[71] The parties are encouraged to discuss and agree on costs. In the absence of agreement, they shall make brief (no more than three pages) written submissions together with cost outlines. Galleria shall submit its submissions within 15 days and Terracap ten days after receipt of Galleria's submissions.

Application dismissed; cross-application allowed in part.

Fuller et al. v. Aphria Inc. et al.

[Indexed as: Fuller v. Aphria Inc.]

2019 ONSC 3778

Superior Court of Justice, Pattillo J.
June 21, 2019

Contracts — Non-competition agreement — Applicant entering into non-competition agreement when he resigned as CEO of company that produced and sold medical marijuana products — Non-competition agreement prohibiting applicant from competing with company in North America "in any capacity whatsoever" — Non-competition agreement not being invalid for overbreadth — Applicant breaching non-competition agreement by leasing land to medical marijuana producer.

Remedies — Relief from forfeiture — Applicant resigning as CEO of company and entering into non-competition agreement and consulting agreement — Consulting agreement including term that gave applicant option to purchase common shares of company through company's stock option plan — Company not accepting applicant's purported exercise of option on ground that option had expired — Applicant applying for damages flowing from refusal and seeking relief from forfeiture in event that option had expired — Application dismissed — Option having expired — Applicant not entitled to relief from forfeiture as he had breached non-competition agreement.

When he resigned as CEO of the respondent A Inc., a company that produced and sold medical marijuana products, the applicant entered into a non-competition agreement and a consulting agreement. The non-competition agreement prohibited him from competing with A Inc. "in any capacity whatsoever" in North America for a fixed term. The consulting agreement contained a term that gave the applicant an option to purchase common shares of A Inc. through the company's stock option plan. A Inc. did not accept the applicant's purported exercise of the stock option on the basis that the option had expired. The applicant brought an application for damages flowing from the refusal. In the event that the option had expired, he sought relief from forfeiture.

Held, the application should be dismissed.

The stock option had expired. The applicant was not entitled to relief from forfeiture as he had breached the non-competition agreement. The non-competition agreement was not invalid on the basis that its geographic scope was overbroad,

given the limited term of the agreement and the facts that it was part of the sale of shares and that the medical marijuana business was in its infancy at the time of the agreement not only in Canada, to which it was contemplated that A Inc.'s business would be restricted, but also in North America. The applicant's knowledge and experience of Canadian licensing requirements would be valuable not only to Canadian companies wanting to get into the business, but to U.S. companies as well. The applicant breached the non-competition agreement by leasing land to a medical marijuana producer.

Cases referred to

Asamera Oil Corp. v. Sea Oil and General Corp., [1979] 1 S.C.R. 633, [1978] S.C.J. No. 106, 89 D.L.R. (3d) 1, 23 N.R. 181, [1978] 6 W.W.R. 301, 12 A.R. 271, 5 B.L.R. 225; *Invescor Restaurants Inc. v. 3574423 Canada Inc.*, [2012] O.J. No. 2569, 2012 ONCA 387, 292 O.A.C. 322, 100 B.L.R. (4th) 173; *Kechnie v. Sun Life Assurance Co. of Canada*, [2016] O.J. No. 3062, 2016 ONCA 434, 349 O.A.C. 391, 401 D.L.R. (4th) 620, 57 B.L.R. (5th) 304; *Kozel v. Personal Insurance Co.* (2014), 119 O.R. (3d) 55, [2014] O.J. No. 753, 2014 ONCA 130, [2014] I.L.R. ¶I-5636, 31 C.C.L.I. (5th) 171, 372 D.L.R. (4th) 265, 315 O.A.C. 378, 61 M.V.R. (6th) 1; *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336, 2010 ONCA 673, 268 O.A.C. 279, 74 B.L.R. (4th) 161; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, [1994] S.C.J. No. 59, 115 D.L.R. (4th) 478, 168 N.R. 381, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 155 A.R. 321, 23 C.C.L.I. (2d) 161, [1994] I.L.R. ¶1-3077; *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 59 B.C.L.R. (5th) 1, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1; *Scicluna v. Solstice Two Ltd.*, [2018] O.J. No. 978, 2018 ONCA 176, 14 C.P.C. (8th) 209, 57 C.B.R. (6th) 250, 421 D.L.R. (4th) 675, 82 B.L.R. (5th) 278; *Weyerhaeuser Co. v. Ontario (Attorney General)*, [2017] O.J. No. 6654, 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248 [as am.], 250
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 98 [as am.]

