

COURT OF APPEAL FOR ONTARIO

CITATION: Kinross Gold Corporation v. Cyanco Company, LLC, 2024
ONCA 441
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DOCKET: COA-23-CV-0885

Huscroft, Miller and Favreau JJ.A.

BETWEEN

Kinross Gold Corporation, Round Mountain Gold Corporation and
KG Mining (Bald Mountain) Inc.

Plaintiffs (Appellants)

and

Cyanco Company, LLC

Defendant (Respondent)

Bevan Brooksbank and Daphne Chu, for the appellants

Daniel Murdoch, Sam Dukesz and Emily Tessier, for the respondent

Heard: May 13, 2024

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated July 7, 2023, with reasons reported at 2023 ONSC 4058.

REASONS FOR DECISION

A. OVERVIEW

[1] The appellants are Kinross Gold Corporation, a global gold mining corporation, and two of its subsidiaries that operate mines in Nevada, Round Mountain Gold Corporation and KG Mining (Bald Mountain) Inc. (collectively, “Kinross”). The respondent, Cyanco Company, LLC (“Cyanco”), supplies Kinross with sodium cyanide for use in its gold mining operations.

[2] Sodium cyanide is an important compound in gold mining, used in a heavily diluted form – a solution of 0.01 to 0.05 percent – to leach gold from gold ore. Although it is heavily diluted in its operational end-use state, it is not delivered to mines in that state. Typically, it is either delivered in tankers as liquid sodium cyanide – at a dilution level of approximately 30 percent – or it is delivered as solid 98 percent sodium cyanide briquettes. Where a mine receives liquid sodium cyanide, it is pumped from the delivery tanker truck to the mine’s storage tanks. The liquid sodium cyanide is later diluted for the leaching process. Where a mine receives solid sodium cyanide the briquettes must first be dissolved at the mine to a 30 percent solution, and then stored in the mine’s storage tanks. Sodium cyanide, when stored as a liquid, is always stored as an approximately 30 percent solution to prevent it from crystalizing.

[3] At one time, the state of the industry in Nevada was that all sodium cyanide was shipped in solid form. This required facilities at the mine for on-site dilution

and storage. In the 1990s, Cyanco began to offer the option of shipping sodium cyanide in liquid form, which was a greater convenience to its customers. But because it is comparatively expensive to ship sodium cyanide as a liquid, this method of delivery is only economically feasible for mines in relatively close proximity to a sodium chloride plant. Cyanco's plant in Winnemucca, Nevada, served several mines in Nevada, including the two appellant mines owned by Kinross Gold Corp (Round Mountain Gold Corporation and KG Mining (Bald Mountain) Inc.).

[4] Cyanco entered into two contracts with Kinross Gold Corp. for the supply of sodium cyanide. One contract was entered into with Kinross Gold Corp. and the two appellant mines for the supply of liquid sodium cyanide to those mines for a "life of mine" term (the "Liquid Agreement"). The other contract was entered into with Kinross Gold Corp. and certain other mines located outside Nevada owned by Kinross Gold Corp. (the Tasiast, Chirano, and Fort Knox mines), and was for the supply of solid sodium cyanide for a 5-year term (the "Solid Agreement"). Negotiations were complex, and Cyanco made concessions on pricing for the Liquid Agreement in exchange for the "life of mine" term. The life of mine term was an important benefit to Cyanco, as it provided a measure of commercial certainty.

[5] The buyers' obligations under the Liquid Agreement are set out in section 20.1 of the Specific Purchase Conditions ("SPC") attached as a schedule to that agreement. In part, the provision states that Cyanco "shall be Buyer's sole supplier

of liquid sodium cyanide throughout the term of the Contract, and Buyer shall not separately contract supply which would be in conflict with this concept without prior written agreement from Seller.”

