

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
)  
2572966 Ontario Inc. and Sandra Lee ) J. Diacur, Counsel for the Plaintiffs  
Miller )  
)  
)  
Plaintiffs )  
)  
- and - )  
)  
)  
Chooch's Inc. and Darren Czarnogorski ) R. DiGregorio, Counsel for the  
) Defendants  
)  
)  
Defendants )  
)  
)  
) **HEARD:** April 15-17, 29, 30, 2026, and  
) May 1, 27, 28, 2026

**REASONS FOR JUDGMENT**

**The Honourable Justice M. Valente**

**Overview**

[1] The Plaintiff, 2572966 Ontario Inc. (“257”), is a former franchisee of the Defendant, Chooch’s Inc. (“Chooch’s”). Chooch’s franchises “Wings Up!” restaurants across Canada. Stacy Todd Miller (“Stacy”) was the principal of 257. The Defendant, Darren Czarnogorski

(“Darren”), was at all material times, and is today, the president of the Defendant franchisor, Chooch’s. The Plaintiff, Sandra Lee Miller (“Sandra”), is the mother of Stacy and has a registered security interest over the personal property of 257.

[2] The Plaintiffs seek a variety of relief in this action, including,

- i. damages in the amount of \$300,000 for breach of contract, misrepresentation and/or conversion as well as for breach of statutory and/or common law duties in the performance of the Franchise Agreement, dated July 10, 2017, between 257 and Chooch’s (the “Franchise Agreement”);
- ii. an order for disgorgement of all profits earned by the Defendants with respect to the former 257 Wings Up! franchise from May 16, 2019, to the date of the order of this court;
- iii. a declaration that 257 entered into and breached a binding agreement with the Defendants which required them to purchase the assets, equipment and chattels of the 257 former Wings Up! franchise, including the payment of all secured indebtedness against such personal property;
- iv. a declaration that the Voluntary Surrender and Mutual Release Agreement and Mutual Release and Indemnity Agreement, dated May 16, 2019 (collectively, the “Voluntary Surrender Agreement”), are void due to misrepresentation, unconscionability, duress and/or being in violation of

s.11 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c.3 (the “Act”), and in the alternative, a declaration that the Voluntary Surrender Agreement was breached by the Defendants; and

- v. aggravated, exemplary and/or punitive damages in the amount of \$250,000.

[3] Each of Stacy, Sandra and Darren testified during the course of an eight-day trial.

[4] Although the Defendants dispute the relief the Plaintiffs are seeking and many of their factual assertions, the parties, to their credit, have agreed to a number of facts which I have considered in my Judgment.

#### **Agreed Statement of Facts**

[5] The following facts are agreed:

- i. 257 was formerly the franchisee with respect to the Wings Up! restaurant located at 2399 Kingsway Drive, Kitchener, Ontario (the “Restaurant”).
- ii. Stacy operated the Restaurant.
- iii. On August 28, 2017, Chooch’s and 257 entered into the Franchise Agreement with respect to the Restaurant business.
- iv. The Franchise Agreement was for an initial term of ten years, with a right of renewal granted to 257 for two additional 5-year terms thereafter.

- v. At all material times, the Restaurant was already an existing, operating business.
- vi. Stacy had been an employee at the Kitchener location, under two previous franchisees, since 2003. The first franchisee was Shame Curran. Stacy was initially hired as a delivery driver by Mr. Curran. Stacy became a full-time kitchen employee shortly thereafter. He became the manager of the restaurant while Shane Curran was still the owner. Chris Rau became the franchisee in 2005. Stacy continued as the restaurant manager under the ownership of Chris Rau.
- vii. In or about 2016, Mr. Rau approached Chooch's about selling the Restaurant to Stacy. The proposed sale was contingent on the approval of Chooch's, but Chooch's was not involved in establishing the particulars of the sale, including the sale price or the purchaser's method of payment, either by cash or through financing.
- viii. Stacy created 257 to be the franchisee. Stacy personally guaranteed the franchisee's obligations pursuant to the Franchise Agreement.
- ix. 257 borrowed \$235,200.00 in order to purchase the Restaurant business from the previous franchisee. The purchase price was \$195,000.00. The total amount paid was \$203,437.21 as shown on the Statement of Adjustments.

- x. Two loan agreements were entered into by 257 with TD Bank: (a) loan #9263351-03, in the amount of \$195,000.00, bearing interest at a rate of \$3.95% per annum; and (b), loan #9263351-01, in the amount of \$40,200.00, bearing interest at the TD prime rate plus 1% per annum.
- xi. As part of the security for the loan agreements, 257 entered into a “Small Business Banking Security Agreement” with TD Bank, granting TD Bank a general security interest in all of 257’s assets and undertakings (the “GSA”).
- xii. Additionally, Sandra personally guaranteed the amounts advanced by TD Bank.
- xiii. Upon completing the purchase from the previous franchisee, 257 took operational control of the Restaurant pursuant to the Franchise Agreement.
- xiv. Pursuant to section 5.2 of the Franchise Agreement, it was open to Chooch’s and/or Darren to furnish “Operating Assistance”, including such continuing advice and guidance as they deemed reasonably necessary from time to time with respect to the planning, opening and operation of the Restaurant.
- xv. Between September 2018, and March 2019, the Defendants issued three Notices of Default to 257.

- xvi. On or about January 30, 2019, Darren called Stacy to a meeting at Chooch's head office.
- xvii. During the January 30, 2019 meeting, Stacy agreed to seek a prospective purchaser for the Restaurant business and signed a document entitled "SALE OF WINGSUP! KITCHENER" to that effect.
- xviii. Shortly after the January 30, 2019, meeting at Chooch's head office, Darren contacted Stacy to advise that he had located a prospective purchaser for the Restaurant business.
- xix. The proposed purchase price for the Restaurant was \$145,000.00, plus cost of inventory.
- xx. The prospective purchaser of the Restaurant business was Karik Patel, using a corporation.
- xxi. After learning of the GSA, Mr. Patel indicated that he could not purchase the Restaurant unless the TD Bank security interest over the Restaurant equipment was discharged.
- xxii. On May 16, or just after midnight on May 17, 2019, Darren and Stacy met at the Restaurant and signed the Voluntary Surrender Agreement.

- xxiii. Chooch's and/or Darren paid \$5,000.00 to 257 on the night of May 16-17, 2019, and made two subsequent payments of \$2,000.00 and \$3,000.00, respectively.
- xxiv. To date, Chooch's and/or Darren have paid a total of \$10,000.00 to 257.
- xxv. On May 16, 2019, Chooch's and/or Darren took over operational control of the Restaurant.
- xxvi. Chooch's and/or Darren sold the Restaurant to Mr. Patel's corporation, which continues to operate it, for \$145,000.00.
- xxvii. Chooch's and/or Darren received the net proceeds of the sale of the Restaurant to Mr. Patel's corporation.
- xxviii. Sandra entered into an assignment agreement with respect to the GSA, involving the payment of the sum of \$235, 231.84 to TD Bank to purchase 257's outstanding debt. As such, Sandra currently holds the GSA against the assets and undertaking of 257.

