IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

CIV 2013-435-14
[2013] NZHC 2893

BETWEEN	MARK JOHN JERLING, ANNELINE JERLING AND GAWITH TRUSTEES LIMITED JOINTLY (AS TRUSTEES OF THE JERLING TRUST), CHRISTOPHER MAURICE KINGDON, ANETTE KRISTIN KINGDON AND GAWITH TRUSTEES LIMITED JOINTLY (AS TRUSTEES OF THE HAVEN TRUST), MARK JOHN JERLING, CHRISTOPHER MAURICE KINGDON AND TIMELESS HOMES LIMITED (FORMERLY RESIDENTIAL WELLINGTON-WAIRAPARA LIMITED) Applicants
AND	MOSS BROTHERS LIMITED, MASTERTON RENTALS LIMITED, JACKIE LIM MOSS, JULIAN ROY MOSS AND SADLER OAKLY NEWMAN TRUSTEES LIMITED JOINTLY (AS TRUSTEES OF THE LIM MOSS JOINT TRUST) AND PERIOD REPLICA HOMES LIMITED Respondents

Hearing:	3 October 2013 (Heard at Wellington)
Additional Submissions:	Respondents, 10 October Applicants, 17 October
Counsel:	P S J Withnall for Applicants D S Lester for Respondents
Judgment:	1 November 2013

JUDGMENT OF RONALD YOUNG J

Introduction

[1] The applicants (collectively called Timeless) were former franchisees and the respondents (collectively called Moss Brothers) were the franchisor relating to a method of building period or colonial homes. They had a falling out. Over an extended period they negotiated a settlement. The settlement was mostly concerned with what to do with partially constructed houses and Moss Brothers retaining for the future its intellectual property rights as against Timeless but allowing Timeless the freedom to function itself as a housing company. Unfortunately the Deed of Settlement did not settle the disputes between the parties. And so given cl 19 of the Deed of Settlement provided for arbitration for a dispute arising out of the Deed, the parties went to arbitration.

[2] The hearing occupied three days in August 2011 and then two further days in November 2011. Closing submissions were filed and served by 16 December 2011. The arbitrator released his decision on 19 October 2012.

[3] Timeless were unhappy with three of the awards made against them:

(a) an injunction which effectively provided for a restraint of trade for two years from the date of the arbitration decision;

(b) damages of $50,000; and

(c) costs.

[4] In these proceedings Timeless challenge those three awards.

[5] The right to challenge an arbitral award in these circumstances is set out in art 34 of sch 1 of the Arbitration Act 1996. Article 34(2) and (6) are of particular relevance. They state:

> *Application for setting aside as exclusive recourse against arbitral award*
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> ...
>
> (2) An arbitral award may be set aside by the High Court only if–

...

(b) the High Court finds that–

...

(ii) the award is in conflict with the public policy of New Zealand.

...

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—

(a) The making of the award was induced or affected by fraud or corruption; or

(b) A breach of the rules of natural justice occurred—

(i) During the arbitral proceedings; or

(ii) In connection with the making of the award.

[6] The applicants challenge the injunction issued by the arbitrator because:

(a) they were unable to fully present their case relating to the injunction;

(b) they were deprived of the opportunity to be heard on the making of the injunction, breaching rules of natural justice;

(c) the terms of the order "perpetuate an unjustified suppression of competition and constitute the unilateral altering of the parties bargain by the arbitral tribunal".

[7] The challenge to the damages award is because:

(a) there was no or inadequate reasoning for the award;

(b) the amount awarded was in conflict with public policy of New Zealand.

[8] The challenge to the costs award is based on the claim that:

(a) the applicants were denied the opportunity to be heard on the exercise of the discretion as to costs in conflict with the public policy of New Zealand; and

(b) the award was unreasonable.

Background facts

[9] Moss Brothers developed a reputation in designing and constructing replica colonial and other early New Zealand housing designs. In 2006 they decided to franchise the construction of these replica houses based on their designs. Eventually a franchise was taken up by Mr Jerling (who ultimately formed Timeless Homes Ltd). But the arrangement did not work out.

[10] The arbitrator described the December 2009 Deed of Settlement as one that was intended to settle all matters between the parties and essentially provided for Moss Brothers to repurchase the franchise. The Jerling interests would be renamed Timeless and construct houses of its own design.

