CITATION: Bayens v. Kinross Gold Corporation, 2013 ONSC 4974
COURT FILE NO.: 12-CV-448651CP
DATE: July 26, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
E. EDDY BAYENS, JOHN SINCLAIR, LUC FORTIN, PIERRE RACICOT and STANLEY SHORTT, in their capacity as TRUSTEES OF THE MUSICIANS' PENSION FUND OF CANADA Plaintiffs	*Celeste Poltak* and *Jonathan Bida*, for the Plaintiffs *Joel Rochon* and *Remissa Hirji* for Harbour Fund II, L.P. and Harbour Litigation Funding Ltd.
– and –	
KINROSS GOLD CORPORATION, TYE W. BURT, PAUL H. BARRY, GLEN J. MASTERMAN and KENNETH G. THOMAS Defendants	*Mark Gelowitz* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: July 22, 2013

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiffs, E. Eddy Bayens, John Sinclair, Luc Fortin, Pierre Racicot, Stanley Short, in their capacity as trustees of the Musician's Pension Fund of Canada, bring this motion for approval of a litigation funding agreement with Harbour Fund II, L.P. ("HF2").

[2] The Defendants, Kinross Gold Corporation, Tye W. Burt, Paul H. Barry, Glen J. Masterman, and Kenneth G. Thomas, do not oppose the motion for approval of the litigation funding agreement.

[3] For the reasons that follow, I grant the motion.

B. FACTUAL BACKGROUND

[4] HF2 is a limited partnership with $191 million available to invest in commercial litigation and arbitrations worldwide. Harbour Litigation Funding Limited is headquartered in London, England, and it acts as investment advisor to HF2. They are authorized and regulated by the Financial Conduct Authority, the regulator for financial services in the United Kingdom. HF2 is a founding member of the Association of Litigation Funders of England and Wales, the regulatory body responsible for litigation funding in England and Wales.

[5] HF2 is an experienced litigation funder in the United Kingdom having reviewed over 1,500 disputes for funding for cases in the UK, Bermuda, the British Virgin Islands, the Channel Islands, Hong Kong, New Zealand and the United States. It should, however, be noted that as far as I am aware this litigation funding experience is mainly for plaintiffs in regular litigation. I am not aware of the extent of HF2's experience in funding class actions, which raise some unique considerations.

[6] Members of the Litigation Funding Association have adopted the Code of Conduct for litigation funders, which sets out standards of best practice and behavior for litigation funders in England and Wales. The Code of Conduct includes provisions that ensure (i) non-interference in litigation; (ii) confidentiality; and (iii) capital adequacy of litigation funders.

[7] The Plaintiffs are the trustees of the Musicians' Pension Fund of Canada, and thus, practically speaking, the Plaintiff is the Musicians' Pension Fund

[8] The Pension Fund brought this securities action on behalf of purchasers of Kinross Gold Corporation shares between February 16, 2011 and January 16, 2012. The Pension Fund alleges that Kinross Gold and four of its current and former senior officers, Tye W. Burt, Paul H. Barry, Glen J. Masterman, and Kenneth G. Thomas, made misrepresentations in the company's public filings. The Pension Fund advances claims at common law and under the Ontario *Securities Act*, R.S.O. 1990, c. S.5.

[9] The Pension Fund's motions for certification and for leave to commence its statutory claims under the *Securities Act* are scheduled for four days - October 22-25, 2013. All steps leading up to the certification and leave motion have been completed but for the exchange of facta.

[10] The Pension Fund was not prepared to proceed with its proposed class action (a) without a contingency fee agreement and (b) if it was exposed to an adverse costs award.

[11] At the outset of the proposed class action, the Pension Fund retained Koskie Minsky LLP as its lawyers, and the law firm agreed to take on the retainer pursuant to a contingency fee agreement, which has been disclosed to the court in the material filed for this motion. The contingency fee agreement is subject to court approval, and ultimately the court supervises and determines Class Counsel's legal fees under the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[12] Although Koskie Minsky was prepared to take on the risk of a contingency fee retainer, it was not prepared to agree to indemnify the Pension Fund from any adverse costs award, and thus, from the outset of the action, Koskie Minsky sought to secure funding for any adverse costs awards made against its client, the Pension Fund.

