

CANADA / JUDGMENT

Eastern Platinum Limited v. Cameron

2020 BCSC 1353

COURT

Supreme Court of British Columbia

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2020 BCSC 1353 Eastern Platinum Limited v. Cameron

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eastern Platinum Limited v. Cameron,

2020 BCSC 1353

Date: 20200817

Docket: S186503

Registry: Vancouver

Between:

Eastern Platinum Limited, Eastplats Acquisition Co. Ltd.

and Eastern Platinum Holdings Limited

Plaintiffs

And

Gregory MacFarlane Cameron, David Cohen, Horng Dih Lee,

Robert Gayton, Gordon Keep, J. Merfyn Roberts and Ian Rozier

Defendants

And

Eastern Platinum Limited

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice M. Taylor

Oral Judgment on Application to Amend a Notice of Civil Claim
and Add Parties

In Chambers

Counsel for the Plaintiffs:

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C.R. Phillips

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Counsel for the Defendants D. Cohen, H. Lee, R. Gayton, G. Keep, J.M. Roberts and I. Rozier:

U. Radoja

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Place and Dates of Hearing:

Vancouver, B.C.

June 18-19 and July 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2020

[1] THE COURT: Thank you for appearing this morning. Recognizing the tight timelines and the approaching trial date, and taking into account the additional time required to finalize written reasons, I have decided to issue these reasons orally.

Introduction

- [2] This is an application by the plaintiffs, Eastern Platinum Limited ("EPL"), Eastplats Acquisition Co. Ltd. ("EACL") and Eastern Platinum Holdings Limited ("EPHL"), for leave to:
1. file an Amended Notice of Civil Claim (the "Proposed ANOCC") pursuant to Rule 6-1(1)(b) of the Supreme Court Civil Rules (the "Rules");
 2. add Maluti Services Ltd. ("Maluti") and Jazz Financial Ltd. ("Jazz") as additional defendants in these proceedings pursuant to Rule 6-2(7) of the Rules; and

3. amend the style of cause to reflect the foregoing additions.

Procedural Background

- [3] The original Notice of Civil Claim (the "NOCC") was filed on June 6, 2018. The defendants David Cohen, Horng Dih Lee, Robert Gayton, Gordon Keep, J. Merfyn Roberts, and Ian Rozier (the "Cohen Defendants") filed a Response to Civil Claim and Counterclaim on September 5, 2018. Gregory MacFarlane Cameron, who was represented by separate counsel from the Cohen Defendants, filed a Response to Civil Claim and Counterclaim on September 26, 2018. The plaintiffs filed a Response to Counterclaim on October 17, 2018.
- [4] A 19-day trial of this action is scheduled to commence on September 28, 2020.
- [5] This is a complex commercial case, and there has been extensive document disclosure to date. Examinations for discovery have been conducted but are not yet complete. A decision on a document disclosure application argued before me by the Cohen Defendants in July, 2020 is pending, and there have been indications from counsel that a further application on privileged documents may be forthcoming.
- [6] In a Case Plan Order dated January 16, 2020, Mr. Justice Groves made a number of orders with respect to scheduling document disclosure and examinations for discovery, including an order that any party wishing to amend its pleadings deliver such amendments to the other parties by March 13, 2020 (the "Case Plan Order").
- [7] On March 13, 2020, in accordance with the Case Plan Order, the plaintiffs delivered the Proposed ANOCC to the defendants. On April 9, 2020, the Cohen Defendants advised the plaintiffs of their objection to a substantial number of the amendments in the Proposed ANOCC. Mr. Cameron also advised that he opposes many of the same amendments in the Proposed ANOCC in addition to certain specific amendments pertaining to him personally.
- [8] In March, 2020 I was assigned to be the case management judge for this action.

The Nature of the Claim

- [9] The following summary of the background facts is drawn from the NOCC and uncontested portions of the Proposed ANOCC. I make no findings of fact. The facts are lengthy, and I will endeavour to summarize only the relevant ones for the purpose of this application.
- [10] The plaintiff EPL is a public mining company amalgamated under the laws of British Columbia. The plaintiffs EACL and EPHL are wholly owned subsidiaries of EPL, both incorporated in the British Virgin Islands.
- [11] The defendants are former directors or senior management of EPL. David Cohen was CEO, President and Chair of the EPL Board of Directors from April 25, 2005 to July 5, 2016. Ian Rozier was a co-founder, former CEO and President of EPL and a director from April 25, 2005 to July 5, 2016.

- [12] Horng Dih Lee was Chief Financial Officer of EPL from November 15, 2007 to July 5, 2016, and Corporate Secretary from November 15, 2007 to July 15, 2016. Gregory MacFarlane Cameron was a director of EPL from September 11, 2015 to July 5, 2016. Robert Gayton, Gordon Keep and J. Merfyn Roberts were directors of EPL from 2008, 2005 and 2006 respectively, until July 5, 2016.
- [13] Maluti is a British Columbia company wholly owned by Mr. Cohen. Jazz is a British Columbia company wholly owned by Mr. Lee. Sterling West Management Ltd. ("Sterling") is a company that the plaintiffs allege had certain dealings with Mr. Lee and/or Mr. Cohen. Buccaneer Management Inc. ("Buccaneer") is a British Columbia company wholly owned by Mr. Rozier.
- [14] EPL directly and indirectly owns a number of platinum group metals and chrome properties in South Africa. These include the Crocodile River Mine ("CRM"), the Kennedy's Vale project ("Kennedy's Vale"), the Spitzkop project ("Spitzkop") and the Mareesburg project ("Mareesburg") (collectively, the "EPL Assets").
- [15] Under South African law, mining operations are required to be carried on in conjunction with historically disadvantaged black economic empowerment partners (the "BEEs"). In relation to the EPL Assets, the BEEs with interests held these interests through certain shareholdings (the "BEE Minority Interests") in EPL's corporate ownership that was established to hold the relevant mining assets, including Lion's Head Platinum (Pty) Ltd. ("Lion's Head") with respect to Mareesburg, Gubevu Consortium Investment Properties (Pty) Ltd. ("Gubevu") with respect to CRM and Kennedy's Vale, and Afriminerals Holdings (Pty) Ltd. ("Afriminerals") with respect to Spitzkop.
- [16] In 2015 EPL management and Hebei Zhongbo Platinum Co. Ltd. ("HZIP") negotiated certain share purchase agreements (the "HZIP SPAs"), pursuant to which EPL would sell its interests in the EPL Assets to HZIP. The HZIP SPAs provided that the plaintiffs would use the purchase consideration to concurrently purchase the BEE Minority Interests. This proposed purchase of the BEE Minority Interests was not with the BEE partners themselves but with two separate entities, Serina Services AG ("Serina") and Ingwenya Incorporated ("Ingwenya"), who it was alleged had provided the BEEs with loans to acquire their shares.
- [17] On January 5, 2015, EPL held a Board meeting to consider approving the HZIP SPAs and, concurrently with the HZIP SPAs, the Board approved certain agreements with respect to the intended buyout of the BEE Minority Interests from Serina and Ingwenya (the "HZIP Transaction"). Despite EPL Board approval, the HZIP Transaction did not complete, and Serina and Ingwenya did not receive the contemplated payments.

