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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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

RESPONDING FACTUM OF FINAL BELL HOLDINGS INTERNATIONAL INC. (BZAM Motion For Security for Costs)

May 22, 2024

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TO: **THE SERVICE LIST**

TABLE OF CONTENTS

PART I - INTRODUCTION

1. The issue on this motion is whether the justness of the case supports an order that Final Bell pay security for costs prior to a CCAA hearing of Final Bell's claim for equitable damages in connection with BZAM's blatant misrepresentations prior to the closing of Final Bell's sale of its Canadian subsidiary to BZAM in exchange for equity and unsecured debt. It is undisputed that unless Final Bell's claim is granted, the $21.5 million in consideration that BZAM agreed to "pay" Final Bell will be wiped out. BZAM, an insolvent entity, should not be awarded security for costs in these unique circumstances. Its motion should be dismissed.

2. BZAM's motion is without merit:

(a) The merits of Final Bell's claim do not justify an award for security for costs – Final Bell has a strong *prima facie* case that it was defrauded of over $20 million in consideration by BZAM. It should not be forced to post security for BZAM's costs.

(b) Final Bell has sufficient assets to pay a costs award, but an order that it post security will compromise its finances at a time when those finances are strained by BZAM's conduct, to which Final Bell's claim relates.

(c) BZAM brought this motion for tactical reasons to seek to avoid being held to account for its conduct. The motion is part of a broader strategy by BZAM to avoid an efficient hearing of Final Bell's claim on the merits.

(d) BZAM will not benefit from security for costs: BZAM is in the process of selling itself to its largest shareholder via a Reverse Vesting Order in exchange for a cash payment equal to the secured debt owed to Cortland. It has no separate, vested interest in seeking security.

(e) Cortland, the only party with a legitimate interest in seeking security, brought a separate motion for security for costs that Final Bell is responding to via a separate factum.

3. The justness of the case does not support an award of security for costs to BZAM in these circumstances.

PART II - SUMMARY OF FACTS

4. The facts concerning Final Bell's claim are described at length in its written opening statement delivered April 16, 2024, on which it relies to supplement the more concise facts set out below. The facts below are almost entirely undisputed, in that they rely on documents and evidence from BZAM and its witnesses, or they refer to undisputed and/or unchallenged evidence or documents from Final Bell and its witnesses.

5. These facts primarily address the merits of Final Bell's claim and BZAM's litigation conduct in response to the claim to respond to BZAM's motion for security for costs.

A. Summary of Final Bell's Claim Against BZAM

6. On January 5, 2024, BZAM and Final Bell completed a transaction (the "**Transaction**") whereby Final Bell sold its Canadian subsidiary ("**FBC**"), to BZAM in exchange for 90 million BZAM shares valued at 15 cents per share and an $8 million promissory note, for total consideration valued at $21,500,000.

7. Prior to closing on the Transaction, Final Bell conducted extensive due diligence. In a data room, through conversations and correspondence, in documents produced prior to closing the Transaction, and in the parties' share exchange agreement ("**SEA**"), BZAM made detailed representations concerning its financial condition, which it knew Final Bell relied on to enter into a transaction where the consideration took the form of equity and unsecured debt.

i. Key Terms of the SEA

8. Key defined terms of the SEA include:

(a) "Misrepresentation" means an untrue statement of a material fact or an omission to state a material fact required or necessary to make the statements contained therein not misleading in light of the circumstances in which they are made.

(b) "Ordinary Course" means, with respect to an action taken by a Person, that such action is (i) consistent with the past practices of the Person and is taken in the ordinary course of business of the normal operations of the Person or its business, and (ii) would be similar in nature to actions customarily taken in the ordinary course of the day to day operations of other Persons that are in the same line of business as such Person.

(c) "Purchaser Books and Records" means, among other things, all books of account, financial statements, tax records, sales and purchase records, business reports, plans and projections and all other documents, files, correspondence and other information of BZAM (whether in written, electronic or other form).

(d) "Transaction Documents" means, among other things, the SEA and all other agreements, certificates and instruments or documents given pursuant to the SEA.[1]

9. The SEA required the parties to exchange disclosure letters as of December 5, 2023, which are incorporated by reference into the SEA and form an integral part of the agreement.[2]

10. The SEA provides that it is governed by and interpreted and construed in accordance with the laws of British Columbia and that any action, suit or proceeding arising out of or relating to the SEA or the transactions contemplated in it would be brought in British Columbia. The parties irrevocably submitted to the exclusive jurisdiction of British Columbia.[3]

11. Article 3 of the SEA sets out numerous representations by BZAM, including that:

(a) BZAM is not in breach of any Purchaser Material Contracts, which term includes the Cortland Credit Facility;

[1] SEA, Article 1; Responding Motion Record ("**RMR**"), Tab 4-4, pp. 457-60.
[2] SEA, Article 1.5, RMR, Tab 4-4, p. 461.
[3] SEA, Article 1.11, RMR, Tab 4-4, pp. 461-62.

