CITATION: Centerra Gold Inc. v Entes Industrial Plants Construction, 2022 ONSC 5491
COURT FILE NO.: CV-22-00680400-00CL
DATE: 20220927

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF RULE 14.05(2) AND 14.05(3)(f) OF THE *RULES OF CIVIL PROCEDURE*

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF CENTERRA GOLD INC.

RE: Centerra Gold Inc. Applicant

AND:

Entes Industrial Plants Construction, Objector

Gebre LLC

Sistem Muhendislik Insaat Sanayi Ticaret S.A.

BEFORE: C. Gilmore, J.

COUNSEL: *Kent E. Thomson, Derek D. Ricci, Maureen Littlejohn, Alexander D. Rose, Eliot N. Kolers* and *Zev Smith*, Counsel, for the Applicant

Ryder Gilliland and *Corey Groper*, Counsel for Entes Industrial Plants Construction

Derek J. Bell, Katelyn Ellins and *Emma Cosgrave*, Counsel for Gebre LLC

H. Scott Fairley, N. Joan Kasozi, Salma Kebeich and *Darren Frank*, Counsel for Sistem Muhendislik Insaat Sanayi Ticaret, S.A.

HEARD: In Writing

COSTS ENDORSEMENT

Introduction

[1] Following my decisions in this matter released on July 28, 2022 and August 17, 2022, I requested that the parties provide written submissions on costs. Those submissions have

now been received. It should be noted that while Sistem Muhendislik Insaat Sanayi Ticaret S.A. filed materials in opposition to the Arrangement, they did not appear on the motion. No costs are sought against that entity.

[2] The Applicant sought Court approval of a Plan of Arrangement ("the Arrangement") with respect to the Kumtor Gold Mine located in the Kyrgyz Republic. Gebre LLC ("Gebre") and Entes Industrial Plants Inc. ("Entes") (together "the Objectors") objected to the Arrangement. Notwithstanding those objections, and for the reasons previously given, the Arrangement was approved.

[3] The Applicant has been wholly successful and now seeks its costs from the Objectors in the amount of $264,985 jointly and severally payable by the Objectors.

[4] The Objectors do not agree that the amount sought by the Applicant is proportionate. Further, they submit that the Applicant is barred from seeking or being awarded costs in this matter as a result of its failure to request costs in its Application, motion materials or oral submissions. Entes submits that if costs are awarded, they be apportioned equally between it and Gebres. Gebres submits that if costs are awarded the costs should be apportioned 75% to Entes and 25% to Gebres.

[5] For the reasons set out below, I award the sum of $100,000 jointly and severally payable by the Objectors within 30 days.

The Positions of the Parties

The Applicant

[6] The Applicant was entirely successful, and the Objectors should therefore expect to pay costs in the context of such an urgent and complex proceeding.

[7] Approval of the Arrangement was critical to the Applicant as it determined the future of the Kumtor Mine worth billions of dollars and also resolved billions in claims wrongfully made against the Applicant by the Kyrgyz Republic. The amounts paid by the Applicant in accordance with the terms of the Arrangement were significant.

[8] It was essential for the Applicant to sever its ties with the Republic given its ongoing exposure to the corruption, the takeover of the mine by a third-party manager (Mr. Bolturuk) without the consent of the Applicant, and the Applicant's ongoing liability with respect to the mining operation.

[9] The issues surrounding the Arrangement were commercially complex with critical timing components. The objections made by the Objectors added complexity, raised issues previously dealt with by this Court and were improper.

[10] The allegations made by the Objectors that the Arrangement was undertaken to insulate the Applicant from creditors or to thwart legitimate creditors of the Republic were found to be without evidentiary foundation by this Court.

[11] The Creditors insisted on pursuing certain arguments including their argument that KGC and the Republic were the same entity, that shares located outside Canada could be seized by the sheriff in Ontario and that payments to KGC could be garnished notwithstanding the worldwide stay of proceedings against KGC in the U.S. Chapter 11 proceedings.

[12] The Applicant submits that it did not address the issue of costs at the hearing because the Court specifically requested that it not do so given the limited amount of time available, and that costs would be dealt with in writing. This request was contained in an email sent by the Court to counsel on July 27, 2022.

