ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00715773-00CL **DATE:** June 30, 2024

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TITLE OF PROCEEDING: In the Matter of BZAM LTD. et al

BEFORE JUSTICE: Justice OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT of OSBORNE, J:

1. These motions engage two issues that arise relatively infrequently:

   a. when and in what circumstances are security for costs appropriate within an ongoing *CCAA* proceeding; and

   b. whether a party against whom no relief is directly sought can be entitled to security for costs.

2. BZAM Ltd. ("BZAM") and Cortland Credit Lending Corporation ("Cortland") each seek an order requiring Final Bell Holdings International Ltd. ("Final Bell") to immediately post security for the costs of its claim originally for rescission of a Share Exchange Agreement dated December 5, 2023, and now damages and equitable relief, including the imposition of a constructive trust.

3. BZAM seeks security in respect of costs on a full indemnity scale in the amount of $636,000, or in the alternative on a substantial indemnity scale in the amount of $575,000, and Cortland seeks security on a partial indemnity scale in the amount of $243,595.34.

4. Final Bell opposes the relief sought.

5. BZAM relies upon the affidavits of Wenbo Sun affirmed April 23, 2024 and May 13, 2024, and the affidavit of Matthew Milich sworn May 28, 2024. Cortland relies on the affidavit of Jonathan Shepherd sworn April 24, 2024. Final Bell relies on the affidavit of Keith Adams dated March 18, 2024.

6. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

Background

7. The overarching background to, and context of, this motion is set out in earlier Endorsements I have issued in this CCAA proceeding.

8. BZAM is a Canadian cannabis company that owns cannabis cultivation facilities in Ontario and Alberta, leases production facilities in Ontario, British Columbia and Québec, leases a retail store in Saskatchewan, and has corporate offices in Ontario and British Columbia. It filed for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36 (the "*CCAA*") pursuant to the terms of the Initial Order granted on February 28, 2024.

9. Approximately three months before BZAM's *CCAA* filing, BZAM had entered into a Share Exchange Agreement with Final Bell dated December 5, 2023, pursuant to which Final Bell sold its wholly-owned subsidiary, Final Bell Canada Inc. ("FBC") to BZAM. The consideration paid for the shares of FBC consisted of equity in BZAM and unsecured debt. As a result, Final Bell became a shareholder of BZAM.

10. Cortland is the pre-filing senior secured lender of BZAM, and the provider of debtor-in-possession ("DIP") financing (the "DIP Lender") pursuant to the Initial Order.

11. Final Bell did not appear on the first day hearing in this proceeding on February 28, 2024 to oppose the Initial Order that was granted. It did not seek to avail itself of the come-back clause in that Initial Order or seek relief amending or vacating the Initial Order. Even at the come-back hearing required under the *CCAA* to be conducted within 10 days of the Initial Order, Final Bell did not oppose the continuation of relief, including but not limited to the stay of proceedings.

12. However, on March 18, 2024, Final Bell brought a claim seeking to rescind the Share Exchange Agreement, alleging fraudulent misrepresentation on the part of BZAM. With the agreement of the parties, that claim has proceeded, and has been case managed, as a trial of an issue within this *CCAA* proceeding. It originally came before the Court on an urgent basis, given that Final Bell's claim for rescission needed to be

resolved in order that the pending Sale and Investment Solicitation Process ("SISP") for BZAM could proceed. Potential bidders needed to know what they were bidding on (i.e., whether the assets and business of BZAM included FBC or not). The parties requested, and the Court accommodated, an extremely expedited case management timetable leading to the summary trial of Final Bell's claim for rescission.

13. Subsequent to the scheduling of the summary trial by which the Final Bell claim was to be adjudicated, Final Bell advised the Court that it was abandoning its claim for rescission. However, it now seeks in its claim damages and equitable relief in the form of an order imposing a constructive trust over any proceeds of the sale of the business of the Applicants. I pause to observe that, subject to the Final Bell claim, those proceeds would be entirely payable to Cortland, which is anticipated to suffer a loss even if it receives the entirety of those net proceeds.