Rules and regulations referred to

Marihuana for Medical Purposes Regulations, SOR/2013-119 [rep.]
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05

Authorities referred to

Hall, Geoff R., *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis, 2016)

APPLICATION for order for damages.

Jason Squire and *Lindsay Woods*, for applicants.
Eric S. Block, *Jacqueline Cole* and *Patrick Healy*, for respondents.

PATTILLO J.: —

Introduction

[1] This is an application by Jon-Paul Fuller ("Fuller") and his personal company, JPF Komon Kaisha Inc. ("JPF Inc."), pursuant

to ss. 248 and 250 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*") seeking damages from the respondent Aphria Inc. ("Aphria") based on Aphria's refusal to permit JPF Inc.'s exercise of 200,000 stock options in accordance with a stock option agreement between the parties.

[2] For the reasons that follow, the application is dismissed. In my view, based on the terms of the agreements between the parties, JPF Inc.'s entitlement to exercise the options expired prior to the date upon which it sought to exercise them. Accordingly, Aphria was entitled to refuse to accept JPF Inc.'s exercise of the options. Further, I am also of the view, in the circumstances, that relief from forfeiture should not be granted.

Background

[3] Fuller has a bachelor's degree in business administration in international business and finance and a certification in Canadian securities and has experience in banking and financial and management consulting. Fuller is the sole owner and directing mind of JPF Inc.

[4] Aphria is a producer and seller of medical marijuana products. Aphria was founded through its predecessor, the respondent Pure Natures Wellness Inc. ("PNW").

[5] In 2012, Fuller, Cole Cacciavillani ("Cacciavillani") and John Carvini ("Carvini") agreed to pursue a medical marijuana business venture, which would later become PNW. In the early stages of PNW, while none of Fuller, Cacciavillani or Carvini drew salaries, their share interest in PNW was split 20/40/40 respectively.

[6] Fuller was appointed chief executive officer ("CEO") of PNW and was, among other things, in charge of obtaining licenses under the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 for PNW to produce, sell, process, ship, transport, deliver and destroy medical marijuana in Canada. During the licensing process, Fuller served in two roles required by Health Canada: the Senior Person in Charge ("SPIC") and the Alternative Responsible Person in Charge ("ARPIC").

[7] By the spring of 2014, PNW had received its licence to cultivate (and destroy), but not sell, medical marijuana. In addition, Cacciavillani and Carvini had invested $2 million into the company's facilities. Further, PNW was expecting to imminently receive its final licence to also distribute and sell medical marijuana. To commercialize its impending status as a licensed producer, PNW was working toward completing a private placement and implementing a reverse takeover to become a public company on the TSX Venture Exchange (the "RTO").

[8] At a meeting with investment banking professionals, Cacciavillani and Carvini were advised that they had a strong business case to become a public company but needed a CEO with more experience to be able to attract investment. As a result, Cacciavillani and Carvini spoke to Fuller and advised him that they no longer wanted him involved in the company.

[9] Extensive negotiations concerning the terms of Fuller's exit from PNW took place during May 2014, involving lawyers for both parties. The negotiations culminated in an agreement that Fuller would sell his shares in PNW to Cacciavillani and resign as CEO of the company.

[10] On June 2, 2014, Fuller executed the following documents (among others):

(a) A Share Purchase Agreement: Whereby Fuller sold his 50,000 common shares (*i.e.*, his 20 per cent stake in PNW) to Cacciavillani for $3,000,000.

(b) A Consulting Agreement: In which Fuller agreed, for a term of two years (*i.e.*, from June 2, 2014 to June 2, 2016), to provide consulting services to PNW through JPF Inc., which included assisting PNW in obtaining its final licence from Health Canada and, if requested, to assist in various tasks related to the disclosure and due diligence for the RTO. The Consulting Agreement provided that JPF Inc. would receive compensation of approximately $590,000 and 200,000 options to purchase common shares of PNW/Aphria (the "Options").