(b) All accounting and financial Purchaser Books and Records have been fully, properly and accurately kept and are complete in all material respects;

(c) There are no pending settlements under any applicable employment Laws which place a financial obligation upon BZAM;

(d) All BZAM Tax Returns that are required to be filed prior to the Closing Date have or will have been timely filed, and all material Taxes shown to be due on such Tax Returns have or will be timely paid **on or before the Closing Date**; and

(e) No Transaction Document contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained in the document not misleading in light of the circumstances under which they were made.[4]

12. BZAM's disclosure letter dated December 5, 2023, was signed by its CEO and affiant in these proceedings Matthew Milich and states, among other things, that BZAM "is current with all its tax returns and filings, and current with all due payments", with the exception of specific CRA payments plans that BZAM disclosed to Final Bell.[5]

13. Milich also signed BZAM's "Officer's Bring-Down Certificate" which the parties exchanged at closing to identify any material changes to the representations in the SEA. BZAM's certificate did not identify any changes to its representations.

14. In summary, both during the due diligence period, in the SEA, and at closing, BZAM made numerous representations to Final Bell that Final Bell relied upon as its rationale for entering into a transaction whereby it would become BZAM's second largest shareholder and largest unsecured creditor.

[4] SEA, Article 3.8, 3.20, 3.23, 3.29(e), 3.31, and 3.37; RMR, Tab 4-4, pp. 466-480.
[5] BZAM Disclosure Letter, RMR, Tab 1-8, p. 160.

B. BZAM's Knowing or Reckless Misrepresentations

15. The materials filed by BZAM in support of its CCAA application told a different story from that represented to Final Bell. It is now apparent that BZAM knowingly or recklessly made misrepresentations to Final Bell concerning four issues that are material to this motion and to Final Bell's willingness to enter into the SEA:

(a) BZAM misled Final Bell about its outstanding excise tax liabilities;

(b) BZAM misled Final Bell its ability to extend its credit facility with Cortland;

(c) BZAM misled Final Bell about its future cash flows as a standalone entity; and

(d) BZAM did not inform Final Bell of its intention to terminate its CFO without cause within days of closing on the SEA, with no plan for a successor.

16. On March 18, Final Bell served a motion record seeking relief on account of BZAM's misrepresentations. Final Bell initially sought rescission and equitable damages. When it became apparent that rescission would be an empty remedy, Final Bell amended its notice of motion to limit its claim to equitable damages in lieu of recission and a constructive trust.[6]

i. BZAM Misrepresents Its Outstanding Tax Liabilities

17. Sean Bovingdon, BZAM's former CFO, explained at his examination how excise tax is charged and payable in the cannabis industry: the cannabis vendor charges the purchaser excise tax when it makes the sale; and in the month after excise tax is charged, the vendor calculates the total excise tax from the month prior, files a "B300" form, and pays the excise tax payable within five days of the end of that month.[7]

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

[7] Transcript of the Examination of Sean Bovingdon held April 8, 2024 ("**Bovingdon Exam**"), pp. 73-74, qq. 274-79. RMR, Tab 8, pp. 1038-39.

18. As an example, Bovingdon explained how this timing works for the month of November:

> 285 Q. Okay. So let's back up. If you are charging in November of the calendar year -- just to make sure I transpose this correctly -- you calculate the excise tax payable at the end of December --
>
> A. Ordinarily.
>
> 286 Q. Ordinarily. And you pay it in the first week of January, ordinarily?
>
> A. Correct.[8]

19. During the due diligence process, BZAM disclosed to Final Bell that it had $6,356,000 in outstanding excise tax arrears payable as of December 5, 2023 (the date of the SEA). These arrears were disclosed to Final Bell as subject to CRA payment plans.[9]

20. By email sent November 28, 2023, Keith Adams, Final Bell's CFO, specifically asked Bovingdon to verify that BZAM's cash flow model included the CRA payment plans. Bovingdon confirmed that the plans were reflected in its model as part of the decrease in accounts payable ("**AP**") in 2024. Bovingdon understood that Adams wanted to know that CRA tax liabilities were accounted for in the material BZAM sent to Final Bell.[10]

21. After persistent effort by Final Bell to get proper documentary disclosure from BZAM, which is described in more detail below, it turns out BZAM misled Final Bell: on the Closing

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[8] Bovingdon Exam, pp. 75-76, qq. 285-86; RMR, Tab 8, pp. 1040-41.
[9] Affidavit of Keith Adams sworn March 18, 2024 ("**Adams Affidavit #1**"), ¶33; RMR, Tab 1, p. 18. BZAM Disclosure Letter, Exhibit "8" to Adams Affidavit #1, RMR, Tab 1-8, p. 160.
[10] Email from Bovingdon to Adams dated November 28, 2023; RMR, Tab 1-7, pp. 132-33. Adams Affidavit #1, ¶36; RMR, Tab 1, p. 18. Bovingdon Exam, pp. 29-30, qq. 116-17; RMR, Tab 8, pp. 994-95.

Date, BZAM had not paid its excise taxes for October and November 2023, which were due no later than December 5, 2023, and January 5, 2024, respectively.[11]

22. As explained below, Final Bell initially thought that BZAM had not filed its B300 forms for August and November 2023 until February 2024. After the trial was adjourned, Final Bell insisted that BZAM disclose, among other things, all B300 forms and records disclosing the filing dates and timing of payment of excise taxes for the pre-closing period. The documents produced by BZAM after the trial adjourned disclose that:

(a) On November 28, 2023, BZAM filed a B300 form disclosing $1,510,090 in excise tax payable for cannabis sales made in October 2023;

(b) On December 22, 2023, BZAM filed a B300 form disclosing $808,863 in excise tax payable for cannabis sales made in November 2023; and

(c) BZAM did not pay these taxes until **January 16, 2024** – 11 days after the SEA closed.