14. That case management timetable contemplated the very steps that in fact occurred: the claimant and the respondents filed extensive affidavit evidence, made extensive documentary production, conducted cross examinations on the affidavits, conducted a Rule 39.03 examination, and responded to undertakings and further document requests.

15. The summary trial was intended to proceed in hybrid format, with evidence of all parties being led by way of affidavit, with cross examinations and other *viva voce* evidence limited to certain fundamental issues. Trial was scheduled for two days on April 22 and 23, 2024, dates which were scheduled by the Court on the consent of all parties, each of whom confirmed their availability for those dates.

16. The trial did not proceed as scheduled. On April 19, 2024, a few days before it was set to commence, Final Bell sought an urgent case conference at which it requested an adjournment of the trial on the basis that it had just received supplementary productions from BZAM that, in the submission of Final Bell, fundamentally changed the landscape and required Final Bell to re-evaluate its position and anticipated evidence. BZAM and Cortland opposed the adjournment. Having heard submissions from all parties, I granted the adjournment requested by Final Bell. The hearing is now anticipated to occur sometime this summer.

17. BZAM and Cortland now seek security for their respective costs of the Final Bell claim, based both on non-residency and good reason to believe that Final Bell lacks sufficient assets in Ontario or elsewhere to pay a costs award if ordered to do so.

Rule 56 and Security for Costs

18. This Court has jurisdiction to make an order respecting security for costs pursuant to Rule 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;
>
> 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.

19. The jurisdiction is discretionary. The analysis to be undertaken by the Court in determining whether that discretion should be exercised has two stages:

a. first, the moving party must show that any one of the six factors set out in Rule 56.01(1) applies; and

b. if the first stage is met, the onus shifts to the responding party to establish that it would be unjust in all of the circumstances to order security for costs.

See: *Brown v. Hudson's Bay Company*, 2014 ONSC 1065 at paras. 33-34.

20. The threshold to meet the first stage of the test is "light", given that "unfairness would result were the defendant required to prove something that is within the knowledge of the plaintiff": *JoBro Film Finance Ltd., v. National Bank of Canada*, 2020 ONSC 975 ("*JoBro*") at para. 6.

21. The second stage involves an inquiry into other factors which may assist in determining the justice of the case:

> [E]ach case must be considered on its own facts are helpful nor just to compose a static list of factors to be used in all cases. In determining the justness of the security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.
>
> See *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827 ("*Yaiguaje*") at para. 25.

22. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rule 56 have been met: *Yaiguaje* at para. 23.

23. As recognized by the Court of Appeal in *Yaiguaje* at para. 24, courts in Ontario have identified various factors to be considered, including the merits of the claim, any delay in bringing the motion for security, the impact of a defendant's conduct on the available assets of the plaintiff, access to justice concerns, and the public importance of the litigation.

24. However, none of those factors is exclusive, mandatory or static, and each case must be considered on its own facts. The overarching objective is, as stated by the Court of Appeal, to consider the justness of the order holistically, examining all the circumstances of the case and being guided by the overriding interests of justice.

Does Rule 56 Apply to Claims in a CCAA Proceeding?

25. Final Bell submits that, as a preliminary issue, Rule 56.01 does not apply at all because BZAM is not a "defendant" or a "respondent" as referred to in Rule 56.01 (1) and is in fact, the Applicant in this CCAA proceeding, and also because Final Bell, as the claimant here, is not a "plaintiff" or "applicant" but is a respondent in this CCAA proceeding.

26. I cannot accept the submission. While Final Bell is indeed a Respondent in this insolvency proceeding, and BZAM is indeed the Applicant, the dispute in respect of which security for costs is sought is the claim of Final Bell described above. Final Bell is the claimant, and it alleges fraud and seeks substantive relief against BZAM. The relationship of those parties in the context of the Final Bell claim is analogous in all respects to that of plaintiff and defendant or applicant and respondent.

27. If necessary, I would place reliance on Rule 1.04(1) which requires that the Rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits, and also on Rule 1.04(2), which provides that where matters are not provided for in the rules, the practice shall be determined by analogy to them.

