**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

# ENDORSEMENT

**COURT FILE NO.: CV-24-00715773-00CL** **DATE: December 2, 2024**

**NO. ON LIST: 1**

**TITLE OF PROCEEDING:**

**IN RE: BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.**

**BEFORE: JUSTICE OSBORNE**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant:**

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**ENDORSEMENT OF JUSTICE OSBORNE:**

**The Motion and Relief Sought**

[1] Cortland Credit Lending Corporation ("Cortland") seeks a declaration that the claims of Final Bell Holdings International Ltd. ("Final Bell") against the Applicants are subordinate to Cortland's claims against the Applicants. Specifically, Cortland seeks an order that any potential entitlement of Final Bell to a constructive trust in relation to assets of the Applicant or the proceeds of the sale thereof is subordinate to the security interest of Cortland over those assets and its corresponding charge, and to Cortland's entitlement to a distribution of such proceeds.

[2] The relief sought by Cortland is supported by the Applicants. Cortland and the Applicants submit that this motion on the threshold issue of whether the constructive trust claim now advanced by Final Bell can prime Cortland's super priority security interest should be heard and determined now. In their submission, unless the answer to that threshold issue is "yes", the trial of Final Bell's claim will very likely be moot as there will be no cash proceeds available to which the constructive trust could attach. They submit that a determination of the threshold issue first is efficient, will minimize costs to the benefit of all stakeholders, and will not prejudice Final Bell.

[3] Final Bell opposes the motion and submits that it ought to be entitled to the opportunity to prove its fraudulent misrepresentation claim, and that factual issues to be determined as part of that claim are relevant to the threshold issue sought to be determined on this motion.

[4] Defined terms in this Endorsement have the meaning given to them in the motion materials and/or my earlier Endorsements made in this proceeding, unless otherwise stated.

[5] Of particular relevance is my Endorsement dated August 12, 2024, scheduling this threshold motion for the reasons set out in that Endorsement, all of which are incorporated herein.

[6] For the reasons below, the motion is granted.

**Facts**

[7] Final Bell, its Canadian subsidiary Final Bell Canada Inc. ("FBC"), and BZAM entered into a Share Exchange Agreement on December 5, 2023, pursuant to which Final Bell sold to BZAM FBC, in exchange for equity and unsecured debt[1] in BZAM. The Share Exchange Agreement closed on January 5, 2024. Both Final Bell and BZAM are in the cannabis business.

[8] Cortland was already the existing lender to BZAM through a credit agreement with BZAM's subsidiary, The Green Organic Dutchman Ltd. On January 8, 2024, three days after the Final Bell transaction closed, BZAM and Cortland entered into a further amended and restated credit agreement ("the Second ARCA") to add the Final Bell parties[2] and their assets to the collateral already pledged to Cortland by BZAM. The Cortland operating credit facility was already almost exhausted: of the $34 million in available credit, $27.5 million was already outstanding.

[9] The Final Bell parties each executed a general security agreement in favour of Cortland and provided other security. Cortland filed *Personal property Security Act* registrations against both Final Bell entities.

[10] Cortland submits that it made the credit advances as a *bona fide* purchaser for value without notice of the claims of Final Bell, and that in any event, the vast majority of the pre-filing advances also predated the Share Exchange Agreement with Final Bell with the further result that there could have been no claims in any event.

[11] Thereafter, Cortland made available to BZAM pursuant to the Second ARCA (and after the Share Exchange Agreement) revolving advances totalling another $18 million (approximately).

[12] It is the position of Cortland that the Final Bell assets then owned by BZAM formed part of the collateral pledged in its favour. Final Bell submits that BZAM made fraudulent misrepresentations to it that it relied on in entering into the Share Exchange Agreement, and that Cortland had constructive knowledge of those fraudulent misrepresentations.

[13] On February 28, 2024, BZAM and the other Applicants (which include the Final Bell entities) were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "*CCAA")* according to the terms of the Initial Order made that date.

[14] Cortland agreed to provide a debtor-in-possession ("DIP") credit facility in accordance with the DIP Facility Agreement of the same date.