23. The timing of the payment is material. Based on the evidence adduced to date, it appears that BZAM was technically insolvent on January 5, 2024, as it did not have access to sufficient funds to pay its excise tax arrears. It needed to add Final Bell Canada's assets to its borrowing base, through the SEA, so that Cortland would increase the credit available to BZAM under the Cortland Facility. Cortland's witness confirmed that it increased the funds available to BZAM by approximately $5 million after the SEA closed.[12]

24. Even if it was not insolvent, BZAM knowingly used cash that was only available to it after closing to pay pre-closing assets. In contrast, FBC did not carry over any pre-closing tax

[11] BZAM Additional Documents disclosed April 29, 2024; RMR, Tab 6-G, pp. 644-839.
[12] Cross-examination of D. Alappatt held April 8, 2024, pp. 25-27, qq. 72-79; RMR, Tab 11, pp. 1270-72.

liability into the merged entity. This $2.3 million misrepresentation comprises half of the $5 million "funding gap" BZAM "identified" a few weeks after closing on the SEA.

ii. BZAM Misrepresents Expected Ability to Extend Cortland Facility

25. BZAM had a $34 million credit facility with Cortland, comprised of base debt and a "revolver" facility. During the due diligence period, BZAM represented that it would continue to have access to approximately $5-7 million under the Cortland Facility throughout 2024 and did not indicate that there was any uncertainty about its renewal:[13]

Cortland Facility[1]		2023 Dec-31	2024 Mar-31	2024 Jun-30	2024 Sep-30	2024 Dec-31
Maximum Revolving Facility Limit		**$34,000**	**$34,000**	**$34,000**	**$34,000**	**$34,000**
AR		$18,322	$19,926	$22,076	$22,805	$23,596
Inventory		$48,202	$47,740	$47,321	$47,220	$44,779
% of Eligible AR	85%	$15,574	$16,937	$18,764	$19,384	$20,056
% of EligibleInventory	15%	$7,230	$7,161	$7,098	$7,083	$6,717
Eligible Total		**$22,804**	**$24,098**	**$25,862**	**$26,467**	**$26,773**
Potential AR advance cash	85%	$13,238	$14,397	$15,950	$16,476	$17,048
Potential Inventory advance cash	25%	$1,808	$1,790	$1,775	$1,771	$1,679
Maximum Capacity (limit of $14,000)		**$14,000**	**$14,000**	**$14,000**	**$14,000**	**$14,000**
Balance		$7,024	$7,446	$8,007	$8,255	$8,119
Available		**$6,976**	**$6,554**	**$5,993**	**$5,745**	**$5,881**

26. Final Bell knew that the Cortland Facility matured in March 2024. However, it is undisputed that in November 2023, BZAM's then-CFO Sean Bovingdon told Adams he saw "no reason" why BZAM did not think it could not get an extension to the Cortland Facility.[14]

27. On December 13, 2023, a few days after signing the SEA, Cortland and BZAM exchanged emails concerning a draft amended and restated credit agreement. Bovingdon asked Cortland a question concerning the maturity date: "Should the Maturity date be 2025?"[15]

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[13] Project Tower PowerPoint, RMR, Tab 1-1, p. 40. BZAM/FB Spreadsheet, RMR Tab 1-2.
[14] Adams Affidavit #1, ¶24; RMR, Tab 1, p. 15. Exhibit "6" to Adams Affidavit #1; RMR, Tab 1-6, p. 129. Bovingdon Cross, pp. 33-34, qq. 131-33; RMR, Tab 8, pp. 998-1000.
[15] Exhibit "4" to Bovingdon Cross [emphasis added]; RMR, Tab 8-4. The draft amending agreement is Exhibit "1" to the Alappatt Cross; RMR, Tab 11-1.

28. In response, Rachael Andrew, Cortland's in-house legal counsel, wrote:

> […] 1. **Maturity Date: maturity date is March 24, 2024 – Cortland isn't granting TGOD an extension at that time.** The amort payments have been pushed out to the same date as the Maturity Date as we'd look to implement that in the future if TGOD requests an extension to the Maturity Date.[16]

29. BZAM did not forward the email or update its information to Final Bell. Even if Bovingdon's email was not a formal request to extend the facility, his representation to Final Bell that he saw **no reason** why BZAM would not get an extension to the Cortland Facility was not longer true: Cortland rejected his suggestion that the maturity date should be extended by a year. This was a material change to BZAM's previous representation to Final Bell.

iii. Misrepresentation Concerning BZAM's Stand-Alone Cash Flow

30. During the due diligence period, BZAM disclosed *pro forma* cash flow statements representing it would have positive cash flows throughout 2024 and that the cash available to it following the merger would not fall below $5.9 million at any point in 2024. Although BZAM's Q3 2023 Financial Statements included a note stating that the BZAM had "insufficient cash on hand to fund its planned operations", the *pro forma* cash flow statements told a different story.

31. However, at a board meeting held February 6, 2024, Milich informed BZAM's board of a $5 million "funding gap" and that a potential restructuring may be the only viable option. This discussion continued at board meetings held February 8 and 12, 2024, by which point BZAM had revised its cash flows to provide for a CCAA filing by month-end.[17]

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[16] *Ibid*. [emphasis added].
[17] Minutes of BZAM Directors' Meeting held February 6, 2024; RMR, Tab 1-LL, p. 812. Minutes of BZAM Directors' Meeting held February 8 and 12, 2024; RMR, Tab 1-MM, p. 815.