- [18] In April, 2016 EPL announced its annual general meeting to be held on June 15, 2016, which was subsequently rescheduled to July 5, 2016. Shortly thereafter Ka An Development Co. Limited ("Ka An"), a party unrelated to EPL management, announced a significant acquisition of common shares in EPL, and further announced an intention to elect an alternative slate of director at the AGM. At the same time, another significant shareholder of EPL, K2 ("K2"), was also contemplating nominating its own slate of directors for election.
- [19] The plaintiffs allege that the defendants, or some of them, who collectively held a comparatively small amount of common shares, vigorously encouraged shareholders to re-elect them to the Board and not to vote for nominees who were put forward by Ka An or K2. However, the plaintiffs allege that by June 30, 2016 at the latest, which was the cut-off date for the deposit of proxy votes with EPL, it would have been apparent to the defendants that they were not going to garner enough votes to be re-elected. Accordingly, the plaintiffs plead as follows in paras. 27 and 28 of the NOCC:
27. Knowing of the failure of the HZP Transaction, the opposition at the 2016 AGM and the impending change in the Board, the Defendants quickly undertook a series of unusual, suspicious and improvident transactions, the result of which caused significant loss and damages to EPL.
28. In or around the spring of 2016, and culminating in the days leading up to the 2016 AGM, the Defendants, or two or more of them, and potentially others who are presently unknown to EPL, formulated a plan to enter into a series of transactions, while the opportunity for them to do was still available, thereby causing EPL and its subsidiaries significant loss and damages (the "2016 Plan").
- [20] In the NOCC, the plaintiffs describe two "steps" in the 2016 Plan. The "first step" was to cause EPL to execute a share purchase agreement dated June 28, 2016 with Hebei Zhongheng Tianda Platinum Co. Ltd. ("HZT") which, if completed, would result in the sale of the CRM to HZT for approximately \$50 million (the "HZT Transaction").
- [21] The "second step" in the 2016 Plan [at para. 30 of the NOCC] involved:
- causing EPL or its subsidiaries to enter into a series of agreements in June 2016 for the transfer of funds to certain foreign entities under the guise of an arms-length business transaction to ostensibly "buy out" the BEE partners of EPL or its subsidiaries.
- [22] Specifically, the plaintiffs allege that, in conjunction with the HZT Transaction, the former EPL management caused EPL and its subsidiaries to enter into share purchase agreements with Serina and Ingwenya which purported to "cancel" the BEE Minority Interests in Lion's Head, Gubevu and Afriminerals and to transfer those interests to Serina and Ingwenya (the "2016 BEE Buyout Agreements").

- [23] In addition, the HZT Transaction contemplated certain payments in the amount of \$13,366,609 USD from EPL or its subsidiaries to Serina and Ingwenya (the "Funds") to be held in escrow pending the earlier of a "change of control" of EPL or certain other stipulated dates.
- [24] The plaintiffs allege, inter alia, that the 2016 BEE Buyout Agreements did not provide for adequate consideration to be provided to the plaintiffs and did not contain adequate or customary terms and conditions.
- [25] Further, the plaintiffs allege that, on or around June 30, 2016, EPL management caused the plaintiffs to enter into escrow agreements (the "Escrow Agreements") with Serina, Ingwenya and an escrow agent, Joelson JD LLP (the "Escrow Agent") and, on or around July 4, 2016, authorized the transfer of the Funds (the "Transfer") to the Escrow Agent, even though they knew or ought to have known that the Funds were not required to be transferred to Serina or Ingwenya under the terms of the 2016 BEE Buyout Agreements. Further, the plaintiffs allege that the Funds were transferred without consent of the new EPL Board elected on July 5, 2016 and prior to the receipt by the Escrow Agent of certain deliverables, including relevant directors' resolutions, stipulated in the Escrow Agreements.
- [26] In addition to the two steps outlined above, the plaintiffs further allege that, in furtherance of the 2016 Plan, the defendants or some of them purported or attempted to cause EPL to enter into indemnity agreements with certain of the defendants or their related entities (the "Indemnity Agreements").
- [27] In the "Legal Basis" section of the NOCC, the plaintiffs allege that the defendants breached their fiduciary and statutory duties to EPL by, inter alia:
- a) entering into the 2016 BEE Buyout Agreements;
 - b) entering into the Escrow Agreements;
 - c) entering into agreements with no valid purpose;
 - d) entering into agreements that were not in the best interests of EPL or its subsidiaries;
 - e) failing to act honestly and in good faith with a view to the best interests of EPL or its subsidiaries;
 - f) failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
 - g) failing to act in accordance with the Business Corporations Act; S.B.C. 2002, c. 57;
 - h) failing to act in accordance with the memorandum and articles of the company;
 - i) acting in a conflict of interest or for their own personal gain;
 - j) including a change of control clause in the 2016 BEE Buyout Agreements;

- k) failing to ensure that EPL had any, or alternatively sufficient, security or other protections in relation to the 2006 BEE Buyout Agreements and the Escrow Agreements;
 - l) failing to exercise due care in approving the 2016 BEE Buyout Agreements, the Escrow Agreements, and the Transfer;
 - m) carrying out the Transfer;
 - n) allowing payment of the Funds;
 - o) causing or attempting to cause EPL to enter into the Indemnity Agreements;
 - p) failing to ensure that EPL or its subsidiaries were granted any, or alternatively sufficient, consideration in relation to the 2016 BEE Buyout Agreements;
 - q) failing to take care to ensure that EPL or its subsidiaries were granted any, or alternatively sufficient, consideration in relation to the 2016 BEE Buyout Agreements;
 - r) failing to disclose a material and disclosable interest in the 2016 BEE Buyout Agreements, the Escrow Agreements or the Transfer, the full nature and extent of which are currently unknown to the plaintiffs but will be explained through further discovery; and
 - s) preferring their own interests to those of EPL or its subsidiaries.
- [28] The plaintiffs further plead in the NOCC that the foregoing facts and legal bases give rise to claims in negligence, intentional interference with economic interests, civil conspiracy and unjust enrichment.

The Proposed ANOCC

- [29] In the Proposed ANOCC, the plaintiffs have substantially supplemented the statement of facts and existing legal claims and have also added new legal claims which include misrepresentation, unconscionability and conversion.
- [30] The amendments sought in the Proposed ANOCC can be separated into five general categories for the purposes of this application:
1. The addition of a "third" and "fourth" step in the 2016 Plan, which the plaintiffs allege involved "purporting to put into place agreements to confer benefits upon the existing officers and directors of EPL" [para. 45 Proposed ANOCC] and the "authorization and implementation of payments out of EPL to certain of the Defendants or their related entities in the days leading up to the 2016 AGM" [para. 87 Proposed ANOCC]. The Proposed ANOCC references the following additional agreements, and payments arriving under these agreements, not previously referenced in the NOCC (the "Termination Payment Amendments"):

- a. a termination payment to Mr. Rozier in the amount of CAD \$1,980,000 dated January 31, 2016, upon his resignation as President and CEO of EPL, arising under a management services contract between Buccaneer and EPL (the "Buccaneer Payment") [para. 48];
- b. a payment allegedly made on or about July 4, 2016, in the amount of \$480,000 to Maluti, arising under a consulting agreement dated May 27, 2016 between EPL and Maluti (the "Maluti Payment") [paras. 90-92], a company controlled by Mr. Cohen, which substantially increased his compensation and provided Maluti with a success fee upon the completion of any transaction resulting in a change of control of EPL;
- c. a termination payment made on or about July 4, 2016 to Jazz, a company controlled by Mr. Lee, in the amount of \$690,000 (the "Jazz Payment") [paras. 90-92]. The plaintiffs allege that the Jazz Payment was made pursuant to a services contract requiring one month's written notice of termination and that no such notice was given prior to the issuance of a payment; and
- d. a termination payment made on or about July 4, 2016 to Sterling in the amount of \$420,000 (the "Sterling Payment") [paras. 90-92]. With respect to the Sterling Payment, I note that the plaintiff EPL commenced an action against Sterling and Mr. Lee on October 16, 2017, claiming a variety of remedies against one or both defendants, including breach of contract, unjust enrichment, conversion, negligence, breach of fiduciary duty and conflict of interest and conspiracy (the "Sterling Action"). I will discuss the Sterling Action in more detail below.

