

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2024-404-001217
[2024] NZHC 1508**

BETWEEN	TOP TEN GROUP NEW ZEALAND LIMITED Plaintiff
AND	TASMAN TOURISM NEW ZEALAND LIMITED First Defendant
AND	COROMANDEL HOLIDAY PARK LIMITED Second Defendant

Hearing:	29 May 2024
Appearances:	John Land and Carter Pearce and for the Plaintiff Mark O'Brien KC and Nick Coyle for the First Defendant Adam Ross KC and Chen Jiang for the Second Defendant
Judgment:	10 June 2024

**JUDGMENT OF MOORE J
[Application for interim injunction]**

This judgment was delivered by me on 10 June 2024 at 4.00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date:

Introduction

[1] The second defendant, Coromandel Holiday Park Ltd (“CHPL”), owns a property at 636 Rings Road, Coromandel from which it operates a holiday park business currently known as the Coromandel Top 10 Holiday Park.¹

[2] As its name suggests, CHPL currently owns and operates its holiday park business as a franchisee of the plaintiff, Top Ten Group New Zealand Ltd (“Top Ten”) and within the plaintiff’s Top 10 Holiday Parks network . CHPL does so subject to a five-year franchise agreement executed on 17 December 2022. As such, the agreement has approximately three-and-a-half-years left to run.

[3] On 20 July 2023, CHPL executed conditional agreements to sell its property and business to the first defendant, Tasman Tourism New Zealand Ltd (“Tasman”). The date of settlement was set for Wednesday 29 May 2024.

[4] Top Ten alleges that this transaction and actions that CHPL took to pursue it with Tasman constitutes a breach of its franchise agreement. It further alleges that Tasman is liable in tort for inducing this purported breach of contract. As relief, Top Ten seeks permanent injunctions restraining CHPL from, among other things, selling or otherwise transferring its land and business to Tasman without its consent and from operating or allowing the operation of its holiday park business under any name or branding other than the “Top 10” brand. It seeks a broadly similar injunction against Tasman restraining it from, among other things, acquiring CHPL’s property and business.

[5] On 27 May 2024, two days prior to the intended settlement date, Top Ten applied for urgent interim relief against CHPL pending the substantive determination of its claims.

[6] While the date for the intended settlement has now passed, Mr Ross KC for CHPL and Mr O’Brien KC for Tasman advised that their respective clients would not

¹ CHPL’s holiday park business is currently listed on the Top 10 Holiday Parks Group website as “Coromandel Top 10 Holiday Park”. See Top 10 Holiday Parks Group “Coromandel Top 10 Holiday Park” <www.top10.co.nz> .

proceed with the sale and purchase of CHPL's property and business until the Court had delivered its judgment on the question of interim relief.

[7] I undertook to deliver a judgment as soon as reasonably possible. This is that decision.

Background

[8] CHPL was incorporated in 1999 by Caron and Sean Steffert for the purpose of acquiring the property at 636 Rings Road and the holiday park business which operated from it. For convenience, I shall refer to that property and the holiday park business collectively as the Coromandel Holiday Park.

[9] As joint shareholders and directors of CHPL, the Stefferts have owned and operated the Coromandel Holiday Park for the last 25 years. During that time, they have owned and operated the Coromandel Holiday Park independently, and as a franchisee – first as a Family Parks franchise from 2009 to 2012, and then from 2012 onwards under the Top 10 brand.

[10] Top Ten is, as indicated, the franchisor of the Top 10 holiday park franchise and the owner of the Top 10 brand.

[11] At present, there are 48 holiday park franchisees within the Top 10 network. The nature of the franchise is that all franchisees are Top Ten shareholders.

[12] As franchisor, Top Ten is responsible for – among other things – marketing and advertising its network of Top 10 holiday parks and providing operational expertise and systems support to its franchisees.

[13] In essence, each franchise is subject to a franchise agreement whereby Top Ten grants franchisees the right to carry on business as a “Franchised Operation” – essentially, as a Top 10 Holiday Park using Top Ten's operational methods and systems – in consideration for the observance of certain terms and the payment of certain fees, including a “marketing levy”. This marketing levy is based on a franchisee's “short-term accommodation revenue”. At its very simplest what Top Ten acquires in

consideration for what it provides franchisees– as Mr Land for Top Ten put it in his submissions in reply – is a contractual interest in its franchisee’s business turnover.

[14] Under Top Ten’s franchise agreement with CHPL, “Franchised Operation” is defined as “the business of operating a public holiday park (including the sale of all associated products and services) at [636 Rings Road, Coromandel] as a TOP 10 Superior Holiday Park using the System pursuant to the terms of this Agreement”.

[15] “System” is defined as:

... TOP 10 methods and systems utilised and exploited in the operation of the businesses forming part of the TOP 10 network as is more particularly set out in the Manuals including:

- (i) The standards and procedures relating to the Franchised Operation as are put in place by [Top Ten] from time to time for its quality control management whether via the Manuals or otherwise;
- (ii) The Intellectual Property; and
- (iii) All modifications or variations to the above as are adopted by [Top Ten] from time to time.

[16] In his affidavit in support of Top Ten’s application for interim relief, Mr Ovendale – Top Ten’s Chief Executive Officer – explains that the following clauses are identical across all franchise agreements:

- (a) cl 3.1, which requires franchisees to promote the “Franchised Operation” by performing their obligations under cl 5 and to “exercise [their] best endeavours in the conduct of the Franchised Operation to promote the mutual business interest of the Franchisor and Franchisee”;
- (b) cl 3.3, which requires franchisees not to prejudice Top Ten’s intellectual property;
- (c) cl 3.16(a)(v), which requires franchisees not to, either during the term of the franchise agreement or after its termination, “be a party to any act, matter or thing” where Top Ten or its business is “brought into ridicule or disrespect”; or where the “goodwill, trade or business” of

Top Ten or any “member of the Top 10 Network” may be prejudicially affected;

- (d) cl 8.1 which provides that franchisees are “not entitled to and shall not assign transfer novate or in [any] way dispose of the whole or any part of its rights and interests” under its franchise agreement without Top Ten’s prior consent;
- (e) cl 8.2 which provides that franchisees may only “dispose of its interests in the Franchised Operation by selling the whole of the Franchised Operation as a going concern” and subject to certain requirements being met to Top Ten’s reasonable satisfaction; and
- (f) cl 8.3 which requires any agreement for the sale and purchase of the Franchised Operation to contain Top Ten’s “further terms of sale”.