[15] In granting the Initial Order, the Court approved the DIP Agreement and, as is usual in *CCAA* proceedings, granted the DIP Lender (Cortland) a super priority charge on the present and after-acquired property of the Applicants (again for greater certainty, including the Final Bell entities) (the "DIP Lender's Charge").

[16] In addition, the DIP Agreement provided that amounts advanced under the DIP Facility were to be used by BZAM to fund its working capital needs. This included restructuring expenses and any pre-filing obligations permitted by Court order and approved by the Agent, not including the funding of any Cortland

[1] 90 million shares of BZAM valued at $0.15 per share and an unsecured promissory note in the principal amount of $8 million.
[2] FBC and Final Bell.

pre-filing obligations. Further, the DIP Agreement required that, following the *CCAA* filing, all post-filing collections would be applied against the Applicants' pre-filing obligations owing to Cortland.

[17] As observed in my Endorsement in respect of the February 28, 2024 first day hearing, the DIP Charge did not secure any obligation that existed prior to the granting of the Initial Order. I observed that this Court has previously approved DIP facilities that authorize use of receipts from operations, post-filing, to repay pre-filing amounts (often described as "creeping roll-up facilities"), pursuant to the jurisdiction found in section 11.2(1) of the *CCAA*[3].

[18] The Initial Order was sought and granted without notice to creditors except Cortland. As required by the *CCAA*, the relief granted in an initial order cannot, given the *ex parte* nature of the initial hearing, extend beyond 10 days, and the relief granted is limited to that which is reasonably necessary for the initial 10-day period. There is a mandatory comeback hearing on notice to affected stakeholders at which time an extension of the stay of proceedings and additional relief is usually sought. That comeback hearing is also an opportunity for those affected creditors to challenge any of the requested relief.

[19] That comeback hearing was held on March 8, 2024, on which date the Court granted the Amended and Restated Initial Order (the "ARIO"). Final Bell received notice of and was represented at that comeback hearing.

[20] The ARIO affirmed the approval of the DIP Agreement and Cortland's super priority charge over all existing and after-acquired BZAM assets (including the Final Bell assets). Further, and consistent with the terms of the Commercial List Model Order, the ARIO confirmed the priority of that super priority charge over, among other things, all trusts.

[21] Importantly for the purposes of this motion, Final Bell did not oppose the approval of the DIP Agreement, the granting of the DIP Lender's Charge, or the fact that, as fully disclosed[4], post-filing collections would be used to repay the pre-filing secured indebtedness owing to Cortland. In any event, and as noted above, virtually all of the prefiling indebtedness had been extended before the claims of Final Bell could have come into existence, as they predated the Share Exchange Agreement.

[22] The ARIO also approved a proposed sales and investment solicitation process ("SISP") for the business and assets of BZAM. That SISP included a stalking horse bid agreement which in turn provided that the only cash proceeds that would be available would be equal to the amount required to pay Cortland's priority debt in full.

[23] As reflected in my Endorsement in respect of the comeback hearing dated March 8, 2024 (and particularly paragraphs 24, 25 and 26), Final Bell was not opposing any of the relief sought, particularly including approval of the SISP or its terms. It advised the Court that it was in the process of investigating whether it would be bringing a motion to seek relief which could have an impact on the SISP. Specifically, Final Bell advised that it was considering bringing the fraudulent misrepresentation claim referred to above and, importantly for the purposes of the SISP, that it may seek rescission of the Share Exchange Agreement on the basis of that fraudulent misrepresentation claim.

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[3] See, in particular, paras. 56 & 57 of the February 28, 2024 Endorsement.

[4] See, in addition to the Endorsement described at footnote 3 and as further described below at paragraph 26, the Pre-Filing Report of the (then) Proposed Court-appointed Monitor and the Affidavit of Matthew Milich sworn in support of the Application. The structure was also the subject of oral submissions at the hearing.

