

CANADA / JUDGMENT

Canivate Growing Systems Ltd. v. Brazier

2020 BCSC 232

COURT

Supreme Court of British Columbia

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2020 BCSC 232 Canivate Growing Systems Ltd. v. Brazier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Canivate Growing Systems Ltd. v. Brazier,

2020 BCSC 232

Date: 20200221

Docket: S196051

Registry: Vancouver

Between:

Canivate Growing Systems Ltd.

Plaintiff

And

Stuart Brazier

Defendant

- and -

Docket: S195626

Registry: Vancouver

Stuart Brazier, Christopher Gielnik, and

Hydrohaus Horticulture Inc.

Plaintiffs

And

Canivate Growing Systems Ltd. and Ingo Mueller

Defendants

Before: The Honourable Madam Justice W. A. Baker

Reasons for Judgment

Counsel for the Plaintiff in Action No. S196051 :

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G.E. Rafter

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J.G Dives, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 13 and 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 21, 2020

[1] There are two applications before me. The first, brought in Action No. S196051, is an application for summary decision brought by the plaintiff Canivate Growing Systems Ltd. ("Canivate"). The application is brought pursuant to both Rule 9-6 (summary judgment) and, in the alternative, Rule 9-7 (summary trial) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. Canivate seeks damages against the defendant Stuart Brazier for actions taken by Mr. Brazier with respect to the domain name canivate.com and seeks to have the domain name transferred from Mr. Brazier to Canivate. The second, brought by the plaintiffs in Action No. S195626, is an application to consolidate both actions.

I. Background

- [2] Mr. Brazier and his business partner Mr. Gielnik have been involved in the development of greenhouse technology going back to 2010. In 2015 they incorporated a company known as Hydrohaus Horticulture Inc. ("Hydrohaus").
- [3] In 2017, Mr. Brazier and Mr. Gielnik agreed with Mr. Mueller to develop the Hydrohaus technology for use in the cannabis industry. They decided to create a company for this purpose, which became known as Canivate Growing Systems.
- [4] On September 25, 2017 Mr. Brazier registered the domain name canivate.com. In December 2017, 1146470 B.C. Ltd. was incorporated for the cannabis greenhouse venture, and in February 2018, the company's name was changed to Canivate Growing Systems Ltd. While I make no findings in this respect, it appears that the initial shareholders included Mr. Mueller, Mr. Gielnik, and Mr. Brazier.
- [5] Mr. Brazier was an officer of Canivate from its inception, and became a director in July 2018. At the time of its incorporation, Mr. Mueller was a director of Canivate, and remains so at present.
- [6] Mr. Mueller was responsible for raising capital necessary to complete development of the technology and the cannabis growing operations. Mr. Brazier was responsible for patenting the Hydrohaus intellectual property and developing the growing operations.
- [7] Hydrohaus and Canivate entered into a business plan to allow for the Hydrohaus technology to be used by Canivate exclusively in the cannabis market. The plan was comprised of the following agreements:
 - a) Mr. Brazier and Mr. Gielnik as inventors of the technology, licenced their technology to Hydrohaus ("Technology License Agreement"),
 - b) Mr. Brazier and Mr. Gielnik sold the technology to Canivate, to allow for the transfer of ownership of the Technology License to Canivate, thereby allowing Hydrohaus to licence the technology from Canivate rather than Mr. Brazier and Mr. Gielnik personally ("Technology Transfer Agreement"), and
 - c) Hydrohaus received the exclusive right to design and build Canivate's cannabis facilities using the technology ("Manufacturing Agreement").
- [8] Mr. Brazier and Mr. Gielnik claim they were entitled to certain shares in Canivate as consideration for the transfer of the Hydrohaus intellectual property.
- [9] A dispute arose between Canivate, Hydrohaus, Mr. Brazier, Mr. Gielnik, and Mr. Mueller in late 2018 with respect to these agreements.
- [10] On October 15, 2018, Mr. Brazier resigned as a director of Canivate. This resignation was filed with the Registrar of Companies on January 18, 2019.

- [11] In January 2019, Mr. Mueller, on behalf of Canivate, wrote to Hydrohaus alleging Hydrohaus was in breach of the Technology Licence Agreement and, on April 25, 2019, Canivate wrote to Hydrohaus purporting to terminate the three agreements. Canivate says that it rescinded the agreements. Hydrohaus says it repudiated the agreements. Canivate then purported to cancel the shares which had been issued to Mr. Brazier and Mr. Gielnik.
- [12] On May 15, 2019, Mr. Brazier, Mr. Gielnik and Hydrohaus commenced an action (Action No. S195626) against Mr. Mueller and Canivate claiming breaches of the three agreements. None of the issues relating to these three agreements are directly before me on this application. Mr. Brazier argues that the domain name canivate.com is included in the definition of technology transferred under the Technology Transfer Agreement, although it is not specifically identified in any of the agreements.
- [13] When the business relationship between the parties became rocky in early 2018, Mr. Brazier took steps to interfere with Canivate's use of the canivate.com domain name, including disabling the domain name immediately following the commencement of Action No. S195626.
- [14] On May 30, 2019 an injunction application was brought for hearing in Action No. S196051 and a decision was rendered on June 3, 2019: *Canivate Growing Systems Ltd. v. Brazier*, 2019 BCSC 899 [Canivate Injunction]. The events up until the end of May are summarized by Madam Justice MacNaughton on the injunction application. I agree with her findings and set them out below:
- [26] Between January and the summer of 2018, Mr. Mueller and other Canivate representatives were engaged in approaching the investment community, seeking seed financing to build a greenhouse under a design concept provided by Mr. Brazier. Mr. Mueller, and other Canivate representatives, were also reaching out to potential customers for the cannabis production from the greenhouse concept Canivate was promoting.
- [27] In the meantime, the shareholders' dispute was percolating.
- [28] On about February 13, 2019, Tanya Helyar, a Canivate employee who had previously had administrative access to the domain name canivate.com discovered that she was unable to access the administration portal for the domain. After February 13, 2019, and until on or about May 17, 2019, Canivate's website and canivate.com emails continued to operate, although Canivate no longer had access to make changes.
- [29] Mr. Brazier had registered the canivate.com domain in his own name, and he is listed as the administrative contact for the domain. Mr. Brazier controls access to the administrative details of the domain, and, as a result, controls the email addresses and websites with which it can be used. This was not a concern to Canivate until the shareholder dispute arose.

