Court of Appeal for Saskatchewan
Docket: CACV4330

Citation: *102021880 Saskatchewan Ltd. (Canadiana Foods) v Baiton*, 2024 SKCA 118
Date: 2024-12-23

Between:

102021880 Saskatchewan Ltd. operating as Canadiana Foods

Appellant
(Plaintiff)

And

James Wesley Baiton (also known as Jim Baiton), The Real Tomato Pizza Company Ltd. & Dwight Stinson

Respondents
(Defendants)

Before:	Schwann, Tholl and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by: In concurrence:	The Honourable Justice Keith D. Kilback The Honourable Justice Lian M. Schwann The Honourable Justice Jerome A. Tholl
On appeal from: Appeal heard:	KBG-RG-01470-2023, Regina (Sask KB) October 28, 2024
Counsel:	W. Timothy Stodalka for the Appellant Kevin Mellor and Moira Keijzer-Koops for the Respondents

Kilback J.A.

I. INTRODUCTION

[1] This case involves a dispute over entitlement to the "Tumblers Pizza" brand.

[2] In August 2023, 102021880 Saskatchewan Ltd. operating as Canadiana Foods applied for an interlocutory injunction. Canadiana sought to restrain James Wesley Baiton, the Real Tomato Pizza Company Ltd. and Dwight Stinson [respondents] from selling food using the Tumblers Pizza name or logo. Canadiana also sought to prohibit them from selling frozen pizza to certain identified customers and to impose conditions on the storage, detention or destruction of goods using the Tumblers Pizza trademark, tradename, or logo.

[3] Before the injunction application was heard, the respondents applied to strike parts of four affidavits filed by Canadiana. In a fiat dated August 23, 2023, a judge of the Court of King's Bench sitting in Chambers largely agreed with the respondents' position and struck parts of those affidavits, which settled the evidentiary record (*102021880 Saskatchewan Ltd. (Canadiana Foods) v Baiton* (23 August 2023) Regina, KBG-RG-01470-2023 (Sask KB)). The same judge later dismissed Canadiana's application for an injunction and awarded costs to the respondents in a separate fiat dated February 16, 2024 (*102021880 Saskatchewan Ltd. (Canadiana Foods) v Baiton* (16 February 2024) Regina, KBG-RG-01470-2023 (Sask KB)).

[4] Canadiana now appeals both the evidentiary ruling and the dismissal of its injunction application. For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[5] The Chambers judge was faced with a challenging evidentiary record, describing the affidavits before her as "voluminous and acutely contradictory". After striking parts of the affidavits filed by the respondents, she found that the remaining evidence from both sides was "extremely contradictory, confusing, incomplete, misleading and in some cases probably deceptive" (at para 12).

[6] Since the evidence was conflicting, the following is a summary of only some of the background events that were reviewed by the Chambers judge, to provide context for the arguments raised on appeal.

[7] Jim Baiton developed a special pizza sauce and started a restaurant he called Tumblers Pizza in 1984. He registered Tumblers Pizza as a business name in 2010 and renewed it in 2019.

[8] In 2016, Mr. Baiton encountered a difficult business environment and owed a large debt to Canada Revenue Agency. These circumstances led him to make an assignment into bankruptcy.

[9] In late 2016 or early 2017, while he was an undischarged bankrupt, Mr. Baiton entered into an oral agreement with his friend, Brian Gibson, to establish a food manufacturing business and to sell frozen pizza throughout Saskatchewan. Canadiana was incorporated for this purpose on May 2, 2017. Mr. Gibson subsequently fell ill and his son-in-law, John Grant, took over as president of Canadiana.

[10] Mr. Baiton was discharged from bankruptcy in August 2017. Around that time, Mr. Baiton began working for Canadiana.

[11] Mr. Baiton worked for Canadiana from July 8, 2017 until June 27, 2022. The nature of Mr. Baiton's role and his relationship with Canadiana is in dispute, and was described by the Chambers judge as a "mystery" (at para 39). The Chambers judge found Mr. Baiton appeared to have been working as a salesman, selling frozen pizza branded as "U-Bake Tumblers Pizza" to Canadiana's customers throughout Saskatchewan. Mr. Baiton says he allowed Canadiana to use the Tumblers Pizza business name during this time on the condition that he would become an equity shareholder in Canadiana at some point. Canadiana disputes this was the arrangement, and claims it owns the Tumblers Pizza business name.

[12] In 2018, while working as a salesman for Canadiana, Mr. Baiton opened another business location and began selling Tumblers fresh pizza and Tumblers frozen U-Bake pizza from that location without Canadiana's knowledge.

[13] In 2020, Pedram Azar became managing director of Canadiana. Mr. Azar claims he created a new logo for Tumblers Pizza. Ownership of the Tumblers Pizza logo and who created it are issues in dispute.

[14] In June 2022, a meeting took place between Mr. Baiton and Mr. Grant. The meeting was surreptitiously audio recorded by Mr. Grant, and a transcript of the meeting was filed in evidence before the Chambers judge.

[15] During that meeting, Mr. Baiton indicated he was prepared to give the Tumblers Pizza business name to Canadiana in exchange for an ownership stake in the company. Mr. Grant did not agree with that proposal, and terminated Mr. Baiton's employment with Canadiana. Mr. Baiton was given six weeks' working notice.

[16] In August 2022, during the term of his working notice, Mr. Baiton entered Canadiana's main frozen food production facility in Regina and removed what he claimed were his special spices. Canadiana alleges that he also took a significant amount of product and turned off a freezer, which resulted in some stock being spoiled. Mr. Baiton was charged with mischief in relation to these events. The charge was later diverted and resolved through the alternative measures program.

[17] On August 31, 2022, an employee of Canadiana sent an email to some of its customers advising that Canadiana was re-branding and discontinuing its use of the Tumblers Pizza name. Canadiana subsequently said this email was sent in error.

[18] In November 2022, Mr. Baiton established a new retail location for the sale of fresh Tumblers pizza and frozen U-Bake pizza.

