
Court of Appeal for Saskatchewan
Docket: CACV4425

Citation: 101011333 Saskatchewan Ltd. v
Vern's Pizza, 2025 SKCA 115
Date: 2025-11-10

Between:

101011333 Saskatchewan Ltd.

Appellant
(Defendant)

And

Vern's Pizza Company Limited

Respondent
(Plaintiff)

Before: Leurer C.J.S., Caldwell and Drennan J.J.A.

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Neal W. Caldwell
In concurrence: The Honourable Chief Justice Robert W. Leurer
The Honourable Justice Jillyne M. Drennan

On appeal from: 2024 SKKB 147, Saskatoon
Appeal heard: October 10, 2025

Counsel: Ryan Lepage and Marek Coutu for the Appellant
Richard Carlson for the Respondent

Caldwell J.A.

I. OVERVIEW

[1] 101011333 Saskatchewan Ltd. [Franchisee] seeks to overturn a Court of King’s Bench Chambers decision under which a judge granted summary judgment in favour of Vern’s Pizza Company Limited [Franchisor] and permanently enjoined the Franchisee from carrying on business as a *Vern’s Pizza* restaurant (*Vern’s Pizza Company Limited v 101011333 Saskatchewan Ltd.*, 2024 SKKB 147 [Judgment]).

[2] The Franchisee began carrying on business as a *Vern’s Pizza* restaurant in 2000 from two locations on the east side of Saskatoon, Saskatchewan [together, the Locations]. In 2016, the landlord of the Franchisee’s 8th Street location [8th Street Location] terminated the lease, leading to the closure of that restaurant [8th Street Restaurant]. The Franchisor took the position that the lease termination and restaurant closure had ended the term of the franchise agreement [Agreement]. The Franchisee disputed that its franchise had ended and continued to operate a *Vern’s Pizza* restaurant [Central Avenue Restaurant] from its location on Central Avenue in Saskatoon [Central Avenue Location]. This led the Franchisor to claim that the Franchisee was passing itself off as a *Vern’s Pizza* restaurant and to seek damages as well as declaratory and injunctive relief in remedy thereof.

[3] The parties’ dispute involves the provision in the Agreement that sets out the term of the franchise [Clause 3]. Due to a drafting omission, that clause is open to interpretation in two principal ways because it states that the term of the Agreement continues “for so long as the Franchisee shall have a good and valid Lease of the premises civically designated as [address of the premises to be used as the restaurant]” (emphasis added; bracketed drafting note in original).

[4] Neither party disputed that they should have replaced the drafting note in Clause 3 with the civic addresses of the Locations. They disagreed as to whether those addresses should have been joined by a conjunction (X and Y) or separated by a disjunction (X or Y). The Franchisor took the view that the loss of either lease would result in the termination of the term of the Agreement (X and Y). The Franchisee asserted that the term of the Agreement would continue notwithstanding the termination of either of its two leases (X or Y).

[5] Upon application by the Franchisor, the judge interpreted Clause 3 to mean that the termination of the lease at the 8th Street Location and the closure of the 8th Street Restaurant had ended the term of the Agreement. He therefore granted summary judgment in favour of the Franchisor and permanently enjoined the Franchisee from carrying on business as a *Vern's Pizza* restaurant from the Central Avenue Location. However, since the Franchisee had continued to pay royalties pursuant to the Agreement throughout the dispute, the judge found that there were no damages owing to the Franchisor.

[6] The Franchisee now asks this Court to find error in the judge's interpretation of Clause 3, to set aside the *Judgment*, and to grant summary judgment in its favour by declaring the Agreement in force. Its core arguments are that the judge misinterpreted the Agreement and misapplied the legal principles of the duty of honest performance of contract (see *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*]).

[7] Having considered the issues raised by the Franchisee, I conclude that the judge did not commit a palpable and overriding error when interpreting the Agreement. The Franchisee has failed to establish that the judge's interpretation of Clause 3 is palpably: (a) inconsistent with the ordinary and grammatical meaning of its wording, (b) not supported by the language of the Agreement as a whole and the known circumstances surrounding its execution, (c) uninformed by the reasonable expectations of the parties at the time of contract formation, and (d) a commercial absurdity. I also find no error in the judge's conclusion that the Franchisor did not breach the duty of honest performance.

[8] I would dismiss the appeal with costs awarded to the Franchisor.

II. ISSUES AND ANALYSIS

[9] The overarching question in this appeal is whether the judge erred when he held that Clause 3 required the Franchisee to maintain restaurant operations at both Locations. In this regard, the Franchisee asks this Court to find that the judge:

- (a) misinterpreted the Agreement;
- (b) misapplied the doctrines of implied term and *contra proferentem*; and

- (c) misunderstood and misapplied the legal principles of the duty of honest contractual performance.

A. The judge did not misinterpret the Agreement

1. Background to the interpretation issue

[10] The Franchisor carries on business as the franchisor of 12 *Vern's Pizza* restaurants, seven of which are in Saskatchewan. There were four restaurants in Saskatoon at the time the parties executed the Agreement.

[11] The Franchisee acquired the Restaurants on October 31, 2000, from the previous franchisee [Lincoln Food]. At that time, the Franchisee took an assignment of a separate lease for each Location. It also entered a new franchise agreement with the Franchisor covering both Restaurants and both Locations (i.e., the Agreement), whereas Lincoln Food had previously operated each Restaurant under a discrete franchise agreement.

[12] In November of 2008, even though it had previously held a long-term lease of the 8th Street Location, the Franchisee elected to continue to occupy that Location on a month-to-month basis. In 2013, the Franchisor advised the Franchisee that its landlord at the 8th Street Location had listed the property for sale. In March of 2015, after it had sold, the Franchisee's realtor offered to assist the Franchisee to obtain a long-term lease of the 8th Street Location from the new owner, but the Franchisee declined that offer.

[13] On July 29, 2016, the new landlord notified the Franchisee that it was terminating the lease of the 8th Street Location as of August 31, 2016. That same day, the Franchisee advised the Franchisor that it would be closing the 8th Street Restaurant effective August 21, 2016. Less than a week later, the Franchisor told the Franchisee that it needed two restaurants on the east side of Saskatoon. On or about August 24, 2016, the Franchisee vacated the 8th Street Location. The parties did not at that time discuss Clause 3 or termination of the Agreement.