- [30] On February 13, 2019, Mr. Wong sent Mr. Brazier an email requesting that he transfer control over the canivate.com domain name to Canivate. On a subsequent phone call, which occurred before February 22, 2019, Mr. Wong spoke to Mr. Brazier about the transfer of the domain name. Mr. Brazier said that he would make a decision by the "end of the week".
- [31] Mr. Wong followed up with an email on February 24, 2019. On February 25, 2019, Canivate's lawyer received a letter from Mr. Brazier's lawyer, disputing that there was ever an agreement to transfer the domain name to Canivate. Counsel advised that, while the shareholders' dispute was ongoing, "our clients are willing to direct traffic from the Canivate.Com URL to whatever other URL Canivate is using."
- [32] On March 15, 2019, Mr. Wong arranged to secure the domain name canivate.ca as a backup to the canivate.com email and Canivate's website. Canivate's website at canivate.ca differs from the website at canivate.com and is still in draft form. On behalf of Canivate, the following domain names were also secured: canivate.org, canivate.me, canivate.de, canivate.info, canivate.co, and canivate.net.
- [33] After securing the domain name canivate.ca, Canivate employees and contractors included a line in their email signature, "[p]lease note change in email address: [employee name]@canivate.ca". However, all Canivate's employees and contractors had canivate.com email addresses and continued to receive emails directed to their canivate.com email.
- [34] Canivate's other business materials were not changed. It did not print new business cards. It continued to hand out business cards with canivate.com email addresses. It did not amend its presentation materials or handouts, and those materials continued to refer to the website at canivate.com. Canivate relied on Mr. Brazier's agreement to continue directing traffic to canivate.ca as set out in his lawyer's letter of February 25, 2019.
- [35] On May 17, 2019, Canivate learned that Mr. Brazier had disabled the canivate.com domain name when Mr. Mueller tried to send an email to Mr. Wong at his email address richard.wong@canivate.com. The email was returned with a message saying that it could not be delivered and that "richard.wong wasn't found at canivate.com."
- [36] As of today, emails to Canivate employees and consultants using their canivate.com email addresses are not being delivered, and a search of Canivate's website at canivate.com and www.canivate.com returns a message that "[t]his website is under construction".
- [37] On May 21, 2019, Canivate's counsel sent a letter to Mr. Brazier's counsel, demanding that Mr. Brazier restore Canivate's access to the canivate.com domain name. The letter read in part:

It is our client's position that Mr. Brazier's actions constitute at least a breach of fiduciary duty, conversion, breach of trust, and unlawful interference with economic relations".

- [38] The letter explained that Canivate would proceed with an injunction application if Mr. Brazier fails to restore Canivate's access to the domain name.

- [39] On May 22, 2019, counsel for Mr. Brazier disputed ownership of the canivate.com domain name.
- [15] On June 3, 2019, this Court issued an interim and interlocutory injunction against Mr. Brazier requiring him to "cease interfering with the settings of the canivate.com domain name, and to restore them to the settings prior to the changes made on or about May 17, 2019, such that www.canivate.com and canivate.com resolve or link to Canivate's website and that emails sent to addresses ending in @canivate.com are delivered to Canivate's employees and contractors with corresponding email addresses": Canivate Injunction at para. 77.
- [16] Following the injunction decision, Mr. Brazier has cooperated with operation of the domain name. Certain problems did occur, however. Certain aspects of the website were lost and not recoverable. These had to be recreated by Canivate at its own expense.
- [17] Because of the continued uncertainty relating to the domain name, Canivate took several steps to register alternate domain names, as described above. In addition, Canivate considered whether to create a new name and brand entirely. It was concerned about radically changing the name of the company because of the potential impact on public perception of the company with such a change, including the perception of and reputation with investors, suppliers, government authorities, and prospective customers.
- [18] Canivate engaged public relations firms to consider the best marketing strategy to mitigate reputational harm and decided to pursue a partial rebranding to use the trademark THE CANIVATE WAY and the domain name thecanivateway.com.
- [19] In the spring and summer of 2019 Canivate was in the midst of planning a public launch. The disruption with the canivate.com domain name, and resulting partial rebranding, complicated and delayed the public launch. While Canivate is not pursuing damages for loss of opportunity in relation to the public launch, it is pursuing damages related to additional costs associated with the rebranding and addressing the temporary loss of the domain name.