[24] I noted in the March 8, 2024 Endorsement that if it did so, that issue may well have to be determined before any bids in the SISP were finalized, since bidders would need to know whether the pool of assets on which they were bidding included the Final Bell assets or not. However, and in respect of the other relief granted on that date, Final Bell did not oppose the relief sought or purport to reserve any rights. That relief included the approval of the DIP Agreement, the granting of the DIP Lender's Charge and the corresponding super priority of that DIP Lender's Charge, and the nature and structure of the stalking horse bid agreement.

[25] Cortland thereafter made advances under the DIP Agreement and in reliance on the super priority status of the DIP Lender's Charge. As at the end of July 2024, approximately $33,715,000 of principal and interest was owing under the DIP Loan. Except for nominal pre-filing expenses of $709.12, all of the amounts currently owing to Cortland as of the hearing of this motion were advanced under the DIP Agreement and in reliance on the DIP Lender's Charge. It follows that the position taken by Final Bell that the priority now sought to be continued by Cortland relates to pre-filing debt is almost completely moot: the amounts owing to Cortland were advanced subsequent to the commencement of this proceeding, and in reliance on the DIP Lender's Charge.

[26] Moreover, and as noted above, the use of proceeds and the nature of the DIP Facility were fully discussed in the Pre-Filing Report of the (then proposed) Monitor (see para. 91) and expressly disclosed in the Affidavit of Matthew Milich sworn February 28, 2024 in support of the Application (see para. 112).

[27] Final Bell then did as it had advised it was considering doing and brought a motion in the *CCAA* proceeding seeking rescission of the Share Exchange Agreement which, if granted, would have had the effect of removing the Final Bell assets from the property of BZAM. Given the urgency in light of the pending SISP, the matter was scheduled to proceed to a summary trial on an expedited timeline agreed to by the parties, with the hearing set to commence on April 22 and 23, 2024.

[28] While Final Bell's misrepresentation claim was advanced against BZAM, Cortland responded to the motion, taking the position that the relief sought would inevitably prejudice Cortland, an innocent party, and ought not to be granted since it would be unjust to Cortland in the circumstances of this matter as Cortland had relied on the unchallenged super priority DIP Lender's Charge to continue to advance new funds into the insolvent BZAM.

[29] Two business days before the summary trial was set to proceed, Final Bell sought an adjournment of the trial as a result of the late production of certain tax filing documents by BZAM, the timing of which prejudiced Final Bell. I granted the adjournment to permit Final Bell an opportunity to consider the documents and its corresponding position at the summary trial.

[30] Final Bell then amended its notice of motion (i.e., its claim) on May 6, 2024 in important respects. It abandoned its plea for the remedy of rescission. It sought instead equitable damages and the imposition of a constructive trust over the property of BZAM and the proceeds thereof to the extent of the value of the Share Exchange Agreement.

[31] BZAM, supported by Cortland, moved for security for costs. In my Endorsement granting security[5], I observed the following at paras. 37 and 41:

> 37. This Court previously approved the DIP Facility pursuant to which the DIP financing was advanced. It allows BZAM to continue operating during this

[5] Endorsement dated June 30, 2024.

> restructuring. Pursuant to the DIP Facility, Cortland was granted a super priority charge over all existing and after-acquired real and personal property of the Applicants. That includes all existing and after-acquired real and personal property of FBC and Final Bell. I pause to observe that Final Bell did not oppose that super priority charge, and nor has it sought subsequently to amend, vary or vacate that charge, although the constructive trust remedy it now seeks would have precisely that effect.
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> …
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> 41. Had the Final Bell claim been outstanding earlier, Cortland may well have elected not to provide DIP financing at all. Other stakeholders (such as other creditors) could also be directly affected by the Final Bell claim here notwithstanding that they are not directly involved in its determination. The pendency of that claim is delaying the progress in the restructuring, including but not limited to the SISP. DIP financing costs and other professional fees that may otherwise have been avoided or reduced continue to accrue, all of which reduces the overall recovery available to creditors and other stakeholders.

**Analysis**

[32] In my view, the declaratory relief sought by Cortland should be granted, and granted now, rather than deferred to a hearing of Final Bell's fraudulent misrepresentation claim against BZAM on the merits, for a number of reasons.

