

CITATION: Kinross Gold Corporation et al v. Cyanco Company, 2024 ONSC 768
COURT FILE NO.: CV-21-00663900-00CL
DATE: 20240205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KINROSS GOLD CORPORATION, ROUND MOUNTAIN GOLD CORPORATION AND KG MINING (BALD MOUNTAIN) INC.,
Plaintiffs

AND:

CYANCO COMPANY, LLC, Defendant

BEFORE: Cavanagh J.

COUNSEL: *R. Bevan Brooksbank, Megan Hodges, and Emily Paslawski*, for the Plaintiffs

Daniel S. Murdoch, Sam Dukesz and Gavin Inkster, for the Defendant

HEARD: In Writing

COSTS ENDORSEMENT

- [1] This action was brought by Kinross Gold Corporation (“Kinross”) and two of its subsidiaries against Cyanco Company, LLC (“Cyanco”).
- [2] The main issue in the action involved the interpretation of a written agreement between Kinross (as contract administrator) and two operating subsidiaries (as buyers), and Cyanco (as seller), for the sale of Products (as defined) (the “Agreement”).
- [3] After a trial, the plaintiffs’ action was dismissed.
- [4] This is my decision with respect to costs.

Positions of the parties

- [5] Cyanco relies on section 12.6 of the Agreement which reads:

12.6 Lawyer’s Fees. If a Party shall commence any action or proceeding against another Party in order to enforce the provisions of this Contract or to recover damages as a result of the alleged breach of any of the provisions of this Contract, the prevailing Party shall be entitled to recover all reasonable costs in connection therewith, including reasonable lawyer’s fees.

- [6] Cyanco submits that it did not act inequitably and there are no special circumstances that would justify the exercise of discretion not to enforce section 12.6 of the Agreement and award it all of its reasonable costs, including fees and disbursements charged by its Canadian counsel (\$2,078,893.45 and \$113,715.67, respectively) and fees charged by its U.S. counsel (\$488,395.24 based on the exchange rate as at September 7, 2023), for a total of \$2,681,004.36 CAD.
- [7] Kinross submits that Cyanco's costs should be confined to the costs of Canadian counsel, on a partial indemnity scale, and that the amount claimed should be reduced by 50% to account for (i) the matter proceeding unnecessarily by way of action instead of by application, (ii) Cyanco's failure to abandon unsubstantiated defences prior to trial, and (iii) its advancement of unproven allegations of bad faith, dishonesty and misrepresentation which unnecessarily lengthened the proceeding and drove up the costs for both parties. Kinross also submits that success was divided because Cyanco was unsuccessful in opposing the declaratory relief sought by Kinross on the ground that this was not an appropriate case for such relief.
- [8] Kinross submits that it should be ordered to pay no more than 50% of the partial indemnity fees of Cyanco's Canadian counsel (\$623,668.04 CAD) and disbursements of \$113,715.67 CAD.

Does the Agreement apply?

- [9] In *Bossé v. Mastercraft Group Inc.*, 1995 CanLII 931 (ON CA), the Court of Appeal explained the principles that apply where there is a contractual right to costs:

The costs of and incidental to a proceeding or a step in a proceeding are, subject to the provisions of a statute or the rules of court, in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid: *Courts of Justice Act*, R.S.O. 1990 c. C-43, s. 131(1); rule 57.01 of the Rules of Civil Procedure. As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for doing so - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which renders the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances.

- [10] The Court of Appeal has confirmed that notwithstanding the contractually agreed upon scale of costs, the quantum of costs must be fair, reasonable, and proportionate having regard to the circumstances of the case. See *7550111 Canada Inc. v.*

Charles, 2020 ONCA 505, at para. 4; *Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135, at para. 133.

- [11] Kinross submits that it only sought a declaration from this Court that the terms of the Agreement were “confined to the supply of liquid sodium cyanide and [did] not preclude the plaintiffs from independently sourcing solid sodium cyanide for their operations at the Mines”. Kinross submits that the proceeding was not pursued to “enforce provisions” of the Agreement, nor to “recover damages as a result of the alleged breach” of the Agreement. Rather, Kinross only sought to clarify the scope of the Agreement.
- [12] Kinross submits that, consequently, section 12.6 is inapplicable to the matter before the Court and costs should be assessed on the presumptive partial indemnity scale.
- [13] Through this action, Kinross sought an order for declaratory relief. If Kinross had been successful in obtaining the declaratory relief it sought, it would have been able to discontinue the purchase of the Products under the Agreement (by purchasing solid sodium cyanide), with the Mines remaining in operation, without being in breach of the Agreement. The declaratory relief sought would allow Kinross to enforce its interpretation of the Agreement against Cyanco.
- [14] When I read the words of section 12.6 of the Agreement in the context of the Agreement as a whole and give the words used their natural and ordinary meaning, I conclude that Kinross commenced this proceeding to enforce against Cyanco its interpretation of the provisions of the Agreement. I am satisfied that section 12.6 of the Agreement applies to this proceeding.