[17] In recent years, two Australian-owned corporations – Tasman and Hampshire Holiday Parks Ltd (“Hampshire”) – have entered the holiday parks market in New Zealand. In 2020, Tasman acquired three holiday park businesses which were previously Top Ten franchises at Waihi Beach, Beachhaven and Christchurch. In 2023, Hampshire acquired holiday park businesses in Queenstown, Kaikoura and Ohope.

[18] Tasman initially acquired its former Top 10 branded holiday park businesses under assignment as a Top Ten franchisee, and on the basis that it would continue to operate these businesses under the Top 10 brand. However, due to disagreements over how these businesses were to be branded and Tasman’s obligation to share data with Top Ten, Top Ten terminated these franchise agreements in late November 2021.

[19] As Mr Land pressed at the hearing, Top Ten now sees Tasman as its major competitor in the New Zealand holiday parks market.

[20] This is the background and context out of which the events which triggered the present proceedings and application for interim relief arose. I now turn to those events.

[21] In 2017, the Stefferts incorporated another company, Cambridge Holiday Park Ltd, to purchase a holiday park business in Cambridge (“the Cambridge Holiday Park”). In her affidavit in opposition, Ms Steffert explains that this decision was made because the Stefferts saw potential in the Cambridge business, and because the couple’s children attended boarding school in the Cambridge region. After purchasing the Cambridge Holiday Park, the Stefferts moved to Cambridge and decided to develop the Cambridge Holiday Park Ltd as a Top Ten franchisee.

[22] In early 2023 the Stefferts then decided to sell the Coromandel Holiday Park. Ms Steffert explains that she and her husband had found it difficult to run two holiday parks at the same time. They considered that selling the Coromandel business would release funds enabling them to finance plans to grow the Cambridge Holiday Park.

[23] To that end, on 16 June 2023, Ms Steffert emailed David Ovendale, Top Ten’s Chief Executive Officer, to advise that it was CHPL’s intention to sell the Coromandel Holiday Park. Mr Ovendale replied that same day. He asked whether CHPL had approached Hampshire as a purchaser, noting that Hampshire would be Top Ten’s “preference ahead of any other corporate considerations”. Needless to say, a sale to Hampshire did not eventuate.

[24] On 20 July 2023, CHPL executed three conditional agreements to sell the Coromandel Holiday Park to Tasman. Two facilitated the sale of the land on which the business was situated,² while the third enabled the sale of the holiday park business itself. Under the third agreement, CHPL and Tasman agreed to a process where, in essence,

- (a) CHPL would first use its best endeavours to attempt to secure Top Ten’s agreement to terminate its franchise agreement with CHPL; and
- (b) failing which, Tasman would attempt to agree acceptable terms for an assignment of CHPL’s franchise agreement with Top Ten.

² Ms Steffert explains that the Coromandel Holiday Park is situated on land at 636 Rings Road, 692 Rings Road and 732 Rings Road. She explains that the property at 732 Rings Road is owned through two Family Trusts. Appended to her affidavit is an Agreement for the Sale and Purchase of that property with Tasman. I note this for completeness and accuracy.

[25] Following this, on 25 July 2023 Ms Steffert emailed Mr Ovendale. She reiterated that CPHL intended to sell the Coromandel Holiday Park and inquired whether Top Ten would agree to terminating its franchise agreement. Mr Ovendale replied that same day. He explained that this would need to go to Top Ten's Board and asked if she consented to that course. He also advised that "generally [the Board] hasn't got in the way of purchases in the past but appetite is likely also to depend on who the purchaser is likely to be".

[26] Mr Ovendale came back to Ms Steffert with the Board's response on 31 July 2023. He advised that the Board's preference was not to terminate its franchise agreement and that it would rather talk to any incoming purchaser about the options of remaining in the Top 10 group.

[27] Then, between 1 and 5 August 2023, Ms Steffert and Mr Ovendale exchanged a series of emails. Ms Steffert acknowledged the Board's preference for maintaining its franchise agreement but asked what it would "cost" for CHPL to terminate its franchise agreement and whether Top Ten would be open to an early termination. On 2 August 2023, Ms Steffert advised that CHPL's "buyer" was Tasman and that "settlement" could be "as early as three months away".

[28] In response to these emails, Mr Ovendale explained that any decision about early termination would have to be made by the Board. He said he would have to get advice before confirming any figures relating to what CHPL would have to pay for early termination. However, in emails sent on 3 and 4 August 2023, Mr Ovendale said that the costs would likely include, but were not limited to:

- (a) the cost of the "breach" of the franchise agreement, for which the value of the remaining term had been calculated at approximately \$164,488;
- (b) collateral reprint costs of approximately \$30,000;
- (c) collateral redistribution costs of approximately \$10,000;
- (d) other "direct costs" at a provisional sum of \$10,000; and

(e) the possible loss of future earnings.

[29] On 4 August 2023, Ms Steffert asked Mr Ovendale whether, if CHPL paid \$164,488, the franchise agreement would be terminated. The following day, Mr Ovendale came back to Ms Steffert explaining that the matter was a “full Board conversation”. He said he fully understood and respected the decision to sell to Tasman but that he was “just sad it wasn’t Hampshire instead”.

[30] On 9 August 2023, Ms Steffert emailed Mr Ovendale and Top Ten’s Board again seeking Top Ten’s agreement to terminate its franchise agreement with CHPL. Ms Steffert explained that if agreed, any termination would be in “full and final settlement”. She also indicated that the suggested value of the remaining term (\$164,488) seemed “high” given the size of the Coromandel Holiday Park and requested that a “detailed breakdown” be given for any proposed “termination sum”.

[31] Mr Ovendale came back to Ms Steffert with Top Ten’s response on 25 August 2023, first by phone call and then via email. He explained that the Board had met to discuss CHPL’s request for early termination but had indicated they would not approve it. Mr Ovendale explains in his affidavit that Top Ten was unwilling to approve a sale to Tasman with an early termination of the franchise agreement because “Tasman was by then a known direct competitor of Top Ten and would immediately remove Coromandel from the Top Ten network”.

[32] On 7 November 2023, CHPL and Tasman varied their agreement for the sale and purchase of the holiday park business. The agreed variation removed their commitments (described above at [24]) to attempt to ascertain Top Ten’s agreement to an early termination of – or failing that an assignment to Tasman of – CHPL’s franchise agreement.

