

CITATION: Belokon v. The Kyrgyz Republic et al., 2015 ONSC 6641
COURT FILE NO.: CV-15-10890-00CL
DATE: 20151028

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: VALERI BELOKON, Applicant

AND:

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and
CENTERRA GOLD INC., Respondents

BEFORE: Justice W. Matheson

COUNSEL: Peter J. Cavanagh, for the Applicant

Matthew Latella, for the Respondent Kyrgyzaltyn JSC

HEARD: In writing.

COSTS ENDORSEMENT

JUSTICE W. MATHESON

[1] This costs endorsement arises from a motion brought by the respondent company Kyrgyzaltyn JSC (“KJSC”) to set aside, or alternatively vary, the March 5, 2015 order of Justice Wilton-Siegel continuing a mareva injunction that he granted *ex parte* on February 25, 2015 (the “Belokon Mareva”).¹

[2] By decision released on September 8, 2015, I ordered that the Belokon Mareva immediately be varied to substantially reduce the assets frozen under it, and further ordered that it be set aside entirely on September 28, 2015, among other orders.

[3] As the successful party, KJSC seeks \$138,144.10 in substantial indemnity costs, all inclusive. The applicant submits that a partial indemnity costs order in the amount of \$55,000, all inclusive, would be appropriate.

¹ Definitions from the motion decision, at 2015 ONSC 5570, are also used in this endorsement.

Applicable cost principles

[4] The general principles applicable to party and party costs are well settled. Costs are discretionary. Rule 57.01 of the *Rules of Civil Procedure* sets out factors I may consider in exercising my discretion, in addition to the result of the proceeding and any written offers to settle. Overall, the objective is to fix an amount that is fair and reasonable, having regard for, among other things, the expectations of the parties concerning the quantum of costs: *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634, 71 O.R. (3d) 291 (C.A.) at paras. 26, 38.

[5] Certain general principles have now been expressly articulated in subparagraphs (0.a) and (0.b) of Rule 57.01, specifically the principle of indemnity and the affirmative obligation to consider the amount of costs than an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

[6] After the hearing of the motion, I ordered that the parties exchange bills of costs the next day, which they did. The applicant relies on his partial indemnity bill of costs provided at that time. It indicates that the applicant's partial indemnity costs were \$52,420.70 for fees, plus disbursements of \$981.71, totaling \$53,402.41. The applicant submits that this bill of costs is indicative of his reasonable expectations.

[7] The applicant also relies upon a costs order that arises from another motion in this application that was heard that same week, in which costs were fixed at \$25,000. I also heard that matter and note that the quantum of costs was agreed to between the parties to that motion. Bearing in mind the differences between the two motions, I do not place significant weight on the quantum of that costs award. The parties also made submissions about costs awards made in the *Sistem* and *Stans* proceedings.

[8] While no formal offers to settle have been put forward, KJSC relies upon the failure of the applicant to consent in a timely way to the reduction of the amount of assets frozen by the Belokon Mareva. In response, the applicant submits that the Belokon Mareva itself allowed KJSC to move to vary the amount, and KJSC did not do so until it brought this motion and made that claim for alternative relief. After this motion was brought, the applicant did consent, although not to the manner in which the reduction would be accomplished as between the cash and the shares.

[9] I have taken into account the timing and scope of the consent to reduce the amount of the assets frozen under the Belokon Mareva. However, I do not conclude that those matters justify an award of costs on a substantial indemnity basis. Nor do I conclude that there has been other conduct that makes this one of the rare cases that justifies that higher scale. An award of partial indemnity costs is more appropriate.

[10] The amount claimed by KJSC on a partial indemnity basis is \$91,442.99 plus disbursements of \$979.62.

[11] I have considered all of the relevant factors under Rule 57.01 and all of the parties' submissions in the exercise of my discretion. Without limiting that consideration, I note the following:

- (1) the parties agree that this was an important matter and that KJSC, as the successful party, should receive an award of costs;
- (2) a very large amount was at stake, exceeding \$60 million;
- (3) KJSC obtained the immediate release of over \$30 million in assets and the subsequent release of the remaining assets subject to further order of the court;
- (4) the judicial history of the Belokon Mareva, as it related to the overlapping proceedings in relation to the Sistem Award, the Stans Award, the Sistem Declaration Order and the Stans Mareva, was complex; and,
- (5) despite that complexity, from the standpoint of the reasonable expectations of the unsuccessful party, the amount claimed is high.

[12] Bearing everything in mind in the exercise of my discretion, I order costs be paid by the applicant to KJSC in the amount of \$75,000 for fees, \$979.62 for disbursements and any applicable HST.

Justice W. Matheson

Released: October 28, 2015