II. Issues

A. Is this application suitable for summary determination?

- [20] Mr. Brazier submits that this application is not suitable for summary determination because it is interrelated with the issues raised in Action No. S195626. He submits that the use of the domain name canivate.com is intrinsically tied up with the agreements between Canivate, Hydrohaus, Mr. Brazier and Mr. Gielnik. He says that he only allowed the use of the domain name while the parties continued in business together. Once that business relationship fell apart, he says he was entitled to retain the domain name and has every right to prevent Canivate from using it. Because he says the issues related to canivate.com are part and parcel of the claims in the other action, he argues all should be considered together.

- [21] Mr. Brazier brought a companion motion with this summary trial application to have the two actions consolidated, and he argues that the consolidation should take place before any summary trial is considered.
- [22] Canivate submits that the issues between it and Mr. Brazier regarding the domain name are separate and distinct from the three agreements at issue in the other litigation. It says the issues raised in Action No. 196051 can be determined independently of Action No. S195626. Canivate points to MacNaughton J.'s observation in Canivate Injunction at para. 57 that Mr. Brazier's "counsel fairly and frankly admitted that Mr. Brazier took the steps he did with respect to the domain name, to give him leverage in the shareholders' dispute." Canivate argues that Mr. Brazier's disruption of the domain name has no legitimate purpose; it was done simply to put pressure on Canivate in the other dispute.
- [23] I am satisfied that this matter is suitable for summary determination. Action No. S195626 relates to the three agreements described above. While the domain name is a relevant collateral fact, it is not material to the issues raised in Action No. S195626. Conversely, the use of the domain name is the sole issue raised in Action No. 196051.
- [24] The plaintiff applies for judgment under Rule 9-6 and, in the alternative, Rule 9-7. Both subrules provide for the determination of all or part of a claim. As such, even if the actions were consolidated, Canivate would be entitled to bring its application for judgment on the issues relating to the canivate.com domain name. The question is only whether the issues are capable of being resolved fairly on a summary basis.
- [25] Dealing first with Rule 9-6, if the plaintiff has pleaded and adduced sufficient evidence to make out a *prima facie* case against Mr. Brazier, the question on this application then becomes whether Mr. Brazier has pleaded sufficient facts to establish one or more defences to the claims and whether he has adduced evidence that could establish one or more of those defences. It is not for me to weigh the defendant's evidence, but rather to assess whether it exists. If it does, then the summary judgment application must be dismissed: *Peace Hills Trust Company v. Brenco Media Inc.*, 2013 BCSC 1755 at paras. 15-16.
- [26] If I find that there is a defence to the claims pleaded, and that Mr. Brazier has adduced some evidence which could establish a defence, I must then decide whether I can find the necessary facts to determine the issues raised pursuant to a summary trial under Rule 9-7, and whether it is just to make such findings on this application: *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at paras. 54-55.
- [27] The plaintiff advances its application for judgment in relation to the following torts: passing off, breach of fiduciary duty, and conversion. It says that if it is successful on any of these heads it will not pursue further its claim for unlawful interference with economic relations and that claim can be dismissed.
- [28] I will consider each of these torts below following my determination of ownership of the domain name canivate.com.

B. Who currently owns the domain name canivate.com?

- [29] There is no dispute that Mr. Brazier coined the name "Canivate". Mr. Brazier asserts that Hydrohaus actually owned the domain name canivate.com, and paid the fees required to host and renew the domain name. Other than his bare assertion that Hydrohaus owns and paid the registration fees for the domain name, Mr. Brazier produced no evidence to corroborate his assertions. However, the applicant Canivate produced registration search results which clearly show that Mr. Brazier personally is the registrant of canivate.com. Further, Mr. Brazier has complied with the injunction against him personally with respect to the use of canivate.com. I find that on a balance of probabilities, ownership of the canivate.com domain name remained at all times with Mr. Brazier personally.
- [30] While Mr. Brazier argued this motion on the basis that Hydrohaus owned the domain name, I do not accept this argument. As such, for the purposes of my analysis, I have addressed the defence arguments consistent with my finding on ownership. That is to say, where Mr. Brazier argued that Hydrohaus owned the domain name, I have addressed the argument as if the defence argued that Mr. Brazier owned the domain name.

C. Is Mr. Brazier liable in the tort of passing off?

- [31] The tort of passing off is both a common law tort, and a claim under section 7(b) of the Trademarks Act, R.S.C. 1985, c. T-13. To succeed, a plaintiff must establish the existence of goodwill, deception of the public due to a misrepresentation, and actual or potential damage to the plaintiff: *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 132.
- [32] Since its creation in December 2017 under the name of 1146470 B.C. Ltd., Mr. Mueller and other staff referred to the company as Canivate. The name "Canivate" was used since the company's inception as its trademark and name in representations to potential investors, governmental authorities, consultants, suppliers, contractors and the public. This was done with the knowledge and acquiescence of Mr. Brazier.
- [33] The use of the domain name by Canivate was confirmed by Mr. Brazier himself in January 2018. At that time, in internal email communication between Mr. Brazier, Mr. Mueller and others at Canivate, Mr. Mueller stated "Similarly, we will need to get some e-mails set up. Not sure if we go with name@canivate.com or we go with name@cgs.com. In any event, we need to check on URL availability and reserve and then Stu needs to advise as to preferences and list of people who should be given an e-mail address." In response, Mr. Brazier replied that "we", which I find to mean Canivate, "have the canivate.com URL". In another email that same day, Mr. Brazier confirmed to Canivate staff that email for the company would be set up with the following format: stuart.brazier@canivate.com.

