Court File No. CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 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.

Applicants

REPLY FACTUM OF THE MOVING PARTY, BZAM LTD.

(MOTION FOR SECURITY FOR COSTS)

May 29, 2024

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Joseph Blinick (LSO# 64325B)
Mike Shakra (LSO# 64604K)
Tom Feore (LSO# 82456H)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for BZAM Ltd.

TO: THE SERVICE LIST

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PART I OVERVIEW

1. BZAM files this reply factum solely to address the following inaccurate submissions in Final Bell's responding factum: (1) Final Bell has sufficient assets to satisfy a costs award, and its precarious financial situation was caused by BZAM's conduct; (2) BZAM has no right to security for costs, including because it is neither a defendant nor a respondent to which Rule 56 applies; (3) Final Bell has a "good chance of success on the merits", and therefore requiring it to post security would be unjust; (4) BZAM's motion for security for costs was brought with undue delay/for tactical reasons; and (5) the quantum BZAM seeks as security is unreasonable and not supported by proper evidence.

2. This reply factum is not intended to address every point raised in Final Bell's responding factum but, rather, to reply to certain material omissions and assertions therein that mischaracterize the facts and legal principles relevant to this motion. The absence of a response to allegations or assertions of fact or law in Final Bell's responding factum should not be interpreted as agreement with those matters on the part of BZAM.

3. Defined terms in BZAM's main factum of April 24, 2024 are employed in this reply factum on the same basis.

4. First, as it relates to Final Bell's financial wherewithal to satisfy a costs award, Final Bell admits that taking cash out of its business to post as security would be "extraordinarily difficult" and would "negatively impact Final Bell's ability to fund its operations and pay its suppliers". These are admissions that Final Bell would be unable to pay a costs award, which are consistent with the disclosure repeated in Final Bell's financial statements since at least 2021. Final Bell is and has at all material times been balance sheet insolvent. Its most recent audited financial

statements, which Final Bell relies on to support its position on this motion, note Final Bell's (and its auditor's) significant doubt regarding its ability to continue as a going concern. Final Bell's liabilities have at all times materially exceeded its assets. It has at all times experienced significant losses (in the tens of millions of dollars), had a working capital deficiency (in the tens of millions of dollars), had negative cash flows from operations (in the tens of millions of dollars), and an accumulated deficit (in the tens of millions of dollars). Indeed, it sought to divest FBC to BZAM because of the significant cash drain that FBC imposed on its insolvent, money-losing business. Simply put, despite its bald assertion to the contrary, the evidence is clear that Final Bell lacks sufficient assets in Ontario (and elsewhere) to satisfy the costs award that could be made in this proceeding. This was the case before Final Bell divested FBC to BZAM, and it remains the case now.

5. Second, Final Bell's suggestion that BZAM has no right to seek security for costs because it is neither a defendant nor a respondent to which Rule 56 applies is disingenuous and inconsistent with the structural reality of the claim, which is proceeding as a trial of an issue, in respect of which Final Bell is the plaintiff/claimant and BZAM is the defendant/respondent. That the claim is proceeding in the context of a CCAA proceeding does not alter the applicability of Rule 56. If anything, this Court has broader powers under section 11 of the CCAA to make any order that it considers appropriate in the circumstances, including an order requiring Final Bell to post security for costs.

6. Third, Final Bell relies on the purported merits of its claim as a basis to avoid having to post security. However, its position in this regard is flawed in several respects. Inherent in Final Bell's position is the notion that it would be unjust to require a corporate plaintiff, who has access

to resources, to post security just because it has a supposedly meritorious claim. However, this is not the law and Final Bell cannot avoid posting security simply because it asserts its claim is meritorious. To the extent the merits are to be considered in the context of a complex claim such as this which is dependent on credibility findings, the merits are at best a neutral factor for Final Bell in determining whether security should be posted. In any event, Final Bell's claim lacks merit, both because there was no fraudulent misrepresentation, and because, even if it could establish fraudulent misrepresentation (which it cannot), the remedy it seeks is unavailable as a matter of law.

7. Fourth, Final Bell's assertion that BZAM's motion is tactical and brought with undue delay misconstrues and mischaracterizes the circumstances leading to the motion. Within days of Final Bell obtaining an adjournment of the hearing over BZAM's objection, BZAM served its motion for security for costs. In the approximately one-month period between when Final Bell commenced its claim on March 18 and when BZAM served its motion for security for costs on April 24, BZAM's attention was focused entirely on having Final Bell's claim adjudicated as quickly as possible so that it could move forward in its CCAA proceedings, which would be in the best interests of all its stakeholders. Once Final Bell obtained an adjournment of the hearing and delayed the timely adjudication of the matter, BZAM immediately brought its motion for security for costs. The motion was brought promptly and for legitimate protective reasons.

8. Fifth, as it relates to the quantum of security that should be posted, BZAM has delivered a detailed costs outline appended to an affidavit and supported by a lawyer's certificate, which segregates professional time in respect of the trial from the time related to the restructuring generally. BZAM's bill of costs only includes time relating to Final Bell's claim. The costs that

BZAM has incurred have been both necessary and reasonable, and are largely consistent with the time reflected by other parties in their own bills of costs, including Final Bell. Final Bell's bill of costs reflects costs of $457,904.25 (exclusive of disbursements) as compared to BZAM's costs of $607,270 (exclusive of disbursements).

9. BZAM has incurred significant unnecessary costs as a result of Final Bell's conduct in the litigation, and it should be afforded a reasonable measure of protection for its costs through an order requiring Final Bell to post adequate and meaningful security.

PART II. REPLY

A. Final Bell Is and Has at All Material Times Been Insolvent with Insufficient Assets to Satisfy a Costs Award

8. In its responding factum, Final Bell baldly claims that it has sufficient assets to satisfy a costs award. However, its assertion in this regard is belied by, among other things: (i) the admissions in its CFO's most recent affidavit and (ii) the information contained in each of Final Bell's financial statements from 2021 onwards (including its most recent audited financial statements for the year ending March 31, 2023 – statements that were only produced after BZAM brought this motion and which relate to a period ending over a year ago (the "**March 2023 Statements**")).

9. In his affidavit, Final Bell's CFO, Keith Adams, acknowledges that posting security would "have a significantly detrimental impact on Final Bell's business",[1] would "negatively impact Final Bell's ability to fund its operations and pay its suppliers",[2] and would be "extraordinarily

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[1] Affidavit of Keith Adams sworn May 9, 2024 ("**Adams May 9 Affidavit**"), at para 7; Responding Motion Record of Final Bell ("**RMR**"), Tab 3, p. 335.

[2] Adams May 9 Affidavit, at para 8, RMR, Tab 3, p. 336; Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 336.

difficult".[3] These admissions, of course, illustrate the same (if not the greater) difficulty that Final Bell will have in paying BZAM's costs, and the consequent need for an order for security for costs.

10. Final Bell's assertion that it has sufficient assets to pay a costs award is also contradicted by the realities of its financial situation as consistently set out in its financial statements going back to 2021 (which are addressed in BZAM's lead factum).

11. In its responding materials, Final Bell relies on the March 2023 Statements to note that, as at March 31, 2023, it had cash of approximately USD $3.6 million, and its cash position improved by USD $276,000 year-over-year, such that, according to Final Bell, it could satisfy a costs award. Final Bell fails to mention (let alone tender any evidence of) its current cash position. It also fails to mention any of the following contained in the March 2023 Statements:

a) the marginal improvement to its cash position in March 2023 as compared to the year prior was not due to any improvement to its financial performance but, rather, due to financing activities;[4]

b) Final Bell's financial performance in fact significantly deteriorated year-over-year. Among other things: (1) total current assets decreased from $26.8 million to $26.6 million year-over-year;[5] (2) accounts payable increased from $12.9 million to $18.6 million year-over-year;[6] (3) total current liabilities increased from $25.4 million to $58.5 million year-over-year;[7] and (4)

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[3] Adams May 9 Affidavit, at para 8, RMR, Tab 3, p. 336; Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 336.

[4] As set out in the March 2023 Statements, the only sources of cash inflow to Final Bell for the year ended March 31, 2023, were financing activities (net inflow of $5.3 million) and the "Effect of Exchange Rate Changes on Cash" (+ $4.3 million). For that period, Final Bell's net cash used in operating activities was negative (net outflow of $6.4 million), as was its net cash used in investing activities (net outflow of $2.9 million): Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 348-349.

[5] Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 344.

[6] Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 344.

[7] Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 344.

losses increased from $22.5 million to $34.6 million year-over-year.[8]

12. Final Bell also fails to mention the going concern note contained in its March 2023 Statements. In particular, note 2 to the March 2023 Statements provides the following:[9]

> A material uncertainty exists that may cast significant doubt about the ability of the Company to continue as a going concern, and therefore, the Company may not be able to realize its assets and discharge its liabilities in the normal course of business.

13. Note 25 to the March 2023 Statements provides a succinct summary of some of Final Bell's liquidity issues:[10]

> The Company has experienced significant losses, has a working capital deficiency of approximately $31.8 million at March 31, 2023, negative cash flows from operations, and accumulated deficit of $34.6 million.

14. While Final Bell notes in its responding factum that it converted certain subordinated convertible notes into subordinate voting shares in January 2024, Final Bell's liabilities continued to materially exceed its assets notwithstanding this conversion. Moreover, Final Bell neglects to mention that, in March 2024, it pursued a new offering of secured convertible notes up to an aggregate maximum principal amount of US$12 million, which bear interest at a rate of 15% per annum.[11] Subscriptions for $8.1 million principal amount of secured convertible notes had been received by Final Bell by April 2024, which increased Final Bell's secured debt by a significant margin, causing its liabilities to even further exceed its assets.[12]

15. Final Bell is a woefully insolvent business, based in the United States, with no ability to satisfy a costs award in this proceeding. Final Bell's attempts to obfuscate this reality are telling,

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8 Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 346.
9 Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 351.
10 Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 397.
11 Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 404.
12 Adams May 9 Affidavit, Exhibit A, RMR, Tab 3, p. 404.

and necessitate a meaningful order for security for costs.

16. Final Bell's assertion that its financial hardship was caused by BZAM's conduct that is the subject of this litigation is also without basis, given that it has been balance sheet insolvent at all material times, well before it divested FBC to BZAM or had any interaction with BZAM whatsoever. Moreover, the FBC business was a cash drain on Final Bell. The record is replete with contemporaneous documentation and admissions given on cross reflecting the significant cash drain FBC imposed on Final Bell.[13] There is no nexus whatsoever between BZAM's conduct that is the subject of this litigation and Final Bell's lack of funds or assets to satisfy a costs award in this proceeding.

B. BZAM is Entitled to Security for Costs as a Respondent

17. Final Bell asserts that BZAM is not a respondent or defendant and, as such, Rule 56 does not apply. However, this submission is at odds with the very structure of the claim Final Bell has advanced, which is proceeding as a "trial" or "summary trial" (as Final Bell consistently refers to it in its opening statement), in respect of which Final Bell is the plaintiff/claimant and BZAM is the defendant/respondent. Indeed, in Final Bell's own factum responding to Cortland's motion, it describes its claim as "a dispute between a claimant [i.e., Final Bell] and a respondent [i.e., BZAM]".[14]

18. Moreover, that the matter is proceeding in the context of a CCAA proceeding only confers wider latitude on the Court to make such orders as it deems fit, including as it relates to security

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[13] See, e.g., Affidavit of Matthew Milich sworn March 25, 2024 ("**Third Milich Affidavit**"), Exhibit FF, Reply MR, Tab 1FF, p.776; Jessel Cross, Qs. 277-278, RMR, Tab 13, p. 1669; Jessel Cross, Exhibit 6, RMR, Tab 13, p. 1693-1696 (see esp. p. 1695); Adams Cross at Qs. 365-382, RMR, Tab 12, p. 1467-1470.

[14] Responding Factum of Final Bell to Cortland (Motion for Security for Costs), at para 19.

for costs. As the Supreme Court of Canada recently described it: "[t]he most important feature of the CCAA — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court. Section 11 of the CCAA confers jurisdiction on the supervising court to 'make any order that it considers appropriate in the circumstances'. This power is vast."[15]

19. Here, an order for security would be appropriate and would serve the objectives of the CCAA, including by preserving going-concern value and protecting creditor recovery by ensuring that BZAM has a means of recovering some of the significant costs it has incurred and will continue to incur in responding to Final Bell's serious and unfounded allegations of fraud.

