IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1019

	BETWEEN	LOCKWOOD GROUP LIMITED Plaintiff/applicant
	AND	BARRY SMALL Defendant/respondent

Hearing: 19 February 2010

Appearances: S Grant and E A James for plaintiff
C S Withnall QC for defendant

Judgment: 21 April 2010

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 12 noon on Wednesday 21 April 2010

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[1] The plaintiff, Lockwood Group Limited (Lockwood) specialises in solid wood house fabrication. It has an established national reputation. Lockwood operates through independently owned construction enterprises which are franchised to carry on business within defined geographical territories.

[2] Odin Construction Limited (Odin) held a franchise in respect of part of the lower South Island. Mr Small became a customer of Odin. Prior to May 2008 he entered into a contract with Odin, pursuant to which the latter agreed to erect a Lockwood home on Mr Small's property near Te Anau. Following completion of the home, Odin was to be entitled to operate it as a show home for a period of one year in order to demonstrate the Lockwood product. Thereafter, possession would pass to Mr Small.

[3] A dispute arose between Mr Small and Odin with respect to contract variations. Mr Small rapidly became disenchanted with Odin and sought to involve Lockwood in the dispute, but soon became dissatisfied with Lockwood as well. As matters developed, he sought to publicise his disagreement with Lockwood and Odin, by communicating with and visiting certain other Lockwood franchisees and business associates, and by seeking to discredit Lockwood in the media.

[4] In February 2009, Lockwood commenced this proceeding alleging breach by Mr Small of the terms of an agreement between Lockwood, Mr Small and Odin, and of the deemed confidentiality obligations imposed by s 14B of the Arbitration Act 1996.

[5] On 27 February 2009, I granted a without notice injunction to Lockwood against Mr Small in the following terms:

> There will accordingly be an injunction until further order of the Court, restraining the defendant from discussing with any third party other than his legal advisers and experts, the facts and circumstances surrounding the subject matter of the arbitration, and from making negative comments or statements about the plaintiff, or its franchisees, or their respective employees, agents or directors, and from acting in breach of his obligations under clauses 5 and 8 of the arbitration agreement made between the plaintiff and the defendant.

[6] No step has been taken by the defendant to vary or rescind the injunction, which accordingly remains in force.

[7] Lockwood now seeks in the alternative, either a direction that the current interlocutory injunction be maintained until trial, or alternatively an interlocutory injunction in varied terms that restrains Mr Small from defaming Lockwood, from further injuring its commercial reputation, and/or from causing it further pecuniary loss until the determination of the proceeding.

[8] Lockwood also seeks relief in respect of alleged breaches by Mr Small of the interim injunction granted by the Court on 27 February 2009, namely:

a) A declaration that Mr Small is in contempt;

b) An order fining him $10,000 for contempt of Court coupled with an order that $5,000 of that fine be paid to Lockwood;

c) Leave to issue a writ of arrest against Mr Small;

d) Leave to issue a writ of sequestration against Mr Small's property;

e) An order that Mr Small pay Lockwood's costs on an indemnity basis.

[9] Mr Withnall for Mr Small argues that the injunction is spent, that there is no proper basis for further interim relief, and that Lockwood has not established that Mr Small is in contempt of the earlier injunction.

Factual background

[10] The dispute Mr Small and Odin was largely concerned with the completion of, and payment for, extras sought by Mr Small.

[11] By mid-2008 Lockwood's chief executive, Mr Heard, had intervened. Lockwood's technical manager, Mr Mooney, inspected the house and endeavoured

to achieve a resolution, but Mr Small remained concerned about Odin's performance. He complained in particular about Odin's directors to Odin's staff and to other Lockwood franchisees, including those in distant parts of New Zealand.

[12] Intense negotiations followed. They culminated in an agreement between Lockwood, Odin and Mr Small dated 19 September 2008. Three days prior to that, on 16 September 2008, Mr Small had written to Mr Kevin Milne of Television New Zealand for the purpose of endeavouring to have his concerns aired on the Fair Go show.

[13] The agreement of 19 September 2008 (which, adopting Ms Grant's nomenclature, I will call the tripartite agreement) recorded the agreement of Mr Small and Odin to refer their dispute to arbitration by Mr Theo Marlow of Dunedin, and annexed a form of arbitration agreement which was ultimately executed by Mr Small and Odin on 23 September 2008.