28. I draw additional comfort for my analogous approach from Rule 56.01(2) itself, which provides that 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 my view, the legislative intent is clearly that security for costs should be available in circumstances of an active claim.

29. Finally, if necessary, in my view, the broad discretion given to this Court in s.11 of the *CCAA* to make any order that it considers appropriate in the circumstances "on the application of any person interested in the matter" would also be a basis for my jurisdiction to order security for costs. The power given to the supervising court is vast, and this broad discretionary power is the feature of the *CCAA* that enables it to be adapted so readily to each reorganization: *Canada v. Canada North Group Inc*., 2021 SCC 30 (CanLII), [2021] 2 SCR 571 ("*Canada North* ") at para. 121, quoting *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10, [2020] 1 S.C.R. 521 at para. 67.

30. In my view, the baseline requirements of appropriateness, good faith and due diligence, and the requirement that the supervising judge must be satisfied that the order sought would advance the policy and remedial objectives of the *CCAA* (i.e., the survival of going concerns, and the objective of providing the conditions under which the debtor can attempt to reorganize) are all such that there is no good policy reason to hold that the security for costs regime established by the Rules cannot apply in a *CCAA* proceeding: see *Canada North*, at para. 21.

31. In this case, the successful party or parties in respect of Final Bell's claim would presumptively be entitled to costs in respect of that claim, just as would a party successful on a motion within any application or action. There is nothing special about a claim advanced in a *CCAA* proceeding, and particularly a significant claim with material costs incurred to prosecute and defend, that disentitles a successful party to costs when the claim is determined. Sometimes costs are sought and sometimes they are not, just as with any proceeding. Claims within a *CCAA* proceeding are routinely the subject of claims for costs, and where the determination of claims is delegated by order to a claims officer (which is very common in complex and large restructurings), those claims officers are regularly given the jurisdiction and discretion to determine and award costs.

32. In my view, it follows that if the successful party or parties on the Final Bell claim would presumptively be entitled to costs following a determination of that claim (as they would be), there is no just rationale for the conclusion that the security for costs regime established by the Rules cannot apply at all.

33. For all of these reasons, I find that Rule 56.01 is not inapplicable to a claim brought within a *CCAA* proceeding.

Is Security for Costs available to Cortland?

34. Final Bell submits that it ought not to be required to post security in favour of Cortland, even if security is otherwise appropriate, since it alleges no wrongdoing against Cortland and seeks no relief against that party.

35. In my view, additional considerations can apply in the somewhat unusual circumstances as are present here, in that the Final Bell Claim is being litigated within this *CCAA* proceeding. It is to be expected, and indeed it is the case here, that other stakeholders are directly affected by this claim.

36. Cortland, in its capacity as senior secured lender and DIP Lender, is such an example. That party is clearly affected by the disruption to the restructuring proceeding (with attendant costs) brought about by the final bow claim, whatever the result. In addition, it is also very directly affected by the result of the claim in

that if Final Bell is successful, the ability of Cortland to recover on its DIP financing and/or on its pre-filing indebtedness owing by BZAM will almost certainly be negatively affected.

37. This Court previously approved the DIP Facility pursuant to which the DIP financing was advanced. It allows BZAM to continue operating during this restructuring. Pursuant to the DIP facility, Cortland was granted a super priority charge over all existing and after-acquired real and personal property of the Applicants. That includes all existing and after-acquired real and personal property of FBC and Final Bell. I pause to observe that Final Bell did not oppose that super priority charge, and nor has it sought subsequently to amend, vary or vacate that charge, although the constructive trust remedy it now seeks would have precisely that effect.

38. As noted above, and subject to the Final Bell claim, Cortland would be entitled to the entirety of the net proceeds from the sale of BZAM's business, and it is anticipated that Cortland would still suffer a shortfall on its indebtedness. It is those very net proceeds over which Final Bell (notwithstanding its late-in-the-day abandonment of its rescission claim), now seeks to assert a constructive trust. If that constructive trust claim is successful, it would "prime" or rank in priority to the claim of Cortland, which would therefore suffer the corresponding loss as a direct result. Accordingly, it is difficult to conclude that Cortland is unaffected by the Final Bell claim.

