IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-000154
[2020] NZHC 1289

BETWEEN	WATER BABIES INTERNATIONAL LIMITED Applicant
AND	KELLY JANE WILLIAMS First Respondent
	SILVANA TIZZONI Second Respondent
	CORAL AND AQUAMARINE LIMITED Third Respondent

Hearing: 3 June 2020

Counsel: S R Carey for the Applicant
D G Dewar & C T C Bell for the Respondents

Judgment: 10 June 2020

JUDGMENT OF DOOGUE J

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Introduction

[1] This is an application for an interim injunction. The Applicant, Water Babies International Limited (Water Babies), is the world's largest provider of swimming lessons to infants and toddlers. It has its headquarters in the United Kingdom but has franchised its teaching system around the world.

[2] The First Respondent (Ms Williams) operated one such franchise in Wellington through a company she incorporated for that purpose, WB Wellington Limited (Water Babies NZ), of which she was the director and sole shareholder. The franchise operated under a franchise agreement dated 3 September 2014 (the franchise agreement) between Water Babies, Water Babies NZ and Ms Williams. In or around September 2017 Ms Williams approached Water Babies about starting her classes in Auckland as well. Water Babies gave her permission to do so but the franchise agreement was not varied accordingly, nor did Ms Williams and

Water Babies enter into any formal documentation concerning this agreement. It appears this was an ad hoc arrangement.

[3] Water Babies says that Ms Williams worked with the Third Respondent, the company Coral and Aquamarine Limited trading as Swim Baby (Swim Baby), in breach of the franchise agreement. Swim Baby is owned and operated by the Second Respondent, Ms Williams' cousin Silvana Tizzoni (Ms Tizzoni). Swim Baby runs baby and toddler swimming lessons in Wellington and Auckland.

[4] Ms Williams essentially appears to deny any breach of the franchise agreement so far as utilising Water Babies' intellectual property is concerned. She accepts that clause 17.1.1 of the franchise agreement has the effect of precluding her from working for Swim Baby because the business is "similar" to that of Water Babies. She has undertaken not to continue working for Swim Baby. However, in the context of this application for an interim injunction she wishes to preserve her position, including her right to fully defend any claim brought against her in a substantive proceeding for breach of clauses 9.2, 17.1.4 and 17.1.5 of the franchise agreement.

[5] Water Babies claim Ms Tizzoni and Swim Baby induced Ms Williams' breach of the franchise agreement. This is robustly rejected.

[6] Water Babies applies for an interim injunction restraining Ms Williams from:

(a) using or divulging to any other person directly or indirectly any information or knowledge concerning Water Babies' Business or systems;

(b) for a period of two years (or, if that period is adjudged to be void as going beyond what was reasonable, one year) being engaged, concerned or interested in any capacity directly or indirectly in any business that competes with or is similar to Water Babies' business in Wellington or Auckland.

(c) revealing or using for the benefit of herself or any third party any knowhow made available to her in the Water Babies Manual or any confidential information acquired from Water Babies in connection with Water Babies' business; and

(d) for a period of one year directly or indirectly soliciting or touting for business from any person who in the two years prior to the termination of the franchise agreement was a client of or in the habit of dealing with Water Babies NZ.

[7] Water Babies also seeks that the interim injunction restrain Ms Tizzoni and Swim Baby from:

(a) making use of Water Babies' confidential information; and

(b) for a period of two years, trading in certain territories in Wellington or Auckland,

Background

[8] Water Babies started in England in 2002. Since then it has expanded to the point where it has 50 franchises in England, as well as in Ireland, Scotland, Wales, Canada, the Netherlands, Germany, China and New Zealand; a total of 71 worldwide.

[9] Water Babies is the largest baby and toddler swimming company in the world, currently teaching 52,000 clients per week. It has won numerous awards including British Franchisor of the Year. It became the first swim school to create its own teaching qualification which sits on its government's formal education framework.

[10] Ms Williams worked at Water Babies' South-West Wales franchise for a number of years prior to her starting her franchise business in Wellington. Water Babies trained Ms Williams through their head office, including her updated teacher training.

[11] On 3 September 2014 Water Babies, Ms Williams and Water Babies NZ entered into the franchise agreement.

[12] Under the franchise agreement, Water Babies provided Ms Williams with Water Babies' knowhow and methods of business, including specific methods of teaching swimming from birth, marketing, special equipment, consumables, data management and communications systems, training and technical support.

[13] Although the franchise agreement provided for its expiry on 3 September 2019, Water Babies and Ms Williams agreed to extend the expiry date to 30 September 2019 and Ms Williams took Water Babies classes up until the week commencing 7 October 2019.

[14] In or around September 2017, Ms Williams wanted to expand her business into Auckland and with Water Babies' agreement did so. This was never recorded in writing by way of a deed of variation of the franchise agreement as required by clause 35.

[15] Mr Thompson, a director of Water Babies, deposed that the events that led Water Babies to pursue this injunction started to emerge in late October 2019 when he received an email from a former swimming teacher at Water Babies NZ. That informant reported that Ms Williams was "now running her own swim school – Swim Baby NZ, teaching an almost identical programme to former Water Babies' clients."

[16] Water Babies started to investigate and found that Ms Williams had incorporated a company called Swim Baby NZ Limited on 3 April 2019. They found a website, swimbaby.co.nz. The website advertised swimming lessons for infants and young children, in both Auckland and Wellington starting at the same times as Water Babies' NZ lessons had started, from the same swimming pools as Ms Williams had run Water Babies' NZ lessons namely the Discovery Pool in Whitby, Palliser Road in Roseneath, the Aquadrome, Trentham School in Upper Hutt, and the AUT campus in Northcote, Auckland.

[17] In a letter dated 28 June 2019 Water Babies sent Water Babies NZ and Ms Williams a notice of breach of franchise agreement dated 27 June 2019. They sought payment of aged debts from Ms Williams and advised her that failure to pay those debts might result in termination of the franchise agreement.

[18] Water Babies wrote to Ms Williams on 17 December 2019 and asked her to confirm that she would cease acting in breach of the franchise agreement. On 23 December 2019 Ms Williams replied. She said that Swim Baby NZ Limited was set up only to potentially retail swimwear, had never traded, was being removed, and that the Swim Baby swimming lessons operation was nothing to do with Swim Baby NZ Limited and that it was just an unwise choice of name.