[14] The tripartite agreement dealt with matters of confidentiality, goodwill, the operation of the show home by Lockwood and related matters. The following clauses of the tripartite agreement are of particular relevance for present purposes:

> 5. The parties have agreed that the course of action described below is agreed by all of them, and by executing this Agreement the parties undertake in good faith to carry out the agreed actions as soon as practicable, with time being of the essence, and all parties will act professionally and with courtesy to each other party. Further, each party acknowledges that where it is mentioned below it will undertake its obligations as soon as practicable and those obligations will be binding on each party as if they were part of the Arbitrator's decision.
>
> …
>
> 8. Each party agrees not to badmouth or speak negatively of the other party to any third parties while the parties are performing their obligations in terms of this Agreement, while the dispute between Small and Odin is being arbitrated and during the time that the show home is operated at Te Anau. In other words, each of the parties shall exercise goodwill towards the other parties and if one party has a material concern about any matter it shall put that concern in writing to the other parties with the intention of resolving such concern in an amicable way, with time being of the essence.

9. In the case of any unresolved disputes in terms of this Agreement only, the parties agree to appoint an expert as a mutually acceptable third party to mediate upon the dispute and the parties agree to comply with the recommendation of such mediator. Such expert shall act as a mediator and not as an arbitrator. Time shall be of the essence in resolving any disputes. Unless otherwise determined by the expert, the cost of each and every such mediation shall be borne equally by the parties. Further, if the parties are unable or unwilling to appoint an expert as a mediator then the provisions of the Arbitration Act 1996 or any amending legislation shall apply and again time shall be of the essence.

11. …

(i) Lockwood has agreed to lease the show home directly from Small for one year from the date of re-opening of the show home and Lockwood and Small will execute the appropriate lease agreement in due course.

[15] During the latter part of 2008, Mr Small appears to have become dissatisfied at the slow pace of the arbitration process. He made frequent contact with Mr Heard, threatening to denigrate Lockwood publicly if Lockwood did not assume responsibility for Odin's obligations to him. By then it was common knowledge that Odin was in financial difficulties.

[16] On or about 14 November 2008 Mr Small approached Fair Go again by sending an e-mail to Mr Milne. He wanted to speak to Mr Milne urgently. A copy of the e-mail to Fair Go was sent to Ms Julie Batt, who was a director of Easy Living Homes Ltd, the Lockwood franchisee for the Queenstown area.

[17] On or about 16 November 2008 Mr Small sent an e-mail to his lawyer, again with a copy to Ms Batt, in which he said that:

> It's back to Fair Go & the media.
>
> It's obvious Lockwood and Odin would prefer to spend more time fighting minor issues than fixing the major problems on the Te Anau show home. Odin's 30 day warning from Lockwood has lapsed & minimal rectification has been carried out. Grant Finch has entered my property contrary to the terms of our agreement.
>
> Please don't spend any more time on this case, only do so if Lockwood accepts responsibility for payment.
>
> The house will be:
>
> > Registered as a leaky home later this week.

> Extensively advertised as a show home for sale, stating that it has no code of compliance & all the rectification required to fix it.
>
> If it means that I will be held liable for making sure every New Zealander knows what these morally brain dead crooks have done, so be it.
>
> The threat of jail will not stop me getting the truth out to the public. I'm overwhelmed by all the people that have come forward to support me.

[18] On or about 4 February 2009, Ms Batt received another e-mail from Mr Small, the thrust of which was that Ms Batt's company was being asked to salvage Lockwood's reputation in the area by agreeing to undertake remedial work for Mr Small.