[13] Costs were not sought in the Applicant's original Application because at the time of issuing the Application, there was no expected opposition. Only after a scheduling appearance with Justice Conway on June 21, 2022 was it made clear that Gebre would be opposing the Plan of Arrangement.

[14] As for the Entes matter, that was a motion brought by Entes against the Applicant and not pursued until after the scheduling appearance with Justice Conway. Given that the Applicant was the Respondent in that motion, it would be entitled to its costs in the ordinary course.

[15] For all of the above reasons, the Applicant seeks partial indemnity costs on an elevated scale of 70% being $264,985. Costs at the usual partial indemnity scale were $227,130. The Applicant submits that although two law firms were used, the Objectors were well aware of this, and that counsel worked efficiently to avoid duplication.

The Objectors

A. Entes

[16] Entes submits that because the Applicant did not seek costs in its Application or motion material, it is disentitled to receive costs. Entes relies on various cases including *Pelletier v. Canada (Attorney General),* 2006 FCA 418 (CanLII) at para 9, in which the Court said that if costs are not requested in the pleadings or at the hearing, the Court cannot award them.

[17] Entes also submits that the costs sought are excessive as there was nothing in Entes' behaviour in the litigation that warrants sanction resulting in the type of elevated costs award sought by the Applicant. The fact that the Court did not accept Entes' position or submissions does not, on its own, attract an elevated quantum of costs. Entes further noted that the Applicant engaged five lawyers to prepare for the hearing who collectively spent more than 153 hours while only one lawyer made submissions.

[18] By comparison, Entes noted that this Court awarded $310,000 in partial indemnity costs in the *Bolturuk* case (a related case also decided by Gilmore, J.) which involved a one-day hearing, multiple records and extensive cross-examinations.

[19] Entes requests that any costs award be apportioned equally between it and Gebres as being consistent with the approach generally taken by courts where multiple defendants are liable for costs. The Objectors presented a common front in which their issues were intertwined, and it would therefore not be reasonable to depart from the normal apportionment of costs between multiple defendants.

B. Gebres

[20] Gebres' position on the issue of the entitlement and the amount of costs sought by the Applicant is aligned with that of Entes.

[21] However, if costs are awarded against the Objectors, Gebres does not agree that such costs be equally apportioned. Gebres' position is that it was not a party to the Entes motion and did not seek garnishment relief against the Applicant. Entes' counsel was allocated twice the amount of time as Gebres' counsel in oral argument. Gebres submitted only a 25-page factum as it had not brought a separate proceeding like Entes which submitted a 40-page factum.

[22] Further, Gebres notes that Entes has appealed the order related to the Entes motion and that because the Entes matter was a separate proceeding, Gebres is not a party to the appeal.

[23] Given all of the above, Gebres submits that if costs are awarded, they should be apportioned 75% payable by Entes and 25% payable by Gebres.

Analysis and Ruling on Costs

[24] Costs of proceedings under the *Canada Business Corporations Act*, R.S.C. 1985, c C-44 ("*CBCA*") are awarded under s. 248. The provision reads, "[w]here this Act states that a person may apply to a court, the application may be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide, and subject to any order respecting notice to interested parties or costs, or any other order the court thinks fit" (emphasis added).

[25] The court in *Domglas Inc. v. Jarislowsky, Fraser & Co.* (1980), 13 B.L.R. 135 (Q.C.C.S), at para. 470 (on Westlaw), aff'd on this ground in (1982), 138 D.L.R. (3d) 521 (Q.C.C.A), at para. 36 interpreted this provision as leaving "the Court a wide discretion as to costs, giving it the jurisdiction to make any order as to costs it thinks fit. In this respect, as with regard to the other decisions made herein by the Court, the guiding principles will be fairness and equity."

[26] While there appears to be no traditional starting point for awarding costs under the *CBCA*, nor specific to awarding costs against creditors opposing a Plan of Arrangement, courts have set out some guiding principles. Most relevant to this case is the jurisprudence with respect to dissenting shareholders.