(c) A Non-Competition Agreement: Wherein Fuller agreed for a two-year term not to carry on, engage in, or have any financial or other interest — direct or indirect — in any competing commercial endeavour, activity or business.

[11] The terms of the Options were set out in Schedule 2.2 (consulting fees) to the Consulting Agreement as follows:

> 200,000 options (the "Options") to purchase common shares of the Client (the "Shares"), such Options to be priced at the lesser of $0.60 per Share or the purchase price per Share of the Private Placement, with an expiry date that is five years from the completion of the RTO, such Options to be issued immediately upon receipt of the Final License. The Options shall be subject to the terms and conditions of any option plan implemented by the Resulting Issuer.

[12] Fuller and PNW also signed an agreement entitled Stock Option Agreement which was hand dated June 2, 2014. The Stock Option Agreement notes in the first preamble that Fuller (the "Optionee") has been granted certain options to acquire common shares in the capital of Aphria under the Aphria Stock Option Plan. Paragraph five sets out the terms of the Options in

chart form and lists the expiry date as June 2, 2019. It states that the Options are subject to the terms and conditions of the Aphria Stock Option Plan. Paragraph 6 refers to an attached form of notice which "the Optionee may use to exercise any of his or her Options in accordance with section 2.3 of the Option Plan at any time and from time to time prior to the Expiry Date of such Options". The Stock Option Agreement further provided that time was of the essence.

[13] On October 28, 2014, Aphria (as PNW had, at that point, begun operating as Aphria) and Black Sparrow Capital Corp. (a company traded on the TSX Venture Exchange) issued a Joint Management Information Circular (the "Circular") in connection with special meetings of the shareholders of both companies to be held on December 1, 2014 to vote on the proposed RTO (which contemplated an amalgamation of the businesses). The Circular included a stock option plan which was identical to PNW's option plan except for the company name.

[14] On December 1, 2014, the shareholders approved the RTO as well as the Aphria Incentive Stock Option Plan (the "Plan") and the other business on the agenda to effect the RTO. The Plan provides, at section 2.3(g)(iv), that

> 2.3(g) Subject to Section 2.3(a) and except as otherwise determined by the Board:
>
> (iv) If a Participant ceases to be an Eligible Person for any reason whatsoever other than in (i) to (iii) above, each vested Option held by the Participant will cease to be exercisable on the earlier of the original Expiry Date of the Option and six (6) months after the Termination Date; provided that all unvested Options held by such Participant shall automatically terminate and become void on the Termination Date of such Participant. Without limitation, and for greater certainty only, this provision will apply regardless of whether the Participant received compensation in respect of dismissal or was entitled to a period of notice of termination which would otherwise have permitted a greater portion of the Option to vest with the Participant.

Eligible Person is defined in section 1.1(o) of the Plan as "any director, officer, employee or Consultant of the Corporation . . ." and any Personal Holding Company.

[15] As a result of the RTO, Aphria's shares began trading on the TSX Venture Exchange.

[16] On December 2, 2014, Aphria received its Final Licence permitting it to distribute and sell medical marijuana. In accordance with the provisions of the Consulting Agreement, the Options vested on that date.

[17] On January 7, 2015, Aphria advised Fuller that his services as SPIC were no longer required but that he would remain the RPIC. Aphria also advised Fuller that it no longer required any

services from him at that time. The Consulting Agreement subsequently expired on June 2, 2016 at the end of its term.

[18] On March 22, 2017, Aphria's common shares began trading on the TSX.

[19] On December 6, 2017, Fuller delivered to Aphria an executed Election to Exercise Stock Options which was attached as Schedule "B" to the Stock Option Agreement, together with a bankers draft payable to PNW for the exercise price ($120,000).

[20] On December 21, 2017, Aphria advised Fuller that it did not accept his exercise of the Options as his right to exercise had previously expired on December 2, 2016 pursuant to the terms of the Plan.