[19] On 19 February 2009, Mr Small renewed his request to Television New Zealand that his problems be given publicity on the Fair Go programme. Over the next few days, his activities escalated. Mr Heard describes what occurred:

> 49. On 20 February 2009, Mr Small circulated an e-mail to all Lockwood franchisees stating that he had contacted Fair Go and stating that:
>
> > 'Bringing this ordeal to the attention of the media will not help the value of my house or the Lockwood name. I feel you and all the Lockwood franchise holders other than Odin will agree with me'.
>
> A copy of this e-mail is annexed and marked 'F'.
>
> 50. On the morning of 24 February 2009, I received two texts from Mr Small. These read:
>
> > 'Bryce this drawn out saga will b shown 2 the public by several means from Monday onward. Only u can stop this now'
> >
> > and
> >
> > 'Contact from Lockwood's lawyer will only make matters worse. Rgs Barry'
>
> 51. On 24 February 2009, Lockwood received an e-mail that had been sent by Mr Small to some of its franchisees, in which he said:
>
> > 'Take a look at this as a concept at this stage. The way Lockwood are acting with a lawyer's letter today is getting right up my nose and a sign will be (sic) more likely be a lot more blatant than this'.

> 52. The e-mail had attached to it two mockup photos showing a utility vehicle painted with signs on either side, being the large Lockwood yellow logo with the Lockwood name on it, and phrases that Lockwood has adopted as part of its promotional campaign being on one side of the vehicle 'QUALITY.GUARANTEED. COMPLIANT' and on the other side of the vehicle 'SOLID.SECURE.NATURAL' and on both sides of the vehicle superimposed over the bottom right hand corner of the logo the words 'Yeah Right'. A copy of this e-mail and the attachment is annexed and marked 'G'.

[20] Lockwood's solicitors contacted Mr Small's solicitors for the purpose of endeavouring to persuade Mr Small against engaging in his threatened activities. But Mr Small declined to give the undertakings sought by the solicitors.

[21] On 21 February 2009, Mr Small sent a further e-mail to Ms Batt and to Mr Craig Mooney, another Lockwood franchisee, in which he claimed that the Council had undertaken a code compliance inspection of his home, and had found there were 48 outstanding issues. Mr Small further stated that he had been advised that Odin had gone into liquidation and that he would be taking the matter up with the media, because that would be detrimental to the Lockwood brand: the franchisees should discuss the issues with upper management.

[22] It was against that background that Lockwood sought and obtained the interim injunction granted on 27 February 2009.

[23] Copies of my minute of 27 February 2009, and of the sealed interlocutory order were served on Mr Dowland, Mr Small's solicitor, and upon Mr Small himself, that same day.

[24] On 3 March 2009, Mr Heard received a phone call from a Mr Mike Ross, who said he was good friends with Mr Small, and had that morning received certain e-mails from Mr Small about "a whole heap of stuff" relating to the Odin dispute. Mr Ross felt "everyone had gone stupid". He indicated that he was happy to become involved as a mediator. Mr Heard responded to the effect that the dispute was subject to a confidentiality agreement, and that neither party could discuss the matter with a third party.

[25] On 26 March 2009, Mr Heard received a telephone call from a Mr Kensington, who the previous day had taxed him at a Lockwood clients' seminar in Hamilton, as to Lockwood's willingness to stand behind under-performing franchisees. Mr Kensington was critical of Lockwood's stance in relation to Mr Small's dispute. It appears that Mr Kensington had originally intended to have a Lockwood house constructed on his property, but decided against doing so after hearing from Mr Small.

[26] The arbitration award was delivered on 17 August 2009. Mr Small achieved a significant measure of success. In particular the arbitrator found effectively that Odin had been overpaid by Mr Small, and that Odin should undertake remedial work.

[27] After the award was delivered, Ms Batt received several telephone calls from Mr Small in which he advised that he intended to pursue Lockwood for any financial shortfall resulting from the arbitrator's decision.

[28] On 14 September 2009 there was another discussion between Mr Kensington and Mr Heard. Mr Kensington advised that he was calling on behalf of Mr Small, that he knew all of the details of the dispute between the parties, and that he was requesting that a meeting be set up to sort out the dispute. Mr Heard declined to discuss the matter again, pointing out that the dispute was the subject of a confidentiality agreement. Mr Kensington responded by asserting that the interim injunction of 27 February 2009 no longer applied, and that it was basically Lockwood's responsibility to fix Mr Small's problem.

[29] A few days later, on 17 September 2009, Mr Small's solicitor wrote to Lockwood's solicitors. The letter was marked as being "without prejudice", but contained no offer to settle the dispute; nor did it form part of a course of privileged correspondence. The letter advised that:

> Barry was not going to agree to remain silent forever.