20. While in its factum responding to BZAM's motion Final Bell asserts that BZAM has no vested interest in seeking security (as it purportedly will not benefit from security for costs) and that Cortland is the only party with a legitimate interest in seeking security, Final Bell separately – and inconsistently – takes the position in its factum responding to Cortland's motion that Cortland is an intervenor with no entitlement to costs. Inconsistency aside, Final Bell's submissions as it relates to BZAM are unfounded. BZAM has a vested interest in seeking security as it is the only means through which it will have any prospect of recovering its significant costs from Final Bell. It would be unjust, and contrary to the objectives of both Rule 56 and the CCAA, for Final Bell to be able to litigate with impunity and drive up costs to the detriment of BZAM and its stakeholders without the risk of facing the costs consequences that should justly follow once the matter is determined on the merits.

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[15] *Canada v. Canada North Group Inc.*, 2021 SCC 30, at para 21.

C. The Purported Merit of Final Bell's Claim is Irrelevant to the Motion

21. In its responding factum, Final Bell submits that its claim is meritorious, such that it should not be required to post any security for costs. This submission is flawed for several reasons.

22. As a matter of law, courts have specifically rejected the notion that "it could be just not to require a corporate plaintiff, who has access to resources, to post security just because it has a meritorious claim."[16] Put differently, it is "unnecessary" for the court "to embark upon a consideration of the merits of the plaintiff's claim" where, in the case of a corporate plaintiff, its shareholders have sufficient resources to permit the corporate plaintiff to post security for costs if ordered.[17] As the court put it in *Pump Dynamics (Ontario) Inc. v. Somek*:

> The Plaintiffs, in resisting the motion for security for costs, raise the issue of the merits of their case. The question of the merits does not arise until impecuniosity as described above has been established. It has not.[18]

23. While Final Bell suggests that an order for security would be unjust, given how burdensome it would be on Final Bell, it also maintains that it has sufficient assets to pay such an award. In other words, Final Bell does not seek to prove its impecuniosity[19]—rather, it seeks to prove the opposite. Further, it has tendered no evidence that would suggest it cannot raise security for costs from its shareholders or others with an interest in the litigation.

24. The significance of "impecuniosity" in this sense is that an impecunious (but *only* an impecunious) corporate claimant could potentially show that an order for security for costs would

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16 *Aviaco International Leasing Inc. v. Boeing Canada Inc.,* [2000] O.J. No. 3284 [ONSC], at para 19.This decision is not reported on CanLII and is therefore appended to this factum as Appendix A.

17 *Aviaco,* above, at para 23.

18 *Pump Dynamics (Ontario) Inc. v. Somek,* [2005] O.J. No. 644 [ONSC] , at para 15.

19 See *Hagshama Canada 9 Gold Ltd. v. Decade Urban Communities Corp.,* 2021 ONSC 5150, at paras 17 and 20, quoting *Crudo Creative Inc. v. Marin,* [2007] O.J. No. 5334 [Div. Ct.], at para 33, where the Court held that, among other things, "a corporate plaintiff who claims impecuniosity must demonstrate that it cannot raise security for costs from its shareholders and associates, i.e. it must demonstrate that its principals do not have sufficient assets…A corporate plaintiff must provide "substantial evidence about the ability of its shareholders or others with an interest in the litigation to post security". Final Bell has not done that here.

be unjust by simply demonstrating that its claim is not "plainly devoid of merit".[20] However, while Final Bell clearly lacks funds and assets to satisfy a costs order, Final Bell has not demonstrated impecuniosity, and therefore the merits of its case are of negligible, if any, weight in analyzing whether ordering Final Bell to post security for costs would be just.

25. While there is some divide in the case law as to whether, in general, the merits of a non-impecunious corporation's claims are a negligible factor or instead one that may carry more weight (if the claim meets a high threshold of merit), in the circumstances of this case the former line of authority is apposite: indeed, as courts have recognized, there are certain cases where "the merits of the case play little role in determining whether this is a just case for awarding security for costs."[21] This is such a case. This is for many of the same reasons as in *Air Palace v. Abdel,* where the court reached the same conclusion, and ordered that security for costs be posted:[22] (1) "[the] case is incredibly complex factually", with (as in *Air Palace*) thousands of pages of motion records and transcripts from the cross-examinations;[23] and (2) the case in part turns on documents, but key parts turn on credibility of witnesses.[24] In a case such as this, "the merits are, at best, neutral in [the court's] assessment" of whether it would be unjust to order security for costs.[25] As the court held in *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*:

> […]In the present case, particularly given that CMB is not asserting that it is impecunious and that there are numerous issues of credibility that must be determined at trial, I conclude that the merits are a neutral factor which do not alter my conclusion that it is just in all of the circumstances that a security for costs order should issue.[26]

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20 *Hagshama Canada 9 Gold Ltd*, above, at para 15.
21 *Air Palace*, above, at para 57.
22 *Air Palace*, above, at para 80.
23 *Air Palace*, above, at para 57(a).
24 *Air Palace*, above, at para 57(b).
25 *Air Palace*, above, at para 58.
26 *Canadian Metal Buildings Inc. v. 14673444 Ontario Limited,* 2019 ONSC 566, at para 26. Emphases added, citations removed.

26. Given the volume of evidence in this case, the jumble of spurious allegations of fraudulent misrepresentation, the nature of the liability and damages issues, and the fact that the credibility of witnesses could be an important factor in the determination of the matters in issue, the merits of the case are, at best for Final Bell, neutral and should not affect the outcome of this motion.

D. Alternatively, Any Merits Analysis Favours BZAM, Not Final Bell

27. To the extent this Court is inclined to consider the merits of Final Bell's claim any more than neutrally on this motion, Final Bell's case does not meet the "high threshold" of a "good chance of success" on the merits.[27]

28. As for the proper approach to considering the merits of Final Bell's case at this stage in the analysis of the justness of security for costs, the court's approach in *Tordoff v. Canada Life Assurance Co.* is instructive. There, the court ordered the plaintiff to post security for costs after an unexpected adjournment of the trial[28]—after the trial had commenced.[29] The court observed that, by the time of the adjournment, "the plaintiff's evidence [was] substantially before the court".[30] By the time of the adjournment, the court also observed, "the plaintiff's credibility ha[d] already suffered considerably", given the "many and major" inconsistencies in his evidence.[31] On that basis, the court found, "it is a fair assessment from the evidence to this point that the plaintiff's case has many problems,"[32] and ordered the plaintiff to post security for costs.[33]

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27 This is a higher threshold than "not plainly devoid of merit", which only applies where the claimant can demonstrate impecuniosity. See *Air Palace v. Abdel,* 2021 ONSC 7882, at para 27(c). See also *Bruno Appliance and Furniture Inc. v. Cassels Brock Blackwell LLP,* 2013 ONSC 4501 [Div. Ct.], at paras 17-19.

28 In *Tordoff v. Canada Life Assurance Company,* [1985] B.C.J. No. 2800 [BCSC], unlike in this case, the adjournments were the result of the plaintiff's medical circumstances and not within his control (see para 4).

29 *Tordoff,* above, at paras 1, 4 and 17; see also *Javaheri v. Heidary*, 2019 BCSC 1682, at para 22.

30 *Tordoff,* above, at para 13.

31 *Tordoff,* above, at para 14.

32 *Tordoff,* above, at para 14.

33 *Tordoff,* above, at para 17.

29. As in *Tordoff*, Final Bell's evidence is "substantially before the court." Final Bell itself has expressly taken the position that the evidentiary record is "complete".[34] Also as in *Tordoff*, Final Bell's claims of fraudulent misrepresentation have many fatal flaws. Despite the requirement that it provide "a high quality of evidence" to support its fraud claim,[35] its evidence is riddled with inconsistencies and contradictions. As described in more detail below, the cross-examinations of both of Final Bell's affiants make clear that neither of them are credible witnesses, with each of them having repeatedly contradicted their prior sworn evidence on key matters at issue.

30. While the alleged fraudulent misrepresentations (and the relief Final Bell seeks) have been a constantly moving target, broadly speaking, Final Bell has accused BZAM of making fraudulent representations concerning: (1) *pro forma* forward-looking cash flow projections provided to Final Bell, at Final Bell's request; (2) various matters relating to the Credit Facility between Cortland and BZAM (the "**Credit Facility**"), including with respect to the potential extension of the maturity date of the Credit Facility, the borrowing capacity available under it, and BZAM's supposed non-compliance with the Credit Facility as it relates to its CFO, Sean Bovingdon; and (3) BZAM's outstanding excise tax liabilities. These allegations are briefly addressed in turn below. There are, of course, additional important facts and defences beyond those referenced herein that support BZAM's positions in this litigation. The below is by no means exhaustive or comprehensive, but, rather, is simply intended to highlight a few of the significant flaws in Final Bell's claim which undermine its assertion that its case has a good chance of success on the merits.

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[34] Letter of A. Winton dated May 3, 2024, Affidavit of Ashley McKnight sworn May 9, 2024 ("**McKnight Affidavit**"), Exhibit H, RMR, Tab 6, p. 841.

[35] *Heffel v. Cole,* 2023 BCSC 2139, at para 88. As the court clarified, "although the *standard* of proof is the same in all civil cases, the *quality* of evidence that will be required will typically vary depending on what the plaintiff must prove." (para 85). See also *Anderson v. British Columbia (Securities Commission),* 2004 BCCA 7, at para 29: "Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element."

1. Alleged Misrepresentations Concerning *Pro-Forma* Forward-Looking Cash Flow Projections

31. Final Bell alleges that BZAM misled Final Bell about its *future* cash flows as a standalone entity. However, as a matter of law, courts have repeatedly recognized that financial projections and forecasts of potential future results are inherently "not actionable".[36] For instance, as the court held in *Jasmur Holdings Ltd. v. Taynton Developments Inc.*, finding no fraudulent misrepresentation in a *pro forma* estimate, a party with over a decade of relevant business experience would have understood that a "*pro forma* was an estimate and a forecast of future events" and not a representation of material fact.[37] As the court added, "a failure to meet the [estimates] is not proof…of a fraudulent misrepresentation."[38] The court rejected the plaintiff's allegation that the defendant fraudulently misrepresented that "the information contained in the *pro forma*, including the costs and time lines, was accurate and reliable."[39]

32. Since the only misrepresentations Final Bell alleges regarding BZAM's projections concern the future, none of them can be successfully made out. It is undisputed that BZAM's standalone model contained no misrepresentations of historical or present (i.e., actual) fact. For instance, as the Monitor observed:

> "The Monitor compared the actual results shown in the Historical Period versus the actual results disclosed as part of BZAM's quarterly financial statements and found that the results for the six-month period ended June 30, 2023 **were in alignment**. […] **The Monitor did not find any material errors in its review of the BZAM Standalone Model**."[40]

33. Mr. Adam's own evidence on cross was that financial forecasts and models are inherently

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36 See, e.g., *Demers v. Desrochers,* 2010 ONSC 4906, at paras 29 and 30 (and the cases cited therein).
37 *Jansmur Holdings Ltd. v. Taynton Developments,* 2016 BCSC 1902, at paras 118, 120 and 133.
38 *Jasmur,* above, at para 122.
39 *Jasmur,* above, at para 103-104, 133.
40 Monitor Report, at paras 57 and 58. Emphasis added.

incapable of being "accurate".[41] Some examples of Mr. Adams' testimony include the following:

(a) "[H]ow could you say forecasts are accurate? Forecasts are estimates.";[42]

(b) "It has a degree of uncertainty to it. That's a forecast.";[43]

(c) "Different people use different assumptions and different operators use different assumptions. That's normal course."[44]

34. As Mr. Adams specifically confirmed during his cross, the nature of modelling involves judgments, assumptions, and inherent uncertainty.[45]

35. Further, the supposed "representation" that Final Bell alleges BZAM made with respect to its projections is expressly disclaimed in the Share Exchange Agreement. Specifically, Article 12.5 of the Share Exchange Agreement expressly incorporates the NDA into the "entire agreement" between the parties.[46] Section 8 of the NDA, in turn, directly disclaims "any representation or warranty, expressed or implied, as to the accuracy or completeness of the Confidential Information disclosed to the Recipient hereunder"—with such "Confidential Information" including the impugned projections. Tellingly, despite alleging that the cash flow projections were critical matters on which Final Bell supposedly relied, Mr. Adams admitted on cross that neither Final Bell nor its legal counsel ever sought to include any representations or warranties concerning cash flows in the Share Exchange Agreement.[47]

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41 Adams Cross, Qs. 567-568, RMR, Tab 12, p. 1510-1511; Adams Cross, Q. 573, RMR, Tab 12, p. 1511.
42 Adams Cross, Qs. 567-568, RMR, Tab 12, p. 1510-1511.
43 Adams Cross, Q. 573, RMR, Tab 12, p. 1511.
44 Adams Cross, Q. 576, RMR, Tab 12, p. 1512.
45 Adams Cross, Qs. 569-573, RMR, Tab 12, p. 1511; Third Milich Affidavit, at para 32 and Exhibit P, Reply MR, Tab 1, p. 9 and 348-349.
46 i.e., the "Confidentiality Agreement", as that term is defined in the Share Exchange Agreement.
47 Adams Cross, Q. 180, RMR, Tab 12, p. 1434.