### **Additional Background Evidence**

[6] In addition to the agreed facts, I have considered the following evidence as relevant background to the issues to be determined. The following evidence, although not admitted, is unchallenged:

- i. After completing grade 11, Stacy worked various jobs until becoming a delivery driver for the Restaurant in 2003.
- ii. At some point after 257 became the franchisee of the Restaurant, Stacy had a romantic relationship with the Restaurant's manager Miranda Martin ("Miranda"). Stacy's relationship with Miranda caused him marital difficulties.
- iii. Darren has a bachelor of business administration degree and is certified as a franchise executive by the International Franchise Association.
- iv. As the Wings Up! Franchisor, Chooch's has some 38 chicken wing franchises across Canada, with the majority of its restaurants centered in Ontario. Chooch's does not operate corporate restaurants today in the ordinary course.
- v. Chooch's earns its income primarily in four different ways. They are from:
  - a. royalties equal to 4.5% of the franchisee's weekly sales;
  - b. supplier rebates;
  - c. product sales to franchisees; and
  - d. a franchise fee of \$34,500 for any new franchise.

- vi. Chooch's expectation is that its franchisees will have a working capital of between \$20,000 to \$30,000 at all times and that its franchisees will earn a profit of 12% to 20% on sales in keeping with industry standards, failing which the likelihood is that the franchisee's expenses are too high and/or sales revenue is being diverted.
- vii. Unannounced audits of the franchisees operations are one way in which Chooch's ensures that its franchisees are achieving a uniform exemplary standard.
- viii. Stacy understood that the franchisor's audits were designed to ensure compliance with its standards. As the Restaurant manager, Stacy was aware of Chooch's expectations and later as the operator of the Restaurant, he appreciated his greater responsibility to meet Chooch's standards.
- ix. After May 16, 2019, Chooch's operated the Restaurant as a corporate store for a brief period of time following which Mr. Patel, through his corporation, operated the Restaurant on the understanding that the purchase price for the Restaurant was to be paid in escrow pending the discharge of any applicable liens against 257's chattels or the purchase of new chattels by the franchisor.

- x. The purchase was completed in July or August 2019, by Mr. Patel's corporation. Any profits generated by the Restaurant during this interim period were retained by Mr. Patel or his corporation.
- xi. In the event that Chooch's is found to be liable in damages to the Plaintiffs, Chooch's claims a set off in the amount of \$126,512 in expenses that it incurred as a result of the sale to Mr. Patel's corporation as well as \$10,121.79 in royalties and product costs due from 257. 257 disputes the validity of these set off expenses.

### **Position of the Parties**

[7] The Plaintiffs advance a number of submissions in support of the relief they seek.

[8] The Plaintiffs submit that Chooch's failed to provide Stacy with the training mandated by the Franchise Agreement. Because Chooch's breached the Franchise Agreement, it was never in a position to enforce or terminate the Franchise Agreement. Upon the wrongful termination of the Franchise Agreement, the Plaintiffs suffered damages resulting from the loss of the Restaurant franchise.

[9] Secondly, the Plaintiffs submit that the Defendants pressured Stacy to sell the Restaurant using notices of default and threats of termination of the Franchise Agreement if he refused to do so. The notices of default and threats were false to the extent that Chooch's was in no position to terminate the Franchise Agreement. Nonetheless,

Chooch's pressure campaign constituted a breach of its statutory duty of fair dealing for which it is liable to the Plaintiffs for both compensatory and punitive/exemplary damages.

[10] The Plaintiffs further submit that in order to sell the Restaurant franchise to Mr. Patel's corporation, Chooch's and Darren, a franchisor's associate, as defined by the Act, agreed pursuant to the terms of the Voluntary Surrender Agreement, to buy the Restaurant franchise, including "all assets, equipment and chattels" which the Defendants knew required payment of all liens registered pursuant to the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*"). The "assets" include the Restaurant franchise's local goodwill. However, instead of fulfilling their agreement to purchase the franchise, the Defendants paid only \$10,000 to Stacy, took operational control of the franchise, and ultimately sold the franchise, keeping the proceeds for themselves in breach of both their agreement to purchase the Restaurant and their statutory duty of fair dealing.

[11] In the alternative, in the event that the Voluntary Surrender Agreement does not accurately reflect the parties' oral agreement requiring the Defendants to discharge the *PPSA* liens, the Voluntary Surrender Agreement is void on several grounds, including the Defendants' negligent misrepresentation, unconscionability, duress and statutory prohibition, and the parties' oral agreement should be given effect and the Plaintiffs compensated in damages.

[12] In the further alternative, it is the Plaintiffs' submission that by taking operational control of the Restaurant franchise and selling it to Mr. Patel's corporation without legal

authority, the Defendants committed the tort of conversion for which they are liable to in damages.

[13] Finally, the Plaintiff's submit that because Sandra took an assignment of the GSA, she is entitled to recover the value of the security in the amount of the outstanding indebtedness to her pursuant to the provisions of the *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10, s.2 (the "*Mercantile Act*").

[14] For their part, the Defendants submit that the parties agreed to amend the training programme as provided in the Franchise Agreement, and in any event, the Franchise Agreement's training provisions are unrelated to the failure of 257 and Stacy, as its principal, to operate the Restaurant franchise pursuant to the terms of the Franchise Agreement.

[15] The Defendants submit that 257's and Stacy's breaches of the Franchise Agreement justify the termination of the Franchise Agreement.

[16] It is also the position of the Defendants that neither the Voluntary Surrender Agreement nor any verbal agreement between Stacy and Darren require the Defendants to liquidate 257's TD Bank debt in its entirety as a condition to Chooch's purchase of the Restaurant's "assets, equipment and chattels" to permit it to sell 257's Restaurant franchise to Mr. Patel's corporation. Rather, Stacy and Darren agreed that the Defendants would purchase 257's hard assets (i.e. its equipment, furniture, fixtures and other assets located at the Restaurant) and liquidate the 257 bank debt sufficient only to discharge the

bank's interest registered against these tangible assets because it was those assets that were to be transferred by Chooch's to Mr. Patel's corporation.

[17] Finally, it is the Defendants' submission that should this court find that there was never a meeting of the minds between Stacy and Darren as to which 257 assets were to be purchased, and what corresponding bank debt was to be paid, the Voluntary Surrender Agreement is unenforceable, in which event, the termination provisions of the Franchise Agreement apply in light of the Plaintiffs' breach of its terms.

**Issues to be Determined**

[18] Given the parties' respective submissions, I have concluded that the following issues are to be determined by this court:

- A. Did Chooch's breach the Franchise Agreement by failing to provide Stacy with the training contemplated by the Franchise Agreement?
- B. Did 257, through Stacy, its principal, breach the Franchise Agreement?
- C. If 257 breached the Franchise Agreement, was its breach attributable to any lack of training provided to Stacy as otherwise required by the Franchise Agreement?
- D. Does the Voluntary Surrender Agreement or an oral agreement between Stacy and Darren require the Defendants to liquidate the entirety of the TD Bank indebtedness secured against 257's personal property or only that

indebtedness secured against 257's equipment, furniture, fixtures and other assets located at the Restaurant premises?

- E. In the event that the Voluntary Surrender Agreement does not accurately reflect the oral agreement of Stacy and Darren requiring that the TD Bank debt be paid in its entirety, should the Voluntary Surrender Agreement be declared void on the grounds submitted by the Plaintiffs in favour of the parties' oral agreement?
- F. Did Chooch's, as franchisor, commit the tort of conversion in taking operational control of the Restaurant and selling it to Mr. Patel's corporation?
- G. Is Sandra entitled to recover from the Defendants 257's TD Bank debt of \$235,231.84 plus interest assigned to her?

**Did Chooch's Breach the Franchise Agreement?**

[19] Section 5.1 of the Franchise Agreement stipulates prior to the opening of the Restaurant, Chooch's shall provide to 257 and one other key employee a training course of at least two weeks or of such duration and at such location as Chooch's may deem necessary, "covering all phases of the System". The preamble of the Franchise Agreement defines "System" as a marketing plan and system for the distribution, marketing and sale of chicken wings and related food products.