[21] Subsequent to Fuller commencing this application, Aphria raised Fuller's alleged breach of the Non-Competition Agreement as a further ground for refusing to honour his exercise of the Options.

[22] Section 4 of the Non-Competition Agreement provides:

> During the Term, the Vendor shall not, on its own behalf or on behalf of or in connection with any Person, directly or indirectly, in any capacity whatsoever including as an employer, employee, principal, agent, joint venturer, partner, shareholder or other equity holder, independent contractor, licensor, licensee, franchiser, franchisee, distributor, consultant, supplier or trustee or by and through any Person or otherwise carry on, be engaged in, have any financial or other interest in or be otherwise commercially involved in any endeavour, activity or business in all or any part of the Territory which is in competition with the Business.

[23] In September 2016, Aphria learned through media reports that the Ontario Provincial Police had charged Fuller with illegal production of marijuana and possession for the purposes of trafficking in connection with a large marijuana grow operation which was in close proximity to Aphria's facilities.

[24] The OPP raid which lead to the charges took place on a property at 1935 Fox Run, Leamington, Ontario, which contains a greenhouse facility (the "Property"). At the time of the raid and the charges, the property was owned by CAFR Corp., a corporation in which Fuller was the sole director and its president.

[25] Fuller has produced a document dated April 26, 2016, titled "Warranty and Indemnity", and entered into between CAFR Corp. as Landlord and Gary Parent as Tenant, which he describes as "effectively an anticipated lease" of the greenhouses on the Property (the "Lease").

[26] The Lease provides, among other things that Parent, the Tenant, will lease two acres of greenhouse on the Property for a term of one year at a monthly rent of $15,000 with automatic subsequent one year renewals in the absence of 30 days written notice from the Tenant. The Tenant paid a $30,000 deposit to CAFR Corp. on the signing of the Lease.

[27] The third preamble of the Lease states that the Tenant wishes to lease the premises "to produce dried marihuana for medical purposes pursuant to the *Marihuana Medical Access Regulations* . . .".

[28] The Lease contains a number of warranties from the Tenant including that he is the rightful holder in good standing of a licence to produce dried marijuana duly issued by Health Canada.

[29] Paragraph 3 of the Lease provides as follows:

> The parties acknowledge that the Landlord has no interest in the plants or products produced by the Tenant and is solely leasing space to the Tenant and is not involved in any way with the said plants or products or the Tenant in any way other than Landlord and Tenant.

[30] On May 4, 2016, CAFR Corp. obtained title to the Property from Giesbrecht Greenhouses Inc.

Position of the Parties

[31] Fuller submits that it is clear from reading the Consulting Agreement, the Stock Option Agreement and the Plan that the intent of the parties was that the Options would be granted for a five-year term. The Options vested on December 2, 2014 when Aphria received the Final Licence and could be exercised by Fuller any time up to December 2, 2019. Accordingly, Alphria's refusal to accept Fuller's exercise of the Options in December 2017 was in breach of contract entitling Fuller to damages, which he claims amount to $4,480,000.

[32] In the alternative, and if the Options expired in December 2016, six months after the termination of the Consulting Agreement, Fuller seeks relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"). Further, although not argued, in the Notice of Application, Fuller also seeks rectification pursuant to ss. 248 and 250 of the *OBCA*.

[33] Fuller submits that Aphria's position that he was in breach of the Non-Competition Agreement is a "red herring". He submits the facts do not support that he was in breach of that agreement prior to its expiry on June 2, 2016.

[34] Aphria submits that the proper interpretation when the three documents, the Consulting Agreement, the Stock Option Agreement and the Plan are read together is that the Options granted to Fuller were subject to the terms of the Plan and that section 2.3(g)(iv) of the Plan clearly provides that the Options expire six months after the termination of the Consulting Agreement, which in this case is December 2, 2016. Accordingly, on December 6, 2017, when Fuller purported to exercise the Options, they had expired.

[35] Aphria further submits that relief from forfeiture should not be granted having regard to the equities in this case. Fuller does not have clean hands given that he was in breach of the Non-Competition Agreement.