[33] It would seem that matters rested there for the next five months until 30 April 2024 when Ms Steffert called both Ian Smith, the Chair of Top Ten’s Board and Mr Ovendale to advise that CHPL was selling the Coromandel Holiday Park to Tasman. During these calls, Ms Steffert advised that the Coromandel Holiday Park would change hands in late May 2024. Mr Ovendale explains that on 7 May 2024 Top Ten

was advised by CHPL's solicitors that the planned completion date for the sale was 29 May 2024.

[34] On 10 May 2024, the Board met and confirmed that it would not "approve" the sale to Tasman. (My use of quotation marks reflects the parties' disagreement as to whether Top Ten's approval was ever needed). Five days later, on 15 May 2024, Mr Smith wrote to Top Ten's franchisees/shareholders to advise them of the Board's position. In it, he said:

As you know, the Franchise Agreement, which is legally binding, requires the approval of the Franchisor (your elected Board) when the Board receives any request to sell an existing park to a third party. In making a decision on this, the directors have a fiduciary duty to do what they believe is in the best interests of the company being Top Ten Group New Zealand Limited in this case.

Section 131 of the Companies Act 1993 states that *"a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company"*.

After careful deliberation, the Board has reached the conclusion that it must decline the request for the sale of Coromandel Top 10 to Tasman Tourism which is a direct competitor. The Board appreciates that this might come as a surprise to some shareholders, but the decision has been made in the best interests of the company.

[35] On 21 May 2024, after some without prejudice correspondence, CHPL's solicitors sent Top Ten (via its own solicitors) an "open letter". In it they said:

- (a) that CHPL's agreements to sell the Coromandel Holiday Park to Tasman were now unconditional;
- (b) that CHPL was willing to pay Top Ten \$175,000 to terminate its franchise agreement, and in full and final settlement of any claim for breach of contract; and
- (c) if CHPL's offer to pay \$175,000 was not accepted, CHPL would request Top Ten's consent to assign its rights and obligations under its franchise agreement to Tasman.

[36] Top Ten’s solicitors responded with their own letter the next day. They explained that Top Ten intended to commence proceedings against Tasman and CHPL “in light of [CHPL’s] disregard of [its] obligations” under its franchise agreement and that Top Ten would seek injunctive relief against both CHPL and Tasman. A broadly similar letter was sent to Tasman. In order to avoid the need to seek urgent interlocutory relief, Top Ten’s solicitors sought undertakings from CHPL that, among other things, it would not complete the sale of the Coromandel Holiday Park to Tasman for a period of three months.

[37] On 23 May 2024, CHPL’s solicitors advised Top Ten that the undertakings would not be given. The present proceedings were issued the next day, Friday 24 May 2024. Top Ten applied for interim relief on Monday 27 May 2024.

Top Ten’s substantive claim

[38] As indicated, Top Ten’s substantive claim against CHPL is that its proposed sale of the Coromandel Holiday Park to Tasman, and actions taken to pursue such a sale, amount to various breaches of its franchise agreement. In summary, it pleads that these actions constitute breaches of:

- (a) CHPL’s obligation under cl 3.1 to “promote” the “Franchised Operation”;
- (b) CHPL’s obligation under cl 3 generally to conduct its holiday park business as a “Franchised Operation”;
- (c) CHPL’s obligations under cls 3.3 and 3.16(a)(v) not to prejudice Top Ten’s goodwill;
- (d) CHPL’s obligation under cl 3.16(a)(i) not to act in a way that adversely affects “the persistency or retention” of “the customers of the Franchised Operation”;
- (e) CHPL’s obligation under cl 3.12 to “act loyally and faithfully towards the TOP 10 Network at all times”;

- (f) CHPL's obligation under cl 8.1 not to "assign, transfer, novate or ... dispose of the whole or any parts of its rights and interests" under its franchise agreement without Top Ten's prior consent; and
- (g) CHPL's obligation under cl 8.2 not to dispose of its interests in the "Franchised Operation" other than by "selling the whole of the Franchised Operation as a going concern", and in accordance with the franchise agreement.

[39] In its prayer for relief, Top Ten seeks a permanent injunction restraining CHPL:

- (1) from selling, transferring or disposing of its interests in the holiday park business operated by [CHPL] at 636 Rings Road, Coromandel, to [Tasman], or to any other party without the consent of [Top Ten];
- (2) from operating or allowing the operation of the holiday park at 636 Rings Road, Coromandel under any name or branding other than the Top Ten brand;
- (3) from selling, transferring or leasing the land on which the holiday park business at 636 Rings Road, Coromandel ... is currently operated, to [Tasman], or to any other party without the consent of [Top Ten].

[40] I interpolate that Top Ten's application for interim relief is sought in exactly the same terms, save for that CHPL be restrained until further order of the Court.

[41] While Top Ten's application for interim relief is solely against CHPL as franchisee, it is also necessary to understand Top Ten's claim against Tasman. As indicated, Top Ten's claim against Tasman is that it is liable in tort for inducing CHPL's breach of contract. Its claim is that from at least July 2023, Tasman encouraged CHPL to cease being a Top Ten franchisee in the knowledge that this would induce CHPL to breach its franchise agreement.

[42] In its prayer for relief, Top Ten seeks a similar injunction against Tasman restraining it:

- (1) from encouraging [CHPL] to cease being a Top Ten franchisee, to cease performing its obligations under the Franchise Agreement, and/or to sell its Coromandel Holiday Park to [CHPL]

- (2) from acquiring any interest in [CHPL's] Coromandel holiday park business;
- (3) from acquiring or leasing the land at 636 Rings Road, Coromandel (record of title SA 165/151) on which the Second Defendant's Coromandel holiday park business is operated.

Applicable principles

[43] The principles to be applied in determining whether to grant an application for an interim injunction are well-known. As the Court of Appeal explained in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,³ the Court must first consider whether there is a serious question to be tried and, if there is, where the balance of convenience properly lies. Finally, the Court is required to step back and assess where the overall justice of the case lies.

Should an interim injunction be granted?

Is there a serious question to be tried?

[44] Mr Land advanced two arguments as to why Top Ten has a serious question to be tried.