[20] Section 5.2 of the Franchise Agreement stipulates that Chooch's may provide 257 with continuing advice and guidance as it deems reasonably necessary with respect to such issues as the selection and purchasing of Products, as defined by the Franchise Agreement, and the establishment and maintenance of administrative, bookkeeping, accounting, inventory control and general operating procedures.

[21] Stacy's evidence-in-chief is that when he was being considered to assume ownership of the Restaurant from Chris Rau, "head office" advised him that he needed two to three weeks of in-store training at the Milton Wings Up! franchise or some other franchise and they agreed to set up the training. Stacy also testified that there was never a discussion that he would not attend another franchise for two weeks of training. Notwithstanding Chooch's promises of in-store training, Stacy received none.

[22] Instead, Stacy was told to complete an on-line training programme which he did successfully complete. The problem with the on-line training, however, was that it was a repeat of what Stacy already knew as a long-time employee of the Restaurant franchise. As a result, the training "did not impact [his] ability to operate the Restaurant as a franchisee".

[23] In particular, the on-line training failed to educate him in the two specific areas of inventory control and purchasing and accounting. As the Restaurant's store manager, he had acquired no experience in either area. Specifically, with respect to accounting training, Stacy testified that he was offered no assistance with QuickBooks, Chooch's

preferred accounting software, and in the end, his lack of accounting expertise was “a major portion” of his problems in operating the Restaurant.

[24] Although he asked for QuickBooks training some ten times, he received none. On one of those occasions when Stacy sought help from “James”, Chooch’s comptroller, James advised Stacy to watch a YouTube tutorial video if he wanted to learn how to use QuickBooks. James’ response, together with head office’s general lack of response to Stacy’s requests for help caused him to conclude that Chooch’s was telling him that he should know how to use QuickBooks.

[25] Stacy conceded, however, that although inventory control was not his job as the Restaurant’s store manager, he “could figure it out”. Additionally, although he never did master the QuickBooks accounting software, Stacy testified that he was able to complete his bookkeeping tasks by using the same self-explanatory accounting spreadsheets developed and used by former franchise owner, Mr. Rau.

[26] Darren testified that whereas two weeks of in-store training for new franchisees was the standard in 2017, today, new franchisees typically receive in-store training of six weeks “because more training is better”. The focus of today’s in-store training is, however, no different than what it was when Stacy assumed ownership of the Restaurant; it continues to emphasize product preparation and its required muscle memory along with operational issues in running a franchise.

[27] Accounting training, and specifically QuickBooks training, has never been part of the in-store education for new franchisees. It is Darren's evidence that Chooch's has never provided accounting training because it does not have the ability to do so. What the franchisor does do, however, is to advise its franchisees of the financial reporting format it expects; to suggest that its franchisees hire a bookkeeper if they are unable to provide financial reporting in the required format; and to encourage its franchisees or their bookkeepers to use the QuickBooks accounting software because the QuickBooks software integrates with Chooch's accounting system. According to Darren, this is the limited scope of the bookkeeping and accounting consultation and advice contemplated by section 5.2 of the Franchise Agreement.

[28] It is also Darren's evidence that the purchase of inventory was not in 2017, and is not today, a part of the franchisor's in-store training programme. Rather, it is addressed in the franchisee's standard procedure manual (the "Manual"), which all new franchisees are expected to read and follow. Stacy was no exception. It is Darren's experience the inventory purchases have never been a problem for Chooch's franchisees if they follow the System as explained in the Manual due in part to the simplicity of the end product's ingredients. According to Darren, to avoid any product issues, the franchisor need only to be able to count.

[29] Contrary to Stacy's testimony, Darren testified that as the Restaurant's manager, Stacy ordered product generally without any problem and "only once and awhile there would be a hiccup".

[30] Darren also testified that when he first met Stacy at his office to discuss his acquiring ownership of the Restaurant franchise, two weeks of in-store training was offered to Stacy, but Stacy rejected the offer. It was Stacy's position, according to Darren, that he knew "the store like the back of his hand", he understood what was required and was eager to begin operating his own business. No immediate decision was made because Darren advised Stacy to think about taking a pass on the in-store training. Stacy ultimately decided, however, that he would learn nothing from the training programme after working for some fourteen years in the business.

[31] Darren testified that he viewed Stacy's decision as reasonable given his effective management of the Restaurant for several years under two previous franchisees. Darren agreed that the in-store training would not be a good use of Stacy's time given that he already had what the in-store training programme might offer him: namely, the necessary muscle memory to make the Restaurant's end product and the required knowledge to address the store's operational issues. Notwithstanding that Darren agreed with Stacy to forego in-store training, Darren advised Stacy that he expected him to read and follow the Manual and complete the on-line training in order to help ensure his success as a new franchisee.

[32] I find on the balance of probabilities that Stacy waived, with Darren's agreement, the two week in-store training contemplated by section 5.1 of the Franchise Agreement. I prefer Darren's evidence over that of Stacy's because I have reason to question Stacy's credibility on the issue of in-store training.

[33] First, however, I find that Darren testified in a straightforward, matter of fact manner whose version of the relevant events on this issue remained intact at the conclusion of his cross-examination. I also accept Darren's evidence that new franchisee training is important to him and that he would not have agreed to waive that training at Stacy's initiative were he not confident that Stacy would succeed without it. I also find Darren's evidence that accounting training not to be a part of the in-store education programme as a matter of common sense given the nature of the business and that it is otherwise consistent with section 5.1 of the Franchise Agreement. It states that immediately preceding or following the opening of the Restaurant, a person experienced in the franchisor's marketing plan and system for the distribution, marketing and sale of chicken wings and related food products will be available to assist the franchisee at the discretion of the franchisor; there is no mention of any accounting assistance being offered.

[34] On the other hand, my difficulty with Stacy's credibility on the issue of in-store training is founded in several areas of his testimony.

[35] First, Stacy testified that he did not pursue the franchisor's training because he had "a lot on his mind" and otherwise was too embarrassed to reach out for the franchisor's assistance. However, owning the franchise was a very important step in Stacy's life. He saw it as a means of making something of his life and those around him, proud of him. He not only wanted to succeed for himself and for his family, but also for his parents who had guaranteed the bank debt to purchase the Restaurant. Within the

context of these circumstances, I cannot accept Stacy's reasons for not demanding the training he says he was not only promised but desperately needed by him.

[36] Second, while on the one hand Stacy testified that he did not pursue the promised training for the reasons as I have explained them, on the other hand, he testified that he asked for QuickBooks training some ten times. The inconsistency in his evidence is palpable and unexplained.

[37] Moreover, of his many calls for accounting training, Stacy's evidence is devoid of any details of his requests for help other than his one call with Chooch's comptroller, James. One would have thought some particulars of this important issue would have resonated with Stacy.

[38] When faced with the fact that he delivered no written requests for the promised training, Stacy explained that he does not write emails because he is "old fashioned" and prefers to talk on the phone about issues. Stacy's "old fashion" manner of conducting business is, however, contradicted by an email exchange between he and regional manager, Katharine Wait, in January 2018. At that time Stacy reached out to Ms. Wait for assistance with respect to a problem employee, a matter with which he had no experience.

[39] It also does not escape me that in Stacy's examination-in-chief, he referred to unspecified persons at the franchisor's head office having promised to provide him in-store training, whereas in cross-examination, Stacy was adamant that the training was

specifically promised by Darren. I conclude that Stacy's testimony evolved to fulfill his version of the truth.