39. Moreover, it is perhaps ironic that Final Bell takes the position that Cortland ought not to be entitled to security for costs when one of the key allegedly fraudulent misrepresentations on which Final Bell bases its claim is that, as noted above, BZAM was anticipated to have sufficient financing available pursuant to the revolving credit facility issued by none other than Cortland.

40. Indeed, Final Bell essentially concedes this point itself in its factum, where it describes Cortland as "the only party with a legitimate interest in seeking security" (para. 2(e)).

41. Had the Final Bell claim been outstanding earlier, Cortland may well have elected not to provide DIP financing at all. Other stakeholders (such as other creditors) could also be directly affected by the Final Bell claim here notwithstanding that they are not directly involved in its determination. The pendency of that claim is delaying the progress in the restructuring, including but not limited to the SISP. DIP financing costs and other professional fees that may otherwise have been avoided or reduced continue to accrue, all of which reduces the overall recovery available to creditors and other stakeholders.

42. The conclusion that Cortland is an affected party entitled to respond to the motion and entitled to security for the costs thereof is reinforced by Rule 37.07(1) which requires that a notice of motion be served on any party "or other person who will be affected by the order sought, unless these rules provide otherwise", and is consistent with the approach taken by this Court in *Re U.S. Steel Canada Inc*., [2022] 5 C.B.R. (7th) 95, 2022 ONSC 6993 at paras. 51 and 52. Here, as in that case, the proprietary and economic interests of the party [seeking security] depend on the outcome of the claim.

43. Finally, I accept the submission of Cortland that equity and fairness militate in favour of it being entitled to security in the circumstances where the consideration that Final Bell received under the Share Exchange Agreement of shares and unsecured debt means that, at its highest, Final Bell is an unsecured creditor and an equity holder of BZAM. Cortland, on the other hand, was and is a secured creditor. It held secured debt pursuant to the revolving credit facility pre-filing, and has a priority charge in respect of the post-filing DIP Facility. To conclude that Cortland ought not to be entitled to security would amount to elevating the position of Final Bell above Cortland and leave Cortland, as the admittedly innocent party against which no allegations are advanced, bearing most of the risk.

44. For all of these reasons, it seems just and equitable that security for costs be available in appropriate circumstances to a party in the position of Cortland. If necessary, I find that the broad discretionary jurisdiction given to a *CCAA* court in s. 11 of the *CCAA* and discussed above is broad enough to direct a party to post

security for costs in favour of another stakeholder in appropriate circumstances, such as I have found to be present in this particular case.

Application of Rule 56 to this Case

45. In this case, there is no dispute that Final Bell ordinarily resides outside Ontario (Rule 56.01(1)(1)(a)).

46. The jurisdiction where the corporate party carries on business is decisive in satisfying the rule in this regard: *Fruitticola SNC v. Rite-Pak Produce Co. Limited,* 2009 CanLII 60089 (ONSC) at para. 7. In any event, however the requirement of being "ordinarily resident" is to be construed, there is no interpretation that allows for the conclusion that Final Bell is "ordinarily resident" in Ontario.

47. Final Bell is a US-based cannabis company, incorporated under the laws of British Columbia. It is therefore ordinarily resident outside of Ontario, specifically in Van Nuys, California, United States. It has no connection to Ontario. While technically or formally a Canadian company in that its registered mailing office is in British Columbia, it is functionally a U.S. operation. Its directors are also all located outside Ontario: one is in the United States, one is in Singapore, one is in Australia and two are in British Columbia. Its Chief Financial Officer is located in California.

48. I am satisfied that the factors set out in Rule 56.01(1)(a) apply.

49. I am equally satisfied that there is good reason to believe that Final Bell has insufficient assets in Ontario to pay the costs of either BZAM or Cortland or both. As a starting point, there is no evidence that it has any assets in Ontario at all.

50. Jurisdiction aside, each of its financial statements since at least December 31, 2021 reflect that Final Bell has recorded net losses from operations and that liabilities exceed assets by a material amount. Moreover, things are trending in the wrong direction: the margin by which its liabilities exceed assets has exceeded over time.

