CITATION: Bayliss v. Plethora Exploration Corp, 2024 ONSC 926
COURT FILE NO.: CV-23-00702131-00CL
DATE: 20240212

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JACK BAYLISS, Applicant

AND:

PLETHORA EXPLORATION CORP., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Ian C. Matthews and Alicia Krausewitz*, for the Applicant

Michael L. Byers, for the Respondent

HEARD: In Writing

COSTS ENDORSEMENT

[1] The Applicant, Jack Bayliss, brought an application as a dissenting shareholder for, among other things, an order fixing the fair value of his shares in Superior Nickel Inc. ("Superior") and requiring Superior to forthwith pay the Applicant the fair value of his shares. The Respondent is Plethora Exploration Corp. ("Plethora"), the amalgamated company after the amalgamation that triggered Mr. Bayliss' Notice of Dissent.

[2] In his Notice of Application, Mr. Bayliss claimed an order fixing fair value of his 900,000 shares at $0.15 per share ($135,000), or such other amount as the Court determines. In response to Mr. Bayliss' Notice of Dissent, Superior had offered to pay him a price per share of zero representing the fair value of the shares (423,471 shares, rather than 900,000 shares) on a standalone and pre-amalgamation basis, for reasons explained in the letter that included this offer. Superior offered, "as a gesture of goodwill", the sum of $1,000.

[3] In an endorsement released on December 21, 2023, I allowed Mr. Bayliss' application, in part, and ordered Plethora to pay Mr. Bayliss the amount of $63,000 ($0.07 per share) as fair value for his shares of Superior.

[4] This is my endorsement with respect to costs.

[5] Mr. Bayliss seeks costs on a full indemnity basis pursuant to section 185(21) of the *Ontario Business Corporations Act* ("*OBCA*"). The amount claimed for costs is $232,821.61.

[6] The *OBCA* provides, in s. 185(15):

> A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (10), send to each dissenting shareholder who has sent such notice,
>
> (a) a written offer to pay for the dissenting shareholder's shares in an amount considered by the directors of the Corporation to be the fair value thereof, accompanied by a statement showing how the fair value was determined; or
>
> (b) if subsection (30) applies, a notification that it is unable lawfully to pay dissenting shareholders for their shares.

[7] Subsection 185(30) provides that the corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that, (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

[8] Subsection 185(21) of the *OBCA* provides that if a corporation fails to comply with subsection 185(15), then the costs of a shareholder application under subsection (19) (which was brought by Mr. Bayliss) are to be borne by the corporation unless the court otherwise orders.

[9] In response to Mr. Bayliss' Notice of Dissent in which he demanded fair value for his 900,000 shares, Superior took the position that under an "Anti-Dilution Agreement", Mr. Bayliss was only entitled to 3% of the total issued and outstanding shares of Superior (this would be far fewer than 900,000 shares). On May 4, 2023, Superior adjusted Mr. Bayliss' shares. Plethora took the position that, as a result of the adjustment, Mr. Bayliss was left with 423,471 of the total issued and outstanding shares of Superior.

[10] By letter dated May 4, 2023, legal counsel for Superior provided certain financial and other information in relation to Superior and advised that the Board of Directors of Superior have determined that on March 23, 2023, the date of the meeting to approve the amalgamation, fair value of the shares, on a standalone and pre-amalgamation basis, is zero. Superior offered to pay to Mr. Bayliss the sum of $1,000 as a gesture of goodwill.

[11] Mr. Bayliss submits that this offer does not comply with the requirements of subsection 185(15) of the OBCA because an offer of zero is not an offer to pay "an

amount" considered by the directors of Superior to be the fair value of the shares held by Mr. Bayliss, and the number of shares in respect of which this offer was made is less than the 900,000 shares held by Mr. Bayliss on the date for valuation. Mr. Bayliss submits that Superior failed to comply with subsection 185(15) of the *OBCA* and, therefore, he is presumptively entitled to costs of this application on a full indemnity scale against Plethora, the amalgamated company.