[40] Finally, to his credit on cross-examination, Stacy conceded that he was ultimately able to maintain the Restaurant's financial records by using the accounting system provided to him by Mr. Rau. He nonetheless insisted that he still needed general training on how to run a business. Earlier in his testimony, however, Stacy stated the help that he needed was in the unique and specific areas of inventory purchasing and accounting. Again, I find that Stacy is prone to adapt his evidence on the issue of in-store training to meet the needs of the situation in which he finds himself.

[41] For all of these reasons, I prefer the evidence of Darren and find that the Defendants did not breach the Franchise Agreement by not providing in-store training to Stacy.

**Did 257, through its Principal Stacy, breach the Franchise Agreement?**

[42] Pursuant to article 8.1 of the Franchise Agreement, 257 agreed to operate the Restaurant "in a manner and to quality consistent with the System...[and]...in full conformity with [the Franchise Agreement], System methods, standards and specifications as set out in the Manual". Specifically, 257 agreed in part to:

- a) operate the Restaurant "with due diligence and efficiency in an up-to-date, quality and reputable manner...";
- b) "ensure that at all times prompt, courteous, and efficient service is accorded to its customers"; and

- c) “maintain the condition and appearance of the [Restaurant] and the equipment used therein consistent with the then image...of the Franchisor’s franchised restaurant businesses as an attractive, modern, clean, convenient and efficiently operated restaurant business offering high quality products and service” (collectively, the “Agreed Terms”).

[43] Section 17.1 of the Franchise Agreement further provides that Chooch’s has the right to terminate the Franchise Agreement upon the happening of any one of events, including:

- a) If 257 breaches any of the terms or conditions of the Franchise Agreement and such breach continues for a period of thirty days after written notice has been given;
- b) If 257 fails to observe any of the rules, bulletins, directions or other notices as particularized in the Manual and any such failure continues for a period of 30 days after written notice has been given; or
- c) If 257 fails to operate for a period of five consecutive business days without the prior written consent of Chooch’s.

[44] Darren testified that Chooch’s implemented a system of unannounced operational audits of its franchisee locations to educate the franchisees so as to ensure that Chooch’s standards in service, quality and safety are met and the franchisee’s Agreed Terms are satisfied. The audit examines all aspects of the franchise’s operations and scores the franchise on an overall percentage basis. The published audit grading criteria stipulates that a score of 91% to 100% exceeds the franchisor’s expectations; a score of 80% to 90% meets the expectations of Chooch’s; a score of 70% to 80% needs improvement; but a score of less than 70% is unacceptable.

[45] Darren testified that operational audits are a common tool in the franchise food industry to achieve excellence. He cautioned, however, that the audit score provides an

incomplete picture of the success of the franchise. To have a complete picture, one has to examine the nature of the default. Darren provided the example that whereas dust on a chair and cross contamination of food would both score a failing grade, the nature of the default is significantly different such that the latter would precipitate Chooch's issuing to the franchisee a notice of default of the Agreed Terms, whereas the former would not necessarily do so. It is Darren's evidence that if Chooch's determined that the franchisee's operational failure created a threat to the System as a whole, such as in the case of food safety which "keeps [him] up at night", then a notice of default would be issued to the delinquent franchise regardless of the overall audit score because one franchise location cannot be allowed to undermine all of the franchise restaurants.

[46] Stacy assumed ownership of the Restaurant on August 20, 2017. Immediately prior to that date, he was the Restaurant's store manager under the ownership of Chris Rau who from all accounts spent most of his time at his Waterloo Wings Up! franchise. Under the management of Stacy from October 29, 2016 to July 8, 2017, the Restaurant obtained operational audit scores as low as 60.81% and as high as 83.87% without Chooch's having to issue one notice of default.

[47] Based on these audit scores, Darren testified that he had confidence that Stacy would succeed as a franchisee and was encouraged by Stacy's acknowledgment in their 2016 discussion that while he had his "ups and downs" with audit scores as store manager, as the Restaurant's owner, he would "take it to the next level".

[48] With Stacy as owner of the Restaurant franchise, the location received operational audit scores of 78.41%, 80.02% and 76.35% on each of October 6, 2017, December 27, 2017, and April 4, 2018 respectively. After the unannounced April 2018 audit, however, the Restaurant never again achieved a score greater than 50% until following the execution of the May 16, 2019, Voluntary Surrender Agreement when Chooch's, and then later, Mr. Patel's corporation took over operational control of the franchise.

[49] The Restaurant received a score of 59.54% on the operational audit of July 4, 2018 (the "July 2018 Audit"). The July 2018 Audit's corresponding Notice of Default, dated September 5, 2018, issued to 257 and Stacy (the "First Default Notice"), recorded a number of breaches of the Agreed Terms of the Franchise Agreement, including:

- Poor staff morale;
- No certified food handlers on site;
- Monthly health and safety inspections not being completed;
- Use of fly strips not appropriate and lots of gnats/fruit flies buzzing around in back;
- Inconsistent handwashing;
- Staff not wearing proper hair net or uniform;
- Vestibule/breezeway dirty top to bottom;
- Walls inside full of marks;
- Floors sticky, greasy and dirty;
- Counter dirty;

- Fridge and freezer temperatures not being checked properly or recorded;
- Fridge handles not being kept sanitized;
- Walk-in fridge dirty and moldy with rusty shelving, caked grime and debris found throughout;
- Food packaging not marked with date received, and X's for old stock to be used first;
- Floors and shelving in clean-up area dirty;
- Mop condition greasy, and dirty water kept in bucket; and
- Employee washroom floors, walls, mirror, fixtures all dirty.

[50] Stacy testified that the July 2018 Audit took place immediately following the July 1<sup>st</sup> long weekend during which both he and store manager, Miranda, were absent from the Restaurant. Although Stacy conceded that the Restaurant was a “mess” on the day of the July 2018 Audit, the audit was a “disaster”, he “did not wholly disagree” with the reported infractions and that the auditor, Salena Fox, “seemed impartial”, nonetheless he testified that the July 2018 Audit was “unfair”, without providing any particulars of its inequities, and generally was part of a plan to target him.

[51] From Darren's perspective the results of the July 2018 Audit were “shocking” because of the nature of the defaults and the rapid decline from the three previous audits conducted under Stacy's ownership.

[52] Because the July 2018 Audit results showed a lack of attention to detail and raised concerns that the pattern of inattention and sloppiness might continue, Darren testified that he personally attended the Restaurant along with head office store personnel

between the July 2018 Audit and the First Default Notice to address the identified problems. Darren visited the Restaurant to review with Stacy the importance of cleanliness and to show Stacy how to properly clean the floor. While Stacy promised Darren that he would ensure that the store's floors were clean in the future, Darren's evidence is that they remained dirty on his subsequent visits.

[53] As a result, of 257's continuing defaults, Darren personally delivered to Stacy the First Default Notice to impress upon Stacy the seriousness of the situation and to advise him that should the defaults continue, they may lead to termination of the Franchise Agreement. For his part, Stacy acknowledged in his evidence that "if you get written up enough times, they show you the door".

[54] Stacy promised to do better.

[55] While Stacy makes much of the fact that the Restaurant never failed a Public Health inspection, it cannot be said that Waterloo Public Health did not identify "critical infractions" at the Restaurant. The "critical infractions" of Public Health inspections of August 13, 2018, and September 10, 2018 both include the Restaurant's failure to protect its food "from contamination or adulteration". The September 2018, Public Health report includes the additional "critical infractions" of ensuring that cooked food is held above 60°C and a certified food handler is present during all hours of operation.

[56] To my mind, the Public Health inspections demonstrate the perpetuation of operational problems notwithstanding that for the most part they were corrected during inspection and thereby avoided any further consequences.