2. Alleged Misrepresentations Concerning Cortland

36. Final Bell also alleges that BZAM made fraudulent misrepresentations concerning Cortland, including regarding (i) the extension of the maturity date of the facility, (ii) the borrowing capacity available under the Credit Facility, and (iii) BZAM's compliance with certain covenants under the Credit Facility as it relates to Mr. Bovingdon.

(a) No Misrepresentation regarding an Extension to the Maturity Date

37. Final Bell's sworn evidence that Mr. Bovingdon "assured" it that BZAM would obtain an extension of the maturity date of the Credit Facility[48] was undermined by Mr. Adams' admissions given on cross. As Mr. Adams admitted on cross, Mr. Bovingdon in fact made "no guarantee or assurance that [the maturity date] would be extended."[49] This is consistent with what Mr. Adams contemporaneously reported to his colleagues at the time.[50] Moreover, Mr. Bovingdon's statement (that he saw no reason the Credit Facility maturity date would not be extended) had a reasonable basis. The maturity date had been extended four times previously,[51] and in communications between Cortland and BZAM dated December 13, 2023, Rachael Andrew of Cortland specifically noted that Cortland would look to implement an extension in the future *if one was requested*.[52] Cortland had made no decision about whether to extend the maturity date of the Facility at any relevant time. Mr. Milich attests to this,[53] and Mr. Bovingdon confirmed as much during his examination.[54] This was also specifically confirmed by Cortland during the examination of its

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48 See, e.g., paragraphs 24 and 29 of the Affidavit of Keith Adams sworn March 18, 2024 ("**First Adams Affidavit**"), RMR, Tab 1, p. 15-17.

49 Adams Cross, Q. 170, RMR, Tab 12, p. 1429; See the Monitor Report, at para 129.

50 Specifically, "[t]he revolver matures 3/31/24 and they see no reason that it won't be extended.": First Adams Affidavit, Exhibit 6, RMR, Tab 1, p. 129.

51 Third Milich Affidavit, at para 69, Reply MR, Tab 1, p. 21.

52 Exhibit 4 to the Bovingdon Cross, RMR, Tab 8-4, p. 1097. While Final Bell relies on the first sentence of this email, in isolation, as supposed support for its contention that Cortland had decided not to extend the facility at this point in time, Final Bell's focus is both misguided and misleading when the entirety of the email is considered.

53 Third Milich Affidavit, at para 67, Reply MR, Tab 1, p. 19.

54 Bovingdon Cross, Qs. 254-256, RMR, Tab 8, p. 1030-1031.

affiant.[55] Ultimately, the prospect of an extension to the maturity date was superseded by intervening events. BZAM never reached the maturity date in March 2024, as it entered CCAA protection prior to that.

38. In any event, Mr. Bovingdon's statement was no more than "[a]n opinion expressed concerning future events", and therefore cannot be "a misrepresentation…of a material fact."[56]

39. Further, despite alleging that this was a critical representation on which Final Bell purportedly relied, Mr. Adams admitted on cross that neither Final Bell nor its legal counsel ever sought to include any representations or warranties concerning an extension of the Credit Facility in the Share Exchange Agreement.[57]

(b) No Misrepresentation regarding the Borrowing Capacity

40. Final Bell's allegation that BZAM fraudulently misrepresented the borrowing capacity available under the Credit Facility was similarly undermined on cross.[58] The crux of this allegation is Mr. Adams' evidence that, according to borrowing base calculations as at February 23, 2024, Mr. Milich represented to the court that less than $2 million was available under the Credit Facility[59]—when, per the Project Tower PowerPoint dated November 2023, "$6-$10 million would be available to BZAM through the Credit Facility throughout 2024."[60]

41. At the time BZAM made this allegedly fraudulent misrepresentation, BZAM did in fact

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55 As Deepak Alappatt of Cortland testified during his examination, between November 2022 and the signing of the Share Exchange Agreement on December 5, 2023, there were no requests made by BZAM, nor were there any decisions made by Cortland, regarding an extension of the maturity date of the Facility (Alappatt Cross, Qs. 6-8, RMR, Tab 11, p. 1251-1252). Mr. Alappatt also testified there were no requests made by BZAM, nor were there any decisions made by Cortland, regarding the extension between December 5, 2023 and the period immediately preceding BZAM filing for CCAA protection (Alappatt Cross, Qs. 9-10, RMR, Tab 11, p. 1252-1253).

56 *Demers,* above, at para 30, quoting *Liberty Mutual Insurance Co. v. Bank of Nova Scotia,* [2008] O.J. No. 2929 [ON SC], at para 63.

57 Adams Cross, Q. 180, RMR, Tab 12, p. 1434.

58 Adam Cross, Q. 462-470, RMR, Tab 12, p. 1490-1491.

59 Third Milich Affidavit, Exhibit QQ, Reply MR, Tab 1, p. 895.

60 First Adams Affidavit, at para 30, RMR, Tab 1, p. 17.

have over $7 million of borrowing capacity available, as is confirmed in the borrowing base calculation dated November 17, 2023.[61] Further, Mr. Adams acknowledged on cross that he understood the pool of "collateral for the draws changes constantly",[62] that "Final Bell was familiar with the advance rate under the facility",[63] and was familiar with the "revolving facility limit."[64] Mr. Adams understood that the total amount of BZAM's "eligible receivables" was "a rolling situation"[65] and that "access to draws under the revolver were directly tied to the amount of eligible receivables as at a particular point in time."[66]

42. Further, neither Final Bell nor its legal counsel ever sought to include any representations or warranties in the Share Exchange Agreement concerning the borrowing capacity available under the Credit Facility.[67]

(c) No Misrepresentation regarding Mr. Bovingdon's Departure

43. Finally, Final Bell's bizarre claim based on an allegedly "implied representation" that BZAM "would not terminate its CFO shortly after the closing if it did not have cause to do so and had no candidate to replace him" has no basis in either the Share Exchange Agreement or in any other evidence. What BZAM actually represented on this point, expressly stated in the Share Exchange Agreement, was that it was not "in material breach" of any "Purchaser Material Contract" (which includes the Credit Facility). This representation was accurate.[68]

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61 Third Milich Affidavit, Exhibit DD, Reply MR, Tab 1, p. 744. Specifically, the "Max Available in Facility" was, with calculations shown, $7,703,326.

62 Adams Cross, Q. 468, RMR, Tab 12, p. 1491.

63 Adams Cross, Q. 469, RMR, Tab 12, p. 1491.

64 Adams Cross, Q. 470, RMR, Tab 12, p. 1491.

65 Adams Cross, Q. 464, RMR, Tab 12, p. 1490.

66 Adam Cross, Q. 462, RMR, Tab 12, p. 1490.

67 Adams Cross, Q. 180, RMR, Tab 12, p. 1434.

68 Mr. Bovingdon's departure was only formalized on January 24, 2024 (Signed Separation Agreement, Bovingdon Cross, Exhibit 2, RMR, Tab 8, p. 1082-1089) – almost two months after the Share Exchange Agreement was entered into on December 5, 2023, and weeks after it closed on January 5, 2024 – and the agreement was that he would continue in the CFO role until April 30, 2024 (See Consulting Agreement, Bovingdon Cross, Exhibit 3, RMR, Tab 8, p. 1090-1096). Even in theory, there could not be any "event of default" (much less "material breach") until, at minimum, Mr. Bovingdon "ceases to be the chief financial officer of [BZAM]"; per the definition of

44. There is also no evidence of either Cortland's dissatisfaction with the arrangement concerning Mr. Bovingdon, or that it had not waived any (non-existent) technical non-compliance.[69] Rather, all relevant evidence indicates Cortland's satisfaction with the situation concerning Mr. Bovingdon.[70] Tellingly, Final Bell did not, and does not intend, to seek to elicit any evidence from Cortland itself on these issues.

3. Alleged Misrepresentations Concerning Excise Tax Liabilities

45. In its opening statement, Final Bell asserted that "BZAM did not file its B300 forms for those months [August and November 2023] until February 12, 2024 – weeks or months after they were due" and BZAM "was therefore not current with its excise tax filings". This assertion was based on Final Bell's mistaken and untested assumption about certain dates contained on the B300s produced by way of answer to undertaking. As a result of Final Bell's attempt to improperly leverage its misconception in this regard to suggest that BZAM had been delinquent in its filing of its B300s, BZAM immediately produced additional versions of the B300s taken from the CRA portal, which illustrated the difference between the *filing date* and the *CRA review date* for the B300s for August and November 2023, and which confirmed that the B300s for August and November 2023 were in fact filed on time.[71]

46. BZAM also made further production of documentation relating to the issue of BMI's B300s

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"Change of Control"; which, without Cortland's consent, may be an "Event of Default" as that term is defined in the Facility: See the most recent iteration of the Credit Facility, Third Milich Affidavit, Exhibit PP, Reply MR, Tab 1, p. 864. This definition of "Change of Control", in respect of Mr. Bovingdon as CFO, has remained constant through every amendment of the Facility, including the Second Amended and Restated Credit Agreement.

69 As an "Event of Default" requires under the Cortland Credit Facility.

70 Mr. Milich discussed Mr. Bovingdon's departure with Cortland prior to it taking place (Milich Cross, Q. 128, RMR, Tab 10, p. 1216-1217), and Cortland indicated its continued support for BZAM following the public announcement of the decision to transition Mr. Bovingdon out of the CFO role in January 2024 (Meeting Minutes – Board of Directors' Meeting of BZAM Ltd. of February 8 and 12, 2024, Third Milich Affidavit, Exhibit MM, Reply MR, Tab 1, p. 815-816).

71 See Letter of J. Blinick dated April 18, 2024, McKnight Affidavit, Exhibit B, RMR, Tab 6, p. 598, and the enclosed productions, including, in particular: (i) BZAM August 2023 B300 Cannabis Duty and Information return filed September 25, 2023, McKnight Affidavit, Exhibit B, Tab 1-B, RMR, Tab 6, p. 599-604; and (ii) BZAM November 2023 B300 Cannabis Duty and Information return filed December 22, 2023, McKnight Affidavit, Exhibit B, Tab 1-D, RMR, Tab 6, p. 618-624.

for the relevant time period (diligently responding to Final Bell's further belated requests), and offered to make Mr. Bovingdon available for a continued examination on this subject-matter at the earliest possible time.[72] Following its receipt of these productions, Final Bell advised that it no longer wished to conduct an examination of Mr. Bovingdon, and it took the position that "the pre-hearing record is now complete".[73]

47. Final Bell now seems to accept that the B300s were filed on time, though it now asserts, again without merit, that the payment of excise tax liabilities for October and November 2023 were late (and in the case of November, by barely a week), and that this somehow constitutes a fraudulent misrepresentation.