[19] Water Babies searched the website swimbaby.co.nz again in mid-January 2020. It was advertising classes commencing in February. The Swim Baby website said that it was a "Coral and Aquamarine Limited company." A company search revealed that it had been incorporated on 9 May 2019 and that its sole director and shareholder was Ms Tizzoni.

[20] Water Babies came across numerous emails from August and October 2019 between Ms Williams and existing Water Babies' clients. These emails demonstrate that these clients had contacted Ms Williams at the Water Babies NZ address and she responded advising of the dates for swim classes from October 2019 to February 2020. These classes were not Water Babies NZ classes but rather Swim Baby classes. The recipient clients would not have known any differently as the advice was sent in response to queries made to Water Babies NZ from the Water Babies NZ email address. Other emails were located where Ms Williams had been emailed about Water Babies NZ and Ms Williams had responded advising that Water Babies NZ was no longer operating. Those emails advised that the correspondents could call Water Babies NZ's telephone number for information about an alternative baby swimming operation.

[21] Assorted other emails located included reference to Ms Williams "going out on her own", and Ms Tizzoni and Ms Williams both giving details to Water Babies NZ clients about upcoming lessons. One client emailed Ms Williams at her Water Babies

NZ address and said "I receive[d] your email of business closure and then another email from Swim Baby do I continue [my son's] course with them?"

[22] On 10 October 2019 without notice to or consent from Water Babies, Ms Williams sent Water Babies NZ employees' employment contracts to her personal email address.

[23] Finally, a review of the Swim Baby NZ Limited page on the companies register on 24 February 2020 revealed that the NZBN industry classification was recorded as being "sports and physical recreation instruction."

The franchise agreement

[24] I now set out the relevant clauses from the franchise agreement.

> 9. **INTELLECTUAL PROPERTY**
>
> …
>
> 9.6 The franchisee acknowledges that the contents of the Manual and all details of the System are confidential and it undertakes that it shall not, except for the sole purpose of conducting the Franchisee's Business, at anytime whether before or after the termination of this Agreement, use or divulge to any other person whether directly or indirectly for his own benefit or the benefit of a third party any information or knowledge concerning the Business or the System which may be communicated to the Franchisee or which the Franchisee may acquire in carrying out his obligations under this Agreement, other than any information which at the time is in the public domain other than as a result of a breach of this Agreement by the Franchisee.
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> …
>
> 17. **RESTRICTIONS ON THE FRANCHISEE UPON TERMINATION**
>
> 17.1 Upon expiry or termination of this Agreement for any cause the Franchisee shall not:-
>
> 17.1.1 for a period of two years (or, if that period is adjudged to be void as going beyond what is reasonable, one year), by any means whatsoever be engaged, concerned or interested directly or indirectly in any capacity whatsoever in any business which competes with or is similar to the Business within the Territory;
>
> …

17.1.4 at any time after the termination of this Agreement reveal or use for the benefit of the Franchisee or any third party any know-how made available to the Franchisee in the Manual or any confidential information acquired from the Franchisor in connection with the Franchisee's Business;

17.1.5 for a period of one year directly or indirectly solicit or tout for business from any person who in the two years prior to such termination was a client of or in the habit of dealing with the Franchisee's Business.

17.2 For the avoidance of doubt, the restriction in clause 17.1.1 shall apply as from the date of expiry or termination of this Agreement notwithstanding that immediately after such expiry or termination there may be no replacement franchisee in place to operate the Business within the Territory; and accordingly, for the purposes of that clause a business shall be treated as competing with the Business at any time if it is of a kind which would so compete were the Business in operation at that time.

…

18. **INDIVIDUAL'S OBLIGATIONS**

…

18.2 Throughout the Term, the Individual shall:-

…

18.2.3 not be associated directly or indirectly in any business competing with or similar to the Franchisee's Business or the Business;

18.3 The Individual undertakes to the Franchisor to be bound by the obligations set out in clauses 9.6 and 17 of this Agreement as if the obligations applied directly to the Individual.

…

35. **AMENDMENTS TO THIS AGREEMENT**

No amendments to this Agreement shall be of any force or effect unless such amendments are recorded in writing by way of a Deed of Variation of Franchise Agreement and such document is executed by all parties to this Agreement.

…

SCHEDULE 2

TERRITORY NZ1 – WELLINGTON AREAS AND BOUNDARY MAPS

Territorial Authority	Population	Age 0 to 4
Lower Hutt City	98241	7233
Porirua City	51717	4431
Wellington City	190959	11493
TOTALS	**340917**	**23157**

…

Water Babies' case

[25] The franchise agreement expired by mutual agreement on 30 September 2019. There were no other Water Babies franchises operating in New Zealand when the agreement with Water Babies NZ expired. None have been established since then. Mr Thompson said in his first affidavit dated 13 March 2020 that Water Babies were in discussion with a swim school operator who was interested in running a Water Babies franchise in the Wellington region. In his second affidavit he refers to two email enquiries to this effect and says that all enquiries are on hold pending resolution of the case against the respondents, in particular Swim Baby.

[26] It is Water Babies' case that Ms Williams used and divulged knowledge of Water Babies' systems to Ms Tizzoni. This included knowledge of their course content, teacher training methods, teaching methods (including action songs), data management and protection systems, and confidential client information.

[27] Furthermore, Water Babies says that as a result of Ms Williams sharing that knowledge with Ms Tizzoni in her capacity as a sole director and shareholder of Swim Baby that Swim Baby has secured Water Babies' clients, former teachers, and time slots at the only available and appropriate swimming pool facilities to such an extent that Water Babies has been shut out of the market. Babies require indoor heated pools, to be safely taught. It is a matter of common ground that these are few and far between in New Zealand. Water Babies says that so long as Swim Baby remains in

business this will negatively affect Water Babies' ability to re-open in Auckland and Wellington.