32. Final Bell submits that the fact that BZAM needed CCAA protection a few weeks after closing on the SEA strongly supports the conclusion that it knowingly or recklessly represented the state of its cash flow to Final Bell before January 5, 2024.

iv. Misrepresentation Concerning Bovingdon's Employment with BZAM

33. In the context of the merger transaction, and having regard to the Transaction Documents (defined in the SEA) and the Cortland Facility, there was an implied representation by BZAM that it would not terminate its CFO shortly after the closing if it did not have cause to do so and had no candidate lined up to replace him. This representation is found, among other things, in:

(a) The SEA, which represented that there were no pending settlements under any applicable employment laws which place any financial obligation on BZAM; and

(b) The Cortland Facility which defined "Change of Control" at BZAM, an event of default, to include if Bovingdon ceases to be the CFO and Cortland is not satisfied with the arrangements made to replace him.[18]

34. However, in December 2023, BZAM formed an intention to terminate Bovingdon immediately after closing on the SEA. Milich admitted on cross-examination that he formed this intention prior to January 5, 2024, but he only informed Bovingdon of his termination on January 11, 2024 – **six days after the SEA closed**. It is undisputed that the termination was without cause and not related to Bovingdon's performance.[19]

[18] SEA, article 3.29(e), RMR, Tab 4-4, p. 476. Fourth Amendment to the Amended and Restated Credit Agreement, dated as of November 3, 2022, article 2.9; Exhibit "2" to the Alappatt Cross; RMR, Tab 11-2. Second Amended and Restated Credit Agreement dated January 8, 2024 ("**SARCA**"), Schedule "C" – Defined Terms; Exhibit "1" to the Alappatt Cross; RMR, Tab 11-1.

[19] Cross-examination of M. Milich held April 8, 2024, pp. 14-17, qq. 50-63; RMR, Tab 10, pp. 1197-1200. Bovingdon Cross, pp. 35-37, qq. 137-46; RMR, Tab 8, pp. 1000-1002.

35. BZAM knew or ought to have known that Final Bell would assume Bovingdon would not be terminated immediately after FBC merged with BZAM. BZAM made a material misrepresentation by omission by failing to disclose to Final Bell that it intended to terminate Bovingdon six days after closing on the SEA with no candidate in place to replace him.

36. Moreover, it is undisputed that when BZAM publicly announced Bovingdon's departure, it falsely stated that Bovingdon was leaving to pursue "other opportunities". BZAM's misrepresentation as to the circumstances of Bovingdon's termination is further evidence that BZAM made a knowing or reckless misrepresentation by omission to Final Bell.[20]

v. Summary of Misrepresentations

37. In summary, Final Bell's claim for knowing or reckless misrepresentation is founded almost entirely on undisputed documents that were mostly produced by BZAM, supplemented by admissions by BZAM's and Cortland's witnesses. The misrepresentation concerning excise taxes is irrefutable and supported by BZAM's business records and former CFO's evidence.

38. Moreover, as explained below, the fact that the most damning documents were only produced after a contested adjournment further demonstrates why an order for security for costs would not be just in this instance.

C. BZAM's Incomplete and Reluctant Documentary Disclosure re Excise Taxes

39. The costs and delay in this proceeding are attributable to BZAM's litigation tactics in response to Final Bell's claim – its documentary disclosure in April 2024 was incomplete and misleading. After it opposed an adjournment to permit Final Bell to seek additional documents, it

[20] Bovingdon Cross, RMR, Tab 8, pp. 1007-1008, qq. 168-170.

made limited additional disclosure, which finally confirmed, as Adams suspected, that Final Bell's excise tax payments were in arrears at closing.

i. Incomplete Response to Final Bell's Redfern Request

40. In this proceeding, the parties agreed to a "Redfern" request process to expedite documentary disclosure, which was the only way Final Bell's claim could be heard in April 2024. In its requests, Final Bell sought production of "All relevant documentation concerning the negotiation of the temporary payment plan BZAM's subsidiary entered into on February 2, 2024 in which it agreed to pay the CRA $164,474 monthly in excise taxes." This payment plan was disclosed for the first time in Milich's February 28 affidavit.

41. BZAM disclosed only two emails, both dated February 2, 2024, in response to this request. One of those documents attached a CRA letter referencing excise tax arrears for August-November 2023, which was evidence of a misrepresentation by BZAM. Bovingdon testified at his examination held April 8, 2024, that he thought the letter was mistaken, that the payment plan was discussed with CRA in July 2023, and those discussions were recorded in emails.[21]

ii. Incomplete Response to Answers to Undertakings

42. Final Bell sought further disclosure of documents responsive to its Redfern Request, which led to disclosure by way of answers to undertakings on April 12, 2024 – ten days before the hearing date. Final Bell also sought disclosure of the B300 returns for the period spanning August through November 2023. In those answers to undertakings, BZAM disclosed emails from

[21] Bovingdon Cross, RMR Tab 8, pp. 1047-1053, qq. 311-327.