- [34] Mr. Brazier did not advise Mr. Mueller that he had in fact registered the domain name earlier in the fall of 2017 with himself personally as the registrant. Mr. Brazier did not assert personal ownership of the domain name, advise anyone at Canivate that the domain name was owned by anyone other than Canivate, or place any conditions on the use of the domain name by Canivate. If he had, it is quite likely that Mr. Mueller would have directed staff to register the domain name cgs.com to ensure that the company's virtual presence was secure.
- [35] Because Mr. Brazier represented that Canivate had the canivate.com domain name, Canivate began developing a website using the canivate.com domain name, and the company created email addresses for all employees using the canivate.com domain name. Both the trademark "Canivate" and the domain name canivate.com were used by the company on letterhead, email, business cards, and presentations. On March 6, 2019, Canivate registered "canivate" as a trademark with the Registrar of Trademarks.
- [36] The word "canivate" and the domain name canivate.com have been used solely by Canivate for two years, essentially since the company was created. Over \$10 million has been raised by the plaintiff using the name Canivate.
- [37] Mr. Brazier has never used the name "canivate" for any purpose other than its use by Canivate. On this application Mr. Brazier conceded that Canivate has established reputation and goodwill associated with the name "canivate".
- [38] With respect to deception of the public due to a misrepresentation, the defendant says that there has not been a deception. Mr. Brazier says that the word "canivate" has not been used by him to deceive the public, or to engage in any misrepresentation which may deceive the public. He says he is entitled to prevent the plaintiff from using the domain name because of his prior ownership of the domain name. He says there is no evidence of confusion in the market.
- [39] Canivate says that the mere registration of the domain name canivate.com, because it uses the trademark "canivate", amounts to a false misrepresentation which constitutes a passing off. Canivate says that it does not have to prove actual confusion. The fact that Mr. Brazier is controlling the canivate.com domain name is sufficient, as the domain name is so similar to the company's name that a person searching the web would assume that canivate.com is the website owned by Canivate.
- [40] Until Mr. Brazier agreed to reinstate the canivate.com domain name, users who tried to go to the company's website were left with the message "under construction", implying the company or its website were not operational. In addition, Canivate points to the fact that Mr. Brazier in controlling the domain name was also able to disable all the email addresses for employees that used the canivate.com email address. After Mr. Brazier disabled the domain name, when people sent emails to the canivate.com email addresses, they received a message back saying the recipient was not found. Canivate says these are representations in fact.

- [41] In *Law Society of British Columbia v. Canada Domain Name Exchange*, 2004 BCSC 1102; aff'd 2005 BCCA 535 [Law Society of British Columbia], the trial judge found that registration of a domain name using terms by which the plaintiff is commonly known may amount to a misrepresentation:
- [21] I now turn to the second aspect and that is the question of whether the plaintiff has proven that the defendant made a misrepresentation. The question is whether there is a misrepresentation in the circumstances by the defendant's registration and use of the domains <lsbc.ca> and <lawsocietyofbc.ca> to redirect traffic to a different website for its commercial benefit.
- [22] Guessing is a common way internet users find and access websites. They guess at the domain name or the website name and type that into the internet browser. To look for the plaintiff's website, an obvious guess would be to type its name, without spaces: "lawsocietyofbc".
- [23] In *British Telecom*, supra, at 497, it is acknowledged, as it was in *BCAA*, supra, that the registration of a domain name may, in appropriate circumstances, amount to a passing off. There, the appellants were dealers in domain names. The Court of Appeal said this:
- The placing on a register of a distinctive name such as *marksandspencer* makes a representation to persons who consult the register that the registrant is connected or associated with the name registered and thus the owner of the goodwill in the name. Such persons would not know of *One In A Million Ltd.* and would believe that they were connected or associated with the owner of the good will in the domain name they had registered. Further, registration of the domain name including the words *Marks & Spencer* is an erosion of the exclusive goodwill in the name which damages or is likely to damage *Marks & Spencer plc*.
- [24] I find, hardly surprisingly, that the use of the name "lawsocietyofbc" in a domain name, without additional words or qualified by other words, is a representation that the site and the location to which it is directed is associated with the plaintiff. That is a misrepresentation.
- [25] Mr. Wright argues that there is no passing off because there must be evidence of a misrepresentation leading to confusion. He says that the user would know that the Law Society is not connected with an adult website or a political site and that in any event there is no proof that the defendant intended to misrepresent and harness the goodwill of the Law Society of British Columbia given the defendant's evidence that "lawsocietyofbc" stands for "Law Society of Barristers Categories" and that "lsbc" stands for "Love Sites by Categories".
- [26] In passing off, proof of intent is not necessary and any misrepresentation need not be deliberate. Evidence of likelihood of confusion leading to the possibility of lost business opportunity is relevant, but actual confusion is not required. Perhaps in some cases it is necessary to show that there is confusion to demonstrate that there is a misrepresentation, but here it is obvious to me that there is a misrepresentation that the domain name is, in

fact, the plaintiff, if not in some way connected or associated with the Law Society of British Columbia.