[14] On October 19, 2016, the Franchisor notified the Franchisee that the end of the lease at the 8th Street Location had terminated the Agreement and that the closure of the 8th Street Restaurant had put the Franchisee in breach of its obligation to continuously operate a *Vern's Pizza* restaurant

from the two Locations, as required by clause 4 of that agreement [Clause 4]. The Franchisee took the position that the term of the Agreement had not ended and continued to operate the Central Avenue Restaurant.

[15] Although the Franchisor had drafted the Agreement and had apparently used the same form of agreement for all its franchises, and even though the Franchisee described it as a “standard form contract”, the Franchisee has not alleged that the judge’s interpretation of it is subject to the standard of correctness. The parties do not consider the Agreement to be a standard-form contract within the meaning given to that term in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*]. They allow that the judge correctly identified the applicable law. They moreover agree that, to succeed, the Franchisee must principally establish that the judge made a palpable and overriding error of fact or in the application of the law to the facts of this matter.

[16] Addressing its onus under this ground of appeal, the Franchisee alleged that the judge made four errors when interpreting the meaning of Clause 3, which states:

3. TERM

The term of this Franchise Agreement shall commence on the day of October, 2000, and shall continue from such date for so long as the Franchisee shall have a good and valid Lease of the premises civically designated as [address of the premises to be used as the restaurant], or in the event that the Franchisee shall purchase the subject premises, for so long as the Franchisee shall carry on the business of a licensed restaurant on the premises, and for so long as the Franchisee shall fully and faithfully perform all of the covenants, terms and conditions herein contained.

[17] In argument, the Franchisee said that the judge erred when determining whether the term of the Agreement had ended because his finding that Clause 3 required it to maintain restaurant operations at both Locations: (a) was not consistent with the ordinary and grammatical sense of the words of the Agreement; (b) was not supported by the circumstances surrounding contract formation; (c) failed to account for the reasonable expectations of the parties at the time of contract formation; and (d) gave rise to commercial absurdity.

[18] As noted, the parties agreed that they would have replaced the drafting note in Clause 3 with the civic addresses of both Locations. Given that consensus, this appeal does not call into question the judge’s analysis in the *Judgment* under the heading “Plain and ordinary meaning”:

[49] Even without completion, the instructions in the square brackets [in Clause 3] are a sufficient reference to the restaurant addresses in para. 1(a). It sets out the premises that are to be used as a “restaurant” within the franchise territory. These are the restaurant premises referenced in para. 3.

[50] I agree with the Franchisor that had anyone at the time of signing asked “which premises are to be used as the restaurant” for the purposes of para. 3 or otherwise, the question would have been obvious to them: specifically, the Central Ave Location and the 8th St Location. It is not logical to suggest that a different address would have been referenced and it is not logical that only one address or the other was to be used as the premises for the restaurant. Paragraph 1(a) makes it clear that both addresses were to be used as the restaurant.

[19] Rather, the parties’ dispute put the judge in the unusual analytical position of determining what word they would have inserted *between* the two addresses had they replaced the drafting note in Clause 3. Would they have used *and* to connect those addresses together, as opposed to *or* to show that each address was an exclusive alternative? For this reason, the judge’s task was not an exercise in determining the ordinary and grammatical meaning of the words of a contract; it was the ascertainment of the mutual intention of the parties for contractual wording they had inadvertently *left out*.

[20] This seemingly simple question (*and* versus *or*) required the judge to look beyond Clause 3 to the context and entire wording of the Agreement and the circumstances surrounding its formation to decide which word the parties would have put between the two addresses. Because the judge’s answer (*and*) profoundly affected the meaning of Clause 3 and, thereby, meant that the term of the Agreement had ended with the termination of the lease of the 8th Street Location and the closure of that Restaurant, any palpable error made when reaching that finding would override the result of the *Judgment*.

[21] As such, the Franchisee sought to establish, through the following arguments in this appeal, that the judge had palpably erred when he found that the parties would have inserted *and* between the two Restaurant addresses had they completed Clause 3.

2. The ordinary and grammatical sense of the words of the Agreement

[22] The Franchisee pointed out that the parties did nothing to adapt the Agreement to suit a franchise arrangement involving the operation of two restaurants from separate locations. It argued that the judge erred because, in its ordinary and grammatical sense, the language of the Agreement as a whole speaks only about a single restaurant and one leased location or “premises”. Therefore,

the Franchisee asked the judge to read Clause 3 as speaking independently about each Location and its respective Restaurant. To the Franchisee, this meant that the civic addresses of the two Locations had to be separated by *or*, such that the term of the Agreement would continue provided that it maintained its operations at one Location.

[23] In explaining its proposed interpretation and the alleged errors in the judge’s interpretation, the Franchisee said that the word *restaurant* in Clause 3 and elsewhere in the Agreement could not be interpreted to mean *restaurants* because, by its ordinary and grammatical meaning, the word *restaurant* is singular. It submitted the judge erred because he found that the word *restaurant* could mean two restaurants. The Franchisee specifically argued that the judge erred by drawing support for that supposed misinterpretation from the description of the franchise grant in clause 1(a) of the Agreement [Clause 1(a)].

[24] The Franchisee submitted that, under the ordinary and grammatical meaning of Clause 1(a), the Franchisor had granted it the right to operate “a fast food restaurant” (emphasis added) on the east side of Saskatoon from *either* of the Locations:

1. GRANT OF FRANCHISE AND PERMISSION TO USE TRADE NAME

(a) Grant of Franchise:

The Franchisee requests and the Franchisor hereby grants a franchise to operate a fast food restaurant identified as VERN’S PIZZA in the following area:

102 – 102 3337B – 8th Street East, Saskatoon, Saskatchewan, S7H 4K1,
706C Central Avenue, Saskatoon, Saskatchewan, S7N 2G9 and metes and
bounds all points east of the South Saskatchewan River.

