IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1380882 B.C. Ltd. v. Aztec Properties Company Ltd.,* 2024 BCSC 1001

Date: 20240610
Docket: S243007
Registry: Vancouver

Between:

1380882 B.C. Ltd.

Plaintiff

And

Aztec Properties Company Ltd.

Defendant

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff:	W.V. Barta S. MacNamara, Articled Student
Counsel for the Defendant:	A. Bayley
Place and Date of Hearing:	Vancouver, B.C. May 31, 2024
Place and Date of Judgment:	Vancouver, B.C. June 10, 2024

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Introduction

[1] On this application, the defendant Aztec Properties Company Ltd. ("Aztec") seeks to set aside an *ex parte* injunction order granted by Justice Walker on May 8, 2024, in favour of the plaintiff, 1380882 B.C. Ltd. ("138").

[2] At issue is whether 138 made full and fair disclosure to this Court when it sought, and was granted, the *ex parte* order, and, if not, whether this Court ought to exercise its discretion to grant new injunctive relief.

Background

[3] The underlying action relates to the lease of premises for a pub and restaurant that operates under the name "Bimini's Pub" on West 4th Avenue in Vancouver. 138 is the tenant under the lease. Aztec is the landlord.

[4] 138 became a party to the lease by way of assignment from the previous tenant near the end of January 2023. At that time, there were approximately nine months left in the lease term with an option to renew for a further five years starting November 1, 2023.

[5] Schedule H to the Lease provides that "the Landlord will … at the Tenant's written request delivered to the Landlord provided in this Lease not earlier than twelve (12) months and not later than six (6) months prior to the expiration of the Original Term, grant to the Tenant a renewal lease… "

[6] Further, section 18 of the Lease provides:

> Any notice, demand, request, consent or objection required or contemplated to be given or made by any provision of the Lease will be given or made in writing …

[7] It is common ground that 138 did not give a written notice of renewal. 138 claims that it verbally informed Aztec of its intention to renew the lease and that Aztec accepted the renewal.

[8] On or around October 18, 2023, Aztec informed 138 that the lease had not been properly renewed. Following correspondence between them, the parties entered into a settlement agreement executed on November 22, 2023 which extended the tenancy to February 29, 2024 and a further agreement dated February 22, 2024, which further extended the tenancy to April 30, 2024.

[9] The parties were not able to agree on further lease terms after that, and Aztec retook possession of the premises on May 1, 2024.

[10] At the *ex parte* hearing on May 8, 2024, this Court granted the *ex parte* order containing the following terms, among others:

> The Defendant will allow the Plaintiff use of the Premises at 2010 West 4th Ave … in the manner described in the Lease … for a period of … 6 months from the date of this Order or when judgment in this matter is pronounced.
>
> …
>
> During the Injunction Term, the Defendant is restrained from interfering, disturbing or disrupting, or attempting to interfere, disturb or disrupt, the business and proper functioning of business operated by the Plaintiff at the Premises …

Issues

[11] The following issues will be addressed in order below:

a) Should the *ex parte* order be set aside on the basis of non-disclosure and, if so, should this Court still consider granting a new injunction?

b) If so, should a new injunction be granted?

Should this Court set aside the *Ex Parte* Order based on non-disclosure and, if so, should it consider granting a new injunction?

[12] In *Canadian Western Bank v. John Doe*, 2024 BCSC 555, I held as follows at para. 11:

> It is trite law that on an *ex parte* application, the applicant must make full and frank disclosure of all material facts. An *ex parte* applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defences may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The

> duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made: *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 37–38.

[13] A material fact is one that may affect the outcome of the application: *Pierce v. Jivraj*, 2013 BCSC 1850, at paras. 37–38.

[14] Where an *ex parte* applicant fails to provide full and frank disclosure, a court may set aside the order. However, even where there has been a material non-disclosure, the court retains the discretion to consider whether the injunction should stand in light of additional evidence on the set-aside application: *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115.

