

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

**CIV-2010-404-1696**

BETWEEN	SAFE KIDS IN DAILY SUPERVISION LIMITED Plaintiff
AND	BARBARA WINSOME MCNEILL First Defendant
AND	MCNEILL ENTERPRISES LIMITED Second Defendant
AND	NATASHA MAY-BABETTE MCNEILL- O'KEEFFE Third Defendant
AND	AATA BAYKIDS LIMITED Fourth Defendant
AND	KIDS CHOICE LIMITED Fifth Defendant

Hearing: 13, 14 April 2010

Appearances: MA Karam for Plaintiff  
M Peters for Defendants

Judgment: 14 April 2010

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**JUDGMENT OF ASHER J**

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MA Karam, Barrister, Auckland  
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[1] The plaintiff, Safe Kids in Daily Supervision Limited, seeks orders by way of an interim injunction against all defendants. The orders sought run to some three pages. In essence the plaintiff seeks to restrain the defendants from operating an after school children's care programme at the Murrays Bay Intermediate School at Murrays Bay, Auckland.

[2] In broad terms the grounds put forward to support the application are that the first, third and fourth defendants are in breach of restraint of trade clauses when they conduct this business, and that all defendants are misusing confidential information relating to the business of the plaintiff.

### **Brief background**

[3] The plaintiff, Safe Kids in Daily Supervision Limited ("Safe Kids"), is a child care franchise operator with some 55 franchises throughout New Zealand. It was incorporated in April 2006. Its present owners, Dawn Engelbrecht and Beverley Parsons, acquired shares in that company in July 2006. The child care franchise business that was purchased by the plaintiff had been run for a number of years previously. The plaintiff purchased its present business from the former owner, Van Hof Limited.

[4] The first defendant, Barbara Winsome McNeill ("Mrs McNeill"), has been a long-term master franchise owner within the plaintiff's franchise group. Her franchise area has been the Rodney/North Shore area of the greater Auckland District. The relevant master franchise agreement which she executed was signed on approximately 12 December 2004 for a five-year term. That agreement contained a restraint of trade clause.

[5] As a master franchisee Mrs McNeill sub-franchised to other Safe Kids operators. While the master franchise agreement Mrs McNeill signed was in her own name, in 2006 she incorporated the second defendant, McNeill Enterprises Limited. It seems that for some purposes Mrs McNeill operated the franchise through McNeill Enterprises Limited with the knowledge of the plaintiff.

[6] From December 2004 Mrs McNeill's daughter, Natasha May-Babette McNeill-O'Keeffe ("Mrs McNeill-O'Keeffe"), or interests associated with her, began operating as a franchisee of the Pinehill/Northcross franchise, within Mrs McNeill's master franchise territory.

[7] In August 2006, Mrs McNeill and her daughter, with the plaintiff's involvement, began discussions concerning a formal sub-franchise agreement. On or about 23 February 2007, a formal sub-franchise agreement was entered into. That sub-franchise agreement is shown to be between the second defendant, McNeill Enterprises Limited, and a company that was incorporated by Mrs McNeill-O'Keeffe, AATA Baykids Limited, the fourth defendant. It was signed, it seems, by Mrs McNeill and Mrs McNeill-O'Keeffe on behalf of each of their companies. There is a deed of guarantee and indemnity attached to the agreement, which ordinarily would have been signed by Mrs McNeill-O'Keeffe. However, in fact it has been signed by Mrs McNeill and not her daughter. This has the effect that Mrs McNeill has signed a guarantee to her own company and there is no guarantee executed by a director or shareholder of AATA Baykids Limited. In particular, no guarantee or other contractual acknowledgement has been signed by Mrs McNeill-O'Keeffe. The sub-franchise agreement also contains a restraint of trade clause, although its terms are different from the restraint of trade clause signed by Mrs McNeill in the master franchise agreement.

[8] Mrs McNeill's master franchise agreement was to expire on 12 December 2009. AATA Baykids Limited's sub-franchise agreement expired on 7 February 2010. During 2009 the plaintiff decided not to renew Mrs McNeill's master franchise agreement. It considered her performance as a master franchisor had been inadequate. It sent a letter to that effect on 11 August 2009. There were then some exchanges between the parties. These culminated in a meeting on 2 December 2009, attended by Mrs McNeill, Mrs Engelbrecht and Mrs Parsons, and Mrs McNeill's granddaughter, Alicia McNeill.