Collectively, I will refer to the Buccaneer Payment, the Maluti Payment, the Jazz Payment and the Sterling Payment as the "Termination Payments";

2. the addition of a "fifth step" in the 2016 Plan whereby the plaintiffs allege the defendants improperly sought on or about June 22, 2016 to convert EPL's existing directors' and officers' insurance into run-off insurance to provide coverage for acts committed by them up to July 5, 2016 (the "Run-Off Insurance Amendments") [paras. 107-110]. The plaintiffs allege that, as a result of the acquisition of the run-off insurance, the existing directors' and officers' coverage was cancelled and the new board and management were left without any insurance coverage while the defendants were correspondingly enriched;
3. an allegation that the defendants converted corporate records of the plaintiffs by failing to return all tangible and intangible property belonging to EPL upon request, including by failing to return certain email and electronic documents, and a further allegation that Mr. Lee, as Corporate Secretary, failed to fulfill his fiduciary duty to maintain the books and records of EPL (the "Conversion Amendments");
4. an allegation that Messrs. Cohen and Rozier, and potentially Mr. Lee, made certain negligent or fraudulent misrepresentations to the balance of the then Board of EPL, composed of the defendants collectively in 2015 and 2016 (the "Misrepresentation Amendments"). The allegations include:

- a. with respect to 2015, the allegation [para. 25] that Mr. Cohen and Mr. Rozier told the Board that the reason for entering into the HZP Transaction with Serina and Ingwenya, rather than the BEEs themselves, was because the BEEs had borrowed funds from Serina and Ingwenya to acquire their shares. The plaintiffs allege that Mr. Cohen and Mr. Rozier falsely or misleadingly led the Board to believe that the BEE Loans were in default, and that Serina and Ingwenya were seeking to collect on the BEE Loans and held the shares to be sold in the HZP Transaction as security for the BEE Loans. Further, the plaintiffs allege that Mr. Cohen and Mr. Rozier failed to advise the Board about the identity of an entity named P.R. Finance Inc., associated with a man named Paul Ray ("Mr. Ray"), which was purportedly affiliated with Serina and Ingwenya, and which allegedly was to receive compensation or remuneration in relation to the transaction;
- b. with respect to 2016, the allegation [para.136] that the defendants Mr. Cohen and Mr. Rozier falsely or negligently represented to the Board, comprised of the defendants collectively, that the shares to be cancelled in the 2016 BEE Buyout Agreements were held as security by Serina and Ingwenya for the BEE Loans, that the BEE Loans existed and were in default, that Serina and Ingwenya had sought to enforce their security under the BEE Loans, omitted to tell the Board of the changes to the structure of the 2016 transaction as compared to the 2015 transaction, and further omitted to tell the Board that Mr. Ray was affiliated with Serina and Ingwenya, all of which had the effect of inducing the plaintiffs to enter into and carry out the 2016 BEE Buyout Agreements. The plaintiffs further allege that the other defendants' reliance on the representations of Mr. Cohen and Mr. Rozier was not reasonable, was grossly negligent and was in breach of their fiduciary statutory duties; and
5. various other allegations which I will address more specifically below that the defendants argue are "useless", argument or do not disclose a cause of action.

Positions of the Parties

- [31] The defendants object to all five general categories of proposed amendments in the Proposed ANOCC. Counsel for the Cohen Defendants made argument before the Court with respect to each of the five categories. Counsel for Mr. Cameron supported the Cohen Defendants on these arguments and also made supplementary submissions with respect to certain misrepresentation allegations in the Proposed ANOCC specifically directed against Mr. Cameron, principally on the basis of a lack of particularity, lateness and prejudicial effect.
- [32] With respect to the first four categories, the Cohen Defendants object that these amendments raise new causes of action and that the relevant limitation period with respect to each of these new causes of action has expired. With respect to the misrepresentation amendments, the Cohen Defendants further argue the allegations contain insufficient particulars and will prejudice the defendants as they will likely create an irreconcilable conflict of interest between Mr. Cohen, Mr. Rozier and Mr. Lee and the other Cohen Defendants, necessitating the retaining of separate counsel. With respect to the fifth

category, the Cohen Defendants argue that the proposed amendments do not relate to any cause of action, are evidence or argument or otherwise "useless" or designed to embarrass.

Applicable Legal Principles

General Approach to Amendments

[33] Rule 6-1(1) of the Rules allows parties to amend pleadings with leave of the court after a notice of trial is served. The notice of trial has been served in this case, and accordingly it is common ground that leave is required to amend the pleadings.

[34] In *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 10, the Court of Appeal described the general approach to applications to amend pleadings as "generous and non-technical." The Court stated:

The general approach to amendments is generous and non-technical, thereby to permit amendments as are necessary to determine the real question between the parties, considering always the interests of justice.

[35] In *Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.*, 2015 BCCA 16 at para. 47, the Court emphasized the need for flexibility in dealing with applications to amend pleadings stating:

... litigation has an evolutionary quality, and there must be some flexibility in ensuring that pleadings adapt to changing circumstances.

[36] A judge's decision to grant leave to amend pleadings is discretionary. Nonetheless, a judge must exercise that discretion judicially and in accordance with the legal principles governing applications to amend: *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at para. 24. In exercising its discretion, the court must ultimately consider what is just and convenient in relation to all the parties: *Swiss* at para. 21; *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*(1996), 19 B.C.L.R. (3d) 282 (C.A.) at paras. 36-38.

Limitation Periods

[37] With respect to the issue of a potentially expiring limitation period on an application to amend pleadings, the first question to be addressed is whether the proposed amendments raise a new cause of action: *Swiss* at para. 21, and *Taylor v. Blenz The Canadian Coffee Company Ltd.*, 2019 BCSC 906 at para. 35. If the amendments do not raise a new cause of action, there will be no issue as to the potential expiry of a limitation period. If they do raise a new cause of action, and it is possible that the limitation period applicable to the new cause of action has expired, the court should determine whether it is just and convenient to allow the amendments assuming that the limitation period has expired: *KPMG Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317 at paras. 47-49; *Blenz* at para. 37.

[38] Where there is a dispute whether a limitation period has expired or where it is inappropriate to decide that issue summarily, an amendment may be allowed without prejudice to the defendant raising the limitation defence at trial: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at paras. 46-48; KPMG at paras. 47-49.

