

CITATION: Growthworks WV Managements Ltd. v. Growthworks Canadian Fund Ltd., 2019
ONSC 4691
COURT FILE NO.: CV-13-10279-00CL
DATE: 20190808

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Growthworks WV Management Ltd., Plaintiff

AND:

Growthworks Canadian Fund Ltd., Defendant

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Melvyn Solmon and Nancy J. Tourgis*, for the Plaintiff

Geoff R. Hall and Atrisha Lewis, for the Defendant

HEARD: In Writing

COSTS ENDORSEMENT

[1] In this proceeding, the Former Manager's claim for an alleged breach of the Management Agreement by the Fund was denied and the Fund's counterclaim for damages arising from a breach of the Management Agreement by the Former Manager was also denied as statute barred. In addition, the Court addressed the validity and quantification of: (1) certain claims of the Former Manager under the Management Agreement arising on its termination and in respect of certain transition services; and (2) certain damage claims of the Fund arising in respect of the Former Manager's management obligations under the Management Agreement and in respect of transition costs (collectively, the "remaining claims"). In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Court's Reasons for Judgment dated May 18, 2018 (the "Reasons for Judgment").

The Positions of the Parties

[2] The Fund seeks costs of \$906,680.57 on an all-inclusive basis. The Fund served an offer on February 24, 2017 pursuant to which each party would consent to a dismissal of all claims between them on a without costs basis and would exchange full releases (the "Offer"). The Fund suggests that the net result to the parties after the trial was substantially identical to the net result contemplated by the Offer. On this basis, the Fund has calculated its costs on a partial indemnity basis to the date of the Offer and on a substantial indemnity basis thereafter.

[3] The Former Manager submits that neither party was successful and therefore no costs should be awarded. Alternatively, it suggests that any costs in favour of the Fund should be limited to the Fund's costs incurred on a partial indemnity basis in respect of the expert evidence pertaining

to the Former Manager's breach of the Standard of Care, which was the principal issue in this proceeding.

Overview of the Litigation for the Purposes of this Award

[4] In my view, this proceeding effectively involved three separate proceedings – the Former Manager's claim, the Fund's counterclaim and the remaining claims. Based on the time devoted to these matters at the trial, I consider that 50% of the time was spent on the Former Manager's claim, 35% was spent on the Fund's counterclaim including the damage calculations and 15% was spent on the remaining claims.

Determination of the Proceedings for Which Costs are Awarded

[5] I agree that the Court should take into consideration the Fund's Offer for the reason that, had it been accepted, the parties would have reached a substantially similar economic outcome without having incurred the expense of the two-week trial. However, I do not think that it is appropriate to consider the entirety of the Fund's fees for the following reasons.

[6] First, the Fund's counterclaim was found to be statute barred for the reasons cited in the Reasons for Judgment which were intimately connected to the Fund's claim that the Former Manager breached the Standard of Care required of it under the Management Agreement. This was a necessary consequence of the fact that the Board and the Former Manager shared responsibility for governance of the Fund. In my view, it should have been clear that the Fund's counterclaim would fail if the Fund successfully defended the Former Manager's claim of breach of the Management Agreement. Accordingly, it would not be appropriate to award costs in respect of the counterclaim on the basis that these costs could have been avoided if the Former Manager had agreed to a dismissal without costs of its claim.

[7] On the other hand, I also do not think that the Former Manager should be awarded any costs in respect of the Fund's counterclaim. The counterclaim was dismissed as a result of inaction by the Board rather than any action on the part of the Fund, let alone any defence on the merits. Given the finding on the principal issue in this litigation that the Former Manager breached the Standard of Care to the detriment of the shareholders of the Fund, I do not think that the Former Manger should be entitled to costs against the Fund for the consequences of the Board's failure to assert the Fund's counterclaim in a timely fashion.

[8] Lastly, a trial was clearly necessary to resolve the remaining claims which were wholly unrelated to the issues in either the Former Manager's claim or the Fund's counterclaim. Further, on an aggregate basis, neither party was materially more successful than the other in respect of the remaining claims. While the amounts of the claims awarded to each of these parties was large, being approximately \$1.3 million in each case, the net payment arising after determination of these claims was less than \$24,000, which was owed by the Fund to the Former Manager. Accordingly, I am of the view that no costs should be awarded in respect of the costs of either party in respect of the remaining claims.

Scale of Costs Awarded to the Fund

[9] This leaves the Fund's claim for costs in respect of the Former Manager's claim, which amounts to \$453,340.28 based on the allocation set out above. As mentioned, this amount is calculated using a substantial indemnity scale after the date of the Offer. The Fund's position is, as mentioned, that these costs would have been avoided if the Former Manager had accepted the Offer.

[10] The Former Manager says that the Court's judgment was not as favourable as the Offer, given that the Offer contemplated an absolute release of all IPA amounts. The parties agree that the issue of any potential claim for IPA Dividends based on a Dissolution Event as defined in the Articles of Amendment for the Class C Shares was not before the Court in this proceeding. I note that the Court is not in a position to assess the extent to which the preservation of this claim is meaningful.

[11] Given the approach to costs in this endorsement and the treatment of the IPA Dividends in the Offer, it is not clear that r. 49.10(2) of the *Rules of Civil Procedure* applies to the Offer. In any event, to the extent it does apply, r. 49.10(2) would provide for costs consequences which differ from those sought by the Fund.

[12] In my view, the Fund should be entitled to its costs in respect of the Former Manager's claim as the successful party. However, such costs should be awarded on a partial indemnity basis given that the Offer was more extensive in respect of the IPA Dividends than was addressed by the Court in this proceeding.

Quantification of Costs Awarded to the Fund

[13] In determining the amount of the costs awarded, I have had regard to the following considerations.

[14] First, this was a complex commercial matter involving extensive productions and expert opinions.

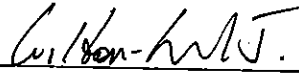
[15] Second, the issues were very important to both parties who engaged in very thorough litigation as a result.

[16] Third, the two preceding considerations justified the use of senior counsel on both sides. There is no suggestion from the Former Manager that the Fund's use of counsel was unreasonable.

[17] Fourth, productions in this proceeding appear to have occurred on an episodic basis over a long period of time culminating in significant productions shortly before trial. I do not attribute this to any particular party. I merely note that this appears to have increased the costs for each party.

[18] Fifth, the Former Manager has not raised any issue regarding the quantum of costs sought by the Fund. More significantly, it has also not provided the Court with its own costs outline which would provide some evidence of its own reasonable expectations. On this basis, I assume that the costs sought by the Fund fall within the Former Manager's reasonable expectations.

[19] Based on the foregoing, I find fair and reasonable costs of the proceeding to be \$400,000 on an all-inclusive basis payable by the Former Manager to the Fund forthwith.



Wilton-Siegel J.

Date: August 8, 2019