[57] The July 2018 Audit was followed by an operational audit on October 3, 2018 in which the Restaurant obtained a score of 34.99% (the "October 2018 Audit"). The October 2018 Audit's corresponding notice of default was issued one day later, on October 4, 2018, (the "Second Default Notice").

[58] The Second Default Notice enumerates all of the same infractions previously identified in the First Default Notice with one notable addition being mouse droppings found throughout all areas of the Restaurant.

[59] When faced with the reality that the defaults of three months earlier had not been addressed, Stacy again suggested that the audit results were unfair but this time he provided explanations for his opinion, including: he did wash his hands consistently but the auditor had not seen him do so; the walk-in fridges' dirt and mould were due to its age and not because of 257's lack of attention; and "it was not [his] job to look for mice droppings twenty-four/seven".

[60] Darren testified that the October 2018 Audit told him that Stacy was not engaged in the operation of the Restaurant which Stacy confirmed to him by reason of being preoccupied with personal health and family problems.

[61] Darren's advice to Stacy was that with the issuance of the Second Default Notice he was admittedly concerned that "this may not end well", the best thing Stacy could do for his family was to get the help he needed and "make the store a success".

[62] The October 2018 Audit was followed by four operational audits on October 19, 2018, January 24, 2019, February 22, 2019, and March 29, 2019, in which the Restaurant received scores of 62.99%, 49.47%, 33.1%, and 50% respectively. Perhaps not surprisingly, the January and February 2019 audit scores prompted the delivery of a third default notice, dated March 21, 2019, to 257 and Stacy (the "Third Default Notice").

[63] The Third Default Notice enumerates a number of contraventions of the Agreed Terms, including 257's default in making 9 royalty payments over the period of October 25, 2018, to March 14, 2019, together with a series of operational failures.

[64] In the January 24, 2019 audit (the "January 2019 Audit"), the franchisor's auditor noted the following specific instances of 257 and Stacy failing to operate the Restaurant with "due diligence, efficiency, quality, and in a reputable manner":

- Owner/operator allowed improperly trained staff to run the store on their own;
- Food preparation was not done properly or completely to met customer demand;
- Lack of enthusiasm and customer service in general;
- Improper maintenance and upkeep at all stations in front and back of the Restaurant; and
- Moldy buns kept online to be served to customers.

[65] In the follow-up audit of February 22, 2019, (the “February 2019 Audit”), the auditor recorded that the Restaurant was in default of maintaining the franchisor’s required standard of cleanliness and repair in the following, among other, specific areas:

- Floors still back and dirty in lobby;
- Floors in back of Restaurant dirty, marked and not swept or mopped properly;
- Walk-in fridge contains rusty shelving, caked grime and debris;
- Dirty warm holding area;
- Dirty utensils and container throughout kitchen;
- Dirty washroom surfaces and fixtures; and
- Dirty sanitation area with dirty dishes from previous day.

[66] Moreover, on the occasion of the February 2019 Audit, the Restaurant was found to be closed “for repairs” without any notice to the franchisor. According to Darren’s unchallenged testimony, the Restaurant was closed because 257 had insufficient funds to purchase chicken product and remained shuttered for five days.

[67] Stacy testified that he felt that the February 2019 Audit was “incorrect”, Chooch’s was “trying to make [him] look bad”, and “it seems like they were out to get [him]”. Stacy did not, however, offer any explanation for the audit’s unfairness and nor did he suggest any reason for the franchisor’s animus.

[68] On the other hand, Stacy admitted in evidence that the Restaurant’s temporary closure in February 2019, was “not the fault of head office” because he “made mistakes

obviously” in overspending and agreed in cross-examination that the Restaurant could have turned a profit had he followed the franchisor’s System.

[69] Darren testified that with the January 2019 Audit results in hand and the fact that Stacy was not at the Restaurant on a regular basis, it was clear to him that Stacy was not acting responsibly and would not fix the Restaurant’s operational failures. Given these circumstances, Darren’s evidence is that he decided “an exit strategy” was required and called a meeting with Stacy for January 30, 2019.

[70] The purpose of the meeting according to Darren was to suggest to Stacy that they work together to find a buyer for 257 to sell the Restaurant. Darren testified that Stacy initially rejected the proposal, preferring instead to fix the operational defaults, but ultimately agreed that a sale was the best option given the stress he was under both at work and in his personal life.

[71] Having reached an agreement in principle, Darren’s evidence was that together, in his office, he and Stacy drafted and signed the January 31, 2019, document entitled, “SALE OF WINGS UP! KITCHNER” (the “Sale Agreement”). The salient terms of the Sale Agreement are as follows:

- a) Chooch’s would make efforts to find a purchaser for the Restaurant and facilitate the sale;
- b) Stacy will bring the Restaurant up to brand standard for purposes of making the Restaurant more attractive to potential purchasers;
- c) If after the expiry of two months, the Restaurant is not sold and the Restaurant is not up to brand standards, the Franchise Agreement will be

terminated by reason of the deficiencies itemized in the operational audits and notices of default, and

d) As at January 31, 2019, none of the aforesaid defaults had been cured.

[72] Stacy testified that he assumed that he was attending Darren's office on January 31, 2019, to discuss the franchisor's upcoming Superbowl menu although according to Stacy's prior testimony, he had had very few prior conversations with Darren. Stacy also testified that he was shocked when he learned that Darren wished to review with him his concerns regarding Stacy as a franchisee. When Darren asked him if he "had thought about selling the Restaurant", Stacy considered it "food for thought" and ultimately agreed to the terms of the Sale Agreement.

[73] In Darren's cross-examination, it was put to him that he threatened to take the Restaurant away from Stacy and leave him only with debt in an effort to coerce Stacy into acceding to the terms of the Sale Agreement. Stacy denied the proposition and I accept Darren's evidence. I reach this conclusion based on Stacy's own narrative of the January 30, 2019, meeting which did not include any details of bullying or threats on the part of Darren. Moreover, in Stacy's May 9, 2019, email exchange with his lawyer regarding the prospect of the pending sale of the Restaurant to Mr. Patel's corporation, there is no suggestion that Stacy is being forced into the sale. Rather, in Stacy's emails to his lawyer he expresses urgency to have the sale completed.

[74] Whether Darren contemplated terminating the Franchise Agreement in early 2019, or not, I find it was open to him to do so on behalf of the franchisor. I am of this mind for two reasons.

[75] First, it is clear to me having considered all of the evidence that 257 breached the Franchise Agreement. The many operational audits and three notices of default detail 257's continuing and repeated breaches, most of which were not remedied within the agreed mandatory 30 day period and many of which remained outstanding in January and February 2019. I need not repeat those breaches here.

[76] It seems to me that for reasons that are not entirely clear, Stacy lost interest in the Restaurant and its success, lacked an awareness of the Restaurant's many problems and assumed no responsibility for them. Stacy's unfortunate state of mind is no doubt one explanation for the franchise's repeated and continuing operational breaches.

[77] Second, I am satisfied that Chooch's and Darren, as a franchise associate within the definition of the *Act*, met their duty to act fairly with 257.

[78] It is trite law that the *Act* provides that every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement. The *Act* also provides that the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. Conduct is not in good faith when it is in bad faith: contrary to community standards of honesty, reasonableness or fairness (see: *Gateway Reality Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C.) and *Mr. Submarines Ltd. v. Sowdaey*, [2002] O.J. No. 4401 ("Sowdaey") at para. 57.

[79] Notwithstanding the duty to act in good faith, the relationship between the parties to a franchise agreement is not a fiduciary relationship. In other words, a franchisor is not required to put the interests of the franchisee ahead of its own interests (see: *Sowdaey* at para. 57).