[11] At [40] of his decision, the arbitrator set out Moss Brothers' claim that Timeless had breached the Deed of Settlement as follows:

> 40. In a carefully detailed claim, Moss Brothers pleads breaches of the following clauses of the settlement:
>
> Clauses 7.2(e) and 7.3(a) – use of Moss Brothers house designs/detailing material that is confusingly similar so as to create a connection;
>
> Clause 8.2 – not following the process for approving advertising;
>
> Clause 9.6 – not following the proper franchise processes in the transition period;
>
> Clause 10 – not complying with the maintenance obligations as agreed;
>
> Clause 12 – infringing use of IP, including:

(i) the use of Moss Brothers plans;

(ii) the use of Moss Brothers specification;

Misrepresentation, by:

- indications that Timeless was to develop very different buildings from the ones it developed;
- use of Master Builder awards;
- use of the words "Moss Brothers";
- Leasing deceptively similar premises from which to operate;

Clause 14 – not complying with the Non Competition provisions;

Clause 18 – making disparaging remarks;

Breach of the condition of its lease to Timeless Home, in that landlord fittings were removed without approval.

[12] The arbitrator worked his way through the evidence relating to each alleged breach or misrepresentation and gave a decision on each. In some claims Moss Brothers won, in others they lost.

Injunction ground of challenge

Was Timeless able to fully present its case?

[13] The arbitrator made the following injunction at the conclusion of his award:[1]

> An injunction is issued preventing Timeless Homes from offering to provide, or providing, or assisting anyone else to provide any services, whether free or not, in relation to the design and construction of houses design, [sic] using architectural features that have been used [sic] New Zealand during the period 1850–1950, for a period of 2 calendar years from the date of this Award.

[14] This issue arose from the definition of the term "Moss Brothers House Designs" in the Deed of Settlement.[2] Clauses 7.2(c) and 7.3(a) of the Deed prevent Timeless from using any Moss Brothers House Designs or confusingly similar designs or material.

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1 Arbitral Award at [254](2).

2 The first alleged breach identified by the arbitrator. See above at [12].

[15] Those clauses provide:

> 7.2 Upon Settlement MBR will:
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> ...
>
> (c) cease using all livery, branding and other marketing material derived from the Moss Brothers franchise except as explicitly permitted by this Deed;
>
> ...
>
> 7.3 The Purchaser Parties will not from Settlement, unless explicitly provided in this Deed:
>
> (a) use any marketing plans, Moss Brothers House Designs, Moss Brothers Detailing, branding, get up, colours, livery, names, trademarks or other Intellectual Property, or other material that is confusingly similar to those of the Moss Brothers franchise or that could create a connection between the Purchaser Parties and the Vendor Parties or any of them;
>
> ...

[16] Moss Brothers House Designs is defined in the Deed in this way:

> "**Moss Brothers House Designs**" means designs for homes using New Zealand period architecture for the period 1850–1950 and includes the Show home, Queenslander style designs, the designs set out in Schedule 1 attached to this Deed, any designs derived from those designs (being all the foregoing) and all houses or structures built during the Moss Brothers Franchise but does not include the MBR designs set out in Schedule 3;

[17] The terms of the injunction issued illustrated that the arbitrator accepted a broad interpretation of the definition rather than the narrow view advocated by Timeless. The arbitrator accepted that the prohibition in cl 7.3(a) together with the definition of Moss Brothers House Designs meant that for two years Timeless could not build a house which had any architectural features of a house built during the period 1850 to 1950 in New Zealand. This was irrespective of any use by Moss Brothers of the particular architectural feature.

[18] Timeless says that it had never imagined that the Deed of Settlement could be interpreted in the way the arbitrator found. It had thought that cl 7(1)(a) was drafted to protect Moss Brothers designs and their intellectual property rights. During the course of the final day's hearing there was discussion between the parties and

particularly between Mr Jerling (for Timeless) and the arbitrator regarding the interpretation of the Settlement Deed and in particular the definition of Moss Brothers House Designs and cl 7.3(a).

[19] During the discussion the arbitrator indicated that he might interpret the phrase as providing the wide prohibition he ultimately settled on. Mr Jerling expressed surprise at this interpretation.

[20] Mr Jerling says that during this discussion he asked the arbitrator if he could have the opportunity of calling his solicitor (who had negotiated the Deed of Settlement) to give evidence. He believed that the lawyers, both his and Moss Brothers, would confirm that the tentative interpretation identified by the arbitrator of cl 7.3(a) and the definition was wrong because it was not what either party had intended.

[21] The applicant's case is that the arbitrator refused to allow either Timeless' solicitors or Moss Brothers' solicitor to be called to give evidence about the circumstances leading up to the signing of the Deed of Settlement.