(Emphasis added)

[25] On this basis, the Franchisee asserted that Clause 3 provides that the term of the Agreement would continue as long as it continued to lease “the premises” for “a licenced restaurant”, which may be interpreted either in the singular or as a disjunctive plural. In support, it called into question the judge’s reliance on clauses 5(a)(v) and 6(o) of the Agreement as indicating the contrary conjunctive proposition. For the purposes of this argument, it is sufficient to understand that each of those clauses refers to the parties’ rights and responsibilities with respect to “the premises” in a way that could arguably be plural and disjunctive and to thereby refer to a single or multiple leased premises. This interpretation is logical, the Franchisee submitted, because the Agreement grants franchise rights to two restaurants at separate locations leased independently from different

landlords. Continuing this argument, the Franchisee noted that, if it had acquired “the premises” for either Restaurant, Clause 3 provides that the term of the Agreement would continue so long as it carried on the business of “a licensed restaurant” from just that property.

[26] In response to these arguments regarding Clauses 1(a) and 3, the Franchisor noted that the description of the territory granted by the former clause is conjunctive, designating franchise area as the civic addresses for both Restaurants “and metes and bounds all points east of the South Saskatchewan River” (emphasis added). It furthermore directed the Court’s attention to the fact that Clause 3 states that the term of the Agreement would also end if the Franchisee failed to perform “all of the covenants, terms and conditions” of the Agreement. On that point, it drew in the language of Clause 4, which the Franchisor described as a “continuous operations clause”:

4. COMMENCEMENT OF OPERATIONS

The Franchisee having commenced operations from the location described in paragraph 1(a) shall during the remainder of term of the Franchise Agreement continuously operate its franchise using its best efforts, skills, diligence in the conduct thereof and regulating the franchise in accordance with the terms of this Agreement and any instructions or directives of the Franchisor which it may make or from time to time provide.

(Emphasis added)

[27] Under these submissions, since the Franchisee had failed to “continuously operate its franchise” from each of the Locations described in Clause 1(a), the Franchisor asserted that the term of the Agreement had been ended independent of the termination of the lease of the 8th Street Location by the cessation of operations at the 8th Street Restaurant. More to the point in this appeal, the Franchisor submitted that Clause 4 makes it plain and obvious that the parties had intended Clause 3 to refer conjunctively to the civic addresses of the two Locations, which is what the judge concluded (*Judgment* at para 51):

b. Paragraph 4 contains a continuous operation clause. It requires the Franchisee, having commenced operations from the location “described in paragraph 1(a)” “8th Street and Central,” to continuously operate its franchise;

c. Considering the reference in para. 4 to the two locations in para. 1(a) and mentioning the Franchisee commencing operations there, it is clear to me that the operation of both locations was important to the Franchisor and required by the Franchise Agreement;

[28] In an attempt to counter the judge’s emphasis on Clause 4, the Franchisee submitted that he could not use that provision to interpret Clause 3 as intending to refer conjunctively to both Locations. That is because, like the word *restaurant*, the ordinary and grammatical meaning of the words *franchise* and *location* in Clause 4 is singular. However, the Franchisee’s proposition does

not establish error in the judge's observation that *franchise* may be defined as "a right to sell a company's product in a particular area using the company's name", or his finding that "there is nothing in the agreement to suggest that there are two separate franchises for those two separate locations that are being created by this one agreement" (at para 55). As the Franchisor observed in this appeal, the franchise granted under the Agreement is the right "to operate a fast food restaurant identified as VERN'S PIZZA" from two distinct and geographically distant locations in an area further described as including "metes and bounds all points east of the South Saskatchewan River", which the parties agreed encompassed all areas of the City of Saskatoon east of that river.

[29] The Franchisee also remarked that the judge erroneously ignored the termination provisions in the Agreement. While the judge set out the detail of those provisions in the *Judgment* (at paras 11 and 12), I agree that he did not go on to address them in his analysis. However, the Franchisee provided no direct assistance in this appeal with how those provisions might indicate error in the judge's determination that the parties had intended that the term of the Agreement would end on the loss of the lease of either Location or the closure of either Restaurant.

[30] As the parties' arguments suggest, and as any English dictionary makes plain, most words in a contract, and the phrases in which contracting parties use them, and certainly those clauses of the Agreement referenced by the parties in this matter, may bear more than one ordinary and grammatical meaning. On the whole of it, I acknowledge that the judge could have found, based on the language of the Agreement, that the ordinary meaning of the words used in the Agreement supported the conclusion that the parties had intended to disjunctively separate the two addresses which they had failed to insert into Clause 3. However, on appeal it is not enough to point out that the judge could have read (or implied) a term differently. The appellant must cogently articulate why it was a palpable error for the judge to interpret the clause in the way that they did.

[31] In this appeal, I am not persuaded by the Franchisee's arguments that the judge erred when he found that the ordinary and grammatical sense of the words of the Agreement supported his finding that the parties had intended to join the addresses of the two Restaurants in Clause 3 with a conjunction.

3. The reasonable expectations of the parties and commercial absurdity

[32] When addressing the factual matrix in the *Judgment*, the judge referred in passing to what he considered were the reasonable expectations of the parties at the time of contract formation, and what he thought were the consequences to the Franchisee of termination of the Agreement:

[70] The Franchisee suggests that it would have been known to the parties that if the term required the holding of a lease for both locations, the Franchisee would be in a precarious legal and financial predicament. Specifically, upon termination of the Franchise Agreement, the Franchisee would automatically be in default of its obligations under the Central Ave Location lease and responsible for damages. As such, they suggest the parties would never have intended that the term of the Franchise Agreement would end if one of the leases was lost considering the known terms of the Central Ave Location lease.

[71] With respect to the Franchisee, there is no evidence to suggest that it is likely the Franchisor or the Franchisee would have considered this type of scenario at the time they executed the Franchise Agreement. Rather, the reasonable expectations of the parties would have been that both parties would fulfill the terms of the Franchise Agreement and their relationship would continue to be mutually beneficial into the future. It is clear at the time of execution, both leases had multiple years left on their terms with a corresponding right to renew for multiple years. This suggests to me both parties were of the view and expected that the status quo would be in place well into the future.