And that:

> He reserved his rights to go to the media if the matter could not be satisfactorily resolved.

Interim injunction

[30] Ms Grant seeks to maintain the interim injunction either in its current terms or in a similar form acceptable to the Court. She relies upon the alleged breaches of contract which grounded the original grant of the injunction, or in the alternative, upon causes of action in defamation and injurious falsehood, now pleaded in an amended statement of claim dated 12 February 2010.

[31] Mr Withnall argues that the contractual basis for the injunction has disappeared, because in terms of clause 8 of the tripartite agreement, the parties are no longer performing their obligations under it, the arbitration between Mr Small and Odin is complete, and it is agreed that Mr Small's home will not in future be operated as a show home.

[32] Mr Small's obligations under the contract were to withdraw his complaint to Fair Go (clause 7), to refer the building dispute to arbitration (clauses 1 and 2), to execute the variation of the contract comprising the arbitration agreement, and to pay the sum of $5,000 for arbitrator's fees (clause 3). All of those obligations have been performed.

[33] Lockwood's obligations to Mr Small under the agreement were concerned with its proposed lease of the home for show home purposes for a period of one year (clause 11). Lockwood also agreed with Odin to withdraw its notice of breach of Odin's franchise agreement and to issue a new notice allowing 30 days to remedy the breach of that agreement (clause 6).

[34] Lockwood was not a party to the arbitration agreement. Mr Small and Odin, who were, expressly agreed that all matters covered by the tripartite agreement were not to form part of the matters referred to arbitration (clause 4).

[35] In terms of the arbitral award, Mr Small was entitled to a refund from Odin of $70,041.49. A list of remedial works was to be completed by 31 October 2009. If and when they were completed, Mr Small was required to pay Odin the sum of $41,921.

[36] By the time of the award Odin had ceased to trade. It performed none of its obligations under the award. Its principals were adjudicated bankrupt in November/December 2009. On the information currently available to the Court, it appears that Mr Small has performed all of his obligations under the tripartite agreement, and that there is no prospect of Odin ever performing its remaining obligations under the arbitral award.

[37] In those circumstances, both Lockwood and Mr Small, have with one arguable exception, performed their obligations in terms of the tripartite agreement in their entirety. Odin has not, but there is no prospect that it ever will do so. The arbitration is complete. Accordingly, the only basis upon which it can be contended that clause 8 of the tripartite agreement continues to have effect, relates to the arrangements in respect of the show home. Here, there are competing assertions.

[38] Mr Small says that:

> Lockwood had advised that it does not want to use the building as a show home, so it has walked away from its obligations in the 19 September 2008 agreement".

Mr Heard, for Lockwood, says:

> The show home idea has been overtaken by time and events beyond our control. Mr Small is understandably impatient to be able to live in his home. It was amicably agreed that the show home idea would be dropped. Lockwood has not 'walked away from' the agreement at all, it simply no longer was in either parties' interests to proceed with this part of the original agreement, and so the agreement was varied. Mr Small was in full accord with this decision.

[39] Ms Grant argues that it is apparent that there is a dispute about Lockwood's future obligation to operate the completed and re-opened show home, that such dispute must be referred to arbitration in terms of clause 9 of the tripartite agreement and that clause 8 of that agreement must accordingly be regarded as still operative.

[40] I reject that submission. The parties are at odds as to the basis upon which the show home aspect of the agreement has come to an end, but they are agreed that it has in fact come to an end. Mr Small, who contends that Lockwood is in breach, has evinced no intention of taking any action against Lockwood in consequence. It

appears indeed that he is content to accept the fait accompli on the point. In the circumstances, there is in my view no dispute to be referred to arbitration. Moreover, as Mr Withnall points out, it is somewhat curious that Lockwood should argue on the one hand that there had been an agreed variation, and on the other, contend that there is a dispute, sufficient to perpetuate the operation of clause 8.

[41] As clause 8 is no longer applicable to the legal relationship of the parties, it follows that there is no contractual basis for the perpetuation of the existing injunction.