- [27] The defendant's main argument is premised on the alleged failure of the plaintiff to demonstrate confusion between its website and the sites to which intended users were directed, i.e. the adult site or the political site. The defendant has argued this case as if it were a question of trademark opposition and infringement rather than what it is, a passing off common law action.
- [28] With respect to the differences between the confusion test for infringement and registration of a trade mark and passing off (at common law or under the Act), Gill & Jolliffe, eds., *Fox on Canadian Law of Trade-Marks and Unfair Competition*, looseleaf, 4th ed. (Toronto: Carswell, 2002), says this at ¶9.1:

The defences available in trade-mark infringement, depreciation of goodwill and passing-off actions are very similar in application. However, the mere invalidity of the registered trade-mark does not necessarily defeat a concurrent passing off action at common law, nor an action under s. 7 of the Act.

[emphasis added]

- [29] Evidence of actual confusion could bolster the fact that there is a misrepresentation but it is not needed here where the misrepresentation is so obvious and that it exists is just a matter of common sense. The use of a domain name that is so similar to the name that the plaintiff is known by and has substantial goodwill in (without additional words) would lead a person surfing the web and going to <lawsocietyofbc.ca> to believe, I conclude, that they were going to the plaintiff's web site or one that was affiliated with the plaintiff.

- [30] As I noted in BCAA, *supra*, at ¶73:

If someone uses a person's trade-mark as the domain name, such as Marks & Spencers.com or McDonalds.com, without any other words or letters, that is likely to confuse members of the public who type in the domain name looking for the website of Marks & Spencers or McDonalds and then come to something else. They will think the website has some connection with the site they were seeking.

- [31] Here the use of such a similar name and a name by which the plaintiff is specifically and commonly known would misrepresent that the domain name was associated with the plaintiff.
- [42] I find that Mr. Brazier's ownership of the domain name canivate.com, together with his past disabling of the domain name, constitutes a misrepresentation in the context of this passing off claim. Consistent with the conclusions and observations of the court in *Law Society of British Columbia*, the word "canivate" is distinctive and internet users are likely to search the name canivate.com in an attempt to find the company website, the placing of the name canivate.com on a register of domain names is a representation to persons who consult the

register that the registrant is connected to the company, and there is the potential for likely confusion. This misrepresentation exists whether the user is directed to an active site not associated with the company or to a page which states the site, and by implication the company, is no longer active.

- [43] I agree that Mr. Brazier's ongoing control of the canivate.com domain name results in a misrepresentation sufficient to establish that element of the tort of passing off. As long as Mr. Brazier controls the domain name, users of the internet will associate him with Canivate, and he will have the ability to actively misrepresent the status of Canivate and its employees, as he did in 2019.
- [44] Finally, Canivate must show actual or potential harm resulting from the misuse of the trademark by the defendant. Canivate points to actual harm suffered during the period Mr. Brazier disabled the canivate.com domain name, including the time spent by Canivate employees in reassuring investors, bankers, prospective customers, and suppliers that Canivate was not out of business. In addition, Canivate had to spend time and money developing alternative branding including domain names, such as canivate.ca and thecanivateway.com. Canivate says that Mr. Brazier's ownership of the domain name interferes with its ability to make changes to the website and set up additional email addresses. Canivate says that Mr. Brazier's interference in the business of Canivate establishes the harm necessary to prove the final element in the tort of passing off.
- [45] Mr. Brazier says that Canivate suffered no harm from his actions, and in fact closed a \$10 million financing in September 2019 despite not having ownership of the domain name.
- [46] I am satisfied that Canivate has proven evidence of harm resulting from Mr. Brazier's registration and use of the canivate.com domain name. The fact that Canivate was able to continue its business notwithstanding the substantial and intentional interference with its critical domain name is not a fact to be held against Canivate.
- [47] The only defences asserted by the defendant are the asserted lack of confusion, which I have addressed above, and Mr. Brazier's ownership of the domain name. Mr. Brazier says he created the name "canivate" for the purposes of the business plan he entered into with Mr. Mueller. He did not create the domain name to confuse Canivate's audience, nor did he register the domain name to extort payment from Canivate.
- [48] Canivate says this is no defence to a claim in passing off. Even if Mr. Brazier was the original owner of the domain name, he lost his rights to the trademark "Canivate" as Canivate developed its reputation and goodwill. Because Canivate holds the trademark to the word "canivate", any use of the word "canivate" by Mr. Brazier in a way inconsistent with Canivate's trademark is an impermissible passing off.
- [49] Canivate relies on *Edward Chapman Ladies' Shop Limited v. Edward Chapman Limited*, 2007 BCCA 370, where the defendant claimed that it retained ownership of the "Edward Chapman Ladies' Shop" name, and the company Edward Chapman Ladies' Shop Limited had, at best, a

licence to use the name further to an agreement to separate the businesses many years earlier. The Court of Appeal did not agree and found that "the plaintiff in a passing-off action must show that its name or mark is distinctive of its wares or services in the market at the time the cause of action arose - not at some distant point in the past.": Edward Chapman at para. 41. As such, the goodwill and reputation developed by Edward Chapman Ladies' Shop Limited since the separation of the businesses was determinative and the defendants were enjoined from using the name.