[19] On June 26, 2023, Canadiana commenced this action claiming damages for the tort of passing off, trademark infringement, and conversion of property, together with an accounting of profits, injunctive relief, and punitive damages. Canadiana applied for an interlocutory injunction approximately two months later.

[20] The Chambers judge struck parts of four affidavits filed by Canadiana, and dismissed Canadiana's application for an injunction. As noted, Canadiana now appeals both the evidentiary ruling and the dismissal of its application for an injunction.

III. EVIDENTIARY RULING

[21] I begin by addressing the evidentiary ruling, which was incidental to the injunction application and is included as part of the appeal under Rule 9(5) of *The Court of Appeal Rules*. Canadiana argues the Chambers judge erred in striking parts of the affidavits of John Grant sworn June 21 and July 26, 2023, and the affidavits of Pedram Azar sworn June 21 and July 26, 2023.

[22] The Chambers judge characterized the application to strike as "comprehensive and far reaching" (at para 8). The respondents raised 70 separate objections to all or parts of 63 paragraphs of evidence. They argued the impugned passages contravened Rules 13-30 and 13-33 of *The King's Bench Rules* because they were argument, speculation, opinion or hearsay; or because they were vexatious, inflammatory, malicious, repetitive, irrelevant, or improper reply.

[23] In her decision, the Chambers judge cited the applicable Rules and referred to jurisprudence on the proper scope of reply evidence. In accordance with the methodology set out in *Wongstedt v Wongstedt*, 2017 SKCA 100, [2018] 4 WWR 82, she then briefly explained her rulings on each of the 70 objections in four different schedules attached to her decision.

[24] Canadiana now appeals 30 of the rulings made by the Chambers judge. In doing so, Canadiana reiterates the same arguments it made before the Chambers judge as to why the impugned parts of the affidavits were admissible and should not have been struck. Essentially, Canadiana says that the Chambers judge simply got each of these 30 evidentiary rulings wrong.

[25] Rulings with respect to the admissibility of evidence are generally subject to a correctness standard of review, particularly where, as here, the admissibility decision involves the interpretation and application of the rules of evidence rather than an assessment of the probative value of the evidence. See: *Grandel v Government of Saskatchewan*, 2024 SKCA 53 at para 49, [2024] 10 WWR 179, citing *Dolynchuk v McGowan*, 2022 SKCA 42 at para 22, 26 CLR (5th) 1; *Kawula v Institute of Chartered Accountants of Saskatchewan*, 2017 SKCA 70 at para 55, 24 Admin LR (6th) 112; and *R v Alves*, 2014 SKCA 82 at para 54, 314 CCC (3d) 313.

[26] In oral argument, Canadiana focussed on two concerns with the merits of the evidentiary rulings made by the Chambers judge.

[27] First, Canadiana argues that the Chambers judge erred in striking parts of the rebuttal affidavits of Mr. Grant and Mr. Azar as improper reply evidence. In her decision, the Chambers judge held that Canadiana's rebuttal affidavits were limited to responding to new information contained in the respondents' affidavits, citing *Field v GlaxoSmithKilne,* 2011 SKQB 16 at para 46, 367 Sask R 192 [*Field*]:

> [16] In addition, the defendants are claiming with respect to the rebuttal affidavits of John Grant and Pedram Azar that portions of those rebuttal affidavits are improper reply. The plaintiffs rebuttal affidavits are limited to responding to new information as contained within the defendants response affidavits. As stated by this Court in *Field v GlaxoSmithKline*, 2011 SKQB 16 at para 46, 329 DLR (4th) 290:
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> > [46] The purpose of reply evidence is to respond to new matters raised by an opposing party. A plaintiff is not permitted to split its case by adducing evidence that could and should have been adduced in the first place. The approach of permitting reply evidence is based on considerations of fairness and trial economy. The first consideration ensures that a defendant is fairly informed of the case to be met before responding. The second avoids an interminable succession of case fragments that could have been presented once at the beginning.

[28] Canadiana agreed with this articulation of the proper scope of reply evidence in the proceedings before the Chambers judge. In written materials filed in response to the application to strike, Canadiana stated it "recognizes that its rebuttal affidavit is limited to responding to new information that is contained in the [respondents'] affidavits" and cited the same paragraph of *Field* quoted by the Chambers judge in the passage reproduced above.

[29] Contrary to the position taken before the Chambers judge, Canadiana now contends that an applicant in a civil case is permitted to raise new information in a reply affidavit and that the Chambers judge erred in law by striking parts of its affidavits as improper reply because they raised new information. Canadiana says that to hold otherwise would require it to anticipate the evidence that might be filed in response to the application.

[30] I am unable to accept this submission. Rule 6-9(6) of *The King's Bench Rules* addresses the filing of a reply affidavit in a Chambers application. It permits the party bringing the application to serve "an affidavit replying only to any new matters raised by the opposite party":

> **6-9**(6) The party bringing the application may then serve an affidavit replying only to any new matters raised by the opposite party, and shall file the affidavit, with proof of service, at least 2 clear days before the date set for hearing the application.
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> (Emphasis added)

[31] Under Rule 6-9(9), if new matters are raised in a reply affidavit without leave, those matters may be disregarded and costs may be awarded against the party filing the reply affidavit.

[32] Under the applicable Rules, the starting point is therefore that reply affidavits are limited to responding to new matters raised by the opposite party. This accords with the purpose of reply evidence recognized in *Field* and cited by the Chambers judge, which is to respond to new matters raised by the opposing party and to prevent an applicant from splitting its case by adducing evidence that could have been called in the first instance. If the approach suggested by Canadiana was adopted and an applicant in a civil case was routinely permitted to raise new information in a reply affidavit without leave, these purposes could not be met.

