.⁷⁶ I have already held that Ms Skeates's email dated 1 October 2008 was in breach of clause 3(b).

[125] In my view clause 10 is permissive not mandatory. It does not require the parties to release the public statement to any particular persons. Nor does it prohibit the parties from making any other statement in respect of the settlement agreement (although clause 17 provides that the settlement terms are confidential). If a statement released by a party breaches a clause in the agreement, it is a breach of that clause, not of clause 10.

⁷³ Plaintiffs' amended application for orders, dated 20 August 2010, at [1](k).

⁷⁴ See above at [58].

⁷⁵ Affidavit of Pauline Skeates, dated 16 November 2009, vol 2, at [16].

⁷⁶ Defendants' synopsis of argument, dated 28 January 2011, at [130].

(m) Negative or derogatory statements

[126] Clause 11 of the agreement provides:

The parties agree to put this dispute behind them and to use their best endeavours to ensure that this occurs both in the letter and spirit of this agreement and to that end will not make negative or derogatory statements about each other.

[127] The plaintiffs plead:⁷⁷

In contravention of clause 11 of the Agreement the dissemination of the defendants' statement and other communications encouraged the defendants' associates, and others, to undermine and thwart the outcome agreed by the parties and recorded in the settlement deed, in particular, Ms Skeates has made derogatory and negative remarks about Dr Divett including words to the effect or inferences that Dr Divett is her enemy and that Ms Skeates is a victim of a person who wants to hurt or destroy her.

[128] The plaintiffs' grounds for this assertion are contained in the affidavit of Annette Dubbert dated 16 August 2010. Ms Dubbert, a German citizen, attended a conference in Salzburg in July 2010 to learn about Insight Focused Therapy. She deposes that Ms Skeates spoke at the seminar and told "her story", and that:⁷⁸

While we were listening to her story, she began to talk about the terrible situation she had just faced in New Zealand the week before in the court. She told us that there is a person who again forced her into court. She said that nobody ever wants to experience what she just had experienced. She felt so weak after this, that she almost was not able to come to the conference. She told us that this was the most humiliating experience she ever had in her life. Since she was a little child she feared this the most – to be humiliated in public and exactly this had happened last week. This person is not willing to make peace – she has one goal – to destroy her. This person in New Zealand will not give up until this has happened. Finally she, Pauline, said she had to accept that there is an enemy in her life. But she will not give up, she will not bow down.

[129] Ms Dubbert drew the conclusion from the 30 or 40 minutes in which Ms Skeates apparently discussed her experience "that there was a very cruel person in New Zealand who was full of hatred against Pauline and doesn't have any basis to

⁷⁷ Plaintiffs' amended application for orders, dated 20 August 2010, at [1](l).

⁷⁸ Affidavit of Annette Dubbert, dated 16 August 2010, vol 6, at [8].

treat her like that, but in her blind anger she has set up her goal – to destroy her life”.⁷⁹

[130] Ms Dubbert goes on to speak of conversations she had with others at the conference. The gist of the evidence is that these people who had some experience in this area also believed that “this other woman” had acted hostilely and without good faith against Ms Skeates. Ms Dubbert summarises her experiences as follows:

Later on at lunch that day and at other free talking times I realised that everyone had knowledge about the person in New Zealand. The clear impression I had was that all of the people I spoke with had detailed information about the whole situation and believed that the woman in New Zealand has done unrighteousness to Pauline by stealing the idea of Refocussing therapy, which they had developed together.

[131] The defendants submit that Ms Dubbert’s affidavit in these respects is inadmissible “on the basis of hearsay, irrelevancy and that they have no probative value”.⁸⁰ Ms Skeates points out that Ms Dubbert was not available for cross-examination in these proceedings.

[132] Ms Skeates herself and other deponents deny the allegations. Ms Skeates deposed that she spoke at the Salzburg conference several days after her cross-examination in these proceedings. During a seminar on “How to Flourish under Siege”, she used as an illustrative point the difficulties she had experienced being the subject of courtroom cross-examination. However, she did not mention any details of the court case — neither Dr Divett nor Refocussing — and “spent only several minutes on that issue”.⁸¹

[133] Her evidence is confirmed by others who attended the conference.⁸² Their view was that the purpose of Ms Skeates’s message was to encourage others and teach them how to flourish when faced with circumstances that are humiliating or out of one’s control. Ms Skeates did not disclose details of the court case and did not

⁷⁹ Ibid, at [10].

⁸⁰ Defendants’ synopsis of argument, dated 28 January 2011, at [135].

⁸¹ Affidavit of Pauline Skeates, dated 8 September 2010, vol 6, at [31].