[15] In the case at bar, Aztec alleges non-disclosure regarding a variety of issues. The most important of these allegations relates to the fact that 138, on the *ex parte* hearing, put before the court an incorrect version of the assignment document which effected the assignment of the lease from the previous tenant to 138.

[16] The document in question is entitled “Assignment, Assumption and Modification of Lease with Landlord’s Consent” and is said to be “made as of January 31, 2023”. The version put before the Court by 138 contains the following recital:

> H. Pursuant to the 2016 Renewal, the Tenant has exercised the First Renewal Term … with the result that, if the right to renew for the Second Renewal Term is validly exercised, the Second Renewal Term will commence on November 1, 2028 and expire on October 1, 2033; a five-year term to the lease will commence on November 1, 2023 and will expire on October 2028.
>
> [Emphasis added.]

[17] It appears clear that the references in this recital to 2028 and 2033 are typographical errors but the more important words for the purpose of this hearing are the underlined ones. At the *ex parte* hearing, 138 relied on this version of recital H, stating at paragraphs 7 and 8 of its Notice of Application, in the Legal Basis:

> [7] The portion of Recital H that follows the final semicolon is a standalone statement which confirms that the Lease had been renewed for a term set to run from November 1, 2023 until October 31, 2028.

> [8] Accordingly, the Assignment Agreement confirms that the Lease was renewed until October 2028, and that no further action was required by the Tenant to effect renewal.

[18] Aztec has produced a version of the assignment agreement which, in Recital H, does not contain the erroneous references to November 1, 2028 and October 1, 2033 and does not contain the words following the semicolon.

[19] 138 concedes now, although I understand it did not concede at the *ex parte* hearing, that the version produced by Aztec is the correct version.

[20] Aztec alleges that the incorrect version was “forged or falsified”. It points out that the signature pages of the two documents, including many of the signatures, are identical in many respects. The electronic signature of Peter Uram, who signed the document on behalf of Aztec, is on the correct version. The incorrect version contains a handwritten signature which purports to be his. The incorrect version of the signature page is shrunken in comparison to the rest of the document as if it was photocopied on a reduced setting.

[21] Aztec submits that there is no plausible explanation as to how the shrunken signature page was attached to an incorrect version of the assignment agreement other than by intentional fraud. It alleges that the PDF version of the document must have been modified to include the incorrect version of Recital H before it was electronically signed by Mr. Uram, and that a fabricated signature page containing Mr. Uram’s handwritten signature was attached.

[22] Much time during submissions was spent on whether this document was fabricated. The evidence regarding the document is somewhat troubling but, in my view, the evidence is not sufficiently clear on this interlocutory application for this Court to make the serious finding which Aztec asks it to make – that 138 sought to defraud the Court. 138 insists that it received the incorrect document because it needed a version of the document to show third parties. Although it concedes now that the document upon which it relied was the incorrect version, it denies creating or falsifying it.

[23] In respect of the issue of non-disclosure generally, it is important to note that the parties did not put before the Court a transcript of the proceedings on May 8, 2024 before Justice Walker, or a transcript of Justice Walker's oral reasons. As a result, it is not possible on this hearing to determine exactly what was said to Justice Walker, what was shown to him, or why he granted the *ex parte* injunction.

[24] Further, I understand that counsel for Aztec, having been given notice the evening before, appeared at the May 8 hearing. Although I am advised that Justice Walker decided to treat the application as *ex parte*, in light of the last-minute notice given to Aztec, I am also advised that counsel for Aztec made some submissions.

[25] I have had regard to the Notice of Application on the *ex parte* hearing and the evidence put before the Court on that hearing but it is not clear to me which particular arguments and aspects of the evidence were brought to Justice Walker's attention and which were not. Further, without a transcript of the proceedings or Justice Walker's reasons, it is impossible for me to determine to what extent Aztec's submissions mitigated any non-disclosure.

[26] In these circumstances, I am satisfied that there was material non-disclosure in that the incorrect version of the assignment agreement was placed before Justice Walker. As a result, the *ex parte* injunction shall be set aside. However, I am not able to find that this non-disclosure (or others alleged by Aztec on this application) were intentional or deliberate, or to what extent the non-disclosure was mitigated by Aztec's submissions.