[28] Water Babies engaged an investigator to watch some Swim Baby classes and report back as to what was being taught. She watched two Swim Baby classes both on 7 March 2020 at the AUT Northcote campus swimming pool in Auckland. She made audio recordings of the lessons she watched as well as conversations she had with a parent of one of the children partaking in the classes and a trainee teacher.

[29] Water Babies says that the recordings captured use by Swim Baby of Water Babies' warm up routine, and in some cases identical teaching methods, skills and songs as used by Water Babies.

[30] The evidence establishes that on 18 October 2019 a Water Babies client complained to Water Babies that her details (her name, email address, and child's name) had been shared with "the new swim school that the ex nz franchiser … has set up." The head of the Water Babies' data protection team asked her how she knew how this confidential information had been passed on to Swim Baby. She replied that she had received an email from Ms Tizzoni about Swim Baby and that Swim Baby was holding a place for her child, despite her not having given permission to Water Babies to release her details. This client added that at the next swim class, they were told that Ms Tizzoni's email had been sent to all Water Babies clients in New Zealand and that a week or two later she had received an invoice from Swim Baby for the following term despite not having enrolled for that tuition.

The Respondents' case

[31] Ms Williams acknowledges that she began employment for a Water Babies franchise based in South Wales in 2012. On her return to New Zealand in 2013 she entered into the franchise agreement with Water Babies and incorporated Water Babies NZ for that purpose.

[32] Ms Williams also acknowledges that she was provided access to Water Babies' booking system, a website, access to the company intranet that houses files and

information relevant to the business, and one set of kit for teaching together with a photography backdrop.

[33] Ms Williams says that as a result of various misrepresentations by Water Babies and a profound lack of support by them as franchisor she struggled to have a viable business and went into considerable debt. By February 2019 in her words:

> My marriage had ended, my health was in tatters, I had worked faithfully for them for five years and had lost all my money. They wanted me to stay in the business to get what they could from me and they gave nothing.

[34] Ms Williams said around this time she spoke to Ms Tizzoni who was supporting her through her mental unwellness. She said:

> Silvana is a former competitive swimmer, successful business woman and now stay at home mum. She told me she would contemplate setting up a swimming business and it is true I was enthusiastic for her to do this.

[35] It is her evidence that in telling people that Water Babies was closing she did not directly promote Swim Baby, but that she did refer people who asked as to the availability of Swim Baby's services.

[36] As to the allegation that she had sent a copy of the Water Babies NZ employment contract to her personal email, she admits this is true but says this was for her own record keeping, as she had recently settled an employment dispute with a former employee and wanted to have the security of retaining the relevant documentation.

[37] She did acknowledge working for Swim Baby. Furthermore, she undertook not to be involved with or employed by Swim Baby for the term of the restraint of trade. She argued that the franchise agreement ought not to be interpreted as being so restrictive as to preclude her from her vocation as a swimming teacher. She qualified as a swimming teacher some time before she worked for the Water Babies franchise in South Wales.

[38] Ms Williams denies that the swimming and training techniques utilised by Swim Baby utilise any of Water Babies' intellectual property. She says that many of

these techniques and action songs are generic and were taught to her as part of her own training prior to joining Water Babies.

[39] Ms Tizzoni has a degree in psychology and has had a career in the public and private sector in various corporate roles, including working as a contractor. She accepted an offer of redundancy from her then employer Spark in March 2019. At that point she decided to make a lifestyle change and move into a vocation with flexible hours, so she could spend more time with her children. In her words:

> As I had made a decision to move from the corporate world, I saw an opportunity that I could establish and run a little business in the gap to be left when Kelly and her company ceased trading.

[40] Ms Tizzoni acknowledged that in discussions with Ms Williams she did know that Ms Williams was not to go into any business in competition with Water Babies. She also acknowledged knowing that Ms Williams was subject to a restraint of trade. However, she assumed that Water Babies had been a complete failure in New Zealand and was never going to trade in New Zealand, so essentially the coast was clear. Further she said:

> I did not once turn my mind to any similarity between the name Swim Baby and Water Babies and I do not believe that they are in fact similar names at all.

[41] Ms Tizzoni accepted that Ms Williams was "heavily involved" as an instructor and trainer at Swim Baby. She denied any use of Water Babies' programmes or information by Swim Baby. It is her case that her programme teaches with the support of an Australian-based entity. Further, she says she has incorporated te reo Māori throughout the programme, making her business entirely unique.

[42] Ms Tizzoni denies conspiring with Ms Williams.

[43] For the sake of completeness, I record that Ms Tizzoni would be prepared to consider a name change for her business if it is established that confusion arises because the name Swim Baby is too similar to Water Babies.

Commencement of proceeding

[44] A proceeding is required to be commenced by the filing of a statement of claim or originating application.[1]

[45] Water Babies has not filed a statement of claim or an originating application. They rely on urgency to bring a pre-commencement application for an interim injunction under r 7.53 which provides:

> **7.53 Application for injunction**
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> (1) An application for an interlocutory injunction may be made by a party before or after the commencement of the hearing of a proceeding, whether or not an injunction is claimed in the party's statement of claim, counterclaim, or third party notice.
>
> (2) The plaintiff may not make an application for an interlocutory injunction before the commencement of the proceeding except in case of urgency, and any injunction granted before the commencement of the proceeding—
>
> (a) must provide for the commencement of the proceeding; and
>
> (b) may be granted on any further terms that the Judge thinks just.

[46] The Court must be satisfied in a pre-commencement application for an interim injunction under r 7.53 that the case is so urgent as to warrant interim intervention. What is meant by urgent was considered by Gendall J when considering r 236A(2) (the predecessor to rule 7.53, and very similar in its wording). He said:[2]

> "Urgent" means needing immediate action. In one sense all applications for interlocutory injunctions could be said to be urgent, so as to seek interim relief to prevent harm or injury to legal rights pending the hearing of the substantive proceeding, but for an application under r236A(2) to be granted, it must be a special case with the urgency of a special nature so that the failure to obtain interim relief would or might lead to irreparable harm.

[47] Even where the Court determines that the applicant is otherwise entitled to an interim injunction on the evidence, the applicant's case can still fail to meet the urgency test attaching to pre-commencement proceedings.

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1 High Court Rules 2016, r 5.25.