⁸² Affidavit of Anita Terlouw, dated 9 September 2010, vol 6, at 287; Affidavit of Lucia Erlbacher, dated 9 September 2010, vol 6, at 291; Affidavit of Karin Roth, dated 23 September 2010, vol 6, at 298–305; Affidavit of Helmut Roth, dated 8 October 2010, vol 6, at 314–315; Affidavit of Anja Diem, dated 25 November 2010, vol 6, at 320–322.

say anything bad about Dr Divett either explicitly or indirectly. Ms Roth says it occurred during only a 10 minute period before lunch.

[134] The defendants state further that conference members did not have knowledge of Dr Divett or the proceedings in New Zealand, although some had been made aware after they were contacted directly by the plaintiffs early in the proceedings. They suggest that Ms Dubbert's impression of the conference was skewed by her own preconceptions and because she was there to assist Dr Divett (who had paid her conference fee).

[135] In my view, Ms Dubbert's evidence is not inadmissible under the hearsay provisions of the Evidence Act 2006 because it is not offered to prove the truth of its contents. Rather, the affidavit sets out what she heard Ms Skeates say at the seminar and gives her general impression of the reputation that Dr Divett has amongst attendees at the conference.

[136] Affidavits not cross-examined on are taken at face value. Where there is a conflict of affidavit evidence, it is a matter for the Court to draw inferences as it sees fit and to attribute appropriate weight to the evidence.⁸³

[137] Ms Skeates was cross-examined on this allegation on 5 August 2010. The questions put to her initially asked whether she had made statements about an "unnamed person from New Zealand".⁸⁴ In that context that person was clearly Dr Divett. Ms Skeates's responses were variously "I have no recollection of that",⁸⁵ "not to my knowledge"⁸⁶ and "I would doubt that would be something I would say".⁸⁷

[138] It was then put to Ms Skeates that she made the statements at the Salzburg conference. Her response was "I would find it very difficult to believe I did that in a public forum".

⁸³ *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR9.74.02]; *Civil Procedure: District Courts and Tribunals* (online looseleaf ed, Brookers) at [HC9.74.01(4)].

⁸⁴ Notes of Evidence, dated 5 August 2010, vol 5, at 29.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, at 30.

⁸⁷ *Ibid.*

[139] It is not necessary for me to decide exactly what Ms Skeates said about Dr Divett at the Salzburg conference and in what context. Clause 11 does not raise a high threshold. Having read the affidavits, and having seen Ms Skeates give evidence, I have no doubt that she breached clause 11. I find, consistent with my observations in [57] and [59], that Ms Skeates did not put the dispute behind her and did make negative or derogatory statements about Dr Divett.

(n) Refocussing trainees

[140] Clause 12 of the agreement states:

Skeates shall direct any persons who may wish to be, or remain involved in the teaching or training of Refocussing, to Divett for appropriate training and accreditation.

[141] The plaintiffs plead:⁸⁸

In contravention of clause 12 of the Agreement the defendants have:

- (i) Directed persons who have made enquiries about Refocussing to their own business;
- (ii) Failed to refer persons with a prior or existing interest in Refocussing to the plaintiffs;
- (iii) Credited Refocussing to Insight Focussed Therapy, thereby improperly retaining contact and relationships with those persons interested and/or trained in the legitimate form of Refocussing.

[142] The plaintiffs do not refer to this pleading in their submissions. There is discovered evidence of an email exchange between Ms Roth and a Mr van Elm, who enquired of Ms Roth about how to become involved in Refocussing. The exchange shows that Ms Roth encouraged him to become involved in Insight Focused Therapy and did not refer him to Dr Divett or Refocussing. But there is no evidence that Ms Skeates played any part in that conversation.

[143] The defendants submit that they have complied with their obligations under clause 12. They say that there is no relevant and reliable evidence to the contrary. They cite Ms Skeates's email of 1 October 2008 wherein she directs her European

⁸⁸ Plaintiffs' amended application for orders, dated 20 August 2010, at [1](m).

associates that if they wished to continue in Refocussing they would need to do so either on their own or through Dr Divett.

[144] In the absence of evidence that Ms Skeates has breached clause 12 I find for the defendants on this point.

[145] The third allegation under clause 12 relates to Ms Skeates's decision to credit trainees who had already completed courses in Refocussing over to Insight Focused Therapy.⁸⁹ This is similar to the claim made at [1](b) of the plaintiffs' amended application for orders.⁹⁰

[146] Whether this occurred or not, in my view it does not amount to a breach of clause 12. Institutions regularly permit students to cross-credit qualifications or skills that they have acquired through other competitor institutions towards a course that utilises similar qualifications or skills. The settlement agreement did not prohibit Ms Skeates from designing and teaching her own programme or taking on trainees who had experience in Refocussing and wished to change to Insight Focused Therapy.

