

CANADA / JUDGMENT

Garcha Bros Meat Shop Ltd. v. Singh

2022 BCCA 36

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 36 Garcha Bros Meat Shop Ltd. v. Singh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Garcha Bros Meat Shop Ltd. v. Singh,

2022 BCCA 36

Date: 20220131

Docket: CA47351

Between:

Garcha Bros Meat Shop Ltd.

Respondent

(Plaintiff)

And

Arshpreet Singh, Kulwinder Kaur Sandhu and 11270058 BC Ltd.

Appellants

(Defendants)

Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated March 19, 2021 (Garcha Bros. Meat Shop v. SJP Enterprises Ltd., New Westminster Docket S232568).

Counsel for the Appellants:

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J.E. Roos

Place and Date of Hearing:

Vancouver, British Columbia

November 12, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 31, 2022

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Dickson

Summary:

Appeal from an interim injunction enjoining the appellants from operating a butcher shop similar to that franchised by the respondent. The appellants were one of two sets of defendants before the chambers judge. The other set of defendants (who do not appeal) operated the franchised business. Upon the respondent's termination of the franchise agreement, they assigned their lease to the appellants. The appellants, one of whom was related to the defendant franchise operator, then operated a similar meat shop out of the same location, despite a restrictive covenant in the franchise agreement. The appellants were restrained from doing so even though they were not signatories to the franchise agreement. Held: Appeal dismissed, stay pending appeal lifted. Upon review of the entire context, the chambers judge's determination amounted to a finding that there was a strong prima facie case that all the defendants had engaged in a civil conspiracy to circumvent the restrictive covenant, which was both pleaded and

argued. Given the case put before the judge, there was no error in failing to consider the test for piercing the corporate veil. The judge's determinations on the reasonableness of the restrictive covenant, the irreparable harm from the appellants' conduct, and the balance of convenience were entitled to deference.

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1.0 INTRODUCTION

- [1] This appeal is from an order issuing an interim injunction restraining all of the defendants in this action, including the appellants, from operating a butcher shop at a specified address in Burnaby, BC. In its essence, the injunction temporarily enforces a restrictive covenant in a franchise agreement for the operation of a retail butcher business at that location.
- [2] The injunction restrains not only the franchisee and its principals, who do not appeal, but also the appellants, who are not privy to the franchise agreement. The chambers judge found that because of the relationships between the appellants and the franchisee, the appellants were also subject to the terms of the franchise agreement: *Garcha Bros Meat Shop Ltd v SJP Enterprises Ltd* (19 October 2021), New Westminster S232568 (BCSC).

2.0 BACKGROUND

- [3] The franchisor is the respondent Garcha Bros Meat Shop Ltd, which is in the business of selling meat, seafood and poultry butcher services. On March 24, 2017, it entered into the franchise agreement with SJP Enterprises Inc ("SJP") and its indemnifier, Parwinder Kaur. Ms. Kaur and her husband, Kuldeep Singh, are the principals of SJP, and as noted, none of these three parties is participating in this appeal.
- [4] Pursuant to the franchise agreement, SJP operated a retail butcher shop under the name "Garcha Bros Meat Shop and Poultry" (the "franchised business") on 6th Street in Burnaby, BC (the "franchised location"). Kuldeep Singh managed the franchised business.

- [5] On August 19, 2019, the franchisor gave notice to SJP alleging that SJP was in material default of the franchise agreement. The notice required SJP to remedy the default within 30 days.
- [6] The franchisor issued further notices of default to SJP on May 28 and July 7, 2020. SJP later responded with complaints about the franchisor's business practices, which the franchisor denied.
- [7] On September 24, 2020, the franchisor wrote to SJP through its solicitors to exercise its right under section 12.3 of the franchise agreement to terminate the relationship, giving SJP 24 hours to perform its obligations in the event of termination as set out in section 12.4 of the franchise agreement.
- [8] The franchisor further reminded SJP of the agreement's restrictive covenant, which is at the heart of this appeal. Among other things, the appellants say that the restrictive covenant is unenforceable because it is ambiguous with respect to who is covered and unreasonably broad in its geographic scope. It reads:

13.2 Competition after termination. In the event of termination of this Agreement for any reason whatsoever, each of the franchisee [SJP] and the guarantor [Ms. Kaur] shall not, without the prior consent of the franchisor, at any time during the period of 30 months from the date of such termination, either individually or in partnership or jointly or in conjunction with any person or persons, firm, association, syndicate, company or syndication as principal, agent, shareholder, or in any other manner whatsoever carry on, be engaged in or be concerned with or interested in or advise, lend money to, guarantee the debts or obligations of or permit its name or any part thereof to be used or employed by any person or persons, firm, association, syndicate, company, or corporation engaged in or concerned with or interested in, any business competitive with or similar to the franchised business, or franchising businesses similar to the franchised business, at the Franchised Location, or within a ten (10) kilometre radius of the Franchised Location

- [9] On October 15, 2020, the franchisor wrote again, taking the position that SJP had failed to perform its obligations as required, and advising that it would seek all available legal remedies if those obligations were not performed.
- [10] At this point, the appellants become involved in the narrative.
- [11] On October 15, 2020, the appellant 11270058 BC Ltd ("1127") was incorporated. The application lists the appellant Arshpreet Singh as 1127's sole director and shareholder. He had previously been employed by SJP in the franchised business.
- [12] On October 18, the appellant Kulwinder Kaur Sandhu replaced Arshpreet Singh as 1127's sole director. Ms. Sandhu deposed that she also replaced Arshpreet Singh as sole shareholder. If she did, that is not reflected in the corporate records. Ms. Sandhu is the cousin of Kuldeep Singh.

- [13] On October 19, SJP assigned to 1127 its lease of the franchised location. Kuldeep Singh agreed to indemnify the lessor by guaranteeing 1127's obligations under the assignment.
- [14] 1127 thereafter carried on business as a retail butcher shop at the franchised location under the name Great Choice Meat and Poultry. Kuldeep Singh continued to work there as an employee of 1127.
- [15] On November 2, 2020, the franchisor commenced action against SJP and Ms. Kaur, and filed a notice of application for an interim injunction restraining SJP from continuing to do business at the franchised location. In its response, SJP pointed out that it had assigned its lease at the franchised location to 1127.
- [16] On December 7, 2020, pursuant to the order of Mr. Justice Blok pronounced November 23, 2020, the franchisor filed an amended notice of civil claim, adding Kuldeep Singh and the appellants as defendants. It also issued a new notice of application seeking interim injunctive relief against all defendants pending the trial of the action.
- [17] That injunction application was heard on December 18, 2020, and February 19, 2021. On March 19, 2021, the chambers judge issued his judgment granting the relief requested against the appellants as well as SJP, Ms. Kaur and Kuldeep Singh. The appellants appeal and have been granted a stay pending this decision. SJP, Ms. Kaur and Kuldeep Singh do not appeal. From their perspective, they are not carrying on the franchised business in any event.