July and September 2023 relating to its negotiation of the CRA payment plan that had previously been omitted. It also disclosed four B300 forms.[22]

43. The B300 forms disclosed on April 12 indicated that BZAM filed two of its forms on February 12, 2024, long after the required due date, in breach of its representations to Final Bell. These forms referenced excise taxes "payable" on the date of filing. This alleged misrepresentation was referenced and relied upon in Final Bell's April 16 Opening Statement.[23]

44. Then, on the evening of April 18, BZAM delivered a letter dated April 17 which purported to "correct" the record concerning its B300 forms by disclosing additional forms. This late disclosure called into question not only the timing of the filing of these forms, but also when the taxes were paid by BZAM, and led to a contested adjournment hearing on April 19. This Court reluctantly determined that an adjournment was required to give Final Bell a fair opportunity to seek further documents and possibly oral evidence from BZAM:

> One of the reasons that I cannot conclude today that there has been no unfairness is that **the trial is about allegations of fraudulent misrepresentations and, specifically, what the obligations and liabilities were of BZAM at the relevant time.** The newly disclosed documents consist of Canada Revenue Agency documents **relevant to the issue of what indebtedness was owing to the CRA at certain points in time. That could be important to a determination of the trial,** and in my view, fairness militates in favour of an adjournment.[24]

[22] Bovingdon Undertakings Chart and Documents, RMR Tab 9, pp. 1105, 1124-34, 1137-82.
[23] Final Bell's Opening Statement, ¶96-98.
[24] Endorsement of Justice Osborne dated April 19, 2024, ¶7; RMR, Tab 7 [emphasis added].

iii. Documents Disclosed After Adjournment Confirm Fraudulent Misrepresentation

45. By letter sent April 22, 2024, Final Bell sought additional documents. By letter sent April 29, BZAM responded by disclosing some, but not all, of the documents sought by Final Bell. Among the documents disclosed were B300 forms and bank statements showing when Final Bell first filed its forms and when it paid the taxes disclosed on each form.[25]

46. Through its persistence from April 4 through April 29, Final Bell was able to obtain documents from BZAM that, taken together, confirm that BZAM breached the SEA and misrepresented its excise tax obligations to Final Bell by failing to pay $2.3 million in excise taxes due on or before closing, as explained above.

47. It is important to note that in response to Final Bell's claim, Milich tried to pass off BZAM's excise tax liabilities since closing as "ordinary course". That explanation, now disproven by Final Bell's additional documents, might have carried the day if BZAM was able to get away with its incomplete and misleading evidence concerning its excise tax payments.[26]

48. Final Bell's adjournment request was both justified and explains why it would be unjust to award BZAM security for costs at a motion brought after the adjournment in circumstances where the adjournment was caused by its incomplete and misleading documentary disclosure.

D. Final Bell Will Be Negatively Affected by an Order for Security for Costs

49. As explained by Keith Adams, Final Bell's CFO, Final Bell has sufficient assets to satisfy a costs award, as unlikely as it may be that the Court will award costs payable to BZAM. Final

[25] Exhibits "F" and "G" to McKnight Affidavit; RMR, Tabs 6-F and 6G.
[26] See Milich March 25 Affidavit, ¶75; BZAM Reply Motion Record, Tab 1, p. 22.

Bell's most recent audited financial statements show it had over $3.6 million in cash as of March 2023.[27]

50. Furthermore, in January 2024, Final Bell completed a transaction that improved its financial position by converting outstanding debt held by the company to equity. On or about January 22, 2024, Final Bell successfully converted of all of its outstanding subordinated convertible notes due in 2024 into Class A subordinate voting shares. Through this transaction, Final Bell discharged $22,770,000 in outstanding debt.

51. But cash flow is a major challenge for the cannabis industry. Many large banks refuse to or cannot led money to cannabis companies because of U.S. federal laws.[28]

52. Adams's unchallenged evidence is that if Final Bell is ordered to take almost $900,000 in cash out of its day-to-day business operations to post as security for costs for several months, it would negatively impact its ability to fund its operations and pay its suppliers. The burden this would place on Final Bell would be extraordinarily difficult.[29]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Overview – BZAM not Defendant or Respondent, SEA Claims Should be in B.C.

53. The issue on this motion is whether the justness of the case supports an award of security for costs against Final Bell in favour of BZAM, a CCAA applicant. There is no dispute that Final Bell is a British Columbia corporation. But the usual onuses should not apply in this case: BZAM is not a defendant or respondent in a proceeding – it is the applicant. At best, BZAM

[27] Final Bell's Consolidated Financial Statements for 2023; RMR, Tab 3-A, p. 349.
[28] Adams Affidavit sworn May 9, 2024, ¶7; RMR, Tab 3, p. 335.
[29] Adams May 9 Affidavit, ¶8; RMR, Tab 3, p. 336.

seeks to apply Rule 56 by analogy to a CCAA claim in circumstances where it is responding to a motion to determine the ranking of priorities amongst its creditors.

54. This motion is further complicated by the fact that BZAM irrevocably attorned to the jurisdiction of British Columbia for claims relating to the SEA or its transactions. But for this CCAA proceeding, this claim would be litigated in Final Bell's home jurisdiction.

55. Moreover, it is undisputed that Final Bell is the largest unsecured creditor and the second largest shareholder of BZAM, and barring further order of this Court, stands to lose over $20 million in this CCAA proceeding in connection with the sale of a corporation that closed mere weeks before this proceeding commenced. The ultimate issue at the upcoming hearing is not whether Final Bell has a claim against BZAM for damages. Damages have been established. Rather, the real issue is whether Final Bell can establish grounds to claim equitable damages and constructive trust so that its claim ranks in priority to, or on part with, Cortland, which is seeking its own order for security for its costs.

56. This unique factual matrix brings this motion outside the ordinary application of Rule 56 and justifies relieving Final Bell of the usual onus that applies to out-of-province claimants in Ontario proceedings.