Adding Parties as Defendants

[39] Rule 6-2(7)(b) and (c) of the Rules provide that at any stage of a proceeding, the court may, on application by any person:

- (b) order that a person may be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceedings is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
- (c) order that a person be added as a party if there may exist between the person and any party to the proceeding a question or issue related to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[40] On an application to add a party as a defendant, the test has two parts: first, whether there is a question or issue between the parties; and second, whether it would be just and convenient to determine that question or issues in the existing proceeding: *Terasen Gas Inc. v. TNL Construction Services Ltd.*, 2011 BCSC 1345 at para. 7.

[41] The Court of Appeal in *John A. Neilson Architects* at para. 45, explained that "the threshold is low" and further explained:

It has been expressed as establishing simply that there is a real issue between them that is not frivolous, or that the plaintiff has a possible cause of action against the proposed party.

Analysis

[42] Applying the foregoing legal principles, I now proceed first to consider whether the amendments in the Proposed ANOCC should be granted.

1. Do the amendments raise new causes of action?

[43] In *Swiss*, Madam Justice Garson of the Court of Appeal reviewed the law relating to what constitutes a cause of action: *Swiss* at paras. 26-31. In that decision, she cites *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, where the Supreme Court of Canada defined "cause of action" as follows:

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.).

[44] Madam Justice Garson also cites the UK Court of Queen's Bench in *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242-43, where Lord Diplock defined a "cause of action" as:

A factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

Madam Justice Garson stated that she saw "little difference between these two descriptions of a 'cause of action': *Swiss* at para. 28; see also *Credential Securities Inc. v. QTrade Canada Inc.*, 2014 BCSC 345 at para. 41 and *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756, at paras. 19-23.

[45] Madam Justice Garson further explained in *Swiss* that a new cause of action does not arise if a party merely pleads a new or alternative remedy based on the same set of facts already pleaded: *Swiss* at para. 31. Thus, the key question in determining whether a new cause of action is being pleaded is not whether a new remedy is sought but rather whether the underlying matrix of material facts entitling one person to obtain a remedy (or remedies) is new.

[46] Applying the foregoing legal test, I now consider whether each of the first four categories of amendments create a new cause of action. With respect to the fifth category, the defendants do not argue that new causes of action are created. I will accordingly address this category separately.

The Termination Payments Amendments

[47] In the Proposed ANOCC, the plaintiffs seek recovery against the defendants for the Jazz Payment, the Maluti Payment, the Sterling Payment and the Buccaneer Payment, among other remedies.

[48] The defendants argue that these proposed amendments have nothing to do with the subject matter of the existing litigation as they are unrelated to the HZT Transaction, the 2016 Serina and Ingwenya Transactions or the Indemnity Agreements and, if allowed, would significantly expand the factual ambit of the existing claim.

[49] In response, the plaintiffs argue that the allegations in the NOCC were sufficiently broad to cover any "general impropriety in self-dealing by the defendants in the spring and summer of 2016", and that these amendments are merely a further particularization of the existing causes of action rather than introducing new causes of action.

[50] At a high level, the plaintiffs' argument has appeal. It is certainly true that many portions of the NOCC were drafted at a broad level of generality with the potential to encompass a wide range of activities and agreements, including activities which either cause damage to the plaintiffs, enrich the defendants or both. For example, the NOCC includes the following generalized wording [emphasis added]:

- Para. 27 refers to "a series of unusual, suspicious and improvident transactions";
- Para. 28 uses the words "formulated a plan to enter into a series of transactions";
- Para. 62 seeks "an accounting for profits" and "the disgorgement" of "any unauthorized profit or benefit that accrued to the defendants";
- Para. 66(c) speaks about "agreements with no valid purpose"; and
- Para. 73 also generally refers to the plaintiffs conspiring by "either lawful or unlawful means" to injure the plaintiffs and speaks to the idea that "the defendants have been enriched by the funds and other benefits received from the plaintiffs and that the plaintiffs have been correspondingly deprived".

[51] However, despite the generality of the wording in the NOCC, it is my view that the Termination Payment Amendments nonetheless do not fall within an existing cause of action in the NOCC. This is because, taking into account the test in *Danyluk*, the NOCC did not set out every fact which it would be necessary for the plaintiffs to prove if disputed in order to support their right to the judgment of the court in respect of the Termination Payment Amendments.

[52] The essence of the plaintiffs' claims with respect to each of the Termination Payments is that they were made "at a time when no moneys or other liabilities were due and owing by EPL under these agreements". However, the NOCC did not include many of the material facts which would be necessary to obtain judgment on the issue of whether moneys or other liabilities were, in fact, due and owing under these agreements.

[53] For example, in the Proposed ANOCC, the plaintiffs plead new facts not only with respect to identifying the agreements under which the Termination Payments were purportedly made, but also with respect to certain of the specific terms and conditions of these agreements (including the terms under which the payments were legally appropriate), the nature of the services provided under these agreements (and whether the services justified the payments in question), and the propriety of the quantum and timing of the payments made. Moreover, the plaintiffs have sought in the Proposed ANOCC to add counter-parties to these agreements who are not previously implicated in the NOCC as new parties to this action. All of the above facts in the Proposed ANOCC have significantly expanded the scope of the factual matrix set out in the NOCC with respect to the Termination Payments.

- [54] A relevant example can be found in the Sterling Action pleadings, which as I have previously explained were filed in a separate action brought by EPL against Sterling and Mr. Lee but also reference the Sterling Payment addressed in the Proposed ANOCC. In the Sterling Action Notice of Civil Claim, EPL includes approximately 26 paragraphs in its Statement of Facts with respect to the terms and conditions of two underlying agreements pursuant to which the Sterling Payment was allegedly made, including an allegation that both agreements had been fabricated or were otherwise invalid, and also includes detailed facts with respect to an alleged conspiracy between Mr. Lee and Sterling to terminate the agreements and arrange for payment of the Sterling Payment without legal justification.
- [55] All these facts are arguably material under the Proposed ANOCC to the question of whether the Sterling Payment was properly due and owing in July, 2016 and are therefore part of the factual matrix necessary to make out the claim that the Sterling Payment was paid without legal justification. Yet all these facts were missing in the NOCC (and indeed I note are mostly missing even in the Proposed ANOCC), and were equally missing with respect to the other Termination Payments. The same analysis would in my view be similarly applicable with respect to the allegations concerning the Maluti Payment, the Jazz Payment and the Buccaneer Payment, which also necessitate the pleading of new material facts underlying the remedy sought.
- [56] The plaintiffs rely heavily on the *Blenz* case in support of their position that the Proposed ANOCC does not introduce new causes of action. However, in my view the reasoning in that case is not directly applicable to the facts in this case. In that case the plaintiffs had sought to amend their Notice of Civil Claim to reformulate a claim of fraudulent and negligent misrepresentation as a claim for breach of pre-contractual duty to disclosure. In her reasons, Madam Justice Warren found that the amendments did not plead a new cause of action as they arose out of the same "transactions or course of dealings" between the defendants and the plaintiffs and there was "significant overlap in the facts alleged" in the original and amended pleadings: *Blenz* at para. 27. In this case, the plaintiffs made a similar argument focusing in particular on the fact that the allegations arise out of the "same course of dealings": *Blenz* at para. 49. While a parallel can certainly be drawn at a high level with this aspect of the reasoning in *Blenz*, I emphasize that a further key finding in that decision was that the amendments were "merely a recasting of the legal characterization of that wrong that is alleged to arise out of the pre-contractual course of dealing" and that the proposed amendments "did not go beyond the scope of the set of facts engaged by the [original pleading]" and did not "change the substance of the factual issues raised in the action"; *Blenz* at para. 44.
- [57] By contrast, and unlike in *Blenz*, the new facts adduced in the Proposed ANOCC are not merely a "recasting of the legal characterization of the wrong that is alleged." Rather, as I have outlined above, the Proposed ANOCC brings into play new transactions and courses of dealings and a significantly expanded set of facts which, as the Court stated in *Blenz*, are indicative of new causes of action.