3.0 ISSUES AND STANDARD OF REVIEW

- [18] The appellants submit that the chambers judge erred by:
1. holding that 1127 was the alter ego of SJP, and therefore subject to the franchise agreement, without applying the proper test for piercing the corporate veil;
 2. holding that the restrictive covenant was enforceable despite significant ambiguity in its terms and an unreasonably broad geographic scope;
 3. holding that the respondent had established irreparable harm without engaging in the required fact-specific analysis;
 4. holding that the balance of convenience favoured the franchisor; and
 5. in the alternative, enjoining the individual appellants on the basis that they were alter egos to the signatories of the franchise agreement.
- [19] The overall standard of review applicable to an appeal from an interlocutory injunction is highly deferential. As Justice Bennett put it in *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395:

- [35] The decision to grant an interlocutory injunction is discretionary, and is entitled to a high degree of deference. This Court must not intervene merely because it would have exercised that discretion in a different way: *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at pp. 155-56; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 22. However, appellate intervention is necessary if the chambers judge erred in principle, made an order not supported by the evidence, or if it appears that the decision will result in an injustice: [*British Columbia (Attorney General) v. Wale* (1986), 9 BCLR (2d) 333 (CA), aff'd [1991] 1 SCR 62] at para. 43.
- [20] As I discuss the issues raised by the appellants, it is important to bear in mind this overarching standard of review. The appellants do not suggest that the judge got the test for an interlocutory injunction wrong. Accordingly, it is not the role of this court to rehear the application or reweigh the evidence. In the absence of an error in principle, or a palpable and overriding error of fact, this Court must defer to the judge's exercise of his discretion.
- [21] It is also important to bear in mind what Justice McLachlin, then of this Court, said for the majority in *British Columbia (Attorney General) v. Wale* (1986), 9 BCLR (2d) 333 (CA) at 346, aff'd [1991] 1 SCR 62: "The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case".
- [22] For the reasons that follow, I would dismiss the appeal.

4.0 ISSUE 1: DID THE JUDGE ERR IN LAW IN FINDING THAT THE APPELLANTS WERE BOUND BY THE FRANCHISE AGREEMENT?

4.1 The judgment below

- [23] After reviewing the background, the judge set out the positions of the parties:
- [18] The butcher shop continues operation under the ostensible leadership of Arshpreet and Kulwinder. The plaintiff alleges the transfer was one of convenience to avoid the rigours of the non-competition clause.
- [19] Upon learning of the assignment and the involvement of [1127] and the other parties, the plaintiff amended the pleadings and joined [1127] and the other two personal defendants, alleging [1127], in concert with Kulwinder and Arshpreet, is the alter ego of the franchisee and has colluded with the franchisee to avoid post-termination obligations arising from the Agreement.
- [21] All defendants deny the entitlement to any remedy under the Agreement.
- [22] The recently added defendants assert they are not bound by the Agreement between the plaintiff and SJP. Rather, [1127] and its officers assert they are, in effect, bona fide purchasers for value and not successors to SJP.

[23] In the material before me, [1127] notes differences between the manner of operation and appearance of the businesses and denies that it [operates] under the guise of a Garcha Meat outlet.

[24] All of the defendants argue the business operating from the Franchised Location is different in appearance and nature from that of the plaintiff and that the customers cannot and will not be of the view they are buying from any of the plaintiff's many other locations. The recipes of the plaintiff, distributed through authorized suppliers, are unknown to either the franchisee or [1127]. Though acknowledging the products now sold from the Franchised Location are similar in description, the defendants deny that they are in receipt of any proprietary knowledge gained through the franchise arrangement between the plaintiff and SJP.

[25] Alternatively, the defendants, collectively, argue that irreparable harm has not been shown and, if so, the balance of convenience does not favour the granting of an injunction.

[Emphasis added.]

[24] The judge then turned to the question of whether the appellants were subject to the franchise agreement, noting the relationships among the parties as discussed above. In terms of those relationships, he described the appellant Kulwinder Sandhu as Kuldeep Singh's sister, presumably based on evidence to that effect in an affidavit of Sandeep Sandhu, a director of the franchisor. But according to Kulwinder Sandhu, who ought to know, she is Kuldeep Singh's cousin. To the extent this was an error on the part of the judge, it was not raised as a palpable and overriding error by the appellants in their grounds of appeal. The judge went on to say this:

[34] The plaintiff [franchisor] notes the absence of the following documents that normally ought to be associated with an arm's length sale of a business, that is: an asset purchase agreement; bill of sale; statement of adjustments; resolutions of the selling company; GST and PST forms; and other documents generally associated with the transfer of a business as an ongoing concern.

[35] Despite the clear allegation in the pleadings as to the relationship between the two sets of defendants, no effort appears to have been made to present any documentary evidence that would support a contention that this was an arm's length transaction.

[36] When pressed with the absence of such evidence, Mr. Gautam, on behalf of [1127] and its principals, conceded during submissions that it would be difficult to conclude otherwise than that the transaction was not an arm's length and that [1127] and its principals are the alter ego of SJP and its principals.

- [37] I go on to conclude from that concession, coupled with the absence of any documents supporting the contention that they are different parties, that SJP and [1127] are, for all intents and purposes, one and the same, and that [1127] and the other two personal defendants are not insulated from the provisions of the Agreement governing the relationship between the plaintiff and the defendant, SJP.
- [38] If authority is required for the proposition that the protection afforded by the Agreement can be extended to others not signatories to it, I rely on *TMI Turf Management Ltd. v. R. De Noble Enterprise Limited* (19 January 1994), Vancouver C931820 (B.C.S.C.), and *Ontario Duct Cleaning Ltd. v. Wiles*, 2001 CarswellOnt 6190.
- [39] In both those decisions, evidence similar to the evidence here supported a conclusion that a successor company incorporated "for the purpose of defeating the non-competition obligations" would result in injunction relief being an available remedy as against those parties.
- [40] Accordingly, I have no difficulty concluding any remedy available to the plaintiff arising from the Agreement is equally available as against [1127] and its principals.

[Emphasis added.]

4.2 The appellants' position

- [25] In argument, the appellants raised three errors of a factual nature. The first was the judge's description of Kulwinder Sandhu as the sister of Kuldip Singh, when she was in fact his cousin. As I pointed out above, there was evidence to support both relationships, although Kulwinder Sandhu's evidence was, perhaps, rather more probative than Sandeep Sandhu's.
- [26] The second was the judge's reference in para 34 to the absence of documents normally associated with an arm's length sale of a business. The appellants point out that this was not the sale of a business, but the transfer of a lease.
- [27] The third was the judge's statement in para 36 that 1127's counsel conceded "that it would be difficult to conclude otherwise than that the transaction was not [at] arm's length and that [1127] and its principals are the alter ego of SJP and its principals". The appellant maintains that while counsel did properly concede that the transaction could not be considered an arm's length one, he did not concede that 1127 and its principals were the alter ego of SJP and its principals.
- [28] This third point leads directly to the appellants' main argument on this issue: that the judge erred in law and in principle by failing to apply the proper test for piercing the corporate veil when he found that 1127 was the "alter ego" of SJP.
- [29] The appellants maintain that the test for piercing the corporate veil in British Columbia is stringent, and is satisfied only where the corporate form has been used for fraudulent or illegitimate purposes, relying on *Edgington v Mulek Estate*, 2008 BCCA 505 at paras 21-26. They say further that the test has two elements: (1) the existence of "complete control"

indicating a lack of independent function by the subsidiary company, and (2) the use of the subsidiary company as a shield for fraudulent or improper conduct. For this, the appellants rely on *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423, 1996 CanLII 7979 (Ont Gen Div), and *XY, LLC v Zhu*, 2013 BCCA 352, leave to appeal to SCC ref'd, 35555, 35557, 35561 (20 February 2014).