[9] The parties undoubtedly discussed the pending termination of Mrs McNeill's franchise agreement and arrangements that would be made to cover the Safe Kids in her area over the school holidays. There is a dispute as to what was ultimately said

and agreed (if anything) at that meeting. Mrs McNeill asserts that she said she was willing to continue to the end of term on 18 December 2009 and run the school holiday programmes until 2 February 2010. She deposes:

In return, however, I said that there was to be no issue raised, after 2 February 2010, that I was subject to a restraint of trade that would prevent me from working as an after school care provider.

Mrs McNeill deposed that Mrs Engelbrecht and Mrs Parsons agreed to her proposal, and on that basis she continued to operate Safe Kids programmes over the school holiday period.

[10] There was then further correspondence, the implications of which have been the subject of submissions from counsel. What is clear is that Mrs McNeill and her daughter, Mrs McNeill-O’Keeffe, then proceeded to set up a new business. The fifth defendant, Kids Choice Limited, was incorporated to be the new vehicle. A programme was negotiated with Murrays Bay Intermediate School for Kids Choice Limited to run an after school children’s programme. That business is now up and running. It employs five staff. Both Mrs McNeill and Mrs McNeill-O’Keeffe are involved in running the business, and there are approximately 50 children who attend.

[11] It is this business which is the focus of this interim injunction application. The plaintiff through its solicitors expressed first, concern at the prospect of a competing business, and then strong protest when it became apparent that there was a business operating. It issued these proceedings on 19 March 2010. It seeks this urgent interim injunction application which, if it is successful, will require the defendants to stop operating the Murrays Bay Intermediate School after school programme. The application must be dealt with promptly. The statement of claim is 42 pages long, and I have received extensive submissions over wide ranging issues.

### **The correct approach**

[12] Both the master franchise agreement and the sub-franchise agreement contain arbitration clauses. The plaintiff accepts that there must be a stay of these proceedings against the first and fourth defendants who are signatories to those

agreements, as the issues between the parties must be dealt with in accordance with the arbitration agreement. Both parties also accept that this court has jurisdiction to grant interim orders under the Arbitration Act 1996 in respect of the first and fourth defendants, and interim injunction orders on the usual basis against the other defendants.

[13] This gives rise to an issue, which Ms Peters put forward as a bar to the plaintiff succeeding in obtaining interim relief against the first and fourth defendants. She submits that the interim order regime under the Arbitration Act is not applicable to the orders sought by the plaintiff.

[14] The principles relating generally to interim injunctions are well known and not directly in contention in the proceedings, and are set out in *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited*.<sup>1</sup> The court first considers whether there is a serious question to be tried in respect of any causes of action pleaded or available to the plaintiff. The court then goes on to consider whether the balance of convenience is in favour of the granting of an injunction or against it. Finally, after considering matters under these heads the court will, on an overview, consider where the justice of the case lies.

[15] The defendants do not suggest that this cannot be the approach in relation to the second, third and fifth defendants. However, it is necessary to consider Ms Peters' submission that there is a jurisdictional barrier to the court considering interim relief against the first and fourth defendants bound, as they are, by the arbitration agreement.

### **Arbitration issues**

[16] In determining this issue it is necessary to consider the background to the provisions of article 9 and 17. These articles came into force with the Arbitration Amendment Act 2007. This new regime originated in The United Nations Commission on International Trade Law (UNCITRAL) on International Commercial Arbitration. A 2000 working group provided proposals to the Model

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<sup>1</sup> *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 143.

Law on which the Arbitration Act 1996 was based. The 2007 amendments adopt the UNICITRAL Model. New Zealand appears to be something of a trail blazer as the first country to adopt these measures.<sup>2</sup> There is, therefore, no guidance as to how they are to be applied.

[17] The original article 9 had given the High Court the power to order interim measures of protection if not incompatible with an arbitration agreement. In particular, at article 9(2) it was provided that the court should have the same power it has for the purposes of proceedings before that court to make an interim injunction or an interim order. It has been held that the court's jurisdiction under the previous article is not co-extensive with the interim injunction jurisdiction of the High Court, and should be no greater except in relation to third parties not bound by the arbitration agreement (*Marnell Corrao Associates Inc v Sensation Yachts Ltd*).<sup>3</sup>

[18] That section has been repealed and there is a new article 9. It provides at articles 9(1) and 9(2):

**9 Arbitration agreement and interim measures by court**

- (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure ... and for a court to grant such measure.
- (2) For the purposes of paragraph (1), the High Court or a District Court has *the same powers as an arbitral tribunal* to grant an interim measure under article 17A for the purposes of proceedings before that Court, and that article and article 17B apply accordingly subject to all necessary modifications.