[58] Furthermore, in considering whether these constitute a separate cause of action, I must take into account one of the key purposes of pleadings, which is to clearly put the defendants on notice with respect to the facts to which they must respond in their own pleadings on discovery and at trial. In *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 16-20, Mr. Justice Voith set out the purposes of pleadings as follows:

[16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such

[17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

[19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

[20] In *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170, Justice Parrett confirmed that the essential purpose of pleadings is to define the issues, giving the opposing parties notice of the case they have to meet and to provide the "boundaries and the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions" (para. 27).

[59] Taking into account the purposes of pleadings referenced in *Sahyoun*, my view is that the NOCC did not fully define the issues, give the opposing party notice of the case they had to meet and provide the relevant boundaries and context with respect to the Termination Payments Amendments. It is also clear that the Proposed ANOCC materially increases the

number and breadth of the facts to which the defendants must necessarily respond, including necessitating a new response to Notice of Civil Claim from Jazz and Maluti. These proposed amendments will certainly increase the range of issues and facts to be addressed on discovery and at trial. They may also increase the scope of document production. Accordingly, it is my view that the Termination Payment Amendments each raise new causes of action. I will address the issue of what is just and convenient with respect to these new causes of action below.

The Failure to Return and Preserve Records/Conversion

- [60] The plaintiffs allege in the Proposed ANOCC that the defendants committed the tort of conversion by, inter alia, failing to return certain tangible and intangible property, including corporate records and emails after a request made by EPL on July 26, 2016. The plaintiffs also separately allege that the defendant Mr. Lee breached his statutory and fiduciary obligations as Corporate Secretary to maintain and secure EPL's books and records after the change in control.
- [61] The defendants again argue that these allegations have nothing to do with the subject matter of the existing litigation as they are unrelated to the HZT Transaction, the 2016 Serina and Ingwenya Transactions or the Indemnity Agreements and if allowed will significantly expand the factual ambit of the existing claim.
- [62] I will not repeat the reasoning set out above with respect to the Termination Payments. However, for similar reasons, it is my view that this amendment also introduces a new cause of action as the NOCC did not address or contain any facts at all with respect to the issue of preservation of corporate property, nor did the NOCC address the actions of the defendants after July 5, 2016. Again, unlike in *Blenz*, this is not merely a recharacterization of existing facts under a new legal theory, but rather a pleading of new facts in support of a new legal theory. Again, I will address the issue of what is just and convenient below.

The Run-Off Insurance

- [63] The plaintiffs have sought to amend the NOCC to include a claim that the defendants converted EPL's then director and officer liability insurance into run-off insurance, resulting in the new board and management not having insurance coverage after July 5th, 2016, and the defendants being covered for acts committed by them up to that time. In the Proposed ANOCC, the plaintiffs have sought to adduce these facts in support of remedies sought for unjust enrichment, breach of fiduciary duty, negligence and unlawful interference with economic interest claims.
- [64] In my view, again for the reasons set out above, the Run-Off Insurance Amendments also introduce a new cause of action, as the NOCC did not address the issue of insurance at all. As with the Termination Payments, it is arguable that the alleged facts with respect to run-off insurance fall within the general description of the NOCC as a "series of unusual,

suspicious and improvident transactions." However, this argument does not address the fact that these amendments require the defendants to respond to a series of new facts about the terms and timing of the relevant insurance policies and the role of a third party insurance provider, HUB International HKMB Limited, in these events, all of which have the effect of expanding the scope of issues to be addressed on discovery and at trial. Further, this amendment brings into play events after July 5, 2016, which again were not addressed in the NOCC. Once again, my view is that these amendments have expanded the underlying matrix of material facts, and I will address the issue of what is just and convenient below.

Fraudulent and Negligent Misrepresentation

- [65] Finally, the Proposed ANOCC makes new allegations with respect to alleged fraudulent and negligent misrepresentations made by Mr. Cohen and Mr. Rozier in 2015 and 2016, and possibly Mr. Lee. These allegations raise new facts with respect to specific representations made by Mr. Cohen and Mr. Rozier to the Board concerning a number of matters I have summarized earlier in these reasons.
- [66] These amendments clearly raise new causes of action as they reference specific negligent or fraudulent statements not previously mentioned in the NOCC, which would be essential as material facts to make out a complete claim for negligence or fraudulent misrepresentation.
- [67] Having found that the Proposed ANOCC creates new causes of action, I will now proceed to consider what is just and convenient under the circumstances.
2. Is it just and convenient for the proposed amendments to be allowed?
- [68] In determining whether it is just and convenient for the proposed amendments to be allowed, the factors to be considered by the court include:
- a. the length of the delay in applying for the amendments;
 - b. the reasons for the delay;
 - c. the expiry of the limitation period;
 - d. the prejudice or absence of prejudice to an opposing party; and
 - e. the extent of the connection between the proposed amendments in the existing claims.

Swiss at para. 37; Teal at para. 67.

- [69] I will consider each of these in turn.

The Length of the Delay in Applying for the Amendments

- [70] The Proposed ANOCC was provided to the defendants approximately three years and eight months after the cause of action arose at the earliest and one year and eight months from the action being commenced.

- [71] In the context of the applicable authorities these delays are not inordinate. For example, in *Blenz*, the Court found a "significant" delay in the context of a case where the action had been commenced five years previous and pertained to events that occurred more than ten years before. In *Neilson*, the Court of Appeal found a delay of 12 years from the date of the first report on potential damage, and five and a half years from the filing of the writ to be "lengthy", although nonetheless found the amendments of the pleadings should be granted. In *0742848 B.C. Ltd. v. Squamish (District)*, 2018 BCSC 1046, the Court found a delay of between six and eight years after the commencement of the potential running dates for the limitation period to be significant. In *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69, the application to add a defendant was brought nine years after the cause of action had been commenced. The delay in this case is considerably shorter than in the foregoing cases.
- [72] Further, as noted above, there is a live question as to when the material facts relevant to the new causes of action were, in fact, discovered by the plaintiffs. As I will address more fully below with respect to the issue of limitation periods, the plaintiffs argue that many of the facts relating to the proposed amendments were not brought to light until well into the discovery process. Further, it is relevant to consider that the proposed amendments were provided more than six months prior to the scheduled trial date and also prior to completion of the examinations for discovery, which are ongoing to date.
- [73] Accordingly, while there has been delay, it is my view that the delay taken alone is not sufficient to decide the matter of what is just and convenient without reference to the other factors.