[36] Aphria further takes issue with Fuller's damage claim in the event that liability is established and submits that there is no basis to award Fuller damages in the application and in any event, his damage claim is inflated.

Discussion

(1) *Breach of contract*

[37] The interpretation of a contract involves the determination of the intention of the parties to the contract based on the language of the contract. The principles guiding the interpretation of a contract have been summarized by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, [2014] S.C.J. No. 53, 2014 SCC 53 and by the Court of Appeal, most recently in *Weyerhaeuser Co. v. Ontario (Attorney General)*, [2017] O.J. No. 6654, 2017 ONCA 1007, at paras. 64 to 68.

[38] Where more than one contract is entered into as part of a single overall transaction, the "related contracts" principle of contractual interpretation requires that the contracts be read in light of each other to achieve interpretive accuracy and to give effect to the intentions of the parties: *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336, 2010 ONCA 673, at para. 16; Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis, 2016), p. 23, ch. 2.2.6.

[39] There is no dispute between the parties that in interpreting the documents to determine when the Options could be exercised, regard must be had to each of the Consulting Agreement, Stock Option Agreement and the Plan.

[40] In this case, the Consulting Agreement, Stock Option Agreement and the Plan are connected, inter-related instruments that must be interpreted in light of each other. The inter-relationship is achieved through the drafting technique of incorporation by reference, which guides the interpretation of complex, or even standard form, commercial documents. See *Invescor Restaurants Inc. v. 3574423 Canada Inc.*, [2012] O.J. No. 2569, 2012 ONCA 387, at para. 19.

[41] Specifically, Schedule 2.2 (consulting fees) of the Consulting Agreement which sets out the terms of the Options, incorporates by reference the future stock option plan that Aphria would implement upon completion of the RTO:

> The Options shall be subject to the terms and conditions of any Option plan implemented by the Resulting Issuer.

[42] A plain reading of the above sentence makes it clear that the parties' intention was to make the terms of the Options subject to the future option plan, if implemented, of Aphria. The sentence refers to "any Option plan implemented" (a forward looking statement) by the "Resulting Issuer", defined in the Consulting Agreement as "the publically- listed entity resulting from the RTO" (Aphria).

[43] Fuller subsequently executed the Stock Option Agreement. Although it is dated June 2, 2014, the parties agree that it was actually signed sometime after that date. They do not agree, however, on when that was. Fuller claims he signed the agreement on or around December 9, 2014. Aphria's position is that it was executed no later than August 15, 2014.

[44] The Stock Option Agreement does not contain an entire agreement clause. Similar to the Consulting Agreement, it also incorporates by reference the terms of the Plan as noted by the following excerpts:

> Whereas the Optionee [Fuller] has been granted certain options ("Options") to acquire common shares in the capital of Aphria ("Common Shares" under the Aphria Incentive Stock Option Plan(the "Option Plan"), a copy of which has been provided to the Eligible Optionee;
>
> 5. Aphria confirms the Optionee has been granted Options under the Option Plan on the following basis, subject to the terms and conditions of the Option Plan:
>
> 6. Attached to this Agreement as Schedule "A" is a form of notice that the Optionee may use to exercise any of his or her Options in accordance with Section 2.3 of the Option Plan at any time and from time to time prior to the Expiry Date of such Options. The Optionee may also elect for the cashless exercise of any of his or her Options pursuant to Section 2.3(i) of the Option Plan.
>
> 7. By signing this Stock Option Agreement, the Optionee acknowledges that he or she has read and understands the Option Plan and agrees to the terms and conditions thereof and of this Stock Option Agreement.

[45] Based on the above terms of the Stock Option Agreement, and specifically the references to the Plan, and in particular section 2.3 and 2.3(i) thereof and the acknowledgement that Fuller had read and understood the Plan, I am more inclined to accept Fuller's evidence as to when the Stock Option Agreement was signed given that the Plan did not come into existence until December 1, 2014.

[46] Fuller submits that he could not have agreed to the terms and conditions of the Plan because it "did not exist" until it was approved by the Aphria shareholders on December 1, 2014. His

own evidence as to when he signed the Stock Option Agreement together with the above-noted provisions of that agreement which refer to the Plan and his acknowledgement that he had both received and read the Plan put an end to that argument.