[42] In the alternative, Ms Grant argues that Lockwood is entitled to call in aid the provisions of s 14A and B of the Arbitration Act 1996, which provide:

> **14A Arbitral proceedings must be private** –
>
> An arbitral tribunal must conduct the arbitral proceedings in private.
>
> **14B Arbitration agreements deemed to prohibit disclosure of confidential information** –
>
> (1) Every arbitral agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

[43] Her argument is advanced on two alternative grounds. First, she argues that Lockwood was, in law, a party to the arbitration for the purposes of the Arbitration Act. Section 2 defines a party as being:

> [A] party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

[44] The argument is that because Lockwood was a party to the tripartite agreement which contained the arbitration agreement, it thereby became a party to the arbitration agreement for the purposes of s 2.

[45] The tripartite agreement commences as follows:

> Background
>
> A dispute has arisen between Small and Odin concerning a home being built by Odin for Small on Small's property near Te Anau. The home was

> intended to be leased back to Odin and used by Odin for a Show Home for one year from completion before Small took full possession and occupancy of it for his own use.
>
> Lockwood has been trying to broker a settlement of the matters in dispute between Small and Odin to bring the disputed issues to a resolution.
>
> Agreed
>
> 1. Small and Odin have agreed to refer most of the matters in dispute to Arbitration, and a copy of the agreed Terms of Reference for the Arbitrator are attached and called 'Appendix A'.
>
> 2. Small and Odin have agreed to appoint Theo Marlow of Dunedin as the Arbitrator ('the Arbitrator') and Mr Marlow has agreed to undertake that role.
>
> 3. Small and Odin have agreed to execute the Variation of Contract being the document contained in Appendix A and to each pay the sum of $5,000 for a total of $10,000 with payment to be made into the trust account of Gallaway Cook Allan, Solicitors at Dunedin being the payment required by the Arbitrator.
>
> 4. Small and Odin agree that all matters covered in this Agreement are not to form part of the Arbitration.

The balance of the tripartite agreement includes clauses 5, 8, 9 and 11, which I have reproduced earlier in this judgment.

[46] It will be observed that the only reference to Lockwood in the early part of the tripartite agreement is to its status as a broker of matters in dispute between Small and Odin. The matters referred to arbitration were, in law, between Small and Odin alone; they did not involve Lockwood. Lockwood's only obligations under the tripartite agreement arise in clauses 5, 8, 9 and 11, all of which are expressly agreed not to form part of the dispute referred to arbitration by Mr Small and Odin.

[47] Section 2 of the Arbitration Act defines the expression "arbitration agreement" to mean:

> …[A]n agreement by the parties to submit to arbitration all or certain disputes which have arisen, or may arise between them in respect of a defined legal relationship, whether contractual or not.

[48] The dispute actually submitted to arbitration was not a dispute between Lockwood and Mr Small, the tripartite agreement expressly defining the parties to the dispute as being Odin and Mr Small. A reading of the tripartite agreement as a

whole discloses Lockwood's evident intention to distance itself from the dispute between Mr Small and Odin.

[49] Accordingly, Lockwood is not entitled, in my view, to maintain a confidentiality claim against Mr Small in reliance on its claim to be a party to an arbitration agreement, or otherwise to be a party to the arbitration.

[50] Ms Grant nevertheless argues that s 14B is wide enough to catch the case of a third party; in other words it is said that a third party may take action where there is a breach by a party to an arbitration of the deemed confidentiality obligation enacted by that section. In support of that proposition she refers to the judgment of Heath J in *Beattie v Attorney-General* HC Auckland CIV-2003-404-3166, 11 June 2004. There, His Honour was concerned with the use by a third party of an interim award, in circumstances where the award could not be shown to have been in the public domain. At [18] Heath J said:

> Having regard to the presumption created by statute (not by contract) in s 14(1) of the Act, I am of the clear view that any person who receives an interim award in the circumstances disclosed in this case, is under an obligation to inquire what agreement has been reached between the parties to the arbitration before treating it as within the public domain.

[51] That was a case in which the focus was upon the use to which a third party might make of material produced to the arbitrator. It does not bear on the question currently before the Court, namely, whether a third party (Lockwood), not a party to the arbitration, is entitled to enforce confidentiality obligations owed by one party to an arbitration to the other. Without more detailed argument than was advanced at the hearing, I am not prepared to conclude that Lockwood, which carefully distanced itself from the arbitration, is entitled to enforce the confidentiality obligation. I conclude therefore that Lockwood has not made out a case for the maintenance of the injunction in reliance on that section.