- [30] The appellants point out that the judge did not address the issue of whether it was appropriate to pierce the corporate veil, and cited no authority on the question. Nevertheless, they assert, pierce the corporate veil is what he did, apparently on the basis that the transaction between SJP and 1127 was not at arm's length. This was wrong in law, the appellants maintain, because the test was not met: there was no evidence that 1127 was controlled by SJP, nor did the franchisor plead that 1127's separate legal personality was used for fraudulent or illegitimate purposes. In these circumstances, the appellants say, there was no proper basis for finding that the appellants, as non-signatories, were subject to the restrictive covenant in the franchise agreement.
- [31] Moreover, the appellants contend that even if the judge did not err in failing to apply the *Transamerica* test for piercing the corporate veil, he nevertheless erred in reversing the onus of proof by basing his conclusion on "the absence of any documents supporting the contention that [SJP and 1127] are different parties" (at para 37). This offends of the principle, the appellants argue, that the party seeking to pierce the corporate veil bears the onus of establishing the proper basis for doing so.
- [32] Finally, the appellants submit that even if the judge did not err in finding 1127 to be the alter ego of SJP, he provided no basis for finding the individual appellants, Kulwinder Sandhu and Arshpreet Singh, also to be alter egos of SJP and its principals.

4.3 The respondent's position

- [33] In the franchisor's submission, the case as argued before the judge was not about piercing the corporate veil. That was never discussed. Rather, the franchisor's position was that 1127 was a sham in the sense that it was not incorporated for the purpose of carrying on an independent business at arm's length, but rather was incorporated for the purpose of avoiding SJP's obligations under the restrictive covenant. The fundamental concept was this: there was a strong *prima facie* case that the appellants engaged in conduct in concert with SJP and its principals that breached the restrictive covenant, justifying extending the injunction to the appellants.

4.4 The appellants' reply

- [34] The appellants agree that a conspiracy analysis could support an injunction against all of the appellants, but maintain that no such analysis was put before the judge. They point out that the word "conspiracy" is conspicuously absent from the reasons for judgment, and maintain that a claim in conspiracy was neither the claim that the franchisor presented nor the claim to which the appellants responded. They say that the franchisor could still apply for an

injunction on that basis, and if they did, then the appellants would be able to respond to it fully as to both fact and law.

4.5 Discussion

4.5.1 What was before the judge?

[35] I begin by looking at the fundamental question: what was the case put before the judge?

[36] There is no doubt that the franchisor pleaded conspiracy in para 32 of its amended notice of civil claim:

Kuldip [Singh], Kulwinder [Sandhu], and Arshpreet [Singh] conspired to incorporate [1127] for the purpose of defeating the non-competition obligations of the Franchisee.

[37] In the Factual Basis section of its notice of application, the franchisor included the following allegations of fact:

15. Kuldip [Singh] conspired with Arshpreet [Singh] and Kulwinder [Sandhu] to incorporate [1127] for the purposes of defeating the restrictive covenant in the Franchise Agreement. The assignment to [1127] was completed after the commencement of these proceedings.

16. [1127] is a mere sham or altar-ego of SJP, Parwinder [Kaur] and Kuldip. [1127] is using the same accountant, printer, and supplier as SJP. Kuldip continues to manager the Burnaby Franchise.

[38] In the Legal Basis section of its notice of application, the franchisor outlined two "serious issues to be tried" in conjunction with the first part of the test for injunctive relief: First, "whether SJP is in breach of their post-termination obligations under the Franchise Agreement", and second, "whether [1127] is passing off its goods or services as being the goods and services of the Franchisor". Later in that section, the franchisor included these allegations:

40. The Defendants, have since October 15, 2020, directly or indirectly and in conjunction with each of the other defendants conducted a business similar to or the very same as the Franchisor from the Franchised Location to assist the Franchisee in breaching its post-termination obligations under the Franchise Agreement.

41. In *Ontario Duct Cleaning Ltd v Wiles*, 2001 CarswellOnt 6190 at 7, the Court held as follows:

"The evidence presented on this motion also supports the proposition that Advanced Air Quality Inc. was incorporated for the purpose of defeating the non-competition obligations of Mr. Wiles. It is appropriate to include the relief sought against that company because the company was formed for the purpose of enabling Mr. Wiles, under the corporate cloak, to compete with the plaintiff when Mr. Wiles had undertaken not to do so".

[39] Near the beginning of her submissions before the chambers judge, counsel for the franchisor summarized her argument this way:

The franchisor is seeking interim and interlocutory injunctions against the franchisee, SJP and Parwinder [Kaur] for breach of the restrictive covenant, as well as [1127], which it alleges is a mere sham or alter ego of the franchisee, and Kuldip [Singh], Kulwinder [Sandhu], Arshpreet [Singh], who it alleges conspired and colluded to incorporate 1127 in an attempt to avoid the post-termination obligations under the franchise agreement.

[Emphasis added.]

[40] The judge acknowledged this position in para 19 of his reasons, quoted above.

[41] Counsel then turned to the first factor of the test for interim injunctions, stating:

With respect to the first part of the test, the serious question to be tried is whether SJP and Parwinder [Kaur] are in breach of their post-termination obligations under the franchise agreement. The plaintiff submits that the franchise agreement was breached and lawfully terminated and SJP is breaching the restrictive covenants contained therein to not compete with the franchise business.

[Emphasis added.]

(Counsel went on to point out that the "strong prima facie case" standard was the appropriate measure in this case.)

[42] With respect to the involvement of the appellants, counsel said this:

Now, moving onto the application to [1127] and the named defendants Kuldip [Singh], Kulwinder [Sandhu] and Arshpreet [Singh], the defendants have since October the 15th, 2020, directly or indirectly and in conjunction with one of the other -- sorry, with each of the other defendants conducted a business similar to or the very same as the franchisor from the franchise location.

It is the franchisor's submission that [1127] is a mere alter ego or sham that SJP incorporated in an attempt to avoid the restrictive covenant. The chronology of events after termination is indicative of the same.

[Emphasis added.]

[43] From this review, I conclude that the allegation of conspiracy or collusion among the defendants in the action--including the appellants--for the purpose of allowing SJP to avoid its obligations under the restrictive covenant, was very much alive before the chambers judge.

[44] What is also evident, in my view, is that counsel used the term "alter ego" as a legally imprecise shorthand for the alleged "sham" that was the focus of the conspiracy: colluding to create a purportedly independent business entity for the purpose of evading the restrictive covenant.

[45] This takes me to the error of law alleged: that the judge found 1127 to be the alter ego of SJP without applying the proper test for piercing the corporate veil.

4.5.2 Error of law?

- [46] Underlying the appellants' argument is the proposition that, conspiracy or no conspiracy, a restrictive covenant can only be enforced against non-signatories where they have been found to be alter egos of the signatories--in the legal sense of being so closely related that the acts of one are the acts of the other--and this finding can only be made where the circumstances justify piercing the corporate veil. They point out, correctly, that the judge did not even address the issue of whether it was appropriate to pierce the corporate veil and cited no authorities on the question.
- [47] That the judge did not do so, in my view, is hardly surprising. In the proceedings before him, neither counsel raised the issue of piercing the corporate veil or presented any authorities relevant to the issue. As I read the arguments below, the case was not advanced as one of piercing the corporate veil to establish that 1127 was the alter ego of SJP. Nor was it defended on the basis that the franchisor could not establish a strong *prima facie* case that the appellants were alter egos of the franchisee so as to justify the extension of the restrictive covenant to them.
- [48] In these circumstances, where the argument on appeal is one not specifically raised below, it is important to keep an eye on what the judge actually ordered. This is because an appeal is from the order made, not from the reasons for judgment: see, for instance, *Ha v Fritzke*, 1999 BCCA 667 at para 23, and *Primerano v Cameron*, 2021 BCCA 64 at para 8.
- [49] It follows that even where the judge's reasoning contains flaws, the result may still be sustainable, at least where upholding it would not result in procedural unfairness.
- [50] Here, the judge pronounced his order this way:
- [99] On filing the appropriate undertaking as to damages, all defendants are temporarily enjoined and restrained, until further order or until trial, from operating the Franchised Location as a butcher shop.
- [51] The formal order as entered May 28, 2021, paralleled the restrictive covenant. It read:
- The defendants are hereby enjoined, restrained and prohibited, either individually or in partnership or jointly or in conjunction with any person or persons, firm, association, syndicate, company or syndication as principal, agent, shareholder, or in any other manner whatsoever carry on, be engaged in or be concerned with or interested in or advising, lending money to, guaranteeing the debts or obligations of or permit their name or any part thereof to be used or employed by any person or persons, firm, association, syndicate, company, or corporation engaged in or concerned with or interested in, any business competitive with or similar to the franchised business within a 10-kilometre radius of the [franchised location] until further order or until the outcome of trial.