[147] I am therefore not satisfied that the defendants have breached clause 12.

Summary

[148] A summary of my findings on each of the applicants' claims is as follows:

- (a) Clause 1(a) of the agreement is an acknowledgement clause and does not impose obligations on the defendants;
- (b) The same applies for clause 1(b);
- (c) In respect of the defendants' alleged continued use of the word Refocussing in breach of clause 2:

⁸⁹ See above at [58].

⁹⁰ See above at [17].

- (i) There is no fiduciary relationship (of agency, partnership or otherwise) between Ms Skeates and the members of the European network, and Ms Skeates is not liable for their actions;
 - (ii) There is no evidence that Ms Skeates has continued to promote, teach, sell or disseminate materials containing the word Refocussing (except to the limited extent admitted at [23] above);
 - (iii) Insight Focused Therapy or IFT is not confusingly similar to Refocussing therapy and RFT respectively;
- (d) The defendants failed to comply with clause 3(a) in respect of www.refocussing.dk, but subsequently it was transferred to the plaintiffs in February 2010. The defendants do not have ownership or control over the other domain names sought by the plaintiffs to be transferred to them;
- (e) Ms Skeates did not use her best endeavours to procure the transfer of domain names and other uses of Refocussing from third parties in accordance with clause 3(b);
- (f) The defendants have not breached clause 5, which requires destruction of materials described in clause 2, as there is no evidence that Ms Skeates has those materials within her power, possession or control;
- (g) Clause 6 is permissive; it allows Ms Skeates to produce her own written materials but it does not impose obligations on the defendants;
- (h) In respect of the defendants' alleged continued use or reproduction of a substantial part of Dr Divett's works:

- (i) The materials described at [78] and [80] above are substantially derived from or based on Refocussing and therefore breach clause 7(a). However, that breach was admitted in the defendants' memorandum of 8 October 2010 and Ms Skeates undertook to remove those exercises from her materials;
 - (ii) The plaintiffs have not proven on the balance of probabilities that Ms Skeates has continued to use or reproduce any other materials substantially derived from or based on the plaintiffs' works;
- (i) I am not satisfied on the balance of probabilities that Ms Skeates has continued to use in the context of Refocussing therapy terminology coined or created by Dr Divett in breach of clause 7(a);
 - (j) The plaintiffs have proven dissemination in breach of clause 7(b) only in respect of the materials described at [78] and [80] above;
 - (k) The defendants failed immediately to destroy, in accordance with clause 8, the materials described at [78] and [80] above;
 - (l) The agreement did not impose an obligation on either party to release the public statement in clause 10; it is a permissive clause;
 - (m) Ms Skeates made negative or derogatory statements in respect of Dr Divett in breach of clause 11;
 - (n) There is no evidence that Ms Skeates breached clause 12 by failing to refer persons interested in Refocussing to the plaintiffs. Crediting trainees from Refocussing to Insight Focussed Therapy is not a breach of clause 12.

[149] I am satisfied that there have been breaches (at least to some degree) by the defendants of clauses 2, 3(a), 3(b), 7(a), 7(b), 8 and 11 of the settlement agreement.

[150] I emphasise that in this judgment I have not made any findings of copyright in favour of the plaintiffs or conversely of breach of copyright against the defendants. My findings reflect only that the plaintiffs have established on the balance of probabilities that some of the settlement terms have been breached. That said, a number of the plaintiffs' claims have not succeeded.

Remedies

[151] It is not necessary for me to make declarations in respect of the findings of breach. The settlement agreement is a contract between the parties; I have heard allegations of breach and I have determined them.

[152] The breaches I have identified do not lend themselves to injunctive relief. With two possible exceptions they do not go to continuing conduct.

[153] The first such possibility is the failure to use best endeavours to procure the transfer of names or indicia as required by clause 3(b) of the agreement. I am not prepared to direct, as the plaintiffs seek, that the defendants now use their best endeavours including paying thousands of dollars if that is necessary. To direct the use of "best endeavours" would be to impose an undefined obligation. To impose within that obligation a direction to pay significant sums of money would be to go beyond the natural construction of the agreement itself. It is best left as a finding of breach answerable, if quantifiable, by damages.

[154] The second such possibility is the breach of clause 11 (the obligation not to make negative or derogatory statements). I do not consider that an injunction would be appropriate for this breach. I have found that there has been a breach. The clause is still operative, the obligation a continuing one. Further breaches could be dealt with effectively as breaches of the agreement.

[155] I reserve leave for the plaintiffs to apply for an award of damages. However, I do not encourage them to do so.

Costs

[156] I reserve leave for the parties to file memoranda as to costs. However, my inclination at this stage would be to let costs lie where they fall.

Brewer J