IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chase Business Development Corp. v. Fiore Cannabis Ltd.,* 2024 BCSC 1306

Date: 20240722
Docket: S231576
Registry: Vancouver

Between:

Chase Business Development Corp.

Plaintiff

And

Fiore Cannabis Ltd., Full Spectrum Medicinal Inc., 1313721 B.C. Ltd., Springcreek Capital Corp., Peter Lacey and Carl Rosenau

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for Plaintiff:	S. J. Evans
Counsel for Defendant, Springcreek Capital Corp.:	L. A. Buitendyk
Counsel for Defendants, Peter Lacey and Carl Rosenau:	S. J. D. Smith
Place and Date of Trial/Hearing:	Vancouver, B.C. July 4, 2024
Place and Date of Judgment:	Vancouver, B.C. July 22, 2024

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Introduction

[1] The defendants Springcreek Capital Corp. ("Springcreek"), Peter Lacey and Carl Rosenau (collectively, the "Defendants") apply for security for costs against the plaintiff, Chase Business Development Corp. ("Chase"). Springcreek seeks an order in the amount of $50,000, while Mr. Lacey and Mr. Rosenau seek an order in the amount of $100,000.

[2] The underlying action relates to a joint venture agreement (the "Agreement") entered in 2019 between Chase, Full Spectrum Medicinal Inc. ("FSM") and Fiore Cannabis Ltd. ("Fiore") to develop cannabis production facilities on lands owned by FSM in Celista, British Columbia. The production facilities needed to be constructed. FSM was later sold in 2021 to 1313721 B.C. Ltd. ("131"). Mr. Lacey and Mr. Rosenau are the directors of 131.

[3] Chase contributed approximately $2.5 million towards the project. Pursuant to the Agreement, Chase was entitled to share in profits, and the return of its contribution plus interest was guaranteed by FSM and Fiore. Chase was entitled to register a mortgage on the Celista property as security for its contribution. In its notice of civil claim ("NOCC"), Chase alleges that it delayed in registering its mortgage at the request of FSM and Fiore.

[4] In the meantime, the project ran into financial difficulties. In June 2021, FSM granted a mortgage to Springcreek against the Celista property, securing a financing and loan agreement of a principal amount of $6 million. The proceeds from the Springcreek mortgage were used to pay out prior mortgages of approximately $2.4 million. The remainder of the loan, which had not all been advanced, was to be used as additional capital to enable FSM to complete the development of the cannabis production facility.

[5] Chase alleges FSM and Fiore breached the Agreement by registering the Springcreek mortgage against the Celista property without Chase's consent, as required by the Agreement. Due to the registration of the Springcreek mortgage,

Chase is now lower in priority and the equity in the Celista property will likely not be sufficient to pay out Springcreek and Chase.

[6] In August 2021, Chase started an action seeking to enjoin FSM and 131 from drawing on the Springcreek mortgage. Chase obtained an *ex parte* injunction freezing all dealings with the Celista property and preventing any further advances under the Springcreek mortgage. On September 17, 2021, the injunction was set aside by the Court in *Chase Business Development Corp. v. Fiore Cannabis Ltd*., 2021 BCSC 2710. The Court found Chase failed to provide full and frank disclosure and that an undertaking as to damages was insufficient as Chase had not shown it had any assets. The Court also found that FSM and Fiore breached the Agreement by registering the Springcreek mortgage against the Celista property without Chase's consent. This action has since been discontinued.

[7] On December 22, 2022, FSM and 131 defaulted on their obligations under the Springcreek mortgage. Springcreek issued demands for repayment of the loan.

[8] In January 2023, Springcreek initiated foreclosure proceedings against the Celista property. Springcreek has been granted conduct of sale. The Celista property has not yet been sold. It is listed for $2.3 million.

[9] Fiore, FSM and 131 have filed an assignment in bankruptcy and all legal proceedings have been stayed against them.