[52] It remains to consider the causes of action based upon alleged defamation and injurious falsehood.

[53] These allegations appeared for the first time in Lockwood's second amended statement of claim dated 12 February 2010. It is convenient to set out this aspect of the pleading in its entirety:

> *Defamation*
>
> 44. The plaintiff relies on the content of the e-mail sent by Mr Small to Ms Batt dated 16 November 2008 in which he describes the plaintiff as being 'morally brain dead crooks' and that he would risk going to jail to let the rest of New Zealand know that. The plaintiff says that in their natural and ordinary meaning the words contained in that e-mail meant and were understood to mean, that the plaintiff was immoral and dishonest.
>
> 45. The plaintiff relies on the telephone conversation between Mr Small and Mr Heard on 20 February 2009, in which Mr Small threatened to publicly expose Lockwood's inadequacies and discredit its name.
>
> 46. The plaintiff relies on the content of the e-mail and accompanying image sent by Mr Small to Lockwood's franchisees on 24 February 2009 in which Mr Small depicts a car with the Lockwood logo painted on it and the phrase, 'QUALITY. GUARANTEED. COMPLIANT' written on one side of the card and on the other side of the vehicle 'SOLID. SECURE. NATURAL' followed by the phrase 'Yeah, Right.' The plaintiff says that in their natural and ordinary meaning the words contained in that e-mail and depicted on the image of the car that Mr Small claimed he would drive around New Zealand to create bad press for Lockwood, meant and were understood to mean that the plaintiff produced a product that was:
>
> (a) Of poor quality;
> (b) Not guaranteed;
> (c) Not legislation Code Compliant;
> (d) Flimsy;
> (e) Not secure; and
> (f) Artificial.
>
> 47. The plaintiff relies on a telephone call from Mr Ross to Mr Heard on 3 March 2009. Mr Ross said that he was a friend of Mr Small and that Mr Small had sent him e-mails about the dispute. The plaintiff says that in that conversation Mr Ross said that he felt 'everyone had gone stupid' and that this indicated that Mr Small had commented on the plaintiff in a manner that meant and was understood to mean that the plaintiff was acting in a foolish manner.
>
> 48. The plaintiff relies on the discussion between Mr Kensington and Mr Heard at a Lockwood client's seminar in Hamilton on 25 March 2009 and the telephone call from Mr Kensington to Lockwood the following day. Mr Kensington told Mr Heard that he had been communicating with Mr Small and that he was critical of Lockwood and the treatment Mr Small had received from Lockwood. On 26 March 2009, Mr Kensington called Lockwood and said that he no longer had any faith in Lockwood. The plaintiff says that this

interaction indicated that Mr Small had commented on the plaintiff in a manner that meant and was understood to mean that the plaintiff was unreliable, irresponsible and treated its customers poorly.

49. The plaintiff relies on a telephone call from Mr Kensington to Mr Heard on 14 September 2009. Mr Kensington said that Mr Small had spoken to Mr Kensington about the dispute between the parties. The plaintiff says that in that conversation Mr Kensington said that he felt Lockwood was playing 'hardball' and that it had to be Lockwood's responsibility to fix Mr Small's problem. The plaintiff says that this indicated that Mr Small had commented on the plaintiff in a manner that meant and was understood to mean that the plaintiff was acting in a ruthless way, that it was shirking its responsibilities and did not stand behind its product.

50. The words and meanings described in paragraphs 44 to 50 above are untrue.

52. The actual and threatened conduct of Mr Small detailed in paragraphs 15 to 41 above constitutes defamation and anticipatory defamation.

Particulars

(a) The words and meanings described in paragraphs 44 to 50 above were published of and concerning the plaintiff;

(b) The actual and threatened conduct of Mr Small has injured the plaintiff's reputation and it has been brought into public scandal, odium and contempt;

(c) The actual and threatened conduct of Mr Small has caused, or is likely to cause, pecuniary loss to the plaintiff;

(d) The defendant has no defence to defamation under the Defamation Act 1992.

And the plaintiff claims:

A A permanent injunction to restrain Mr Small from making negative comments or statements to any third party other than his legal advisers and experts about Lockwood or its franchisees and its and their employees, agents, directors or otherwise in relation to the subject matter of the Arbitration Agreement.