[45] His first, and primary, argument was that CHPL's sale to Tasman amounted to a repudiation and abandonment of CHPL's obligations under its franchise agreement. As the agreement conferred no express rights of termination on CHPL as franchisee, Mr Land submitted CHPL had no right to terminate its agreement without Top Ten's consent before the expiration of the agreement's five-year term. He submitted that this was, in effect, what CHPL would be doing if it sold the Coromandel Holiday Park to Tasman.

[46] His second (and "secondary") argument was that regardless, it was nevertheless seriously arguable that CHPL's sale amounted to a disposal of its "rights and interests" under the franchise agreement for which Top Ten's prior consent was required under cl 8.1.

³ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

[47] Mr Land said it was significant that CHPL had offered \$175,000 in consideration for Top Ten's agreement to an early termination. Likening this case to *Wholesale Distributors v Songle Supermarket*⁴ and to *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd*,⁵ he submitted that it was seriously arguable that Top Ten was entitled to injunctive relief.

[48] In response, Mr Ross and Mr O'Brien both accepted that Top Ten might have a tenable claim against CHPL for failing to carry the franchise agreement to term. However, they rejected that this was sufficient to establish that Top Ten had a real prospect of succeeding in its substantive claim for a permanent injunction. As I understood their position, it was for this reason they argued there was no serious question to be tried.

[49] The thrust of their collective submissions was that Top Ten had no real prospect of obtaining a permanent injunction because:

- (a) the Top 10 franchise was a marketing co-operative and so was fundamentally different to the more orthodox forms of franchise involved in *Wholesale Distributors* and *SPAR*;
- (b) there was no express provision nor any basis to infer a term prohibiting CHPL from selling its land and or business without Top Ten's consent so long as the Coromandel Holiday Park was not sold as a "Franchised Operation";
- (c) cls 8.1 to 8.3 applied only to CHPL selling the Coromandel Holiday Park as a "Franchised Operation", which it was not doing; and
- (d) CHPL's franchise agreement was fundamentally concerned with the protection of Top Ten's intellectual property (namely, its "System") and gave Top Ten no proprietary right in CHPL's land or business.

⁴ *Wholesale Distributors Ltd v Songle Supermarket Ltd* [2014] NZCA 565, (2014) 16 NZCPR 14.

⁵ *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd (No 1)* [2011] FCA 1054.

[50] In my assessment Mr Ross and Mr O'Brien's arguments about the nature of CHPL's franchise agreement carry considerable force. I agree with Mr Ross that the Top 10 franchise is aptly described as a marketing co-operative and that it would appear from the evidence that it is Top Ten's franchisees who collectively endow the Top 10 franchise with goodwill, as opposed to Top Ten itself as franchisor. As such, I accept that the Top 10 franchise is fundamentally different from the franchises in *Wholesale Distributors* and *SPAR* where the goodwill towards the franchise came from the franchisors themselves. I also consider counsels' arguments that damages are the appropriate remedy for Top Ten's substantive claims to have real merit. This is a point I shall return to.

[51] Nevertheless, I accept that Top Ten has serious questions to be tried. It must be seriously arguable that CHPL's sale could amount to both a repudiation of its franchise agreement and a breach of cls 8.1 to 8.3 such that it has a real prospect of obtaining permanent injunctive relief. My (interrelated) reasons follow.

[52] First, and perhaps most fundamentally, the effect of CHPL's sale of the Coromandel Holiday Park to Tasman would be to strip CHPL of the very property and business by which it could be a "Franchised Operation" (that is, by which it could conduct the "business of operating" a Top 10 Superior Park at the 636 Rings Road property).

[53] Notwithstanding that the whole of the agreement appears directed towards requiring CHPL to be a "Franchised Operation" for the duration of its term, that requirement would seem to be explicit in cl 3.1 at least given it relevantly provides that CHPL "exercise its best endeavours in the conduct of the Franchised Operation to promote the mutual business interest of the Franchisor and Franchisee".

[54] In the absence of any express provision affording CHPL the right to unilaterally terminate its franchise agreement with Top Ten, it follows that it must be seriously arguable that CHPL's sale would amount to a breach of its franchise agreement. I therefore accept – as Mr Land submitted – that this case is similar to *SPAR*, albeit that the present involves a sale of a franchisee's business to a competitor rather than a franchisee transferring to a competing franchise.

[55] Secondly, I do not accept that this conclusion is precluded by the absence of any express provision prohibiting CHPL from selling its land or business without Top Ten's consent.

[56] While I acknowledge that there is no such express provision to this effect, I do not consider it seriously unarguable that this could not be the effect of cls 8.1 to 8.3 on a proper construction of the contract. Clauses 8.1 and 8.2 are concerned with CHPL's "interests" in the "Franchised Operation". Given the definition of "Franchised Operation", there is at least a serious question to be tried that CHPL may not sell its land or business without selling "the whole of the Franchised Operation", subject to certain requirements being met to Top Ten's reasonable satisfaction, as required by cl 8.2. Indeed, given the lack of an express unilateral right of termination, it is commercially logical that Top Ten would only have agreed to a franchisee disposing of its interests while its franchise agreement was still in place in a way which enabled Top Ten's franchise to continue.

[57] Nor do I consider it seriously unarguable that such a term could be implied into the agreement. As already explained, CHPL's ongoing performance of its obligations under its franchise agreement relies on its ownership and operation of the Coromandel Holiday Park. For that reason, I consider it unpersuasive that such a provision could have been but was not expressly adopted by the parties, which this Court considered significant in *Lightbourne v New Zealand Racing Board*.⁶ Unlike the present, there was no arguable basis in *Lightbourne* that the plaintiff's implied term was necessary to give the plaintiff's contract business efficacy.⁷

[58] I similarly reject for largely the same reason that the effect of this would be to grant Top Ten a proprietary right it had not bargained for as the Supreme Court of New South Wales considered significant in *Blockbuster Australia Pty Ltd v Karioi Pty Ltd*.⁸ As Mr Land submitted, that case is also distinguishable given the franchise agreements in that case had expired.

⁶ *Lightbourne v New Zealand Racing Board* HC Auckland CIV-2008-404-7273, 10 December 2008 at [62].

⁷ At [60].

⁸ *Blockbuster Australia Pty Ltd v Karioi Pty Ltd* [2009] NSWSC 1089.

[59] Thirdly, I do not accept that cls 8.1 to 8.3 do not apply because CHPL is not selling the Coromandel Holiday Park as a “Franchised Operation”.