[10] Chase has not been repaid for its contribution or any interest from FSM and Fiore. In March 2023, Chase filed this action, alleging the Springcreek mortgage was a fraudulent conveyance or a fraudulent preference and that Springcreek induced a breach of the Agreement.

[11] This action has been stayed until the application of the Defendants for security for costs has been determined.

Legal Framework

[12] The court may order a corporate plaintiff to post security for costs pursuant to s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 236 If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[13] The purpose of security for costs has been described as "to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff" and that the "plaintiff is not to be permitted a free ride on an unlikely claim at the defendant's expense": *Island Research & Development Corp. v. The Boeing Co.*, [1991] B.C.J. No. 12 at 3, 1991 CanLII 598 (S.C.).

[14] The test to be followed is in four parts, as set out in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 36 C.P.C. (4th) 266 at paras. 14–23, 1999 CanLII 5860 (B.C.S.C.):

> 1. First, the defendant must establish a *prima facie* case that the plaintiff company will be unable to pay the defendant's costs if the action fails.
>
> 2. If the defendant does so, the onus shifts to the plaintiff to demonstrate:
>
> (a) It has exigible assets of sufficient value;
>
> (b) The defendants do not have an arguable defence; or
>
> (c) The plaintiff would suffer undue hardship if an award for security for costs was made such as stifling the action.

[15] The principles guiding an application for security for costs are summarized in *Kropp v. Swaneset Bay Golf Course Ltd*., 29 B.C.L.R. (3d) 252 at para. 17, 1997 CanLII 4037:

> 1.The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
>
> 2.The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
>
> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
>
> 4.The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
>
> 5.The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
>
> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
>
> 7. The lateness of the application for security is a circumstance which can properly be taken into account.

[16] As I understand it, once the defendants have shown a *prima facie* case that the plaintiff will be unable to pay an award of costs, the plaintiff has to show that it does have exigible assets, the defendants have no arguable case or that an order for costs will prevent the action from being heard. In exercising its discretion, the Court must balance the injustices which may flow from the use by a defendant of a security of costs order to stifle a legitimate claim and the use of impecuniosity by a plaintiff to put undue pressure on a defendant to settle claims with meritorious defences.

Prima Facie **Case that the Plaintiff will be Unable to Pay the Defendants' Costs**

[17] Chase is not the registered owner of any real property in British Columbia. A search of the BC Personal Property Registry shows no party has a secured interest in any personal property owned by Chase. In June 2023, the date Springcreek filed its application seeking security for costs, Chase had not filed its annual report with the BC Corporate Registry since November 2020. Chase has since filed an annual report.

[18] On August 1, 2023, a related company to Chase, 1196788 BC Ltd. ("119") was also not in good standing due to a failure to file annual reports. After Mr. Lacey and

Mr. Rosenau filed their application for security for costs, 119 has since filed an annual report and is no longer listed as not being in good standing.

[19] There is no evidence that Chase conducts any ongoing business. Chase has no website or any online presence. There is no evidence that Chase is an active company currently generating revenue.

[20] The Defendants have shown a *prima facie* case that Chase will be unable to pay an award of costs.

Does Chase have any Exigible Assets?

[21] While Chase is not the registered owner of any real property, Chase argues it has beneficial ownership of a parcel of land in Squilax, B.C. Tai Yuan Lo, one of the directors of Chase, deposed in an affidavit on July 6, 2023, that Chase is the beneficial owner of undeveloped lands at 8767 Holding Road, Squilax (the "Squilax Property"). The Squilax Property is legally owned by 119 for and on behalf of Chase, as set out in a declaration of bare trust and agency agreement dated March 13, 2019 (the "Bare Trust Agreement"). Both Mr. Lo and Kevin Hu are directors of Chase and directors of 119. Mr. Lo deposed the Squilax Property is assessed at approximately $1.086 million with no financial encumbrances. The Squilax Property has been listed for sale since June 2022.

