



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

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TITLE OF PROCEEDING: BZAM LTD. et al

BEFORE JUSTICE: Justice OSBORNE

**PARTICIPANT INFORMATION**

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## **ENDORSEMENT OF JUSTICE OSBORNE:**

- [1] This case conference was requested by the DIP Lender, Cortland Credit Lending Corporation (“Cortland”).
- [2] Defined terms in this Endorsement have the meaning given to them in the materials and/or in earlier Endorsements made in this proceeding.
- [3] Cortland seeks a case management order scheduling a threshold motion for the determination of the priority of its claims over those of Final Bell, assuming Final Bell were to obtain the relief it seeks on its pending trial of an issue in respect of the Final Bell claims.
- [4] The history and chronology of this matter has been complex, and regrettably, very acrimonious.
- [5] As set out in previous Endorsements, Final Bell brought a claim seeking, among other things, rescission of the relevant agreement. That proposed relief had obvious implications for the entire restructuring and in particular the SISP process. Accordingly, the matter was submitted to be extremely urgent, and I directed that a summary trial proceed on an expedited schedule.
- [6] Shortly before the commencement of that summary trial, Final Bell sought, and was granted, an adjournment on the basis of a dispute about certain Canada Revenue Agency documents and their interpretation and effect.
- [7] Final Bell then amended its claim to abandon the request for rescission, but also to seek a constructive trust with the practical effect that, if granted, Final Bell would have a priority claim over the assets of the Applicants.
- [8] Cortland opposes this relief on the basis that it was a *bona fide* third party purchaser for value without notice, having advanced all of its pre-filing security for good consideration, and without knowledge of Final Bell’s claims, and having advanced funds pursuant to the DIP Facility, and corresponding DIP Charge that secures all of Cortland’s lending or Final Bell was on notice of the motion for approval of the DIP Facility, and corresponding Charge, and did not oppose that relief. Cortland submits that the priority afforded to it by the DIP Charge will be very materially compromised if Final Bell succeeds on its claim for constructive trust which would effectively prime the DIP.
- [9] For all of those reasons, Cortland asks the Court to exercise its case management function and schedule a hearing in respect of, and then determine, the threshold issue of the relative legal priority. It submits that this would provide for material increased judicial efficiency to the benefit of the Court and the parties on the basis that, if Cortland is correct that its security cannot be subordinated to the claim of Final Bell, the continuation of the summary trial in respect of the claims advanced by Final Bell will be moot, since there will be no proceeds from which Final Bell could recover even if successful.
- [10] The position of Cortland is supported by the Applicants who submit, in addition, that further delays to approval of the Stalking Horse Purchase Agreement can be avoided by a timely adjudication of the threshold motion.
- [11] Final Bell opposes such a case management order being made, submitting that the relief being sought by Cortland is in effect a mid-trial motion for partial summary judgment, and it is impossible and unfair to bifurcate the legal issue of relative priority between Final Bell and Cortland from the factual issue of whether, as Final Bell alleges, the Applicants made fraudulent misrepresentations.
- [12] This Court has broad discretion as the supervising CCAA Court to make such case management directions, and to manage the proceeding generally, such as may be appropriate to minimize costs and time and

maximize efficiency for the benefit of the Court and all affected stakeholders. That requires the sequencing and determination of matters in a complex and multi-step CCAA proceeding such as this, in an orderly fashion.

- [13] I am satisfied in the circumstances that it is an appropriate exercise of my discretion to direct that the threshold issue be determined first, as requested by Cortland. Such a motion requires materials that will be significantly more limited than will be the materials required for the summary trial. In fact, Cortland has already served its motion materials.
- [14] It is to the benefit of all parties that costs be minimized, and this restructuring be advanced as expeditiously as possible.
- [15] In my view, there is no prejudice to Cortland by this direction. Cortland submits that it is entitled to its “day in court” and wants to present its case in support of its claim on the facts that the Applicants made fraudulent misrepresentations on which Final Bell relied in entering into the agreement. Final Bell submits that this Court ought not to determine at this stage whether those factual claims have merit. To be clear, I am not making any such factual determination about the alleged fraudulent misrepresentations.
- [16] The practical reality is, however, that even if Final Bell succeeds on its factual claims, it must also succeed on the legal issues of priority that are the subject of the proposed threshold motion in order for there to be any practical difference. Put differently, there is no practical difference in outcome whether Final Bell can prove actionable fraudulent misrepresentations or not, unless Final Bell can also succeed on its claim that it is entitled to a constructive trust as a remedy, flowing from such liability findings.
- [17] It seems to me, therefore, that it works no unfairness on Final Bell for the threshold motion to be determined effectively on the hypothetical basis that: “assuming the Final Bell claims succeeded, the key legal issue is whether Final Bell is entitled to a priority over Cortland?”.
- [18] In my view, such a direction is well within the scope of my description as the supervising CCAA Court. The fact that the parties had exchanged opening statements and some documents prior to Final Bell’s request for an adjournment on the eve of the summary trial does not make the requested direction in any practical sense equivalent to a mid-trial motion for partial summary judgment. Nor am I persuaded that Final Bell is prejudiced because I directed that it post security for costs as it has now done. The motion for security for costs was brought, prior to the amendment of the relief sought by Final Bell to abandon its claim for rescission but to seek a constructive trust. In any event, it is to the benefit of all parties if the costs that may ultimately be payable by one party to another, and incurred by all parties for their own respective benefits, be minimized.
- [19] If Final Bell succeeds on the threshold motion, it will have all of its rights to argue the factual elements of its fraudulent misrepresentation claims. Moreover, it can argue all of its legal positions on the threshold motion, just as it would following trial. If it does not succeed on the threshold motion, however, the result of the factual determinations will inevitably be moot, given the limited funds available, and all of the parties will have spent materially less resources litigating the issues.
- [20] In the circumstances, I am satisfied that proceeding in this manner is to the benefit of all parties, and I cannot see any prejudice to Final Bell.
- [21] This Summary Trial was previously scheduled for two days on September 18 and 19. In the circumstances, the threshold motion will proceed at 10 AM on September 18 and continue as necessary for one half day. The September 19 date is vacated. The summary trial is adjourned to be scheduled as soon as possible following a determination of the threshold motion as necessary.

[22] Cortland has already delivered its threshold motion materials. The Applicants will do so promptly, and Final Bell will deliver its responding materials. I strongly urge the parties to work out a case management timetable for the exchange of materials for the threshold motion among themselves in order that it is fully briefed for determination on September 18.

Oleary, J.