[80] I conclude that Chooch's and Darren did not act in bad faith by ending their relationship with 257 pursuant to the terms of the Sale Agreement and could have instead, and in all of the circumstances, terminated the Franchise Agreement. I reach this conclusion because of 257's course of continued operational non-performance; most particularly in the critical areas of food production and storage. Notwithstanding the improved October 19, 2018 operational audit score of 62.99%, I am satisfied that 257 demonstrated a continued pattern of material operational non-compliance that could not be ignored and risked jeopardizing the System and business reputation of Chooch's as franchisor.

[81] To my mind, with the implementation of six audits between July 4, 2018, and March 29, 2019, and the delivery of three notices of default, not to mention the additional site visits by Darren and head office personnel, the franchisor did what it could to educate and alert Stacy to critical issues. Chooch's and Darren cannot be faulted for Stacy's unfortunate loss of focus on the business of the Restaurant. Otherwise, I find that there is no evidence of ill will on the part of Darren towards Stacy. Stacy was the author of the Restaurant's lack of success. To conclude that Chooch's and Darren were not entitled to end their relationship with 257 pursuant to the terms of the Sale Agreement, or in other

circumstances, terminate the Franchise Agreement pursuant to its provisions, would require that the franchisor be required to put the franchisee's interests ahead of its own (see: *Sowdaey*, at para. 58). Clearly this cannot be the law.

**Is there a Causal Connection between Stacy's Lack of Training and 257's Breach of the Franchise Agreement?**

[82] If I am wrong in concluding that Chooch's did not breach the Franchise Agreement by not providing the two weeks of in-store training and that training included both accounting and inventory management lessons, I find that there is no causal connection between the franchisor's breach of the Franchise Agreement and 257's breach of the same agreement.

[83] The evidence is that with his extensive 14 years of experience, Stacy successfully operated the Restaurant as owner for over 8 months without incident. Stacy also acknowledged that he established a system of bookkeeping and inventory control. Perhaps most importantly, there is no evidence to suggest that a lack of accounting and inventory control training by the franchisor contributed directly or indirectly to 257's operational failures, and most critically, to its food safety significant challenges.

**Does the Voluntary Surrender Agreement or an Oral Agreement Between Stacy and Darren Require Chooch's and Darren to Liquidate the Total 257 TD Bank Indebtedness?**

[84] In April 2019, Darren obtained an offer to purchase the Restaurant as a going concern from Mr. Patel in the amount of \$145,000. The offer to purchase was accepted by Stacy on behalf of 257, as vendor. The agreement of purchase and sale could not, however, be completed as proposed because the amount of the TD Bank debt exceeded the purchase price by some \$90,000. For obvious reasons, 257's primary lender was not prepared to discharge its security interest without payment in full and Mr. Patel was not prepared to purchase the Restaurant encumbered with the TD Bank personal property charge in place.

[85] In order to facilitate the sale to Mr. Patel's corporation, Stacy and Darren agreed that Chooch's would sell the Restaurant. To that end, Chooch's, 257 and Stacy entered into the Voluntary Surrender Agreement, the relevant terms of which are as follows:

The parties to this Voluntary Surrender Agreement mutually acknowledge the following: ...

6. Franchisor has...agreed to purchase the assets, equipment and chattels associated with the Franchise (the "Franchise Assets") from Franchisee. In exchange, Franchisee has agreed to renounce, surrender and yield up to Franchisor, as of the Effective [being, May 16, 2019 as defined by the Voluntary Surrender Agreement], the right and license to operate the Franchise Agreement, the Franchise Assets, and any ancillary agreements related to the Franchise Agreement (collectively, the "Ancillary Agreements")

.....

1. Recitals True and Complete

Each of the Franchisee and the Guarantor [being, Stacy] agrees that the foregoing recitals are true and complete, and that they are hereby incorporated by reference into the Voluntary Surrender Agreement.

.....

3. Voluntary Renunciation, Surrender and Termination of Agreements

Franchisee voluntarily renounces and surrenders to Franchisor the Franchise and all of Franchisee's right, title and interest in the Franchise Agreement and the Franchise Assets and Franchisor hereby terminates the Franchise Agreement and the Ancillary Agreements, effective as the Effective Date.

Upon termination,

- a) Franchisee shall immediately cease to be franchisee of Franchisor,
- b) Franchisor shall pay to Franchisee a sum of \$5,000, and
- c) Franchisee shall return to Franchisor (and ensure that it has not retained) any hard or soft copies of the Manual and all other printed matter, including menus and menu boards, and all other items used in connection with the operation of Franchise which bear any marks, or other indicia associated with the System. In the possession or control of Franchisee or the Guarantor.

In addition, upon the discharge of all liens and encumbrances registers against the Franchise Assets, Franchisor shall pay to Franchisee a sum of \$15,000.

[86] Whereas there is ambiguity in the last sentence of section 3 of the Voluntary Surrender Agreement with respect to who is to "discharge all liens and encumbrances", the parties are agreed that it was one or both of the Defendants who were to discharge them.

[87] The parties are not in agreement, however, with respect to the defined scope of the “Franchise Assets” which were to be purchased by the Defendants and from which the TD Bank security was to be discharged.

[88] The Plaintiffs’ position is that the Franchise Assets include 257’s goodwill which would require the Defendants to liquidate the entirety of the TD Bank indebtedness that is secured against all of the assets, property and undertaking of 257, including its goodwill. Stacy testified that he understood Darren’s statement that “he would take over the assets” to mean that he would take over all of the bank debt. Stacy also testified that with Darren’s assurances that he would “get the liens taken off”, he understood that his parents’ home would be “saved” from the bank’s enforcement of its security.

[89] On the other hand, the Defendants’ position is that the definition of “Franchised Assets” does not include 257’s goodwill but is limited to the assets required to operate the Restaurant. Darren testified that there were no discussions or negotiations between he and Stacy about Chooch’s acquiring 257’s goodwill or Chooch’s liquidation of the bank debt. Darren’s evidence is that the only offer he made to TD Bank was for the Restaurant’s chattels. That offer was in the amount of \$3,000 and was made in anticipation of negotiating with the bank and reaching a purchase price in the approximate amount of \$20,000 for 257’s operating assets.

[90] Based on past experience, Darren was so confident that he would be able to strike a bargain with the bank for 257’s chattels, he advanced the cumulative sum of

\$5,000 to Stacy in addition to the agreed \$5,000 payment upon signature of the Voluntary Surrender Agreement. In the end, however, the bank was not interested in negotiating with Darren regarding a buy-out of its debt secured over 257's operating assets because it had agreed to sell its entire debt in the amount of \$235,231.84 to Sandra in consideration for an assignment of its security to her.

[91] In interpreting the Voluntary Surrender Agreement, I am guided by the contemporary approach to contract interpretation as stated by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*"), where at para. 47 to 48, the Court held that the overriding concern for this court is to determine:

The intent of the parties and the scope of their understanding...To do so a decision maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known of the contract. Consideration of the surrounding circumstances recognizes that a certain contractual invitation can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.

[92] In *Weyerhaeuser Company Limited v. Ontario (A.G.)*, 2017 ONCA 1007 ("*Weyerhaeuser*"), Brown J.A., writing for the majority, set out the below holistic approach to contractual interpretation at para. 65:

When interpreting a contract, an adjudicator should:

- i. determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
- ii. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that

gives meaning to all its terms and avoids an interpretation that would render one or more of its terms ineffective;

- iii. read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, includes facts that were known or reasonably capable or being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
- iv. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[93] The Plaintiffs submit that the parties' agreement to include local goodwill, or goodwill of the Restaurant, in the definition of "Franchise Assets" is supported by the text of the Voluntary Surrender Agreement which contemplates "assets" as being additional to and separate from "equipment, and chattels".