[emphasis added]

Article 9 no longer gives the court the powers it had to grant interlocutory injunctions when it considers the grant of interim measures. It specifically restricts the High Court's powers to grant interim measures, to the same powers as those of an arbitral tribunal. The general High Court jurisdiction, summarised in *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited*, therefore, quite specifically no longer applies. The court will consider the grant of interim measures on the basis that they should complement and facilitate the arbitration, and in same

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<sup>2</sup> Article by Tomás Kennedy-Grant QC "*Interim Measures in Arbitration*" [2008] NZLJ 83 at 86.

way and with the same limitations as an arbitral tribunal carrying out such an exercise.

[19] Article 17 sets out new provisions for granting an interim measure. Article 17A provides:

**17A Power of arbitral tribunal to grant interim measure**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure.

It is provided at article 17B(1):

**17B Conditions for granting interim measure**

- (1) If an interim measure of a kind described in subparagraph (a), (b), or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that—
- (a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and
  - (b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and
  - (c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

It is not necessary to set out the other provisions of article 17B.

**The status quo**

[20] Ms Peters submits that for the plaintiff to succeed there must be a clear status quo as required in the definition in the amended articles of “interim measure”. She submits that a status quo must be identified and be fully restorable or maintainable.

[21] The new interpretation article, introduced in the 2007 amendment, provides:

**interim measure** means a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following:

- (a) maintain or restore the status quo pending the determination of the dispute.

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<sup>3</sup> *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 at [74].

- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings;
- (c) provide a means of preserving assets out of which a status quo award may be satisfied;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute;
- (e) give security for costs.

She submits that if the status quo referred to in (a) is not identifiable in an application, then there is no basis upon which the court can make any interim orders. She submits that if this is the position, it is not necessary for the court to go on and consider the matters set out in 17B. She submits that the application must fail for this reason, because the status quo in December before the business at Murrays Bay Intermediate School began is not restorable. There were then franchise arrangements in place that have now ended and cannot be reinstated.

[22] Mr Karam for the plaintiff submits that, to the contrary, the phrase “status quo” should not be given such a restricted definition, and that the purpose of the definition of “interim measure” is to do no more than to define the nature of the remedy that is available.

[23] The concept of the status quo frequently arises in interim injunction applications. The nature of the status quo is referred to as a matter of relevance in the assessment of the balance of convenience. The statement of Sir John Pennycuik in *Fellowes & Son v Fisher*<sup>4</sup> is often quoted:

By the expression “status quo” I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief.

[24] The concept of the status quo is inherently flexible. It can be a point some time prior to the issue of proceedings, often the position prior to the conduct complained of. Sometimes it is fixed at the point of time of the issue of the proceedings. Sometimes, when the plaintiff is seeking to stop a wrong which is threatened in the future, it will be the position at the time of hearing. This inherent



flexibility was recognised by McGechan J in *E R Squibb & Sons (NZ) Ltd v ICI New Zealand Ltd*.<sup>5</sup> He said:

I turn therefore to the status quo. At what date? It is of course a somewhat flexible concept. A useful starting point is the state of affairs which prevailed before the defendant commenced the conduct the subject of claim in the proceeding: *Metric Resources Corp v Leasemetrix Ltd* [1979] FSR 571, 582. In the present case, there are difficulties. ... In these circumstances, there is some attraction in the alternative timing for ascertainment of status quo favoured in *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] 2 All ER 770, 774-5, ie the status quo at the date of issue of proceedings ... I think the latter approach has particular justice where, as here, a plaintiff sits back for some months and allows a defendant to expand operations without protest.

[25] On occasions in interim injunction applications it is not possible to exactly restore the status quo because circumstances have changed. A party may have started on a course of alleged wrongdoing which cannot be unwound, and all that a court can do is stop further wrongdoing or make some orders to try and relieve the effect of that wrongdoing. This position was recognised by Wild J in *Cosco (NZ) Ltd v Port of Napier Limited*,<sup>6</sup> where he stated at pg 13:

*The status quo*

To demonstrate the difficulties inherent in this concept, Mr Brown argued for a status quo gradually transposing itself with the passage of time from the position existing before the breach alleged, to the current position. If I was to attempt to preserve the status quo, I would select the position existing immediately before the plaintiff's dissemination of the allegedly confidential information on 17 February. By definition, I cannot preserve that position. All I can do is make orders which go some way toward retrieving it.