B. Test for Security for Costs – the Justness of the Case

57. Even if BZAM can rely on the usual onus-shifting under Rule 56, which is denied, the facts of this case do not support an award for security for costs. In *Yaiguaje v. Chevron*

Corporation, the Ontario Court of Appeal confirmed that "an order for security for costs should only be made where the justness of the case demands it."[30]

58. The factors to consider in determining the justness of the case include the merits of the claim, delay in bringing the motion, and the impact of actionable conduct by the moving party on the available assets of the claimant. These factors can lead to a Court dismissing a motion for security for costs in circumstances where the moving party has met the traditional initial onus.[31]

59. For example, in *Chemicheck*, the Court held that even where a plaintiff was not impecunious, it should not award security for costs where the claimant demonstrated a strong case on the merits and the plaintiff's financial hardship was caused by the defendant's conduct.[32]

60. The Court applied this principle in *Bisson o/a Grimes Roofing*, where it determined it would be unjust to award security for costs where the impoverishment of the claimant "may have been caused in part" by the party seeking security. In *Bisson*, the responding party alleged fraud against the party seeking security. The motion judge did not find that the allegation had been proven, but he was sufficiently satisfied that the moving party "may have" contributed to the responding party's financial situation and declined to award security for costs.[33]

61. These cases are examples of the long-standing principle that security for costs should not be ordered where the Court has good reason to believe that the Defendants contributed to the Plaintiff's circumstances giving rise to the basis for them to seek security in the first place.

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[30] *Yaiguaje v Chevron Corporation* ("*Chevron*"), 2017 ONCA 827 at para. 23.
[31] *Chevron,* at para. 24.
[32] *Chemicheck Inc. v Teva Canada Limited*, 2015 ONSC 2061 at para. 14.
[33] *Bisson o/a Grimes Roofing et al v. Drevniok et al*, 2016 ONSC 2684 at paras. 18-19.

62. Another factor to consider is BZAM's delay in bringing its motion. A motion for security for costs must be brought promptly after the defendant discovers it has a reasonable basis for seeking security. The justness of the case requires that a plaintiff not be placed in the position of having to post security for costs after it incurred significant expense to advance its claim. Delay without explanation is fatal to a security for costs motion.[34]

63. Even where there may be an explanation for the delay, the Court should consider the timing of the motion to determine if the circumstances of the case weigh against granting security for costs. In *Solea International*, the Court held that it would be inappropriate to award security for costs when all of the evidence was in the record, documentary and oral discovery had been completed, and the parties were ready for the final hearing on the merits.[35]

64. Similar considerations apply here. BZAM always knew that Final Bell was a British Columbia corporation. It claims, without evidence, that it has incurred almost $475,000 in fees since March 18 and that it will incur almost $120,000 more for a two-day summary hearing. Even accounting for overlawyering, as submitted below, there is obvious prejudice to Final Bell if it has to post security for BZAM's costs on any scale in circumstances where:

(a) BZAM did not seek security before the originally scheduled hearing;

(b) The adjournment of that hearing was caused by BZAM's last-minute disclosure of documents that muddied the record;

(c) After the adjournment, at Final Bell's request, BZAM delivered documents that prove it made a fraudulent misrepresentation concerning its excise taxes;

(d) BZAM was only able to bring this motion because of its conduct leading to the adjournment.

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[34] *Wilson Young & Associates Inc. v. Carleton University et al*, 2020 ONSC 4542, at paras. 59 and 62.
[35] *Solea International BVBA v. Bassett & Walker International Inc.,* 2018 ONSC 3237, at para. 22.

65. Granting BZAM security in these circumstances is tantamount to rewarding it for its faulty documentary disclosure, which was the sole cause of the adjournment. The delay in bringing this motion, whether intentional or not, and the overall context of the bringing of this motion support a finding that it would be inappropriate to award security for costs to BZAM.

C. Final Bell Has a Strong *Prima Facie* Claim for Fraudulent Misrepresentation

i. Fraud or Recklessness as to Truth of a Statement

66. Rescission is the traditional remedy when a contract is found to be unconscionable, and therefore unenforceable. The remedy of rescission in such circumstances extinguishes the agreement as from the beginning ("*void ab initio*") so that it is as if it never existed. The objective of the remedy is to restore the parties to their original positions as far as possible.[36]

67. The general principles and requirements for recission are set out in *Deschenes v. Lalonde*:

(a) The equitable remedy of rescission is available for a false or misleading representation that induces a contract;

(b) Rescission requires proof that the misrepresentation was material and was relied on by the party seeking to rescind the contract;

(i) A "material misrepresentation" is one that must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement, though it need not be the sole inducement for acting;

(ii) Whether a contracting party relied on the misrepresentation, at least in part, to enter into the agreement is a question of fact to be inferred from all the circumstances of the case and evidence at trial.[37]

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[36] *Rick v. Brandsema*, 2009 SCC 295 at para. 66; Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission*, 2nd ed. (Oxford: University Press, 2014) [*The Law of Rescission*], at paras. 13.01 — 13.02.

[37] *Deschenes v. Lalonde*, 2020 ONCA 304 at para 29.