[60] As Mr Land submitted, a similar argument was rejected in *SPAR*. There, the defendant franchisee – which was a supermarket – argued that they were not bound to purchase their groceries from the franchisor once it had ceased operating as a franchise store as required by its franchise agreement. This was because the defendant was no longer conducting a business, as defined in the agreement, which meant a “retail grocery outlet ... conducted in accordance with” the franchisor’s licensing system. However, the defendant franchisee had no right to terminate its agreement. The Federal Court of Australia rejected the argument. It considered that such a reading would allow the defendant to evade its obligation to purchase its groceries from the franchisor by breaching its obligation to conduct the franchise.⁹

[61] I agree with Mr Land that a similar argument might apply here. CHPL’s argument for why cls 8.1 to 8.3 do not apply rests on an entitlement to unilaterally terminate its franchise agreement. However, there is no such express provision in the contract and Mr Ross and Mr O’Brien did not attempt to argue that such a right was implied. Indeed, I would find it difficult to see why such a right should be implied when there is nothing unusual about a franchisee being bound to the duration of a five-year franchise agreement.¹⁰ To hold that those clauses did not apply would be to say that CHPL was entitled to breach its franchise agreement to evade its obligations under it.

[62] This brings me to my fourth point. Mr Ross and Mr O’Brien’s arguments about the proper focus of the franchise agreement are attractive. As they submitted, the agreement would appear to be focused on the protection of Top Ten’s intellectual property – its “System”. If so, this necessarily confines the proper interpretation of the agreement’s clauses. However, it is well-established that it is not the Court’s role to determine difficult questions of law on an application for interim injunction.¹¹ As Gault J recently said in *Hawkins Ltd v Elizabeth Properties Ltd*:¹²

⁹ *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd (No 1)*, above n 5, at [10]. See also [11]–[12].

¹⁰ *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd (No 2)* [2012] FCA 1116, (2012) 298 ALR 69 at [24].

¹¹ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407.

¹² *Hawkins Ltd v Elizabeth Properties Ltd* [2024] NZHC 561.

[49] In some cases, the proper interpretation of a contract may amount to such a difficult question. It is not the Court's function on an interim injunction application — or always feasible under urgency — to determine such a question of interpretation in what may be in effect a final ruling.

[63] For me to find that there is no serious question to be tried on the basis of the proper construction of the franchise agreement, read as a whole, would be to trespass into the trial Court's domain.

[64] Finally, I do not consider Top Ten's claim for a permanent injunction against CHPL to be so untenable as to not be seriously arguable, notwithstanding the apparent appropriateness of damages.

[65] It was sufficient for the Court of Appeal in *Wholesale Distributors* that the franchisor was able to show that it was seriously arguable that its franchisee had breached the agreement in offering to sell and then settling the sale of its business without the franchisor's consent.¹³ Indeed, it rather seems the Court considered that it was therefore seriously arguable that injunctive relief would follow when it said (albeit in the context of considering the overall justice of the case and in response to a particular point):¹⁴

A franchisor is entitled to expect that its franchisee will comply with the terms of the franchise agreement and to seek injunctive relief if it does not.

[66] Similarly in *SPAR*, it was sufficient for the franchisor to simply show that its franchisee had no right to terminate its agreement on the face of that contract.¹⁵

[67] In a recent decision of this Court, *Kwok v HND Holding Ltd*, Anderson J considered that the plaintiffs had a "difficult case" to establish a right to a permanent injunction on its claim, among others, for a breach of its loan agreement.¹⁶ Nevertheless, she accepted that the plaintiffs' claims were seriously arguable for the purposes of seeking interim relief.¹⁷ I consider it appropriate to adopt a similar approach here. Although Top Ten is likely to face a considerable hurdle in showing

¹³ *Wholesale Distributors Ltd v Songle Supermarket Ltd*, above n 4, at [18].

¹⁴ At [32].

¹⁵ *SPAR Licensing Pty Ltd v MIS QLD Pty Ltd (No 1)*, above n 5, at [3].

¹⁶ *Kwok v HND Holding Ltd* [2024] NZHC 1153 at [68].

¹⁷ At [80].

why damages would not be the appropriate remedy for its substantive claim, it has satisfied me that its claim for breach of contract is nevertheless seriously arguable. The adequacy of damages is a factor which should more properly be considered in assessing where the balance of convenience lies.

[68] Accordingly, I accept that Top Ten has serious questions to be tried as against CHPL. It is unnecessary to consider whether it has a seriously arguable case as against Tasman given it seeks only to restrain CHPL in the interim.¹⁸

Where does the balance of convenience lie?

[69] In considering where the balance of convenience lies, the task for the Court is to balance the risk of doing an injustice.¹⁹ That is, to assess the injustice that would be caused to the plaintiff if an interim injunction were refused but the plaintiff was successful at trial as against the injustice that would be caused to the defendant if the interim injunction were granted but later discharged.

(a) *What injustice might Top Ten suffer?*

[70] Mr Land submitted that if an interim injunction was not granted, Top Ten would be irreversibly prejudiced. A key holiday park would be lost, rendering any permanent injunction to restrain CHPL nugatory. Moreover, a message would be sent to both Top Ten's other franchisees and to Tasman that Top Ten's franchise agreements meant nothing, and that Tasman could procure other franchisees to breach their franchise agreements.

[71] Mr Land also submitted that the impact on Top Ten could not be readily quantified in damages. Mr Ovendale's estimations about the potential loss of value if CHPL's franchise agreement were terminated were always subject to the approval of Top Ten's Board, and in any event, only indicative. As this Court said in *New Zealand*

¹⁸ As the Court of Appeal indicated in *Wholesale Distributors Ltd v Songle Supermarket Ltd*, above n 4, at [12] and [18].

¹⁹ *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225 (CA) at 237 per May LJ.

Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Company Ltd damages to goodwill and reputation are notoriously difficult to assess.²⁰

[72] In response, Mr Ross and Mr O'Brien submitted that damages were plainly an adequate remedy for Top Ten's substantive claim and thus for any injustice it might suffer if an interim injunction was refused but Top Ten were ultimately successful on their cause of action at trial. They each emphasised that Mr Ovendale's correspondence with Ms Steffert showed Top Ten was easily able to quantify its losses.