The Reasons for the Delay

[74] The plaintiffs provided the following explanations for the delay:

- i. this is a complex commercial case that is international in scope involving parties in China, South Africa, Switzerland and Liechtenstein;
- ii. in addition to this action and the *Sterling Action*, the plaintiffs have brought claims against *Serina* and *Ingwenya* commenced June 6, 2018, in an attempt to recover the Funds and have had to defend an action brought by *HZT* with respect to specific performance of the *HZT* share purchase agreements;
- iii. there has been extensive document production and lengthy examinations for discovery which have been necessary to assist the plaintiffs in uncovering key facts;
- iv. the plaintiffs received a significant number of documents from Mr. Lee at a late stage of the proceedings in June 2019, which the plaintiffs allege ought to have been returned to *EPL* in 2016 but were not. This they allege delayed their investigation into the facts underlying the Proposed *ANOC*; and
- v. the plaintiffs had complied with the Case Plan Order.

[75] In my view these explanations are reasonable under the circumstances taking into the account the complexity of the case and the scope of the discovery process. Of note here is that the plaintiffs did in fact comply with the timelines in the Case Plan Order, to which the defendants had previously agreed.

The Expiry of the Limitation Period

[76] Section 6-1 of the Limitation Act, S.B.C. 2012, c. 13, states that a claim must not be commenced more than two years after the date on which the claim is discovered. Section 8 states that a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- a. that injury, loss or damage had occurred;
- b. that the injury, loss or damage was caused by or contributed to by an act or omission;
- c. that the act or omission was that of the person against whom the claim is or may be made;
- d. having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[77] Section 22.5 of the Limitation Act confers upon the court the discretion to grant amendments that raise new claims that would otherwise be time barred.

[78] The Cohen Defendants argue that the Termination Payment Amendments, the Conversion Amendments, the Misrepresentation Amendments and the Run-Off Insurance Amendments are all statute-barred, as the plaintiffs were aware of the existence of each of the underlying facts prior to or earlier than the end of July, 2016. For example, with respect to the Termination Payments, the Cohen Defendants note that the plaintiffs had considered them "suspicious" from the outset and launched an investigation in respect of them. The Cohen Defendants also note that on May 30, 2017, EPL announced it had concluded "extensive investigation into certain actions taken by former management" and, on October 16, 2017, it commenced the Sterling Action seeking recovery of the Sterling Termination Payments but took no steps to recover Maluti or Jazz Termination Payments. The Cohen Defendants infer from this that the plaintiffs had the requisite knowledge with respect to these potential causes of action as early as 2017, and possibly earlier, and simply chose not to pursue them. They make similar arguments with respect to the Conversion Amendments and the Run-Off Insurance Amendments.

[79] In response, the plaintiffs argue that although they were aware of certain of the facts related to these causes of action, they learned new material facts during the course of examinations for discovery. Further, the plaintiffs argue that the sequencing and timeline of the events that form part of the conspiracy were "substantially illuminated" by thousands of documents produced by Mr. Lee late during the course of the discovery process, which they allege ought to have been returned by Mr. Lee to EPL in July, 2016 but which were not. Finally, the plaintiffs argue that the defendants were, in fact, put on notice with respect to these

potential causes of action by virtue of the questions asked on discovery by the plaintiffs with respect to the underlying material facts and the response of the plaintiffs to demands for particulars.

- [80] In my view the question whether any limitation has expired with respect to these new causes of action is a live issue but not one that can be resolved on a summary basis on this application. On the one hand, the defendants have raised legitimate issues concerning the apparent failure of the plaintiffs to take prompt legal action once they had apparently first discovered the facts giving rise to the relevant causes of action. In particular, I have not heard a satisfactory response from the plaintiffs to the question why they commenced the Sterling Action in 2017, which was clearly inside the limitation period, but did not take similar action against Maluti and Jazz in the same timeframe. On the other hand, to the extent that these questions relate to what the management of EPL knew or ought reasonably to have known at the relevant times, it appears to me that these questions cannot be adequately addressed without the benefit of viva voce evidence and cross-examination, as the credibility of witnesses will certainly be important in deciding this issue.
- [81] For example, the defendants made various allegations in their argument about what Ms. Hu, the current President and CEO of EPL, knew or should have known about the Termination Payments during the relevant period. These allegations are denied by the plaintiffs. In their reply argument, the plaintiffs include the following passage [paras. 18-20]:
- [18] .one of the material facts learned through discovery was that, pursuant to the terms of his consulting agreement, entered into with Jazz, the termination payment to Mr. Lee was not due or owing when he had a bank draft (the equivalent of cash) issued on July 4.
- [19] The Cohen Defendants submit that this ought to have been known by the current CEO of EPL, Diana Hu, because in the context of a third party making an offer to EPL to acquire its assets that third party received Mr. Lee's consulting agreement in the course of due diligence in or about March 2016.
- [20] It is unreasonable to suggest that Ms. Hu would have known or understood, or remembered, the specific terms of the agreement that she saw through another entity in the context of due diligence several months prior to the AGM. This is particularly so where the provision in question is not a simple term.
- [82] The above passage, which addresses the question of what Ms. Hu reasonably knew or should have known or understood with respect to the complex set of facts, agreements and documents underlying the claim, illustrates the difficulty of deciding the issue of discoverability without access to viva voce testimony from Ms. Hu and likely other members of the executive team at EPL.
- [83] Further, I note that there is conflicting evidence with respect to what facts exactly the plaintiffs discovered or confirmed during the course of examinations for discovery and when these facts were discovered. This latter issue is complicated by the late disclosure of

documents by Mr. Lee to the plaintiffs, with close to 4,000 documents being provided on or about June 10, 2019, and another 748 on or about July 11, 2019. The plaintiffs have a reasonable argument that this delay in disclosure may have impaired their ability to complete their investigations with respect to the new causes of action in a timely manner, although again this would need to be addressed with viva voce testimony.

- [84] Accordingly, without predetermining any of the factual issues, my view is that this limitation period question is not appropriate for determination in a summary manner on this application. I will address further below the impact of the limitation period issue on my order in this case.

The Prejudice or Absence of Prejudice to an Opposing Party

- [85] The Court of Appeal has stated that an amendment must not be refused merely because it may be potentially prejudicial to the other party. Evidence of actual prejudice that could not be compensated by costs must be present: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550 (C.A.) at paras. 43 and 46.
- [86] Regard must be had to both presumed and actual prejudice. With regard to presumed prejudice, Madam Justice Martinson in *Weinlich v. Campbell*, 2005 BCSC 1865 at paras. 54-55 explained that there must be a "balancing of prejudices", although the prejudice to the plaintiff in refusing an amendment will generally be greater than the prejudice to the defendant in granting the amendment. She stated:
- [54] With respect to presumed prejudice, a plaintiff is prejudiced if a party is not added to an action when, by virtue of the expiry of a limitation period, the pursuit of a claim in a separate action is impossible. Conversely, prejudice to a proposed defendant is presumed if the addition is contemplated after the expiry of the limitation period, because any possible limitation defence is lost.
- [55] As explained by Master Bolton in *Takenaka v. Stanley*, 91 B.C.L.R. (3d) 179, 4 C.P.C. (5th) 258, 2000 BCSC 242 at para. 41, the prejudice to a plaintiff in the former situation will usually be greater than the prejudice to a defendant in the latter. In the former situation the plaintiff loses the opportunity to ask a court to consider the claims that the defendant has done something the law of the land considers actionable. In the latter, the defendant loses a windfall opportunity to avoid entirely any potential liability. Their respective situations may be precisely balanced in financial terms, but not as a matter of justice. Master Bolton concludes: "[a] right to seek justice cannot be fairly equated with a right to cut short the search without an answer."