[94] Further, the Plaintiffs submit that the parties knew that Mr. Patel was prepared to buy the Restaurant for \$145,000 and the used equipment was not worth more than 257 had paid for it in 2017: of the total 2017 \$195,000 purchase price, only \$40,000 was allocated to the value of the equipment with the balance allocated to goodwill. Leaving out local goodwill would provide no explanation for a purchase price above the 2017 value of the equipment. Moreover, the only other "asset" associated with the Restaurant was its local goodwill which Darren acknowledged as representing the business' future anticipated profits.

[95] While I accept that the text of the relevant paragraph contemplates “assets” being separate and distinct from “equipment, and chattels”, the analysis ignores that there is no evidence to suggest that Darren knew the particulars of the breakdown of the 2017 purchase price for the Restaurant and that like local goodwill, the Restaurant’s fixtures are an asset in addition to and separate from its equipment and chattels. Therefore, it does not necessarily follow as the Plaintiffs would have me find that it would be objectively commercially absurd for the parties to ignore local goodwill as an asset.

[96] The Plaintiffs also submit that this court should reject as illogical Darren’s evidence that at the time of execution of the Voluntary Surrender Agreement, he thought only the Restaurant’s equipment was secured in favour of the bank, and only the equipment need be “purchased” from the bank. Rather, in reliance upon Darren’s email to Chooch’s lawyer, dated May 14, 2019, the Plaintiffs submits that this court ought to conclude at the relevant time Darren knew not only the amount of the bank indebtedness but that its security encumbered all of 257’s assets, property and undertaking, including its goodwill.

[97] In the May 14, 2019, correspondence to the franchisor’s lawyer, Darren acknowledges “liens in excess of \$215,000” and references “doing a *PPSA* search as part of the sale”. But Darren also states in his email that: “there are several registered liens on the equipment”; after he has “removed the liens off of the equipment” he will give Stacy \$20,000 in cash as part of the settlement; and the purchase proceeds are to be held in trust “until the equipment is free and clear of any liens”. Within the total context of

the email, I am unable to conclude that Darren knew of the wide net of the bank security in May 2019, particularly in light of his testimony that Chooch's lawyer only ever discussed with him the liens on 257's equipment and never told him anything about the bank having a general security agreement.

[98] Finally, in support of their position that the term "Franchise Assets" includes 257's goodwill, and therefore requires the entire TD Bank debt be liquidated, the Plaintiffs submit that at the time that the Voluntary Surrender Agreement was signed, Darren knew that Stacy's mother had guaranteed the bank debt and to obtain Stacy's agreement to terminate the Franchise Agreement, it was essential to him that the TD Bank indebtedness be liquidated to protect his parents' home.

[99] Certainly, Darren's evidence is that he knew from Stacy that Stacy was seeking a bank loan to finance the Restaurant's 2017 purchase and Stacy's parents were assisting him in some way with that financing. Darren also testified that at one point Stacy advised him that his parents took out a line of credit on their house to assist with the purchase. This evidence does not, however, equate to Darren knowing at the relevant time that Stacy's mother, Sandra, was personally liable for all of the bank debt required to acquire the Restaurant.

[100] Furthermore, I do not accept Stacy's submission that he advised Darren and Darren knew the extent of Sandra's exposure. I am unable to accept the submission because Stacy testified that he did not recall if he told Darren "many details" about the

purchase financing. Otherwise, Stacy's evidence is that he told Darren that he was borrowing from his parents and they were "helping [him] out". It also does not escape me that in his May 9, 2019, email correspondence to his lawyer, Stacy confirmed, "As far as the loans head office has no knowledge of any of my affairs and such".

[101] To my mind this evidence falls short of imputing Darren with knowledge of the true nature of Sandra's personal liability to TD Bank.

[102] Whereas Stacy testified how "scared" he was for his parents, that he feared that they might be "homeless" and that he told Darren on his signing of the Voluntary Surrender Agreement that at least his parents' house would be "safe", other than the last ambiguous statement, there is no evidence to suggest that Darren knew in May 2019 that the payment of the bank debt in full was crucial to Stacy to ensure that his parents were protected from the bank. On the other hand, Darren's evidence is that he and Stacy never discussed payment of the entire TD Bank debt. On the contrary, Darren testified that he advised Stacy that if the Restaurant's purchase was financed through a small business improvement loan, once the sale to Mr. Patel's corporation was completed, he would likely be personally liable for 25 percent of the residual debt.

[103] For their part, the Defendants advance two arguments in support of their position that the parties did not intend "Franchise Assets" to include goodwill.

[104] First, the Defendants submit that because pursuant to the terms of the Franchise Agreement, and in particular, sections 2.1, 11.1 and 11.2, the Restaurant's

goodwill is owned by Chooch's, it would be illogical to suggest that the franchisor agreed to purchase that which it already owns.

[105] I disagree with this submission. I am unable to accept it because notwithstanding that I might agree with the significances of the cited provisions of the Franchise Agreement, the submission fails to recognize the difference between personal goodwill and local goodwill. The former is attributable to the franchisor's brand or system and is the franchisor's property. The latter, however, is that goodwill attributable to an individual franchise location and is the franchisee's to sell (see: *The Queen v. Saskatoon Drug & Stationery Co. Ltd.*, 1978 CanLII 3655 (FC), at para. 455).

[106] Second, the Defendants submit, and I agree, that the impugned contractual term is to be interpreted in a manner consistent with the Franchise Agreement which in all of the circumstances is the overriding agreement between the parties.

[107] Section 17.3 of the Franchise Agreement provides that upon the expiration or termination of the agreement the franchisor shall have the option:

To purchase from the Franchisee...all or any portion of the fixtures, equipment, furniture or other assets located on, in or at the Premises (defined as the location of the Restaurant) or otherwise used in connection with the Franchised Business.

[108] Moreover, section 17.4(b) of the Franchise Agreement specifically excludes local goodwill from the calculation of the purchase price payable by Chooch's to 257 for any assets purchased by it pursuant to section 17.3 of the Agreement:

In no event, shall any amount be payable under this Section 17.3 for goodwill” (sic) or “growing concern value”;

[109] In my view, these provisions of the Franchise Agreement must be considered in determining what personal property Chooch’s agreed to purchase pursuant to the terms of the Voluntary Surrender Agreement. After having considered sections 17.3 and 17.4(b) of the Franchise Agreement, I conclude that it would be commercially unreasonable for the parties to have agreed to include local goodwill as part of the Franchise Assets to be purchased by Chooch’s.

[110] Furthermore, I find that it would be equally commercially unreasonable for the parties to have agreed pursuant to the terms of the Voluntary Surrender Agreement that 257 should receive greater compensation upon it surrendering all interest in the Franchise Agreement than it would otherwise have received upon the Franchise Agreement’s termination in the circumstances as I have found them. Specifically, I find it commercially absurd that Chooch’s would pay and 257 would expect to benefit from the repayment of its bank debt plus \$20,000 when only a fraction of that amount would be paid and received pursuant to the provisions of the Franchise Agreement upon its termination by Chooch’s as I have found it was in a position to do as a result of 257’s breaches.

[111] Neither Stacy nor Darren were able in their respective testimonies to offer any viable commercial reason for Chooch’s to pay in excess of \$263,00 for a return of \$145,000.

[112] In the end, having considered the language used by the parties, and having read the text of the Voluntary Surrender Agreement as a whole and in the context of the surrounding circumstances, I find that the parties intended to exclude any goodwill from the definition of “Franchise Assets” and to include only that personal property required to operate the Restaurant.