[73] Relatedly, Mr O'Brien submitted that the Court of Appeal's indication in *Wholesale Distributors* that franchisors were entitled to injunctive relief was founded (as referred to at [65]) on the protection of a franchisor's proprietary interests, as was the situation in that case. Here, Top Ten has no such interest given none of Top Ten's intellectual property interests, business systems or confidential information were being transferred to Tasman.

[74] Mr Ross and Mr O'Brien further submitted that any risk other franchisees might act in the same way as CHPL was speculative, unsupported by evidence and otherwise the result of business owners seeking to realise the best value of their assets. In any event, the appropriate claim against them would be damages. In the absence of a proprietary right in the Coromandel Holiday Park itself, their essential submission was that Top Ten simply could not show that any claim could not, and would not, be adequately compensable by damages.

[75] While I have found that Top Ten has established a serious question to be tried (for the purposes of seeking an interim injunction), I agree with Mr Ross and Mr O'Brien that damages are overwhelmingly the appropriate remedy for Top Ten's substantive claim and thus adequate protection against any injustice it might suffer if this application was refused but it is successful on its causes of action at trial. My reasons follow.

²⁰ *New Zealand Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Company Ltd* (1979) 1 TCLR 18 (HC) at 27.

[76] First, the precision of Mr Ovendale’s calculations are telling. Although I accept his calculations were always subject to Board approval, his ability to respond to Ms Steffert’s request in such a timely and detailed way underscores the relative ease by which damages may be calculated.

[77] As Mr Ross submitted, if CHPL is in breach of its franchise agreement by selling the Coromandel Holiday Park to Tasman, the main loss to Top Ten would be the discounted present-day value of whatever fixed sum it expected to receive over the remaining term of the franchise. Top Ten has calculated a figure for this. An interim injunction will not normally be granted where damages would adequately compensate a plaintiff and the defendant is good for that judgment.²¹ The fact that Top Ten’s success at trial would be rendered nugatory is not because damages are inadequate, but rather because its current pleadings do not pray for them.

[78] Secondly, the question here is whether an award of damages is adequate,²² not perfect.²³ While I accept as a matter of principle that loss of goodwill is more difficult to calculate, the fact that monetary compensation may not ideally vindicate a plaintiff who suffers such loss is not the focus on an application for interim injunctive relief.

[79] As Mr Ross and Mr O’Brien submitted, the present case is different to those where injunctive relief was necessary to preserve a plaintiff’s proprietary rights which, if breached, made damages inadequate and difficult to quantify. In *Wholesale Distributors*, that right was the franchisor’s option upon termination of the franchise to purchase the assets of the business from the franchisee, which would have been lost if the sale of the business in that case were not restrained.²⁴ In *Supatreats Asia Pte Ltd v Grace and Glory Ltd*, the right was a restraint of trade.²⁵ Also relevant in that case was evidence of considerable confusion in the marketplace as to the defendants’ rebranding and the resultant risk of significant damage to the plaintiff’s business

²¹ *Air New Zealand Ltd v Wellington International Airport Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008 at [6].

²² *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2007] NZCA 586, [2008] 2 NZLR 418 (CA) at [131].

²³ Andrew Barker “Interim Injunctions” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2011) at [6.3.1].

²⁴ *Wholesale Distributors Ltd v Songle Supermarket Ltd*, above n 4, at [21]–[22].

²⁵ *Supatreats Asia Pte Ltd v Grace and Glory Ltd* [2018] NZHC 1612, [2019] NZCCLR 3.

model, ability to establish itself in the New Zealand market and attract future franchisees.²⁶

[80] While I acknowledge that no such proprietary-like right was engaged in *SPAR*, the apparent inadequacy of damages in that case was due in large part to evidence that the competing franchisor (which the defendant was seeking to convert to) was attempting to drive the plaintiff out of the market from a considerably dominant position within that market. That is not the position here. Indeed, it is Top Ten and not Tasman which enjoys market superiority in the New Zealand holiday parks market.

[81] In the absence of a proprietary right in the Coromandel Holiday Park itself, I find it difficult to see why damages would otherwise be inadequate.

[82] I also consider it significant that CHPL is not Top Ten's only Coromandel-based franchisee.²⁷ Thus, the loss of goodwill to the Top 10 franchise through the sale of the Coromandel Holiday Park to Tasman is not that CHPL would have no presence in the Coromandel, but rather that its presence would be diminished. That, in my view, makes the stake of the injustice Top Ten might face more limited, and necessarily more compensable by damages.

[83] Thirdly, I consider Mr Land's submissions that other Top Ten franchisees might go on to break their agreements if CHPL is not temporarily enjoined to go too far.

[84] As Mr Ross submitted, the concern that other franchisees will sell their land and or businesses is speculative. Top Ten's only evidence on this point is Mr Owendale's opinion. It is unqualified and unsupported by extrinsic evidence. I also consider it notable that the evidence suggests Top Ten is not opposed to a sale to Hampshire, which is also a competitor. Its objection is a sale to Tasman. This tends to indicate that Top Ten's concern is not so much the loss of a holiday park from its own network (which is effectively the goodwill loss it will suffer) but rather that Tasman should gain one. In his submissions in reply, Mr Land submitted that while

²⁶ At [54].

²⁷ I take judicial notice of the fact that the Top 10 Holiday Park Group includes the Shelly Beach Top 10 Holiday Park at 243 Colville Road, Coromandel 3584 and the Hot Water Beach Top 10 Holiday Park at 790 Hot Water Beach Road, Whitianga 3591, as Mr O'Brien submitted.

Top Ten might not have an interest in CHPL's land or assets, it nevertheless had a "very real interest" in keeping its franchise chain together. With respect, the evidence about a preferred sale to Hampshire undermines the force that submission might otherwise carry.

[85] More fundamentally however, I do not accept that if Top Ten's present application is declined, Tasman will be emboldened or that other franchisees will seek to sell their holiday park businesses to it as well.

[86] As I have explained, Top Ten has a serious, if not strong, claim that its franchisees cannot unilaterally terminate their franchise agreements and that they would be in breach of contract if they sold their underlying properties and businesses to a third party without Top Ten's consent to terminate their franchise agreements. This is because, in doing so, they would be selling the very assets that enabled them to continue their franchises. The fact I consider the making of a permanent injunction to be most unlikely is not because of the lack of strength in that claim, but because of the adequacy of damages in this case.

[87] In my view, the very real prospect of a claim for damages by Top Ten and the associated legal costs that would follow would play strongly into the decision-making of any Top Ten franchisee that decided to pursue a similar course to CHPL. The same is true of Tasman.