[22] Timeless submits that once it became clear that the parties may have a different interpretation of the relevant portion of the Deed of Settlement, or that the words of the Deed might not have reflected the agreement of the parties, then there was potential for further evidence to be called. This could be relevant to estoppel by representation, rectification, the Contractual Mistakes Act 1977 and assist in the interpretation of this part of the Deed. Timeless makes the point that both parties were represented by lay people in the arbitration so that the legal issues were not necessarily easily identified.

[23] Timeless say that there appear to be two reasons why the arbitrator refused to allow the evidence:

(a) time pressure; and

(b) the arbitrator's view that the proposed evidence was not admissible and/or relevant to his task.

[24] As to the latter point the applicant says that the arbitrator could not possibly have assessed (based on *Vector Gas Limited v Bay of Plenty Energy*)[3] whether in fact the evidence the solicitors could give was admissible. For example, negotiations of the parties will typically be admissible where there are claims for rectification or estoppel by representation. Both claims were potentially available at the time to Timeless when the dispute about the meaning of the Deed became apparent and the question of calling the parties' solicitors arose.

[25] The result was that Timeless submits it was unable to properly present its case. It was in effect denied the opportunity to be heard on issues which related centrally to the injunction award. This breached the rules of natural justice and was accordingly in conflict with the public policy of New Zealand. This failure by the arbitrator, therefore, came within the limited grounds to review an arbitrator's decision.

[26] The respondents' case is that the question about the interpretation of the relevant provisions of the Deed of Settlement was known by both parties prior to the arbitration. There was, therefore, plenty of opportunity for Timeless to properly prepare and present their case beforehand. Secondly, the respondents point out that Mr Jerling, on behalf of Timeless, expressly acknowledged during the course of his evidence near the end of the arbitration that he did not want to hold up the proceeding and did not want to delay the completion of the case by having the lawyers give evidence. In any event, Mr Jerling's lawyer, Mr Anderson, was not available on that day to give evidence. The respondent stressed that Timeless said at the end of the hearing it did not want an adjournment.

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[3] *Vector Gas Limited v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 449 at [19].

[27] The respondents point out that the arbitrator said when asked about Timeless' lawyer giving evidence:

> ... that would become, if in the end and this is truly hypothetical, if I was to rule against a party you felt that they had been given different advice by their lawyers, you would have had to take that up with your lawyer and possibly that leads to argh you know another dispute. It's of no relevance to me what your lawyer told you this agreement meant.

[28] The arbitrator stressed that what he was trying to do was interpret the documents on their face and avoid what the parties thought or believed was agreed, either personally or through their lawyer.

Did Mr Jerling ask for an adjournment to have his lawyer called to give evidence?

[29] During the course of discussion on day six of the arbitration, near the end of the hearing, Mr Jerling observed that Moss Brothers had approved Timeless' brochures which described houses Timeless proposed to build (as the Deed of Settlement provided). Mr Jerling said that many of these houses in the "approved" brochures could be called traditional style houses (from 1850–1950). Mr Jerling complained that Moss Brothers were now apparently claiming that Timeless could not build these houses because the Deed of Settlement prohibited Timeless from using architectural features used in New Zealand houses between 1850 and 1950. Mr Jerling said it was inconsistent for Moss Brothers to approve Timeless' brochures which said Timeless were prepared to build traditional style houses, many of which had architectural features used in New Zealand houses between 1850 and 1950, when Moss Brothers claimed that the Deed of Settlement in fact prohibited Timeless from building such houses. Moss Brothers claimed the approval of the brochures did not mean they accepted Timeless could build the houses described in the brochure.

[30] This complaint by Timeless raised with the arbitrator the question of the exact extent of the restriction in the Deed of Settlement on Timeless' entitlement to build houses of particular designs.

[31] During the course of the discussion between the arbitrator and Mr Jerling, it became clear that there was a significant difference between Mr Moss and Mr Jerling about the interpretation of this restriction. Moss Brothers apparently believed that the restriction prevented Timeless from using any feature of a New Zealand house designed between 1850 and 1950 for the two year period. Timeless understood that the clause meant that the restriction related to Moss Brothers designs which "copied" some design features from houses built during this 100 year period.

[32] As the arbitrator said, in response to Mr Jerling's observations:

> So that could be a major misunderstanding of how this is supposed to work.

[33] Mr Jerling responded:

> It's a huge misunderstanding because when we signed up to this agreement our lawyers and Mr Moss' lawyers spent six months between them having a verbal agreement or an agreement in a meeting with Judge Hobbs [who had assisted in the completion of the Deed of Settlement] and actually fleshing that agreement out into a written agreement. And in all those six months Mr Moss' lawyers and our lawyers were talking to each other.