[26] With these considerations in mind I turn to the specific words in the definition of "interim measure" in article 17 of the First Schedule. The fluid nature of the status quo is recognised in the definition at (a). The interim measure must "maintain or restore the status quo". The two concepts of restoring something that has been taken away or maintaining something that presently exists are mutually exclusive, but both are embraced. This indicates that the phrase "status quo" must be approached in the same flexible way in which it is approached in interim injunction cases. I consider that the phrase is used in the sense of maintenance or restoration of

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<sup>4</sup> *Fellowes & Son v Fisher* [1976] 1 QB 122 at 141.

<sup>5</sup> *E R Squibb & Sons (NZ) Ltd v ICI New Zealand Ltd* [1988] 3 TCLR 296 at 322.

<sup>6</sup> *Cosco (NZ) Ltd v Port of Napier Limited* HC Napier CP7/99 31 March 1999.

a state of affairs either past or present. I do not accept Ms Peters' submission that a past status quo must be exactly recoverable. As recognised in *Cosco (NZ) Ltd v Port of Napier Limited*, changes to the status quo have often taken place by the time of the court hearing. It is not a finite concept.

[27] To conclude on the issue of status quo, I consider that the purpose of the reference to maintaining or restoring the status quo in the definition in article 17 is to define the nature of the interim relief that is available. In accordance with the law in relation to interim injunctions at common law, the purpose of interim orders is to maintain or restore a state of affairs pending the determination of a dispute. The reference to the status quo is not intended to require a court or arbitral tribunal to find some identifiable and precisely definable situation that has existed or does exist, before making an interim measure. It is not intended to create a restrictive threshold requirement. Its purpose, rather, is to identify the holding and temporary nature of interim orders.

### **Issues to be considered**

[28] I turn to the issue of whether a court or arbitral tribunal in considering whether interim measures should be granted, must consider different issues under article 17 of Schedule 1 of the Arbitration Act 1996 to those that would be considered in an interim injunction application.

[29] Under article 17A the power is discretionary. The arbitral tribunal "may" grant the interim measure. Then various matters that the applicant "must" establish are then set out at 17B(1).

[30] To deal with the last of the 17B(1) factors first, 17B(1)(c) requires a "reasonable possibility" that the applicant will succeed on the merits of the claim. This requirement can be seen as akin to the "serious question to be tried" requirement for an interim injunction. It could be argued that a "reasonable possibility" is a higher threshold, but a number of decisions have emphasised that the

requirement for a serious question to be tried is in itself a significant threshold. As Eichelbaum J said in *Ansell v New Zealand Insurance Finance Limited*:<sup>7</sup>

Notwithstanding the demise of the former test of a strong prima facie case, I am conscious that the question whether there is a serious issue to be tried should not be brushed over lightly. It is not sufficient for the plaintiffs just to say that there is a tenable cause of action from a legal point of view, and a conflict of evidence on the facts.

In *Re Lord Cable (Deceased)*,<sup>8</sup> Slade J said it is:

[n]ecessary for any plaintiff who is seeking interlocutory relief to adduce sufficient and precise factual evidence to satisfy the court that he has a *real prospect of succeeding* in his claim for a permanent injunction of the trial.

[emphasis added]

[31] As these statements show, a real possibility of success is a requirement in an interim injunction application. There are differences between the threshold test for an interim injunction and other tests arising in the High Court Rules, such as the requirement for a “strong arguable case” for freezing orders or in relation to service out of jurisdiction. The adjective “strong” creates a higher threshold. However, I do not consider that such a difference arises in relation to 17B(1)(c). There is no adjective such as “strong” and no significant difference between the “reasonable possibility of success” test in article 17B(1)(c) and the usual interim injunction test of “serious question to be tried”. I will approach matters on the basis that there is no difference.

[32] The other issue that arises is whether the court can consider any matters other than those listed at 17B(1), (a), (b) and (c). On this point Ms Peters strongly submitted that the court should consider the range of issues normally considered in an interim injunction application, while Mr Karam submitted I should not go beyond the three criteria set out.

[33] It can be observed that 17B(1)(a) and (b) cover much of the essential traditional balance of convenience considerations considered by the courts in interim injunction applications. It is a fundamental consideration in such applications

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<sup>7</sup> *Ansell v New Zealand Insurance Finance Limited* HC Wellington A434/83 30 November 1983.