[13] In June 2012, the Pension Fund applied to the Ontario Class Proceedings Fund for funding for this action. The Class Proceedings Fund considered the application for 6 months, but ultimately determined in the late fall of 2012 not to provide funding.

[14] After the rejection of the funding application, Koskie Minsky then approached Harbour Litigation Funding Limited to provide funding for the adverse costs in this action. Harbour Litigation Funding Limited considered the request over several months, and ultimately it decided to fund the action through one of its investment funds, HF2. Koskie Minsky then negotiated the terms of the litigation funding agreement over the course of several more months.

[15] On May 30, 2013, the Pension Fund entered into the funding agreement, whereby HF2 would provide an indemnity in respect of adverse costs award and in return, receive a fixed percentage of any net recovery in favour of the class. The funding agreement provides that HF2 will provide an indemnity for adverse cost awards in an amount up to $1 million for the motions for certification and leave and $5 million afterwards, in respect of any common issues trial. In return, if the action succeeds, HF2 would be repaid any adverse costs it paid and receive a percentage of net recovery to the class (net of class counsel fees, taxes, and disbursements and administration and notice costs). HF2 would receive 7.5% of any net recovery if the action is resolved before certification or 10% of net recovery if resolved afterwards.

[16] The funding agreement requires Koskie Minsky periodically to report to HF2 regarding the progress and status of the action. However, the Plaintiffs maintain sole control over the litigation. The agreement provides:

> The Claimants [the plaintiffs] shall have control over the conduct of the Proceedings and, in accordance with the Overriding Objective, shall have the right to conduct the Proceedings as the Claimants consider appropriate, including the right:
>
> (a) to compromise the Causes of Action and/or the Proceedings against any Defendant on any terms they consider appropriate; and
>
> (b) to abandon, withdraw or discontinue the Proceedings or any part of the Proceedings;

[17] The funding agreement imposes a duty of confidentiality on HF2 in respect of any information or material it receives in the action. HF2 is required to return and destroy any such information or material at the end of the action.

[18] The Defendants were advised about the litigation funding agreement and their position was that they would not oppose the agreement provided that it was term of the order approving the litigation funding agreement that HF2 post security for the costs for which it had agreed to be the indemnifier. HF2 agreed to post security for costs at different stages of the action as follows:

> (i) $300,000 CDN on or before August 22, 2013;
>
> (ii) an additional $700,000 CDN by no later than 30 days after any order certifying this proceeding as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and

> (iii) an additional $2,000,000 CDN by no later than 90 days prior to the scheduled trial date;

[19] Koskie Minsky views the funding agreement as a reasonable alternative to the Class Proceeding Fund and as fair to both the Plaintiffs and the class as a whole.

C. DISCUSSION

[20] The *Class Proceedings Act, 1992* is a procedural statute designed to enhance access to justice, and one of the matters that the *Act* addresses is the barrier to access to justice of an adverse costs award.

[21] Although favourable costs awards encourage access to justice, the normal exposure of a litigant to an adverse costs award discourages access to justice, because the risks of the litigation overwhelm the rewards, and this is particularly true in most class actions where an individual claimant's recovery will be very modest compared with the risk of an adverse costs award. For example, in a class action where the classes' claim in the aggregate is $100 million, a class member with a $100 individual claim would not and could not sensibly take on the risk of paying a defendant its costs of successfully defending the action.

[22] A no-costs regime is the most direct means to address the economic barrier caused by an adverse costs award. This approach was recommended by the Ontario Law Reform Commission in its foundational report that led to the enactment of Ontario's class action legislation. See: Ontario Law Reform Commission, *Report on Class Actions* (1982).