[33] The approach suggested by Canadiana would also raise concerns identified by Wigmore about unfairness to a respondent who would not know the case they have to meet, and about the confusion that would be created if an applicant did not have to introduce the evidence it relies upon in the first instance:

> **¶16.260** Two very practical rationales for this rule were articulated by Wigmore:
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> > … first, the possible unfairness of an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.
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> (Footnotes omitted)

(Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at ¶16.260, citing 6 Wigmore, *Evidence* (Chadbourn rev, 1976) §1873 at 672).

[34] Although it is open to the court to expand the scope of permissible reply, in this case, Canadiana did not seek leave under Rule 6-9(9) to raise new matters in its reply affidavits. In these circumstances, I see no error by the Chambers judge in striking parts of Canadiana's affidavits as improper reply because they raised new information.

[35] Second, Canadiana argues that the Chambers judge erred in striking one paragraph of Mr. Azar's affidavit sworn June 21, 2023, and one paragraph of Mr. Grant's affidavit sworn July 26, 2023, because they were irrelevant. In support of this submission, Canadiana cites *Kennett*

v Diarco Farms Ltd., 2018 SKQB 61 at paras 27–28, 21 CPC (8th) 353, for the proposition that a court should often exercise caution before concluding that information in an affidavit is irrelevant and striking it for that reason.

[36] Without commenting on whether the content of the two paragraphs in issue may be relevant to the substantive issues in the action, I have no hesitation in concluding they were properly struck as irrelevant to Canadiana's application for an interlocutory injunction.

[37] The subject paragraph of Mr. Azar's affidavit states that on April 13, 2010, Mr. Baiton's son incorporated a company called JR's Delicious Concessions Inc. This company is not a party and is not otherwise mentioned anywhere in the evidence.

[38] The subject paragraph of Mr. Grant's affidavit exhibits an email auto reply from Mr. Baiton's trustee in bankruptcy dated July 26, 2023, confirming that he is out of the office until July 31, 2023. This evidence appears to have been tendered to show why an affidavit from the trustee could not be obtained to exhibit an email Canadiana's counsel had received from the trustee. However, since this email was received into evidence by the Chambers judge, the fact the trustee was out of the office was irrelevant to the injunction application.

[39] Although these two issues were the focus of Canadiana's submissions, I have reviewed and carefully considered each of the evidentiary rulings under appeal. Having done so, I am not persuaded the Chambers judge erred in striking the parts of the affidavits identified in any of the 30 rulings under appeal. In my view, the Chambers judge understood and correctly applied the applicable rules of evidence, and I agree with the reasons given. I would dismiss the appeal from the evidentiary rulings in the fiat dated August 23, 2023.

IV. INJUNCTION DECISION

[40] I now turn to Canadiana's appeal of the fiat dated February 16, 2024, dismissing its application for an interlocutory injunction.

[41] Canadiana acknowledges the Chambers judge correctly identified the law governing the granting of an interlocutory injunction set out in *Mosaic Potash Esterhazy Limited Partnership v*

Potash Corporation of Saskatchewan Inc., 2011 SKCA 120, 341 DLR (4th) 407 [*Mosaic*]. The Chambers judge was required to consider: (i) whether there is a serious issue to be tried; (ii) whether Canadiana had demonstrated a material risk of irreparable harm if the injunction was not granted; and (iii) whether the balance of convenience favoured granting the injunction. See also: *Mann v Mann*, 2024 SKCA 24 at para 23.

[42] A decision to grant an interlocutory injunction is discretionary in nature and is entitled to deference. See: *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 22, [2017] 1 SCR 824; and *Turtle v Valvoline Canadian Franchising Corp.*, 2021 SKCA 76 at para 29. This Court will interfere with a decision of the Court of King's Bench involving the grant or refusal of an interlocutory injunction only if the decision "involves an error of principle, the disregard or misapprehension of a material fact, a failure to act judicially or a result that is so plainly wrong as to amount to an injustice" (*Farms and Families of North America Inc. (Farmers of North America) v AgraCity Crop & Nutrition Ltd.*, 2024 SKCA 22 at para 50, quoting *101280222 Saskatchewan Ltd. v Silver Star Salvage (1998) Ltd.*, 2019 SKCA 59 at para 14, [2019] 11 WWR 516).

[43] The Chambers judge concluded that Canadiana had demonstrated a serious issue to be tried, but not a material risk of irreparable harm. The Chambers judge also determined that the balance of convenience did not favour granting the injunction, and dismissed the application because two of the three requirements for injunctive relief set out in *Mosaic* had not been established.

[44] Canadiana raises six grounds of appeal in relation to the dismissal of its injunction application. In general terms, Canadiana argues the Chambers judge erred in the following ways:

(a) in failing to recognize the nature of the goodwill associated with Tumblers Pizza when considering whether there was a serious issue to be tried;

(b) in not finding that Mr. Baiton owed a fiduciary obligation to Canadiana when considering whether there was a serious issue to be tried;

(c) in finding Canadiana had not established a meaningful risk of irreparable harm if the injunction was not granted;

(d) in applying the balance of convenience test;

(e) in failing to consider granting an alternate form of injunction prohibiting the respondents from selling Tumblers frozen pizza to certain people Canadiana identified as their customers; and

(f) in granting costs of the application to strike and the application for an injunction to the respondents.

[45] For the reasons set out below, I am not persuaded that the Chambers judge erred in any of the ways alleged by Canadiana.

A. The goodwill associated with Tumblers Pizza

[46] The first ground of appeal is that the Chambers judge erred by failing to recognize the nature of the goodwill associated with Tumblers pizza. Canadiana says the Chambers judge did not appreciate that the goodwill in issue was that associated with the sale of Tumblers frozen pizza to retailers, not the sale of Tumblers fresh pizza in a restaurant. Canadiana contends that the Chambers judge did not understand the true nature of its business, which led her to overlook this distinction.

[47] In the context of the injunction application, the existence of goodwill was relevant to whether Canadiana had established a serious issue to be tried in relation to the tort of passing off. Since the existence of goodwill is an element of that tort, the Chambers judge had to examine goodwill to determine whether there was a serious issue to be tried in relation to that cause of action.