[12] In my endorsement, I held that Mr. Bayliss had failed to establish that the directors of Plethora, by offering zero, the value that Plethora's board of directors considered to be the fair value of the shares of Superior in the circumstances, failed to exercise their business judgment in a responsible way in the best interests of Plethora and commensurate with its duties as a responsible corporate citizen. I held that Mr. Bayliss had failed to establish that Plethora acted oppressively toward Mr. Bayliss.

[13] Mr. Bayliss submits that an offer of something more than "zero" per shares for all of his 900,000 shares was needed for Superior to comply with s. 185(15) of the *OBCA*. He accepts that an offer of 1 cent per share, or even $1/10^{th}$ of a cent per share, for 900,000 shares would have complied with s. 185(15) of the *OBCA*.

[14] The offer made by Superior of zero is the amount considered by the directors of Superior/Plethora to be the fair value of the shares of Superior held by Mr. Bayliss. In compliance with s. 185(15), the letter from Superior's legal counsel provided an explanation for how the fair value was determined. I do not agree that the directors of Superior were required to offer an amount higher than they considered to be the fair value of the shares in order to comply with this statutory provision. Given this offer, it was of no consequence that the number of shares that the directors of Superior considered were held by Mr. Bayliss (giving effect to the Anti-Dilution Agreement) was less than the number that he actually held (as of the close of business on the day before the amalgamation resolution was passed). The amount of the offer would be the same, zero.

[15] I conclude that by sending the offer of zero in response to Mr. Bayliss' Notice of Dissent, Superior did not fail to comply with s. 185(15) of the *OBCA*. The costs consequences of s. 185(21) of the *OBCA* are not triggered. Given this conclusion, it is not necessary for me to determine whether the word "costs" in s. 185(21) of the *OBCA* means "full indemnity" costs, as Mr. Bayliss contends.

[16] I conclude that Mr. Bayliss, as the successful party, is entitled to costs of the application on a partial indemnity scale.

[17] In his Bill of Costs, Mr. Bayliss claims fees on a partial indemnity scale of $83,553.30. Mr. Bayliss claims HST on fees of $10,861.93. Mr. Bayliss claims disbursements of $77,014.66 (inclusive of HST) which are mainly payments for charges of his expert valuator. Mr. Bayliss deducts $1,161.26 representing partial indemnity costs (both fees and disbursements) for the unsuccessful motion to strike paragraphs in an affidavit.

[18] In *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, the Court of Appeal for Ontario set out the principles to be applied when a judge fixes costs and, at para. 26, held that "[o]verall ... the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant".

[19] In *Carter v. Ford Motor Company of Canada*, 2021 ONSC 5586, Perell J. cited *Boucher* for the proposition that the amount of costs awarded should reflect the fair and reasonable expectations of the unsuccessful litigant. In *Carter*, Perell J. cited *Pearson v. Inco Ltd*., [2002] O.J. No. 3532, at para. 20, for the proposition that the approach to the recovery of fees paid to expert witnesses ought to be exactly the same as the approach to the fees to be recovered by counsel. The court should fix an amount which is reasonable for the losing party to pay and, in so doing, the court is not bound by what the client may have actually had to pay the expert.

[20] Plethora submits that the amount claimed for costs is excessive and disproportionate given the amount at issue and the amount awarded. Plethora submits that the result was mixed and Mr. Bayliss was not successful in obtaining oppression remedy relief, warranting a downward adjustment in the amount of costs.

[21] Plethora's Bill of Costs shows costs on a partial indemnity scale of $46,871.10. This includes disbursements, including expert charges, of $19,756.18. According to its Bill of Costs, Plethora's actual costs were $64,947.70.

[22] Plethora submits that Mr. Bayliss' partial indemnity costs should be fixed in the amount of $40,000.

[23] Mr. Bayliss replies that to award this amount (representing 17% of his full indemnity costs and 23% of his partial indemnity costs) would chill meritorious applications and disincentivize pre-litigation fair value offers in lower-value cases. Mr. Bayliss submits that he acted reasonably in commissioning a comprehensive valuation report from a certified business valuator.