- [52] When counsel for the appellants in the court below (who was not counsel before us) addressed the allegation that 1127 was a sham, he did not assert that the circumstances failed to satisfy the test for piercing the corporate veil. Instead, he pointed out that neither Kuldeep Singh nor Kulwinder Sandhu were parties to the franchise agreement. When he turned to authorities, counsel relied on cases dealing with the enforceability of restrictive covenants, such as *BMR Bath Master Reglazing Ltd v Watson*, 2010 BCSC 1170, rather than cases setting out the test for piercing the corporate veil.
- [53] What becomes apparent, in my view, is that neither the parties nor the judge were treating this as a question of whether it was appropriate to pierce the corporate veil in order to determine whether the two companies were, in law, alter egos. Rather, as the judge noted at para 19, the franchisor's case was based upon the proposition that the appellants acted in concert with the franchisees to use 1127 to avoid post-termination obligations arising under the franchise agreement. The use of the phrase "alter ego" was inexact and not treated by anyone as a formal legal concept.
- [54] Viewed this way, what the judge found amounted to this: the franchisor had established a strong *prima facie* case that the appellants, together with Kuldeep Singh, had participated in a group effort to avoid the consequences of the restrictive covenant, and had created 1127 to further this conspiracy.
- [55] In this regard, it is noteworthy one of the authorities on which the judge relied was *Ontario Duct Cleaning Ltd v Wiles*, [2001] OJ No 5150, 2001 CarswellOnt 6190 (Ont SCJ), cited by the franchisor in its notice of application. There, the plaintiff sought an interim injunction restraining the defendant Wiles and Advanced Air Quality from competing within the territory protected under a franchise agreement. The court had no difficulty concluding that the defendant Wiles had breached the non-competition clause in the franchise agreement. The court then addressed the question of whether it was appropriate to extend the relief sought to that company to Advanced Air Quality, which was not a party to the franchise agreement. As cited in the notice of application quoted above, the court said this:
- [7] The evidence presented on this motion also supports the proposition that Advanced Air Quality Inc. was incorporated for the purpose of defeating the non-competition obligations of Mr. Wiles. It is appropriate to include the relief sought against that company because the company was formed for the purpose of enabling Mr. Wiles, under the corporate cloak, to compete with the plaintiff when Mr. Wiles had undertaken not to do so.
- [Emphasis added.]
- [56] This parallels the position of the franchisor before the judge: that Kuldeep Singh, Kulwinder Sandhu and Arshpreet Singh conspired to incorporate 1127 for the purpose of defeating the restrictive covenant.

- [57] In my view, this supports the proposition that, fundamentally, the judge's conclusion that the appellants were subject to the restrictive covenant was based upon their apparent collusion with the franchisee and Kuldip Singh to avoid it. This is what made 1127 a "sham". I say "apparent collusion" because, of course, the question here was not whether that collusion had been proved on a balance of probabilities; that is for trial. The question here was whether the franchisor had made out a strong prima facie case of collusion. The judge found that it had, and I can see no error in that conclusion.
- [58] This proposition is also supported by the discussion that underlies the factual error the appellants allege in connection with the "alter ego" question. As we have seen, the appellants complain about the judge's reliance on what he described as counsel's "concessions" that the transaction was not at arm's length and that 1127 and its principals were the alter ego of SJP and its principals. While they accept that counsel conceded that the transaction was not at arm's length, they maintain that counsel did not concede that the companies and their respective principals were alter egos.
- [59] The discussion in question occurred in the context of the submission by counsel for the appellants that the restrictive covenant did not bind his clients because the business was carried on by 1127, which was owned solely by Kulwinder Sandhu, and the clause did not cover her or any other family member of the franchisee or the guarantor. On further questioning, counsel for the appellants conceded that there was no evidence of any value transferred from his clients to SJP and its principals, leading to this exchange:

THE COURT: So you say the way that everybody can defeat all of these clauses that don't say, your assigns and the like, is simply to put a nominee in in terms of a husband, a wife, a son, somebody else, carry on the business as usual and that end[s] the matter and all of the covenants under the agreement are to the wind?

COUNSEL: But My Lord, at this stage of the proceeding, we don't know if -- what, if any consideration flowed. It is still a preliminary stage of the matter.

THE COURT: Well, I'm sorry, You say at this early stage we don't know what?

COUNSEL: We don't know what, if any, consideration flowed. On this application you don't have any evidence of any consideration.

THE COURT: Well, who could possibly supply that evidence other than the defendants? Surely that's incumbent upon the defendants to establish that, wait a minute, this is not as it might seem at first blush; here are the underlying exchanges that make this not what it appears to be on the face of it, which is, here, I can't do it anymore, you do it, to somebody's husband.

COUNSEL: Yes, and I think the only evidence of that is what is found in my client's affidavit wherein she says that this proposal was presented to her given that SJP was forced out of business and to mitigate its losses SJP transfer the lease to my client, the numbered company, and they continued the meat shop under the name and style of Great Choice. That's the evidence we have.

Now, does that -- does that mean that in a non-arm's length transaction each and every -- in each and every instance there is foul play involved? I don't -- I don't think so, My Lord, but I understand it does not pass the smell test. I totally agree with that. It does not for sure pass the smell test. I will give that to the plaintiff.

But that does not necessarily, at this preliminary stage, result in a strong prima facie case.

THE COURT: Well, I didn't suggest that. I simply -- you are distinguishing as between the defendants as if there is -- were there a black hat in this scenario, it is not you; it would be SJP and its owners, and you are untouched by any of the contractual terms or the like. I fully understand what you say about the ambiguity of the business and the vagueness of the terms, and that seems to be a better point than it is to say that, oh, somehow your clients are untouched by this agreement because they are, my words, bona fide purchasers for value. As you say, that does not pass the stink test given the relationship between the [parties] and the fact that this appears to be a transaction of convenience.

COUNSEL: And as I said, My Lord, with all respect, I acknowledge and I concede that it does not pass the smell test. I do. I do agree and acknowledge with that. But moving on.

THE COURT: Yes.

COUNSEL: And I'll leave that point just on that note, My Lord.

THE COURT: All right.

COUNSEL: Yes, it doesn't pass the smell test. But I'm going to move on, My Lord.

THE COURT: Yes.

COUNSEL: On the clause itself.

[Emphasis added.]

[60] As can be seen, this discussion did not include any reference to whether the appellants were, in law, the alter egos of SJP and its principals. That was not a point anyone had raised. What the discussion did canvass was the suspicion raised by the relationships among the parties, given that there was no evidence of consideration. This occurred in the context of defence counsel's submission that the restrictive covenant did not apply to Kuldeep Singh, because he did not sign the franchise agreement, or to 1127, which was directed by Kulwinder Sandhu.