**Collateral Attack on the ARIO**

[33] First, the constructive trust claim now advanced by Final Bell is inescapably a collateral attack on the ARIO and specifically the approval of the DIP Loan Agreement and the super priority DIP Lender's Charge in favour of Cortland that secures the DIP Loan.

[34] The DIP Loan represented "new funds in" to BZAM, on a Court-approved basis pursuant to the ARIO, which funds were expressly required to keep BZAM operating as a going concern to the benefit of all stakeholders, including creditors and employees.

[35] As noted, Final Bell was specifically given notice of the comeback hearing, and indeed attended at the hearing resulting in the ARIO. It did not oppose the relief sought.

[36] If Final Bell sought to oppose the priority afforded to Cortland through the DIP Lender's Charge, or in particular, the structure of the DIP Term Sheet, that was the time to do so. As noted in the Pre-Filing Report of the Monitor, BZAM would still require additional financing, and the DIP Facility effectively provided for approximately $7 million of additional liquidity beyond the existing Credit Agreement. Cortland was the senior secured creditor of the Applicants in any event, such that the Court-appointed Monitor was of the view that the structure would not materially prejudice the creditors of the Applicants. Put differently, there was no other alternative source of funding to provide the required liquidity (and none was proposed by Final Bell).

[37] Cortland then relied on its super priority DIP Lender's Charge, and advanced over $33 million in DIP funding. That charge, as is typical in *CCAA* proceedings, specifically and expressly had priority over all trusts (i.e., including any constructive trust, such as is now sought by Final Bell).

[38] It would be inequitable, unjust, and contrary to the basic principles of *CCAA* restructurings to allow Final Bell to have elected to not oppose that relief when granted on notice, then later advance a claim for rescission, then abandon that claim for rescission in the face of the pending SISP deadlines, and then later still advance a claim for a constructive trust over those same assets and seek a corresponding priority over the DIP Lender's Charge that had been in place for months.

[39] Such a constructive trust inescapably undermines the ARIO, a seminal order in most *CCAA* restructurings because it sets out the framework within which the restructuring will proceed, and the imposition of a constructive trust would inevitably reverse the priorities established and confirmed by the ARIO.

[40] In this Application, like many *CCAA* restructurings, one of the fundamental milestones early in the proceeding is the approval of DIP financing. If no DIP financing is available, or none is available on appropriate terms, the restructuring may almost immediately become a liquidating *CCAA* as the debtor company ceases to be able to carry on operations and continue as a going concern. There may be a complete shutdown and a resulting bankruptcy.

[41] But where a lender, as a source of DIP funding, steps forward (and proposed DIP lenders are often existing lenders who have familiarity with the debtor company and its operations), all stakeholders are given notice of the proposed terms of the DIP financing and the opportunity (usually at the comeback hearing) to make submissions about whether those terms should be approved.

[42] As the Supreme Court has confirmed, there is nothing unusual or inappropriate about a court-ordered financing charge that has priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": see *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271, at para. 60; *Canada v. Canada North Group Inc*., 2021 SCC 30, [2021] 2 SCR 571, at para. 25 ("*Canada North*").

[43] Where that occurs, as it did here, another stakeholder cannot bide its time while the DIP lender advances funds in reliance on its security, and the debtor continues as a going concern as a result thereof, and then come forward months later when DIP funds have been advanced and assert a priority in the form of a constructive trust that would prime the court-approved DIP Lender's Charge.

[44] This is exactly the sort of collateral attack that affects the fairness and integrity of the justice system, since the moving party seeks to circumvent the effect of a decision previously rendered when the party did not avail itself of the direct attack procedures open to it: see *Canada (Attorney General) v. Telezone Inc*., 2010 SCC 62, [2010] 3 SCR 585, at paras. 60-62.

[45] The doctrine of abuse of process is to the same effect, in relevant part, and permits the court to exercise inherent jurisdiction to preclude litigation which "would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice". All of this is consistent with protecting the principal of finality: see *Toronto (City) v. C.U.P.E Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at paras. 37-38.