48. Final Bell's position again misstates and omits key facts that are relevant to the issue. Importantly, BZAM (like all cannabis companies) from time-to-time filed B301s (Applications for a Refund of Cannabis Duty under the *Excise Act, 2001*).[74] While not mentioned anywhere by Final Bell, BZAM's relevant B301 filings produced in the litigation resulted in significant refunds totalling over $1.8 million being credited to BZAM, starting in September 2023.[75] These refunds exceeded the excise tax liability for October.

49. In any event, as the Monitor notes in its report, and as is well known in the cannabis industry, "it is not uncommon for companies operating in the cannabis industry to defer payment of excise taxes".[76] This could be the case for a number of different reasons, including where, as here, refund credits for prior excess payments are expected to offset new ordinary course excise

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72 Letter of J. Blinick dated April 29, 2024, McKnight Affidavit, Exhibit F, RMR, Tab 6, p. 637-642 (see esp. 639).
73 Letter of A. Winton dated May 3, 2024, McKnight Affidavit, Exhibit H, RMR, Tab 6, p. 841.
74 This typically occurred if inventory for which a B300 had been filed had been destroyed, such that excise tax should not have been paid with respect to that inventory.
75 The B301s can be found in the McKnight Affidavit, Exhibit G, Tab 2, RMR, Tab 6, at p. 742-778.
76 Second Report of the Monitor, at para 124.

liabilities.

50. Mr. Adams also acknowledged on cross that he has no understanding of how excise tax in Canada works, nor of what a B300 even is.[77] Notwithstanding Final Bell's admitted lack of understanding regarding excise tax, Final Bell elected not to conduct a further examination of Mr. Bovingdon or ask any questions of BZAM or its counsel about any of these matters. At this stage, there is simply no evidence in the record that could support a finding of fraudulent misrepresentation with respect to BZAM's excise tax liabilities, all of which were filed on time and all of which were offset by refunds and/or paid in due course. That Final Bell calls the excise tax documents "the most damning documents" is telling, and highlights the tenuous nature of the entirety of its case.

4. Final Bell Has Not Proven, and Cannot Prove, the Requisite Intent to Deceive

51. In addition to coming nowhere close to providing "high quality" evidence that BZAM knowingly or recklessly made a false representation of material fact to Final Bell, it has also failed to prove—as fraudulent misrepresentation also requires—that BZAM made such a knowingly or recklessly false representation with "an intent to deceive the plaintiff."[78] In both its Written Opening Statement and its responding factum on this motion, Final Bell fails to mention this second step.[79]

52. Fraud is not an oversight, mistake, or an error; fraud is "something dishonest and morally wrong".[80] To successfully make out its claim for fraudulent misrepresentation, Final Bell is

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77 Adams Cross, Q. 683-686, RMR, Tab 12, p. 1540; Adams Cross, Q. 715, RMR, Tab 12, p. 1547.

78 *Kaynes v. BP, PLC,* 2019 ONSC 6464, at para 24; *Smith v. Sino-Forest Corp.,* 2012 ONSC 24, at para 321, citing *Beckman v. Wallace,* (1913), 29 OLR 90 (Ont. C.A.), *inter alia*.

79 See Written Opening Statement of Final Bell, at paras 107-117, and Responding Factum of Final Bell to BZAM Ltd. (Motion for Security for Costs), at paras 66-68.

80 *Eurobank Ergasias S.A. v. Bombardier Inc.,* 2024 SCC 11, at para 222.

required to establish not only that a false representation was made knowingly or recklessly but also that it was made with "intentional dishonesty, the intent being to deceive."[81] It has failed to do so.

53. Describing the importance of this second aspect, the court has explained that proving knowledge or "recklessness is only half the battle. The overall motive may not matter, but the defendant still must have had the intent to deceive".[82] Despite this, Final Bell has so far provided no evidence whatsoever for this key element of its claim, nor can it (because there was no intent to deceive).

5. The Relief Final Bell Now Claims is Not Available

54. Notably, Final Bell belatedly abandoned its rescission claim approximately a week after the matter was scheduled to be fully adjudicated, and it now seeks to impose a constructive trust over any proceeds of the sale of the Applicants' business to the Stalking Horse Bidder, which proceeds are entirely payable to Cortland and in respect of which there is no clear or direct connection to Final Bell's claim.

55. Courts have almost invariably refused to grant a constructive trust where doing so would upset the established priority scheme as amongst creditors, particularly where a constructive trust would unfairly compromise the legitimate interests of a secured creditor such as Cortland.[83] Given that Cortland as DIP Lender also has the added protection of a court-ordered charge that ranks in priority to all trust claims (statutory or otherwise), Final Bell has no tenable claim to a constructive trust —and, in any event, pursuant to the terms of the ARIO, any constructive trust that could

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81 *Ibid.*

82 *Smith,* above, at para 323.

83 See, e.g., *Kingsett Mortgage Corp et al v. Stateview Homes et al*., 2023 ONSC 2636 (and the cases cited therein), including at paragraphs 71-72, 75 and 80; *Pacific Shores Resort & Spa Ltd., Re*, 2013 BCSC 480 at para 73; etc.

theoretically be imposed would be subordinate to the DIP Charge and cannot have any meaningful impact on the rights of the parties at this point.

56. Accordingly, even if Final Bell could conceivably make out its claim of fraudulent misrepresentation – which it cannot – the constructive trust remedy it seeks is unavailable, and moot. Further, as Final Bell acknowledges in its responding factum on Cortland's motion, equitable damages alone without a constructive trust will amount to "meaningless" and "empty" remedy.[84] Given all the circumstances, Final Bell's claim can have no practical consequences for the parties. Final Bell should post security for the costs it has caused BZAM to waste in responding to its unfounded, and now moot, claim.[85]

E. BZAM has Not Acted Tactically or with Delay in Bringing its Motion

57. BZAM has not brought its motion tactically or with any delay at all, let alone any undue delay. BZAM brought this motion within approximately one month after Final Bell commenced its claim for rescission on March 18, 2024.

58. In the brief period between when Final Bell commenced its claim on March 18 and when BZAM's motion for security for costs was served on April 24, BZAM's attention was focused entirely on having Final Bell's claim adjudicated as soon as possible. In that brief timeframe, BZAM diligently complied with all steps under the agreed-upon timetable leading to the hearing and was ready to proceed on the scheduled dates.[86] Once Final Bell obtained an adjournment of the hearing and delayed the timely adjudication of the matter, BZAM immediately brought its

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84 Responding Factum of Final Bell to Cortland Credit Lending Corporation (Motion for Security for Costs) at para 31.

85 Where a matter is moot—that is, "[i]f the decision of the court will have no practical effect on [the parties'] rights, the court will decline to decide the case.": *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342 [SCC], at p. 353.

86 Among other things, it prepared a responding record, made documentary productions, defended cross-examinations of its witnesses, cross-examined Final Bell's witnesses, answered undertakings, and took all other steps required to prepare for the hearing—which it was ready to begin, on schedule, on April 22.

motion for security for costs.

59. In any event, as courts have made clear, "a motion for security for costs can be brought at any time".[87] To the extent this court finds that there was any delay in pursuing this motion on BZAM's part, such delay must be unreasonable and unexplained, and must have caused actual prejudice to the plaintiff, in order to make ordering security unjust.[88] Any delay in bringing the motion—which, again, was brought within approximately one month of the claim's commencement—is reasonably explained by the reality of the trial schedule and BZAM's diligent efforts to have Final Bell's claim adjudicated on the merits as quickly as possible.

60. In any event, Final Bell has not alleged (much less shown) that it has suffered prejudice as a result of any alleged delay in bringing this motion.

61. BZAM's motion is also not "tactical". It is protective. BZAM has been put to extreme expense to defend serious and unfounded allegations of fraud advanced by an insolvent, out-of-country claimant who has litigated this case with impunity and with no regard for the impact its litigation strategy and conduct has caused to BZAM and its various stakeholders. BZAM reasonably expected that the trial of this claim would be completed by April 22-23, per the timetable agreed to by the parties. Final Bell's conduct in seeking the adjournment on April 19 (and its conduct since, including its abandonment of its rescission claim a week after the claim was supposed to be fully adjudicated), has undermined the certainty on which BZAM and other parties relied in organizing their affairs with respect to this proceeding. An order for security for costs is

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87 *855191 Ontario Ltd. v. Turner,* 2011 ONSC 918, at para 16. This includes, as the court notes, even *during* trial.

88 *Tabrizi v. Kaushal et al.,* 2017 ONSC 7660, at paras 24 and 26.

imperative so that BZAM has a reasonable degree of protection in this regard.

F. The Quantum of Security Sought is Reasonable and Appropriate

62. Final Bell submits that, if this Court decides to order Final Bell to post security for costs, the quantum of security BZAM seeks is inappropriate because its costs are unreasonable and not supported by proper evidence. However, BZAM's costs are largely consistent with Final Bell's costs, and BZAM has delivered a detailed bill of costs, appended to an affidavit, that sets out the services provided and the associated costs for those services, the hours spent, the hourly rates charged for those hours spent, the names of the timekeepers who provided the services, and the details about the years of experience of each timekeeper; all of which is supported by a lawyer's certificate attesting to the fact the time was incurred.

63. While Final Bell takes issue with there being no dockets to support the security for costs sought by BZAM, its complaint in this regard is based upon a speculative and baseless concern that the bill of costs may include time for matters relating to the restructuring proceeding. BZAM's bill of costs includes no time for any matters unrelated to Final Bell's claim, as is clearly set out in the bill of costs and the description of services for which costs are sought.[89]

64. Dockets are generally not required[90] (and the Court specifically declined to order production of dockets in connection with this motion[91]). Indeed, Final Bell has tendered its own

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89 There a total of 7 timekeepers on the bill of costs. Three of the timekeepers (Joseph Blinick, Tom Feore and Josephine Bulat) are all litigators that have worked exclusively on the Final Bell litigation, whose time collectively amounts to over 467 of the 534 hours incurred as at the date of bill of costs, being 88% of the time. Preet Gill is a research lawyer who has had no involvement in any restructuring matters and, in any event, has less than 7 hours on the bill of costs. The balance, being the time incurred by Sean Zweig (7.7 hours), Mike Shaka (40.2 hours) and Jamie Ernst (12.8 hours), was also incurred on the Final Bell litigation and, in any event, this time amounts to a fraction of the costs in respect of which security is being sought.

90 See, e.g.: *Godard v. Intelcom Courier Canada Inc.,* 2023 ONSC 1941, at paras 38-39; *M&M Homes Inc. v. 2088556 Ontario Inc.,* 2019 ONSC 6400, at paras 21-22 aff'd 2022 ONCA 364, leave to appeal to SCC ref'd,; *Chandra v. Canadian Broadcasting Corp.,* 2015 ONSC 6519, at para 6; and *Legacy Leather International Inc. v. Ward,* 2007 CanLII 2357 (ON SC) [Comm. List], at para 6.

91 Endorsement of Justice Osborne, May 6, 2024.

bill of costs on this motion, without providing any dockets, and its bill of costs reflects time that is largely consistent with the time set out in BZAM's bill of costs.

65. If the Court orders security for costs, it has a wide discretion as to the quantum of security to be posted. It must make an order that is just in all the circumstances. It does so by balancing the respondent's entitlement to a reasonable measure of protection for its costs, with the impact on the claimant. However, the law is well-established that the Court should not "circumvent its duty by ordering a token amount", such that the order would be "ineffectual".[92]

66. This is fast-paced and high-stakes litigation. At the heart of Final Bell's claim are a hodgepodge of very serious allegations of fraud, which have been advanced on a record that has been contradicted on cross and shown to be baseless. The relief Final Bell seeks is also unavailable. If BZAM is successful at trial, this would justify a substantial costs award in favour of BZAM, likely on an elevated scale.[93]

67. BZAM respectfully requests that this Court order Final Bell to post security for costs in the usual fashion, reflecting BZAM's actual and reasonably anticipated fees and disbursements, on the appropriate scale. The amounts reflected by each scale are set out in BZAM's bill of costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May 2024.

Bennett Jones LLP

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92 *Michigan National Bank v. Axel Kraft International Ltd.,* [1999] O.J. No. 418 [ONSC], at para 17. This decision is unreported on CanLII, and is therefore appended to this factum as Appendix B.