<sup>8</sup> *Re Lord Cable (Deceased)* [1976] 3 All ER 417 at 431.

whether the harm in question is adequately reparable by an award of damages. It is also a fundamental issue in such applications whether the harm complained of by the plaintiff will substantially outweigh the harm that a defendant is likely to suffer if relief is granted, and the defendant ultimately succeeds. The consideration of these issues involves the analysis of the practical effects of the granting of an injunction. It also involves an assessment of the financial situation of both plaintiff and defendant. Although there is no specific reference to the provision of an undertaking as to damages in article 17B(1), it can be assumed that if a plaintiff does not provide an adequate undertaking as to damages then it will be much more difficult for such a plaintiff to satisfy a court or tribunal under article 17B(1)(b) that the harm if the relief is not granted outweighs the harm that is likely to result if it is. This is because an enjoined defendant who is later vindicated will recover nothing.

[34] As Ms Peters points out, the wording of article 17B does not of itself preclude a tribunal or court from considering other matters. While the three considerations set out “must” be considered, the wording does not make those three matters the exclusive considerations, and the general discretion set out in article 17A is expressed without fetter.

[35] It was stated in the introduction to the Arbitration Amendment Bill at pg 1:

The amendments focus on increasing party autonomy whilst reducing judicial involvement in the arbitral process, providing greater consistency with the laws and processes of other jurisdictions, and increasing the powers of the arbitral tribunal.

It is later stated at pg 2:

We consider that including amendments to reflect the recent update to the Model Law would increase certainty for arbitral parties by providing more detail as to how and when interim measures will be applied.

This indicates an intention that the amendments will define the detail as to how the discretion to grant interim measures is to be exercised.

[36] Given that the court’s powers to grant interim relief are expressed to be identical to those of an arbitral tribunal, it would be surprising if the full range of considerations that apply to interim injunctions could be applied to a consideration

of whether an interim measure should be granted. For instance, issues such as the public interest considered in *Finnigan v New Zealand Rugby Football Union Inc (No. 2)*<sup>9</sup>, and the consequences to innocent third parties: *Dunedin Taxis (1965) Limited v Dunedin Airport Limited*,<sup>10</sup> do not seem to be matters that would naturally fall within the ambit of an arbitral tribunal. An arbitral tribunal derives its jurisdiction from the contract between the parties. The Arbitration Act gives it ancillary powers. In exercising a discretion an arbitral tribunal would not usually regard itself as equipped to consider wider public interest and third party interest considerations. Third parties have no status before it. While an arbitral tribunal has the remedial powers of the High Court under s 12, it does not follow that an arbitral tribunal has the inherent jurisdiction of that court. At the very least, a court or arbitral tribunal will exercise considerable caution before going beyond the considerations specifically set out in article 17(B)(1). An arbitral tribunal will hesitate to consider the “overall justice” in such circumstances, and limit its considerations to those in article 17B(1).

[37] Thus, in considering the granting of interim orders in this case in relation to the first and fourth defendants, I will not go beyond the specific considerations in 17(B)(1).

[38] It is now necessary to turn to the merits of this application in the light of the approach set out. Despite the reverse order in article 17B I propose following the usual process of considering first, whether there is a serious question to be tried (or reasonable possibility that the applicant will succeed), and then go on to the balance of convenience considerations set out at 17B(1)(a) and (b). I will also consider the broader interim injunction issues in relation to the other defendants who are not shown to be subject to the arbitration clauses at this stage.

### **Serious question to be tried/reasonable possibility of success**

[39] There is no doubt that the first defendant has signed a restraint of trade clause. Ms Peters has raised a number of defences. The defence I refer to first is

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<sup>9</sup> *Finnigan v New Zealand Rugby Football Union Inc (No. 2)* [1985] 2 NZLR 181 at 188.

<sup>10</sup> *Dunedin Taxis (1965) Limited v Dunedin Airport Limited* (1990) 3 PRNZ 391.

that at the meeting of 2 December 2009 it was agreed by the plaintiff's representatives that she could, if she did the holiday programmes as part of the franchise, then proceed to operate on her own.

[40] It is difficult to assess the strength of this claim as it involves the word of some parties against that of other parties. The immediate correspondence as it exists, which I will not detail, does not necessarily support the first defendant's contention that an agreement was reached. The initial letter sent by the plaintiff referred to a different agreement, and in her solicitor's reply it was suggested that no agreement had been reached at all. Nevertheless, I accept that there may be explanations for this correspondence and it is far from conclusive. Thus, the defence that has been raised here by the first defendant is on its face, possibly sufficient to defeat a summary judgment application, but far from being a complete answer to the claim, at this point.