[27] In *Domglas Inc.*, the Court at para. 474 (on Westlaw) noted that it is

> [O]f the opinion that one of the functions of the awarding of taxable Court costs in proceedings under the provisions of s. 184 C.B.C.A., should be to encourage other corporations and their dissenting shareholders, on the one hand to make realistic offers and, on the other hand, to entertain reasonable expectations. Conversely, the aim must be to discourage other corporations from making unrealistic offers and their dissenting shareholders from making exorbitant demands.

[28] Further, in *Nunachiaq Inc. v. Chow* (1993), 79 B.C.L.R. (2d) 116, 8 B.L.R. (2d) 109 at para. 8, aff'd 1994 CanLII 2022 (BC CA) the Court noted that proceedings under *CBCA* s. 206 are clearly adversarial and, therefore:

> [A]n award of costs in this context must strike a balance that protects corporate shareholders (who generally are in a weaker financial position than the corporations involved), but discourage 'undue harassment of management through frivolous suits': see D.H. Peterson, *Shareholder Remedies in Canada* (1989), at p. 31; and *Domglas*, *supra*, at p.234.

[29] Perhaps the most factually analogous case is *Trizec Corp. (Re)* (1994), 21 Alta. L.R. (3d) 435 (ABQB). In this case, the Plan of Arrangement involved the acquisition by Horsham of an equity position in and control of the board of directors of Trizec. Similar to Centerra, the plan was the product of a desperate need to restructure and recapitalize or face bankruptcy. A group of unsecured creditors opposed the arrangement, while Trizec shareholders supported it. At no point was it suggested that the plan was not put forward in good faith. The plan was approved and no ruling as to costs was made, although counsel was invited to submit arguments.

[30] Recently, in *Taiga Gold Corp (Re)*, 2022 ABQB 290, Taiga sought the Court's approval of a Plan of Arrangement under s. 193 of the *CBCA*. The Respondent opposed the proposed Plan of Arrangement. The Court approved the proposed Plan of Arrangement and ordered no costs in the Application: at para. 79.

[31] On the other hand, there are examples where the objectors to an approved Plan of Arrangement were ordered to pay costs. The most notable example is in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 167 where the approval of the Plan of Arrangement was affirmed and the cross-appeals were dismissed, both with costs throughout.

[32] While it is clear that there is differing case law related to the ordering of costs against an Objector under a Plan of Arrangement, in the end it is a matter for this Court's discretion.

[33] The argument submitted by the Objectors that the Applicant is disentitled to costs because of the lack of notice is not accepted by this Court. The parties were put on notice by the Court that costs submissions would not be heard orally but were to be made in writing at a later date. Further, I accept the Applicant's submissions on the timing of both the Entes motion and the Gebres objections. That is, neither of the Objectors' positions with respect

to the Plan of Arrangement were crystallized until after the appearance before Justice Conway and, as such, could not have formed part of any relief in the Application.

[34] Further, I agree with the Applicant that it was a Respondent in the garnishment motion brought by Entes and is therefore entitled to costs as the successful party in the normal course.

[35] In exercising its discretion in ordering costs, the Court must advert to the parties' behaviour in the litigation and whether such behaviour unnecessarily prolonged matters or were an abuse of process. In this matter, I find that while the Objectors' positions were not accepted by this Court, they cannot be said to have been improper. An elevated scale of costs is therefore not required in this case.

[36] As for the quantum of costs, this is a case that was of great importance to the Applicant. Much hung in the balance with respect to the approval of the Arrangement. This is articulated throughout my reasons in both my endorsement and the more expansive reasons released later. Without the approval of the Arrangement, Centerra's value to its shareholders was at risk as was the possibility of ongoing liability in a country whose politics and justice system were entirely at odds with the Applicant.

[37] The objections must therefore be viewed through this lens of necessity and urgency. I might also add that had Entes been successful, the Applicant risked paying twice under its Agreement with the Republic in order to satisfy the garnishment.

[38] The amount of costs awarded must be fair, reasonable and proportionate. I do not find that the amount sought by the Applicant is either reasonable or proportionate. As pointed out by Entes in its submission, this Court awarded $310,000 to the Applicant in the *Bolturuk* case, a case which involved lengthy records, examinations and a full day hearing.

[39] The hearing in this matter took one-half day and had the benefit of using some of the material from the *Bolturuk* matter as well as a hearing by the same judge who was well aware of the background of the case and did not require lengthy explanations as to the urgency of the matter or its factual history.