93 *Catford v. Catford,* 2013 ONCA 58, at para 4.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *306440 Ontario Ltd. v. 782127 Ontario Ltd.,* 2014 ONCA 548
2. *855191 Ontario Ltd. v. Turner,* 2011 ONSC 918
3. *Air Palace v. Abdel,* 2021 ONSC 7882
4. *Anderson v. British Columbia (Securities Commission),* 2004 BCCA 7
5. *Aviaco International Leasing Inc. v. Boeing Canada Inc.,* [2000] O.J. No. 3284 [ONSC]
6. *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342 [SCC]
7. *Bruno Appliance and Furniture Inc. v. Cassels Brock Blackwell LLP,* 2013 ONSC 4501 [Div. Ct.]
8. *Canada v. Canada North Group Inc.*, 2021 SCC 30
9. *Canadian Metal Buildings Inc. v. 14673444 Ontario Limited,* 2019 ONSC 566
10. *Catford v. Catford,* 2013 ONCA 58
11. *Chandra v. Canadian Broadcasting Corp.,* 2015 ONSC 6519
12. *Demers v. Desrochers,* 2010 ONSC 4906
13. *Eurobank Ergasias S.A. v. Bombardier Inc.,* 2024 SCC 11
14. *Godard v. Intelcom Courier Canada Inc.,* 2023 ONSC 1941
15. *Hagshama Canada 9 Gold Ltd. v. Decade Urban Communities Corp.,* 2021 ONSC 5150
16. *Heffel v. Cole,* 2023 BCSC 2139
17. *Jansmur Holdings Ltd. v. Taynton Developments,* 2016 BCSC 1902
18. *Javaheri v. Heidary*, 2019 BCSC 1682
19. *Kaynes v. BP, PLC,* 2019 ONSC 6464
20. *Kingsett Mortgage Corp et al v. Stateview Homes et al*., 2023 ONSC 2636
21. *Legacy Leather International Inc. v. Ward,* 2007 CanLII 2357 (ON SC) [Comm. List]
22. *M&M Homes Inc. v. 2088556 Ontario Inc.,* 2019 ONSC 6400
23. *Michigan National Bank v. Axel Kraft International Ltd.,* [1999] O.J. No. 418 [ONSC]

24. *Pacific Shores Resort & Spa Ltd., Re*, 2013 BCSC 480

25. *Pump Dynamics (Ontario) Inc. v. Somek,* [2005] O.J. No. 644 [ONSC]

26. *Smith v. Sino-Forest Corp.,* 2012 ONSC 24

27. *Tabrizi v. Kaushal et al.,* 2017 ONSC 7660

28. *Tordoff v. Canada Life Assurance Company,* [1985] B.C.J. No. 2800 [BCSC]

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

RULE 56 SECURITY FOR COSTS

Where Available

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

[…]

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

APPENDIX A

Most Negative Treatment: Distinguished
Most Recent Distinguished: Mirza v. Pervaiz | 2009 CarswellOnt 3061 | (Ont. S.C.J., Feb 26, 2009)

2000 CarswellOnt 3088
Ontario Superior Court of Justice

Aviaco International Leasing Inc. v. Boeing Canada Inc.

2000 CarswellOnt 3088, [2000] O.J. No. 3284, [2000] O.T.C. 994, 48 C.P.C. (4th) 366, 99 A.C.W.S. (3d) 391

Aviaco International Leasing, Inc., Aviaco Traders International, Inc. and Furlong International, Ltd., Plaintiffs and Boeing Canada Inc., Boeing of Canada Ltd., The Boeing Company, Nomar A. Acuna, Bahamasair Holdings Ltd., Philip M. Bethel, Darrell E. Rolle, David Livingston Johnson, Sovereign Aircraft Ltd., Duncan Ernest Wilfred Rapier, Famona Investment Limited, Edward P. Williams and Frederick G. Murray, Defendants

Nordheimer J.

Heard: September 1, 2000
Judgment: September 6, 2000
Docket: 98-CV-159655CM

Counsel: *Warren H.O. Mueller, Q.C.* and *Glen Grenier*, for Plaintiffs.
Glenn Hainey and *John Ormston*, for Defendants, Boeing Canada Inc., Boeing of Canada Ltd., The Boeing Company.
John Rook, Q.C., for Defendant, Nomar A. Acuna.
Nancy J. Spies, for Defendants, Sovereign Aircraft Ltd., Duncan Ernest Wilfred Rapier.
Shan K. Jain, Q.C., for Defendant, Darrell E. Rolle.
Giovana Asaro, for Defendants, Bahamasair Holdings Ltd., David Livingston Johnson.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.q Costs
V.3.q.viii Security for costs
V.3.q.viii.C Jurisdiction and discretion
Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.e Interlocutory proceedings
XXIV.10.e.ii Motions and applications
Headnote
Corporations --- Practice and procedure in actions involving corporations — Costs — Security for costs — Jurisdiction and discretion
Defendants allegedly engaged in bribery scheme which resulted in termination of contracts and destruction of plaintiffs' business — Plaintiffs brought action for damages of $450,000,000 for conspiracy, inducing breach of contract, intentional interference with economic relations, fraud and deceit — Defendants brought motion for order requiring plaintiffs to post security for costs through completion of examinations for discovery — Motion granted — Rule 56.01 of Ontario Rules of Civil Procedure allows

court to consider merits of claim in determining whether order for security for costs should be granted — Mere fact that corporate plaintiff with access to resources has meritorious claim does not mean that it would not be just to require plaintiff to post security for costs — Plaintiffs admitted that their shareholder had adequate resources to permit them to abide by order for security of costs — Consideration of merits of plaintiffs' claim unnecessary — Plaintiffs ordered to post security for costs in amount of $1,198,614 — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 56.01.

Table of Authorities

Cases considered by *Nordheimer J.*:

ABI Biotechnology Inc. v. Apotex Inc., [1995] 8 W.W.R. 562, 102 Man. R. (2d) 108, 93 W.A.C. 108, 33 C.B.R. (3d) 307, 41 C.P.C. (3d) 394 (Man. C.A.) — not followed

ABI Biotechnology Inc. v. Apotex Inc., [2000] 3 W.W.R. 217, 142 Man. R. (2d) 80, 212 W.A.C. 80 (Man. C.A.) — considered

Heck v. Royal Bank (1986), 11 C.P.C. (2d) 109, 56 O.R. (2d) 168 (Ont. H.C.) — considered

Horvat v. Feldman (1986), 15 C.P.C. (2d) 220 (Ont. H.C.) — applied

International Nesmont Industrial Corp. v. Coopers & Lybrand (November 13, 1998), Doc. Vancouver C957537 (B.C. S.C.) — referred to

John Wink Ltd. v. Sico Inc. (1987), 15 C.P.C. (2d) 187, 57 O.R. (2d) 705 (Ont. H.C.) — distinguished

Kurzela v. 526442 Ontario Ltd. (1988), 66 O.R. (2d) 446, 32 C.P.C. (2d) 276, 31 O.A.C. 303 (Ont. Div. Ct.) — considered

Pierce International Discovery Inc. v. Buffalo Mines Ltd. (February 24, 1997), Doc. Vancouver C964314 (B.C. S.C. [In Chambers]) — referred to

Ragged Runner Enterprises Ltd. v. Victoria Sports Traders Inc. (September 15, 1993), Doc. Kelowna 10208 (B.C. Master) — referred to

Smith Bus Lines v. Bank of Montreal (1987), 20 C.P.C. (2d) 38, 61 O.R. (2d) 688 at 690 (Ont. H.C.) — referred to

Smith Bus Lines v. Bank of Montreal (1987), 25 C.P.C. (2d) 255, 61 O.R. (2d) 688 (Ont. H.C.) — considered

Taulbee v. Bowen (1986), 9 C.P.C. (2d) 90, 54 O.R. (2d) 763 (Ont. H.C.) — considered

Tour-Mate Technologies Corp. v. Syntronix Systems Ltd. (March 18, 1993), Doc. Vancouver C921887 (B.C. S.C.) — distinguished

Warren Industrial Feldspar Co. v. Union Carbide Canada Ltd. (1986), 8 C.P.C. (2d) 1, 54 O.R. (2d) 213 (Ont. H.C.) — considered

459433 Ontario Ltd. v. Markborough Properties Ltd. (March 18, 1986), Doc. 8372/82 (Ont. H.C.) — considered

1056470 Ontario Inc. v. Goh (1997), 34 O.R. (3d) 92, 13 C.P.C. (4th) 120, 32 O.T.C. 225 (Ont. Gen. Div.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 56.01 — considered

R. 56.01(1) — pursuant to

MOTION for order for security for costs.

***Nordheimer J.*:**

1 The defendants collectively move for an order requiring the plaintiffs to post security for costs of this action through the completion of the examinations for discovery. The plaintiffs oppose the motion on the basis that they ought not to be required to post security for costs where they have a strong *prima facie* case on the merits and where the admitted impoverishment of the plaintiffs was caused by the actions of the defendants which form the subject of their claim. In the alternative, the plaintiffs say that these factors form appropriate grounds to reduce the amount of any security for costs that might be ordered by a factor of one-half to two-thirds. Finally, there is the issue of what amount of costs should be posted as security since the plaintiffs assert that the draft bills of costs submitted by the defendants are exaggerated particularly in the area of the estimated length of the examinations for discovery.

2 This action involves a claim by the plaintiffs arising out of an alleged payment of bribes by some of the defendants to other of the defendants through yet other of the defendants regarding the purchase of five Dash-8 commuter aircraft. The plaintiffs

allege that this scheme of payments led to the termination of contracts relating to these aircraft to which they were parties which in turn led to the destruction of their businesses. They claim, as a consequence, damages in excess of $400,000,000.00 and punitive damages of $50,000,000.00. The causes of action alleged include conspiracy, inducing breach of contract, intentional interference with economic relations, fraud and deceit. The action is a complex one and, as one would expect, is going to be hard fought.

The merits of the plaintiffs' claim

3 The first question raised by this motion is: "Under what circumstances and to what extent should the court consider the merits of the plaintiff's claim on a motion for security for costs?" Rule 56.01 of the *Rules of Civil Procedure* states:

> The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;
>
> (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
>
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
>
> (f) a statute entitles the defendant or respondent to security for costs.

The key words from the rule on which the plaintiffs rely are the words "as is just."

4 There is no dispute that the plaintiff companies are ordinarily resident outside of Ontario. The plaintiff, Aviaco Traders, is located in Newfoundland and the other two plaintiffs are located in Barbados. There is also no dispute that the plaintiffs do not have sufficient assets in Ontario to pay the costs of the defendants. They are what is commonly referred to as "shell" corporations. The plaintiffs say, however, that the reason that the plaintiffs have no assets and are now shell corporations arises from the actions of the defendants upon which the plaintiffs' claim for damages in this action is based.

5 There is also no dispute that the single largest, if not sole, ultimate shareholder of the plaintiffs is a corporation which does have the financial resources to enable the plaintiffs to post security for costs if they are ordered to.

6 It is clear from the authorities that the court will have reference to the merits of a plaintiff's claim in certain circumstances and, indeed, may even relieve a plaintiff from having to post security for costs in certain circumstances where it otherwise would be required to do so by the terms of rule 56.01. In fact, it is clear from the wording of rule 56.01 itself that the merits play some role in the determination of whether security for costs must be posted since the rule provides, as one ground where security may be ordered, actions where the claim is frivolous and vexatious.

7 Put in a summary fashion, the plaintiffs essentially assert that the merits are always a factor for consideration by the court in deciding whether security for costs should be posted. On the other hand, the defendants contend that the issue of the merits of the claim are considered by the court only where the plaintiff is impecunious and an order requiring the plaintiff to post security for costs would, for all intents and purposes, bring the action to an end. Put another way, the defendants say that if the plaintiff has the ability to post security for costs then the court will not relieve a plaintiff from that requirement just because the plaintiff's claim is meritorious.