- [50] I agree with Canivate. Any rights Mr. Brazier may have had in the domain name when he registered it in 2017 were lost when he consented to the use of the domain name by Canivate alone, and consented to the use of the name Canivate Growing Systems Ltd. for the company which was incorporated in December 2017. Canivate proceeded to develop significant reputation and goodwill in the trademark "canivate" over the past two years. Mr. Brazier's prior and existing ownership of the domain name canivate.com is not sufficient to defeat a claim in passing off, in light of the goodwill and reputation now established by the plaintiff Canivate.
- [51] I am not satisfied that this issue is appropriate to be determined under Rule 9-6 because the defendant has raised a defence, and introduced some evidence in support of his defence.
- [52] However, I find that this issue is properly decided under Rule 9-7. I am able to find the facts necessary to decide the issue of passing off. In particular, on the material before me I am able to determine the key facts relating to the ownership of the domain name, the use and misuse of the domain name by Mr. Brazier, the misrepresentation by Mr. Brazier, the reputation and goodwill associated with the trademark "canivate" in favour of Canivate, and the impact on Canivate of Mr. Brazier's use of the domain name canivate.com.
- [53] In reviewing the factors discussed by the court in *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at paras. 11-12, the facts are not complex, the plaintiff is seeking a relatively low amount of damages which are easily determined, there is some urgency in returning control of the domain name to Canivate, and the passing off issue is not an issue in the shareholder dispute.
- [54] A conventional trial is not required. I find that it is just and appropriate to determine this issue by way of a summary trial.

D. Mr. Brazier liable to Canivate for breach of his fiduciary duties?

- [55] Canivate says that Mr. Brazier, as an officer and director of Canivate, owed it fiduciary duties including duties of loyalty, to act in good faith, and avoid conflicts of interest and self-interest.
- [56] Canivate says that Mr. Brazier had a duty to transfer the domain name to Canivate while he was a director and officer, or shortly thereafter. In failing to transfer the domain name, and then to suspend its use as leverage in relation to the other action, Mr. Brazier acted in breach of fiduciary duties. Canivate says that it was particularly vulnerable to Mr. Brazier's

unilateral acts in cutting off administrative access in February 2019 and then disabling the account in May 2019. Canivate also says that these fiduciary duties continued after Mr. Brazier ceased to be a director and officer.

- [57] Mr. Brazier does not deny the existence of fiduciary duties. He says that he complied with the duties on him as a director and officer, but he says that those duties stopped when Canivate wrongfully terminated the agreements in April 2019. Mr. Brazier says that, because of the terminations, Canivate could have no reasonable expectation of Mr. Braizer owing continuing fiduciary duties.
- [58] Mr. Brazier relies on *Mace v. Dirk*, 2006 ABCA 106 [Mace] in support of this contention. However, the facts in *Mace* are entirely different from the facts before me. In *Mace* the Alberta Court of Appeal found that in a small closely held corporation, with only two shareholders who were also the directors, there was no reasonable expectation on the part of one of the directors/shareholders that the other would continue on with the business after giving unilateral notice of termination of the business. The court found that there was no fiduciary relationship between the withdrawing party and the company which would compel the withdrawing party to continue on with the business.
- [59] The situation before me is entirely different. This is not a case where Canivate says that Mr. Brazier has an ongoing duty to benefit Canivate. Rather, Canivate says that Mr. Brazier has a continuing obligation to not harm Canivate, and to not take advantage of Canivate's vulnerability in relation to the domain name - a vulnerability created by the fact that only Mr. Brazier knew he was the sole registrant of the domain name and that Mr. Mueller and others at Canivate, based on a statement made by Mr. Brazier in January 2018, understood the domain name to be owned by the company.
- [60] I agree with Canivate. The actions of Mr. Brazier are particularly egregious given that the intention of Mr. Brazier was to deliberately harm Canivate and generate leverage for himself in the other action.
- [61] It is settled law that a breach of fiduciary duty can occur even after a senior officer and director, such as Mr. Brazier, has left the company: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592. In particular, this is so where the director takes and exploits an opportunity of the company for his own advantage. In the case before me, Mr. Brazier acted contrary to the interests of the company in February 2019, before the termination of the agreements. Then, one month after termination of the agreements, Mr. Brazier took further steps to harm the company. He took the domain name which he had brought to the company, and which the company had adopted, used, and relied on throughout its existence, and used that domain name for his own advantage. Given the proximity in time to Mr. Brazier's role as a director, and his actions which exploited the vulnerability of the company, together with his stated intention of doing such acts for the illegitimate purpose of generating leverage in his lawsuit against the company, I find that Mr. Brazier was in breach of a continuing fiduciary duty which he owed to the company. Mr. Brazier was entitled to sue

the company as he did in Action No. S195626; but he was not entitled to use his position as a fiduciary to his own advantage and to the detriment of the company.

- [62] Similar to the facts in the case of *Prim8 Group Inc. v. Tisi*, 2016 ONSC 5662 [Prim8], it is no answer to Mr. Brazier's actions to assert that Canivate was not harmed because it was able to create alternate sites, and ultimately Mr. Brazier agreed to reinstate the domain name and cooperate in the continued use of the site and email addresses while the litigation was pending. It was clear to me on the evidence that Canivate's ability to interact with its investors, customers, governmental bodies and others was interfered with and impeded by the actions of Mr. Brazier. In Prim8 the court concluded that the director in that case was not entitled to take away with him critical software that he had brought to the company. Similarly, in the case before me, Mr. Brazier was not entitled to "take away" or disrupt the use of the canivate.com domain name simply because he says he brought it to the company.
- [63] In Action No. S195626 Canivate filed a counter claim claiming that Mr. Brazier breached his fiduciary duties to the company. The breach of fiduciary duty claims in Action No. S195626 focus primarily on the allegation that Mr. Brazier preferred the interests of Hydrohaus over the interests of Canivate. The breach of fiduciary duty claim in Action No. S196051, however, is distinct and can be determined independently of the claims advanced in Action No. S195626.
- [64] For the reasons stated above in relation to the tort of passing off, I find that Rule 9-7 is the appropriate rule under which to determine the breach of fiduciary duty claim.
- [65] The facts in relation to the specific allegation of breach of fiduciary duty raised in this action are not complex. I am satisfied that I am able to determine the key facts, including the dates Mr. Brazier was an officer and director of Canivate, his use of the domain name at all relevant times, Canivate's use of the domain name at all relevant times, Mr. Brazier's intention in disabling the domain name, and the impact of his actions on Canivate. Canivate is seeking a relatively low amount of damages which are easily determined. The specific allegations raised in No. S196051 are discrete and can be determined apart from those raised in Action No. S195626.
- [66] I find that a conventional trial is not required to determine the issue of breach of fiduciary duty alleged in Action No. S196051, and it is just and appropriate to determine this issue by way of a summary trial.