[46] Specifically, within restructuring proceedings the courts will not allow a modification of the initial order that would impermissibly change the dynamics between the DIP lender and the objecting stakeholder: *Collins & Aikman Automotive Canada Inc., Re*, 2007 CanLII 45908 (ON SC), at paras. 105-107.

[47] Such would be, as observed by then Regional Senior Justice Morawetz in *Target Canada Co., Re*, 2016 ONSC 316, contrary to the "building block" nature of sequential orders made in *CCAA* proceedings. As the Court stated in that case at paras. 81 and 85:

> [81] The CCAA process is one of building blocks. In this proceeding, a stay has been granted and a plan developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during *CCAA* proceedings be respected. In this case, the Amended and Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.
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> …
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> [85] It cannot be fair and reasonable to ignore post-filing agreements concerning the *CCAA* process after they have been relied upon by counterparties or to rescind consent orders of the court without grounds to do so.

[48] This is consistent with the observations of Justice Côté, writing for the majority of the Supreme Court in *Canada North* at para. 30:

> [30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. **For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all** claims, smacks of unfairness […] [*Emphasis added*].

[49] Here, Final Bell elected not to oppose the ARIO. Nor did it appeal the order once made. Moreover, like all Initial Orders and ARIOs, and consistent with the Model Orders of the Commercial List, the ARIO contained what is commonly referred to as the "comeback clause". That clause expressly enabled any affected party to seek to amend, vary or vacate the order, and to do so rapidly where required, on seven days' notice. Final Bell never sought any such relief. Nor did it seek at the ARIO hearing to adjourn the motion for approval of the DIP Facility until a later date if it wished to consider its position (leaving aside what effects such an adjournment may have had on the restructuring and the continued operations of BZAM).

[50] Final Bell submits that it did not take any of these steps because, as of March 8, 2024, it did not have the knowledge and therefore the ability to advance the constructive trust claim on which it now relies. Cortland disagrees, and I accept the position of Cortland in this regard.

[51] First, Final Bell clearly knew the nature of the misrepresentations upon which it then based and still bases its entire claim. Final Bell's basic claim has three components: that BZAM intentionally misrepresented its financial circumstances and solvency (including but not limited to the fact that it was current in its excise tax filings and remittances), that Final Bell relied on the misrepresentations, and that it would otherwise not have entered into the Share Exchange Agreement.

[52] Second, Final Bell was also seeking rescission of the Share Exchange Agreement as soon as it advanced its claim as a result of those alleged misrepresentations.

[53] Finally, Final Bell knew, as of that date on which it first advanced its claim (and in fact it knew as of the date of the *CCAA* filing of BZAM and the evidence of insolvency filed in support of that Application), that it needed to prime the DIP Facility and therefore obtain a priority over the DIP Lender's Charge in order to succeed on its claim. Yet, it took no steps to do so either at the comeback hearing or at any time thereafter. It failed to avail itself of the seven day "comeback clause" in the ARIO, bring any motion to amend the ARIO, or seeking urgent relief as the Commercial List routinely accommodates from parties in appropriate circumstances.

[54] I also cannot accept the submission of Final Bell that Cortland knowingly and willingly took the risk that it might lose its super priority merely as a result of the fact that Final Bell was claiming rescission. Final Bell submits that the fact of its rescission claim constituted an event of default pursuant to the terms of the DIP Facility, with the result that Cortland could have terminated the DIP Facility, but did not do so.

[55] In my view, that is an unreasonable position in the circumstances of this case. Cortland continued to make advances under the DIP Facility based on its super priority DIP Lender's Charge which had not been challenged and was not thereafter challenged by any party. It was reasonable for Cortland to rely on that Court-ordered Charge to continue to fund the ongoing operations of BZAM, precisely as that Charge was intended to allow for. All stakeholders, including but not limited to Cortland, relied on that set of circumstances, and the continued operations of BZAM, which in turn depended on the liquidity resulting from the DIP Facility and Charge.