[72] Although the Franchisor's interpretation will have significant impact on the Franchisee, given the entire context of the Franchise Agreement, that is not something that sways my interpretation of the Franchise Agreement. It is merely a reflection of the risk faced when operating a business.

(Emphasis added)

[33] In this Court, the Franchisee revisited its submissions about the parties' expectations and about the consequences of termination of the Agreement to both parties. All told, it contended that the judge's interpretation of the Agreement as terminating on the loss of one of its leases or the closure of a Restaurant as being outside the reasonable expectations of commercial contracting parties and as leading to a commercially absurd result.

[34] One premise stated for these arguments is that the parties share an interest in maximising their revenue from the franchise granted to the Franchisee. With that being the assumed mutual objective, the Franchisee remarked that operating from two locations within the franchise territory is not the only way to achieve that goal. In the instant context (where one of two leases has ended), the Franchisee proposed that revenue would be maximised by continuing to operate from the Central Avenue Location, just as it has done. Therefore, it submitted that the judge had erred by failing to interpret the Agreement according to what was commercially reasonable in the circumstances.

[35] I must disagree. Given the expectation with which the Franchisee premised its argument, it would have been illogical for the judge to have interpreted Clause 3 otherwise than as he did. While the closure of the 8th Street Restaurant would have indisputably resulted in a reduction in the overhead costs of the Franchisee's operations, the accepted evidence overwhelmingly established that (and provided a cogent explanation for why) each party's revenue had also decreased after that closure.

[36] It is no answer for the Franchisee to say that the termination of the Agreement by reason of the loss of one lease "would result in the disorderly cessation of *all* Vern's operations for half of the City of Saskatoon". While an absence from the marketplace might occur for a snapshot in time, nothing would prevent the Franchisor from granting the franchise area to a new franchisee. The submission that the parties had reasonably expected that profits from the franchise would be maximised after closure of one Restaurant by focussing solely on profiting from the remaining Restaurant is, respectfully, a non sequitur in the context of a franchising arrangement.

[37] Nonetheless, the Franchisee submitted that "most rational commercial franchisors" would "prefer to continue operating out of the remaining location while figuring out what (if anything) to do about restoring a second location" instead of negotiating for what it described as the commercial absurdity of:

- (a) the disorderly cessation of all *Vern's Pizza* restaurant operations on the east side of Saskatoon, thereby ending all sales royalties from the franchise territory;
- (b) the loss of "viable and ongoing operations" at the Central Avenue Location;
- (c) liquidation or disposal of the equipment and inventory of the Central Avenue Restaurant;
- (d) the loss of the "experienced management" provided by the Franchisee's principals, "whose non-competes would be arbitrarily triggered and who would likely be in breach of the Central Avenue Lease";
- (e) the dismissal of the Franchisee's workforce; and
- (f) the diminishment of the goodwill associated with *Vern's Pizza* branding,

all of which would have been to the benefit of the Franchisor's competitors.

[38] In the narrative relevant to this issue, months after the closure of the 8th Street Restaurant (which, as noted previously, occurred on or about August 24, 2016), the parties met to discuss their relationship. The Franchisor said that continuing or reviving the Agreement was not an option. It nonetheless attempted to find alternative locations on the east side of Saskatoon for the Franchisee to open a second restaurant. In a later meeting on December 8, 2016, the Franchisor confirmed its view that the Agreement had ended but put forward alternative second-restaurant locations on the east side of Saskatoon for the Franchisee to consider, including by providing it with the MLS Real Estate Listings for six potential sites. It also encouraged the Franchisee to itself search for another location. The Franchisor followed this up with an email the next day, again providing alternative locations. Then, on December 27, 2016, the Franchisor wrote to the Franchisee, stating:

Re: The Vern's Pizza Company Ltd.

Expired Franchise Agreement Dated October 31 2000

This letter is further to our various conversations. Even though the term of your franchise agreement has ended, you have continued to carry on business and pass yourself off as a Vern's Pizza business. You are using our proprietary and intellectual property without right to do so. This includes but is not limited to unauthorized use of our name, trademarks, recipes and goodwill. If this matter is not resolved shortly to our satisfaction, The Vern's Pizza Company will commence legal action against you. In that action, we will seek payment from you of damages as well as all revenue earned by you in connection with your use of our name and property, commencing from and after the date your agreement ended plus legal costs. In the meantime, although it is no longer characterized as royalties, we will accept payment of the amount that previously would have been considered as royalties or other operations as a Vern's Pizza business. By paying this amount and our company receiving it, nothing will be construed as authorization or acceptance of your infringement of our rights nor shall it be construed as a renewal or extension of your expired franchise agreement.

[39] On January 20, 2017, the Franchisee responded:

... With respect, your allegation in that [December 27, 2016] letter to the effect that the term of the Franchise Agreement has ended, is incorrect and as such, our client will continue to honour its commitments under that Franchise Agreement as it always has. It is our expectation that the Franchisor will continue to honour its obligations thereunder as well.

[40] In keeping with the foregoing letters, the Franchisee continued operating a *Vern's Pizza* restaurant from the Central Avenue Location and to make payments to the Franchisor equal to 5% of the Franchisee's gross sales from the Central Avenue Restaurant. The litigation in this matter

commenced after all of this occurred. By October of 2022, the Franchisee had paid, and the Franchisor had accepted, \$247,051 in royalties related to sales at the Central Avenue Restaurant.

[41] The Franchisee’s argument about what a reasonable franchisor would have expected in this circumstance is obviously inconsistent with what the Franchisor actually expected would have happened after the closure of the 8th Street Restaurant. The evidence does not support the Franchisee’s contention that a reasonable franchisor would not have structured its franchise arrangements in a way that left a franchisee to bear the natural consequences of its unilateral decision to close one of only two restaurants that it had covenanted to operate. The argument ignores the corresponding covenants of franchisors in an exclusive arrangement not to allow other franchisees to operate within the franchised territory. In that regard, the Franchisor has economic and contractual interests in ensuring that the goodwill of the *Vern’s Pizza* branding and restaurant operations is continually represented by all of its franchisees in each of its franchised territories. For these reasons, in my view, it is axiomatic that franchisors would reasonably expect their franchisees to at least maintain their own market share in the territories over which the franchisees have exclusive rights.