[27] I have concluded that is appropriate to exercise this Court's discretion to consider the merits of the application anew, and to assess *de novo* whether the test for an injunction is met. In doing so, the court can take non-disclosure on the *ex parte* hearing into account: *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 at para. 18.

Should a new injunction be granted?

Applicable test

[28] As is well known, on an application for an injunction, the Court must first consider the merits of the applicant's case. If the applicable merits threshold is met, the Court will go on to consider the issues of irreparable harm and balance of convenience. In this case, there is a dispute between the parties regarding the applicable threshold to be applied at the first stage of the three-part test.

[29] 138 argues that the injunction is an ordinary prohibitive injunction and that in order to pass the first stage of the test it must only establish that there is a serious question to be tried. Aztec, however, argues that 138 seeks a mandatory injunction and submits that the applicant must establish a strong *prima facie* case.

[30] The serious question test was applied in *Wu v. Li*, 2019 BCSC 1215 at para. 18 and *Coast Hotels Limited v. Northwest Hotels Inc*. 2002 BCSC 1707 at para. 8. In both of those cases, a commercial tenant was seeking to prevent its eviction while still occupying the premises.

[31] By contrast, in *Ivy Lounge West Georgia Limited Partnership v. TA F&B Limited Partnership*, 2021 BCSC 997 [*Ivy Lounge*] at para. 29, the plaintiff had been evicted from the premises before the injunction application was advanced. In that context, this Court held:

> … where, as here, the injunction being sought is a mandatory injunction (because it seeks to require that the defendant take a positive step), the applicant must show that it has a strong *prima facie* case

[32] Regarding the different tests applicable to mandatory and prohibitive injunctions, the Supreme Court of Canada held as follows in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*]:

> [15] ... on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR - MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a

> positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel …
>
> [16] ... While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR - MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". ... Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.
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> [Emphasis added.]

[33] Further, in *Canivate Growing Systems Ltd. v. Brazier*, 2019 BCSC 899 at para. 48, this Court held:

> [48] Determining whether the first stage of the analysis of an injunction application requires a serious issue to be tried or a strong *prima facie* case is determined by the practical effect of the order sought. In circumstances where the effect would be to "grant relief tantamount to a final judgment on the merits", as in *CBC*, the applicant is required to demonstrate a strong *prima facie* case.

[34] In my view, in light of these decisions, there is no absolute rule that the strong *prima facie* test must be applied to injunction applications in commercial tenancy disputes in which the tenant has already been evicted by the time the injunction is brought. Rather, as stated in *CBC*, the Court must identify the substance of what is being sought and consider the particular circumstances of the matter.

[35] In the case at bar, a new injunction would not require the defendant to take steps to restore the status quo which are “costly and burdensome”. I note that the *ex parte* order made by Justice Walker has already permitted 138 to resume possession of the premises.

[36] Further, an injunction would not grant relief tantamount to final judgment on the merits. Indeed, an injunction would permit 138 to remain in the premises only

until the final determination of the action, and Aztec has advised the Court that it intends to advance a summary trial application to resolve the proceeding in August of this year.

[37] For these reasons, it is my view that the lower threshold ought to apply and 138 must establish only a serious question to be tried in order to satisfy the first part of the three-part injunction test.

Serious question to be tried

[38] There are two aspects to the case being advanced by 138. In order to be successful at the trial of this action, it must first persuade the Court that it properly renewed the lease. Second, assuming that it has met that burden, it must also persuade the Court to set aside the settlement agreements. I will address these two aspects in turn.

[39] I note that 138 has alleged that Mr. Uram has been motivated in his treatment of Aztec by "blatant prejudice" and a "repulsive agenda designed to restrict [138's business] from targeting members of the queer community". However, the evidence on this application does not establish these serious allegations and, in any event, proof of a nefarious motivation on the part of Aztec would not change the legal outcome if the lease was not properly renewed in accordance with the lease or the settlement agreements are not set aside.