2 *Tardus Mortgages Ltd v Lister* HC Palmerston North CP 38-98, 27 August 1999 at 6.

[48] Mr Dewar, counsel for the respondents, submitted that the application for an interim injunction should be struck out as Water Babies had not established the urgency threshold.

[49] I am satisfied for three primary reasons that Water Babies has established the necessary urgency test attaching to pre-commencement proceedings. First, their efforts were impeded by evidential insufficiency as to the breach of the franchise agreement by Ms Williams. Ms Williams herself contributed to this by initially dissembling as to her conduct. Secondly, the proceedings were disrupted by COVID-19. Thirdly, Swim Baby does not intend to desist operating from the same pools, at the same lesson times, with some of the same teachers (originating from or trained by Water Babies), and former Water Babies clients. Swim Baby is thereby prima facie continuing to erode Water Babies' goodwill.

[50] In this case the first indication that Water Babies had that the franchise agreement may have been breached by Ms Williams was the email they received from a former employee of Water Babies in late October 2019. They investigated, and in December 2019 they wrote to Ms Williams seeking her response. She replied on 23 December 2019 in what can only be described at best as a somewhat inaccurate and dissembling response, which was written at a time when she was employed by Swim Baby in the business of teaching babies and toddlers to swim and where it can be strongly inferred that she had provided confidential information to that company (for example, the Water Babies NZ client list for the Wellington region).

[51] As a result of this dissembling and inaccurate letter, Water Babies needed to find other sources of evidence to support the contention that Ms Williams had breached the franchise agreement. To suggest that in the face of Ms Williams' denial Water Babies had sufficient evidence at that time to seek an injunction is untenable.

[52] Once the necessary evidence to mount a case for a serious question to be tried in respect of all three respondents was established, proceedings were filed. COVID-19 intervened and, from the point of the lockdown to the change to alert level two, some largesse needs to be afforded to all practitioners and their clients

for operating legal practice under those conditions, particularly where the case had an international dimension.

[53] In the circumstances, there was no untoward delay in bringing these proceedings, and where they remain urgent because of the potential erosion of Water Babies' goodwill in the market place it would be unfair and unjust to dismiss the application.

The law: interim injunctions

[54] Consideration of an application for an interim injunction focuses on three matters:[3]

(a) whether there is a serious question to be tried;

(b) the balance of convenience between the parties; and

(c) an assessment of the overall justice of the case.

Serious question to be tried

[55] The New Zealand courts tend to take a closer look at the claim than was advocated by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*, in which his Lordship said that this head was only there to weed out frivolous or vexatious claims with no real prospect of success.[4]

[56] A process often followed in New Zealand is that set out by Lush J in the Australian case *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd*.[5] That approach is to consider the applicable law, the facts put forward by each side and where the issues lie, and to assess whether there is a tenable resolution of the issues of law and fact on which the applicant could succeed.

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3 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).
4 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 (HL) at 408.
5 *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309 at 31; *Development Consultants Ltd v Lion Breweries Ltd* [1981] 2 NZLR 258 (HC).

Balance of convenience

[57] The balance of convenience can also be described as "the balance of the risk of doing an injustice".[6] It is the "guiding principle" in granting an interim injunction.[7] This stage requires the Court to balance the injustice or harm that may be caused to Water Babies if an interim injunction is not granted and Water Babies ultimately succeeds in gaining a permanent injunction, against the injustice or harm that may be caused to the respondents if an interim injunction is granted and Water Babies ultimately fail to gain a permanent injunction. Although this inquiry is "broad and flexible",[8] the Courts usually consider factors such as:

(a) the adequacy of damages to both parties;

(b) preservation of the status quo;

(c) the relative strength of each parties' case;

(d) the conduct of the parties; and

(e) the effect on innocent third parties.

Adequacy of damages for both parties

[58] In relation to the adequacy of damages, the House of Lords in *American Cyanamid* held:[9]

> … the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his

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6 *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 (CA) at 237; *McLaughlin v McLaughlin* [2019] NZHC 2597 at [37].

7 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 337.

8 *McLaughlin v McLaughlin*, above n 6, at [38].

9 *American Cyanamid Co v Ethicon Ltd*, above n 4, at 408.

> succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

[59] Adequate compensation in this context is what is fair and just in the circumstances of the case, including consideration of intangible harm and the difficulty of assessing damages.[10]

[60] An interim injunction is the common place relief granted to protect a restraint of trade, including in franchising. In *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* the Court of Appeal said that "[c]ases to restrain breaches of contract are prime candidates for injunctive relief."[11] In *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* Hammond J said, in respect of restraints of trade, that "if a franchisor could not protect its interests after termination, the franchising industry generally would collapse".[12]

[61] In relation to whether damages are an adequate remedy in cases involving a breach of a restraint of trade, I note Gault J's comment in *Mad Butcher Holdings Ltd v Standard 730 Ltd*:[13]

> Damages based on the defendants' trading may be reasonably easily calculated, but that does not necessarily mean that damages would be an adequate remedy. As Holland J said in *Linde Aktiengesellschaft v C W F Hamilton & Co Ltd*, in normal events a party to a contract with a valid restraint of trade clause is entitled to have the clause enforced and damages would not often be regarded as an adequate remedy for loss of the plaintiff's contractual rights.[14]

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10 *Gilks v Marsh* (1982) 1 NZCLC 95-063 at 6.

11 *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2007] NZCA 586, [2008] 2 NZLR 418 at [124].

12 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 8 TCLR 612 (HC) at [275].

13 *Mad Butcher Holdings Ltd v Standard 730 Ltd* [2019] NZHC 589 at [40].

14 *Linde Aktiengesellschaft v C W F Hamilton & Co Ltd* (1988) 3 TCLR 216 (HC) at 222. See also John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 512.

[62] However, the difficulty in calculating damages must be considered both ways. In *Western Work Boats Ltd v Kelly*, in relation to the enforceability of a restraint of trade clause, the Court found it would be easier to calculate damages for the breach of the clause, than it would be to quantify the loss caused by an unjustified interim injunction.[15] Damages were therefore considered an adequate remedy for the applicant, but less so for the respondent.