B Damages in the sum of $1,110,000.

C Costs.

Injurious Falsehood

53. The plaintiff repeats paragraphs 15 to 50 above.

54. The actual and threatened conduct of Mr Small detailed in paragraphs 15 to 50 above constitutes injurious falsehood.

Particulars

(a) The words and meanings described in paragraphs 44 to 50 above are untrue;

(b) The defendant published or caused to be published the words and intended the meanings described in paragraphs 44 to 50 above knowing them to be false or recklessly not caring whether they were true or false and or with no honest belief that they were true;

(c) In so doing the defendant was actuated by the dominant motive of damaging the plaintiff in its business; and

(d) The actual and threatened conduct of Mr Small has caused, or is likely to cause, both quantifiable and unquantifiable pecuniary loss to the plaintiff.

And the plaintiff claims:

A A permanent injunction to restrain Mr Small from making negative comments or statements to any third party other than his legal advisors and experts about Lockwood or its franchisees and its and their employees, agents, directors or otherwise in relation to the subject matter of the Arbitration Agreement.

B Damages in the sum of $1,110,000.

C Costs.

[54] The starting point is the established principle that interim injunctive relief will not ordinarily be available in defamation cases unless the statements made, or likely to be made, by a defendant are obviously untruthful and defamatory: *Bonnard v Perryman* [1891] 2 Ch 269 and *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 at 132-133. A similar approach is adopted in injurious falsehood cases: *Alan H Reid Engineering Ltd v Ramset Fasteners (NZ) Ltd* (1990) 4 TCLR 126 at 131.

[55] Mr Small's current position is encapsulated in the following passage in his most recent affidavit:

22. My complaint about Lockwood is its failure to select and supervise and control its franchisees to ensure that people buying the Lockwood product get the quality of product it promotes and sells. I have no complaints about the product itself. I still believe it is an excellent product, and have said so, and will say so again.

23. However, what I got was a franchisee with a history of business failure, and shoddy and unacceptable workmanship, for which Lockwood will not accept responsibility, because the building contract was with the franchisee. I have no chance of recovering

> against Odin. I have overpaid $70,000.00, and still have to complete the building. If I have to bear the cost of that, and it seems that I will have to, I simply want to be able to tell people the facts.

[56] Mr Small does not claim that Lockwood products are in any way inferior or substandard. Indeed, it seems that he accepts them to be of a high standard. His concern seems to be focused upon the adequacy of Lockwood's franchisee selection processes.

[57] Nothing before the Court presently suggests that Lockwood is under any legal obligation to discharge Odin's responsibilities to Mr Small in terms of the arbitration award. Mr Small seems to think that Lockwood nevertheless has a moral responsibility to do so. That view appears to underpin Mr Small's campaign against Lockwood, although the publications of which Lockwood complains cover much wider ground. I note that there is no explicit indication from Mr Small that he proposes a trial to plead truth or any other available defence. As yet there is no statement of defence.

[58] Mr Small's e-mail of 16 November 2008 to Ms Batt refers to "morally brain dead crooks" and claims that Mr Small would risk going to jail to let the rest of New Zealand know it (paragraph 44). There is a question as to whether that statement was made in respect of Lockwood, or merely about Odin, but it is arguable that it was intended to apply to both: *Christchurch Press Co Ltd v McGaveston* [1986] 1 NZLR 610 (CA). The statement is plainly defamatory, although publication seems to have been restricted to Ms Batt.

[59] At paragraph 45 Lockwood pleads a telephone conversation between Mr Small and Mr Heard on 20 February 2009, in which the former threatened publicly to expose Lockwood's inadequacies and discredit its name. I accept that this constitutes some evidence of Mr Small's intention to impugn Lockwood's integrity, but because the precise words are not pleaded, it is difficult to place significant weight on this aspect of the plaintiff's claim.

[60] Paragraph 46 of the amended statement of claim is in a different category altogether. Here, the plaintiff has pleaded the words complained of, and the meanings contended for. The signs which Mr Small threatened to deploy had no

basis in fact and he makes no attempt now to justify them. Indeed, he accepts that Lockwood's products are of high quality.