[56] It follows that, in the face of multiple and continuing opportunities to challenge the priority of the DIP Lender's Charge, the subsequent collateral attack on the ARIO cannot succeed.

**The Claim of Final Bell is an Equity Claim**

[57] There is a second principal reason that Final Bell's claim, even if ultimately successful, cannot rank in priority to the super priority DIP Lender's Charge of Cortland. The claim of Final Bell is an "equity claim" as defined in the *CCAA*. As such, the claim of Final Bell ranks behind the claims of all creditors, not just creditors with court-ordered priority charges.[6]

[58] Subsection 6(8) of the *CCAA* is clear that equity claimants are not entitled to share in assets of an insolvent corporation until the claims of all ordinary creditors have been paid in full. "Equity claim" is defined in s.2(1) as "a claim that is in respect of an equity interest, including a claim for, among others, … (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Québec, the annulment, of a purchase or sale of an equity interest."

[59] That is precisely what Final Bell's claim is: it bought an equity interest in BZAM in exchange for its Canadian subsidiary. It did not supply goods or services, and it was not an employee. It is a party to an agreement pursuant to which it acquired shares. In *Nelson Financial Group Ltd*., 2010 ONSC 6229, 75 BLR (4th) 302, Pepall, J. (as she then was), held that "equity claims" as defined in s. 2(1) of the *CCAA* include, among other things, a claim for rescission of the purchase of an equity interest (para. 27), and that fraudulent

[6] As noted above (see FN 1), Final Bell received as consideration under the Share Exchange Agreement both equity and unsecured debt in the form of a promissory note. There is no issue that, as the holder of the note, it is an unsecured creditor ranking behind Cortland and all other secured creditors. When I conclude that the claim of Final Bell ranks behind the claims of all creditors, I am referring to its claim for rescission of the Share Exchange Agreement that resulted in it being a holder of equity in BZAM.

misrepresentation claims advanced by a shareholder seeking to recover their investment were considered equity claims subject to ss. 6(8) and 22.1 of the *CCAA* (para. 26, citing with approval *Blue Range Resource Corp., Re,* 2000 ABQB 4, 15 C.B.R. (4th) 169).

[60] In asserting its late-breaking claim for a constructive trust, Final Bell is seeking to elevate what is inescapably an equity claim into a claim of not only a creditor, but a first-ranking creditor with priority over the Court-ordered super priority DIP Lender's Charge. Such is expressly not permitted under the *CCAA*, within which the definition of "equity claims" should be given an expansive interpretation: *Sino-Forest Corporation (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at paras. 40-45.

**No Determination of the Merits of the Fraudulent Misrepresentation Claim**

[61] To be clear, in my view, my findings above that the position now taken by Final Bell is a collateral attack on the ARIO, and that the claim of Final Bell is an equity claim within the meaning of the *CCAA*, are sufficient to dispose of this motion and I need not make any determination about the merits of Final Bell's fraudulent misrepresentation claim against BZAM. All I am determining on this motion is whether, even if such a claim were successful, it would rank in priority to Cortland's super priority DIP Lenders Charge.

[62] I accept that the practical reality, resulting from the likely fact that there will be no assets available to unsecured creditors, that Final Bell may determine that it does not wish to pursue its fraudulent misrepresentation claim in those circumstances. Again, I am simply determining that even if such a claim succeeded, (or, put differently, assuming for the purposes of this motion that the claim was valid), Final Bell would not be entitled to a priority over Cortland by way of a constructive trust rather than damages.

[63] None of my findings above are dependent on any finding of credibility of any BZAM or Cortland witness, but rather turn on the relevant provisions of the *CCAA* and the earlier orders made in this proceeding.

[64] For these reasons, I also reject the submission of Final Bell that this motion is in fact a motion for partial summary judgment on its claim. It is not. It is a motion for declaratory relief to confirm the existing priority of the DIP Lender's Charge over a subsequently advanced claim in equity for a constructive trust, without any determination about the validity of the underlying claim based on fraudulent misrepresentation.