[34] Further discussion between the arbitrator and Mr Jerling followed. Mr Jerling expressed surprise that it could be suggested that he was prohibited from using, in any house Timeless built, any aspect of New Zealand house design from the 100 year period during the two year restraint period.

[35] Mr Jerling insisted that whatever the relevant clause may or may not have said the parties and their lawyers had intended the narrow interpretation of the clause that he advocated. The arbitrator suggested that the interpretation of the clause might be otherwise. Mr Jerling and the arbitrator then discussed whether there had ever been a mutual agreement as to the terms of the contract or whether there had been some form of mistake between Moss Brothers and Timeless.

[36] Mr Jerling said that his lawyer had negotiated the agreement and his lawyer had told him what the agreement meant. He said that he would never have signed an agreement which prevented him from building houses with New Zealand architectural features from 1850 to 1950. This would prevent him from building almost any house during the two year restriction.

[37] Mr Jerling then suggested to the arbitrator that if there was a fundamental disagreement about what the clause said then the parties should get the two lawyers to give evidence at the arbitration to say what they understood the relevant clause meant because, as he said, they "drafted it".

[38] The arbitrator responded that what the lawyers thought they were doing or what the lawyers thought the contract meant did not matter because what mattered was what the contract said. Mr Jerling responded:

> ... well if they have explained the contract to their clients and explained the contract to mean one thing and you make the determination that the contract means another, then what?

[39] The arbitrator said that it was his ruling that was important because it was his decision as to what the contract said and meant.

[40] Further discussion over some time followed. Mr Jerling then came back to the discussion about lawyers giving evidence. He asked the arbitrator to consider a letter from his lawyer, Mr Anderson. Mr Anderson sent Mr Jerling a letter the previous night because Mr Jerling stressed it was only the lawyers who could say what the agreement meant. Mr Anderson had said that while he was happy to give evidence he could not do it that day because he was otherwise engaged.

[41] The arbitrator said, however, that he did not consider that that evidence would be helpful to him. He said that it was no relevance to him what Mr Jerling's lawyer had told him the agreement meant. Mr Jerling, however, went back to the point that what was important is what the two lawyers had negotiated and agreed upon and, therefore, what the two lawyers had wanted the agreement to say.

[42] Mr Jerling said that it was only the day before the arbitration that he understood that Moss Brothers claimed the Deed of Settlement meant he was prohibited from using any architectural features from New Zealand houses built between 1850 and 1950 for two years following the Deed.

[43] The arbitrator repeated that he did not consider he would be assisted by any evidence from the lawyers. And until the very end of the arbitration there was no more discussion about calling further evidence regarding the pivotal restriction in the Deed.

[44] At the end of the arbitration one of the representatives of Timeless reminded the arbitrator that the lawyer said he could not be here today. He said:

> ... as a witness we should ask for an adjournment now I don't want that but I just want it on the record that, that was suggested because we feel it is important that what we were told by our solicitor who cost us a bloody fortune.

[45] The arbitrator indicated that he was not interested in that evidence "because that's why you have a contract". The arbitrator made it clear that what the contract meant to the arbitrator was what mattered. The arbitrator again stressed that he felt he would not be helped by any evidence from the solicitors.

[46] Moss Brothers submitted in this last exchange with the arbitrator Timeless had made it clear that they were not seeking an adjournment to call the evidence of their lawyer and, therefore, Timeless could not now complain that they did not have a reasonable opportunity of calling their solicitor to give evidence.

[47] Having read all of the relevant evidence I am satisfied that the arbitrator made it clear that he would not allow Timeless to call evidence from the solicitor when the issue first arose, well before the end of the arbitration. The arbitrator made it clear to Mr Jerling and other representatives of Timeless that he considered that that evidence was irrelevant to his task and that no such evidence would be permitted to be called.

[48] The comments by the representatives of Timeless at the end of the hearing that they were not seeking an adjournment had to be seen in the light of the clear rejection by the arbitrator of any evidence from Timeless' solicitor (repeated at this time).

[49] I accept that the discussions between Timeless and the arbitrator regarding calling the solicitor are not as clear as could be hoped for regarding an application to call the evidence and a ruling rejecting the application. If Timeless had been represented by counsel then an application to call such evidence and a formal ruling by the arbitrator sought was probable. I take into account both parties represented themselves. Within that context, I consider the evidence establishes an application to call the solicitor to give evidence by Timeless and a rejection of that application by the arbitrator.