[6] Cyanco thus contracted to be the sole supplier of liquid sodium chloride to the two mines for as long as they were in operation. The pricing was set by an index in the Liquid Agreement, and Kinross was obligated to provide Cyanco with an annual forecast of the quantity of liquid sodium chloride it would require. The sole supply obligation was qualified in two respects. First, if Kinross sought to purchase liquid sodium cyanide in a quantity that exceeded Cyanco’s maximum volume obligation and Cyanco was unable or unwilling to provide the extra supply, then Kinross was free to source the product elsewhere. Second, Kinross was entitled to purchase a limited quantity of product from other suppliers “for the purpose of testing products purported to represent new technologies or developments in the field of sodium cyanide.”

[7] Kinross’ obligations to purchase were further qualified by a provision that stated that Kinross has “no obligation to purchase any minimum volume of Products or any Products at all from the Seller if the Site is not operating or if the Site does not for any other reason require liquid sodium cyanide.” Under s. 2.1.1 of the SPC, “Product” is defined as “liquid sodium cyanide as described in section 4 of this SPC”, which specified the product as “NaCN 30% (nominal) aqueous solution”.

B. THE DISPUTE

[8] On May 11, 2020, Kinross issued a request for proposals for the supply of solid sodium cyanide to all of its active mines, including the two appellant mines. Cyanco objected to this, on the basis that it had a contractual right to provide the sole supply of liquid sodium cyanide for the two appellant mines. Kinross then brought an application in the Superior Court for a declaration that the Liquid Agreement provided Cyanco with the right to the sole supply of liquid sodium cyanide only, and not solid cyanide. The application was later converted to an action. Kinross took the position that the Liquid Agreement did not preclude Kinross from discontinuing its use of liquid sodium cyanide and independently sourcing solid sodium cyanide to replace it.

C. THE TRIAL JUDGE'S REASONS

[9] The trial judge dismissed the action. He concluded that the Liquid Agreement obligated Kinross to purchase sodium cyanide exclusively from Cyanco for the life of mine term for each of the two appellate mines.

[10] The trial judge rejected Kinross' submission that the term "Product", as used in the Liquid Agreement, meant "liquid sodium cyanide" in any concentration. Rather, giving the words their "ordinary and grammatical meaning" he concluded the words were meant to indicate: "sodium cyanide in solution (as opposed to solid form) that would include liquid sodium cyanide sold and delivered as the 'Product'

(in a 30% concentration by weight) as well as, more broadly, sodium cyanide in solution at other concentrations.” The Product was therefore a particular specification of liquid sodium cyanide.

[11] This interpretation is the keystone for a textual analysis of the Liquid Agreement that the trial judge builds over the course of more than 40 paragraphs. The Liquid Agreement is complex, and it is not necessary to repeat the trial judge’s extensive analysis of the meaning of the several relevant provisions, an analysis that is informed by the evidence of how gold mines generally operate and how the two appellant mines specifically operate.

[12] After surveying all of the relevant provisions, the trial judge concludes that:

When I give the words used by the parties their ordinary and grammatical meaning, I conclude that Kinross is not obligated to purchase any Products (liquid sodium cyanide in a nominal 30% concentration and meeting other contractual specifications) if the Site is not operating or if the Site does not for any other reason require liquid sodium cyanide for its operations. Otherwise, Kinross has an obligation to purchase Products from Cyanco.

[13] The trial judge concluded from the evidence before him that given the existing state of technology, Kinross required liquid sodium cyanide for its operations. The fact that sodium cyanide could be delivered as a solid, did not change this. Even if sodium cyanide had been delivered as a solid, it would have to be dissolved, first to 30 percent in a holding tank, and then further diluted in operation. It therefore followed that if the mines were operating, and if liquid sodium

cyanide was needed for those operations, there was an obligation to purchase the Product from Cyanco.

D. ISSUES ON APPEAL

[14] Kinross argued that the trial judge erred in law in interpreting the Liquid Agreement by:

1. Failing to consider the Liquid Agreement as a whole and to give liquid sodium cyanide a consistent meaning;
2. Failing to interpret the Liquid Agreement in light of surrounding circumstances;
3. Failing to apply the “related contracts” principles of contractual interpretation; and,
4. Failing to assess commercial reasonableness in an objective manner.