51. The moving parties submit that Final Bell has at all times been, and remains, balance-sheet insolvent. Its condensed consolidated financial statements as of and for the three and nine months ended December 31, 2022 and 2021, which constitute its most recent publicly-disclosed financial statements, reveal total assets of USD $72,575,890 as against total liabilities of USD $86,015,166, therefore yielding negative equity of USD $13,439,276 as at December 31, 2022.

52. The moving parties submit that over time, between the date of those financial statements and during the nine months thereafter ending September 30, 2023, the financial situation of Final Bell deteriorated even further, such that by March 31, 2023, its total liabilities exceeded its total assets by USD $29,030,384.

53. Moreover, Final Bell's condensed consolidated statement of cash flows as at March 31, 2022 and March 31, 2023 reflect losses from operations in the amounts of USD $13,137,736 and USD $17,710,102, respectively, and that it suffered net losses of USD $22,521,933 and $52,201,853, respectively.

54. The audit of Final Bell's condensed consolidated financial statements was never completed for the year ended March 31, 2022 or the year ended March 31, 2023. In fact, its auditor resigned on November 3, 2023, citing professional standards and issues of "concern" regarding Final Bell's valuation of FBC, the company it sold to BZAM (less than one month after its auditor resigned).

55. As a result of its failure to file financial statements, Final Bell was placed under a Cease Trade Order by the British Columbia Securities Commission on August 14, 2023. That CTO remains active, although partially revoked by the BCSC on September 30, 2023 and January 9, 2024 at the request of Final Bell to avoid materially prejudicial events occurring.

56. As a result of all of the above, BZAM and Cortland submit that while Final Bell may not be impecunious, there is good reason to believe that it does not have sufficient assets in Ontario to pay the costs of BZAM and/or Cortland if ordered to do so.

57. There has been much jurisprudence about whether and in what circumstances the fact that a corporation's liabilities exceed its assets is enough to meet the first part of the test, or whether a corporation's operational insolvency is similarly enough to meet the test. (See, for example, *JoBro,* at para. 39; *Capital Sports Management Inc. v. Trinity Development Group Inc., et al*, 2020 ONSC 7309 at para. 17; *Legendary Log Homes, Inc. v. Courtice Auto Wreckers Limited*, [2008] O.J. No. 4028 [ONSC] at para. 2; and *American Axle & Manufacturing Inc. v. Durable Release Coasters Ltd.*, [2006] O.J. No. 5283 [ONSC] at para. 33.

58. However, the application of the test as articulated in *JoBro* requiring that the issue be approached holistically and in a common sense manner, allows for no conclusion here other than that Final Bell lacks sufficient assets to satisfy a costs award, in or even outside Ontario, with the result that Rule 56.01(1)(d) also applies.

59. Accordingly, I am satisfied that the moving parties have established that the first stage of the test has been met, such that the onus shifts to Final Bell to establish that requiring it to post security for costs in the circumstances would be unjust.

60. I am reinforced in this conclusion by the position of Final Bell itself, which submits in paragraph one of its factum that "the issue on this motion is whether the justness of the case supports an order that Final Bell pay security for costs".

61. A consideration of what is just in any one case is clearly dependent on the particular circumstances of that case. The objective is to ensure equality between litigants and avoid, for example, creating a circumstance where the effect of an order requiring a party to post security would almost automatically mean, in a practical sense, that that party was deprived of the opportunity to bring its claim. Against this, however, the court must balance the right of the party or parties seeking security to avoid a circumstance where those parties would be compelled to defend a claim in respect of which it is virtually certain that they could never recover any costs, whatever the result.

62. This balancing is particularly relevant in a matter like this one where the allegations are serious (fraud), the costs will likely be significant and they will be incurred in relatively short order given the accelerated timetable for this claim and summary trial.

63. The respective positions of the parties with respect to the merits of the Final Bell claim are wholly at odds with one another.

64. Final Bell submits that the strength of its claim is a factor in its favour, since it has a strong *prima facie* case that it was defrauded.