[41] Other defences are raised by the first defendant. It is suggested that the wording of the clause does not in fact prohibit her conducting her present activity. The clause reads as follows:

#### 24.2 **Restraint upon termination**

The Franchisee covenants that it shall not for the period of years specified in clause 11 of schedule 1 following the expiration or termination of this agreement (or any period in renewal or extension of it) either solely or as director, manager, employee, advisor or agent or otherwise howsoever for any person or corporation directly or indirectly:

- (a) Can't operate or be concerned or interested in any business conducted in competition with the business of Skids (or its other Franchisees) within the area specified in clause 11 of schedule 1;
- (b) approach or solicitor or endeavour to obtain the custom of any existing customer of Skids.

As Mr Karam frankly admitted, it is not well drafted and it is perhaps arguable that the business which is presently being carried on at Murrays Bay Intermediate is not actually in competition with the business of SKIDS. There is no evidence that SKIDS has any current business within the area, or is offering any services to the children attending the fifth defendant's programme. However, equally the phrase

“competition with the business of SKIDS” can be interpreted as prohibiting any business that is the same type of business as that of SKIDS whether or not there is direct competition. Another defence raised by Ms Peters is the fact that the assignment of the agreement to the present plaintiff may not have included the right to enforce a restraint of trade clause.

[42] I do not purport to do justice to the detailed submissions I have heard on the strength or weakness of the plaintiff’s claim. I am satisfied that it is possible that the restraint of trade clause will be interpreted as covering the present business of the fifth defendant in which the first defendant is involved. While recognising that there are credible defences that can be raised, I am satisfied that there is a serious question to be tried, and that the plaintiff’s claim against the first defendant on the basis of the breach of the restraint of trade clause has a reasonable possibility of success.

[43] The alternative basis of claim is breach of confidence. There is no doubt that a great deal of confidential material was given to the first defendant, including all the systems related literature that had been devised by the plaintiff, customer lists and other confidential information.

[44] I bear in mind the three requirements for a cause of action based on breach of confidence set out by Megarry J in *Coco v A N Clark (Engineers) Ltd (No. 2)*.<sup>11</sup> The information must have the necessary quality of confidence, must have been imparted in circumstances importing an obligation of confidence, and there must have been an unauthorised use of the information to the detriment of the confiding party.

[45] For the purposes of this application the plaintiff has established the first and second requirements. There is, however, no direct evidence of an unauthorised use of the information by the first defendant. She and the other defendants strongly deny the misuse of confidential information. They assert they have returned all the franchise material and they assert that they are using their own systems and knowledge. There is no doubt that their general knowledge and skills acquired in the course of employment or a business, even if quite specialised, and the use of

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<sup>11</sup> *Coco v A N Clark (Engineers) Ltd (No. 2)* [1969] RPC 41.

information and opportunities learned are not generally to be restrained: *Holden v Architectural Finishes Limited*.<sup>12</sup>

[46] Mr Karam effectively asks the court to infer the inevitability of a misuse of confidential information in the circumstances. He points in particular to the fact that the existing customers of the franchise became, at least in part, the customers of the fifth defendant. Given that the plaintiff has had no opportunity to effect discovery, it is understandable that no specific proof of misuse of confidential information can be provided. I hold by a fairly fine margin that a serious question to be tried or a reasonable possibility of success has been shown in relation to breach of confidence.

[47] The claim against the second defendant is based on breach of confidence only. I must say in relation to the second defendant there is no evidence that the second defendant company is actually playing any role in the business of the fifth defendant. I do not find a serious question to be tried of breach of confidence shown against the second defendant.

[48] In relation to the third defendant, Mrs McNeill-O’Keeffe, the restraint of trade clause applying to her is better drafted. Ms Peters has not suggested that on its face it could not apply to her involvement in the fifth defendant. The problem for the plaintiff in relation to Mrs McNeill-O’Keeffe is that she has not signed the restraint of trade document.

[49] On the face of the documentation it would appear likely that the plaintiff intended Mrs McNeill-O’Keeffe to sign the restraint of trade clause, together with her company AATA Baykids Limited. This could certainly be expected as a matter of sound commercial practice. Mr Karam argues that despite her non-signature she is contractually bound. He relied initially on the doctrine of rectification. A stronger argument is that an agreement could be inferred from conduct. On the principles discussed in *Brogden v Metropolitan Railway Co*,<sup>13</sup> there is some evidence which indicates a mutual assumption that Mrs McNeill-O’Keeffe was bound by the agreement.