[22] However, a search conducted in November 2023 revealed there was a mortgage registered against the Squilax Property. In his second affidavit dated December 8, 2023, Mr. Lo deposed that the mortgage related to a loan agreement for $145,000 loaned to Chase from two investors in February and March 2023. The loan was to provide Chase with funds for its legal fees. The loan agreement was executed on July 7, 2023, but backdated to June 20, 2023. The mortgage was registered against the Squilax Property on August 16, 2023. Mr. Lo deposed that the mortgage is the only financial encumbrance on the Squilax Property, and that Chase retains more than sufficient equity in the Squilax Property to pay any potential costs awards.

[23] Chase argues beneficial ownership of the Squilax Property is akin to legal ownership in these circumstances. Chase argues if the Defendants are successful after trial, the Defendants would be entitled to register any costs order against title to the Squilax Property pursuant to s. 86(9) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 [*COEA*]:

> 86(9) If a judgment creditor has knowledge that the judgment debtor is the beneficial owner of an estate or interest in land, the title to which he or she has not registered, the judgment creditor may, on proof satisfactory to the registrar, apply, in the same manner as an application is made to register any other judgment, to register the judgment against the beneficial estate or interest in the land affected.

[24] Chase argues the existence of the Squilax Property shows it does have exigible assets in sufficient amount, and the Defendants' applications for security for costs ought to be dismissed.

[25] The Defendants' position is the plaintiff has not met the onus of showing it has exigible assets of sufficient value to satisfy a costs award. The plaintiff has not tendered evidence of its financial position. The Squilax Property is the only asset it has put forward, and the Defendants argue in these circumstances, the Squilax Property is not sufficient. The Defendants argue the circumstances of the mortgage registered against the Squilax Property are unexplained, and that Mr. Lo did not provide full disclosure of the mortgage in his first affidavit. Giving the most favourable interpretation to Mr. Lo, while technically the Squilax Property may have been unencumbered when he swore his first affidavit, the Defendants argue Mr. Lo knew then that the loan had already been advanced and would be registered against the Squilax Property. The loan agreement has not been produced by Chase. Additional charges may be registered against title to the Squilax Property prior to trial. As Chase has not provided any financial disclosure, the Defendants argue the Court cannot assess whether Chase may have other creditors who may similarly register charges against the Squilax Property, in priority to the Defendants.

[26] In these circumstances, in my view, the plaintiff has not met the onus of showing it has exigible assets. Neither party was able to locate any cases considering

if beneficial ownership of real property is sufficient to defeat an application for security for costs. In these circumstances, I do not find Chase's beneficial ownership of the Squilax Property to be sufficient. While Chase argues the Defendants can pursue enforcement through the *COEA*, I note that to register the judgment against the land requires "on proof satisfactory to the registrar". The "registrar" appears to refer to "a district registrar or deputy district registrar of the Supreme Court", as defined by s. 1 of the *COEA*. Chase has not led any evidence or made any submissions on what that proof may be. It is unclear if the Bare Trust Agreement would be satisfactory to the registrar such that the Defendants can enforce their judgment on the Squilax Property. Where a closely related company to the plaintiff owns real property that would be sufficient to pay costs, an order for security for costs against the plaintiff was still made, even where the closely related company is a party to the action as a third party defendant: *Vineyard Homes At The Rise Ltd. v. Jaks Clay Tile Co*., 2007 BCSC 516 at paras. 18–21.

[27] Further, I agree with the Defendants that there are unexplained circumstances of the mortgage registered against the Squilax Property. The timing of the loan agreement, the registration of the mortgage and Mr. Lo's first affidavit have not been adequately explained. Chase has not tendered any evidence of its financial status. I note it was incorporated in November 2018, shortly before the Agreement was signed. There was a corporate name change in April 2020. Chase does not have a lengthy business history. There is minimal evidence before the Court as to what business Chase conducts, other than Mr. Lo's statement that Chase is engaged in investing in and developing cannabis production facilities. There is no evidence of other investments, profits, losses or revenue. I find the plaintiff has not met the burden of proving that it has exigible assets sufficient to satisfy a costs award.