[42] The commercial-absurdity argument is a straw man because the closure of the 8th Street Restaurant presumably resulted in most of the consequences the Franchisee now submits a reasonably acting franchisor would seek to avoid. That is, the closure undoubtedly caused the operation of that Restaurant to cease (whether that was disorderly adds nothing), ended all sales royalties from that Restaurant, involved the loss of a “viable and ongoing” operation, and presumably resulted in the liquidation or disposal of the equipment and inventory of that Restaurant, the dismissal of some of the Franchisee’s workforce, and the diminishment of the goodwill in the franchise territory associated with *Vern’s Pizza* branding. Which is to say the Franchisee’s argument is hollow because the itemised events are the reasonably expected commercial consequences of the closure of *either or both* of its Restaurants.

[43] Further, I fail to understand how the Franchisee’s submission about what a reasonable franchisor would expect supports a finding of palpable error in the judge’s interpretation of Clause 3. Put bluntly, nothing in the language of the Agreement or the factual matrix on record here suggests that the parties had mutually intended to absolve the Franchisee of the natural

consequences of failing to perform its obligations under the Agreement, whether those obligations are interpreted disjunctively or conjunctively with respect to the Locations and the Restaurants.

[44] In short, the Franchisee's arguments about the parties' reasonable expectations and commercial absurdity fail to establish palpable error in the judge's finding that the parties had intended to join the two addresses for the Restaurants in Clause 3 with a conjunction.

4. The factual circumstances surrounding contract formation

[45] Under this rubric, the Franchisee submitted that the judge failed to properly weigh and consider the factual record. It said the judge disregarded most of its evidence of the circumstances that surrounded the formation of the Agreement and made factual findings without any evidentiary basis for them. It asserted that each of these allegations is an error of law.

[46] It is not disputed that the parties had entered into the Agreement well before the individual who is the now directing mind of the Franchisor became its sole director and shareholder. Because his predecessor did not swear an affidavit, there was no direct evidence as to what was in the Franchisor's knowledge at the time of contract formation. The only evidence of this nature from the parties was subjective to the Franchisee, coming as it was from the affidavit of one of its two principals.

[47] Based on the evidence before him, the judge found that ten facts had been known or ought to have been known by the parties at the time of contract formation (*Judgment* at para 65):

1. Prior to the execution of the Franchise Agreement, Lincoln Food had operated two Vern's Pizza locations: the Central Ave Location and the 8th St Location, on the east side of Saskatoon;
2. The Franchisee purchased the assets of Lincoln Food and took assignment of the two leases that were in place for the restaurant locations;
3. The 8th St Location lease was for a term of five years and was to expire on November 30, 2005, and had an option to renew for a further four years;
4. The Central Ave Location lease was for a term of five years and two months, ending on January 15, 2003, and also had an option to renew for a further five years;
5. There was only one Franchise Agreement executed covering both locations instead of two agreements each pertaining to one location;
6. The Franchise Agreement was drafted by the lawyers for the Franchisor;
7. The Franchisee was represented by counsel during the relevant time in which the Franchise Agreement was executed;

8. The Franchisee purchased the assets from Lincoln Food which included equipment and tenant improvements at the two restaurant locations;

9. At the time of execution, there were two locations operating as a Vern's Pizza restaurant on the east side of the River and two operating on the west side of the River; and

10. A sizable portion of sales for Vern's Pizza is in-store sales of pizza by the slice, which differs from many competitors who do not offer pizza by the slice.

[48] After considering the import of these mutually known facts, the judge wrote:

[66] When I consider the surrounding circumstances to the execution of the Franchise Agreement, I conclude that the factual matrix weighs in favour of finding that the parties had intended that the Franchisee would be operating both locations during the term of the Franchise Agreement and, if they did not, the term would be at an end.

[67] Most telling is the fact that prior to execution of the Franchise Agreement, the parties knew there were two Vern's Pizza restaurant locations operating east of the River before the Franchise Agreement was executed. I have concluded it would have been the intent of the parties at the time of execution that the *status quo* would continue, namely two locations would operate in this territory into the future. The suggestion that the parties would have intended that at some point only one Vern's Pizza location would or could operate on the east side of Saskatoon is, in my view, contrary to what would have been known or contemplated by the parties at the time of execution based on the admissible evidence before me. I note there is no evidence before me as to the terms of the Franchise Agreement or agreements with Lincoln Food and the Franchisor. All that can be taken from the evidence is that there were two Vern's Pizza locations operating on the east side of Saskatoon.

[68] Furthermore, it strikes me that if the parties had intended to treat the two locations as separate franchises, they would have completed two separate agreements, each outlining their own territory. Alternatively, they would have specifically and clearly worded the Franchise Agreement to reflect that intention.

[69] Lastly, I note that the evidence from the Franchisee was that "a sizable portion of their sales comprised of in-store sales of single slices of pizza" [Shutyk Affidavit, para. 56]. Given the business model and the parties' past experience with the Vern's Pizza operations, I have concluded that as pizza by the slice is a sizable revenue stream, both the Franchisor and Franchisee would want to maximize this type of revenue by having two store fronts which service this type of business in the large territory that was granted.

[70] The Franchisee suggests that it would have been known to the parties that if the term required the holding of a lease for both locations, the Franchisee would be in a precarious legal and financial predicament. Specifically, upon termination of the Franchise Agreement, the Franchisee would automatically be in default of its obligations under the Central Ave Location lease and responsible for damages. As such, they suggest the parties would never have intended that the term of the Franchise Agreement would end if one of the leases was lost considering the known terms of the Central Ave Location lease.

[71] With respect to the Franchisee, there is no evidence to suggest that it is likely the Franchisor or the Franchisee would have considered this type of scenario at the time they executed the Franchise Agreement. Rather, the reasonable expectations of the parties would have been that both parties would fulfill the terms of the Franchise Agreement and their relationship would continue to be mutually beneficial into the future. It is clear at the time of execution, both leases had multiple years left on their terms with a corresponding

right to renew for multiple years. This suggests to me both parties were of the view and expected that the *status quo* would be in place well into the future.