[50] I therefore reject Moss Brothers' claim that Timeless did not pursue or maintain their interest in having their lawyer called to give evidence about the circumstances in the negotiations which gave rise to the Deed of Settlement at the end of the hearing.

Should Timeless have anticipated the need to call their lawyer?

[51] The second issue raised by Moss Brothers was that it should have been clear to Mr Jerling right from the beginning of the dispute about the Deed that he and Moss Brothers had a fundamentally different interpretation of the meaning of the Deed of Settlement as it related to the restraint provision. And thus, Mr Jerling should have anticipated the need to call his solicitor and could have done so as an ordinary part of the evidence.

[52] I think it is clear from the evidence that Mr Jerling did not appreciate until the case was significantly advanced that what Moss Brothers was saying was that for the two year restraint period, Mr Jerling was not allowed to build houses with any of the architectural features mentioned.

[53] As Timeless pointed out, Moss Brothers had approved Timeless brochures which had pictures of houses Timeless said they could build. These houses had architectural features from New Zealand houses built between 1850 and 1950 but they did not infringe upon Moss Brothers designs. Understandably Timeless thought the brochure would hardly be approved if Moss Brothers claimed Timeless could not build the houses in the brochure. This approach by Moss Brothers clearly informed Timeless' belief as to the meaning of the restriction in the Deed. I am satisfied in the circumstances Timeless could not reasonably have anticipated the need to call their solicitor as a witness at the arbitration.

Was the arbitrator wrong to refuse to allow this evidence to be given?

[54] I now return to Timeless' fundamental complaint: that the arbitrator wrongly refused to allow them to call relevant evidence. Mr Jerling made it clear to the arbitrator that at best the parties had apparently signed a Deed of Settlement with wildly different understandings and intentions as to what pivotal provisions in the Deed meant. He believed the lawyers had relevant evidence to give about the content of the Deed of Settlement. He believed the lawyers would confirm that the intention had been to draft cl 7.3(a) to restrain Timeless from building a limited range of houses designed by Moss Brothers or designs in which Moss Brothers held the intellectual property rights.

[55] Mr Jerling stressed throughout that he would never have agreed to a restraint which prevented him from using any architectural feature of any New Zealand house designed between 1850 and 1950. As he understandably observed, that was likely to mean any house he proposed to build would be prohibited. He made the point that even houses seemingly of contemporary design would likely have some features of houses built between 1850 and 1950.

[56] I accept counsel's submissions for Timeless that given the way in which the arbitration developed, the arbitrator could not confidently assert that the evidence of the solicitors would be irrelevant. As counsel said, the proposed evidence needed to be heard first and then a ruling given on its relevance and admissibility.

[57] Negotiations between parties to a contract can be admissible if they assist a reasonable and properly informed third party to ascertain the meaning of words that have been used in the contract.[4] Further, negotiations between the two parties to a contract are often admissible where there is a claim for rectification or estoppel by representation. While Mr Jerling did not identify these two potential claims directly in his discussion with the arbitrator, it is clear he was asserting that either the parties had agreed to his interpretation of the Deed whatever the text said (possible rectification) or Moss Brothers had (through their lawyer) at the time of the signing of the Deed, said the restriction was as Timeless now asserts (possible estoppel by representation). Thus the evidence was potentially relevant to the correct interpretation of the Deed and relevant to rectification or estoppel by representation.

[58] I am satisfied the arbitrator erred when he refused to allow Timeless (and Moss Brothers in reply) to call its solicitor to give evidence. Mr Jerling had identified a number of ways in which this evidence might well have been relevant to the outcome of a pivotal part of the arbitration.

Is this error in conflict with the public policy of New Zealand?

[59] As I have noted at the beginning of this judgment, not every error is reviewable under sch 1, art 34 of the Arbitration Act 1996. It is only where the error results in a conflict with public policy that a decision of an arbitrator may be set aside by this Court. An award is in conflict with the public policy of New Zealand if a breach of natural justice occurred during the arbitral proceedings.[5]

[60] Here, the error was a failure to permit evidence to be given by a witness for Timeless who at least prima facie had relevant evidence about a pivotal issue in the arbitration. This failure can properly be framed as a breach of natural justice by the arbitrator in that he refused to allow Timeless to call relevant evidence. I am, therefore, satisfied that this ground of challenge to the arbitral orders granting the injunction, is made out. It is essentially a combination of the two grounds set out at [7](a) and [7](b) of this judgment. The injunction at [254](2) of the award is therefore set aside as contrary to the public policy of New Zealand.

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4 Vector Gas, above n7.