E. Is Mr. Brazier liable to Canivate in conversion?

- [67] Liability for the tort of conversion is established where a person wrongfully interferes with the goods of another in a manner that is inconsistent with the owner's rights of possession: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727. Canivate says that Mr. Brazier interfered with its use and possession of the domain name, "canivate" trademark, associated website and email addresses. Mr. Brazier says that the domain name is owned by Hydrohaus and, therefore, no claim in conversion against him

can succeed.

- [68] I have already determined that the domain name canivate.com was owned by Mr. Brazier, and not Hydrohaus. Therefore, the real issue is whether Mr. Brazier's ownership of the domain name is sufficient to defeat a claim in conversion.
- [69] The tort of conversion relates to an owner's right of possession. Canivate does not assert current ownership of the domain name. Rather, it says that Mr. Brazier has misused the domain name in the ways described above, and seeks to have ownership of the domain name transferred to Canivate. However, Canivate does own the website content, the trademark in the name "canivate", and the email addresses and content associated with the domain name.
- [70] Are electronic data in the form of a website or an email address, or intellectual property in the form of a trademark, goods which can be the subject of a claim in conversion? Goods are typically defined as physical goods, such as chattels or crops (see the Sale of Goods Act, R.S.B.C. 1996, c. 410). The law of conversion grew out of the law of detinue, where a person wrongfully refused to return goods upon a demand by the owner. Conversion could be claimed where a person exerted exclusive control over goods, preventing the owner's use or possession of the goods.
- [71] In the electronic age in which we live, I find that it would be incongruous if conversion were limited to physical goods, or tangible chattels. In the case at bar, the defendant exerted exclusive control over Canivate's website as soon as he removed administrative control of canivate.com from the company. The defendant held the only key to the website which was critical to operations of the company, and prevented Canivate from using its website and email addresses. I find that a modern conception of conversion must include wrongful interference with intangible goods, such as electronic data, websites and email.
- [72] This modern understanding of the application of the law of conversion is consistent with the law stated by United States Court of Appeals, Ninth Circuit in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) at 1030 [*Kremen*] in which the court recognized the conversion of intangible property, specifically domain names.
- [73] Caitlin Akins, in "Conversion of Digital Property: Protecting Consumers in the Age of Technology" 23 Loyola Consumer Law Rev. 215 (2010) at 235, discusses *Kremen*, and a subsequent decision of the New York Court of Appeals in *Thyroff v. Nationwide Mutual Insurance Co*, 864 N.E. 2d at 1273, summarizing the New York Court of Appeals' discussion as follows:

In its discussion, the court listed four reasons why the digital chattel at issue should be recognized for the purposes of conversion. First, there must be a civil remedy to accompany the criminal charge of theft in some cases. Second, virtual documents are only a button push away from being printed and manifested as tangible chattels. Third, in a philosophical sense, writing is writing, no matter what form it takes; and writing is a form of property. Fourth, there must be a

way to recoup the expenses of creating digitized possessions. Elaborating on the practical realities of virtual documents, the court also concluded that it is not a document's or idea's physical manifestation that determines its worth, but the value of its content.

[74] I find the reasoning articulated in the passage above to be directly applicable to the case before me.

[75] Similarly, although no analysis on the issue of intangible goods was provided in its reasons, I note that in *Prim8* the Ontario Superior Court of Justice found that interference with access to a software program could give rise to liability in conversion.

[76] In the result, I find that the defendant is liable to Canivate for conversion of Canivate's website and email addresses. I am not satisfied that the defendant wrongfully interfered with the use of Canivate's trademark, in the sense of exerting exclusive control of the trademark. Rather, the wrongful acts of the defendant in relation to the trademark are addressed in the tort of passing off, as discussed above.

[77] I find this issue to be appropriately determined pursuant to Rule 9-7. The key facts required to be found in determining the issue of conversion are addressed in relation to the other torts discussed above. As such, I find it is just and appropriate to determine the issue of conversion by way of summary trial.

F. What remedies should be awarded?

[78] Canivate seeks to have the canivate.com domain name transferred to it. There is authority for such an order in *Marks & Spencer Plc, et al. v. One in a Million and others*, [1997] E.W.H.C. Patents 357 at para. 28, *aff'd* [1998] 4 All E.R. 476 (Eng. C.A.), where the court found this to be the most effective remedy which created no injustice to the defendant, who had no legitimate use of the domain name. I find the same reasoning to be applicable in the case before me. The defendant has no use for the domain name, and his continued ownership of the domain creates a perpetual misrepresentation in the eyes of the public. As such, I order the defendant to transfer the domain name canivate.com to Canivate within 30 days of this decision.