[63] The House of Lords in *American Cyanamid* held that whether either party is in a position to pay damages is a factor to be considered when assessing the adequacy of damages.[16] New Zealand courts have also considered the ability of parties to pay damages. Although ultimately declining to grant an interim injunction, the Court in *Anvil Jewellery Ltd v Riva Ridge Holdings Ltd* considered the ability of the parties to pay damages, in assessing the adequacy of damages.[17] The Court had a "reservation" as to the adequacy of damages for the applicant, due to the potential inability of the respondents to pay an award of damages, in contrast with the applicant's ability to pay damages.[18] Had there been sufficient evidence of the respondents' financial position, the Court may have been satisfied damages were an adequate remedy.[19] In *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd*, in finding the balance of convenience favoured the granting of an interim injunction, the Court found it was "significant" that the applicant was in a position pay substantial damages, while there was doubt about whether the respondent would be able to do so.[20]

Relative strength of each party's case

[64] In finding where the balance of convenience lies, the strength of the plaintiff's case is one factor to be considered. Hardie Boys J in *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* said that where a plaintiff has established there is a serious question to be tried, "the relative merits of the parties' cases ought not to assume prominence in a consideration of where the balance of convenience lies."[21]

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15 *Western Work Boats Ltd v Kelly* [2016] NZHC 2577 at [28].
16 *American Cyanamid Co v Ethicon Ltd*, above n 4, at 408.
17 *Anvil Jewellery Ltd v Riva Ridge Holdings Ltd* [1987] 1 NZLR 35 at 42.
18 At 42.
19 At 42.
20 *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd* HC Auckland CIV-2007-404-001438, 21 May 2007 at [86].
21 *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154 (HC) at 157.

[65] There is an intrinsic limit to the examination of the merits of the argument based on the affidavit evidence provided and the interlocutory nature of the application. As Lord Diplock observed:[22]

> The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

The conduct of the parties

[66] The applicant's conduct can be relevant, as an injunction may be refused if the applicant does not come to the Court with clean hands, in such a way that would make the granting of an injunction unconscionable.[23]

[67] A respondent's conduct can also be an important consideration when assessing the balance of convenience, notably where a respondent has acted with its "eyes wide open"; in other words, while aware of the applicant's right.[24] In finding that the balance of convenience favoured the preservation of the status quo in *New Zealand Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Co Ltd*, Chilwell J held:[25]

> A defendant cannot create his own inconvenience and then have it taken into account in balancing the scales of convenience – at least not when he embarks upon questionable conduct with his eyes open.

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22 *American Cyanamid Co v Ethicon Ltd*, above n 4, at 409.
23 *Media Works NZ Ltd v Sky Television Network Ltd* (2007) 74 IPR 205 (HC) at [106].
24 *New Zealand Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Co Ltd* (1979) 1 TCLR 18 at 28.
25 At 28.

Preservation of the status quo

[68] A useful description of the approach to this consideration was provided by Lord Diplock in *American Cyanamid*:[26]

> Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

[69] The status quo has been referred to as "the last peaceable state between the parties".[27] However, I note there is some disagreement over when the status quo is to be assessed: before the alleged wrongdoing; or immediately before the commencement of proceedings.

Overall justice

[70] This final stage requires the Court to "stand back from the case and consider where the overall justice of the case lies."[28] Although the balance of convenience will normally determine whether the Court should grant an interim injunction, a consideration of the overall justice may mean this is not so.[29]

Is there a serious question to be tried in relation to Ms Williams?

The law: restraint of trade

[71] As Water Babies' claim is partly founded on the restraint of trade provisions in the franchise agreement, I note here the law generally on restraints of trade:[30]

> Contractual provisions that constitute a restraint of trade are prima facie void and therefore unenforceable. Nevertheless, where the party seeking to enforce

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26 *American Cyanamid Co v Ethicon Ltd*, above n 4, at 408-409.
27 *R & M Wright Ltd v Ellerslie Gateway Motels Ltd* HC Wellington CP188-90, 11 July 1990 at 8.
28 *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd*, above n 20, at [90].
29 *McLaughlin v McLaughlin*, above n 6, at [67].
30 *Skids Programme Management Ltd v McNeill* [2012] NZCA 314, [2013] 1 NZLR 1 at [36].

> the restricted provision establishes that the restriction is reasonable, it may be enforced.[31]

[72] In *Skids Programme Management Ltd v McNeill* the Court of Appeal had "no doubt" that a New Zealand franchisor may have an interest capable of protection by a restraint of trade provision, and found there was an enforceable restraint of trade clause in the case before it.[32] The Court first considered whether there was a protectable interest, and found there was, with reference to features offered by the franchisor including: its name and goodwill; support offered to franchisees; material such as manuals, pricing structures, employment documentation, and programme modules; and knowhow and material, even if that was widely available, as it created the immediate knowledge which gave the franchisee an immediate significant advantage over any other start-up competitor.[33]

[73] The Court then considered the public interest, and found it was reasonable to protect the franchisor's interest in the restraint of trade.[34]

[74] Finally, the Court considered the reasonableness of the term and geographic boundary of the clause. The Court expressed doubt about the reasonableness of a 15-kilometre geographical restraint, but ultimately did not need to decide the issue. The Court upheld the High Court's finding that a two-year term was unreasonable, and three months was sufficient to protect the franchisor's interest. The Court did note this was the minimum, and six months could have been justified. The Court found three months was the "bare time that it would have been necessary for the appellants to set up a competing operation within the franchise area untrammelled by direct competition from a former franchisee."[35]

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31 *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA) and *Brown v Brown* [1980] 1 NZLR 484 (CA), following *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 (HL).

32 *Skids Programme Management Ltd v McNeill*, above n 30, at [41].

33 At [49].

34 At [52].

35 At [54].

Is the restraint of trade enforceable?

[75] The respondents' case is partly founded on the assertion that Water Babies has no interest to protect and that as a result the application for an interim injunction must fail. I address two distinct arguments on this ground: whether Water Babies has a protectable interest; and whether the terms of restraint of trade are reasonable.