5 Arbitration Act 1996, sch 1, art 34(6)(b)(i).

Terms and effect of injunction – restraint of trade

[61] The second ground of challenge relating to the injunction order is that the injunction ordered by the arbitrator was in conflict with the public policy of New Zealand because of its terms and effects. Clause 14 of the Deed of Settlement was a non competition clause. It provided as follows:

> Other than as expressly permitted by this Deed, the Purchasing Parties shall not compete or directly or indirectly assist any person to compete against the Vendor Parties or the Moss Brothers franchise for a period of 2 years after Settlement.

[62] Competition was said to include the construction of any houses by Timeless using New Zealand period architecture between 1850 and 1950.[6] As I have noted, the definition of Moss Brothers House Designs in the Deed of Settlement was, at least on the arbitrator's interpretation, extraordinarily wide.

[63] Timeless' case is that cl 14 was effectively a restraint of trade provision. The applicants say that a fundamental principle of law is engaged here because:

(a) restraint of trade provisions have been regarded suspiciously by the law and the underlying reason is one of public policy. A restraint of trade clause locks away valuable skills from society and limits competition;

(b) the clause, because of its breadth, was not effectively protecting Moss Brothers' intellectual property interests and the Deed did that in any event;

(c) the Deed simply had the effect of reducing competition;

(d) just because there may have been a breach of cl 14 as found by the arbitrator, did not mean there should be an injunctive remedy. The proper course was to make an award of damages. The reason for a two year restriction was that at the end of that period the parties

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6 Above at [16]–[17].

should be able to go their own separate ways. This was not what the arbitrator's award allowed given the reimposition of the two year ban;

(e) to reimpose the two year restriction from the date of the arbitral decision significantly expanded what the parties had negotiated in the Deed of Settlement. It was given without any reason.

[64] By itself I see no objection to cl 14 as a restraint of trade clause. The rationale for the clause was to protect Moss Brothers' intellectual property rights.

[65] However, the order made by the arbitrator has several aspects to it which are of concern.[7] No reasons were given for making the injunctive order. It may be the order made arose from the arbitrator's interpretation of cl 7(3)(a) and the definition of Moss Brothers House Designs. These were the fundamental provisions which defined the extent of the two year restriction in cl 14. Timeless acknowledged it had assumed a narrower meaning to the clauses, assuming they protected only Moss Brothers' designs. And so presumably the arbitrator considered that reimposing the two year term with the benefit of the wider interpretation of the restriction on Timeless would ensure proper compliance with cl 14.

[66] There were several problems with this. First, I have speculated about the reasons why the arbitrator made the order he did because the arbitrator gave no reasons for the injunction imposed.

[67] Secondly, ordinarily a damages award would be made in such circumstances. This would require Timeless to account for any profit it had made out of the breaches and require it to compensate Moss Brothers for any loss of business based on previous business records.

[68] Thirdly, even if the appropriate award was an extension of the restraint of trade, it is hard to understand why an additional two years was required. There was no dispute that Timeless had, in part, obeyed the restraint. It simply had not done so

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7 Above at [14].

fully and so a further period of less than two years would have been the logical approach.

[69] I do not consider, however, that there is anything to the submission that the restraint of trade provision by itself was unenforceable. Without the restraint there was every reason to think that Timeless would have profited from Moss Brothers intellectual property rights. Moss Brothers were entitled to protection from that occurrence. In the circumstances the appropriate way to obtain that was by way of a restraint provision.

[70] I am satisfied the arbitrator erred in imposing the two year extension of the restriction. There was a rationale for some shorter restriction on Timeless to reflect its breach. However, I do not consider this "error" is within the public policy pre-requisite for interference by the Court. The error related to the extent of the remedy. No public policy issue arises here. I therefore reject this ground of challenge.

Damages

[71] At [254](6) of the award, the arbitrator said:

> The Respondents are to pay the Applicants the sum of $50,000 within 21 days of the date of this award in respect of the claim for liquidated damages for the breaches of copyright and contract found above;

[72] It is appropriate to set out in some detail the reasoning of the arbitrator as to remedy given the claim under this aspect of the award relates to failing to give proper reasons.

> 249. Moss Brothers has succeed on some of its claims, but has failed in relation to a large number, namely; the advertisements in the Wairarapa Times article of 17 February 2012 and the "moving" advertisements; the LinkedIn page, the Jerling Business Card, the style of premises, the Public Statement (Schedule 4) the McLeod Plans, the Wright project, the franchise maintenance obligations, the Pre-Lim contract (settlement at Hearing), copyright in the Carnegie specification (settled at Hearing) on mis-representations to the public, making disparaging remarks, the Carnegie royalty calculation, the chattels removed, and copyright in the Buchan plans. In my view, many of these were frivolous and time consuming, and

pursuing them increased the complexity of the Hearing and added to its length. I make allowance for that in the costs order below.