[65] It follows that there is no prejudice to Final Bell in having the threshold issue determined on this motion, as opposed to dismissing this motion in having the priority issue determined as part of the summary trial of its claim. All of the relevant evidence was before the Court on this motion. As noted, almost all of it turns on the relevant statutory provisions in the terms of earlier Orders made in this proceeding, and the credit agreements (second ARCA and DIP Facility) with Cortland anyway.

[66] Conversely, there is, in my view, significant prejudice to BZAM, Cortland, and all other stakeholders, including but not limited to employees of BZAM, in deferring this matter, which would further delay the progress of this restructuring with attendant additional costs, accrual of interest and continuing uncertainty.

[67] Nor do I find it necessary to determine whether Cortland in fact had actual or constructive knowledge of the fact that the representations made to Final Bell in the Share Exchange Agreement were inaccurate and fraudulently so. I also accept the submission of Cortland that the position now advanced by Final Bell is inconsistent with the position it took on the security for costs motion where it was expressly clear, in both its factum and oral submissions, that it was not alleging any wrongdoing against Cortland. In amending its notice of motion to assert a constructive trust claim that ranks in priority to Cortland's super priority DIP Charge, Final Bell now asserts (for the first time only recently) that Cortland knowingly received the proceeds of fraud.

[68] I reject that submission also, not only because it is inconsistent with the previous admission of Final Bell that Cortland was not alleged to have committed any wrongdoing (which admission is not sought to be withdrawn), but substantively because there is no evidence upon which I could make such a finding in any event.

[69] Final Bell submits in its claim that BZAM made representations and warranties in the Share Exchange Agreement to the effect (among other things) that it was current in its excise tax filings and remittances, when in fact it was not.

[70] I accept the submission of Cortland that it would be commercially absurd, unrealistic and unreasonable to impose a duty on it (as a third party lender to BZAM) to do the following:

a. review the contractual representations and warranties made by its borrower (BZAM) to a proposed acquisition target (Final Bell) in an agreement to which Cortland was not a party;

b. then undertake whatever due diligence was required to assess the accuracy of those contractual representations; and then

c. evaluate any possible fraudulent intent on the part of BZAM.

failing all of which would have exposed it to potential claims from BZAM's counterparty.

[71] In sum, it would be entirely destabilizing to grant Final Bell a priority over the DIP Lender's Charge at this point. It would be fundamentally inconsistent with the objectives of the restructurings that the *CCAA* was intended to facilitate, and to the "building block" approach endorsed by now Chief Justice Morawetz in *Re Target*.

**Result and Disposition**

[72] For all of these reasons, the motion is granted.

[73] Cortland has been successful on the motion. It is presumptively entitled to its costs.

[74] Cortland has submitted a Bill of Costs attached as Exhibit 11 to the Affidavit of Jonathan Shepard sworn April 24, 2024, reflecting partial indemnity costs of $344,990.58 and substantial indemnity costs of $517,240.21. Final Bell has submitted a Costs Outline reflecting partial indemnity costs of $61,255.67 and substantial indemnity costs in the amount of $90,252.04. All amounts are inclusive of fees, disbursements and HST.

[75] Pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[76] Rule 57.01 provides that in exercising its discretion under s. 131, the court may consider, in addition to the result in the proceeding (and any offer to settle or contribute), the factors set out in that Rule.

[77] The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 24-26.

[78] In my view, there is no basis here to award costs on an elevated scale and they should be awarded on a partial indemnity basis. Taking into account the factors set out in Rule 57 and considering them in the particular circumstances of this case, in my view, an appropriate award of costs is $150,000 inclusive of fees, disbursements and HST. I recognize that this is not an insignificant sum. However, this was a complex case, the issues were prepared, briefed and litigated on an expedited timetable, the amounts at issue were significant, numerous contested Court appearances and motions were necessitated, and various steps were undertaken all as described above.

[79] Rule 57.03 provides that, on the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall fix the costs of the motion and order them to be paid within 30 days.

[80] Accordingly, that amount is payable by Final Bell to Cortland within 30 days.

[81] Order to go in accordance with these Reasons.