[47] Accordingly, when read together, the Consulting Agreement, the Stock Option Agreement and the Plan establish that the intention of the parties, construed objectively, was that the Options granted to Fuller incorporated the terms and conditions of the Plan.

[48] As noted above, section 2.3(g)(iv) of the Plan provides that if a Participant ceases to be an Eligible Person for any reason whatsoever other than in section 2.3(g)(i) to (iii), "each vested Option held by the Participant will cease to be exercisable on the earlier of the original Expiry Date of the Option and six (6) months after the Termination Date . . .".

[49] Aphria submits that section 2.3(g)(iv) applies to Fuller, as a consultant, and accordingly his Options expired on December 2, 2016, which is six months after the Consulting Agreement terminated on June 2, 2016.

[50] Fuller relies on the opening qualification to section 2.3(g) of the Plan, which provides that it is subject to section 2.3(a) "and except as otherwise determined by the Board". He submits, having regard to section 2.3(a)(i) of the Plan as well as sections 1.3(b) and 2.1(a) that the Board of Aphria has the discretion to grant options for a term not exceeding ten years and that, in the circumstances, the Board exercised its discretion to grant Fuller the Options that could be exercised at any time with the five-year term.

[51] Section 2.3(a)(i) provides, in part, that the period during which an Option may be exercised shall be determined by the Board at the time the Option is granted provided that no Option shall be exercisable for a period exceeding ten years.

[52] Section 1.3 deals with the administration of the Plan and section 1.3(b) authorizes the Board to provide for the granting, exercise and method of exercise of Options "as it shall determine". Section 1.3(d) gives the Board the right to delegate the administration and operation of the Plan, in whole or in part, to a committee of the Board or any member of the Board.

[53] Section 2.1(a) provides that subject to the provisions of the Plan, the Board shall have the authority to determine the limitations, restrictions and conditions, if any, in addition to those set forth in sections 1.3(b) and 2.3 applicable to the exercise of an Option.

[54] Based on the above provisions of the Plan, Fuller submits the Board clearly has the authority to grant options beyond the six-month expiry period provided for in section 2.3(g)(iv). Further,

he submits the Board exercised that authority by entering into the Stock Option Agreement, which provides that the Options expire in five years and which was signed by a member of the Board.

[55] With respect, the above interpretation of the terms of the Options does not accord with the plain wording of the agreements. The Options clearly incorporate the terms and conditions of the Plan. While the Plan permits the Board to alter the terms of the Options, including the period during which they may be exercised, there is nothing in the agreements to indicate that the Board did that in respect of the Options. Nor is there any evidence that the Board authorized its member who signed the Stock Option Agreement to vary the terms and conditions of the Plan and specifically section 2.3(g)(iv).

[56] Based on the above, therefore, I find that in accordance with the terms of the Options granted to Fuller by Aphria, while the expiry date of the Options was June 2, 2019, the exercise date was the earlier of the expiry date and six months after the Termination Date as provided by section 2.3(g)(iv) of the Plan. Accordingly, the Options expired on December 6, 2016, six months after the termination of the Consulting Agreement. Aphria did not breach the agreements in refusing to honour Fuller's exercise of the Options.

(2) *Relief from forfeiture*

[57] In the alternative, Fuller claims relief from forfeiture pursuant to s. 98 of the *CJA*, which provides that the court may grant relief against, among other things, forfeiture on such terms as are considered just.

[58] Relief from forfeiture refers to the power of the court to protect a person against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement: *Kozel v. Personal Insurance Co.* (2014), 119 O.R. (3d) 55, [2014] O.J. No. 753, 2014 ONCA 130, at para. 28.

[59] Relief from forfeiture is an equitable remedy which is purely discretionary: *Scicluna v. Solstice Two Ltd.*, [2018] O.J. No. 978, 2018 ONCA 176, at para. 28 citing *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, [1994] S.C.J. No. 59 and *Kechnie v. Sun Life Assurance Co. of Canada*, [2016] O.J. No. 3062, 2016 ONCA 434.