65. Final Bell alleges that it is entitled to damages and equitable relief essentially on the basis that it sold its subsidiary, FBC, to BZAM in exchange for shares and unsecured debt, only to have BZAM file for insolvency protection three months later. It alleges four broad fraudulent misrepresentations:

a. BZAM misled Final Bell about its ability to extend a revolving credit facility granted by Cortland, which Final Bell understood was going to be extended in March, 2024 for another 15 months;

b. BZAM misled Final Bell about its future cash flows as a standalone entity;

c. BZAM misled Final Bell about its outstanding excise tax liabilities other than those disclosed; and

d. BZAM did not inform Final Bell of its intention to terminate it CFO without any succession plans and very shortly after the closing of the FBC acquisition.

66. BZAM denies all of the fraudulent misrepresentation allegations, a position in which it is fully supported by Cortland, who has been involved prior to filing as BZAM's pre-filing senior secured lender, and thereafter as the DIP Lender. BZAM and Cortland submit that the Final Bell claim is without merit and that BZAM made no misrepresentations, fraudulent or otherwise.

67. In my view, and while recognizing that the merits of the underlying claim can be a factor taken into account, the merits of the Final Bell claim here are a neutral factor. As noted above, the allegations are serious, and the claim has serious consequences for all parties involved. The nature of the fraudulent misrepresentations alleged engage credibility issues of a number of individuals involved, including but not limited to the credibility of the CEO and former CFO of BZAM. That is in large part why the summary trial contemplates *viva voce* evidence, albeit from a limited number of witnesses and on a limited number of issues.

68. The Final Bell claim engages vigourously contested allegations of discrepancies between documents said to have been produced during the due diligence period, and records subsequently disclosed following the Final Bell transaction, including but not limited to Canada Revenue Agency filings in respect of cannabis excise tax obligations.

69. In my view, I am not in a position on this motion to resolve these fundamental issues or make any significant preliminary findings in respect thereof, with the result that the merits of the case are a neutral factor.

70. Moreover, the moving parties submit that Final Bell is advancing its claim purely for tactical reasons and delay in order to gain leverage, and that this is illustrated by the fact that, notwithstanding its threats to do so, Final Bell did not avail itself of the come-back right in the Initial Order to seek to set aside that Initial Order (including the stay of proceedings) within the 10 day period, or at any time subsequently. Nor has it sought, as noted above, to amend or vacate the super priority charge in favour of Cortland as DIP Lender.

71. They submit that Final Bell was late in asserting its claim and did not advance the claim for many weeks while this CCAA proceeding was ongoing. When it did bring its claim, it sought the remedy of rescission, which was wholly disruptive to the proceeding generally, and to that then-ongoing SISP process in particular. Only once the summary trial of the Final Bell claim was scheduled on an urgent basis did Final Bell then abandon its claim for rescission, although that has only a partially calming effect since it continues to seek a constructive trust over the proceeds of sale of the assets and business of BZAM.

72. In response, Final Bell submits that the moving parties, and particularly BZAM, were late in bringing these motions for security and such motions must be bought promptly after the defendant discovers it has a reasonable basis for doing so. Final Bell submits that the justness of the case requires that it not be placed in the position of having to post security for costs after it has incurred significant expense to advance its claim.

73. While I accept that delay can be a factor (both ways), in my view, it does not operate in the particular circumstances of this case to favour Final Bell. The claim would already have been heard on the merits at the originally proposed summary trial but for the adjournment request of Final Bell. While I do not fault Final Bell for bringing that request (indeed, I granted it), I do not think that in the circumstances the fact that the summary process has expanded and now continues and it is in that context in which the moving parties bring these motions, amounts to delay such as to disentitle the moving parties to relief.

74. In the same way, I cannot accept the submission of Final Bell that granting security to BZAM in the circumstances is "tantamount to rewarding it for its faulty documentary disclosure". While BZAM could have moved for security earlier, there is no question but that this entire claim has proceeded on a very expedited timetable and the parties (all of them) have been busy responding to issues in real-time and preparing for trial on an accelerated basis.