250. Moss Brothers has succeeded in relation to the use by Timeless Homes of images of Moss Brothers houses (interior and exterior) in advertising, brochures, on the Internet, Yellow Pages (Internet and paper versions) the Dream Home supplement, on the use of unapproved brochures, the cell phone, misrepresentation as to the "direction" Timeless would follow, the text of the Buchan specification, and copyright in the verandah cross section. Inherent also is a finding that Timeless has breached the non-competition clause – by using the materials just listed, including terms like "villa" on the Internet, Timeless has been competing in offering villas and other replica homes with architectural styles falling within those of the proscribed time period.

251. However, it is not clear what impact this unlawful competition has had on the business of Moss Brothers. Mr Moss agreed under cross examination that Moss Brothers has not been actively making and selling houses for the past several years. He did however, refer to the fact that Moss Brothers has several other licensees of its designs. The pleadings also rely on the fact that the Deed acknowledges that damages are unlikely to be a sufficient remedy, and how important performance of the obligations by Timeless were. This is probably the aspect of the case that would have benefited most from submissions by experienced counsel.

252. A liquidated sum of $75,000 in respect of all damages in copyright and breach of contract was sought. Other than referring to the apparent decline in activity of Moss Brothers, this issue, and this sum was not properly challenged. Not all the breaches alleged have been made out, nor is it clear that Timeless Homes have profited by the breaches which have been established. In the end I must do what I can with what was before me.

[73] The grounds of challenge[8] primarily revolve around the complaint that the arbitrator gave no reason for his award of damages. A failure to give reasons is, Timeless says, a breach of public policy as being contrary to natural justice.

[74] As the decision of the arbitrator illustrates, Moss Brothers had sought $75,000 as liquidated damages for breach of the Deed and breach of copyright. However, it seems that at the beginning of the arbitration, Moss Brothers' claim came down to a claim for $75,000 for breach of the Deed.

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8 Above at [8].

[75] Article 31(2) of sch 1 of the Arbitration Act 1996 provides as follows:

> **31 Form and contents of award**
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> ...
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> (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

[76] Timeless' case is that the award does not comply with art 31. It identifies in some detail where there are and are not breaches of the Deed. But when it comes to an assessment of damages there is no reasoning by the arbitrator. Moss Brothers say their claim for damages was effectively not challenged by the applicants at trial.

[77] The Deed of Settlement said[9] that a payment of $100,000 by Moss Brothers to Timeless was to settle all claims and:

> 6. It is essential to the Vendor Parties willingness to pay the Settlement Funds and to enter into this Deed that:
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> ...
>
> (b) that the Purchaser Parties comply with all provisions of this Deed of Settlement relating to the Vendors' Intellectual Property;
>
> (c) that MBR and the Purchasers comply with the non competition provisions of this Deed of Settlement.

[78] The arbitrator found that the non competition provision had been breached and Moss Brothers' intellectual property rights also breached. He reached a figure of damages of $50,000 for the breach of contract and damages in copyright.

[79] The claim for damages before the arbitrator could not be for liquidated damages. The Deed did not nominate a genuine pre-estimate of loss to be paid as damages in the event of a breach by either party.[10]

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9 Deed of Settlement, cl 6.

10 See *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 (CA) at 1447 per Diplock LJ.

[80] The classic remedy for breach of contract is compensatory damages. They are typically loss based. Here, it may be that Moss Brothers could show a loss of profits from Timeless' actions or if not, then they may be able to prove wasted expenditure. It may be that restitutionary damages could be payable by Timeless, for example, Moss Brothers may claim it paid $100,000 in part in the expectation that Timeless would comply with the competition restrictions imposed in the Deed.

[81] If the latter claim was made then the arbitrator would have needed to assess how any such award might fairly fit with the terms of the injunction award.[11] The injunction award effectively required performance of the restriction in the Deed by Timeless for a further two year period. The payment of damages in such circumstances together with an additional two year performance requirement could result in double compensation to Moss Brothers.

[82] I raise these issues to illustrate that any possible damages award had some complexity and required proper assessment and analysis. The claim that Timeless did not "oppose" the damages claim (even if true) does not assist Moss Brothers. Their obligation was in some way to prove the damages sought (or a lesser amount). It was not, as Moss Brothers claimed, for Timeless to "properly" challenge the claimed loss but for Moss Brothers to prove the loss under a recognised head of damage. The arbitrator undertook none of this analysis nor told the parties why he had settled on $50,000 as damages payable.