68. A misrepresentation occurs either by the active making of a statement that is not true or by failing to disclose material information to the other party and then entering into the contract knowing that the other side is operating under a mistaken assumption. Put another way, a fraudulent misrepresentation is a statement either known to be false or made not caring whether it is true or false, which is also referred to as "recklessness".[38]

ii. Equitable Compensation in Addition to or in Lieu of Rescission

69. Rescission, as an equitable remedy, is meant to put the contracting parties back in the positions they were in before entering into the contract. Even where the parties cannot be restored precisely to the pre-contractual situation, courts may still grant and tailor the rescission remedy because it is an equitable remedy focussed on practical justice, not rigid technicalities.[39]

70. However, if rescission is unavailable or appropriate, or if it will not make the claimant whole, then the Court can order equitable compensation as a remedy for unconscionable dealing as an alternative to, or in conjunction with, an order for rescission. Thus, a defendant may be required to pay market value for the property subject to the contract and account for the benefits the defendant received through possession of the property.[40]

71. Rescission and equitable compensation relieve and prevent unconscionability and unfairness. They are flexible remedies, as explained by the Supreme Court in *Rick v Brandsema*:

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[38] *1323257 Ontario Ltd. (Hyundai of Thornhill) v. Hyundai Auto Canada Corp.*, 2009 CanLII 494 (ON SC) at para 72. *Barclays Bank v. Metcalfe &Mansfield*, 2011 ONSC 5008 at para 156; aff'd 2013 ONCA 494.
[39] *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2023 ONSC 6688 at para 157.
[40] *Rick v. Brandsema*, 2009 SCC 10 at paras. 66–67; *The Law of Rescission* at paras. 17.01 — 17.09; GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2011) at 762.

> [W]hen rescission is unavailable because restitution, as a practical matter, cannot be made, damages in the form of "equitable compensation" are imposed to provide relief to the wronged party. This is because, as the British Columbia Court of Appeal said in *Dusik v. Newton* (1985), 1985 CanLII 406 (BC CA), 62 B.C.L.R. 1: "Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of the unconscionable bargain" (p. 47)."[41]

72. In a recent case where a plaintiff successfully claimed they were induced to purchase real property under false pretences and rescission was alleged to be inappropriate, Justice Centa determined that equitable compensation would be best achieved by selling the property on the open market and paying damages to the plaintiff equal to the difference between the purchase price paid by the plaintiff and the price obtained through the sale, plus expenses.[42]

73. Justice Centa's judgment demonstrates the creativity and flexibility to be applied by the Court to ensure that an innocent victim of a fraudulent misrepresentation is made whole and that non-arm's length parties who benefited from the impugned transaction contribute to the remedy, so that the plaintiff was put in the position it was in prior to entering into the contract.

74. In circumstances where some of the property subject to the contract ended up in the hands of a third party such that it cannot be returned to its original owner, the court will award the original owner alternate relief aimed at restoring its pre-contractual position. The Supreme Court noted in *Nesbitt v Redican*, "the practice has always been for a Court of Equity to give

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[41] *Rick v. Brandsema*, 2009 SCC 10 at para. 66.
[42] *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2023 ONSC 6688 at para 168.

relief by way of rescission whenever by the exercise of its powers it can do what is practically just, *though it cannot restore the parties precisely to the state they were in before the contract*".[43]

75. More recently, the Court of Appeal for Ontario confirmed that it is an incorrect principle of law to hold that recission may never be ordered where it would adversely affect third parties. Rather, recission may be available even if a third party acquires an interest in the contract property which renders *restitutio in specie* impossible.[44]

i. Final Bell Meets the Test for Equitable Compensation in Lieu of Rescission

76. The evidence summarized above establishes, on a balance of probabilities, that:

(a) Final Bell sold FBC to BZAM in exchange for equity and unsecured debt;

(b) BZAM made several material representations to Final Bell leading up to the execution of the SEA;

(c) These representations concerned, among other things, excise tax liabilities, the availability of the Cortland Facility, projected future cash flows, and Bovingdon's tenure at BZAM;

(d) The representations are material;

(e) Final Bell relied on the representations and would not have entered into the SEA if it knew the representations were false;

(f) The representations were made in circumstances where BZAM's officers knew they were false or else were reckless as to their truth;

(g) The Transaction has resulted in an unjust situation for Final Bell – it has been left with nothing to show for the sale of its Canadian subsidiary mere weeks before BZAM sought CCAA protection; and

(h) The Monitor prepared a Confidential Supplement to its Second Report that addressed ability to rescind the Transaction. The Confidential Supplement was

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[43] *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 at para. 60; *Redican v. Nesbitt*, 1923 CanLII 10 (SCC) at p. 153 [emphasis added].
[44] *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 at para. 85; *Stewart v. Complex 329 Ltd.* (1990), 1990 CanLII 7839 (NB KB) at p. 20; T*rans-Canada Trading Co. v. M. Loeb Ltd.*, 1947 CanLII 340 (ON SC); *McCarthy v. Kenny*, 1939 CanLII 333 (ON SC) at p. 563.

not shared with Final Bell, but it is presumed to contain information that would support a conclusion that rescission was impracticable.

77. While this is not a motion for summary judgment, the evidentiary record is nearly complete. The only remaining evidentiary step is for Final Bell to conduct a limited cross-examination of Milich in Court. But the paper record already demonstrates that BZAM misled Final Bell in circumstances where its officers knew their representations were false.

78. In particular, the excise tax documents demonstrate on a balance of probabilities that BZAM failed to pay over $2.3 million in pre-closing excise taxes until 11 days after closing, after Cortland made an additional $5 million available under the Cortland Facility as a consequence of the addition of FBC's assets to BZAM's asset base.

79. In these circumstances, Final Bell's claim has a strong chance of success. The evidence discloses multiple fraudulent misrepresentations by the moving party, a CCAA applicant, which strongly weigh against granting BZAM security for costs.