75. In my view, and having considered all of the relevant factors in the circumstances of this case holistically, I am satisfied that it would be fair and just to require Final Bell to post security in favour of both

BZAM and Cortland. The Final Bell claim is significant and wholly disruptive to this restructuring proceeding. That is not to say that it is without merit, and the disruption may ultimately be determined to have been justified, but at present, the disruption is real and the merits of the claim are undetermined.

76. Moreover, the claim is complex, proceeding as noted above, on an extremely expedited timetable, and requires the expenditure of very significant resources by all affected parties, as is reflected in all of the Bills of Costs discussed below.

77. There is no evidence before me to the effect that an order requiring security to be posted would force an end to the Final Bell claim. On the contrary, Final Bell submits that, notwithstanding its balance sheet insolvency, it would be in a position to pay an award of costs following the determination of its claim, if ordered to do so.

78. For all of the above reasons, I am satisfied that Final Bell has not met its onus of establishing that it would be unjust to compel it to post security for costs.

Quantum of Security to be Posted

79. The next issue, then, is what quantum should be required.

80. The court has wide discretion as to the quantum of security to be posted, and that discretion must be exercised in a manner that is just in all the circumstances. As is clear from the jurisprudence cited above, it is the role of the court to do its best by balancing the entitlement of the responding parties to the claim to a reasonable measure of protection for their costs, as against the impact of any order requiring security to be posted on the claimant.

81. The principles and factors that apply to a determination of the appropriate quantum are substantially similar to the factors that apply to the exercise of discretion in fixing costs. The amount ordered must fall within the reasonable contemplation of the parties, and the court must be guided by what is reasonable and fair: *Canadian Metal Buildings Inc. v. 1467344 Ontario Limited*, 2019 ONSC 566 at para. 27; and *2018218 Ontario Limited v. Realty Specialists Inc.,* 2019 ONSC 150 at para. 23.

82. In this particular case, that involves a consideration of three points, among others.

83. First, BZAM submits that security in respect of costs on an elevated scale (full indemnity or substantial indemnity, as opposed to partial indemnity) could be appropriate given that the allegation by Final Bell in the underlying claim is fraud, such that it would presumptively be entitled to costs on an elevated scale at the end of the day if successful.

84. Cortland seeks security on a partial indemnity scale.

85. Final Bell acknowledges that costs may be awarded on an elevated scale where dishonest conduct is alleged as in this case, but it submits that the strength of its case is such that security should be ordered, if at all, only on a lower scale given its *prima facie* case that misrepresentations were knowingly or recklessly made by officers of BZAM.

86. In my view, and balancing all of the factors, I am not persuaded that security should be ordered in respect of costs on an elevated scale. Whether costs will ultimately be awarded in respect of the Final Bell claim at all, let alone on an elevated scale, remain to be seen. It is not automatic that unsuccessful allegations of fraud inevitably entitle a successful party to elevated costs: see *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9 at para. 26. In my view, the equities in this case justify an order requiring that security be posted, but not on an elevated scale.

87. Second, it is important to ensure that the quantum reflects only the potential costs of this particular claim. Here, Final Bell submits that the costs claimed by BZAM include costs of this restructuring proceeding beyond the four corners of this claim, and should therefore be reduced.

88. It is elementary that the quantum reflects only the costs incurred or to be incurred with respect to this claim.

89. Final Bell contests the quantum sought to be posted by BZAM in part, on the basis that BZAM has not submitted actual dockets reflecting solicitors' time already incurred. In my view, this is not fatal to BZAM's position. Dockets are often not required, and I previously gave case management directions to the effect that dockets were not required in connection with this motion (see Endorsement made in this proceeding dated May 6, 2024).

90. Further, I accept the statement from counsel to the effect that the Bill of Costs does not include any time for matters unrelated to the Final Bell claim, consistent with the Bill of Costs itself in the description of services in respect of which costs are sought to be secured. Obviously, actual entitlement to an award of costs, and the quantum of such costs, are for another day, and the costs claimed will have to be justified.