Renewal

[40] As indicated above, Schedule H to the Lease provides that "the Landlord will … at the Tenant's written request delivered to the Landlord as provided in this Lease … grant to the Tenant a renewal lease…" Further, section 18 of the Lease provides:

> Any notice, demand, request, consent or objection required or contemplated to be given or made by any provision of the Lease will be given or made in writing …

[41] As discussed, 138 concedes that there was no written renewal. Rather it argues that it verbally renewed the lease and that Aztec accepted the renewal. 138's

owner Sweety Lamba deposes that “I had a number of conversations with representatives of the Landlord wherein I made it clear that the Tenant would be renewing the Lease. Some of those conversations occurred within the six months prior to October 31, 2023.”

[42] 138 argues that it is inconceivable that it would have spent $250,000 on leasehold improvements, as it claims to have done, if it did not intend to renew the lease, and that Aztec “must have known” that 138 wanted to renew the lease. However, these arguments are legally irrelevant if 138 was not entitled to give the renewal notice verbally.

[43] Regarding whether it is entitled to give notice other than in writing, 138 relies on the decision of the Ontario Court of Appeal in *Ross v. T. Eaton Co*. (1992), 11 O.R. (3d) 115 for the following proposition:

> … if an offeree wishes to depart from the method of acceptance prescribed by the offeror (which is not insisted on as the sole method of acceptance), he or she can only do so effectively if the communication is by a method which is not less advantageous to the offeror and the acceptance is actually communicated to the offeror. I would not think that actual communication alone would be sufficient if the method used was not "not less advantageous to the offeror" …

[44] *Ross* was cited in *Birdi v. Luch*, 2016 BCSC 1361 at para. 62 wherein this Court held:

> [62] Where the offeror has prescribed the method of acceptance, the applicable legal principle, as stated by the Ontario Court of Appeal in *Ross v. T. Eaton Company* (1992), 11 O.R. (3d) 115 and adopted by this court in *C.G. Coyle & Associates Inc. v. Hastings Sunrise Development Ltd*., 2008 BCSC 527 at para. 25 and *Excel Autobody Ltd. v. Tsang & Sons Holdings Ltd*., 2015 BCSC 553 at para. 40 is summarized as follows:
>
> > If the offeror uses terms insisting that only acceptance in a particular mode is binding, it is mandatory. If he or she does not insist... it is directory, [so long as a mode no less advantageous to the offeror is adopted].

[45] In my view, *Ross* and *Birdi* make it clear that there are three criteria which must be fulfilled before a non-prescribed method of communication will be valid: the method prescribed by the offeror must not be insisted on as the sole mode of

acceptance; actual notice must have been communicated; and the notice must not be less advantageous than the prescribed method.

[46] In this case, it appears that there are serious questions to be tried regarding whether actual notice has been communicated and whether verbal notice is less advantageous. However, in my view, 138's position on the first of these criteria is problematic.

[47] 138 submits that in *Ross*, the applicable clause used the imperative "shall" and is therefore indistinguishable from this case in which the clause uses the word "will". However, this submission does not withstand a closer examination of the clause in *Ross*. In that case, the clause stated:

> Any notice, request or demand herein provided for or given hereunder if given by the Lessee to the Lessor shall be sufficiently given if mailed by registered mail…"
>
> [Emphasis added.]

[48] It appears clear in my view that the clauses are different in kind. The clause in *Ross* states that notice *shall be sufficiently given if mailed*. Therefore, notice by mail is sufficient, but not necessary, and the clause is permissible, but not mandatory. By comparison, as stated above, the clause in this case states that any notice required or contemplated to be given or made by any provision of the Lease *will* be given or made in writing.

[49] Even assuming it can persuade the Court that actual notice was given and that the actual notice was not less advantageous to Aztec, 138 cannot succeed if the lease required it to give notice in writing. At least on the materials before this Court, it is difficult to see how the lease can be read other than to insist only on written notice.

