IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-000200
[2014] NZHC 402

BETWEEN	GREEN ACRES FRANCHISE GROUP LIMITED Applicant
AND	GARTH REUBE and GWYNETH REUBE Respondents

Hearing: 27 February 2014

Appearances: D J Chisholm QC and J D Ryan for applicant
L onniah for respondents

Judgment: 7 March 2014

JUDGMENT OF LANG J
[on application for interim injunction]

This judgment was delivered by me on 7 March 2014 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] From 26 January 2004 until 26 January 2014, Mr and Mrs Ruebe ("the Ruebes") carried on a lawnmowing and garden maintenance business in South Auckland. They did so as sub-franchisees of the well-known Green Acres household and garden maintenance franchise.

[2] When the sub-franchise expired, the Ruebes did not renew it. They removed the Green Acres livery from their vehicle, and changed their telephone numbers from those that they formerly used during the term of the subfranchise. They also handed back the Green Acres Operations Manual.

[3] The sub-franchisor, Green Acres Franchise Group Limited ("Green Acres"), has issued the present proceeding because the Ruebes have set up a business on their own account servicing the clients they acquired during the term of the subfranchise. Green Acres seeks an interim injunction preventing the Ruebes from continuing to operate their business until such time as Green Acres' substantive claim against them has been heard and determined by way of arbitration.

Relevant principles

[4] There is no dispute regarding the principles that apply in this situation. The franchise documentation contains a provision requiring the parties to refer all disputes to arbitration.[1] Counsel agree that Green Acres' substantive claim will need to be resolved within that forum. In this proceeding Green Acres relies upon Article 9 of Schedule 1 to the Arbitration Act 1996 ("the Act"). Article 9 permits a party to an agreement containing an arbitration clause to obtain interim relief from the Court pending determination of a substantive dispute by way of arbitration.

[5] The traditional test for an interim injunction is that the applicant must establish a serious question to be tried, and that the balance of convenience favours the granting of the relief sought.[2] These issues are largely incorporated into Article 17B of Schedule 1 of the Act which provides that the applicant for an interim measure must satisfy the Court that:

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1 Clause 30.1.

2 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129.

(a) the harm will not be adequately reparable by an award of damages;

(b) the harm of not granting an injunction outweighs the harm of granting the injunction; and

(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim;

[6] In *Safe Kids in Daily Supervision Ltd v McNeill* Asher J addressed the similarity between the provisions of art 17B and the traditional requirements for the granting of an interim injunction.[3] His Honour concluded that there was no difference between the requirement under art 17B(1)(c) that there was a reasonable possibility that the applicant would succeed on the merits and the traditional requirement of a serious question to be tried.[4] In relation to the requirements under arts 17B(1)(a) and (b), Asher J concluded that these elements were similar to the traditional balance of convenience requirements, but doubted whether the Court could have regard to the full range of considerations that usually apply to interim injunctions.[5] For instance his Honour doubted that wider public interest and third party interests were valid considerations under art 17B.

[7] Counsel for the Applicant suggested that the decision of Andrews J in *Solid Energy New Zealand Ltd v HWE Mining Pty Ltd* differs in respect to the overlap between the balance of convenience requirements and those in arts 17B(1)(a) and (b).[6] For present purposes I do not consider it necessary to evaluate the finer distinctions between the two approaches. In this case the wider interests that sometimes form part of the balance of convenience test do not arise. Therefore I have proceeded on the basis that the test under art 17B is the same as the traditional test.

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3 *Safe Kids in Daily Supervision Ltd v McNeill* [2012] 1 NZLR 714.
4 At [31].
5 At [36].
6 *Solid Energy New Zealand Ltd v HWE Mining Pty Ltd* HC Auckland CIV-2010-419-904, 5 August 2010.

Background

The contractual arrangements

[8] The master franchise arrangement is contained in an agreement dated 28 April 1997 (and subsequently renewed) between Green Acres Lawnmowing Limited and a company called Ancom Limited ("Ancom"). Ancom assigned its rights and interests under the master franchise agreement to the applicant, Green Acres Franchise Group Limited, by deed of assignment dated 12 November 2004.

[9] The master franchise agreement granted Ancom a licence to operate a similar lawnmowing and garden services contracting business to that which the master franchisor was then operating. The agreement permitted Ancom to grant sub-licences to contractors who wished to operate using the Green Acres system in South Auckland.

[10] The Ruebes entered into a sub-franchise agreement with Ancom by deed dated 20 January 2004. The term of the sub-franchise, as recorded in item 6 of Schedule 1 to the sub-franchise agreement, was ten years. It commenced on 27 January 2004 and expired on 26 January 2014. The Ruebes had a right to renew the agreement for a further ten year term.