[61] That the judge found a strong prima facie case to the contrary is consistent with the proposition underlying the franchisor's position, that the franchisor can enforce a restrictive covenant against a non-signatory to the franchise agreement where the non-signatory engages in conduct in concert with the franchisee that breaches the terms of the covenant: see, for instance, Andraya Frith, Dominic Mochrie & Gillian SG Scott, eds, Canadian Franchise Guide, 2nd ed (Toronto: Thomson Reuters Canada, 2019) (loose-leaf updated 2020, release 3), vol 2 at 18-11, 18-12.

- [62] The proposition underlying the appellants' position, that a restrictive covenant can only be enforced against non-signatories where they have been found to be alter egos of the signatories, was not advanced in the court below. It is, of course, an arguable point: that the principle of privity of contract prohibits a finding that colluding non-signatories (here, the appellants) are bound by the terms of the restrictive covenant as a result of their collusion. The proper approach may well be to deal with the problem not by applying the contractual provision to the non-signatories, but by enjoining them from continuing with their conspiracy to operate a business in violation of the restrictive covenant: see, for instance, the discussion in Michael R Gray & Jason M Murray, "Covenants Not to Compete and Nonsignatories: Enjoining Unfair Conspiracies" (2006) 25 Franchise LJ 3 at 107.
- [63] In my view, however, this question need not be decided on this appeal because both approaches yield the same result. Either way, the key is the finding of a strong prima facie case, made by the judge here, that the successor company (1127) was incorporated by the franchisee, Kuldip Singh and the individual appellants for the purpose of defeating the franchisee's non-competition obligations. And, most importantly, either approach supports the order the judge made, prohibiting all the defendants from continuing to operate the business in breach of the restrictive covenant.

4.5.3 Procedural unfairness?

- [64] I return to the appellants' contention that the judge's decision was not based on a conspiracy analysis. While they accept that a conspiracy analysis could support an injunction against the appellants, they maintain that the case was not presented that way, so they did not have an opportunity of responding to such an argument in the proceeding below.
- [65] I disagree. For the reasons explained above in paras 33-42, it is my view that the issue was squarely before the judge.
- [66] It is true, as I have noted, that the relevant "serious issue to be tried" in the franchisor's notice of application referred only to SJP being in breach of the restrictive covenant, and made no reference to the appellants at all. Nevertheless, there can be no doubt that the role of the appellants and their participation in the alleged collusion was front and centre as the matter was argued--without any objection from their counsel. I see no procedural unfairness in this regard.
- [67] I now turn to the argument that the judge erred in placing the onus of proof on the appellants.

4.5.4 Misplaced onus of proof?

- [68] In the appellants' submission, the judge erred in law by putting the onus of proof on them to demonstrate that the circumstances did not support piercing the corporate veil. He did so, the appellants contend, by basing his conclusion on what he described as the absence of any effort "to present any documentary evidence that would support a contention that this was an arm's length transaction" (at para 35). I disagree.
- [69] It is evident that the judge's remarks flowed from the exchange between the judge and counsel quoted above at para 56. As the exchange demonstrates, the question under discussion was not who had the onus of demonstrating that the situation justified piercing the corporate veil. That issue was not on the radar. The point the judge was making was this: if any evidence was to be led to contest the proposition that 1127 was incorporated for the purpose of circumventing the restrictive covenant (such as the transfer of consideration and appropriate documentation), it could only come from the appellants. But no such evidence was adduced. The judge's exchange with counsel, as quoted above, makes this clear.
- [70] In short, the franchisor had raised a *prima facie* case. The question then became, what evidence was there to rebut it? As the judge observed, there was none.
- [71] I see no error in this regard.
- [72] It remains to consider the alleged errors of fact.

4.5.5 Errors of fact?

- [73] As I have already intimated, there is nothing to indicate that the first alleged error, concerning Kulwinder Sandhu's relationship to Kuldip Singh, was either palpable (given that there was evidence to support both possible relationships) or overriding (in that nothing appears to have turned on the finding that she was Kuldip Singh's sister, instead of cousin: see, for instance, *HL v Canada (Attorney General)*, 2005 SCC 25 at para 56.
- [74] The second error relates to the judge's concern about the absence of documents normally associated with "an arm's length sale of a business", when the transaction was the assignment of a lease, not the sale of a business. While it is true that the principal transaction here was the assignment of a lease, the fact remains that as the judge observed in the exchange quoted above at para 56, the appellants had put forward no evidence at all of the "underlying exchanges" that would suggest this transaction was at arm's length. Indeed, as far as can be determined, everything SJP had used in the business was transferred to 1127, or at least was used by 1127 in its operation of Great Choice Meats and Poultry. The point, surely, was the absence of any evidence to refute the otherwise irresistible conclusion that SJP and 1127 were not dealing at arm's length. That was the point made by the judge, and that was the point conceded by counsel for 1127. I see no material error in this regard.
- [75] This takes me to the third error, which concerns that exchange, and which relates directly to the alleged error of law discussed above. As the appellants contend, and as we have seen, the appellants' counsel below did not make a specific concession that 1127 and its principals were the alter ego of SJP and its principals. But that is not material in light of the manner in

which the discussion unfolded and how the term "alter ego" was used by both the franchisor's counsel and the judge. The question under discussion was whether the parties could be viewed entirely separately, as maintained by the appellants' counsel. The answer was no. Given their relationships and the evidence, the transaction did not pass the smell test. Counsel agreed.

4.5.6 Conclusion on issue 1

- [76] I conclude that the appellants have failed to demonstrate any material factual error, and that their allegation of an error of law is misconceived. The issue of piercing the corporate veil was never argued. What the judge determined, in essence, was that the franchisor had raised a strong prima facie case that the appellants had colluded with Kuldip Singh and SJP to circumvent SJP's obligations under the restrictive covenant. No error has been demonstrated in that regard. Even if that finding does not justify enforcing the restrictive covenant directly against the appellants, it supports the judge's order enjoining them from continuing with their alleged conspiracy to circumvent the restrictive covenant.
- [77] As I discuss below, this same conclusion disposes of the further error alleged by the appellants in relation to finding the individual appellants to be alter egos of the franchisee or otherwise subject to the restrictive covenant (issue 5).

5.0 ISSUE 2: DID THE JUDGE ERR IN HOLDING THAT THE RESTRICTIVE COVENANT WAS ENFORCEABLE?

5.1 Standard of review

- [78] The issue raised is one of contractual interpretation. Accordingly, it is a question of mixed fact and law and, in the absence of an extricable question of law, subject to a deferential standard of review: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; *Landmark Solutions Ltd v 1082532 BC Ltd*, 2021 BCCA 29 at para 8.
- [79] I see no merit to the submission of the appellants that the assessment of whether the covenant is sufficiently ambiguous, or the geographic scope sufficiently broad, to render the covenant unreasonable is an extricable question of law to be reviewed on a correctness standard. In my view, this assessment is not extricable, but is inherent in the process of applying legal standards to a set of facts, which is what makes this a question of mixed fact and law (see *Housen v Nikolaisen*, 2002 SCC 33 at para 26, and *Sattva* at paras 49 and 51-52).
- [80] It is also important to bear in mind the highly deferential standard of review to be accorded an interlocutory injunction, as discussed above. It must be remembered that the onus on the franchisor was not to establish that the restrictive covenant was enforceable, but to raise a strong prima facie case that it was.