Do the Defendants have an Arguable Defence?

[28] The onus is on the plaintiff to show the Defendants do not have an arguable defence.

[29] As I understand it, the plaintiff does not disagree that the Defendants have an arguable defence. The Defendants' position is there was no fraudulent conveyance or fraudulent preference, as the Springcreek mortgage was to secure a *bona fide* commercial loan provided to FSM. The Defendants' position is they were not part of the Agreement between the plaintiff and FSM, and there is no evidence the Defendants were aware of the terms of the Agreement.

[30] I find the Defendants have an arguable defence.

Would an Order for Security for Costs Cause Undue Hardship to the Plaintiff?

[31] In my view, the plaintiff has not tendered any evidence to show it would be prevented from prosecuting its claim if an order for security for costs is made. Chase has not argued that it would not be able to fund this litigation if an order for security for costs is made. As Chase is the beneficial owner of the Squilax Property, Chase has the ability to secure some funds to continue this litigation, as it has already done through the loan agreement.

[32] Chase has not shown any undue hardship if it is ordered to pay security for costs.

The Quantum

[33] Springcreek has submitted a draft bill of costs that estimates costs for a 15-day trial to be approximately $54,500. Springcreek seeks an order that Chase post $50,000 as security for its costs. Springcreek argues due to the allegations of fraud, an award of special costs may be made after trial. Further, Springcreek argues this action may be found to be an abuse of process, as Chase is using this litigation to put pressure on Springcreek to settle. For these reasons, Springcreek argues Chase should post security to cover almost the entirety of Springcreek's estimated bill of costs.

[34] Mr. Lacey and Mr. Rosenau have submitted a draft bill of costs that estimates their costs at approximately $57,000. They seek an order that Chase post $100,000

as security for its costs. They argue the allegations of fraud made against them by Chase may bring a future special costs award against Chase, and justifies a higher amount.

[35] Chase argues the quantum sought is too high. Chase argues the early stage of an action weighs in favour of a discount against the amount claimed, as the action may be settled prior to the significant steps shown in the bill of costs: *Boardwalk Contracting Inc. v. Naples*, 2017 BCSC 1581 at para. 44; *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co*., 76 B.C.L.R. (2d) 231 at para. 34, 1993 CanLII 1669 (C.A.). Chase submits an appropriate amount is $20,000 for Springcreek and $25,000 for Mr. Lacey and Mr. Rosenau, secured against the Squilax Property.

[36] In these circumstances, I do not find persuasive the Defendants' submission that a possible special costs order after trial ought to increase the quantum. I agree with the plaintiff that merely pleading fraud does not open the plaintiff to a special costs order. It is simply too early to assess whether the plaintiff will be able to prove fraud. The plaintiff has some basis to assert it has been harmed, as the Springcreek mortgage was registered on the Celista property before Chase was able to register its interest. Chase claims in the NOCC that it postponed registering the Chase mortgage at the request of Fiore, so as not to detrimentally impact Fiore's share price. Discovery has not yet occurred. In my view, it would be speculation at this point to find that special costs may be awarded against Chase after trial.

[37] As to how much Chase ought to post as security for costs, I find it ought to be less than set out in the Defendants' draft bills of costs. This is very early in the litigation process. It is unclear if a resolution may be possible after exchange of documents or discovery. There is no indication that this trial would be especially complex or involve expert evidence. The parties may be able to agree to admissions which may narrow the scope of the issues and evidence. Doing the best with the limited information available, I find an appropriate quantum is $30,000 for Springcreek and $30,000 for Mr. Lacey and Mr. Rosenau. This sum of $60,000 shall be posted by Chase within 30

days of this order. Security may be posted by payment either into court or by payment to the Defendants' counsels in trust.

[38] Costs of this application will be in the cause.

"Chan J."