8 I now turn to a review of the existing authorities. I start with the decision in *Horvat v. Feldman* (1986), 15 C.P.C. (2d) 220 (Ont. H.C.) where Madam Justice McKinlay upheld the decision of Master Donkin in which the Master had held that it was a legitimate line of inquiry on an examination being conducted on a motion for security to costs to inquire into the merits of the plaintiff's claim. In upholding the Master's view that the merits were relevant, McKinlay J. said, at p. 222:

> Now, however, r. 56.01 provides that the Court may make such order for security for costs "as is just." If those words are to mean anything, they must mean that the person hearing the motion — Master or Judge — may consider all matters which will assist him in making a "just" order, and that would often include consideration of the merits of the case.

Later on the same page, McKinlay J. said:

> The more difficult question to deal with in applications for security for costs is not whether the merits may be canvassed, but the extent to which they may be canvassed. It is that question which generated the general comments of the Master. He undoubtedly considered that laying down any detailed rules on that question was impossible, and I agree.
>
> The appropriateness of any investigation into the merits will depend, among other things, on the nature of the action, the complexity of the pleadings themselves, and whether the defendant can satisfy one of the preliminary requirements set out in (a) to (f) of r. 56.01.

9 Next in sequence is the decision in *459433 Ontario Ltd. v. Markborough Properties Ltd.* (March 18, 1986), Doc. 8372/82 (Ont. H.C.) where Henry J. upheld a decision of the Master refusing an order to post security for costs. Mr. Justice Henry said, at p. 3:

> But I will assume impecuniosity on the part of the corporate plaintiff. The Master did not consider the action to be spurious or frivolous, but worthy of investigation. I agree and I would go so far as to say that, on the material before me, it is meritorious and ought to be tried, although I do not presume to predict the outcome. There is, however, a reasonable chance that the plaintiffs will recover some amount by way of damages and that in itself is a contingent form of security for defendant's costs, even taking into account the plaintiff's admitted debt for the arrears of rent.
>
> As to point (c), the Master had reason to conclude, on the affidavit evidence, that impecuniosity on the part of the plaintiff corporation was caused, in part at least, by the defendant, by failing to provide adequate facility for the plaintiff's business and by appropriating to itself the plaintiff's business as a going concern, thereby depriving it of an important asset. *That is a good reason to refuse security to the defendant*. (emphasis added)

10 Following that decision there is *Heck v. Royal Bank* (1986), 56 O.R. (2d) 168 (Ont. H.C.) which again was an appeal from the decision of a Master which required a witness to answer questions regarding the merits on a cross-examination of an affidavit filed in support of the motion. Mr. Justice Sutherland upheld the Master's decision. Sutherland J. relied on the above decision of McKinlay J. and agreed with the proposition that the merits of the action may be an appropriate consideration on a motion for security for costs.

11 Next is the decision in *Warren Industrial Feldspar Co. v. Union Carbide Canada Ltd.* (1986), 54 O.R. (2d) 213 (Ont. H.C.) which involved an appeal from a District Court judge who had dismissed a motion for security for costs at least partly on the basis that the plaintiff had a meritorious claim. On appeal, Trainor J. reversed that decision and ordered that security had to be posted. In his decision, Trainor J. said, at p. 221:

> I am in agreement with Master Sandler that the inclusion of the words "as is just" in rule 56.01(d) permits the court to consider the merits of a case in determining whether to order security for costs. *It appears to me that it would only be appropriate or necessary to consider the merits of a case where the defendant has established a prima facie case of entitlement to security for costs, and the plaintiff seeks to avoid posting security on the basis of its own impecuniosity*. In such a case, the court may consider the merits of the plaintiff's case to determine whether it has a valid cause of action which it should be permitted to litigate without posting security and to assess its prospects for success at trial. (emphasis added)

12 In *Taulbee v. Bowen* (1986), 54 O.R. (2d) 763 (Ont. H.C.), there was again an appeal from a decision of a Master which had refused to order increased security for costs. Mr. Justice A. Rosenberg upheld the Master's decision primarily on the basis that the plaintiffs were going to recover some amount in the action and therefore it appeared "remote" that if the plaintiffs wound up having to pay any costs (resulting from the impact of any offers to settle for example) the amount of their recovery would not be sufficient to permit them to do so.

13 The decision of *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 (Ont. H.C.) was another case of an appeal from a Master's order which had required security to be posted. Mr. Justice Reid reversed the Master's decision and set aside the order requiring security for costs to be posted. It is clear to me from a review of that decision that Reid J. was of the view that the plaintiff had a meritorious claim and that the requirement to post security would prevent the action from proceeding. Mr. Justice Reid said, at p. 708:

> There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.

Later, on the same page, Reid J. also said:

> Some have expressed or espoused the view that the question is to be answered by assessing the merits of plaintiff's claim, i.e., the likelihood of success. *The merits, however, are merely a consideration in making "such order for security for costs as is just" and are by no means determinative*. (emphasis added)

14 Then there is *Smith Bus Lines v. Bank of Montreal* (1987), 61 O.R. (2d) 688 (Ont. H.C.); leave to appeal to the Divisional Court refused: (1987), 61 O.R. (2d) 688 at 690 (Ont. H.C.), a decision upon which the defendants rely heavily. It is a further decision of Mr. Justice Sutherland subsequent to his earlier decision in *Heck v. Royal Bank*, *supra*. The procedural path by which the matter came before Sutherland J. is somewhat complicated and unusual. There was originally a decision of Master Peterson ordering security for costs to be posted. That order was appealed before Hollingworth J. Apparently Hollingworth J. gave a decision on the matter after argument had been commenced and adjourned but not completed. When this was drawn to his attention, Hollingworth J. quashed his decision and referred the matter to Rosenberg J. Mr. Justice A. Rosenberg heard the matter and gave reasons for his decision to dismiss the appeal. Those reason are referred to at the beginning of the report of the decision of Sutherland J. cited above. In the course of his decision, Rosenberg J. said, at p. 690:

> Trainor J. held that once the defendant has established that the plaintiff in accordance with rule 56.01 has insufficient assets in Ontario to pay the costs of the defendant, then the onus shifts to the plaintiff to either show undisclosed assets that could satisfy the costs or alternatively to show impecuniosity. Impecuniosity in that sense is quite different than having insufficient assets. Insufficient assets relate to the possibility that the defendant, if successful, will not be able to recover costs. Costs could only be recovered if the corporation had assets that could be the subject of an enforcement of judgment. On the other hand impecuniosity would prevent the plaintiff from proceeding.

15 The motion that came before Sutherland J. was a motion to quash the decision of Rosenberg J. or alternatively to grant leave to appeal from that decision. Mr. Justice Sutherland concluded that he did not have jurisdiction to quash the decision of Rosenberg J. In the course of considering the motion for leave to appeal, however, Sutherland J. said, at p. 705:

> The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show "impecuniosity" meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on business and litigation through a shell corporation. To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187: "If an order for security stops

> a plaintiff in its tracks it has disposed of the suit." To raise impecuniosity there must be evidence that if security is required the suit will be stopped — because the amount of the security is not only not possessed by the plaintiff but is not available to it. Here there is simply no evidence to that effect.

and later at p. 706:

> In my opinion, there is no conflict between *Warren* and *Wink* on the question of the need for the corporate plaintiff to establish its impecuniosity by evidence *before* the court goes on to consider the merits of the plaintiff's case. (emphasis added)

16 That case is followed by the decision of the Divisional Court in *Kurzela v. 526442 Ontario Ltd.* (1988), 66 O.R. (2d) 446 (Ont. Div. Ct.). The motions judge had refused to require the plaintiff to post security for costs because, in his view, the plaintiff had a meritorious claim. The Divisional Court reversed that decision and said, at p. 447, per McRae J.:

> We agree that it is not a frivolous claim. However, it appears that the motions court judge did not consider the fact that once it is established that the corporate claimant has insufficient assets, the onus then shifts to the claimant to show that money may not be available to it from the shareholder or shareholders of the company, to fund the action and to post a security for costs, as the courts have repeatedly held.

17 Next is the decision in *1056470 Ontario Inc. v. Goh* (1997), 34 O.R. (3d) 92 (Ont. Gen. Div.) which again was an appeal from a decision of a Master. The Master granted an order requiring a corporation to post security for costs and also required the sole shareholder, who was not a party to the proceeding, to provide an undertaking to personally pay any costs. The Master had found the corporate plaintiff's claim to be meritorious. On appeal, Mr. Justice Borins reversed the Master's decision. Borins J. found that the Master erred in ordering the corporate party to post security and erred in requiring the sole shareholder to provide an undertaking of the type ordered. On the first point, Borins J. said, at pp. 95-96:

> The master, having found that Dawnlight was impecunious within the meaning of rule 56.01(1)(d) and that its claim was not devoid of merit, should not have ordered it to provide security. In *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187 (H.C.J.), it was held that if a plaintiff establishes that it is impecunious to the point where it cannot provide security for costs, with the result that the lawsuit will be "stopped in its tracks" by an order for security, and that it has a meritorious claim, the plaintiff should be allowed to proceed. "Impecuniosity" would appear to require more than "insufficient assets in Ontario to pay the costs of the defendant" as required by rule 56.01(1)(d), and in the case of a corporate plaintiff requires, as the master found in this case, that it establish the moneys are not available from its shareholders or other sources by way of security: *Smith Bus Lines Ltd. v. Bank of Montreal* (1987), 61 O.R. (2d) 688, 25 C.P.C. (2d) 255 (H.C.J.); leave to appeal to Divisional Court refused: 61 O.R. (2d) 688n; see also *Smallwood v. Sparling* (1983), 42 O.R. (2d) 53, 34 C.P.C. 25 (H.C.J.), and *Rackley v. Rice* (1992), 8 O.R. (3d) 105, 89 D.L.R. (4th) 62 (Div. Ct.). In concluding that Dawnlight should not have been ordered to provide security for costs, I have also taken into consideration its allegation that it was the conduct of the defendants by counterclaim which caused it to be impecunious.

18 Lastly there is the decision in *ABI Biotechnology Inc. v. Apotex Inc.* (1995), 41 C.P.C. (3d) 394 (Man. C.A.) upon which the plaintiffs rely heavily. In that case, the Manitoba Court of Appeal in considering their security for costs rule (which happens to also be rule 56.01 and which has very similar language to the Ontario rule) expressly disagreed with the conclusion reached in *Smith Bus Lines v. Bank of Montreal*, *supra*. Indeed the Manitoba Court of Appeal said that *Smith Bus Lines* was "wrongly decided." The Manitoba Court of Appeal said, per Helper J.A. at p. 399:

> Rule 56.01 cloaks the master or judge hearing such an application with a very broad discretion. He or she is required to consider all the circumstances of the case in making a just determination. There is nothing in the wording of the rule which would lead me to conclude that in the case of an impecunious corporate party, evidence that the shareholders of that corporation have the means to provide security for costs precludes a consideration of all other relevant factors. I make no attempt to provide an exhaustive list of those factors. However, in my view, precluding the master or judge from considering such matters as the merits of the case, the purpose of the application for security for costs, the cause of the

> corporate party's impecuniosity, the size and nature of the corporation and the hardship incurred if the security is ordered unduly fetters the discretion that a clear reading of the rule bestows.

And later at p. 400:

> I see no reason for tying the court's hands and automatically requiring an order for security for costs when the application is brought against an impecunious corporation whose shareholders have the ability to provide those costs.

19 Where does this review of the authorities lead? I believe that the plaintiffs are correct that the use of the words "as is just" in rule 56.01 does allow the court to have a consideration of the merits of the claim in determining whether there should be an order granted requiring security for costs to be posted. Where I find myself in disagreement with the plaintiffs is the assertion, which is inherent in their position, that it could be just not to require a corporate plaintiff, who has access to resources, to post security just because it has a meritorious claim. While accepting that anything is possible, it is difficult for me to conceive of the circumstances where such a conclusion would be a just or appropriate result. Here, for example, we have plaintiffs who are advancing a claim for damages which, by any definition, involves a huge sum of money and whose principal shareholder is admittedly possessed of considerable resources such that it could allow the plaintiffs to post security if it so chose. In such circumstances, could it be said to be just to remove that requirement just because the plaintiffs may have a meritorious claim? I do not believe so.