5.2 The judgment below

- [81] After setting out the restrictive covenant (see para 8 above), the judge turned to the issue of its reasonableness and enforceability:
- [63] The plaintiff argues that the restrictive covenant is reasonable and thus enforceable given its restriction to a small geographical area for a period of 30 months. Such, says the plaintiff, is necessary to preserve the franchisor's good will and market share in the area upon termination of the Agreement. The franchisor argues that both SJP and Parwinder as its principals are in breach of their obligations upon termination under the Agreement for assigning the lease of the Franchised Location to [1127], a business competing directly with the franchisor, after learning of the default. Kuldip, a director of SJP, guaranteed [1127]'s obligations under the assignment of lease.
- [64] The defendants, collectively, argue that the term "franchise business" is not defined in the Agreement, such that I cannot determine its application to the defendants.
- [65] In my view, there is little merit in suggesting the terms in the restrictive covenant "persons, firm, association, syndicate, company, or corporation engaged or concerned with or interested in any business competitive with or similar to the franchise business or franchising businesses similar to the franchise business at the Franchised Location", are insufficient to allow me to conclude that the retail meat shop currently operated by [1127] from the Franchised Location is captured by that description.
- [66] The defendants [1127], Kulwinder, and Arshpreet have continued since October 15, 2020, to conduct a business similar or the same as the franchisor from the Franchised Location. Admittedly, the name has been changed and the store appearance has been altered somewhat. However, the products sold are essentially the same specialized chicken and lamb products, together with other marinated specialty products. Some of the plaintiff's logos, a rooster, remain in place in the new incarnation of the current outlet.
- [67] The defendants note there are a number of meat shops in the area such that the plaintiff had no exclusivity at the Franchised Location, but that does not negate the conclusion I draw that the description of the restrictive covenant is sufficient to cover the undertaking now operated by [1127]. The plaintiff has no control over other operations within the geographical limit set out in the Agreement; it does over SJP and its assignees.
- [68] Further, I find the restriction is reasonable in all the circumstances as to its terms and geographic location.

5.3 The appellants' position

- [82] Relying on the decision of the Supreme Court of Canada in *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6, the appellants submit that restrictive covenants, as restraints of trade, are prima facie unenforceable unless the restriction is reasonable. They submit further that the burden of demonstrating reasonableness is on the party seeking to enforce the restriction.

- [83] Here, the appellants assert, the franchisor failed to discharge that burden.
- [84] In the appellants' submission, the restrictive covenant was ambiguous because it purported to prevent SJP and Ms. Kaur from operating "any business competitive with or similar to the franchised business, or, franchising businesses similar to the franchised business" at the franchised location or within a 10-kilometre radius thereof. The appellants note that the term "franchised business" is not defined in the franchise agreement and is unclear. Moreover, they say, it is by no means clear what constitutes a business that is "competitive with" or "similar to" the franchised business. Would this include operating a grocery store that sells marinated Indian meats? Even less clear is what would constitute operating any "franchising business similar to the franchised business".
- [85] In these circumstances, the appellants argue, it is impossible for SJP, Kuldeep Singh and Ms. Kaur to determine with any certainty what they are prohibited from doing.
- [86] As to the geographic scope of the restrictive covenant, the appellants say that the judge's reference in para 63 to a "small geographic area" merely describes the franchisor's argument, and is simply wrong. An area with a radius of 10 kilometres from the franchised location, they assert, covers over 314 square kilometres, which would comprise all of Burnaby and New Westminster as well as portions of Surrey, Vancouver, Richmond, Coquitlam, Port Moody and Delta. As such, the appellants maintain, it is plainly unreasonable--or at least, the respondent failed to discharge its burden to show why such a large geographic scope is reasonable.

5.4 The respondent's position

- [87] The franchisor says that the appellants' reliance on Shafron is misconceived because the restrictive covenant here is part of a commercial contract, not an employment contract. It follows, the franchisor argues, that in accordance with the decision of the Supreme Court of Canada in *Payette v Guay Inc*, 2013 SCC 45, the restriction is presumed lawful (the onus being on the appellants to rebut the presumption), and is subject to a lower level of scrutiny.
- [88] In any event, the franchisor asserts, the judge was required only to find that the restrictive covenant was *prima facie* reasonable, and his conclusion that it was is owed deference.
- [89] When the restrictive covenant is considered in its proper context as part of a franchise agreement and after taking into account the surrounding circumstances, the franchisor submits, its scope is clear at least on a *prima facie* basis. As to the geographic scope, the franchisor submits that radius is the most reasonable tool to use, and no error has been demonstrated in the judge's conclusion.

5.5 Discussion

[90] As the appellants point out, the Court in *Shafron* stated that a restrictive covenant in an employment contract is prima facie unenforceable unless demonstrated to be reasonable. In doing so, the Court discussed the difference between an employment contract and a contract for the sale of a business, where different considerations apply. The appellants maintain that the franchise agreement here is akin to the former, while the franchisor asserts that it is comparable to the latter.

[91] This dichotomy was further acknowledged by the Supreme Court in *Payette*, decided under Quebec civil law. There, the Court confirmed at para 4 that the scope of a restrictive covenant will "vary with the nature of the relationship between the parties to the contract and the context in which the covenant was made".

[92] Both *Shafron* and *Payette* referred to the Court's earlier decision in *Elsley v JG Collins Insurance Agencies Ltd*, [1978] 2 SCR 916, which emphasized at 924 the importance of distinguishing the scope of a restrictive covenant linked to a commercial agreement from the scope of one linked to a contract of employment:

The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

A different situation, at least in theory, obtains in the negotiation of a contract of employment where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment.

[93] Was the restrictive covenant here one linked to a commercial agreement or a contract of employment?

[94] We were presented with no authority determining this question in relation to a franchise agreement, although the issue has been recognized as open to debate. As the Court of Appeal for Ontario observed in *MEDIChair LP v DME Medequip Inc*, 2016 ONCA 168:

[36] Whether a restrictive covenant in a franchise agreement should be viewed and treated as it is in a contract of employment because of an imbalance in bargaining power, or as it is in the sale of a business is the subject of recent ongoing debate. See Peter J. Klarfeld and Mark S. VanderBroek, "Law on Covenants Against Competition Shifts Toward Greater Enforceability by Franchisors" (Fall 2011), *Franchise L.J.* 76; and Jennifer Dolman, Adam Ship, Rebecca Hall-McGuire and Tyler Wentzell, "Governing Principles & Recent Trends in the Enforcement of Restrictive Covenants in Franchise Agreements" (2015), 43 *Advocates' Q* 448.

- [95] This issue is not one that must, or should, be decided on this appeal. This is because the judge did not decide the point as a question of law, but rather, in the context of an interlocutory application and on the limited record before him, determined whether the franchisor had established a strong *prima facie* case that the restrictive covenant was reasonable and therefore enforceable. The general onus was thus put on the franchisor. Because of the context, this is a different question from which party, as a matter of law, had the onus of establishing reasonableness, or to what level of scrutiny the restrictive covenant should be subjected. Those questions, in my view, should be left until they are raised squarely on a complete record that would allow the court to assess fully the nature of the relationships between the parties to the contract and the context in which the covenant was made--in other words, at trial.
- [96] In the application below, the judge looked at the impugned words of the restrictive covenant in the context of the franchise agreement as a whole in order to determine, on a *prima facie* basis, whether they were ambiguous. He found that they were sufficiently clear to allow him to conclude on the evidence before him that the retail meat shop operated by 1127 from the franchise location was captured, both in terms of the nature of the business, and the persons involved (at paras 65-66). This was sufficient, in my view, to establish a strong *prima facie* case that the words were not ambiguous.
- [97] The judge then went on to find, at para 68, that "the restriction is reasonable in all the circumstances as to its terms and geographic location."
- [98] The appellants correctly point out that the judge did not specifically discuss the restrictive covenant's geographic scope in analysing its reasonableness. Before us, they submitted that the reasonableness of the geographic scope needed to be considered first, prior to any analysis of whether the appellants would be captured by it. But these points were not raised by the appellants below either in their application response or in their submissions before the judge.
- [99] The approach of the appellants in their application response was that the franchisor had failed to demonstrate a strong case for upholding the restrictive covenant on an interim basis. They began with the proposition that the franchisor could not pass the "first hurdle of demonstrating that it terminated the franchise agreement with SJP for cause".
- [100] The appellants then argued that the onus was on the franchisor to show the reasonableness of the terms of the restrictive covenant, which must be shown to be reasonable between the parties and with reference to the public interest. They submitted that 1127 and Kulwinder Sandhu were not parties to the restrictive covenant, and were not given trade secrets, before arguing that the terms of the restrictive covenant were too broad and ambiguous to be enforceable. In particular, they asserted that it failed to clearly identify what constitutes "franchise business".