[11] The sub-franchise agreement required the Ruebes to pay a fee of $16,000 to the sub-franchisor. In consideration of that payment, Ancom granted the Ruebes a non-exclusive sub-franchise contract to use and apply the system and know-how it had acquired from the master franchisor. Ancom also provided the Ruebes with an initial client base to provide them with a guaranteed level of income from the outset.

[12] The sub-franchise agreement also contained the following terms:

(i) The Ruebes were to pay a royalty and brand levy to the sub-franchisor in the sum of $125.00 plus GST per week.

(ii) The terms of the sub-franchise agreement were subject to the terms contained in the master franchise agreement. In the event of any

inconsistency between the two agreements, the terms of the master franchise agreement were to prevail.

(iii) The Ruebes were to be provided with a Green Acres operations manual, and were required to adhere to the methods, procedures and policies established and prescribed by that manual.

(iv) The Ruebes would provide lawnmowing and gardening services for customers referred to it by Ancom. They were also permitted to provide the same services for persons other than those referred to them by Ancom, but they were required to give priority to the customers referred to them by the sub-franchisor.

(v) The Ruebes were prohibited from carrying on any activity that competed, either directly or indirectly, with that operated by Ancom during the term of the agreement.

(vi) Ancom had the right to terminate the agreement by notice in writing upon the occurrence of any of eight specified events. If this occurred, the agreement specified the consequences that would follow. One of these was that for a period of two years, the sub-franchisor was not permitted to be involved, either directly or indirectly, in any business similar to that operated by Ancom.

The events surrounding the expiry of the sub-franchise agreement

[13] During November and December 2013, Green Acres and the Ruebes engaged in correspondence regarding renewal of the sub-franchise agreement. Initially, the Ruebes indicated that they were prepared to renew the agreement. By January 2014, however, they had changed their minds and advised Green Acres that they had decided not to renew the agreement. During the weekend of 24 to 26 January 2014, they delivered a flyer in the following terms to their customers:

Lawnmowing

Dear Customer

> I wish to advise that my contract with Greenacres completed on the 20th January 2014.
>
> I have decided not to renew with Greenacres.
>
> Greenacres have your contact details, and will in due course contact you with regards to having a new contractor take over.
>
> If you wish to continue with my services, please confirm directly to me using one of the following new contacts.
>
> Thank you for your loyal support thru out my time with you.
>
> Garth Ruebe
>
> …

[14] On 26 January 2014, the Ruebes delivered final accounts to their customers together with the following advice:

> **Lawnmowing**
>
> Dear Customer 26/01/14
>
> Please find your final account under the name of Greenacres Law mowing.
>
> We have tried to reach as many customers as possible in order to advise you of the change in Lawn mowing status.
>
> For those that wish to remain with me, nothing will change regarding Bank a/c, lawn mowing day, price.
>
> New name will be **Garth's Mowing**, with contact details below.
>
> Your next bill will not now be until 28th February so if you have a mow due this week, it will be part of that billing.
>
> Business cards should be available this week and will be handed out accordingly.
>
> Kind regards
>
> Garth Ruebe
>
> …

[15] Since 26 January, the Ruebes have continued to carry out lawnmowing and garden maintenance work for persons who were on their customer list when the sub-franchise agreement expired. The Ruebes do not consider that they are under any further obligation to Green Acres, and believe that they are now free to carry on

business in this way notwithstanding the restraint of trade provisions contained in the sub-franchise agreement.

Serious issue to be tried

[16] Two issues arise in this context. The first relates to the ownership, if it can be called that, of the right to carry out work for existing customers. The second relates to the restraint of trade provisions in the sub-franchise agreement.

Customer lists

[17] Green Acres maintains that it has a proprietary interest in the right to provide services to customers formerly serviced by the Ruebes during the term of the sub-franchise agreement. This has a physical manifestation in the form of the customer list in the Ruebes' possession when the sub-franchise agreement expired. This contains the names, addresses and contact details of both the customers referred to the sub-franchisee by the sub-franchisor and those who became customers of the business independently of any referral by Green Acres.

[18] Green Acres has a copy of the Ruebes' customer list, but it is apparently out of date. Many of the customers whom Green Acres have already contacted were no longer being serviced by the Ruebes, or have moved address. The Ruebes say that they have provided Green Acres with details of their customers on an ongoing basis, and that Green Acres has obviously not deleted the contact details of customers who no longer require their services.