[48] Although the evidence before the court was conflicting, the Chambers judge concluded that there was a serious issue to be tried in relation to the tort of passing off. In reaching that conclusion, the Chambers judge found that whether any goodwill exists in the Tumblers Pizza business name and logo, and who owns that goodwill, were significant issues for trial:

> [69] A significant issue at trial in this case will not only be whether any goodwill exists in Tumblers Pizza but if there is goodwill, WHO owns that goodwill in the business name/logo in Tumblers Pizza. Canadiana is claiming that the goodwill in Tumblers Pizza belongs to Canadiana, not Baiton. Baiton is claiming that the goodwill in his business name/logo in Tumblers Pizza is all his – not Canadiana's.

[49] The Chambers judge therefore found that Canadiana had met the first element of the *Mosaic* test for an interlocutory injunction.

[50] Despite this finding, Canadiana argues the Chambers judge erred in failing to recognize that the goodwill in issue was associated with the sale of Tumblers frozen pizza, not Tumblers fresh pizza. This is an argument that the Chambers judge made a palpable and overriding error of fact in determining the nature of the goodwill in issue when analyzing whether Canadiana had established a serious issue to be tried in relation to the tort of passing off.

[51] Canadiana says the goodwill in issue was not that associated with Mr. Baiton's historic business of selling fresh pizza out of his Tumblers Pizza restaurant prior to 2016. It argues the Chambers judge failed to understand that Mr. Baiton was selling frozen pizza to grocery stores out of a strip mall in Regina both before and during his bankruptcy in 2016, while Canadiana was also selling frozen pizza to grocery stores throughout Saskatchewan and parts of Alberta. Canadiana says the relevant goodwill was therefore goodwill in selling frozen pizza under the Tumblers brand, not fresh pizza, and that the Chambers judge misapprehended or disregarded this material fact.

[52] I am not persuaded by this argument. Even if there is a distinction between goodwill in Tumblers frozen and fresh pizza, it was immaterial to the Chambers judge's finding that Canadiana had established a serious issue to be tried in relation to its passing off claim.

[53] In addition, there was no palpable and overriding error in characterizing the goodwill in issue as goodwill in the Tumblers Pizza brand for purposes of determining whether Canadiana's passing off claim raised a serious issue to be tried. This characterization was consistent with the way the goodwill in issue was framed in the statement of claim, and was supported by the evidence before the Chambers judge.

[54] In the statement of claim, Canadiana pleaded that the respondents "wrongfully used the Tumblers Pizza name and the logo created by the Plaintiff to sell product to the Plaintiff's existing and prospective Saskatchewan customers". Canadiana also pleaded that "the Defendants' wrongful actions have depreciated the Plaintiff's goodwill". The relevant goodwill identified in the

statement of claim was therefore goodwill in the Tumblers Pizza name and logo, and was not limited only to goodwill in the sale of frozen pizza under that name and logo.

[55] This conclusion is also supported by a cease and desist letter sent to the respondents by counsel for Canadiana dated March 28, 2023. This letter spoke of ownership of the Tumblers brand generally, and included statements that any use of the Tumblers name or logo "constitutes passing off, trademark infringement and other actionable tortious activities". It also included a demand that the respondents "cease and desist any use whatsoever of our client's TUMBLER'S brand including the word mark, logos and the like, or anything else confusingly similar".

[56] In these circumstances, I see no error in how the Chambers judge analyzed the nature of the goodwill in issue.

B. The fiduciary obligation issue

[57] The second ground of appeal is that the Chambers judge failed to find that Mr. Baiton owed a fiduciary obligation to Canadiana following the termination of his employment.

[58] Canadiana argues the Chambers judge was required to determine whether Mr. Baiton was a fiduciary because it was relevant to the alternate form of injunction it had sought prohibiting the respondents from selling frozen Tumblers pizza to certain customers identified in its application. Canadiana says that if the Chambers judge had found Mr. Baiton was a fiduciary, she would have granted the injunction because, as a fiduciary, he would have had a duty not to compete with Canadiana after his employment was terminated. I am not persuaded by this argument.

[59] In the statement of claim, Canadiana pleads that Mr. Baiton was a fiduciary, had access to Canadiana's customer list, and owed a duty not to solicit Canadiana's clients after leaving his employment. A breach of fiduciary duty is not expressly pleaded, and no relief is expressly sought in the statement of claim for breach of fiduciary duty. However, the Chambers judge was clearly aware of Canadiana's position that Mr. Baiton breached a fiduciary duty when he contacted its customers to sell Tumblers frozen pizza under what Canadiana argues is its business name and logo:

> [72] The tort of passing off is in fact a serious issue to be tried in this case. In addition, the serious issue of whether or not Baiton was ever in a fiduciary relationship with

> Canadiana as a result of his being employed with them from 2017 to 2022 will also need to be determined by the Court. …
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> [73] Again, the affidavit evidence is very contradictory on the file; Canadiana claiming that Baiton was more than a mere salesman to the company and, as such, Baiton was in breach of his fiduciary duties owed to them as his former employer when, for example, he contacted their customers to sell Tumblers Pizza, being their business name and logo. Baiton, on the other hand, claims to have never been in a fiduciary relationship with his former employer.
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> [74] In addition to these two major issues to be tried in this action, there are other serious issues to be tried. …
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> (Emphasis added)

[60] The Chambers judge found that the question of whether Mr. Baiton was a fiduciary who owed a duty not to compete with Canadiana was a serious issue to be tried. On the first element of the *Mosaic* test, the Chambers judge again found in favour of Canadiana.

[61] Notwithstanding this, Canadiana says the Chambers judge erred by not making a definitive finding that Mr. Baiton was in a fiduciary relationship with Canadiana and granting the alternate form of injunction it had sought based on that finding. In my view, the Chambers judge was not required to make a definitive finding on this point to decide the injunction application. The Chambers judge correctly framed and addressed the question of whether Mr. Baiton was a fiduciary under the first element of the *Mosaic* test, and did not err by not definitively finding that Mr. Baiton owed a fiduciary obligation to Canadiana. A final determination of whether Mr. Baiton was a fiduciary of Canadiana could not properly be made on the interlocutory application before the Chambers judge.