20 I am also concerned what might result from adopting the approach urged by the plaintiffs. In this regard, I adopt the observation of Madam Justice McKinlay in *Horvat* that the difficult question is not whether the merits may be canvassed, but the extent to which they may be canvassed. If the inquiry becomes too extensive, there is a real risk that a motion for security for costs will become some form of surrogate motion for summary judgment. It should also be kept in mind in this regard that motions for security for costs are normally heard after pleadings have been closed and before any form of discovery has taken place. They are therefore heard at a very preliminary stage where, as a number of the above cases have pointed out, it becomes very risky to try and establish any likelihood of outcome.

21 In terms of the decision of the Manitoba Court of Appeal in *ABI Biotechnology Inc. v. Apotex*, *supra*, I decline to adopt its approach for three reasons. First, while I am not bound by the decision in *Smith Bus Lines*, I am bound by the decision in *Kurzela* which adopted the approach in *Smith Bus Lines*. Secondly, I must say that I have considerable difficulty with the assertion in *ABI* that *Smith Bus Lines*, was wrongly decided. With respect, I believe that Helper J.A. overstated the conclusions reached by Mr. Justice Sutherland. There is nothing in the decision which says that the merits are "not relevant" or that an order for security for costs is "automatically" required where a corporation is impecunious. Rather, the decision simply says that there is a *prima facie* entitlement in such circumstances to an order for security for costs which the plaintiff then bears the onus of rebutting. It may be that it will be difficult in most cases for a corporate plaintiff, with access to the necessary resources, to rebut that *prima facie* entitlement in terms of what is "just," for the reasons I have already mentioned, but that is not the same thing as characterizing the order as "automatic."

22 Third, and perhaps most importantly, the Manitoba Court of Appeal has itself declined to follow the decision. In a subsequent and very recent decision in the very same case, *ABI Biotechnology Inc. v. Apotex Inc.*, [2000] 3 W.W.R. 217 (Man. C.A.), Philp J.A. said, at p. 232:

> The Court's comments in *ABI v. Apotex (No. 1)* that *Smith Bus Lines* was wrongly decided and should not be followed in Manitoba were clearly *obiter*.

And then later at pp. 232-233:

> What, then, are the principles that should guide the court in applying Rule 56.01 (d) to the defendants' applications for security for costs? The general rule at common law and in equity has been, from time immemorial, that poverty is not a bar to a litigant, and that rule remains alive and well in Manitoba. Security for costs will not be ordered against a plaintiff who has no assets if its effect is to stifle a genuine claim. However, as we have seen, the courts have applied the rule less generously when a corporate plaintiff asserts insolvency or impoverishment in response to an application for security for costs. *A*

> *corporate plaintiff with "insufficient assets" must also establish that it cannot raise the security; that its shareholders are unable to advance funds to allow it to post security. In my view, that is not an attack on the legal persona of a corporation or a lifting of the corporate veil. To me, it reflects the court's recognition of its duty to do what is just in the circumstances*. Courts have determined that a corporate plaintiff without assets, manipulated by shareholders with assets, ought not to be able to say to the defendant, "Heads I win, tails you lose."
>
> Underlying the decisions reviewed above is the realization that the making of an order for security for costs against a corporate plaintiff without assets will not have the effect of stifling the action if its shareholders, or some of them, have the ability to provide the necessary funds. Whether or not the action proceeds when security has been ordered remains the decision of the shareholders who are manipulating the plaintiff and funding the litigation. In that sense, it is a decision not unlike the one any plaintiff or prospective litigant must face: Do the chances of success justify the expense and exposure to costs? (emphasis added)

It will be seen, therefore, that the Manitoba Court of Appeal has adopted the very same approach to this issue as the Ontario cases, that I have reviewed above, have taken. I note that Mr. Justice Helper, who wrote the decision in *ABI Biotechnology Inc. v. Apotex (No. 1)*, *supra*, was a member of the panel of the Manitoba Court of Appeal that decided *ABI Biotechnology Inc. v. Apotex Inc.*. I feel compelled also to note that none of the counsel on this matter drew this subsequent decision to my attention.

23 I therefore conclude that it is unnecessary for me to embark upon a consideration of the merits of the plaintiff's claim since the plaintiffs have admitted that their shareholder has the resources available to permit them to abide by an order for security for costs if made. For all of these reasons, including the above observations of Philip J.A. which I respectfully adopt, the defendants are entitled to an order for security for costs.

Do the merits reduce the amount of security?

24 The next issue is whether the amount of security for costs to be posted should be reduced as a consequence of the fact that the defendants may have caused the impecuniousity from which the plaintiffs suffer. The plaintiffs refer to a series of decisions in British Columbia that have adopted this approach, namely, *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.* (March 18, 1993), Doc. Vancouver C921887 (B.C. S.C.); *Ragged Runner Enterprises Ltd. v. Victoria Sports Traders Inc.* (September 15, 1993), Doc. Kelowna 10208 (B.C. Master); *Pierce International Discovery Inc. v. Buffalo Mines Ltd.* (February 24, 1997), Doc. Vancouver C964314 (B.C. S.C. [In Chambers]) and *International Nesmont Industrial Corp. v. Coopers & Lybrand* (November 13, 1998), Doc. Vancouver C957537 (B.C. S.C.). The plaintiffs take from these decisions that, in cases where the plaintiff can adduce "some measure of evidence" that its impecuniousity was caused by the conduct of the defendant, it is entitled to have the amount of the security reduced that it would otherwise be required to post. The plaintiffs further say that the amount of reduction imposed should be either one-half or two-thirds of the amount for security otherwise found to be appropriate.

25 The later three cases all rely on the decision in *Tour-Mate* so it is important in my view to look at precisely what the court concluded in that case. Mr. Justice Brenner said, in reaching his conclusion to reduce the amount of the security to be posted, at paras. 21-22:

> If the plaintiffs' impecuniosity had been caused by other factors, I would not hesitate to order security in the amount sought by the defendants. However, where a plaintiff's want of means has been brought about by a defendant's alleged conduct, the court must weigh that factor in deciding whether and, if so, how to exercise its discretion under section 229 of the *Company Act* R.S.B.C. 1969 c. 59.
>
> In my view the proper course in a case such as this is to order security, but reduced in amount from the $42,000 sought by the defendants. Security ought to be ordered because of the plaintiffs' admitted impecuniosity and because the application was timely filed. *However full security should not be ordered because to do so may very well deprive the plaintiffs of any opportunity to press their case* in circumstances where it may turn out that their lack of means was wrongfully caused by the defendants. (emphasis added)

26 It is clear therefore that Mr. Justice Brenner reduced the amount of the security because to order full security to be posted would have run the risk that the plaintiff's action could not then proceed. This is the same factor which the Ontario cases, I have referred to, have considered in determining whether security should be posted at all. However, it is a consideration that can only have application where there is evidence that the plaintiffs, or their shareholders, can raise some, but not all, of the funds that would be necessary to answer an order for security for costs. I agree with Brenner J. that it is a factor that can be taken into consideration in appropriate cases. However, it is not a factor here because the evidence is admitted to establish that the predominant shareholder of the plaintiffs could cause them to answer to an order for security for costs even if it was granted in the full amount of what the defendants have asked for.

The amount of security

27 Lastly, I turn to the consideration of what amount should be ordered as security for costs. The defendants have filed draft bills of costs which total something in excess of $1.6 million. The plaintiffs have, based on a number of criticisms of the draft bills of costs, suggested that number should be reduced to something in the order of $700,000. As I noted at the outset of these reasons, the principal difference between the two sides is the likely length of the examination for discovery, although there are other issues raised by the plaintiffs.

28 It is clearly difficult at this stage of the proceedings where none of the parties have yet been examined and where documentary production has only begun to have any real insight into how long the examinations are likely to take. The plaintiffs' estimation for any given examination is generally about one-half to one-third of what the defendants' estimate. For example, the defendants estimate that the examination of Boeing will take 15 days whereas the plaintiffs estimate 5 days. The same is true of the estimation made for the plaintiffs' examination.

29 Part of the reason for the differences, at least with respect to the examinations for discovery of the various defendants, turns on whether each of the defendants is entitled to examine the other defendants on the basis that they are adverse in interest. The plaintiffs ask that I make a ruling now on this issue. The defendants say that such a ruling is premature given that documentary discovery has not as yet taken place. They also contend that it may be impossible to determine whether any given defendant is adverse to any other defendant until the examination is in fact conducted and the evidence is heard. The difficulty with the defendants' position in this regard is that adversity of interest is normally determined by the pleadings of the parties. I agree with the plaintiffs that this is an issue that should be dealt with, at least on a preliminary basis, prior to the examinations for discovery being held. On the other hand, both for the reasons that the defendants have advanced, and because I do not feel that I have had the benefit of full argument on the issue, I believe it is premature to address the issue in the context of these reasons. I suggest therefore that the issue be addressed before me at a later date but prior to the actual examinations being held.

30 For the purposes of examining the bills of costs, I intend to proceed on the basis that there will be some examination by co-defendants but that the impact of those examinations should not unduly lengthen the total time for each party's examination.

31 In addition to that consideration, I will mention the other general considerations that I have applied to the bills of costs before I turn to the actual issue of quantum. I accept the plaintiffs' contention that it is not necessary for there to be two senior counsel for any given party in attendance at the examinations for discovery. While I accept that junior counsel may be warranted, if any party feels it is necessary to have two senior counsel present to represent its or his interests at a discovery that party is entitled to do so but it is not something for which I will require the plaintiffs to bear the costs for these purposes.

32 In terms of the other criticisms made by the plaintiffs, I am not prepared to reduce the amounts sought for those events that have already occurred and with respect to which the defendants advise me they have adjusted their bills of costs to reflect the actual time spent. This is not an assessment of those costs. That determination will come much later. On the issue of motions, I agree with the plaintiffs that the costs for this motion should be, and will be, dealt with by me and therefore should not form part of the costs for which security is to be posted. On the issue of reporting to clients, I do not find the amounts set out in the bills of costs so high that they warrant tinkering with. Lastly, in terms of the disbursements claimed, I agree with the plaintiffs that the presumption should be that all of the examinations for discovery (with the exception of the non-appearing defendants)

will be conducted in Toronto. Given the number of parties involved, the fact that all counsel are located in Toronto and that the documents will wind up here, that would seem the more logical and cost effective approach to be taken. I have reduced the amounts sought for travel and accommodation expenses accordingly. On the issue of transcripts from the plaintiffs' discoveries, I have simply divided those costs among the five sets of defendants equally.

33 Turning to the actual numbers then, I have used the following lengths of time for the examinations for discovery in coming to my conclusion regarding the amount of security to be posted:—

Boeing	10 days
Rolle	5 days
Acuna	10 days
Bahamasair	5 days
Johnson	5 days
Aviaco	10 days
Rapier	5 days
Bethel et al	10 days
EDC	5 days

34 In terms of the costs sought, I have re-calculated the amounts consequent on the above times for the examinations for discovery and the other considerations I have set out, and made the following determination of the costs to be posted:—

Defendant	**Fees***	**Disbursements***	**Total**
Boeing	$284,262	$33,908	$318,170
Bahamasair/Johnson	220,592	33,908	254,500
Acuna	233,688	33,331	267,019
Sovereign/Rapier	167,417	30,163	197,580
Rolle	132,252	29,093	161,345

Notes: * — figures are inclusive of GST.

35 I therefore grant an order requiring the plaintiffs to post security for costs in the total amount of $1,198,614.00. The security may be posted by way of a bond or letter of credit that is in a form acceptable to the defendants and to the accountant of the Superior Court of Justice. I recognize the possibility (if not the certainty) that I may have made errors in my calculations in arriving at the above amounts. If counsel determine that some material error has been made, recognizing that this is not an exercise in mathematical precision, then they may write to me in that regard before the formal order is taken out.

36 The above order is made without prejudice to any of the parties moving to increase or decrease the amount of security based on the actual events as they unfold. It is also without prejudice to any motion for further security regarding the costs of the trial of this action which the defendants may wish to bring after the examinations for discovery have been held.

37 As for the costs of this motion, the parties have advised me that a further hearing will be necessary in the near future to deal with other matters. I suggest that submissions on the costs of this motion be made at that time. If that turns out not to be feasible, then I will accept written submissions on the issue if I am advised that the parties prefer to follow that route.