[40] In the circumstances, I find that the amount of $100,000 in costs is both reasonable and proportionate to the length of the hearing, its complexity and importance to the Applicant, the Applicant's success and in consideration of caselaw cited above which supports that costs are often not awarded at all where objections are made to a Plan of Arrangement.

[41] Turning to the apportionment of costs, generally, unsuccessful plaintiffs are jointly and severally liable for costs unless the Court, in the exercise of its discretion, orders otherwise: *Meady v. Greyhound Canada Transportation Corp.*, 2013 ONSC 5568, 55 M.V.R. (6th) 120, at para. 90, aff'd 2015 ONCA 6, citing *King v. On-Stream Natural Gas Management Inc.* (1993), 21 CPC. (3d) 16 at para. 17. Put more directly by Wilson J. in *Sacks v. Ross*, 2016 ONSC 2498 at para. 56: "It is the law in Ontario that plaintiffs are jointly and severally liable for a costs order made against them. It is only in special circumstances that this principle should not be followed."

[42] Courts have held that an order for joint and several costs is appropriate where litigants jointly initiate and advance an unsuccessful proceeding or step in a proceeding. Specific factors must be present to justify a departure from the standard approach.: *Scala v. Toronto Police Services Board*, 2019 ONSC 4359 at para. 19, citing *Girgis-Boktor v. Reddy*, 2016 ONSC 7503 at para. 26.

[43] I see no reason to depart from the standard approach and believe costs should be awarded against the unsuccessful parties jointly and severally. The Objectors prosecuted a common cause of action in opposing Centerra's Plan of Arrangement. They maintained a commonality of interest, purpose, and objective in the litigation: *Scala*, at para. 18. I agree with Entes in that the parties "presented a common front."

[44] Gebre argues this is not an appropriate case for joint and several costs. It relies on *Filipovic v. Upshall*, [1998] O.J. No. 4498 cited in *Reddy* at para. 15 presumably for the proposition that parties must be "joined together in pursuit of like remedies arising from the same alleged cause of action and [be] all represented by the same counsel." I do not agree.

[45] I do not read *Filipovic* and *Reddy* as standing for the proposition that parties must be represented by the same counsel to be held jointly and severally liable. While it may be a factor relevant to a Court's discretion, it does not appear to be a dispositive factor.

[46] In *Reddy* - the case cited by Gebre - the Court does not appear to adopt that factor in reaching its decision to award joint and several costs against the unsuccessful parties. Perhaps most tellingly, the parties in *Reddy* found to be jointly and severally liable for costs were not represented by the same counsel.

[47] On my reading, *Reddy* works against Gebre. In conducting the analysis in *Reddy*, Stinson J. highlighted the fact the defendants "clearly supported each other in venture" in pursuit of a common goal: at para. 17. Paragraph 19 of the decision goes on to galvanize the relationship between the two unsuccessful parties and is worth reproducing in full as it is particularly applicable to Entes and Gebre:

> The relief sought was part of a strategy which all defendants chose to pursue. To again borrow the language of Shaw J. the defendants "acted together when it was in their benefit and should also be considered as one when it is to their detriment." In the wake of the unsuccessful result – and in light of the adverse costs consequences – Mr. Chew now seeks to distance and disassociate himself from that strategy. At the time, however, he was a willing participant. He may be unhappy with his decision to join forces with Mr. Reddy and may blame Mr. Reddy for persuading him to do so, but that is not properly a concern for the plaintiff – or the court.

[48] *Reddy* also counters Gebre's argument that Entes conducted twice as much oral argument as it did. Stinson J. gave little weight to the amount of oral argument each party was afforded and instead looked at the overall advancement of the common arguments: "As well, although Mr. Reddy presented most of the oral submissions on behalf of the

defendants, Mr. Chew was present in court throughout the argument and also participated (albeit to a lesser degree) in the oral argument": at para. 18.

[49] For that reason, I am not persuaded by Gebre's argument that joint and several liability is not appropriate in this case and would award costs against Gebre and Entes jointly and severally.

Orders

[50] Costs of $100,000 are awarded to the Applicant payable jointly and severally by the Objectors within 30 days.

C. Gilmore, J.

Date: September 27, 2022