C. Irreparable harm

[62] The third ground of appeal is that the Chambers judge erred in finding Canadiana had not established a meaningful risk of irreparable harm if the injunction was not granted. This is an argument that the Chambers judge erred in applying the second element of the *Mosaic* test to the facts before her. Again, I am not persuaded by this argument.

[63] The Chambers judge correctly noted that Canadiana was required to establish a meaningful risk of irreparable harm as the second element of the *Mosaic* test. Irreparable harm in this context is “harm which either cannot be quantified in monetary terms or which cannot be cured, usually

because one party cannot collect damages from the other" (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (WL) at para 64 [*RJR-MacDonald*]). Put another way, a plaintiff seeking an interlocutory injunction is required to establish "a meaningful doubt as to the adequacy of damages if the injunction is not granted" (*Mosaic* at para 61).

[64] On the evidence before the Chambers judge, Canadiana's losses could be readily calculated, quantified in monetary terms, and compensated by an award of damages. The Chambers judge found Canadiana had provided detailed evidence of its potential damages, calculated down to the penny:

> [77] On the contradictory materials before the Court at this time, Canadiana has not established that it would suffer irreparable harm if an interim/interlocutory injunction is denied at this time.
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> [78] Within the June 21, 2023 affidavit of Pedram Azar at paragraphs 56 and 57, he made a detailed calculation of potential losses Canadiana has suffered as a result of Baiton's actions in lost sales to 32 customers, totalling $66,439.00 in 2022 and $475,915.63 as at June 2023.

[65] The Chambers judge concluded that Canadiana had not established irreparable harm because it had not shown it would suffer any harm "other than damages that can be calculated" (at para 80). Canadiana argues the Chambers judge erred in two ways in reaching this conclusion.

[66] First, Canadiana says the Chambers judge erred by failing to find it would suffer irreparable harm based on a possible loss of market share if the interlocutory injunction was not granted. I disagree.

[67] In some circumstances, courts have found that a potential loss of market share can constitute irreparable harm. See for example: *Fettes v Culligan Canada Ltd*., 2009 SKCA 144 at para 35, [2010] 6 WWR 420; *Mosaic* at para 93; *Knight Archer Insurance Ltd. v Dressler*, 2019 SKCA 34 at paras 47–50, [2019] 8 WWR 245 [*Knight Archer*]; and *Turtle v Valvoline Canadian Franchising Corp*., 2021 SKCA 46 at para 39.

[68] This possibility was recognized by the Chambers judge. In finding that Canadiana had not established irreparable harm, the Chambers judge stated she considered *Knight Archer*, which she described as providing guidance "in determining the existence of irreparable harm in certain cases such as loss of clients or market share notwithstanding an accountant being able to calculate with pen and paper an amount of loss" (at para 79). Without commenting on this description of *Knight*

Archer, it is sufficient to observe that the Chambers judge clearly considered, but ultimately rejected, the idea that Canadiana had established a loss of market share sufficient to constitute irreparable harm.

[69] This conclusion was supported by the evidence before the Chambers judge. Although there was evidence Canadiana was unprofitable, it provided no evidence it was insolvent, in danger of closing its business, or that it was likely to lose significant market share if the interlocutory injunction was not granted. Rather, the evidence was that Canadiana sold four other pizza lines aside from the U-Bake Tumblers Pizza brand that was in issue, and that Canadiana had not made any money from the Tumblers brand. In fact, this was one of Canadiana's reasons for dismissing Mr. Baiton as part of a planned restructuring of its operations. In these circumstances, I see no error in the Chambers judge failing to find irreparable harm based on a potential loss of market share.

[70] Second, Canadiana says the Chambers judge erred by failing to find irreparable harm because the respondents would likely be unable to pay a damages award if the interlocutory injunction was not granted. Again, I disagree with this submission.

[71] In some circumstances, irreparable harm can exist where a successful party will be unable to recover damages from the other party if an injunction is not granted. See for example: *RJR-MacDonald* at para 64; and *Target Brands, Inc. v Fairweather Ltd.*, 2011 FC 758 at para 23, 392 FTR 152.

[72] Canadiana argues the evidence of Mr. Baiton's assignment into bankruptcy in 2016 supported the conclusion that the respondents (presumably including The Real Tomato Pizza Company Ltd. and Dwight Stinson) likely had no ability to pay a damages award. Canadiana says that since the respondents had provided no evidence of their capacity to pay a damages award if Canadiana was ultimately successful in the action, the Chambers judge erred in applying the second element of the *Mosaic* test by not finding there was a meaningful risk of irreparable harm based on the respondents' likely inability to pay a damages award if Canadiana succeeded in the action.

[73] I am not persuaded by this argument. The Chambers judge expressly recognized Canadiana's concern that it may only receive a hollow judgment if it is successful after trial. Based on the evidence before her, it was open to the Chambers judge to conclude that the fact Mr. Baiton had made an assignment in bankruptcy several years earlier was not sufficient to establish a risk of irreparable harm based on an inability to recover damages from the defendants if the injunction was not granted and Canadiana was ultimately successful at trial. I see no error in the Chambers judge's conclusion that Canadiana had not established irreparable harm on this basis.

[74] In reaching this conclusion, I have considered Canadiana's submission that there was an evidentiary burden on the respondents to adduce evidence of their ability to pay a damages award. Canadiana provides no authority for this proposition. However, it is unnecessary to address this argument because the Chambers judge found that Canadiana's persuasive burden to establish irreparable harm as the second element of the *Mosaic* test had not been met, even in the absence of direct evidence from the respondents of their ability to pay a damages award.

[75] For these reasons, the Chambers judge did not err in finding Canadiana had not established a meaningful risk of irreparable harm.