[88] It is a consequence of these interrelated reasons that I have concluded any injustice to Top Ten if an interim injunction was declined but it was successful on its causes of action at trial would be adequately compensated by damages.

(b) What injustice might CHPL and Tasman suffer?

[89] Ms Steffert says that since executing its agreements to sell the Coromandel Holiday Park to Tasman, their Cambridge business has obtained an agreement in principle with the Waipa District Council, for a long lease and consents to build four

new buildings and a swimming pool. She says that if the sale of the Coromandel Holiday Park to Tasman cannot proceed until further order of the Court:²⁸

- (a) CHPL may be liable to pay default interest at 12 per cent per annum to Tasman for failure to settle;
- (b) Tasman could cancel its agreements to purchase the Coromandel Holiday Park if CHPL is in breach of those agreements;
- (c) significant interest may be incurred on business loans that CHPL (and the Steffert Family Trust) have with the Bank of New Zealand; and
- (d) the Stefferts would have no money to develop the Cambridge Holiday Park or to complete their intended acquisitions and construction plans.

[90] On the basis of this evidence, Mr Ross submitted that CHPL would suffer serious loss and inconvenience if an interim injunction was granted. He also submitted that CHPL would face the injustice of being forced to continue a commercial relationship with a party in whom it had lost trust and confidence. He contended that such a mandatory injunction would be contrary to principle and established authority.

[91] Mr O'Brien similarly submitted that Tasman would also face considerable loss and inconvenience, referring to the affidavit of Tasman's Chief Executive Officer, Nicole Milne. In that affidavit, Ms Milne says:

- (a) Tasman has expended serious time and money on its agreements to acquire the Coromandel Holiday Park (including approximately \$291,415 in transaction costs and \$128,754 of internal staff time);
- (b) any default interest that CHPL may be liable to pay Tasman would not provide it the opportunity to grow the Coromandel Holiday Park and

²⁸ I have not included the precise figures that Ms Steffert refers to because I was advised they are commercially sensitive.

would likely prevent CHPL from continuing to invest in it while it waited for trial and a decision from the Court;

- (c) Tasman would be at risk of losing its deal to acquire the Coromandel Holiday Park; and
- (d) if Tasman were unable to purchase the Coromandel Holiday Park by April 2025, it would need to make a new application to the Overseas Investment Office which would incur a close to \$200,000 application fee, associated transaction costs and which could not be guaranteed to be successful given the political dynamics involved in granting such applications.

[92] Mr Ross and Mr O'Brien further submitted that Top Ten's undertaking as to damages was unlikely to – or that there was real doubt that it would be able to – satisfy the losses that CHPL and Tasman would suffer. On the basis of Mr Ovendale's evidence about Top Ten's annual turnover for the 2024 financial year, for the previous year and its "net equity position", they submitted that there was serious doubt that Top Ten could satisfy any award of damages that a Court might order it to pay.²⁹

[93] Mr Land, in response, submitted any prejudice that CHPL and Tasman might suffer was self-inflicted and otherwise adequately compensated by damages. Top Ten made it clear to CHPL that it was not entitled to walk away from its franchise agreement and Tasman had proceeded with its eyes open to the existence of the franchise agreement. Furthermore, both defendants were advised in August 2023 (Tasman being advised by CHPL) about Top Ten's indication that it would not approve an early termination. As for the suggestion that CHPL's injunction amounted to a mandatory injunction, Mr Land submitted that what was sought was not contrary to principle or authority, and that such arguments differentiating prohibitory and mandatory injunctions were "barren".

²⁹ I take a similar approach of referring to these figures generally too, given their commercially sensitive nature.

[94] I start with the last point first, despite it assuming relatively little prominence in argument.

[95] I do not consider there is any serious prejudice to CHPL through the mere fact of having to continue its franchise agreement with Top Ten. The limited evidence before me suggests that Top Ten franchisees otherwise conduct their businesses independently, although subject to the requirements of their franchise agreement. To that extent, I do not accept that this is one of those cases where the Court would be compelling two parties to endure a dysfunctional commercial relationship. I also note that the Stefferts continue to have a relationship (indeed the same relationship) with Top Ten through their Cambridge Holiday Park business. While it would require the Stefferts to run two businesses, they have been doing this since 2017 while living in Cambridge.

[96] However, I accept that CHPL and Tasman would both stand to suffer serious losses if an interim injunction was granted. The questions are whether and to what extent it matters that CHPL and Tasman would appear to have proceeded “with their eyes open” and whether those losses are compensable by damages (and indeed, by Top Ten’s undertaking as to damages). I take each of these questions in turn.

(i) *Have the defendants’ proceeded with their eyes open?*

[97] In *SPAR*, the Federal Court of Australia considered that any prejudice the defendant was likely to face was self-inflicted, and that nothing the plaintiffs had done had “in anyway fostered the notion that [the defendant] could simply walk away from the contract”.³⁰

[98] I accept that a similar point may be made here. The fact that the defendants’ sale and purchase agreement for the Coromandel Holiday Park business included requirements on CHPL to seek to terminate its franchise agreement with Top Ten and, if that failed, for Tasman to negotiate an acceptable assignment, rather suggests that they knew or at least contemplated that CHPL could not simply terminate its franchise agreement. Furthermore, they were both on notice when they agreed to remove those

³⁰ *SPAR Licensing Pty Ltd v MIS Qld Pty Ltd (No 1)*, above n 5, at [13].

requirements in November 2023 after Ms Steffert was advised by Mr Ovendale in August 2023 that Top Ten would not approve an early termination of its franchise agreement.

[99] I would not put it as strongly as saying that Top Ten did “nothing” to foster the notion that CHPL could proceed as it did, given Mr Ovendale’s advice on 25 July 2023 that the Board “generally haven’t got in the way of purchases in the past”. However, I acknowledge too that Mr Ovendale made clear in that email that any decision had to go to the Board. In short, I accept that it is relevant, though not determinative, that the defendants have proceeded with their eyes open.

(ii) *Could the defendants be adequately compensated by damages?*

[100] I accept Mr Land’s point that the default interest CHPL would be liable to pay is plainly compensable in damages, and I accept too that many of the costs Ms Milne refers to are equally compensable in that way.