[83] I am satisfied the arbitrator did not, as he was obliged to, give reasons for this pivotal aspect of the award. That failure was a failure to comply with art 31 and a breach of natural justice and, therefore, in conflict with the public policy of New Zealand. I therefore set aside this aspect of the award.

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[11] Above at [14].

Costs

[84] The arbitrator dealt with costs in this way:

> 254. Accordingly, I make the following orders:
>
> ...
>
> (8) Within 28 days of receipt from the Respondents of a written schedule of their costs in this arbitration since 12 March 2010, which schedule shall be delivered by the Applicants within 21 days of the date of this Award, the Respondents shall pay to the Applicants an amount equal to 50% of the total sum claimed in that schedule.

[85] Timeless submits that the order should be set aside because it was denied the opportunity to be heard on costs and the award was unreasonable.

[86] At cl 19 of the Deed the parties agreed:

> 19. Any dispute or difference arising out of or in connection with this Deed, or the subject matter of this Deed, including compliance with any of the obligations contained in this Deed, the Lease or under any of the Agreements set out in clause 7 that survive termination ("**Dispute**") shall be referred to a principal officer of each party. If the dispute is not resolved within 5 working days of the dispute being so referred then the Dispute will be referred to and finally resolved by Peter Dengate-Thrush, Barrister of Wellington (who shall appoint an alternative if he should be unavailable for any reason or if he is unable to appoint an alternative, such an alternative shall be appointed by the President of AMINZ) who shall act as an arbitrator. Mr Dengate Thrush (or other appointee) shall address the issue of process and costs of resolving the Dispute in such manner as he sees fit. There shall be no right to appeal against the decision of the arbitrator.

[87] Timeless says that the discretion by the arbitrator to award costs in cl 19 was not unfettered and must be exercised judicially. Timeless says, therefore, before the arbitrator could make a proper award he should have heard from the parties. This was not a straightforward costs award. Both parties had partially succeeded in the arbitration.

[88] Further, the costs awarded were a percentage of Moss Brothers' costs which Moss Brothers considered appropriate. The arbitrator, therefore, left the amount of costs to Moss Brothers without oversight as to reasonableness or a prospect of challenge by Timeless. Moss Brothers, therefore, were free to charge however much they chose.

[89] Given the arbitrator had concluded that Moss Brothers had in part succeeded in the arbitration, he was in a position to assess the appropriate percentage Timeless should pay.

[90] While best practice would be to invite submissions on costs, I do not consider a failure to call for costs submissions relating to the appropriate percentage or whether as a matter of principle indemnity costs should be ordered was a breach of natural justice. The arbitrator knew who had succeeded and on what matters. He was, therefore, uniquely placed to assess the appropriate percentage to award Moss Brothers. The difficulty with the award, however, relates to two aspects. The arbitrator, acting judicially on costs should, even where indemnity costs are awarded, retain supervision to ensure the indemnity costs are reasonable. This includes ensuring the costs sought relate properly to the arbitration, are a reasonable rate and for a reasonable time. This is likely to be especially important where as in this case, the parties represented themselves and the precise extent of indemnity costs might be unclear.

[91] Secondly, to uplift the arbitrator's award, each party was required to pay 50 per cent of the arbitrator's costs. By the arbitrator's award, Timeless was then required to pay 50 per cent of Moss Brothers' costs which included their 50 per cent of the arbitrator's fee. Thus Timeless paid 75 per cent of the arbitrator's fee. It is not clear whether this was intended by the arbitrator.

[92] In summary, I do not consider it was essential in the circumstances for the arbitrator to seek submissions on the 50 per cent award or the principle of indemnity. It would have been best practice to do so. However, it is in breach of natural justice to deprive a litigant of a chance to make submissions on costs where the arbitrator is considering permitting a litigant to set the level of indemnity costs without

supervision. No reasonable arbitrator would make such an award without providing the affected litigant with an opportunity to make submissions, nor would a reasonable arbitrator set indemnity costs on the basis of the unsupervised costs of a lay litigant.

[93] This award is also against public policy and is set aside.

[94] In summary, I am satisfied, therefore, the awards set out in [254](2), [254](6) and [254](8) of the arbitral award should be set aside. As a consequence [254](7) will be of no effect.

Costs

[95] If Timeless seek costs, a memorandum should be filed within 14 days. Moss Brothers have a further 14 days to respond.

Ronald Young J

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