[60] The factors that the court must consider in deciding whether to grant relief from forfeiture are the conduct of the party seeking the relief; the gravity of the breach; and the disparity between the value of the property forfeited and the damage caused by the breach: *Kozel*, at para. 31, citing *Saskatchewan River Bungalows*, at p. 504 S.C.R.

[61] In *Scicluna*, at para. 29, the court stated that the three factors are not a three-part test, each one of which must be met, but rather are elements to guide the court in the exercise of its discretion.

[62] As I will discuss shortly when dealing with Fuller's claim for damages, Fuller claims damages of $4,480,000 for breach of contract. Aphria submits that the maximum value of Fuller's loss of the Options is $2,820,000. Whatever Fuller's loss, it is substantial. Further, there is no evidence that Aphira has suffered any damage from Fuller's failure to exercise the Options within the time required. Accordingly, there is clearly a significant disparity between the value of the Options and any damage to Aphria.

[63] Fuller submits that relief from forfeiture should be granted based on the fact that he never received a copy of the Plan and therefore was not aware of the six-month time period to exercise the Options. Further, he submits that it would be "unconscionable" to deny him millions of dollars when Aphria has suffered no prejudice.

[64] Aphria submits that relief from forfeiture should not be granted based on Fuller's conduct and specifically his breach of the Non-Compete Agreement which, pursuant to section 4.2(b)(iii) of the Consulting Agreement gives Aphria the right to terminate the Consulting Agreement. Further, section 4.3 of the Consulting Agreement provides that in the event it is terminated in accordance with the provisions of section 4.2, all unexercised options outstanding shall be forfeited, terminated and cancelled and no longer be in force. Section 4.4 provides, among other things, that the provisions of Article 4 "shall" survive the termination of the agreement.

[65] I do not accept Fuller's evidence that he never received a copy of the Plan. It is clear from the terms of the Stock Option Agreement, which he signed, that he not only received a copy of the Plan, he acknowledged that he had read it and understood it.

[66] The Non-Compete Agreement was entered into by Fuller on June 2, 2014 as a condition to the closing of the purchase of his shares in PNW. It had a term of two years (similar to the Consulting Agreement) and dealt with both non-competition and non-solicitation of both customers and employees. Section 10 required immediate notification of any violation, contravention or breach of the agreement.

[67] Section 4 of the Non-Compete Agreement, set out above, deals with non-competition and provides, in part, that Fuller either directly or indirectly cannot engage in any capacity in any "endeavor, activity or business in all or any part of the "Territory"

which is in competition with Aphria's business, which is defined as consisting of the cultivation, production, distribution and sale of medical marijuana as licensed by Health Canada under the *Marihuana for Medical Purposes Regulations*.

[68] In my view, the Lease between CAFR Corp., which Fuller controlled, and Gary Parent dated April 26, 2016, constituted a breach of section 4 of the Non-Compete Agreement. The Lease was entered into during the term of the Non-Compete Agreement. Further, the Lease establishes that Mr. Parent is in the same business as Aphira, *i.e.*, the production of medical marijuana pursuant to the *Marihuana for Medical Purposes Regulations*. CAFR Corp. received $30,000 on the signing of the Lease.

[69] Fuller submits that being a landlord, especially with the exclusion in the Lease from any involvement in Parent's affairs, is not caught by section 4. The language of section 4, however, specifically excludes involvement "in any capacity whatsoever". Just because landlord is not one of the listed categories does not mean it is not included.

[70] Fuller further submits that Aphria is out of time to rely on his activities as a breach of the Non-Compete Agreement because it learned about them in September 2016, more than two years ago. What Aphria leaned at that time was that Fuller had been charged with offences involving the production of marihuana. It did not obtain a copy of the Lease until it was produced late in this application. My decision that Fuller breached the Non-Compete is based on the Lease and not the criminal charges. Aphria is not out of time.