Motion granted.

APPENDIX B

1999 CarswellOnt 412
Ontario Court of Justice, General Division

Michigan National Bank v. Axel Kraft International Ltd.

1999 CarswellOnt 412, [1999] O.J. No. 418, 30 C.P.C. (4th) 344, 89 O.T.C. 145

Michigan National Bank, Plaintiff (Respondent) and Axel Kraft International Limited, Axel Kraft and Ronald Calmes, Defendants (Applicants)

Pitt J.

Heard: January 27, 1999
Judgment: February 19, 1999
Docket: 97-CV-132673

Counsel: *Harold H. Elliott* and *Charles M. Gastle*, for the Plaintiff (Respondent).
James P. Dube, for the Defendants (Applicants).

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.f Order for security
XXIV.3.f.i Form and amount of security
Headnote
Practice --- Costs — Security for costs — Order for security — Form and amount of security
Defendants brought motion for order requiring plaintiff to post security for costs in amount of $191,985.24 — Master found that defendants entitled to security for costs but fixed security for costs at $3,000 on ground that plaintiff had strong case — Defendants appealed — Master applied wrong principles in exercising his discretion when he decided to fix token amount for security — Master may give some consideration to merits in determining issue of entitlement to security for costs but once entitlement decided in favour of defendant master cannot render decision ineffectual by setting token amount — Amount of security to be posted by plaintiff fixed at $66,000 — Appeal allowed.
Table of Authorities
Cases considered by *Pitt J.*:
Hallum v. Canadian Memorial Chiropractic College (1989), 70 O.R. (2d) 119 (Ont. H.C.) — considered
Hawaiian Airlines Inc. v. Chartermasters Inc. (1985), 50 C.P.C. 224, 50 O.R. (2d) 575 (Ont. Master) — referred to
Horvat v. Feldman (1985), 5 C.P.C. (2d) 267 (Ont. Master) — referred to
Horvat v. Feldman (1986), 15 C.P.C. (2d) 220 (Ont. H.C.) — referred to
Launer v. Sommerfeld (1964), 48 W.W.R. 224, 45 D.L.R. (2d) 293 (B.C. S.C.) — referred to
Marleen Investments Ltd. v. McBride (1979), 23 O.R. (2d) 125, 27 Chitty's L.J. 69, 13 C.P.C. 221 (Ont. H.C.) — referred to
Taulbee v. Bowen (1986), 9 C.P.C. (2d) 90, 54 O.R. (2d) 763 (Ont. H.C.) — referred to
Rules considered:
Federal Court Rules, 1998, SOR/98-106
R. 56.01 — referred to

APPEAL from order of Master fixing amount of security for costs.

***Pitt J.*:**

1 This is an appeal from an order of a master fixing the amount of security for costs to be posted by the plaintiff (respondent) in the sum of $3,000.00, rather than the sum of $191,985.24 requested by the defendants.

2 The master's endorsement reads and follows:

> The defendants seek an order (inter alia) 1) requiring the plaintiff to deliver a further and better affidavit of documents; and 2) requiring that Mr. D. Snide attend for cross-examination on the affidavit of documents delivered by the plaintiff, pursuant to Rule 30.06.
>
> As the defendants now have knowledge of most of the relevant documents, in my opinion, no useful purpose would be served by ordering a cross-examination on the affidavit of documents. Actually, the plaintiff had agreed to provide a further and better affidavit of documents before the hearing began: see paragraph 10-13 inclusive of the affidavit of V. Gibb sworn 7 October, 1998.
>
> There will therefore be an order that the plaintiff deliver a further and better affidavit within 15 days from the date thereof which is to include the documents set out in Exhibit "S" to the affidavit of V. Gibb.
>
> The moving parties further seek an order for security for costs. The defendants have established that they are within Rule 56.01(a) and Rule 56.01(1)(d) and are entitled to security for costs unless the plaintiff proves either a) that it has sufficient assets in Ontario to pay the defendants' costs which is not the case here, or b) that it is impecunious; no question of impecuniosity arises here. The defendants are entitled to security for costs. I have considered the merits of the action and, in doing so, I am of the view that the plaintiff has a strong case. In the result, the plaintiff is ordered to post security in the amount of $3,000.
>
> This amount shall be paid within 30 days of the date of this order and Form 56A shall otherwise apply. There is a further term of the order that the plaintiff may not set this action down for trial until a further order is obtained fixing the further security, if any, that is to be furnished by the plaintiff. The motion for such an order may be brought by either party.

3 Only the portion of the endorsement dealing with security for costs is material to this application. However, there is the matter of a cross-motion brought by the plaintiff before the same master. This cross-motion sought to expunge from the record certain affidavit material on which the defendants relied. The cross-motion was adjourned to a date to be fixed by the registrar, and has not been rescheduled by the plaintiff. I make reference to the cross-motion because the defendants suggested that the master ought to have postponed the hearing of the security for costs so as to hear the motion and cross-motion together.

4 The main thrust of the defendants' submission is that having found for the defendants on the issue of entitlement as he did, the master could not properly order a "token" amount on the ground that "the plaintiff has a strong case". This is especially so at a stage in the proceeding where it is extremely difficult to assess the relative strengths of the parties positions. In addition the defendants object to the imposition of a requirement that further application be made before the action is set down. They do so on the ground that such a request erodes from the protection intended to be given to defendants by an order for security for costs, i.e. to ensure that defendants do not have to proceed with costly litigation steps unless the security to which they are entitled is posted in a timely manner.

5 The plaintiff's position in substance is that the master's jurisdiction is to make "such order for security for costs as is just" (Rule 56.01) and that the master has a broad discretion to determine what is just. In exercising his discretion the master is entitled to take the strength of the plaintiff's case into consideration and may properly require that the question of quantum be determined in more than one application and consequently be paid in instalments.

6 As a consequence of this the plaintiff argues that the standard of review ought to be that found to be the case in *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (Ont. H.C.) where it was held that:

> An appeal from an interlocutory order should be heard as an appeal rather than a rehearing on the merits. In such an appeal there should be no interference with the order below unless there is an error in principle or it is clearly wrong.

7 The plaintiff further submits that the correctness of the master's decision is bolstered by the circumstance that for all practical purposes the defendants have acknowledged in their pleadings fraudulent conduct on their part; that such an acknowledgment formed the basis of the master's finding of the strength of the plaintiff's case, although not articulated as such.

Analysis

8 The merits of the plaintiff's case is a relevant consideration in an application for security for costs.

9 See for example:

Hallum v. Canadian Memorial Chiropractic College (1989), 70 O.R. (2d) 119 (Ont. H.C.)

Horvat v. Feldman (1985), 5 C.P.C. (2d) 267 (Ont. Master) affirmed by the High Court of Justice (1986), 15 C.P.C. (2d) 220 (Ont. H.C.).

Launer v. Sommerfeld (1964), 45 D.L.R. (2d) 293 (B.C. S.C.)

Taulbee v. Bowen (1986), 54 O.R. (2d) 763 (Ont. H.C.)

10 However it is well to remember the admonition of Master Sandler in *Hawaiian Airlines Inc. v. Chartermasters Inc.* (1985), 50 O.R. (2d) 575 (Ont. Master), at 577 that "[i]n most cases, it will be impossible to reasonably come to any conclusion on where the merits of a case lie and the "merits" will be a neutral factor" in a security for costs motion.

11 On the significance of the fraud pleading, the defendants' position is that even if there were some admission of fraudulent conduct — which interpretation it disputes — such conduct had no possible impact on the plaintiff's decision making, could not have been the cause of its loss, and therefore ought not to have been given such weight. What is more, by delaying the disposition of the motion until the cross-motion had been dealt with, the master would have had a better opportunity to evaluate the merits.

12 In *Hallum v. Canadian Memorial Chiropractic College*, supra, Doherty J., as he then was discussed the issue of the standard of review in the following language, at page 122:

> I must also reject the College's assertion that I can substitute my discretion for that of Judge Wren. The cases relied on by the College are all cases where an appeal was taken from an interlocutory order made by a master or a local judge in an action proceeding in the Supreme Court: *Passarelli v. Di Cienzo* [(1989), 67 O.R. (2d) 603, 34 C.P.C. (2d) 54]; *Tru-Style Designs Inc. v. Greymac Properties Inc.* (1986), 56 O.R. (2d) 462 at p. 474, 31 D.L.R. (4th) 253, 11 C.P.C. (2d) 117 (H.C.J.); *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 at pp. 438-9, 43 C.P.C. 178 (C.A.). In those cases, the scope of appellate review is measured by reference to the significance of the interlocutory order in the determination of one or more of the ultimate issues in the case. In cases dealing with motions for security for costs, this distinction has proved somewhat difficult to make and the cases reveal some inconsistency in the approach taken: *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187 (H.C.J.); *423322 Ontario Ltd. v. Bank of Montreal* (1988), 66 O.R. (2d) 123 at p. 127 (H.C.J.); *Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd.* (1986), 54 O.R. (2d) 213 at p. 222, 8 C.P.C. (2d) 1 (Ont. H.C.J.). The ambit of the review may depend upon whether the motion for security for costs was granted or refused. [emphasis mine]

13 The learned judge decided, at page 122, that he would interfere with the order below "only if I am satisfied that the court applied the wrong principles in exercising the discretion given to it by rule 56.01."

He continued later at page 123:

> Rule 56.01 which empowers a court to order security for costs establishes a two step inquiry. First, the defendant must show that it "appears" that one of the six factors set out in cls. (a) through (f) of rule 56.01 exists. Secondly, if the defendant can clear the first hurdle, the court may make any order as to security for costs "as is just". I take this second stage to require

> an inquiry into all factors which may assist in determining the justice of the case. I also take the discretion created by this second stage as permitting orders which range from an order requiring full security for costs in a lump sum payment to an order which provides that no security for costs need be posted: *Horvat v. Feldman* (1986), 15 C.P.C. (WD) 220 (Ont. H.C.J.). [emphasis mine]

14 In deciding to grant the appeal the learned judge did take into consideration as a relevant factor that the plaintiff's case "appears, at this stage, to be far from a strong one."

15 Evidently by his decision to make the order the master has decided by implication that there is at least some merit to the defendants' position or, conversely, there may be some weakness, however small, in the plaintiff's case. By providing the parties with another opportunity to raise quantum at an unspecified date prior to the setting down of the action the master is implying that there is some chance that the relative strengths of the parties' positions may become more apparent at a later stage. By that time however the defendants may have committed enormous resources to their defence.

16 In these circumstances I believe it is improper to deprive the defendants of the fruits of their effort to obtain the order, especially where, as here, there is no question of impecuniosity on the part of the plaintiff. Only the defendants could be prejudiced by this order. That factor is significant as the defendants have produced some evidence that the plaintiff has discontinued an action bearing some similarity to this one before resolution at an earlier date, in the United States.

17 The master applied the wrong principles in exercising his discretion when he decided to fix a token amount for security when it is found that the defendant is entitled to security. While the authorities appear to hold that a master may give some consideration to the merits in determining the issue of entitlement in a motion for security for costs. In my view, once entitlement is decided in favour of the defendant the master cannot render the decision ineffectual by setting a token amount.

18 An appropriate amount to be ordered at this time, given the financial status of the plaintiff and the right to an application at a later date, is the sum of $66,000.00, as reflected in the bill of costs as an amount that would accrue prior to trial.

19 The appeal is allowed. The amount of security to be posted by the plaintiff is fixed at $66,000.00 to be paid within 30 days of the date of this order. The parties are at liberty to bring another motion for additional security for costs after all examinations for discovery and other interlocutory proceedings are completed.

Costs

20 As to costs, the parties may, if they cannot agree, make brief written submissions, within 30 days of the issue of these reasons.

Appeal allowed.

End of Document

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,* AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 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.

Court File No.: CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

REPLY FACTUM OF MOVING PARTY, BZAM LTD.

(MOTION FOR SECURITY FOR COSTS)

BENNETT JONES LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Joseph Blinick (LSO# 64325B)
Mike Shakra (LSO# 64604K)
Tom Feore (LSO# 82456H)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for BZAM Ltd.