[19] So far as the Ruebes are concerned, the physical list may not be of huge importance on a day to day basis. They can be taken to be familiar with their customers, and probably carry out work for them on a pre-arranged weekly, fortnightly or monthly basis. Mr Ruebe would also no doubt be familiar with the location of the properties in respect of which he provides lawnmowing and maintenance services. It can also be assumed, however, that the contact details that the Ruebes hold in respect of their customers remain of some importance for billing and contact purposes.

[20] The sub-franchise agreement does not refer explicitly to customer lists. It does, however, contain an acknowledgement by the sub-franchisee of the sub-franchisor's exclusive right to use Green Acres' trade mark and intellectual property.[7] The sub-franchise agreement defines intellectual property as follows:

> **"Intellectual Property"** means all intellectual property relating to Green Acres's services and the System including the Know How, confidential information, copyright and Trade Mark relating to the Business;

[21] The sub-franchisee agreement then defines "Know How" as follows:

> **"Know How"** means the System as it relates to the operation of the Business and includes proprietary information relating to Green Acres services, trade secrets, trade practices, data, samples, distribution information, software information, plans, formulae, marketing and advertising expertise, standard agreements, technical or non-technical information, pricing information, signs, clothing, colour schemes, plant, equipment and any other items or information as may form part of the System;

[22] Although the definition of "Know How" does not expressly refer to customer lists, it could be argued that the customer list is intellectual property for the purposes of the sub-franchise agreement. Customer lists could be considered confidential information or proprietary information under the definition of "Know How".

[23] In addition, the master franchise agreement contains the following recital:

> (f) The Licensor is the sole owner of all property right, title and interest in certain know how relating to the marketing and operation of the Lawn Mowing and Gardening Services identified by the trade mark(s) GREEN ACRES and the GREEN ACRES Logo, including confidential information, *customer lists* and pricing, Lawn Mowing and Gardening Care Services contracts, standard Contractor licence agreements, colour schemes, trade mark(s) signs, and advertising, etc. (hereinafter collectively called "the know how").
>
> (Emphasis added)

[24] As is self-evident, this clause expressly acknowledges that the Know How Ancom acquired under the master franchise agreement included customer lists. Given that the master franchise is to take priority in the event of any inconsistency between the terms of the two agreements, the contact details of customers that Green

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7 Clause 12.1.

Acres referred to the Ruebes may arguably form part of the Know How that Ancom acquired from the master franchisee and then permitted the Ruebes to use in their business.

[25] Clause 20.1 of the sub-franchise agreement is also relevant. It provides that the Ruebes shall have "the right to the non-exclusive use … of the Trade Mark, Intellectual Property and Know How of the system". The word "use" in this context indicates that they did not acquire any proprietary rights in the intellectual property and know how. Rather, they obtained the non-exclusive right to use them during the term of the sub-franchise agreement. That right came to an end upon the expiry of the agreement.[8]

[26] It is arguable that different considerations may arise in relation to customers who were not referred to the Ruebes by Ancom or Green Acres. Clause 10.15(e) of the sub-franchise agreement provides as follows:

> e. in the event that the Contractor [Ruebes] shall sell or otherwise dispose of the Contractor's Business then all business acquired directly by the Contractor as referred to in the previous subclauses of this clause shall form part of the Contractor's Business and shall be disposed of by the Contractor to the purchaser of the Contractor's Business *provided that such business as referred to in this clause may be purchased by the Franchisee* [Ancom] *should the Franchisee elect to purchase such acquired business at a fair market value.* Should the Contractor and the Franchisee be unable to agree a fair market value then the Contractor shall be free to obtain an offer in writing from any third party provided that a right of first refusal is granted to the Franchisee (to be exercised in writing within seven days) to purchase the acquired business. Should the Franchisee not exercise this right as provided for in this clause, the Contractor shall be free to sell to that third party on terms no less favourable than those first offered to the Contractor by that third party.
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> (Emphasis added)

[27] The wording used in this clause arguably suggests that the Ruebes have a proprietary interest in customers who were not referred to them by Ancom or Green Acres. This flows from the fact that the clause gives Green Acres the right to purchase this component of the Ruebes' business. That right would arguably not be necessary if Green Acres already owned this component of the Ruebes' business.

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[8] Clause 20.2(c) of the sub-franchise agreement.

The Ruebes estimate that approximately 70 per cent of their current customers were not referred to them by Green Acres.

[28] These factors persuade me that there is a serious issue to be tried in relation to the ownership of the customer list. There appear to be arguments both ways in relation to whether the customer list is covered by the sub-franchise agreement, and if it is, whether the agreement covers all customers, or just those referred by Green Acres.