[101] The only reference in the application response to the geographic scope was in para 14 of the Legal Basis section:

14. The [1127] business does not affect any trade connections of the [franchisor] as it does not have a store within 10-kilometres of the Premises from where [1127] operates its meat shop, in the name and style of Great Choice.

[102] The point of this paragraph, as I understand it, is that there is no other Garcha Bros Meat shop franchise operating within a 10-kilometre radius of Great Choice. This was supported by the evidence of Kulwinder Sandhu in her first affidavit. If anything, this evidence supports the reasonableness of the geographic scope of the restriction. In terms of Garcha Bros shops, the franchised location was the only one within that territory--hence the reasonable need to protect it.

[103] Given the context and the interim nature of the application, there was material to support the judge's finding of a strong prima facie case that the restrictive covenant was reasonable. As no error in principle has been demonstrated, I would defer to the judge's conclusion.

6.0 ISSUE 3: DID THE JUDGE ERR IN LAW IN CONCLUDING THAT THE RESPONDENT HAD ESTABLISHED IRREPARABLE HARM?

6.1 The judgment below

[104] In addressing this aspect of the test for interlocutory injunctive relief, the judge said this:

[70] That leads to the inquiry as to whether the plaintiff has shown irreparable harm warranting the injunctive relief sought.

[71] As was noted in *Onkea Interactive Ltd. v. Smith*, 2006 BCCA 521:

[18] Irreparable harm is of two types. First, there is harm that cannot be quantified in monetary terms, such as permanent market loss or irrevocable damage to business reputation. Second, there is harm that cannot be compensated: for example, because an award of damages will not be collectible

[72] The plaintiff argues both are present here, noting that "the franchisor carefully researches and selects geographical locations where it opens new franchises". The franchisor deposed that it chooses locations based on the belief that there is a market for their products and competition has not been established. The [franchisor's] directing mind, Mr. Sandhu, selected the rental premises in Burnaby and took Kuldip to visit the three he thought would be most suitable.

[73] He suggested in the material before me that the plaintiff will suffer loss of business reputation from the continued and unauthorized use of "the franchisor's system and misappropriation of confidential information". This [was] founded on the affidavit of Mr. Kumar, who was unable to taste any difference in the product he had purchased when the premises were styled "Garcha Bros.", and then later when he purchased similar products

from "Great Choice". Additionally, and most importantly perhaps, the franchisor says it runs risk of losing control of its franchise business.

- [74] That said, the plaintiff does not allege that the defendants are in possession of proprietary recipes or marketing techniques exclusive to the plaintiff. Mr. Kumar's taste test hardly qualifies as evidence upon which I conclude the defendants are utilizing any proprietary knowledge acquired from the plaintiff in the now selling of meats from the Franchised Location.
- [75] Given the plaintiff fails to specify with any particularity the nature of the systems or proprietary information, such as recipes, participation in bulk purchasing power using the auspices of the franchisor, it is difficult to give credence to the first assertion.
- [76] However, the plaintiff also advanced evidence from other franchisees deposing to the fact that if one franchisee can take the benefits of franchising and then simply change its name and continue to operate as before, those franchisees will consider following suit. Additionally, the plaintiff argues that the defendants are fomenting dissent amongst the other franchisees who collectively sent an email objecting to various practices of the franchisor. Three of the eight persons complaining noted that there was a coalition led by Kuldip Singh of the Burnaby franchise.
- [77] Finally, despite the name change, the plaintiff argues that the defendants continues to use a number of symbols associated with the plaintiff, including the rooster logo on its signs, much of the colour scheme, language, and signage promising always fresh and tasty, display cards with a rooster logo, and product names that are offered, a variety of chicken products, spiced in herbs similar to those that are offered by Garcha Bros. franchises.
- [78] The plaintiffs referred me to Cappuccino Affair Ltd. v. 820295 Alberta Ltd., 2000 ABQB 753, where the court stated:
- [30] the loss of control over its own franchise is a serious loss to the applicant.
- [31] The cumulative loss of royalties and the unauthorized and uncontrolled operation of the terminated franchises endangers the existence of the Applicant The continued unauthorized use of the Applicant's trade mark and other intellectual property created a further loss to the Applicant. Taken together, these losses are difficult to quantify and therefore cannot be compensated for adequately by way of an award of damages at a trial of the action.
- [79] All of this fosters, says the plaintiff, a conclusion that if the injunction is not granted, it will lose goodwill, business reputation, loss of control over other franchise outlets, loss of market share in Burnaby as well as royalties and fees.
- [80] Further, it notes concerns in recovering damages from the defendants, a group of individuals of unknown means and two companies recently formed.

[81] As against this, the defendants collectively argue the business now operat[ing] under the name of Great Canadian Meats is substantially different in appearance but, in essence, a butcher shop is a butcher shop and the fact that the products are similar does not give rise to the concerns as articulated by the plaintiff.

[82] Further, it notes the provisions of the [Franchises Act, SBC 2015, c 35]. However, on balance, I consider that the plaintiff has established irreparable harm, not on the basis of the retention by the defendants of any proprietary information, namely recipes, but on the basis of the seeming uprising related in the other franchisees, I conclude, at least at this preliminary stage, with the assistance of the defendants here, in fomenting a cause as against the franchisor alleging the practices that are set out in the response to civil claim.

[Emphasis added.]

6.2 Discussion

[105] The appellants maintain that the judge based his finding of irreparable harm on a potential loss of goodwill, business reputation and franchise control. This was done, the appellants submit, without any meaningful inquiry into the facts, overlooking the fact-specific analysis discussed by this Court in *Landmark Solutions*, and therefore flows from an error of law.

[106] In this regard, the appellants rely on the following passage from *Landmark Solutions*:

[62] In *RJR-MacDonald* at 341, the Court said, "[Irreparable harm] is harm which cannot be quantified in monetary terms . Examples include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined" (citations omitted).

[63] In [*Edward Jones v Voldeng*, 2012 BCCA 295] the Court said:

[36] The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio. In my view, in this case the potential damages arising out of solicitation, being calculable, do not constitute irreparable harm.

[37] Non-competition covenants restrict a departing employee from seeking business generally. It usually will not be possible to tell whether business is lost to the employee's new employer as a result of prohibited competition as opposed to legitimate competition. Such damages, not being calculable, generally do constitute irreparable harm. To similar effect are actions which may damage the reputation of a former employer, or the general use of confidential information.

- [64] In this vein, a loss of goodwill may constitute irreparable harm if that harm is not calculable. Whether this is so, however, depends on the circumstances of the case. The Court's comments in *Edward Jones* reflect the fact-specific nature of this enquiry. For example, a loss of goodwill was found to be unquantifiable, and irreparable in nature, in *Hayden v. Hayden*, 2005 BCSC 983 at para. 22; *Jardine Lloyd Thompson v. Fogal et al.*, 2007 BCSC 271 at para. 36; *Emerald Passport Inc. v. MacIntosh*, 2008 BCSC 1289 at para. 45; and *AllWest Insurance Services Ltd. v. Meredith Phendler*, 2009 BCSC 2 at para. 59.
- [65] Conversely, there are a number of decisions where courts have determined, on the facts before them, that the loss of goodwill could be calculated and did not constitute irreparable harm: see e.g., *472448 B.C. Ltd. v. 343554 B.C. Ltd.*, 2006 BCSC 1075 at para. 22; *Capital Direct Lending Corp. v. Blanchette*, 2019 BCSC 1068 at para. 71.