D. BZAM FAILED TO ADDUCE PROPER EVIDENCE SUPPORTING ITS COSTS

80. In the alternative, if security for costs is awarded, Final Bell submits that the quantum of security should be much lower than the amount sought by BZAM. The Court will recall that at the May 6 case conference, Final Bell sought disclosure of BZAM's dockets, as required when a Bill of Costs is delivered. The Court refused this request but noted that the failure to deliver dockets will be considered on the motion.

81. A Bill of Costs is prescribed in Form 57A under the *Rules of Civil Procedure*, and expressly requires a party to attach copies of the dockets or other evidence that support the fees

claimed. BZAM refuses to deliver its dockets and altered its Bill of Costs to remove the prescribed statement concerning dockets.

82. While dockets may not be necessary in every motion where security for costs are sought, the absence of BZAM's counsel's dockets is problematic given that Final Bell's motion is within a broader CCAA application where other unrelated issues are being handled by BZAM's counsel, the quantum of costs sought are intense for a four-week litigation period, the costs are sought on a full or substantial indemnity basis, and costs are sought for four partners and three associates – seven timekeepers in all.

83. BZAM's Bill of Costs does not provide sufficient particularity as to which tasks were performed by which timekeeper to enable a proper assessment of the reasonableness of the time claimed by counsel. For example, BZAM seeks security for fifty hours incurred or to be incurred by Mike Shakra, an insolvency partner at the Bennett Jones firm who is not a litigator.[45] This is in addition to the time incurred or to be incurred by Sean Zweig, another insolvency partner. BZAM seeks approximately $50,000 in security for these two non-litigation partners. Without dockets, it is impossible to determine whether there was any unreasonable overlap in the 203.5 hours claimed for Mr. Blinick and the 235.1 hours claimed for Mr. Feore between March 18 and April 24, just by way of example.

84. In the circumstances, the Court cannot take BZAM's Bill of Costs at face value. Instead, the Court should draw an adverse inference from the refusal to provide redacted dockets and

[45] McKnight Affidavit, Exhibit "L"; RMR, Vol. 1, Tab 6L, p. 948.

assume that had these dockets been provided, a review of the dockets would support a finding that the quantum of costs sought by BZAM is unreasonable and unjust.

85. Nor should security be awarded on a full or substantial indemnity basis. While it is acknowledged that costs may be awarded on an elevated scale where dishonest conduct is alleged, in this case, Final Bell has made out a strong *prima facie* case that misrepresentations were knowingly or recklessly made by BZAM's officers.

86. In *Hamilton v Open Window Bakery Ltd.*, the Supreme Court held that not all unsuccessful attempts to prove fraud automatically lead to the conclusion that the unsuccessful party should be liable for elevated costs, since not all such attempts are considered to be reprehensible, scandalous or outrageous conduct.[46]

87. Here, given the evidence already adduced, it is not outrageous for Final Bell to claim that BZAM's misrepresentations were knowingly or recklessly made. Final Bell is not alleging dishonest conduct with nothing to support its case. Some of the dishonest conduct is undisputed: for example, Bovingdon admitted that BZAM intentionally published a misleading statement concerning his departure from BZAM. Other dishonest conduct is demonstrable by the direct contrast between the representations to Final Bell and the actual facts known to BZAM when those representations were made.

PART IV - ORDER REQUESTED

88. Final Bell requests that BZAM's motion be dismissed, with costs.

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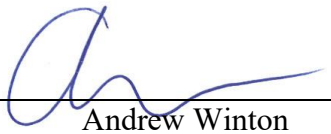
[46] *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 26.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2024.



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May 22, 2024

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SCHEDULE "A" -

LIST OF AUTHORITIES

Cases

1. *Yaiguaje v Chevron Corporation* ("*Chevron*"), 2017 ONCA 827.
2. *Chemicheck Inc. v Teva Canada Limited*, 2015 ONSC 2061.
3. *Bisson o/a Grimes Roofing et al v. Drevniok et al*, 2016 ONSC 2684.
4. *Wilson Young & Associates Inc. v. Carleton University et al*, 2020 ONSC 4542.
5. *Solea International BVBA v. Bassett & Walker International Inc.,* 2018 ONSC 3237.
6. *Rick v. Brandsema*, 2009 SCC 295.
7. *Deschenes v. Lalonde*, 2020 ONCA 304.
8. *1323257 Ontario Ltd. (Hyundai of Thornhill) v. Hyundai Auto Canada Corp.*, 2009 CanLII 494 (ON SC).
9. *Barclays Bank v. Metcalfe &Mansfield*, 2011 ONSC 5008; aff'd 2013 ONCA 494.
10. *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2023 ONSC 6688.
11. *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589.
12. *Redican v. Nesbitt*, 1923 CanLII 10 (SCC).
13. *Stewart v. Complex 329 Ltd.* (1990), 1990 CanLII 7839 (NB KB).
14. *Trans-Canada Trading Co. v. M. Loeb Ltd.*, 1947 CanLII 340 (ON SC).
15. *McCarthy v. Kenny*, 1939 CanLII 333 (ON SC).
16. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9.

Secondary Sources

17. Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission*, 2nd ed. (Oxford: University Press, 2014).
18. GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters Canada Limited, 2011).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 1.03, 56.01

1.03 (1) In these rules, unless the context requires otherwise,
…
"applicant" means a person who makes an application;
…
"plaintiff" means a person who commences an action;
…

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.

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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