91. Third, Final Bell submits that the quantum of costs sought to be posted is simply unfairly high and that even if this Court were persuaded that security was appropriate, the quantum should be reduced so as not to prevent Final Bell from asserting its claim.

92. Where the requirement for security for costs has been established, and the majority of litigation steps have been completed, a plaintiff must generally pay security for those costs already incurred and for anticipated costs of upcoming steps in the litigation: *Shuter v. Toronto Dominion Bank*, [2007] O.J. 3435 [ONSC] at para. 193; *Demessey Limited v. Cassels Brock and Blackwell LLP*, 2011 ONSC 4122 at para. 33.

93. BZAM seeks security to be posted in accordance with its draft Bill of Costs. It breaks down costs already incurred and costs estimated to be incurred going forward, and summarizes total fees and disbursements as follows: $635,712.96 (full indemnity scale), $574,986.81 (substantial indemnity scale), and $392,808.38 (partial indemnity scale).

94. Cortland has also filed a Bill of Costs. That reflects total fees, inclusive of disbursements and HST, in the amount of $243,595.34 (partial indemnity scale), $363,001.43 (substantial indemnity scale), and $402,723.53 (actual fees). As noted above, Cortland seeks security to be posted in the partial indemnity amount.

95. Final Bell has filed its own Costs Outline in respect of its claim to support its submission that the quantum sought by each of BZAM and Cortland is excessive. The Costs Outline of Final Bell reflects costs incurred to date, and it projects costs going forward, all-inclusive of fees, disbursements and HST, as follows: $293,230.27 (partial indemnity scale), $430,601.55 (substantial indemnity scale), and $476,391.97 (actual amounts).

96. In my view, and having considered all of the relevant factors, including the work undertaken to date in respect of the Final Bell claim and the projected work to be undertaken through to and including the completion of the summary trial, an appropriate order is one that requires Final Bell to post security for costs in favour of BZAM in the amount of $350,000 and in favour of Cortland in the amount of $147,000, for a total of $497,000. All amounts are inclusive of fees, disbursements and HST.

97. I observe that this aggregate amount is, in my view, well within the range that Final Bell could expect to pay if unsuccessful in its claim. I pause to observe that the Purchase Price in the Share Exchange Agreement included Consideration Shares (as defined in the Agreement) with a value of $13,500,000 (90 million Purchaser Shares at a deemed price per Purchaser Share of $0.15). Moreover, the proportion of the amount I

have ordered to be posted in favour of Cortland relative to BZAM is equal to the proportion of partial indemnity costs claimed by those parties relative to one another.

Result and Disposition

98. The motion of each of BZAM and Cortland is granted. Final Bell is ordered to post security for costs in the following amounts:

a. in respect of the costs of BZAM: $350,000; and

b. in respect of the costs of Cortland: $147,000.

99. Given the expedited timetable pursuant to which the Final Bell claim is being tried, that security is to be posted within 15 days, failing which the parties may seek a case conference before me to determine next steps, including whether the Final Bell claim should be dismissed.

100. BZAM and Cortland seek their costs of this motion, if successful. So too does Final Bell. Having been successful, BZAM and Cortland are presumptively entitled to their costs.

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

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

103. The overarching objective is to fix an amount that is fair, reasonable, proportionate and within the reasonable expectations of the parties in the circumstances: *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579 (Ont. C.A.).

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

105. BZAM has filed a Costs Outline pursuant to which it seeks costs on a partial indemnity scale inclusive of disbursements in the amount of $30,747.87. (The Costs Outline also reflects substantial indemnity costs of over $46,000 and actual costs in excess of $51,000).

106. All parties filed extensive motion records, facta, authorities, briefs and aides memoire. In my view, and having considered all of the Rule 57 factors in the circumstances of this motion, Final Bell should pay to BZAM its costs in the amount of $20,000 and Cortland its costs in the amount of $8500. Those costs are inclusive of fees, disbursements and HST. They are payable by Final Bell to BZAM and Cortland respectively, at the same time as the security is to be posted: within 15 days.

107. Order to go to give effect to these reasons.

Osborne J.