[49] As to error, the Franchisee submitted that the judge “inexplicably did not consider” the Franchisee’s “objective and uncontested evidence concerning the operations of the two locations at the time of contract formation”.

[50] In that regard, the Franchisee’s principal swore that, at the time the parties had entered the Agreement, they had known that the Restaurants were “independent, standalone operations”. He averred that it was a well-established fact that the Restaurants “were, and always had been, separate, going concerns”, with separate employees, inventory, equipment and leases. He proffered that the Franchisee intended to continue operating from each Location independent of the other.

[51] The Franchisee stated that the judge misunderstood the point-in-time nature of its principal’s evidence, erroneously finding that it was about “subsequent conduct” (*Judgment* at para 61), and that the judge had overlooked that the Franchisee’s facts were not challenged by cross-examination or otherwise contradicted by the record. However, having reviewed the evidence in question and the *Judgment*, I am unable to reach the same conclusion.

[52] As an example of error, the Franchisee alleged that the judge had improperly relied on its 2017–2021 financial statements as evidence of what was in the parties’ knowledge at the time of contract formation. In this respect, the judge found that, when the Franchisee had reported the financial performance of its Restaurants, the “two locations were not separated” (*Judgment* at para 60). Given the dates of the financial years involved, the Franchisee described the statements as subsequent-conduct evidence, a category of evidence that the judge knew was not relevant to the interpretation of a contract.

[53] I agree in principle with the Franchisee’s observation that it is difficult to fathom how the judge could come to find that financial statements from 2017 (and after) was evidence of what the parties had known or intended in 2000. As the Franchisee pointed out, under *Sattva*, subsequent-conduct evidence does not assist with the interpretation of a contract and, therefore, does not properly form part of the matrix of relevant facts. I do not agree, however, that the judge used the evidence in that way.

[54] As I read the *Judgment*, the judge used financial statements in evidence as a tool when evaluating the credibility of the affidavit evidence that the Franchisee proffered to support its proposition that the Restaurants had always been distinctly separate operations. While the judge referred to the “financial statements filed as exhibits to affidavits in this application” as indicating that the Restaurants “were treated as one operation by the Franchisee”, that generic category of documents included financial statements for another corporation owned by the principals of the Franchisee that operated a *Vern’s Pizza* restaurant under a franchise on the west side of Saskatoon with “separate reported financial results” (*Judgment* at para 60). Notably, the Franchisee owned the assets associated with both Restaurants.

[55] At bottom, as I read the *Judgment*, the judge found that the sets of financial statements in evidence were “inconsistent with the notion that the locations were operated *as separate franchises*” (emphasis added). He did not make any findings of fact on the basis of that evidence. In practical effect, the judge simply found that the Franchisee had failed to establish on a balance of probabilities a fact that it had asserted was known to both parties at the time of contract formation. Given that the judge articulated a reasonable basis for rejecting that fact, he did not palpably err in doing so.

[56] Having rejected the asserted import of its evidence in this way, I do not accept the Franchisee’s further proposition that the judge made findings of fact about the *status quo* at the time of contract formation in the absence of any evidence or that he mischaracterised the *status quo* then in existence. Although quoted earlier in these reasons, on this point the judge wrote:

[67] Most telling is the fact that prior to execution of the Franchise Agreement, the parties knew there were two Vern’s Pizza restaurant locations operating east of the River before the Franchise Agreement was executed. I have concluded it would have been the intent of the parties at the time of execution that the *status quo* would continue, namely two locations would operate in this territory into the future. The suggestion that the parties would have intended that at some point only one Vern’s Pizza location would or could operate on the east side of Saskatoon is, in my view, contrary to what would have been known or contemplated by the parties at the time of execution based on the admissible evidence before me. I note there is no evidence before me as to the terms of the Franchise Agreement or agreements with Lincoln Food and the Franchisor. All that can be taken from the evidence is that there were two Vern’s Pizza locations operating on the east side of Saskatoon.

(Emphasis added)

[57] While I agree with the Franchisee's proposition that making a finding of fact on the basis of no evidence would be an error of law, that did not occur in this case. Respectfully, as I will explain, I conclude that the Franchisee set up straw man and self-defeating arguments to allege that that kind of error had occurred under the *Judgment*.

[58] First, the Franchisee submitted "there is simply no evidence whatsoever that the parties intended the status quo to continue *in perpetuity*" (emphasis added). While that may be a true statement, it does not disclose error because the judge did not make such an extreme finding of fact. Taking the evidence of the *status quo* at the time of contract formation at its highest, the judge found that "All that can be taken from the evidence is that there were two Vern's Pizza locations operating on the east side of Saskatoon" (*Judgment* at para 67; see also para 65). That fact, or that *status quo*, was fully established by undisputed evidence. As to what that fact meant, the judge concluded that the existence of the two Restaurants at the time of contract formation contradicted the suggestion that the parties had "intended that at some point only one Vern's Pizza location would or could operate on the east side of Saskatoon". On the other hand, the judge held that "it would have been the intent of the parties at the time of execution that the *status quo* would continue" (at para 67). Of course, he said nothing about it continuing *in perpetuity* because the issue before him was whether the parties intended that the loss of one or both leases would bring the franchise relationship to an end.

[59] Second, the Franchisee argued that, even if it had been the parties' intention to maintain the two Restaurants in perpetuity, the judge "mischaracterized the status quo" by ignoring the Franchisee's evidence that it had independently operated the Restaurants at the time of contract formation. This is merely a recitation of the Franchisee's allegation that the judge had made findings of fact untethered to the evidence, which I have rejected.

[60] With the Franchisee's third submission, also made under the presumed mutual intention to maintain the *status quo* of the two Restaurants in perpetuity, it said that the presumption does not address what the parties would have intended if it became no longer *possible* to maintain that *status quo*. I have difficulty following the thread of this argument. The Franchisee accepts that the *status quo* at the time of contract formation was two restaurants on the east side of Saskatoon. Whether the Restaurants were operated together or separately, Clauses 3 and 4 plainly establish that the

parties had intended the term of the Agreement to end if the *status quo*, whatever it was, ceased to be the *status quo*.