[61] Paragraphs 47 to 49 of the amended statement of claim are pleaded in a somewhat discursive fashion, and standing alone could not support either cause of action. In particular, the actual words alleged to have been used by Mr Small have not been pleaded in the usual way.

[62] Finally, at paragraph 50, there is the express indication from Mr Small's solicitor to the effect that his client intends to pursue his media campaign to discredit Lockwood.

[63] Given my earlier findings, Lockwood is not entitled to restrain Mr Small from disclosing the circumstances of his dispute with Odin. On the other hand, neither is Mr Small entitled to impugn Lockwood's honesty or integrity, or the quality of its products. Mr Small has adduced no evidence at all to suggest that he is in a position to establish the truth of the highly defamatory allegations which go to those matters. Neither has he given any form of undertaking which might be of comfort to Lockwood. Indeed, he proposes to maintain his campaign.

[64] In my view, Lockwood has made out its case for an interim injunction, but in a greatly modified form.

Contempt

[65] It is a civil contempt to disobey a judgment or order of the Court requiring a person to abstain from doing a specified act. In order to make out a case for contempt, the plaintiff must establish that:

a) The terms of the injunction are clear and unambiguous;

b) The defendant has had proper notice of such terms;

c) The terms have been broken by the defendant: *Saville v Roberts & Morris* HC Christchurch CP9/86, 10 December 1986. It is not necessary that the plaintiff establish that there has been wilful disobedience: *Knight v Clifton* [1971] 2 All ER 378 at 393 (CA). Neither is it necessary to establish that a defendant knew that he was breaching an injunction. It is sufficient to show that the defendant's actions were deliberate: *Siemer v Stiassny* [2008] 1 NZLR 150 (CA).

[66] The plaintiff relies in support of the contempt application upon Mr Small's apparent communications with Ms Batt, Mr Ross and Mr Kensington. It appears that all of Mr Small's relevant communications with Ms Batt occurred after the arbitral award was delivered in August 2009. By then, clause 8 of the tripartite agreement upon which the interim injunction was based was effectively spent. Technically of course, the injunction remained in force. Nevertheless, the foundation for it was gone. I cannot regard Mr Small's communications with third parties subsequent to the delivery of the arbitral award, as constituting a sufficient justification for the imposition of a penalty for contempt.

[67] There is evidence to suggest that Mr Small communicated with both Mr Ross and Mr Kensington in or about March 2009, for the apparent purpose of obtaining their assistance in sorting out his disputes with Odin and Lockwood. On the face of it that was a technical breach of the injunction, but I do not accept, as Ms Grant submits, that it was a breach simply to advise either of these gentlemen of the existence of the injunction.

[68] Even where a contempt is established however, the imposition of a sanction is a matter within the discretion of the Court. An important question will be the extent of the contempt and the motive with which the defendant was acting. A further question is the degree of prejudice suffered by the innocent party.

[69] Here, I am satisfied that it is not appropriate to impose any penalty upon Mr Small. I discount any steps taken by him after 17 August 2009 because, although the injunction technically remained in force, the foundation for it (clause 8 of the

tripartite agreement) was spent. The earlier communications with Mr Ross and Mr Kensington, on the face of things, were aimed primarily at resolving the dispute.

[70] I have considered whether or not to grant a declaration, but that is unnecessary having regard to the fact that the present injunction is to be substantially modified. Mr Small must however, understand that he is to comply in every respect with the injunction which I now propose to grant.

[71] Lockwood's application for committal and associated orders for contempt of Court is accordingly dismissed.

Conclusion

[72] For the foregoing reasons I make the following orders:

a) The interim injunction granted by me on 27 February 2009 is rescinded;

b) There will be an injunction restraining the defendant, his servants or agents until further order of the Court from commenting adversely to any person upon the honesty or integrity of the plaintiff or its management, or upon the quality of its products;

c) The plaintiff's contempt application is dismissed.

[73] For the avoidance of doubt the injunction is not intended to prevent the defendant from discussing the facts and circumstances of the defendant's dispute with Odin, provided that he does not impugn the plaintiff's honesty, integrity, or products.

[74] The costs of and incidental to these applications are reserved. Counsel may file memoranda if they are unable to agree.

C J Allan J