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<sup>12</sup> *Holden v Architectural Finishes Limited* [1996] 7 NZCLC 260,976.

<sup>13</sup> *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 at 692.



[50] Given that evidence, I accept that there is a serious question to be tried that the restraint of trade clause applies against the third defendant, and that the claim against her based on it has a reasonable possibility of success. The comments I have already made in relation to the breach of confidence claim also apply to the claim against Mrs McNeill-O’Keeffe.

[51] I do not, however, consider that any serious question has been shown against the fourth defendant as I am not aware of any evidence showing any active involvement of the fourth defendant in the business of Kids Choice Limited. That company is, on the face of matters, bound by the restraint of trade clause.

[52] There is another defence raised in relation to the restraint of trade clause. It contains a Contracts (Privity) Act 1982 clause so that promises and undertakings are also for the benefit of the head franchisor. There may be an issue as to whether the plaintiff can take advantage of that clause, but that is not an issue that can be determined at this point.

[53] As to the fifth defendant, if the first and third defendants are in breach of the restraint of trade clause or in breach of confidence, then so is the fifth defendant, which they are in control of and which they operate.

[54] I conclude, therefore, that there is a serious question to be tried and a reasonable possibility of success in respect of the claims against the first, third, and fifth defendants.

**Balance of convenience/assessment of article 17B factors**

[55] I propose initially approaching this issue on the basis set out in article 17B(1)(a) and (b). As I have observed, the issue of whether the harm caused by the defendants is adequately reparable by an award of damages, and whether that harm substantially outweighs the harm that the defendants are likely to suffer if the interim relief is granted, is essentially a balance of convenience assessment in any event.

[56] I comment, first, that there is an undertaking for damages provided by the plaintiff, which appears to be adequate. The position of the defendants is less clear. I am informed without objection from the bar that Mrs McNeill does not own a house but Mrs McNeill-O'Keeffe does, although it is not clear that there is significant equity in that house. There is evidence that the defendants own significant chattels which they use in their business, including vehicles, but it is difficult to assess the value of those items.

[57] The defendants have provided an undertaking to retain the vehicles that are presently owned, and all other assets, and to pay into their solicitor's trust account an amount equivalent to the fees payable as if the fifth defendant was a franchisee. That will amount to 11 percent of the revenue earned by the fifth defendant. The defendants also undertake to refrain from advertising the fifth defendant's services, to refrain from conducting business other than from one location, to not increase the numbers of children who are enrolled, and to cooperate fully with the plaintiff in determining both these proceedings and any associated arbitration proceedings.

[58] Thus, it would seem likely that a modest damages award can be met by the defendants. No attempt has been made by the parties to assess what damages the plaintiff might get if the plaintiff is successful. At the very least those are likely to be the franchise fees that would have been received by the fifth defendant. These are going to be preserved in terms of the undertaking. There is the issue of further damages on account of damage to the plaintiff's goodwill which must be considered.

[59] The operation of the fifth defendant is limited. It involves a single location and some 50 students. Given that there are 55 franchises in New Zealand, this particular single location business does not appear to strike at the heart of the plaintiff's operations. It has not been suggested that the defendants have actually taken any customers that might have otherwise been customers of the plaintiff's franchisees. This is not surprising given the fact that the defendants appear to have a particular relationship with the principal of the school from which they conduct their business, and it seems clear that that principal will not wish to deal with the plaintiff, at least at the present time. There is no suggestion that there is any alternative

franchisee of the plaintiff currently available to take the pupils who are presently attending the fifth defendant's programme.

[60] Thus, it is not apparent that the plaintiff is suffering any significant direct financial loss as a consequence of the plaintiff's business. The plaintiff does, however, argue that damage to goodwill is likely to arise because other franchisees will see the rebel business operating and be emboldened to challenge the plaintiff themselves.

[61] This does not seem to be a particularly likely proposition. The plaintiff is clearly pursuing the defendants vigorously. If the plaintiff is active this proceeding should be heard quickly. The parties agree to have all matters resolved in either court or arbitration proceedings. They should seek priority. It has been expressly stated that the defendants will cooperate. Clearly there is urgency. Thus, the plaintiff has already shown itself as fully prepared to vigorously enforce its rights and it is difficult to see why any franchisee would consider the lack of interim orders as a sign of weakness. The defendants, of course, have taken a great risk and this, it could be expected, would be apparent to any other franchisee. If the defendants lose they will be required to close down their business and pay damages, and all their work over this year will have been in vain.