[61] In short, I am not persuaded by the Franchisor's submissions that the judge erred in fact or in law in his assessment of the circumstances surrounding contract formation.

5. Summary on the overarching question of contract interpretation

[62] This appeal is about the parties' dominant purpose for putting Clause 3 in the Agreement because that purpose dictates how, if they had done so, the parties would have completed that clause by replacing the drafting note with the civic addresses of the Restaurants. The Franchisee argued that the addresses would have been separated by a disjunctive *or*. The Franchisor said a conjunction, *and*, was intended.

[63] The judge found that the parties had intended that the Franchisor would grant the Franchisee exclusive rights to a territory, and that the Franchisee would be obligated to maintain the two Restaurant operations it had acquired within that territory. On that basis, by giving Clause 3 a conjunctive interpretation, he concluded that the term of the Agreement had been terminated by the ending of the lease of the 8th Street Location and the closure of the 8th Street Restaurant.

[64] There is no basis to interfere with the judge's determination that the term of the Agreement had ended in August of 2016. The Franchisee has not established that the judge's interpretation of Clause 3 as requiring it to maintain restaurant operations at both Locations is palpably: (a) inconsistent with the ordinary and grammatical sense of the words of the Agreement; (b) uninformed by the reasonable expectations of the parties at the time of contract formation; (c) unsupported by the circumstances surrounding contract formation; or (d) a commercial absurdity.

[65] Accordingly, I would dismiss the appeal taken by the Franchisee on the ground that the judge misinterpreted the Agreement.

B. The judge did not misapply the doctrines of implied term and *contra proferentem*

1. The law of implied term

[66] In its submission under the doctrine of implied term, the Franchisee took issue with the fact that the judge had turned down its invitation to give “business efficacy” to the Agreement by adding a term to Clause 3 that referred disjunctively to the two Locations or Restaurants (at para 74; see S.M. Waddams, *The Law of Contracts*, 8th ed (Toronto: Canada Law Book, 2005) at 350–51).

[67] This argument is a rehash of the Franchisee’s submission that a reasonable franchisor would, for commercial reasons, prefer not to terminate a franchise agreement in these circumstances. The Franchisee draws in the commercial-absurdity argument by suggesting that the natural consequences of it breaching the Agreement (regardless of how Clause 3 is interpreted) are not in keeping with business efficacy. But the argument has no better traction under the doctrine of implied term than it did under the submission respecting the parties’ reasonable expectations.

[68] In the Franchisee’s submission, to achieve business efficacy, the judge should have added the addresses missing from Clause 3 with a disjunctive *or* between them. The judge concluded, however, that it was not “necessary to imply such a term into this agreement” because he could “resolve the issue of contract interpretation in this case utilizing the text and context of the Franchise Agreement” (at para 76).

[69] While there are various descriptions of the doctrine, a court may add an implied term to a contract based on “the presumed intentions of the parties, where the term is necessary to give business efficacy to a contract” (*Double N Earthmovers Ltd. v Edmonton (City)*, 2007 SCC 3 at para 30, [2007] 1 SCR 116). In *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, [1999] 1 SCR 619, Iacobucci J. wrote:

[29] As mentioned, LeDain J. stated in [*Canadian Pacific Hotels Ltd. v Bank of Montreal*, [1987] 1 SCR 711,] that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the “officious bystander” test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of

obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

(Emphasis in original)

[70] When summarising the doctrine in Jason W. Neyers *et al*, *Fridman's The Law of Contract in Canada*, 7th ed (Toronto: Thomson Reuters, 2024) at 707–708, the authors state that, other than where it is statutorily mandated, there are “three possible bases for the implication of terms into a contract”, namely:

- (a) when it is clear from the contract and its surrounding circumstances that the parties “would have expressly included such a term had they foreseen its necessity or had its absence drawn to their attention”;
- (b) when a term is required “to give effect to what has been called ‘the reasonable expectations of the parties’”; and
- (c) when a term “is needed to give purpose and effect to the rest of the contract”.

[71] As noted, I find no palpable error in the judge’s conclusion as to how, had the absence of the civic addresses from Clause 3 been “drawn to their attention”, the parties would have replaced the drafting note in that clause. As part of his analysis, the judge had to deal with evidence of an intention that was contrary to what he found was the mutual intention of the parties at the time of contract formation. In that interpretation process, the judge resolved ambiguity in intent by considering the text of the whole of the Agreement, by assessing the reasonable expectations of the parties, and by reference to the factual circumstances known to have surrounded contract formation. I infer from the *Judgment* that, after assessing the purpose and meaning of Clause 3, the judge was not left with any concern that something more was required “to give purpose and effect to the rest of the contract”.

[72] More directly, the judge’s analysis of the intention of the parties undoubtedly dispelled any notion that a term, such as that put forward by the Franchisee, was necessary to give business

efficacy to the Agreement. Axiomatically, because the judge accepted the Franchisor's petition under the doctrine of implied term, he properly declined the Franchisee's invitation to employ that law to give Clause 3 a different interpretation.

2. The doctrine of *contra proferentem*

[73] The doctrine of *contra proferentem* comes into play in the interpretation of a contract in limited circumstances. Where the language of a contract is ambiguous, the interpreting court first seeks to resolve the ambiguity under the general rules of contract construction, e.g., by looking to its wording as a whole and the circumstances surrounding its formation. It is only where the contract remains ambiguous after this exercise that an interpreting court should turn to *contra proferentem* as the "rule of last resort" and construe the contract against its drafter (Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) at 103; and see *Reliance Petroleum Ltd. v Stevenson*, [1956] SCR 936 at 953 (per Cartwright J.); *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at para 80; and *Labrador-Island Link General Partner Corporation v Panalpina Inc.*, 2020 FCA 36 at para 40).