Is Cyanco entitled to recover from Kinross legal fees on a full indemnity scale as opposed to a partial indemnity scale?

- [15] Kinross submits that section 12.4 of the Agreement does not clearly and unequivocally provide for full indemnity costs and that the wording does not evidence a mutual intention between the parties that there is such an agreement.
- [16] In support of its submission that costs should be awarded on a partial indemnity scale, Kinross relies on *The Trustees of the Labourers’ Pension Fund of Central and Eastern Canada et al. v. Sino Forest Corporation et al.*, 2019 ONSC 4632. In *Sino Forest*, Perell J., at para. 36, held:

It is a matter of contract interpretation whether the successful party is entitled to costs other than on a partial indemnity basis, and it is only when the contract clearly and unequivocally provides for a different scale of costs that the court should depart from the normal scale of costs.

- [17] Kinross notes that in *Sino Forest*, the agreement provided for payment of costs on a “full indemnity scale” whereas, the language of the Agreement does not clearly provide for “full indemnity” costs
- [18] Cyanco relies on *Nadarajalingam v. Zhao*, 2018 ONSC 1618. In *Zhao*, a guarantee contained the agreement of the guarantor to pay “all costs and expenses incurred by the Lender ... in connection with enforcement of its rights” under the guarantee. The defendants relied on this provision to claim full indemnity costs. The plaintiffs pointed to absence of contractual language for payment of “full indemnity” or “substantial indemnity” costs and opposed an award of full indemnity costs. Dunphy J. held that the wording of the agreement was straightforward and applies to “all costs, losses, expenses ... including legal fees”, and that the plain meaning of the contractual provisions provide for payment of all of the costs claimed. Justice Dunphy concluded that the defendants had a contractual entitlement to full indemnity costs.
- [19] The Agreement was made between two sophisticated commercial parties. The language of section 12.6 provides for the prevailing party to recover all reasonable costs in connection with the action or proceeding. When I read section 12.6 of the Agreement and give the words used their natural and ordinary meaning, I conclude that the use of the word “all” shows that the parties intended that the prevailing party is entitled to recover all reasonable costs in connection with the action on a full indemnity basis.
- [20] Although the court has discretion to depart from the contractually agreed upon scale of costs, I do not see any good reason not to enforce the parties’ bargain. In reaching this conclusion, I do not find that, apart from section 12.4 of the Agreement, there are circumstances that would justify an award of costs on an elevated scale.

Costs claimed for fees charged by Cyanco’s U.S. counsel

- [21] Cyanco seeks \$488,395.24 in legal fees incurred in respect of its U.S. counsel. Cyanco’s U.S. counsel have a long-standing relationship with Cyanco and provided strategic advice during the litigation, including by attending examinations for discovery and trial. Cyanco states in its costs submissions that U.S. counsel was closely involved in the defence of the litigation in light of its institutional knowledge of the Cyanco business and the Kinross relationship. Cyanco states that because there is limited Canadian law on requirements contracts, U.S. counsel was directly involved in the potential application of U.S. law on requirements contracts in Ontario.
- [22] Cyanco submits the Agreement relates to supply arrangements in the U.S., that Cyanco is a U.S. company, and the Mines are located in the U.S. Cyanco points out that it was fighting to save a substantial part of its business and tens of millions of dollars in annual revenue and that it was reasonable for it to retain U.S. counsel in

an advisory role. Cyanco submits that under the Agreement, it is entitled to recover all of its reasonable costs incurred.

- [23] In support of this submission, Cyanco relies upon *Nelson Education Limited (Re)*, 2015 ONSC 4225. In *Nelson*, a creditor sought costs of a motion made in a CCAA proceeding from the applicants. The creditor requested costs for its U.S. counsel. The motion judge noted that all parties had U.S. counsel advising in connection with the Company. The creditor asserted that the applicants had relied on a provision in an agreement that was governed by U.S. law and, therefore, it was appropriate that they seek guidance from U.S. counsel. The motion judge observed that there was no indication in the material that U.S. counsel did much in connection with the matters being assessed. The motion judge allowed \$10,000 as costs for U.S. counsel (the creditor had claimed \$41,137.50).
- [24] The Agreement is governed by Ontario law, so there was no need for U.S. counsel to provide advice in connection with U.S. law.
- [25] I have reviewed the Bill of Costs of U.S. counsel. I am not satisfied from my review that the fees charged by U.S. counsel for the activities described did not overlap with the fees charged by Canadian counsel for the same activities. It was open to Cyanco to ask its U.S. counsel to assist with this Canadian litigation (acting in the role of internal instructing counsel), including by reviewing documents and attending examinations for discovery and the trial, but, in my view, its expenses in this regard were not reasonably required for Cyanco to defend the action. Cyanco was represented by experienced and capable Ontario counsel who were well qualified to advise and represent Cyanco in this action, and did so.
- [26] In my view, the fees charged by U.S. counsel do not qualify as reasonable costs in connection with Kinross' action for which Kinross should be responsible. An award of costs against Kinross in respect of charges by Cyanco's U.S. counsel would not be fair, reasonable, or proportionate having regard to the nature of the action. Cyanco's request for an award of costs providing for recovery of fees charged by its U.S. counsel is denied.