- [87] Counsel for the defendants rely heavily on the presumed prejudice argument in this case. As noted in *Weinlich*, on the level of principle this argument taken alone may not necessarily weigh in their favour. However, it is not necessary for me to decide the issue on the basis of presumed prejudice alone since in my view the defendants' argument fails on the basis of actual prejudice.
- [88] With respect to actual prejudice, the onus is on the party who opposes the amendment to demonstrate that the prejudice affects the party's ability to respond to the amended claim: *Weinlich* at paras. 56-58; *Yablonski v. Corp. of the City of Cranbrook*, 2002 BCSC 1875 at para. 37. In meeting this onus, the respondent must adduce evidence that the alleged delay would prejudice their ability to bring or defend an action such as lost witnesses or evidence or destruction of documents: *John A. Neilson Architects* at paras. 96-102; *Levy v. Petaquilla Minerals Ltd.*, 2012 BCSC 776 at para. 14.
- [89] On this application I find it significant that the defendants have adduced no affidavit evidence to demonstrate that the alleged delay would prejudice their ability to defend the action and have made no allegations with respect to potential lost witnesses or evidence or destruction of documents.
- [90] Counsel for the Cohen Defendants argue that they will suffer prejudice if the misrepresentation amendments are allowed as it will require the Cohen Defendants to seek separate representation due to a potential conflict arising between the defendants. They also argue that the granting of the amendments may threaten their trial date, require the filing of additional pleadings and necessitate further pre-trial discovery. Counsel for Mr. Cameron further alleges that he has suffered prejudice over the past two years because he had had to "forego profession and business opportunities" and argues that he will suffer prejudice as a result of a deprivation at the earliest opportunity to clear his name.
- [91] I am not persuaded by these arguments. In the first place these are not the types of prejudice identified in the authorities as being relevant to the ability to defend the case, such as lost witnesses or evidence. Second, I note that these arguments made by legal counsel are arguments and are not supported by evidence. In *Weinlich* at paras. 65-66, the Court rejected the argument of counsel that the issue of actual prejudice could be addressed by way of legal argument noting that:

The onus is on him as he is the one who knows to who degree he has been truly prejudiced, and it is not for the court to speculate as to what prejudice he may have suffered.

Third, I note that the prejudice identified by the defendants falls more within the category of prejudice that can ultimately be addressed by a costs order rather than prejudice which would tend to justify denying a proposed amendment.

The Extent of the Connection between the Proposed Amendments and the Existing Claims

- [92] The Cohen Defendants acknowledge the Misrepresentation Amendments are directly related to the subject matter of the existing action, and I would agree. With respect to the other causes of action, I also have little doubt that the amendments in the Proposed ANOCC are closely connected to the existing claims in the NOCC. The plaintiffs' principal claim as set out in the NOCC is that the defendants in 2016 conspired to give effect to a plan whereby they undertook a "series of unusual, suspicious and improvident transactions" in which the defendants "allegedly acted in a conflict of interest or for their own personal gain and preferred their own interests to those of EPL or its subsidiaries", and also failed to make closure of their material interests. The additional facts in the Proposed ANOCC have the effect of expanding the timeframe of the alleged conspiracy back to 2014 and later into 2016, adding the additional causes of action relating to the Termination Payments, the run-off insurance, the conversion and the misrepresentations and adding two new parties.
- [93] Although the amendments are relatively extensive, in my view they are closely connected to the original claims in the NOCC. In the first place, I note that all the individual defendants implicated in the new causes of action are, with the exception of Mr. Cameron (who was not a director of EPL in 2014), the same individual defendants implicated in the NOCC.
- [94] Second, with respect to the corporate defendants, I note that the two new defendants added in the Proposed ANOCC, Maluti and Jazz, are companies wholly owned by the defendants, Mr. Cohen and Mr. Lee respectively. Similarly, Buccaneer, which is referenced in the Proposed ANOCC but not named as party, is a company owned by the defendant Mr. Rozier. Accordingly, it cannot be said that these corporate entities had no notice or were unaware of the claims in the NOCC or the status of the litigation from the outset, nor can it be said that their role was unrelated, as all these companies conducted business with, and received payments from EPL, during the relevant period: *Kennedy v. Turtle Bay Marina Inc.*, 2013 BCSC 1829 at para. 27(d) and (e).
- [95] Third, and most importantly, the new claims in the Proposed ANOCC are consistent with the original theory of the case and the NOCC, which is that there was a conspiracy of the defendants to enrich themselves at the expense of the plaintiffs and that they did not make full, or any, disclosure of such conspiracy and enrichment. The Proposed ANOCC merely extends the timeframe of the alleged conspiracy, expands the categories of payments and benefits through which the defendants allegedly enriched themselves by including the Termination Payments, the Buccaneer Payment and the Run-Off Insurance Amendments and with, respect to the Conversion Amendments, alleges that the defendants (other than Mr. Cameron) took steps after the fact to cover it up and obstruct an investigation by the plaintiffs. All these new allegations are closely connected to, consistent with and in some cases implicit in or are a necessary consequence of the claims in the NOCC, read broadly.

- [96] The Cohen Defendants have urged the Court to adopt a narrow reading of the factual nexus between the allegations in the Proposed ANOCC and the NOCC, arguing that they are "unrelated to the existing claim". This argument strikes me as artificial as it appears to be based on the assumption that any transaction not expressly named in the NOCC cannot by definition be part of a "series or unusual, suspicious and improvident transactions" referenced in the NOCC. I am not convinced that such a narrow reading is appropriate on an application to amend pleadings where, as the Court of Appeal in *Century Services* at para. 10, made it clear, the proper approach is "generous and non-technical."
- [97] By analogy I note that in *Eastern Platinum Limited v. Cameron*, 2019 BCSC 1515, an earlier application for production of documents brought by the plaintiffs in this case, Master Elwood addressed and rejected a comparably narrow argument by the Cohen Defendants that the NOCC did not suggest the defendants had personally received any benefits as a result of the transaction. He interpreted the NOCC more broadly as follows:
- [36] Although a secret benefit or kick-back is not expressly pleaded, the notice of civil claim does allege that the defendants caused EPL to enter into a series of transactions immediately prior to and following the 2016 AGM that were without consideration (para. 45), undertaken with the intent to injure EPL (para. 53), and unnecessary and without rational reason (para. 61).
- [37] In paragraph 66(r) in the legal basis section of the notice of civil claim, the plaintiffs allege that the defendants breached their fiduciary duty by failing to disclose a material interest in the buy-out agreement, the escrow agreement and the transfer of funds. In response to a demand by the Cohen Defendants for particulars of this allegation, the plaintiffs allege undisclosed prior relationships or dealings between the defendants and the two South African companies involved in the transactions.
- [38] Further, in paragraph 76 in the legal basis section of the notice of civil claim, the plaintiffs allege that the defendants have been enriched by the transfer of funds and other benefits received from the plaintiffs.
- [39] While these latter allegations are not, strictly speaking, allegations of fact in the factual basis section of the notice of civil claim, I do not think pleadings should be compartmentalized in this way when determining what the material facts are for the purposes of document disclosure. The material facts in this case include allegations that the impugned transactions were entered into for ulterior purposes and the defendants were unjustly enriched as a result. Documents that came into existence after the defendants left the company on July 6, 2016, may be relevant to the defendants' understanding of the transactions in issue, their relationship with the entities identified in the notice of civil claim and whether they stood to benefit in any way from the transactions.