[76] The assertion that Water Babies has no protectable interest appears to be based on the fact a new franchisee has not been established. This assertion is inconsistent with clause 17.2 of the franchise agreement, which explicitly preserves Water Babies' rights under the restraint of trade, regardless of whether there is another franchisee in place. I acknowledge that when considering injunctive relief in relation to a restraint of trade, an applicant must show the parties are in competition.[36] While it may be possible for the respondents to argue the restraint of trade is unreasonable if Water Babies has no intention of competing in the region, the restraint of trade provision is to be assessed as at the date of the franchise agreement.[37] A similar argument recently failed in *Mad Butcher Holdings Ltd v Standard 730 Ltd*.[38]

[77] Additionally, the respondents base their argument on the allegation that Mr Thompson has perjured himself in his affidavits where he makes mention of the approach by three prospective franchisees to Water Babies this year. This submission is in my view highly speculative and unfortunate at this stage of proceedings particularly. Further, Mr Thompson says in his affidavit that Water Babies asked Ms Williams if she knew of any person or former employee that may wish to take over the franchise. For the purposes of this application I am prepared to accept that Water Babies may find a replacement franchisee for the Wellington area.

[78] Prima facie it seems amply clear that Water Babies does have a protectable interest. They have been operating in Wellington and Auckland since 2017. They have their name and their goodwill, and they provided significant material to Ms Williams such as manuals, programme modules, knowhow and the materials listed

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36 *Mike Pero (New Zealand) Ltd v Heath* [2015] NZHC 2040 at [33]; *Propellor Property Investments Ltd v Moore* [2015] NZHC 863 at [20].

37 *Mad Butcher Holdings Ltd v Standard 730 Ltd*, above n 13, at [25].

38 At [24]-[25].

in schedule one to the franchise agreement. Further, they had established relationships with local swimming facilities and had appropriated their facilities at the optimal times for parents and their children to enjoy their lessons. They plainly had a significant client base. All of this prospectively gives any franchisee an immediate significant advantage over competitors.

[79] For the reasons given in the authorities above, I consider a restraint of trade provision in this context is enforceable. However, I doubt that a two-year term is reasonable, and consider one year would be reasonable. I also note the franchise agreement does not extend outside of the Wellington region, so both Ms Williams and Ms Tizzoni are currently free to teach in Auckland (provided of course they do not use Water Babies' intellectual property). I also note Ms Williams is currently free to teach children over the age of five years, within the Wellington region.

The law applied to Ms Williams

[80] The case against Ms Williams is founded in contract, based on a breach of the franchise agreement. Ms Williams does not deny breaching the franchise agreement. Notwithstanding Ms Williams' concessionary approach to the matter, for the sake of completeness I now set out the evidence I rely upon to satisfy myself that there is a serious question to be tried as to whether or not she has breached the franchise agreement.

[81] Ms Tizzoni's evidence is that Ms Williams was "heavily involved" in Swim Baby as an instructor and trainer. Further, the email correspondence attached to Mr Thompson's first affidavit (outlined at [20] and [21] above) suggests that while still a Water Babies franchisee, or subject to the restraints in clause 17 of the franchise agreement, Ms Williams directed Water Babies clients to Swim Baby. Although Ms Williams does not refer to Swim Baby in her emails, I infer from these emails that she referred clients to Swim Baby in subsequent telephone calls or provided client details to Swim Baby. This is also consistent with the complaint Water Babies received (outlined at [30] above), about information being given to Swim Baby.

[82] I am satisfied on the evidence that there is a serious questioned to be tried that Ms Williams breached the franchise agreement in the following ways:

(a) divulged information and knowledge about the swimming system and business to Ms Tizzoni and Swim Baby (in breach of clause 9.6);

(b) was engaged or interested in a business that was similar to and was competing with the Water Babies business (in breach of clause 17.1.1), notwithstanding there was as yet no other franchisee (as provided for by clause 17.2);

(c) used knowhow and confidential information acquired from Water Babies for her benefit and for the benefit of Ms Tizzoni and Swim Baby (in breach of clause 17.1.4); and

(d) solicited and touted for business from persons who were clients of Water Babies NZ in the two years prior to the end of the franchise agreement (in breach of clause 17.1.5).

Is there a serious question to be tried in relation to Ms Tizzoni and Swim Baby?

[83] The case against Ms Tizzoni and Swim Baby is founded not in contract, but in tort. The claim is that Ms Tizzoni and Swim Baby induced Ms Williams' breach of the franchise agreement.

The law: the inducement of a breach of contract

[84] Water Babies relies on the formulation of the tort in the decision of the House of Lords in *OBG Ltd v Allan*,[39] which has been adopted in a number of New Zealand cases:[40]

(a) there must be a legally enforceable contract;

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39 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

40 *SGS New Zealand Ltd v Nortel (1998) Ltd & Ors* HC Whangarei CIV-2006-488-000384, 20 December 2007; *ABC Developmental Learning Centres (NZ) Ltd v Artemis Early Learning Ltd* HC Christchurch CIV-2010-409-001198, 25 June 2010; *Onyx Bar & Café (Cambridge) Ltd v Jans* [2012] NZHC 948; *Philip Moore & Company Ltd v Surridge* [2018] NZHC 562.

(b) the defendant must have engaged in conduct which in fact induced the breach of the contract;

(c) the defendant must have known that its conduct would induce the breach; and

(d) the inducing conduct must have caused the loss or damage to the plaintiff.

[85] In relation to (b), the "real question which has to be asked" is: "did the defendant's acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability?"[41]

[86] When it comes to considering (c), the House of Lords emphasised that a party must know they are inducing a breach of contract:[42]

> It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so.