[71] Fuller further submits that the Non-Compete Agreement is not valid in law because it covers too wide a geographic scope. The "Territory" is North America and, at the time of the Agreement, it was contemplated that Aphria would only carry on business in Canada. I do not consider the geographical scope of the Non-Compete Agreement to be too broad given the limited term of the Agreement, the fact that the Agreement was part of the sale of shares and that at the time of the Agreement the medical marijuana business was in its infancy not only in Canada but North America too. Fuller's knowledge and experience in the Canadian licensing requirements would be valuable to not only Canadian companies wanting to get into the business but U.S. companies as well.

[72] Having breached the Non-Compete Agreement, Fuller was obligated by its terms to notify Aphria immediately. He did not.

[73] In my view, in light of Fuller's conduct in breaching the Non-Compete Agreement and failing to notify Aphria of the breach, he is not entitled to relief from forfeiture. He does not have "clean hands" to permit equitable relief.

(3) *Damages*

[74] As part of the application, Fuller claims damages from Aphria for breach of the agreements in refusing to honour his exercise of the Options. Because I have found that in accordance with the agreements, the Options expired prior to Fuller exercising them, Aphria did not breach the agreements.

[75] Apart from the fact that Fuller is not entitled to damages because there is no breach of contract by Aphria, there is no basis for the court to award damages in Fuller's application. Rule 14.05 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 does not allow for damages to be awarded on an application. While the notice of application refers to ss. 248 and 250 of the *OBCA*, no claim has been advanced or argued based on those provisions. Simply put, there is no jurisdiction for the court to award damages on this application.

[76] Nevertheless, I will briefly address Fuller's damage claim. In a Supplementary Record, Fuller provided the affidavit of Bruce Roher, a partner at Fuller Landau LLP attaching as an exhibit an expert report by Jeffrey Cling at Fuller Landau providing an opinion of Fuller's loss resulting from Aphria's failure to deliver the 200,000 shares pursuant to the exercise of the Option (the "Opinion").

[77] The Opinion is based on Fuller's evidence that he would have sold the shares received in the days following their peak price of $24.75 per share in early January 2018. Fuller estimated that he would have received between $20 and $23 per share. Using those share prices, Mr. Cling concluded the amount which Fuller would have received (*i.e.*, his loss) was between $3,880,000 based on $20 a share and $4,480,000 based on $23 a share. The average of those share prices equals $4,180,000.

[78] Before me, Fuller claimed damages of $4,448,000 — the higher share price.

[79] Mr. Cling's report is not so much an expert opinion as a mathematical exercise. It is clear that it is based on Fuller's evidence and is therefore of little assistance. Further, Fuller's evidence that he would have sold around the peak of the market causes me serious concerns.

[80] As the Supreme Court points out in *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633, [1978] S.C.J. No. 106, at p. 655 S.C.R., it is unrealistic to assume that an individual would have the foresight to be able to sell at the peak of the market. Rather a medium range based on the share price over time is a more appropriate way to proceed.

[81] In response, Aphria submits, adopting the approach of the Supreme Court in *Baud* that Fuller's losses would be $2,820,000 based on the medium share price from the purported exercise date to the commencement of the application of $14.70 a share, less the exercise price.

[82] Accordingly, I assess Fuller's damages at $2,820,000.

Conclusion

[83] For the above reasons, therefore, the application is dismissed.

[84] Aphria is entitled to its costs of the application on a partial indemnity basis.

[85] At the conclusion of the argument, both parties provided cost outlines setting out their partial indemnity costs. Fuller claims a total of $91,358.38 made up of $71,974.79 in fees and $19,974.79 in disbursements. Aphria claims a total of $93,234.42 in costs made up of fees of $78,698.94, disbursements of $3,809.40 and the balance in HST.

[86] The total costs for both parties is remarkably close. To the extent there is a significant difference it is in the disbursements and specifically the fees for Fuller's expert. Fuller had two counsel at the hearing and Aphria had three. Although they each participated in the argument, I do not consider, given the issues, that Fuller should have to pay for all three.

[87] Having regard to the issues raised, the cost outlines and the submissions of counsel, I award costs to Aphria in the total amount of $75,000. In my view, that amount is fair and reasonable and within the contemplation of Fuller.

Application dismissed.