[101] However, I have real misgivings over whether damages would appropriately compensate CHPL in the very real event that it was no longer able to sell the Coromandel Holiday Park to Tasman and the flow on consequences on the Stefferts’ ability to develop their Cambridge Holiday Park. Ms Steffert’s evidence is that the nature of the market for buying and selling holiday park businesses is such that their profitability has made them more expensive, and thus more difficult to buy. Indeed, she says that when Hampshire did not want to buy the Coromandel Holiday Park, CHPL “had to go with Tasman (the only other purchaser)”. Without placing too much emphasis on what is necessarily limited evidence on an application for interim injunction, it strikes me that if Tasman cannot purchase the Coromandel Holiday Park, it will be extremely difficult to assess the loss that CHPL would suffer as a result in the likely event that a permanent injunction is not granted. Indeed, calculation of that loss seems far more elusive than quantifying the losses Top Ten would suffer if an interim injunction was not granted, but they were successful at trial.

[102] This naturally leads to the question of whether Top Ten is truly “good for” its undertaking as to damages. When there is a likelihood of financial detriment to the defendant, the plaintiff has an obligation to provide the Court with sufficient

information to enable the Court to assess the worth of the undertaking.³¹ If a question is raised about its sufficiency, it should be met with evidence.³²

[103] In this case, the supporting evidence is Mr Ovendale’s affidavit which, in addition to what I have already referred to, explains that the Top Ten network of franchisees has a very significant combined income.

[104] Mr Land did not address this point save to say that it was only relevant “in the extremely remote scenario” that CHPL was not held to be in breach of its franchise agreement at trial.

[105] With respect, I consider this answer insufficient. For the reasons I have already given, CHPL would still face prejudice if an interim injunction was granted but it was nevertheless found liable for breach of contract and ordered to pay damages. Even more fundamentally however, the onus is on Top Ten to establish that it can make good its undertaking as to damages. While it might be the case that Top Ten’s shareholders or directors have agreed with Top Ten some arrangement for it to honour its undertaking as to damages, I cannot infer this. Furthermore, I see no reason why such information could not have been provided by Mr Ovendale, if it exists. Given the losses that both CHPL and Tasman point to, and the information given by Mr Ovendale (in particular, Top Ten’s “net equity position”) I consider Top Ten’s evidence in support of its ability to make good any undertaking to be seriously wanting.

[106] In summary, while I accept that CHPL and Tasman have, to an extent, proceeded with “their eyes open”, I accept that any loss CHPL might suffer arising from it no longer being able to sell the Coromandel Holiday Park to Tasman would be difficult to quantify and thus inadequately compensable through damages. I also harbour real doubts over the sufficiency of Top Ten’s undertaking.

³¹ Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR7.54.01] citing *Park Lane Builds Ltd v Shiva Eco Homes Ltd* [2022] NZHC 1438 at [58].

³² *Nuwave Software Ltd v Objective Corporation Solutions NZ Ltd* [2022] NZHC 2511 at [17] citing *Cowan v Cowan* [2021] NZCA 463 at [12]–[15].

(c) *Where does the balance lie?*

[107] It will be apparent for the reasons already given that I consider the balance of convenience lies with the defendants, who in my view stand to face a greater risk of injustice than Top Ten.

What does the overall justice of this case demand?

[108] Mr Land contended that, standing back, Top Ten's claims were strong, that CHPL was the author of any misfortune it might face and that Tasman, as a third party, could not seriously be said to be innocent. He further submitted it was reasonable for Top Ten to have acted when it did in bringing its application given when it discovered the proposed sale to Tasman in late April this year. For these reasons, Mr Land submitted justice demanded that the interim injunction be given.

[109] In contrast, Mr Ross and Mr O'Brien submitted that the justice of the case militated against granting the interim injunction. They submitted the losses to CHPL and to Tasman were likely to be significant and irreparable in damages, and that it was significant that Top Ten had no proprietary right in CHPL's business or land itself. Furthermore, given the time left to run on the agreement and the improbability of obtaining a trial within a year, Top Ten would likely obtain most of what it wanted at trial. Given the serious doubts about the sufficiency of Top Ten's undertaking, and what they contended was a delay in bringing the application, they submitted the overall justice lay with declining interim relief.

[110] I consider any question of delay to be neutral in this case. Mr Land pointed to a "gap" from the time CHPL and Tasman varied their agreement for the sale and purchase of the holiday park business, and when Ms Steffert advised on 30 April 2024 that the Coromandel Holiday Park would be changing hands to Tasman. While Top Ten certainly knew that plans were afoot to sell to Tasman, I do not consider this weighs against granting interim relief. It was not until Ms Steffert's phone call that Top Ten definitively knew CHPL was selling to Tasman. Time ran from that point. In my view Top Ten acted expeditiously.

[111] Standing back as I must, I consider the overall justice requires that interim relief be declined. While I accept that Top Ten has a strong claim for breach of contract, I consider any such claim would be adequately compensable in damages. For the reasons given, I do not consider the same can be said for CHPL. Although not determinative, I also harbour real reservations over the sufficiency of Top Ten's undertaking as to damages, which further weighs against granting interim relief.

[112] Relatedly, to grant Top Ten the interim relief it seeks would be to impose on both CHPL and Tasman a very significant burden to maintain the status quo in circumstances where, if Top Ten is successful in establishing its causes of action, the award of any damages is likely to be comparatively modest to the sale of the Coromandel Holiday Park. While the defendant's conduct is relevant to where the overall justice sits, this is a very different case from those where a proprietary interest was at stake (*Wholesale Distributors* and *Supatreats*) or where damages were plainly inadequate (*SPAR*).

[113] Rather, I consider Lord Hoffman's comments in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* about the defendant in that case to be apposite (with the caveat that I make no substantive findings):³³

It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables [the plaintiff] to secure, in money terms, more than the performance due to him is unjust.

[114] Simply put, awarding the interim injunction as sought would represent a disproportionate response to the interim resolution of this dispute.

[115] Accordingly, Top Ten's application for an interim injunction is declined.

Result

[116] Top Ten's application for an interim injunction against CHPL is declined.

³³ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) at 16 per Lord Hoffman.

[117] CHPL and Tasman are entitled to costs. If costs cannot be agreed, memoranda not exceeding three pages excluding appendices may be filed by CHPL and Tasman within **20 working days** of the delivery of this judgment, and by Top Ten **10 working days** thereafter. I will then determine costs on the papers.

Moore J

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