D. The balance of convenience

[76] The fourth ground of appeal is that the Chambers judge made several errors in how she applied the balance of convenience test.

[77] The Chambers judge correctly identified the balance of convenience as the third element of the *Mosaic* test. She framed the question before her as which of the parties would suffer greater harm from the grant or refusal of an interlocutory injunction, noting that the focus of the balance of convenience inquiry is on the overall equities and justice of the case.

[78] The Chambers judge stated that if an injunction was granted, Mr. Baiton would "lose everything he has worked for since 1984", and that while Mr. Baiton only sold Tumblers pizza, "Canadiana sells five different kinds of frozen pizza, Tumblers frozen U-Bake pizza being only one of them" (at para 83). The Chambers judge found that the balance of convenience favoured denying the injunction.

[79] Canadiana argues the Chambers judge erred in assessing the balance of convenience in six ways. In general terms, Canadiana says the Chambers judge erred by:

(a) failing to recognize that Mr. Baiton did not have "clean hands";

(b) determining that Mr. Grant did something wrong in recording his meeting with Mr. Baiton on June 27, 2022;

(c) failing to determine whether Mr. Baiton's actions after 2017 constituted "estoppel by acquiescence" to Canadiana's continued use of the Tumblers name and logo;

(d) failing to recognize that Mr. Baiton sold Tumblers pizza to retail customers contrary to his obligations to Canadiana as his former employer and while he was still in bankruptcy;

(e) failing to recognize that the respondents used the Tumblers Pizza logo that had been created by Mr. Azar for Canadiana; and

(f) failing to recognize that customers continue to be confused because there are two entities selling frozen pizza under the Tumblers Pizza name.

[80] These arguments are imprecisely framed in the notice of appeal, and their relationship to the balance of convenience analysis was not, in all cases, clearly articulated or extensively developed. The final two arguments were not addressed in Canadiana's factum at all.

[81] However, most of the points raised by Canadiana may be understood as arguments that the Chambers judge disregarded, failed to consider, or misapprehended material evidence when applying the balance of convenience test. The third point may be understood as an argument that the Chambers judge erred in principle by failing to make a legal determination relevant to the balance of convenience analysis. As explained below, I am not persuaded the Chambers judge erred in any of these ways.

1. Failing to recognize that Mr. Baiton did not have "clean hands"

[82] First, Canadiana says the Chambers judge failed to recognize that Mr. Baiton did not have "clean hands" because he: (i) entered Canadiana's frozen food production facility for nefarious purposes during his period of working notice; and (ii) because he sold Tumblers frozen pizzas when he was an undischarged bankrupt. Canadiana argues these factors should have weighed against the respondents in the balance of convenience analysis. In my respectful view, this argument is premised on a mistaken reading of the Chambers judge's reasons.

[83] The Chambers judge cited the following authority for the proposition that an injunction is an equitable remedy that is subject to principles governing equitable orders, including the maxim that "one who seeks equity must have clean hands":

> [16] In *Pichler v Meadows*, 2010 ONSC 1863 at para 22 [*Pichler*], it reads:
>
> *The Equitable Doctrine of "Clean Hands"*
> [22] Murray J. said as follows at paragraph 17 of *Beidas* [(2008), 294 DLR (4th) 310]:
>
> > In *Sherwood Dash Inc. v. Woodview Products Inc.* [2005] O.J. No. 5298, P.M. Perell J. quoted the often-cited maxim that one who seeks equity must have clean hands. He said as follows in paragraphs 51-53:
> >
> > > An injunction is an equitable remedy and it is subject to the principles that govern the grant of equitable decrees and orders. One of those principles is the maxim that "one who comes to equity with clean hands."
> > >
> > > As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In *Argyll v. Argyll*, [1967] Ch. 302, Ungoed-Thomas, J. described the principle nicely at pp. 331-2, when he said: "A person coming to Equity for relief ... must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought."
> > >
> > > In City of Toronto v. Polai, (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), in describing the clean hands principle Schroeder, J.A. stated at pp. 699-70:
> > >
> > > > The misconduct charged against the plaintiff as ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint

> is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1669), 1 Chan. Cas. 154, 22 E.R. 739: "... that the iniquity must be done to the defendant himself."
>
> (Emphasis added)

[84] After commenting on the challenging state of the evidentiary record and reviewing this authority, the Chambers judge expressed concerns about whether any of the parties were coming to the Court with clean hands. The Chambers judge observed that both sides claimed misconduct by the other related to their business relationship. She stated this misconduct was relevant to the request for injunctive relief, and could invoke consideration of the "clean hands" maxim when deciding whether an injunction was appropriate.

[85] The Chambers judge went on to express the concern that Canadiana was also claiming general moral misconduct by Mr. Baiton related to his entrance into Canadiana's production facility on August 1, 2022, and his assignment into bankruptcy:

> [18] The Court does have concern, however, that Canadiana may also perhaps be claiming general moral misconduct on the part of Baiton; namely, he entering Canadiana's frozen food facility at 629 Park Street, Regina, Saskatchewan, in the early morning hours of August I, 2022, to get what he claims are his own spices, and Baiton assigning himself into bankruptcy in November 2016.

[86] After citing the statement that "Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court" (quoted in *Pilcher*, reproduced above), the Chambers judge stated that she would disregard this evidence if it was put forward for the purpose of showing Mr. Baiton's general wrongdoing:

> [20] While Canadiana may argue that the August 1, 2022 incident and Baiton's 2016 bankruptcy are not being put forward as evidence of general wrongdoing of a villain or wrongdoer but are relevant and material evidence that taints the appropriateness of the remedy being sought, the Court has a concern that Canadiana has, in fact, put this evidence forward on the basis of general evidence of wrongdoing of a villain or wrongdoer. If that, in fact, is the purpose of putting such evidence forward, such potential misconduct of general wrongdoing of a villain or wrongdoer has been totally disregarded by the Court in considering whether or not to grant this application for an interim/interlocutory injunction at this time.
>
> (Emphasis added)

[87] Canadiana argues this passage indicates that the Chambers judge disregarded the evidence of Mr. Baiton's entry into Canadiana's production facility and his assignment into bankruptcy. It says this evidence should not have been disregarded because it showed that Mr. Baiton did not have clean hands, which weighed in favour of granting the injunction in the balance of convenience analysis.