[Emphasis added.]

- [107] I do not view this passage as setting out a principle of law that the judge failed to apply. Rather, it articulates a recognition that whether an alleged loss of goodwill constitutes irreparable harm will depend on the specific facts of each case. As I read the passage from the chambers judge's reasons quoted above, a fact-specific inquiry is precisely what he undertook in concluding that the franchisor had established irreparable harm in this case "at this preliminary stage". It is not for us now to reweigh the evidence, and, again, I would defer to the judge's conclusion.

7.0 ISSUE 4: DID THE JUDGE ERR IN CONCLUDING THAT THE BALANCE OF CONVENIENCE FAVOURED THE FRANCHISOR?

7.1 The judgment below

- [108] In addressing this question, the judge said this:
- [83] Finally I turn to the matter of the balance of convenience. As I say, I need to consider where the balance of convenience is and, as between the parties, which of the parties will suffer greater harm from the granting or refusal to grant an interlocutory injunction pending a decision on its merits.
- [87] The plaintiff notes that the franchisee, Kuldip, was a construction worker with no previous experience in operating a retail butcher shop before entering into the Agreement. The franchisor says it provided a business model, found the location of the franchise premises, provided a system, training, trademarks, goodwill and contacts with the market for supplies.
- [88] According to the plaintiff, the franchisee continues to gain all of the benefit of the Franchised Location while at the same time fomenting dissent and dissatisfaction with the franchise arrangements amongst other franchisees.
- [89] The defence, while generally denying the allegations of the breaches alleged, seems more focused, both in the response to civil claim and in its sworn material before me, of noting that the franchisor was price gouging and, as I say, not operating with the duty of good faith.

SJP says it will suffer "irreparable harm" because its grievance as to the alleged price gouging and unfair business practices caused it to assign its lease to [1127] and it does not operate the store any longer, but the remaining terms of the lease subject to renewal had 15 months left when the termination notice was served, hence it was mitigating its damages.

- [90] As to the defendant [1127] and the personal defendants associated with it, they adopt the position that Garcha Bros. is price gouging and that the other franchisees are joining in opposition to the plaintiff's business practices. [1127] further argues that there is nothing unique about the products it sells and there are no trade secrets or secret recipes which make Garcha Bros.' products unique.
- [91] [1127's] adoption of SJP complaints about the plaintiff's business practices strengthen my conclusion the two are one and the same.
- [92] Operating merely as an assignee of the lease and conducting a "new enterprise" from the same location, [1127] cannot and should not join in the defence of SJP.
- [93] Taken at face value, SJP says it has no further interest in the Franchised Location and is not involved in the ongoing operation of the shop that operates from it. Hence it is difficult to see how it could suffer either irreparable harm or the balance of convenience would favour not granting an injunction against it. Its potential exposure is for the remaining rent owing under the terms of the lease if [1127] is unable to continue to operate the assignment.
- [94] If SJP succeeds in its defence, the lost revenue from the assignment or the ongoing cost of the lease for its duration will form part of its damages for the wrongful termination of the Agreement by the plaintiff.
- [95] Insofar as the balance of convenience relates to [1127] and the associated personal defendants, there is little evidence of any potential damage to [1127] given the lack of material evidencing funds paid by it to assume the lease. It, too, can be adequately compensated through an award of damages.
- [96] Admittedly late in the day, the plaintiff offer[ed] to take the assignment of the lease from [1127] and carry on operating a business from the Franchised Location. Such addresses, at least in part, the issue of mitigation.
- [97] The potential damage to the plaintiff is not, as suggested by SJP, confined to only the royalties and advertising revenue, but as well loss from the markup on products sold franchisees through its authorized suppliers and, as well, potential loss of control over the other franchisees if it can be demonstrated that a franchisee can resile from its obligations under the Agreement without being bound by the terms of its restrictive covenant.
- [98] Finally, given the requirement of an undertaking as to damages and the apparently broader business base measured as against the ability of two corporations and four individuals to pay any damages assessed, I conclude the balance of convenience favours the plaintiff.

[Emphasis added.]

7.2 Discussion

[109] The appellants submit that the chambers judge's conclusion that the balance of convenience favoured the franchisor was based largely on the finding that "there is little evidence of any potential damage to [1127]" (at para 95). In so finding, the appellants say, the judge failed to consider that if the order comes into effect, 1127's business will effectively be shut down and its employees laid off. It will be unable to meet its lease obligations and may face eviction. As 1127 is obliged by the lease to operate a meat shop, it cannot simply open a new business. Moreover, the appellants will be deprived of funds needed to defend the action.

[110] In these circumstances, they submit, the balance of convenience favours them.

[111] The appellant's position amounts to a complaint that the judge erred in weighing the balance of convenience, a discretionary process entitled to the highest deference: Vancouver Aquarium at para 35. While the judge did not specifically describe the harm that would be occasioned to the appellants by shutting down their business, the fact remains that he did take into account that any loss suffered by the appellants would be compensable in damages, while the same could not be said of the franchisor's loss of goodwill and the effect on other franchisees. In discussions with counsel concerning the undertaking to be given by the franchisor, the judge emphasized at para 100 the need to ensure that there is a "deep enough pocket" to pay the damages of the defendants if they are successful.

[112] As Justice McLachlin said in Wale at 345, "The first step in determining where the balance of convenience lies is to examine the adequacy of damages as a remedy for the respective parties." That appears to be the approach the judge followed here, and I can see no error of principle or palpable and overriding error of fact in the judge's conclusion.

8.0 ISSUE 5: DID THE JUDGE ERR IN ENJOINING THE INDIVIDUAL APPELLANTS?

[113] The appellants summarize their argument on this issue as follows:

In the alternative to the foregoing, if the chambers judge did not err in finding that [1127] was the alter ego of SJP and finding that the Restrictive Covenant was reasonable and enforceable, the appellants nevertheless submit that the chambers judge erred in law in enjoining Arshpreet and Kulwinder pursuant to the Restrictive Covenant. The appellants submit that there was no proper legal basis to enjoin individuals who are not parties to the Franchise Agreement.

[114] The appellants' submission in this regard is based upon three propositions:

- First, that the judge erred in ordering relief against Arshpreet Singh and Kulwinder Kaur Sandhu on the basis that they are alter egos of SJP, when that argument was not advanced;

- Second, that the judge erred in concluding that he could pierce the corporate veil between 1127 and the individual appellants, concluding that the protection afforded by the franchise agreement could be extended to others who were not signatories to it;
- Third, that if, in the alternative, the judge enjoined the individual appellants on the basis of the claim of civil conspiracy, the judge erred in concluding that this presented a serious question to be tried given that it was not pleaded as such.

[115] I dealt with each of these arguments in relation to the first issue in section 4.0. For the reasons I express there, I would not accede to this ground of appeal.

9.0 CONCLUSION AND DISPOSITION

[116] As I noted in section 3.0 above, Justice McLachlin observed in *Wale* at -346 that the "fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case". In my view, the appellants have failed to show that the injunction granted here is not just and equitable in the circumstances of this case, and have demonstrated no proper basis for interfering with the chambers judge's discretion. Accordingly, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Dickson"

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