Are the costs claimed for fees and disbursements charged by Cyanco's Canadian counsel unreasonable and disproportionate?

- [27] There is no question that the litigation was very important to the parties. Both sides retained capable and experienced counsel. The outcome of the litigation would have significant financial consequences. The litigation was hard fought.
- [28] Kinross submits that the trial judgment addressed and determined two issues: (i) whether this matter was an appropriate case for the Court to grant declaratory relief; and (ii) whether the Agreement was confined to liquid sodium cyanide and did not preclude Kinross from independently sourcing solid sodium cyanide for their operations. Kinross was successful on the first issue. Kinross submits that any costs

awarded to Cyanco should be reduced because of its lack of success on the first issue.

- [29] Although Cyanco was unsuccessful in defending the action on the basis that the declaratory relief sought by Kinross was unavailable, Cyanco was successful in defending the action on the main issue involving the interpretation of the Agreement. I decline to decide costs on an issue by issue basis and to reduce Cyanco's costs because it was not successful on one issue in respect of which relatively little time was expended.
- [30] In support of its submission that Cyanco's claim for costs should be reduced, Kinross submits that by not formally abandoning its defences of *ex turpi causa* or issue estoppel, Cyanco put Kinross to unnecessary expense in responding to these defences, and that Cyanco's costs should be reduced accordingly. Kinross submits that considerable evidence was adduced in relation to the negotiation of the Agreement and the insertion of the qualifier "liquid" into the Agreement which would not have been needed had the defences of *ex turpi causa* and issue estoppel been formally abandoned prior to trial.
- [31] I do not agree that Cyanco's costs should be reduced for this reason. Both sides tendered evidence concerning the negotiations including the circumstances surrounding the inclusion of the word "liquid". I accept Cyanco's submission that its decision not to pursue the defences of *ex turpi causa* and issue estoppel was made based on the evidence as tendered at trial. I do not reduce its claim for costs because of this decision.
- [32] Kinross submits that Cyanco unnecessarily moved to convert Kinross' application to an action, a motion to which Kinross consented provided that the timetable for the action be expedited. Kinross submits that Cyanco should face cost consequences for inappropriately insisting upon a lengthened judicial process that ultimately proved unnecessary.
- [33] The parties consented to this procedural order and I am not satisfied that it was wrong for them to have done so. I do not agree that Cyanco should have its claim for costs reduced because Kinross' application was converted to an action.
- [34] Kinross submits that Cyanco made unproven allegations that Kinross commenced the litigation in bad faith and for improper and ulterior motives, and that Kinross "intentionally or negligently misrepresented" material facts to Cyanco during the negotiation of the Agreement. Kinross submits that any award of costs to Cyanco should be reduced because of these unproven allegations which were prejudicial to Kinross and posed the risk of significant reputational harm.
- [35] In my Reasons, I did not make findings with respect to Cyanco's pleaded allegations concerning Kinross' conduct. It was not necessary for me to do so. In the absence of findings in this regard, I do not reduce Cyanco's claim for costs for

this reason. Cyanco was the successful party, and it is entitled to an award for its reasonable costs of the action.

- [36] Kinross submits that the amount of costs claimed by Cyanco are excessive and disproportionate. Kinross submits that Cyanco's costs should be reduced to account for the excess amount over Kinross' costs.
- [37] Cyanco claims fees for its Canadian counsel on a full indemnity scale in the amount of \$2,078,893.45. Kinross provided its Bill of Costs which shows that fees charged by its counsel at actual rates were \$1,716,246.50. The difference is \$362,646.95.
- [38] The parties' relative expenditures is a relevant consideration where there is an allegation that costs claimed are excessive. However, the fact that the fees charged to Cyanco exceed those charged to Kinross does not make the fees claimed by Cyanco unreasonable.
- [39] Cyanco submits that the litigation was "bet-the-company" litigation with hundreds of millions of dollars of revenue and the future of the Winnemucca plant at stake. I accept this submission.
- [40] When I consider the factors in rule 57.01(1) of the *Rules of Civil Procedure*, I am satisfied that the amount claimed by Cyanco for the fees of its Canadian counsel is fair, reasonable, and proportionate having regard to the circumstances of this case. I am satisfied that this amount of fees is within a range of fees that Kinross would reasonably expect to pay if it was unsuccessful in this action.

Result

- [41] I fix Cyanco's costs (on a full indemnity scale in accordance with the Agreement) in the amount of \$2,192,609.12 comprised of fees of \$2,078,893.45 and disbursements (including experts fees) of \$113,715.67. These costs are to be paid by the plaintiffs.

Cavanagh J.

Date: February 5, 2024