[88] As a matter of law, it is questionable whether the "clean hands" maxim applied to Mr. Baiton as the *respondent* to the injunction application as argued by Canadiana and as appears to have been implicitly suggested by the Chambers judge. See for example: *Bolianatz Estate v Simon*, 2006 SKCA 16 at para 49, 264 DLR (4th) 58 (concurring reasons of Richards J.A. (as he then was)), leave to appeal to SCC refused, 2006 CanLII 35599; and *Alie-Kirkpatrick v Saskatoon (City)*, 2019 SKCA 92 at para 70, [2020] 3 WWR 629. However, it is unnecessary to decide this issue because when paragraph 20 of the decision (quoted above) is read in context, it is apparent that the Chambers judge was simply stating that the evidence of Mr. Baiton's entry into Canadiana's production facility and his assignment into bankruptcy would not be used for an improper purpose. The Chambers judge did not say that this evidence was disregarded for all purposes; she said this evidence was disregarded if it was tendered to establish general misconduct by Mr. Baiton, which she had identified as an improper evidentiary purpose.

[89] Put another way, the Chambers judge was simply saying that if the evidence was tendered to show Mr. Baiton was a bad person (or, to quote the language cited by the Chambers judge, a "villain or wrongdoer"), then it would not be considered for that purpose in deciding the injunction application.

[90] It is also apparent that the evidence of Mr. Baiton's entry into Canadiana's production facility and his assignment into bankruptcy was not totally disregarded, but was considered by the Chambers judge. Both events were included in the Chambers judge's review of the timeline of events later in the decision, and the Chambers judge also noted that the legal consequences of Mr. Baiton's bankruptcy was an issue in the case. Reading the reasons as a whole, I am not persuaded the Chambers judge overlooked or disregarded this evidence. She simply made it clear that she would not use it for an improper purpose.

2. Recording the meeting between Mr. Grant and Mr. Baiton

[91] Second, Canadiana argues the Chambers judge erred in determining that Mr. Grant did something wrong by surreptitiously recording his meeting with Mr. Baiton on June 27, 2022, when Mr. Grant terminated Mr. Baiton's employment. Canadiana says this led the Chambers judge to conclude that Canadiana did not have "clean hands" and to deny the injunction for this reason. Again, in my respectful view, this argument is premised on a mistaken reading of the Chambers judge's reasons.

[92] The Chambers judge did not find that Mr. Grant had done anything wrong by recording the meeting. Rather, when reviewing the incidents of misconduct the parties had alleged against each other, she stated only that Mr. Baiton was *claiming* that Mr. Grant had surreptitiously recorded him when he was fired:

> [17] Misconduct has been claimed by both Canadiana and Baiton against the other. […] Examples of some of these alleged acts of misconduct on the part of Baiton include his working a side Tumblers Pizza business while working as a salesman for Canadiana, and in 2019 renewing Tumblers Pizza as a business name without advising his then employer, Canadiana. On the part of Canadiana, Baiton claims it registered in 2020 the business name Tumblers Food Manufacturing Saskatchewan without his knowledge and on June 27, 2020 [*sic*] surreptitiously recorded him when he was fired by John Grant.
>
> (Emphasis added)

[93] In this passage, the Chambers judge was reviewing the allegations of misconduct each side had made against the other. The Chambers judge did not find as a fact that Mr. Grant did something wrong by recording his meeting with Mr. Baiton on June 27, 2022; nor did she deny the injunction for this reason. As such, the Chambers judge did not misapprehend the evidence or reach an improper conclusion when assessing the balance of convenience in the manner alleged by Canadiana.

3. Estoppel by acquiescence

[94] Third, Canadiana argues the Chambers judge failed to determine whether Mr. Baiton's actions after 2017 constituted "estoppel by acquiescence" to Canadiana's continued use of the Tumblers name and logo.

[95] As I understand it, Canadiana says that Mr. Baiton acquiesced in allowing Canadiana to use the Tumblers Pizza name after 2017. Canadiana says that since Mr. Baiton was allowing

Canadiana to use the Tumblers Pizza name and logo anyway, he would suffer no harm if the injunction was granted and he was restrained from using the name and logo pending trial. Canadiana argues the Chambers judge should therefore have determined whether Mr. Baiton was estopped from claiming he would suffer harm if the injunction was granted, because if this finding had been made in Canadiana's favour, it would have supported granting the injunction in the balance of convenience analysis.

[96] Put another way, the argument is that if the Chambers judge had found that Mr. Baiton's actions after 2017 constituted "estoppel by acquiescence" to Canadiana's continued use of the Tumblers name and logo, she would have concluded that the balance of convenience favoured granting the injunction. Since the Chambers judge did not make this determination, Canadiana argues she erred in her assessment of the balance of convenience.

[97] The relative likelihood of harm to the parties was certainly a relevant consideration in assessing the balance of convenience: *Mosaic* at para 113(c). The Chambers judge was clearly alive to this, as she framed the question to be answered in the balance of convenience analysis, in part, as which of the parties would suffer greater harm from the grant or refusal of the interlocutory injunction.

[98] As part of assessing the relative risk of harm if Mr. Baiton was restrained from using the Tumblers Pizza name and logo pending trial, the Chambers judge understood that there was conflicting evidence about the basis upon which Canadiana had used the name and logo since 2017. Mr. Baiton's evidence was that he had not unconditionally acquiesced in allowing Canadiana to use the Tumblers Pizza name. When reviewing the background facts, the Chambers judge noted that Mr. Baiton admitted he wanted Canadiana to use the Tumblers Pizza name – but on the condition that he would become an equity owner of Canadiana at some point. When assessing the balance of convenience, the Chambers judge also noted Canadiana's evidence was different – that it had owned the Tumblers Pizza name and logo since 2017 when Mr. Baiton began working with Canadiana as a salesman.