[87] The Court of Appeal has held that a sufficiently strong suspicion that a contract existed and a deliberate choice not to enquire can provide the requisite knowledge.[43] This still requires a subjective, rather than objective, inquiry.[44] Knowledge of the precise terms of the contract is not required. Knowledge of the existence of a contract and the means of knowledge as to the terms is sufficient: "it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent to whether it is a breach or not."[45] Breach of the contract need not be the desired end of the person inducing the conduct to breach; it is sufficient that the breaches were a means to achieve another end.[46] It is not necessary for the applicant to establish that the person

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41 *OBG Ltd v Allan*, above n 39, at [36].
42 At [39].
43 *Diver v Loktronic Industries Ltd* [2012] 2 NZLR 388 at [47].
44 At [47].
45 *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 (CA) at 700-701.
46 *OBG Ltd v Allan*, above n 39, at [42].

inducing the conduct which amounts to a breach intends harm to come to the applicant.[47]

[88] I turn now to the final element of the tort in (d), namely that the inducing conduct must have caused damage, in this case to Water Babies. Particular damage does not need to be proved, if the breach would inflict damage in the ordinary course of business.[48] Damages are recoverable if the loss was a reasonably foreseeable consequence of the respondent's conduct.[49]

The law applied to Ms Tizzoni and Swim Baby

Was there a legally enforceable contract?

[89] The fact that there was a legally enforceable contract operating at the relevant time is not disputed by the respondents.

Did Ms Tizzoni and Swim Baby induce Ms Williams' breaches of contract?

[90] Both Ms Williams and Ms Tizzoni said Swim Baby was Ms Tizzoni's idea and that Swim Baby has from its inception been Ms Tizzoni's business.

[91] For her part, Ms Tizzoni, who had helped Ms Williams at Water Babies, said that she wanted to leave the corporate world and saw an opportunity to establish Swim Baby in "the gap" left by Ms Williams parting company with Water Babies. She incorporated Coral and Aquamarine Limited for this purpose. She is the company's director and "hands on owner".

[92] It seems apparent that Ms Tizzoni told Ms Williams she was going into the children's swimming lessons market. Ms Williams admits referring Water Babies clients to Swim Baby, when they asked about alternative options after Water Babies stopped operating.

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47 At [192].
48 *Philip Moore & Company Ltd v Surridge*, above n 40, at [206].
49 At [206].

[93] Ms Tizzoni herself wrote to Water Babies' clients while Ms Williams was still a franchisee, telling them about Swim Baby. A Water Babies client confirmed that Ms Tizzoni's email was sent to all Water Babies clients and another said she had received an email from Swim Baby asking if she wished her child to continue having swim lessons with Swim Baby. Mr Thompson confirms that Water Babies did not give its client list to Ms Tizzoni and Ms Tizzoni confirms she had not had direct contact with Water Babies. There is a strong reasonable inference to be drawn that the list was provided by Ms Williams to Ms Tizzoni.

[94] Further, there is evidence that Water Babies clients did become Swim Baby's clients. Swim Baby operated swimming lessons that relied heavily on using the same pools, the same times, some of the teachers trade by Water Babies, and some of Water Babies' intellectual property. Finally, Ms Williams was employed by Swim Baby as a trainer and instructor.

[95] The evidence establishes that Ms Williams' actions constituted a breach of the franchise agreement. Each action of breach benefited Ms Tizzoni and Swim Baby.

[96] Ms Tizzoni is at great pains in her affidavit to deny using any of the Water Babies programmes or information. She says Swim Baby instead teaches with the support of the Laurie Lawrence Swimming Approach through the World Wide Swim School which is based in Australia. She also says she has adapted these processes to incorporate te reo Māori.

[97] Again, I believe her evidence is somewhat selective because it obviates any mention that she herself contacted Water Babies' clients in order to offer her business services to them. Nor does it mention that in employing Ms Williams and getting her to train teachers according to the methods she herself had learnt from Water Babies, she was in fact utilising their methods to a greater or lesser degree.

[98] Ms Tizzoni records in her affidavit that she was aware of Ms Williams' financial difficulties and the "distress it caused to her", as well as the breakdown of her relationship and "the breakdown in Kelly's mental health that went with that." I find it likely Ms Tizzoni would have been aware she was offering significant support

to Ms Williams through the Swim Baby business, which would have encouraged Ms Williams' breaches of the franchise agreement.

[99] In light of these factors, I find a serious question falls to be answered that Ms Tizzoni and Swim Baby induced Ms Williams' breaches of the franchise agreement.

Did Ms Tizzoni as the director and sole shareholder of Swim Baby know that her conduct would induce Ms Williams' breach?

[100] Ms Tizzoni accepted that she had actual knowledge, not only that Ms Williams had a franchise agreement with Water Babies, but also that she was bound by a restraint of trade. However, she also said that "as she saw it" Water Babies had failed in New Zealand and was not going to continue to trade in this country.

[101] Mr Carey, counsel for Water Babies, argues that Ms Tizzoni, in knowing Ms Williams had a restraint of trade, must also have known that her own actions of inducement (as set out above at [90]-[99]) would cause a breach of the franchise agreement and the restraint of trade. I agree. Whether or not Water Babies had an intention to continue their business presence in New Zealand or not is immaterial. Ms Tizzoni's assumption to the effect that Water Babies was not going to continue business in New Zealand does not obviate the fact that she knew that Ms Williams had a franchise agreement with Water Babies which included a restraint of trade clause. It is also telling in my view that Ms Tizzoni made no attempt to contact Water Babies to establish their position on the matter. She appears to have been wilfully blind as to whether Ms Williams' actions amounted to a breach of contract.

Did Ms Tizzoni's conduct cause loss or damage to Water Babies?

[102] Mr Carey submitted that typically a franchisor whose restraint of trade clauses are breached will suffer loss, be it any or all of a loss of goodwill or reputation, a loss of market share, a loss of profit, a loss of a chance to secure future business and so on.

[103] The statement of Hammond J that without restraint clauses the franchising industry would collapse puts into stark relief the importance of such clauses in that

industry.[50] Mr Carey submitted that the corollary of those propositions is that breach of such an important clause would typically cause damage.

[104] Mr Dewar submitted two arguments on this ground: that Water Babies had suffered no losses; and that if it had, any breach of the franchise agreement did not cause those losses.

[105] In submitting Water Babies suffered no damage, Mr Dewar relied on the United Kingdom Supreme Court decision in *One Step (Support) Ltd v Morris-Garner*, which set out criteria to be considered when calculating damages for breach of a non-compete covenant, including how many customers were lost, for how long, and what volume of business was lost.[51] Mr Dewar submitted Water Babies suffered no losses, on the basis there was no alternative franchisee to compete with Swim Baby. I note here that the case against Ms Tizzoni and Swim Bay lies in tort, and the general rule is that compensatory damages are awarded in the amount required to put a plaintiff back into the position they would have been in, had the wrong not occurred.[52]

[106] In submitting there is no causal link between Ms Williams working for Ms Tizzoni and any losses Water Babies may have suffered, Mr Dewar again appears to rely on the fact Water Babies did not immediately establish another franchisee.