[79] Canivate also seeks damages for all losses which flowed from Mr. Brazier's wrongful acts, including injury to reputation, business and goodwill, and all expenses incurred. Mr. Brazier argues that at most nominal damages should be awarded if any of the torts are proven, and he agrees with all expense claims for the period prior to the injunction being issued.

[80] Canivate points to the following impacts from the wrongful acts of Mr. Brazier, all of which I accept as proven:

- a) In February 2019 Canivate's branding and messaging was interrupted, it could not update its website, and it could not access statistics or information regarding its domain - all because it no longer had administrative access to the domain,

- b) In February 2019 Canivate could not create new email addresses as needed, also because it no longer had administrative access to the domain,
 - c) In spring 2019 Canivate made more than 50 presentations to over 200 potential investors, all using the canivate.com name,
 - d) Because of the disruption and uncertainty regarding the domain name, Canivate had to rework its branding and public relations strategies,
 - e) For 3-4 weeks following May 17, 2019, Canivate's website and email addresses were disabled by Mr. Brazier, resulting in an unquantifiable loss of email communication for Canivate's 14 employees, all immediately following a month of intense marketing and presentations which was expected to generate significant traffic to the company,
 - f) When the website and email were restored, certain content was lost and had to be recreated,
 - g) Canivate was forced to engage consultants to determine whether an entirely new name and brand should be considered, ultimately deciding to rebrand as THE CANIVATE WAY, to reference the trademark in which they had developed reputation and goodwill and allow the company to obtain a new domain name with the .com extension which the company considered to be essential to its business presence,
 - h) Canivate's publicity launch was delayed a number of months,
 - i) The market for cannabis ancillary companies took a turn in October 2019 such that public equity financing was no longer available and, due to the delays occasioned by Mr. Brazier's wrongful acts, Canivate lost the opportunity to try to obtain such financing, and
 - j) Mr. Brazier disabled the domain name as a tactic to put pressure on Canivate in the shareholder claim he had filed two days previously.
- [81] Canivate submits that a conservative and appropriate assessment of general damages is \$35,000 for passing off, \$5,000 for breach of fiduciary duties, and \$5,000 for conversion. General damages in this case are difficult to assess with any precision. In the circumstances, I find that an award for general damages which is roughly equal to the amount I award for special damages is appropriate. As such, I order the defendant to pay Canivate \$40,000 in general damages for all wrongful acts.
- [82] The specific expenses claimed by Canivate are:
- a) \$12,011.27 for Aha Creative, calculated as 15% of its charges to the company during the relevant time. Ruth Atherley, the principal of Aha Creative, provided an affidavit in which she states that 15% of her time during the relevant period was spent on addressing the issues arising from the wrongful acts of Mr. Brazier,

- b) \$10,574.24 for Brodeur Partners, the American consultant who worked closely with Aha Creative. Mr. Wong, the CFO of Canivate and Ms. Atherley both attest that approximately 15% of Brodeur's time during the relevant period was spent addressing the issues created by Mr. Brazier,
 - c) \$6,324.38 in time spent by Mr. Wong dealing with the issues created by Mr. Brazier during the period the domain name was disabled,
 - d) \$220.15 and \$5,155.85 for IT related expenses incurred before June 2019,
 - e) \$6,714.64 for expenses relating to the change to the thecanivateway.com domain and associated marketing materials using the new brand.
- [83] Mr. Brazier takes issue with the expenses incurred by Aha Creative and Brodeur, and the expenses in relation to the new brand - THE CANIVATE WAY.
- [84] Mr. Brazier submits that there is no direct evidence from any person at Brodeur to confirm Ms. Atherley's estimate that 15% of their time was attributed to addressing the problems created by Mr. Brazier. Ms. Atherley worked closely with Brodeur, as did Mr. Wong. While it would have been preferable to have an affidavit from someone at Brodeur, I am satisfied that Mr. Wong and Ms. Atherley are capable of estimating the time spent by Brodeur dealing with the issues. I find Mr. Wong's estimates to be reasonable and, if anything, his estimates understated the full cost to Canivate.
- [85] With respect to the cost incurred for rebranding, none of this would have been required but for the wrongful acts of Mr. Brazier. It does not lie in Mr. Brazier's mouth to dispute the extensive efforts made by Canivate to recover from the untenable position he put the company in.
- [86] I award Canivate \$41,000 in special damages.
- [87] Canivate also seeks punitive or aggravated damages. I am not satisfied that a further award for such damages is justified in this case. Aggravated damages are a form of compensatory damages, and I am satisfied that the awards I have already made fully compensate the plaintiff.
- [88] Punitive damages are intended to punish a wrongdoer. There is no doubt Mr. Brazier's conduct was poorly thought out and has resulted in significant liability findings against him. However, I balance his behavior prior to the injunction with his behavior since June 2019. He has fully cooperated with the plaintiff and complied with both the letter of the injunction and the spirit of the injunction. I find punitive damages are not appropriate in this case.

G. Should the actions be consolidated?

- [89] As I have allowed the application of Canivate and thereby finally determined all issues in Action No. S196051, that Action is at an end.

[90] In the result, the application to consolidate Actions No. S196051 and S195626 is dismissed. Action No. S195626 will proceed in the ordinary course.

H. Costs

[91] Costs are awarded to Canivate Growing Systems Ltd. and Ingo Mueller in the cause in Action No. S195626.

[92] Costs are awarded to Canivate Growing Systems Ltd. in Action No. S196051.

"W.A. Baker, J."

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