[23] However, against the recommendation of the Commission, but with the recommendation of the Attorney General's Advisory Committee on Class Actions Reform (Report, February 1990), the Legislature rejected a no-costs regime for Ontario. The normal "loser pays costs" regime applies in Ontario with modest modification. Section 31 of the *Class Proceedings Act, 1992* maintains the loser-pays principle but encourages the court to consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest, in which circumstances, the court has the discretion to order that there be no costs awarded to a successful defendant. Section 31 states:

> *Costs*
>
> 31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.
>
> *Liability of class members for costs*
>
> (2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.
>
> *Small claims*
>
> (3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

[24] Instead of employing a no-costs regime, the Ontario Legislature responded to the problem of the economic barrier of an adverse costs award by introducing funding from the Class Proceedings Fund of the Law Foundation of Ontario. The Law Foundation is established under s. 53 of the *Law Society Act*, R.S.O. 1990, c. L.8. Among its functions is the administration of the Class Proceedings Fund, which was established by the Legislature as part of the class proceedings regime introduced by the *Class Proceedings Act, 1992*.

[25] A representative plaintiff may apply to the Law Foundation to ask that the Fund be responsible for the disbursements of an action, and if the Class Proceedings Committee of the Law Foundation agrees to provide this funding, then the Law Foundation becomes liable for the defendant's costs in the proceeding should the defendant be entitled to costs and should the defendant apply to the Foundation for payment of them. A defendant who is entitled to make an application may not recover any part of the costs award from the plaintiff: *Law Society Act*, s. 59.4(3); *Garland v. Consumers Gas*, [2004] 1 S.C.R. 629.

[26] In determining whether to provide support and thus shield the representative plaintiff from costs and expose itself to a corresponding liability, the Class Proceedings Committee is directed by the *Law Society Act* and the related regulations to have regard to: (a) the merits of the plaintiff's case; (b) whether the plaintiff has made reasonable efforts to raise funds from other sources; (c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded; (d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; (e) any other matter that the Committee considers relevant; (f) the extent to which the issues in the proceeding affect the public interest; (g) the likelihood that the proceeding will be certified; and (h) the available money in the fund. See: *Law Society Act*, ss. 59.2-59.3; Ont. Reg. 772/92. s. 5.

[27] If the representative plaintiff's class action succeeds, then pursuant to Ont. Reg. 771/92, there is a levy payable to the Class Proceedings Fund equal to the sum of the amount of any financial support paid for disbursements and 10 per cent of the amount of the award or settlement funds to which one or more persons in the class is entitled.

[28] Pausing here, in the case at bar, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding for this action. The Class Proceedings Fund has limited resources, and it is not obliged to accept all applications. Why, the Class Proceedings Fund rejected this application is not known. Although the Committee may consider the merits of the plaintiff's claim in determining whether to support the action, in my opinion, the Class Proceedings Fund should not be regarded as a filtering mechanism to determine what class actions are worthy or unworthy to be financially supported by third-party funders.

[29] In any event, in the case at bar, the Pension Fund did not receive the support of the Fund, and it was confronted with the reality that it was exposed to an adverse costs award. Historically, for the circumstance where the Class Proceedings Fund is not involved, plaintiffs have turned to their lawyers to not only act on a contingency fee basis but to agree to indemnify the representative plaintiff in the event that an adverse costs award were to be made, and historically, many class actions have proceeded with Class Counsel agreeing to indemnify the representative plaintiff.

[30] Indeed, it became the conventional wisdom that Class Counsel, who have far more to gain from a class action than the individual class members or the representative plaintiff, would be negligent or unethical if they allowed their client, the representative plaintiff, to assume a potentially catastrophic financial risk. Thus, historically, indemnities from Class Counsel have moved from being an open secret to the norm.

[31] Anecdotal evidence suggests that indemnity agreements became more popular than resorting to the Class Proceedings Fund. In any event, some form of funding for adverse costs is, as a practical matter, a necessity in most every class proceeding. As Justice Strathy recognized in *Dugal v. Manulife Financial Corporation* 2011 ONSC 1785 at para. 28, no "rational" plaintiff in a class proceeding would risk an adverse cost award that would far exceed his or her potential recovery in the action.

[32] The approach of an indemnity from Class Counsel was likely unforeseen by the Law Reform Commission and by the Ontario Legislature when it enacted the *Class Proceedings Act, 1992* and established the Class Proceedings Fund. It is certain that the promoters of class proceedings did not foresee the astronomical size of the adverse costs awards that have been awarded in class proceedings, which have substantially intensified the risk and the associated barrier to access to justice.