Restraint of trade

[29] Clause 16 of the sub-franchise agreement is headed "Consequences upon Termination". It includes the following clause:

> **16.2 Non Competition** The Contractor shall not for a period of two years both within the Territory or in any other place whatsoever conduct on its own account or be concerned or interested in either directly or indirectly as agent, representative, servant, employee, partner, shareholder or director in any firm or corporation conducting a similar business to the System and any similar service provided from time to time by Green Acres.

[30] Green Acres contends that the effect of this clause is to prevent the Ruebes from carrying on a competing business for a period of two years from 27 January 2014.

[31] In considering the effect of Clause 16.2, the context within which it appears in the sub-franchise agreement may be of significance. Clause 16 appears immediately after Clause 15, which gives the sub-franchisor the right to terminate the sub-franchise agreement upon the occurrence of certain events. These do not include expiry of the sub-franchise agreement. Rather, they all relate to termination for cause. It could therefore be argued that Clause 16 provides only for the consequences that occur once the sub-franchise agreement has been terminated under Clause 15. It can be argued that those consequences, including the restraint of trade clause, do not apply when the sub-franchise agreement comes to an end otherwise than in accordance with Clause 15.

[32] Having said that, all of the remaining consequences prescribed by Clause 16 would clearly apply in the event that the sub-franchisee elects not to renew the agreement at the end of its term. They include a requirement to return the operations manual, trade mark and intellectual property to the sub-franchisee and to remove signage containing the trade mark or intellectual property. In addition, the sub-franchisee is required to cancel its telephone and cellphone number used in connection with the business or to assign those numbers to the sub-franchisor if required to do so. Clause 16.1 of the sub-franchise agreement also requires the sub-franchisee to deliver to the sub-franchisor "all addresses, keys and codes to all properties where the contractor is currently performing the contractor's business".

[33] I therefore consider that, although it is arguable the restraint of trade prescribed by Clause 16.2 only applies where the sub-franchise agreement has been terminated under clause 15, it is also arguable that it applies in all situations in which the sub-franchise agreement terminates or comes to an end. It follows that there is a serious issue to be tried in respect of this issue as well.

[34] Counsel for the Ruebes also endeavoured to persuade me that the terms of the restraint are too wide, because they purport to restrain the sub-franchisee from carrying on a competing business both within South Auckland and "in any other place whatsoever". He also submits that the sub-franchise agreement does not adequately define the territory within which the restraint of trade is to take effect.

[35] These arguments do not assist the Ruebes' cause in the present context. The courts have often granted interim relief in circumstances where the applicant is seeking to enforce a restraint of trade provision for a similar period. Whether or not a restraint for that length is reasonable will ultimately be a matter for the arbitrator to determine.

[36] Similarly, the arbitrator will need to determine whether, if the restraint provision is to be enforced at all, it is reasonable that it be enforced throughout New Zealand. For present purposes, however, Green Acres largely sought to restrain the Ruebes from continuing to perform services for existing clients in the South Auckland area. Counsel advised me during the hearing that some of the Ruebes'

clients live just outside that area, but still within the greater Auckland area. Any concerns that there may be as to the appropriate boundaries within which the restraint provision should apply would not have persuaded the Court that Green Acres cannot establish a serious issue to be tried.

Balance of convenience

[37] The real issue in the present case is where the balance of convenience lies. Counsel for Green Acres submits that damages will not be an adequate remedy, and that Green Acres will suffer irreparable harm if the Ruebes are permitted to continue to operate their business in breach of the restraint of trade provisions in the sub-franchise agreement. He points out that other sub-franchisees will see that the Ruebes have effectively been permitted to walk away from their obligations under the agreement, and that this will open the floodgates for other sub-franchisees to follow suit. This in turn will cause incalculable harm to the integrity of the Green Acres franchise.

[38] Counsel also points out that the courts have been prepared to grant interim injunctions in similar circumstances in numerous other cases. He says that the present case is no exception, and that an interim injunction is the only appropriate remedy here.

[39] I accept that the courts have often been prepared to issue an interim injunction when a franchisee has attempted to set up business in opposition to the franchisor. In this area, however, each case turns on its own facts. I consider the facts of this case to be somewhat different to those in other cases where the courts have been prepared to grant interim relief to the franchisor.[9]

[40] Mr Ruebe currently services the needs of approximately 80 customers. He does not hold an exclusive right to operate in any particular area. He knows of at least five other contractors who work in the same area in which he operates. He is one of 750 sub-franchisees providing similar services to approximately 15,000

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[9] See for instance *Mike Pero (NZ) Ltd v Exact Solutions* CIV-2007-442-66, 17 April 2007 where an injunction was granted and *Safe Kids in Daily Supervision Ltd v McNeill,* above n 3 where an injunction was refused.

customers around New Zealand. Given the overall scale of the Green Acres' system, I do not consider there is a real risk of the Ruebes harming the integrity of that system if they are permitted to continue in business for a further short period until Green Acres' substantive claim is determined by arbitration.