[74] Given that the judge was able to resolve ambiguity in Clause 3 through resort to the text of the Agreement as a whole, the reasonable expectations of the parties and the factual matrix, that resolution precluded the employment of the doctrine of *contra proferentem* in this case. As such, the judge did not err by failing to use the doctrine to construe the contract against the Franchisor.

3. Summary on alleged misapplication of the law of implied term and *contra proferentem*

[75] Overall, because the judge did not err when resolving contract ambiguity, he had the proper basis to decline to take the Franchisee up on its invitations to read the word *or* into Clause 3 for purposes of business efficacy or to interpret the Agreement as against the Franchisor as its drafter. There was no reason for the judge to employ either of these approaches to contract interpretation, and, therefore, he did not err by failing to do so.

[76] I would dismiss these grounds of appeal.

C. The judge did not misidentify or misapply the legal principles of the duty of honest contractual performance

[77] The Franchisee made two arguments in relation to the duty of good faith, i.e., the organising principle that contracting parties “generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily” (*Bhasin* at para 63).

[78] The first argument dealt with alleged legal error in what was required to establish that the Franchisor had intended to breach its duty of honest performance and with the sufficiency of the evidence tending to prove that the Franchisor had had that requisite intent. The second argument alleged that the judge erred in law by concluding that damages was the only remedy available at law for a breach of that duty.

[79] As background to these arguments, the duty of honest performance “requires the parties [to a contract] to be honest with each other in relation to the performance of their contractual obligations” (*Bhasin* at para 93(3)). The duty operates irrespective of the intentions of the parties, and its content varies with context. But what the organising principle requires is not without sharp edges. One such edge is that a contracting party has no general duty to subordinate their interest to that of another contracting party. Each party may rely on a minimum standard of honesty from the other contracting parties in their performance of the contract, thereby providing fair opportunity to all parties to protect their respective interests.

[80] Here, the Franchisee asserted that the judge erred by characterising the law as requiring it to establish that the Franchisor had acted with “intentional dishonest or malicious intent” (*Judgment* at para 94). It correctly observed that the law is “simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract” (*Bhasin* at para 73).

[81] Importantly, as I read the *Judgment*, the language the Franchisee excerpted from paragraph 94 was not a description of the requisite intent; it was how the judge had characterised the factual inference that the Franchisee itself had asked him to draw from evidence that the Franchisor had not told the Franchisee that the term of the Agreement had ended:

[94] First, despite the suggestion that I should infer an intentional dishonest or malicious intent by the Franchisor’s silence, especially in light of the long-standing

relationship, the Franchisor's knowledge of the month-to-month lease, the drafting deficiency, and the fact that the Central Ave location was still a going concern, I have concluded there is insufficient evidence for me to make that inference and I decline to do so.

(Emphasis added)

[82] Over the preceding 13 paragraphs of the *Judgment*, the judge had set out jurisprudence on the duty of honest performance and had accurately summarised its requirements.

[83] As to the argument about sufficiency of the evidence, the short answer is that the judge found that the evidence was insufficient to draw the inference that the Franchisor had, by relying on its contractual rights, somehow dishonestly performed obligations under the Agreement.

[84] As to the law, the judge correctly observed that the duty “does not impose a fiduciary duty or a duty of loyalty”, which led him to conclude that the Franchisor’s “mere silence of an intention to rely on its legal right under the Franchise Agreement is not enough to support a finding of a breach of any legal duty of honest performance currently recognized” (*Judgment* at para 95). Relying on case law, the judge went on to note that “there is no duty to advise another party of a pending expiration of a term of an agreement” (at para 96).

[85] As to the evidence, the judge remarked that there was:

- (a) “no evidence that the Franchisor actively misled the Franchisee to believe the term of the Franchise Agreement would not expire upon the closing of the 8th St Location” (at para 97);
- (b) “no evidence that the Franchisor was aware of the Franchisee’s mistaken interpretation of the Term Provision in the Franchise Agreement” (at para 99); and
- (c) “no evidence that the Franchisor – armed with [knowledge of the Franchisee’s interpretation] – simply remained silent, allowing the continuation of the mistake, which could have been a breach of honest performance” (at para 99).

[86] Speaking to points of fact that were established by the evidence, the judge stated that, “on the Franchisee’s own evidence, it appears that either the Franchisee never turned its mind to the

term of the Franchise Agreement or was simply mistaken about their rights under the Franchise Agreement” (at para 97). He also found that:

[100] It is clear to me that despite this long-standing relationship, both parties kept their cards close to their chest; the Franchisor remaining silent on the term of the Franchise Agreement, the Franchisee remaining silent as to their plans with the lease at the 8th St Location. Given the evidence and the circumstances of this case, I do not find a breach of the duty of honest performance by the Franchisor.

[87] In this appeal, the Franchisee asks this Court to take a different view than the judge of what the evidence as a whole established and to conclude that it had satisfied the legal requirements of a breach of the duty of honest performance by the Franchisor. But this Court’s role is to review the *Judgment* for error. In exercising our appellate function, I am not persuaded that the judge palpably erred when making his findings of fact or in his application of the duty of honest contractual performance to the facts as he found them.

[88] As there is no basis to interfere with the judge’s conclusion with respect to the duty of honest performance of contractual obligations in this matter, the ground of appeal asking whether damages is the only remedy legally available for a breach is moot. Nonetheless, I observe that the judge did not rule that damages was the only available remedy for a breach of the duty. He speculatively wrote without any analysis that, if he had found breach, he would have been “bound by comity to follow [*Suffern Lake Regional Park Authority v Danilak*, 2022 SKQB 118] on the issue of remedy available for breach of honest performance, given no contrary authority was provided” (*Judgment* at para 102). In this context, the judge’s statement is plainly conjecture, with no intent that it would have precedential value.

III. DISPOSITION

[89] Because the judge did not err in his interpretation of the Agreement or in the application of the governing legal principles to the facts as he found them, the appeal against the *Judgment* must be dismissed. I would award \$3,000 in fixed costs to the Franchisor.

“Caldwell J.A.”

Caldwell J.A.

I concur. “Leurer C.J.S.”

Leurer C.J.S.

I concur. “Drennan J.A.”

Drennan J.A.