Settlement Agreement

[50] As indicated above, a settlement agreement was made between the parties dated November 22, 2024. Under that agreement, the landlord returned possession

of the premises to the tenant on a month to month basis. The agreement stated that the month to month tenancy would expire on February 29, unless otherwise agreed.

[51] On or about February 22, 2024, the parties reached a further agreement extending the date for delivery of vacant possession to April 30 “to provide more time for lease discussions and to ensure the Premises are operated in compliance with this terms [*sic*]”. The February agreement imposed various requirements on the tenant regarding the tenant’s use of the premises, hours of operation, and required video surveillance of all public areas of the premises other than washrooms.

[52] As indicated above, if these agreements are binding, it does not matter whether 138 validly renewed the lease, as it agreed under the settlement agreements to vacate the premises by April 30, 2024.

[53] In response to Aztec’s reliance on these settlement agreements, 138 pleads mistake and duress, arguing that both or either of these principles ought to relieve it from its obligations under the agreements.

[54] In relation to mistake, 138 alleges that it was misled into believing that it failed to properly renew the lease. I observe that if it indeed did fail to properly renew the lease, there was no mistake.

[55] As to duress, the applicable law was stated recently by this Court in *Gorup-Paule v. Palmatier*, 2024 BCSC 353 at para. 144:

> [144] Duress, including "economic duress", is a coercion of the will that vitiates consent: *Pao On v. Lau Yiu*, [1979] All E.R. 65 (P.C) at p. 78, adopted in *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 (B.C.C.A.) and by both Justice D. Smith in dissent and Justice K. Smith for the majority in *Bell v. Levy*, 2011 BCCA 417 at paras. 51 and 71. Commercial pressure is not enough. Rather, the pressure (a) must be such as to amount to compulsion and (b) must be illegitimate: *Universe Tankships of Monrovia v. International Transport Workers' Federation*, [1982] 2 All E.R. 67 (H.L) at p. 88.
>
> [Emphasis added.]

[56] It appears that the legitimacy of the compulsion in this case will depend at least in part on whether the lease was validly renewed. If it was not validly renewed,

it is difficult to see how the pressure placed on the tenant to sign the settlement agreements constituted illegitimate compulsion rather than commercial pressure.

Conclusions on serious question issue

[57] On its face, 138's position has serious difficulties. It appears that the lease required a renewal to be in writing. If the lease was not validly renewed, it appears to be unlikely that 138 will be able to establish either mistake or duress. As discussed above, in order to succeed at trial, 138 must establish that the lease was validly renewed *and* that the settlement agreements ought to be set aside.

[58] That said, the serious question threshold is a low one, essentially requiring the Court to be satisfied only that the action is not frivolous or vexatious: *Wu* at para. 22; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 49-50. Despite the difficulties in 138's case, I am not able to conclude that it is frivolous or vexatious. Accordingly, I will now turn to the issues of irreparable harm and balance of convenience.

Irreparable harm

[59] 138 cites authority for the general proposition that interference with an ongoing business is, in itself, irreparable harm. However, in my view, that general proposition is too broad. In *Ivy Lounge*, Justice G.C. Weatherill held at paras. 36 and 37:

> [36] Irreparable harm is harm that either cannot be quantified in monetary terms or that cannot be cured: *RJR-MacDonald*, at 341; *Airside Event Spaces Inc. v. The Township of Langley*, 2021 BCCA 90 at para. 20.Permanent market loss or irrevocable damage to business reputation has been recognized as constituting irreparable harm, as has interference with property rights or a business: *Canadian Pacific Railway Limited v. Doe*, 2020 BCSC 388 at para. 55; *Onkea Interactive Ltd. v. Smith*, 2006 BCCA 521 at para. 18. However, loss of goodwill, sales and revenues, and rights under a lease are quantifiable and compensable: *472448 B.C. Ltd. v. 343554 B.C. Ltd*., 2006 BCSC 1075 at para. 22.
>
> [37] Here, the plaintiff does not contend that its damages will be impossible to quantify. Rather, it has focused on the fact that it has invested significant capital in the business and that it will run out of money soon if it is unable to re-occupy the Licenced Area. It has proffered no evidence that its future losses are unquantifiable. There is no evidence of what the plaintiff's finances