[41] Relevant to this assessment is the fact that the Ruebes are not walking away from their sub-franchise in mid-term. Rather, they have not elected to renew it after the term of the agreement has expired. Their actions are therefore only of potential relevance to other sub-franchisees whose agreements have also come to an end by effluxion of time. Given that the term of such agreements is ten years, the stance taken by the Ruebes is likely to be relevant to a very limited class of sub-franchisees. I therefore do not accept that the present case is likely to open the floodgates to similar action being taken by other sub-franchisees.

[42] I also reject the submission that other sub-franchisees will view the Ruebes as having effectively been freed from their obligations under the sub-franchise agreement. Those who take any interest in the present case will readily appreciate that Green Acres is taking active steps to enforce its rights under the sub-franchise agreement, and that the ability of the Ruebes to continue in business will depend wholly on the outcome of the forthcoming arbitration.

[43] Counsel agree that, with co-operation on both sides, the issue of liability could readily be determined by an arbitrator within the next two to three months. The arbitrator's decision will largely be confined to the interpretation to be given to the relevant clauses of the two agreements. The facts will largely not be in dispute.

[44] Furthermore, so long as the Ruebes continue to keep and retain full and proper records, it will not be difficult for Green Acres to assess the quantum of any damages that may be payable to it if it succeeds at arbitration. Given that the Ruebes typically charge between $15 and $25 for each job performed, the quantum of damages for lost revenue is unlikely to be high. The Ruebes have also given evidence that the equity in their home is sufficient to ensure that Green Acres will not suffer loss if they are permitted to carry on in business in the interim.

[45] In addition, Green Acres remains free to lobby and compete for the business of the Ruebes' clients during the period between now and the arbitration. It has already begun that process. Provided the Ruebes keep proper records of the services that they are henceforth providing, Green Acres will be able to maintain a clear and accurate picture of their current client base.

[46] Taking these matters into account, I do not consider that there would be any material prejudice to Green Acres if the status quo was to be preserved pending the arbitrator's decision.

[47] However, the position for the Ruebes will be much different if an interim injunction is granted. If that should occur, they would immediately be required to cease providing services to those who were their clients as at 26 January 2014. It can safely be assumed that most of those persons require their lawns to be mowed and other garden maintenance work to be carried out on a fairly regular basis. This work will not be able to be deferred pending the arbitrator's decision. Clients will therefore have no option but to engage another contractor to carry it out. There is no guarantee that clients would seek to engage another Green Acres contractor. They are free to engage whoever they wish. Importantly, however, the end result will inevitably be the loss of the Ruebes' core business. Even if they succeeded at the arbitration, there must remain a real risk that their customers will not return.

[48] These factors persuade me that the balance of convenience firmly favours the retention of the status quo at this stage.

Result: consequential orders

[49] At this stage I am not prepared to grant the injunctive relief that Green Acres seeks. The substantive dispute should now proceed to arbitration in accordance with the dispute resolution provisions of the sub-franchise agreement.

[50] I reserve leave, however, for Green Acres to renew its bid for interim relief in the event that it considers that the Ruebes are not assisting to expedite the arbitral process. This can be done by way of memorandum marked for my attention,

together with an affidavit setting out the factual basis upon which the bid for renewal is made.

[51] I also direct that the Ruebes are henceforth to maintain full and proper records of all lawnmowing and garden maintenance services provided for clients who were on their customer list as at 26 January 2014. As a minimum, the records shall include the name of the client, together with the address at which the services were provided. They shall also include a brief description of the services performed, and the amount charged in respect of those services.

Next event

[52] Counsel agree that this Court will have no role in determining the substantive dispute. In order to ensure that matters are on track for the arbitration, however, I will hold a telephone conference with counsel on 5 May 2014 at 9 am.

[53] Counsel have leave to ask the Registrar to arrange a telephone conference before me prior to that date should any further issue arise that requires the assistance or intervention of the Court.

Costs

[54] The Ruebes have technically been the successful parties in relation to the application for interim relief. On the other hand, this may be an appropriate case for costs to follow the outcome of the arbitration. If counsel cannot reach agreement regarding costs within 14 days, they may file brief memoranda (not more than five pages in length) addressing that issue, and I will then determine it on the papers.

Lang J

Solicitors:
Claymore Partners Ltd, Auckland
Corban Revell, Auckland
Counsel:
D J Chisholm QC, Auckland