[62] Thus, I consider that the award of damages that the plaintiff is likely to achieve should it be successful in establishing its causes of action will be limited. It is not possible to put forward any figures, and indeed none have been proffered by the parties.

[63] Of course, it is often a reason for the grant of an interim injunction that the assessment of damages is difficult. Certainly the assessment of damage to goodwill would not be a precise exercise in this case. But for the reasons that I have indicated that assessment is likely to be of a modest figure and I do not consider that difficulty to be in any way conclusive. The undertaking to pay an amount equivalent to the franchise fees into a trust account and to retain vehicles and assets which will have some value, albeit it modest, is relevant to my assessment of the ability to meet damages.

[64] I must now balance those considerations (the considerations of article 17B(1)(a)), against the harm that the defendants will suffer should an interim injunction or interim orders be granted (17B(1)(b)). The result of orders will be the immediate closure of the business. They could no longer operate. They would have to terminate the services of their staff. They could no longer offer their programmes to their existing pupils who would be likely to go elsewhere. There is likely to be a delay of at least some months before a fixture. Should the defendants ultimately succeed they will be faced with a business that has ceased to exist and would be very difficult to revive as the goodwill will have been dissipated.

[65] The effect of a victory at this point to the plaintiff will not necessarily have the effect of ending the action, but it may. There would be little incentive on the plaintiff to continue the action. It would be open for the defendants to continue it and then to seek judgment and an award of damages based on the undertaking as to damages. The plaintiff is undoubtedly good for the undertaking. However, at that point there would be a real difficulty in assessing damages. The court would have to try and assess what the business might have accomplished if it had been allowed to continue. That would be a difficult exercise. Mrs McNeill and Mrs McNeill-O’Keeffe might well have been forced to other areas of activity and not be able to return to running children’s programmes after school.

[66] I distinguish this case from that of *Mike Pero (New Zealand) Limited v Exact Solutions Limited*,<sup>14</sup> that was relied on by the plaintiff. That was a franchise case where the defendant franchisee had gone through detailed training but then resigned, then going into work in competition with the franchisor. An interim injunction was granted on the basis of the restraint of trade clauses in the franchise agreement. There the defendant was by profession a solicitor and had worked in that role until taking up employment with the plaintiff. He did not have any background in the relevant industry, and there was an element of flagrancy in him learning about the franchise operation from the plaintiff and then shortly afterwards leaving the plaintiff to go into competition against it.

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<sup>14</sup> *Mike Pero (New Zealand) Limited v Exact Solutions Limited* HC Wellington CIV-2007-442-66 17 April 2007.

[67] In contrast, the first and third defendants have been long involved in children's programmes, and it is the focus of their knowledge, skill and work activities. They have an existing business, albeit it one started while within the plaintiff's franchise umbrella. They will suffer a more unrecoverable and more direct loss if an injunction is granted, than the defendant in the *Mike Pero (New Zealand) Limited v Exact Solutions Limited* case.

[68] On an overview, I consider that the harm that is likely to flow to the defendants if the application is granted outweighs the harm being suffered by the plaintiff, given the plaintiff's ability to seek damages. To put it in the precise words of article 17B(1)(a) and (b), the plaintiff's harm is likely to be adequately repairable by an award of damages and that harm does not substantially outweigh the harm that the defendants are likely to suffer if the injunction is granted. In interim injunction terms, the balance of convenience favours the defendants.

[69] For the purposes of the interim injunction application against the other defendants I stand back and consider the overall justice of the situation. There is a reasonable possibility that the plaintiff will succeed. Indeed, the defendants are taking a significant risk given the possible application of the restraint of trade clauses. However, for the reasons that I have outlined, this is not a case where an assessment and balancing of the practicalities requires the court to intervene. The balance of convenience favours the defendants. Their five staff can retain their jobs in the meantime. The proceeding should run its course in the usual way.

## **Result**

[70] By consent the claims against the first and fourth defendants are stayed.

[71] The application for interim injunction and interim orders under the Arbitration Act 1996 is declined. I record that this is on the basis of the undertakings that have been provided on behalf of the defendants and are on the court file. Given that these undertakings have been relevant to my refusal to grant the orders sought, I reserve leave to the parties to apply further should there be any relevant circumstances arising in relation to those undertakings.

[72] I record that these are urgent proceedings, given that the plaintiff has shown a serious question to be tried and that if the plaintiff is right the defendants are actively breaching restraint of trade clauses. These proceedings are by consent placed on the Fast Track.

[73] Costs are reserved.

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**Asher J**