[113] Having reached this conclusion, it does not escape me that the Voluntary Surrender Agreement has been frustrated by TD Bank’s decision not to negotiate with Chooch’s for the discharge of its security over the operational assets of 257 but instead opted to sell its debt to Sandra. Given the frustration of the parties’ agreement and by finding that at all material times Chooch’s was in a position to terminate the Franchise Agreement, I agree with the Defendants’ submission that in these circumstances the termination provisions of sections 17.3 and 17.4 of the Franchise Agreement should be applied *nunc pro tune* as an equitable means of ending the parties’ business relationship.

[114] As I have not, however, received the benefit of the parties’ submissions as to how the relevant provision of the Franchise Agreement might be applied, I make no findings. I leave it to the parties to address the issue. In the event, however, that they are unable to reach an agreement, they may contact the Trial Coordinator to arrange an attendance before me to consider the matter.

**Should the Voluntary Surrender Agreement be Set Aside in Favour of the Parties' Oral Agreement to Pay the TD Bank Debt and Discharge its Security for the Reasons Alleged by the Plaintiffs?**

[115] Based on the evidence, I find that there was no agreement between the parties other than the agreement memorialized in the Voluntary Surrender Agreement, and therefore, I find it unnecessary to consider this submission of the Plaintiffs. In any event, I have already found that the Voluntary Surrender Agreement has been frustrated in circumstances where 257 had breached the Franchise Agreement.

**In Taking Operational Control of the Restaurant in May 2019, Did the Defendants Commit the Tort of Conversion?**

[116] Because Chooch's was at all material times in a position to terminate the Franchise Agreement, I find that the Defendants are not liable to 257 in the tort of conversion for assuming operational control of the Restaurant prior to its sale to Mr. Patel's corporation.

**Is Sandra Entitled to Recover from the Defendants 257's TD Bank Debt Assigned to Her?**

[117] Sandra mortgaged her home to purchase the TD Bank debt and take an assignment of its security. Sandra paid \$243,091.23 in September 2019, to complete the assignment which was comprised of the debt of \$235,231.84 plus fees and interest. On October 3, 2019 an amendment registration was filed under the *PPSA* between TD Bank,

as assignor, and Sandra, as assignee, with respect to the bank's security interest in the assets, property and undertaking of 257.

[118] In the meantime, after the cessation of 257's operations in May 2019, Chooch's, and later, Mr. Patel's corporation, used the charged equipment, chattels and fixtures (collectively, the "Assets") to operate the Restaurant until in or about March 2020. At that time, some or all of the Restaurant equipment was replaced by Chooch's to facilitate the completion of the sale to Mr. Patel's corporation, and the used equipment was placed in storage pending an agreement with TD Bank for its purchase. According to Darren's evidence, ultimately after some three or four years of storing the equipment, it was scrapped by Chooch's.

[119] Sandra submits that pursuant to section 2(2) of the *Mercantile Act*, she is entitled to recover from the Defendants the TD Bank indebtedness assigned in her favour.

[120] I disagree. While section 2(2) of the *Mercantile Act* affords Sandra the right to be indemnified from "the principal debtor, or any co-surety, co-contractor or co-debtor", neither of the Defendants fall within the definition of these potential indemnifiers. Neither of the Defendants were liable in the first instance to repay the TD Bank loan; that liability was solely that of 257 and Sandra as guarantor.

[121] On the other hand, 257 used the Assets secured by Sandra in the interim operation of the Restaurant, disposed of certain of the secured Assets and sold the balance to Mr. Patel's corporation as a part of that sale without accounting in any way for

Sandra's interest in the Assets. I therefore find that Chooch's is liable to Sandra in the tort of conversion for the value of the Assets.

[122] I do not find, however, as Sandra would have me conclude, that Chooch's is liable to compensate her for 257's local goodwill that is also charged in her favour as 257's primary secured creditor. I am of this mind because at the time of the registration of Sanra's security interest, 257 had not operated for several months, and therefore, its goodwill had no value.

[123] None of the parties provided the court with submissions regarding the value of the Assets as of May 2019, or at any subsequent date. Nonetheless, I am reminded by the Court of Appeal's direction in *Martin v. Goldfarb*, (1998), 41 O.R. (3d) ("*Martin*") and more recently in *Westmount-Keele Limited v. Nicholas C. Tibollo Professional Corporation*, 2025 ONCA 401 ("*Westmount-Keele*"). In both decisions, the Court stated that when the assessment of damages is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resort to guesswork (see: *Westmount-Keele* quoting *Martin*, at para.24). However, the Court of Appeal also made clear in *Westmount-Keele* that the assessment of damages by guesswork is to be confined to cases where damages by their inherent nature are difficult to assess (at para.25). Otherwise, where the absence of evidence makes the assessment of damages an impossible task, the litigant is entitled to nominal damages at best (see: *Westmount-Keele* quoting *Martin*, at para.24).

[124] In assessing Sandra's damages, I have taken the following evidence into account:

- In August 2017, 257 purchased the Restaurant's operations from Chris Rau's corporation for \$195,000 of which approximately \$40,000 was allocated to the value of the equipment and \$155,000 was allocated to the value of the goodwill.
- In his email of September 12, 2019, Darren offered to purchase the Assets from the TD Bank for \$3,000 in consideration of the discharge of its security.
- Darren testified that the \$3,000 offer was a first offer to initiate negotiations with the bank and he was prepared to pay as much as \$20,000 for the Assets.

[125] Given this evidence, and in all of the circumstances, I exercise my discretion to assess Sandra's loss in the sum of \$25,000.

### **Disposition**

[126] For all of the foregoing reasons, the claims of 257 are dismissed.

[127] An order will go awarding damages to Sandra and payable by Chooch's of \$25,000 plus pre-judgment interest at the rate prescribed by the *Courts of Justice Act*, RSO 1990, c. C.43 from the date of issuance of the statement of claim.

[128] All other claims of Sandra are dismissed.

[129] The termination provisions of sections 17.3 and 17.4 of the Franchise Agreement shall be applied *nunc pro tune* by 257 and Chooch's as an equitable means of terminating the parties' relationship. In the event that the parties are unable to agree on the result of the application of these provisions, a further attendance may be arranged before me through the Civil Trial Coordinator.

### **Costs**

[130] I urge the parties to agree on the issue of costs. In the unfortunate event that they are unable to do so, I will consider oral cost submissions in the event a further attendance is required before me to resolve any issues with respect to the application of sections 17.3 and 17.4 of the Franchise Agreement.

[131] Alternatively, I will consider written cost submissions on the following basis:

- Within 14 days of the release of these Reasons for Judgment, the parties seeking costs will deliver their written submissions;
- Within 21 days of the release of these Reasons for Judgment, the responding parties will deliver their written submissions;
- There will be no right of reply;

- Submissions are not to exceed 3 pages, double-spaced, and shall not include footnotes;
- The page limitation does not include bills of cost, relevant offers and authorities; and

[132] If submissions are not received within the above timelines, the parties will be deemed to have resolved the issue of costs and costs will not be determined by me.

---

Justice M. Valente

**Released:** July 16, 2026

**CITATION:** 2572966 Ontario Inc. et al. v. Chooch's Inc. et al., 2026 ONSC 3790  
**COURT FILE NO.:** CV-20-72967  
**DATE:** 2026-07-16

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

2572966 Ontario Inc. and Sandra Lee Miller

Plaintiffs

- and -

Chooch's Inc. and Darren Czarnogorski

Defendants

---

**REASONS FOR JUDGMENT**

---

Justice Valente

**Released:** July 16, 2026