[107] Having found that Water Babies does have a protectable interest, I am satisfied that for present purposes, it is reasonably foreseeable that inducing a breach of the franchise agreement is likely to cause loss in the ordinary course of business. Ms Tizzoni and Swim Baby continue to cause loss to Water Babies, by continuing to provide services to former Water Babies clients while utilising Water Babies' intellectual property, teachers trained by Water Babies, and the only available pools at times formerly occupied by Water Babies.

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50 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*, above n 12.
51 *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [105].
52 *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA) at 359 citing *Livingstone v Rawyards Coal Co* (1880) 5 AC 25 at 39.

[108] I therefore conclude that there is a serious question to be tried that Ms Tizzoni – in her personal capacity and as director and shareholder of Swim Baby – knew that her conduct would induce Ms Williams' breaches of the franchise agreement.

Balance of convenience

Damages as a remedy against Ms Williams

[109] Water Babies' case against Ms Williams for breaching the franchise agreement in a significant number of ways is strong and warrants interim relief. Ms Williams is legally aided on a benefit and owes a significant amount of money to Water Babies. She is not in any position to pay any damages ultimately awarded. Thus, this consideration in the balance of convenience weighs in favour of Water Babies.

Damages as a remedy against Ms Tizzoni and Swim Baby

[110] Ms Tizzoni has not said whether she would be able to pay damages if they are ultimately awarded against her. I asked Mr Dewar if he wished to take the opportunity to get instructions on these matters and he elected not to do so. It is a reasonable inference to draw in those circumstances that Ms Tizzoni and Swim Baby do not have the resources to pay any award of damages. This consideration in the balance of convenience weighs in favour of Water Babies. I have no doubt that Mr Dewar would have advised his clients of the importance of this aspect of the tests to be applied in this case. It is a significant factor in the balancing exercise if Ms Tizzoni and Swim Baby do not have the wherewithal to meet damages.

Relative strength of each party's case

[111] As already outlined, the case against Ms Williams is very strong.

[112] Although I acknowledge there are more complexities to the case against Ms Tizzoni and Swim Baby, which will require further analysis at the substantive hearing of Water Babies' claim, I consider the case against them is strong enough to warrant interim relief.

Respondents' conduct

[113] Ms Williams knowingly breached the terms of the franchise agreement. Initially, she actively dissembled when she was challenged by Water Babies on the behaviour that constituted the breach. She now accepts some of her conduct amounts to a breach of the franchise agreement.

[114] Ms Tizzoni was aware that Ms Williams' franchise agreement contained a restraint of trade, yet without any enquiry of Water Babies she wrote to Water Babies' clients directing them to Swim Baby and employed Ms Williams to teach swimming classes using Water Babies' teaching techniques.

[115] Given their knowledge of the terms of the franchise agreement, I consider Ms Williams and Ms Tizzoni were acting with their "eyes wide open", and their conduct counts against the balance of convenience being weighed in their favour.

The effect on innocent third parties

[116] Counsel did not refer me to any arguments relating to the effect of my decision on innocent third parties, and I can see none that would obviously sway the balance of convenience either way.

Preservation of status quo

[117] Given I am satisfied the other factors are not evenly balanced (as damages would not be an adequate remedy for Water Babies, Water Babies has a strong case, and the respondents' conduct counts against them), it is not necessary for me to consider preservation of the status quo.

Overall justice in this case

[118] I am satisfied that a consideration of the balance of convenience test is sufficient. Counsel did not point me to any additional matters which might provide another reason for exercising my discretion to grant or decline the injunction sought. For the reasons given I am satisfied that the application for an interim injunction should be granted.

Orders

[119] The application for an interim injunction under r 7.53 is granted, on the following terms:

(a) Ms Williams is restrained from, at any time, using or divulging to any person, whether directly or indirectly, for her own benefit or for the benefit of a third party, any information or knowledge concerning the Water Babies' Business or System, in breach of clause 9.6 of the franchise agreement.

(b) Ms Williams will provide an undertaking that she has or will destroy any copies in her possession or control of Water Babies' Manual and any written details of the Water Babies' Business or System.

(c) Ms Tizzoni and Swim Baby are restrained from, at any time, making use of or benefitting from information or knowledge concerning Water Babies' Business or System.

(d) Ms Tizzoni and Swim Baby will provide an undertaking that they have or will destroy any copies in their possession or control of Water Babies' Manual and any written details of Water Babies' Business or System.

(e) Ms Williams is restrained from being engaged, concerned or interested, directly or indirectly, in any capacity whatsoever, with Swim Baby or any other business that competes with or is similar to Water Babies' business, in breach of clause 17.1.1 of the franchise agreement, within the territory set out in Schedule 2 of the franchise agreement, *for a period of one year from 30 September 2019*.

(f) Ms Williams is restrained from further soliciting or touting for business from any person who was a client of, or in the habit of dealing with, the Swim Baby's business as a franchisee of Water Babies, in breach of clause 17.1.5 of the franchise agreement.

(g) Ms Tizzoni and Swim Baby are restrained from continuing to trade in the territory set out in schedule two of the franchise agreement, *for a period of one year from 30 September 2019*.

[120] The applicant shall file a statement of claim and notice of proceeding *within 10 working days* of today's date.

[121] In the event that the applicant fails to file their statement of claim in accordance with this direction, the interim injunction shall lapse.

[122] The Registrar is to allocate a case management conference *no later than 20 working days* after the date of filing of any statement of defence.

[123] The parties shall file memoranda for the first case management review *no later than 15 days* after the statement of defence is filed.

[124] Costs are reserved.

[125] If counsel are unable to agree on costs then they shall each file a memorandum of no more than five pages each, making submissions as to the appropriate costs to be awarded.

Doogue J

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Thomas Dewar Sziranyi Letts, Lower Hutt