[33] The impact of these astronomical costs awards is apparently now having an impact on whether Class Counsel is prepared to provide the indemnity the representative plaintiff usually needs in order to bring a class action on behalf of the class members. The impact is that Class Counsel are no longer as willing to assume both the risks associated with a contingency fee agreement and also the risk of the indemnity for a catastrophically high adverse costs award. As a consequence, and as illustrated by the case at bar, plaintiffs and class counsel have looked for an alternative to the Class Proceedings Fund and to indemnities from Class Counsel. (Another alternative is to start a class action in another jurisdiction that does not impose a loser pays costs regime.)

[34] The new alternative is funding from a third party funder, and the current state of affairs in that courts in Ontario have come to accept and have approved the use of third party funders. Third party funding of class proceedings is permitted in Ontario as an appropriate manner of allowing plaintiffs and class counsel to mitigate the substantial litigation risks in class proceedings. There have been two Ontario class proceedings where the court has approved third party funding arrangements. See: *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 and 2011 ONSC 3147 and *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937.

[35] It may be wise for the Legislature to revisit whether any of this is what it intended when it rejected the Law Reform Commission's recommendation that class actions be governed by the loser pays principle. In the meantime, the court is now challenged with developing the jurisdiction to determine when third party funding should be approved for a particular case.

[36] This challenge is exacerbated by the difficulty illustrated by the case at bar that the motion for approval may be an unopposed motion.

[37] In the case at bar, although the Defendants do not consent, they do not oppose third party funding for the obvious reason that they have been appeased by the term of the court's

approval that security for costs be posted. Thus, courts have been left to develop the approval criteria for third party funding largely on their own initiative, relying on common sense, knowledge of the problems of access to justice and of the administration of justice, and academic commentary. Justice Leitch's pioneering work in *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (S.C.J.) was very valuable in developing criteria as was Justice Strathy's work in *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 and 2011 ONSC 3147, and I attempted to make a contribution in *Fehr v. Sun Life Assurance Company of Canada* 2012 ONSC 2715.

[38] Funding agreements have been approved in England and Australia: *Arkin v. Borchard Lines Ltd. And Others*, [2005] 1 W.L.R. 3055 (C.A.); *Campbells Cash and Carry Pty Ltd.*, 229 C.L.R. 386, (Aus. H.C.); *QOSX Ltd. v. Ericksson Australia Pty. Ltd. (No. 3)*, [2005] F.C.A. 933 (Aus. F.C.); see also R. Mulheron and P. Cashman, "Third Party Funding: A Changing Landscape" (2008) 27 C.J.Q. 312.

[39] Based on the Canadian case law, I am satisfied that the third party litigation funding agreement in the case at bar should be approved. Put somewhat differently and more cautiously, I am satisfied that third party litigation funding agreements are approvable and that there is reason to approve and no known reason not to approve the agreement in the case at bar.

[40] A note of caution is necessary because the concept of third party funding is a work in progress and subsequent cases may identify problems that I have overlooked.

[41] To be more expansive, I can extract the following principles from the developing case law that support the conclusion that the court should approve the funding agreement in the case at bar:

- Third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis.
- Plaintiffs must obtain court approval in order to enter into a third party funding agreement.
- A third party funding agreement must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The third party agreement is itself not a privileged document.
- The court has the jurisdiction to make an approval order binding on the class pre-certification of the class: *Fehr v. Sun Life Assurance Company of Canada* 2012 ONSC 2715; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785; *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (S.C.J.), *contra*.
- To be approved, the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members.

- To be approved, the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
- Before approving a third party funding agreement, the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to Class Counsel in the best interests of the class members. (To speak colloquially, the concern is that insulated from an adverse costs award and with a modest individual claim to compensation, the representative plaintiff will not have any "skin in the game" with a resultant diminished commitment to advance the class action on behalf of the class.)
- Before approving a third party agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members' access to justice.
- In seeking approval for a third party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund for funding. If, however, approval from the Fund is sought and refused, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding.
- Before approving a third party agreement, the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award. (This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund's percentage uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable.)
- To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.
- It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant's costs. (Whether this should be a necessary term in every case has not been determined in the case law.)

[42] For the above reasons, I approve the litigation funding agreement in the case at bar.

[43] Order accordingly. There should be no order as to costs.

Perell, J.

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