[24] The reasonableness and proportionality of the costs claimed depends on the circumstances of each case. Rule 57.01 of the *Rules of Civil Procedure* sets out the factors the court may consider in exercising its discretion to award costs. One important factor is amount claimed and the amount recovered in the proceeding. In this case, Mr. Bayliss claimed payment of fair value for his shares (at the high end) of $135,000. His expert opined that the fair value (at the low end) was $0.11 per share, which translates to a claim of $99,000. Mr. Bayliss' expert opined that, in his opinion, the fair value was at the higher end of the range, for reasons he gave. The amount awarded was $63,000.

[25] Mr. Bayliss' claim for costs on a partial indemnity scale, $170,268.63 (inclusive of fees, HST and disbursements), exceeds the average fair value claimed for his shares by more than $53,000. His claim for costs exceeds the amount awarded by more than $107,000.

[26] On this application, Mr. Bayliss had the burden of proving fair value of his shares. Plethora would have reasonably expected from the outset that expert evidence would be required. It would not be unexpected that the time expended by counsel for Mr. Bayliss' application exceeded the time expended by Plethora's counsel, given his burden of proof. The reports submitted by Mr. Bayliss' expert were detailed and comprehensive, and included different market based methodologies.

[27] This was a moderately complex proceeding. Several affidavits were filed by both sides. Cross-examinations of the fact witnesses were held. The legal effect to be given to the Anti-Dilution Agreement added to the complexity. The application was argued over a full day on the Commercial List. Additional written submissions were made on a question of law that arose during the hearing. Plethora took the position late in the proceedings that Mr. Bayliss was not entitled to be paid fair value for his shares. This added complexity to the litigation.

[28] The nature of this application, the factual background (including the Anti-Dilution Agreement), and the need for Mr. Bayliss to present expert evidence to meet his burden, made it reasonably apparent to Plethora that Mr. Bayliss' legal costs would be significant and could approach or exceed the amount claimed by Mr. Bayliss to be the fair value of his shares. Of course, it was open to Plethora to make an offer to settle to protect itself with respect to costs. While Plethora made offers, the amount awarded was significantly higher than the offers.

[29] I do not accept Plethora's submission that in these circumstances Mr. Bayliss' costs should be fixed at $40,000.

[30] Where a party's claim is for a moderate amount, as here, it is, of course, open to this party to commit substantial resources to the claim, but the party doing so must recognize that it might be disproportionate and unreasonable to expect the opposing party to pay those costs.

[31] In another dissenting shareholder case, where the facts were more complex and amount to which the opposing party was reasonably exposed to liability was significantly higher, it might be reasonable and proportionate for the unsuccessful party to expect to pay costs based on the number of hours expended by counsel for Mr. Bayliss in this case and the extremely detailed and comprehensive approach taken to the valuation issue by the expert retained by Mr. Bayliss.

[32] In my view, however, in the circumstances of this application, it would be unreasonable and disproportionate to expect Plethora to pay Mr. Bayliss' claim for

costs based on full legal fees for the hours expended (on a partial indemnity scale) and full reimbursement of the charges by the expert he retained.

[33] When I consider the factors in rule 57.01 of the *Rules of Civil Procedure* and the principles in *Boucher*, I conclude that it would be fair, reasonable and proportionate to fix Mr. Bayliss' costs of this application on a partial indemnity scale at $99,951.75 comprised of fees of $50,000, HST on fees of $6,500, and disbursements (reflecting a reduction of the fees claimed as disbursements for charges by Mr. Bayliss' expert to $40,000) of $43,451.75. This amount is, in my view, within a range of costs that Plethora could reasonably have expected to pay of it were to be unsuccessful on the application.

[34] I fix costs to be paid by Plethora to Mr. Bayliss in the amount of $99,951.75.

Cavanagh J.

Date: February 12, 2024