E. ANALYSIS

The standard of review

[15] The Liquid Agreement is a non-standard contract. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50, the Supreme Court explained that appeals involving interpretations of contracts such as this most often raise questions of mixed fact and law, which are reviewable on the standard of palpable and overriding error. Where, however, a trial judge’s reasons reveal an extricable error of law, such errors are reviewable on a correctness

standard. However, *Sattva* urged courts to be “cautious in identifying extricable questions of law in disputes over contractual interpretation” as “the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific”: at paras. 54-55. Accordingly, “the circumstances in which a question of law can be extricated from the interpretation process will be rare”: *Sattva*, at para. 55.

(1) Failing to give “liquid sodium cyanide” a consistent meaning

[16] Kinross argues that the trial judge erred by giving “liquid sodium cyanide” shifting meanings, sometimes reading it as indicating a 30 percent solution, and sometimes as a 0.01 to 0.05 percent solution. This failure to attribute the same meaning to the same term is, Kinross says, an extricable legal error.

[17] The alleged error is based on a misreading of the trial judge’s reasons. On the trial judge’s reading of the Liquid Agreement, “liquid sodium cyanide” indicates sodium cyanide in a solution, regardless of the concentration. It is contrasted with solid sodium cyanide. The Product is a specification of liquid sodium cyanide – a 30 percent solution. The trial judge does not hold that liquid sodium cyanide sometimes means a 30 percent solution exclusively, and simultaneously means a 0.01-0.05 percent solution exclusively.

[18] The contract to be interpreted is complex and requires familiarity with the particulars of the gold mining industry in Nevada. The trial judge had the benefit of

expert evidence in this regard and had to make factual findings. This complexity is the reason the application was converted to an action. This is precisely the type of contractual interpretation that *Sattva* directs appellate courts to review on a deferential standard. Given that the trial judge made no error in principle, Kinross must establish that he made a palpable and overriding error. It has not done so.

(2) Failing to apply surrounding circumstances

[19] Kinross argues that the trial judge erred by first interpreting the Liquid Agreement without considering the surrounding circumstances, and then only considering the surrounding circumstances so as to confirm the interpretation made in isolation from them.

[20] This is not a sound reading of the trial judge's reasons. The trial judge's reasons are lengthy, detailed, and demonstrate a careful command of the evidence before him, including all the circumstances leading up to the negotiation of the contract. The trial judge clearly had the entirety of the factual matrix in view when interpreting the contract. The particular structure of the reasons for judgment – including a discrete section in which the trial judge explains how the surrounding circumstances support his interpretation of the contract – should not be taken as indicative that the trial judge had somehow compartmentalized and disregarded this same evidence in reasoning to his conclusions. This ground of appeal fails.

(3) Failure to apply the related contracts principle

[21] Kinross argues that the trial judge failed to interpret the Liquid Contract in light of the Solid Contract, which Cyanco made at the same time. There is nothing to this argument. The two contracts were not made between the same corporate entities. While the agreements both involved Cyanco and Kinross Gold Corp., the other mining entities involved were different. Additionally, the Liquid Agreement contains an “entire agreement” clause that expressly excludes any contemporaneous written agreements and states that there are no collateral contracts.

(4) Failing to assess commercial reasonableness in an objective manner

[22] Kinross argues that the trial judge erred in his application of the interpretative principle of commercial reasonableness – that a contractual interpretation that would lead to a commercially absurd result is presumed to be incorrect. The trial judge is said to have exclusively used Cyanco’s commercial interests as an indicium of reasonableness, rather than relying on an objective conception of commercial reasonableness and without referring to Kinross’ perspective. Again, we disagree. It is clear from the trial judge’s reasons that he assessed commercial reasonableness objectively and considered Kinross’ perspective on commercial reasonableness.

[23] Kinross has strained to fashion an error in principle out of a disagreement with the trial judge's application of the law to the facts that he found on the evidence before him. Without any error in principle, Kinross is required to identify a palpable and overriding error in the trial judge's analysis and it has not done so.

F. DISPOSITION

[24] The appeal is dismissed. The respondent is entitled to costs of the appeal in the amount of \$150,000, inclusive of HST and disbursements, as agreed among the parties.

“Grant Huscroft J.A.”

“B.W. Miller J.A.”

“L. Favreau J.A.”