[99] Given this conflicting evidence, and since both sides claimed ownership of the business name and logo, there was more than one inference that could be drawn from Canadiana's use of the business name and logo after 2017 when assessing the relative likelihood of harm in the balance

of convenience analysis. On Mr. Baiton's evidence, an injunction preventing him from using the Tumblers Pizza name and logo pending trial would cause him harm; on Canadiana's evidence, it would not.

[100] Ultimately, the Chambers judge found that whether Mr. Baiton's actions after 2017 constituted "estoppel by acquiescence" to Canadiana's continued use of the Tumblers name and logo was an issue to be decided at trial. In my view, the Chambers judge made no error in reaching this conclusion in the circumstances before her.

4. Sales to retail customers

[101] Canadiana's fourth argument is that the Chambers judge failed to recognize that Mr. Baiton sold Tumblers pizza to retail customers contrary to his obligations to Canadiana as his former employer and while he was still in bankruptcy.

[102] Canadiana says that Mr. Baiton was unable, as a matter of law, to enter into an oral agreement with Mr. Gibson to establish Canadiana while he was an undischarged bankrupt. Canadiana also says that Mr. Baiton sold Tumblers pizza after leaving his employment in violation of his obligations to it as his former employer. Canadiana argues the Chambers judge erred in assessing the balance of convenience because she failed to recognize these facts.

[103] Without commenting on the merit of Canadiana's argument about the effect of Mr. Baiton's bankruptcy, I am not persuaded the Chambers judge erred in assessing the balance of convenience in the manner alleged.

[104] When assessing whether there was a serious issue to be tried, the Chambers judge recognized Canadiana's assertion that Mr. Baiton had breached a fiduciary duty to Canadiana as his former employer by selling Tumblers pizza to Canadiana's customers. When reviewing the timeline of events, the Chambers judge also expressly noted that Mr. Baiton continued to sell Tumblers pizza notwithstanding his bankruptcy in 2016–2017. Later in the decision, the Chambers judge held that the legal consequences of Mr. Baiton's bankruptcy on his ownership of the business name and logo were issues to be tried in the action.

[105] Reading the reasons as a whole, I am satisfied that the Chambers judge was aware of the arguments being made by Canadiana about the effect of Mr. Baiton's bankruptcy on the original agreement to start the business and the implications of him selling Tumblers pizza after he left Canadiana's employment. The Chambers judge did not err in assessing the balance of convenience by failing to recognize these facts.

5. The Tumblers Pizza logo

[106] Canadiana's fifth argument is that the Chambers judge erred in assessing the balance of convenience because she failed to recognize that the respondents were using the Tumblers Pizza logo that was created for Canadiana by Mr. Azar.

[107] Although Canadiana does not address this argument in its factum, it is apparent that the Chambers judge understood this point. When reviewing the timeline of events, she noted that Mr. Azar made the disputed claim that he was responsible for creating a new logo for Tumblers Pizza. The Chambers judge also observed that the question of who created the logo, and ownership of it, were in issue between the parties. I see no error in the Chambers judge's analysis of the balance of convenience on this basis.

6. Customer confusion

[108] Canadiana's sixth argument is that the Chambers judge erred in assessing the balance of convenience by failing to recognize that customers continue to be confused by the existence of two entities selling frozen pizza under the Tumblers Pizza name.

[109] Again, Canadiana does not address this argument in its factum. However, I am not persuaded the Chambers judge erred by failing to recognize customers were confused. Canadiana's action was based on the tort of passing off, and the fact that both sides were selling pizza using the Tumblers name and logo was the central reason why Canadiana was seeking the interlocutory injunction. The Chambers judge also expressly noted that customers were confused about who should be contacted regarding Tumblers pizza orders. From this, I conclude that the Chambers judge considered customer confusion in her overall assessment of whether an interlocutory injunction was justified in the circumstances. In this context, Canadiana's argument reduces to an assertion that the Chambers judge should have weighed the relevant considerations differently.

This is not a basis for the Court to intervene in a case like this. There is no error in the Chambers judge's assessment of the balance of convenience on this basis.

7. Conclusion on balance of convenience

[110] For all the reasons set out above, the Chambers judge did not err in assessing the balance of convenience or concluding that the balance of convenience favoured not granting the interlocutory injunction sought by Canadiana.

E. Alternate form of injunction

[111] The fifth ground of appeal is that the Chambers judge erred in failing to consider granting an interlocutory injunction prohibiting the respondents from selling Tumblers frozen pizza to its customers. Canadiana says this would have allowed the respondents to continue selling frozen pizza – just not to Canadiana's existing customers that it had identified in the application. Canadiana argues the Chambers judge erred in failing to consider this alternative form of injunction.

[112] I am not persuaded the Chambers judge failed to consider the different possible terms for the injunction that were proposed by Canadiana. Early in her decision, the Chambers judge expressly reviewed each of the alternatives proposed by Canadiana, which included "an interim and/or interlocutory injunction prohibiting the respondents from selling any frozen pizzas to the customers identified in Appendix 'A'" to the amended notice of application. The Chambers judge was clearly aware that granting an injunction on these terms was an option and determined not to do so.

F. Costs

[113] Canadiana's sixth and final ground of appeal is that the Chambers judge erred in granting the respondents costs of the application to strike and the application for an injunction. As this argument is premised on Canadiana's appeal being successful and no error has been demonstrated, there is no basis for this ground of appeal.

V. CONCLUSION

[114] For the reasons set out above, I would dismiss Canadiana's appeal with one set of costs to the respondents fixed at $4,500.

"Kilback J.A."
Kilback J.A.

I concur. "Schwann J.A."
Schwann J.A.

I concur. "Tholl J.A."
Tholl J.A.