> are or why it cannot reopen elsewhere. There is no evidence that the Licenced Area is unique and cannot be replaced. The mere loss of a business location or goodwill does not equate to irreparable harm. Whether this is so depends on the circumstances of each case: *Landmark Solutions Ltd. v. 1082532 B.C. Ltd*., 2021 BCCA 29 at paras. 63-65.
>
> [Emphasis added.]

[60] In my view, these words are apposite to the facts of this case.

[61] 138 has cited numerous ways in which it says that it will suffer harm if an injunction is not granted permitting it to operate its business on the premises until the end of the lease renewal period. However, in my view, the harms described by 138 are mostly financial in nature.

[62] Ms. Lamba deposes that 138 invested in approximately $250,000 in leasehold improvements at the outset of the lease and has only been able to operate the business to try to recover those costs since February 2023. She asserts that the plaintiff has invested heavily in marketing its business. She complains that if the business is forced to close, employees will find other employment and that it will be "difficult and expensive" to replace them. She asserts that the business earns a disproportionately large amount of its annual revenue during the summer months, and that by being forced to close, the business "is currently losing in excess of $100,000 of damages per month".

[63] Mr. Uram deposes that the "Bimini's" name belongs to the defendant, so to the extent that the goodwill of the restaurant's name may be diminished, damage will be suffered by 138.

[64] If the plaintiff is ultimately successful in persuading a court that it validly renewed the lease and the settlement agreements ought to be set aside, the primary basis for a damages award will be 138's lost profits over the balance of the five-year renewal period which would have commenced in 2023 had the lease been validly renewed. Further, if 138 can prove any other types of harm, including some or all of those described above, it can be awarded further damages accordingly. In my view, damages would adequately compensate 138 for its losses.

[65] Importantly, Aztec has adduced evidence that it has considerable assets, including the subject premises and the adjoining property upon which an affiliated liquor store operates. Mr. Uram deposes that Aztec owns the two properties outright, and that their assessed values exceed $11 million. It appears clear that Aztec would be able to pay an award of damages if 138 is successful at trial.

[66] On the basis that damages would be an adequate remedy, I am not prepared to grant a new injunction in favour of 138.

Balance of convenience

[67] Given my conclusion regarding irreparable harm, it is not necessary to consider the balance of convenience. However, if I must assess the balance, I would find that it favours Aztec on the basis of 138's failure to make full and frank disclosure at the *ex parte* hearing, and the weakness of 138's position. It is clear that a factor to be considered at the balance of convenience stage is the strength of the applicant's case: *Kremler v. Simon Fraser University*, 2023 BCSC 805 at para. 56.

[68] Further, there is some evidence that during the spring of 2023, when the settlement agreements are in effect, 138 ran ticketed events which arguably violated Aztec's liquor license as well as the lease, which required the premises only to be operated as a neighbourhood event. This evidence suggests that additional irreparable harm could be suffered by Aztec if the lease is continued until trial.

[69] On the other side of the balance, I have found that the harm which will be suffered by 138 if an injunction is not granted and 138 succeeds at trial can be adequately compensated in damages.

Conclusion and Costs

[70] I have concluded that an injunction is not warranted in the circumstances of this case. Aztec's application to set aside the *ex parte* injunction is allowed, and 138's application for further injunctive relief is refused.

[71] Aztec has sought an award of special costs, which might be awarded on an interlocutory injunction application if the degree and extent of the non-disclosure on the *ex parte* application were intentional or sufficiently severe or egregious, or if the application were so utterly lacking in merit, as to deserve reproof or rebuke. However, I cannot find that these criteria are met on the evidence on this application.

[72] Aztec's costs of this application and of Aztec's attendance at the *ex parte* application shall be paid by 138 at scale B.

"The Honourable Justice Loo"