- [98] In considering what is just and convenient in this case with respect to the proposed amendments, I believe a similarly non-technical reading of the Proposed ANOCC is appropriate on this application, taking into account the broad language employed in the NOCC and the overall theory of the case.
- [99] Accordingly, it is my view that it would be just and convenient to allow the amendments in the Proposed ANOCC, subject to certain exceptions and qualifications set out later in these reasons.

Joinder of New Parties

- [100] Before I proceed to outline those exceptions and qualifications, I will address the separate but related question of whether Jazz and Maluti should be added as parties pursuant to Rule 6-2(7)(b) and (c) of the Rules. The test for joinder of a party is in two parts: first, whether there is a question or issue between the parties and the proposed defendants which relates to the relief, remedy or subject matter of the action; and second, whether it would be just and convenient to determine that question or issues in the existing proceeding: Terasen at para. 7.
- [101] On an application to add a party as a defendant, the Court of Appeal has explained that "the threshold is low"; John A. Neilsen Architects at para. 45. With respect to the first part of the test, the plaintiffs must show that a "real and not frivolous issue" exists between the parties and the proposed defendants. The plaintiff must plead sufficient material facts to support the claim, but does not have to show that the allegations can likely be proven: John A. Neilsen Architects at para. 45; Terasen at para. 8.
- [102] With respect to the first issue, I conclude that there is a real issue between the plaintiffs and Maluti and Jazz that is not frivolous. The plaintiffs allege that Maluti and Jazz were the recipients of two of the Termination Payments that were made or orchestrated by the defendants unlawfully and for their own benefit, that these companies had contracts with EPL which were breached, and further allege that Maluti and Jazz were wholly owned by two of the defendants. Further, both Maluti and Jazz are parties to the Indemnity Agreements referenced in the original NOCC. These allegations clearly establish a real issue, particularly as the plaintiffs do not need to show at this stage that these allegations can be proven.
- [103] With respect to the second branch of the test, I note that the "just and convenient" analysis with respect to joinder parties overlaps substantially with the just and convenient test for amendments of pleadings addressed above. I will not reiterate that analysis here, which is largely applicable to the joinder issue except to note that the delays with respect to the claims against Maluti or Jazz are similar or identical to the delays with respect to the other causes of action and that neither Maluti or Jazz (nor Mr. Cohen or Mr. Lee) have put forward any evidence of actual prejudice. Accordingly I find that joinder of parties is just and convenient in this case.

[104] Having found that the amendments and joinder of parties in the Proposed ANOCC should be granted, I will now proceed to address the specific exceptions to, and qualifications of, that finding. Specifically I will deal with three issues:

1. the limitation period issue;
2. the abuse of process issue; and
3. the amendments that are allegedly useless, evidence or do not give rise to any cause of action issue.

Limitation Period Issue

[105] As discussed above, there is a real issue on this application as to whether the relevant limitation periods have expired. For the reasons discussed above, it is in my view not appropriate to decide that issue summarily at this time. Accordingly, the Termination Payment Amendments, the Conversion Amendments, the Misrepresentation Amendments and the Run-Off Insurance Amendments will be allowed without prejudice to the defendants raising limitation defences at trial: Neilson Architects at paras. 46-48 and KPMG at paras. 47-49.

Sterling Action - Abuse of Process

[106] It is an abuse of process for a plaintiff to have two actions extant against a defendant that claim the same relief: Neilson Architects at para. 29 and Dixon v. Stork Craft Manufacturing Inc., 2013 BCSC 1117 at para. 61.

[107] The Cohen Defendants argue that several of the claims in the Proposed ANOCC have already been pleaded and pursued by EPL against Mr. Lee and Sterling in the Sterling Action. Specifically, the Cohen Defendants identify a number of paragraphs in the Sterling Action (paras. 14, 15, 17-22, 22-26, 34-38, 50-51) that are also pleaded in similar form in the Proposed ANOCC (paras. 90, 91, 92, 95, 117(c), 111 and 113, 117(d), 145-146, 115-116 and 126).

[108] It is clear from the above that if the amendments in the Proposed ANOCC are granted, there will be two actions commenced by the same plaintiffs for the same or similar relief against the defendant, Mr. Lee and also Sterling (Sterling is not named in the Proposed ANOCC, but there are several references in the proposed ANOCC to Sterling). The overlap between the two actions with respect to facts alleged and relief sought is substantial. For example, the wording in para. 14 of the Sterling NOCC is identical to the wording of para. 126 of the Proposed ANOCC.

[109] In my view the Cohen Defendants are correct in identifying a concern about the close overlap between the claims in the two separate actions. As stated in Stork at para. 68, at least as it relates to the impugned paragraphs, the one action is practically a mirror image of the other and both repeat and expand upon the same claims. However, as noted in

Neilson, the abuse of process is not crystallized at this stage, and it is theoretical only until such time as the amendments are allowed. At para. 33, the Court of Appeal in Neilson stated as follows:

- [33] There could not be two actions claiming the same relief against the respondents unless and until the chambers judge granted the owners' joinder application. That application had to proceed before abuse of process became an issue. If the chambers judge dismissed it, the potential for two actions extant against the respondents disappeared and the question of abuse of process did not arise. The owners would have been left to pursue the parallel action against the respondents. If the chambers judge permitted joinder, he could at that point properly consider whether the two co-existing actions presented a sufficient threat of abusive relitigation to constitute an abuse of process and, if so, what would be an appropriate remedy.
- [110] Taking into account the foregoing, it seems to me that the practical solution under the circumstances is to adjourn the application with respect to the amendments in the Proposed ANOCC that overlap with the Sterling Action at this time with leave to bring the application to amend on at a later date. In the interim, the plaintiffs can decide whether they wish to amend the pleadings in the Sterling Action to eliminate the overlap, or to bring an application in the seeking an order to consolidate the two cases: see Stork at para. 61. From the perspective of judicial economy and fairness to the parties, it appears to me, without deciding the matter, that there are good reasons why the two actions should be heard together, given the close relationship of certain of the facts and allegations. However, since that application is not before me, I am not in a position to rule on the issue of consolidation at this time.
- [111] Pending such an application, I will adjourn the plaintiff's application to amend the NOCC with respect to the following paragraphs of the Proposed ANOCC: paras. 90(c), the words "or Sterling" in para. 91, the reference to "Sterling" in para. 92, the words "and Sterling" in para. 95, the inclusion of Mr. Lee in paras. 111-113, 115-116, 126 and 145-146.

Amendments which are Evidence, Argument, do not disclose a Cause of Action or are otherwise "Useless"

- [112] The defendants contend that a number of paragraphs in the Proposed ANOCC contain evidence, arguments and do not disclosure a cause of action or are otherwise "useless".
- [113] Rule 3-7(1) states that a pleading must not contain the evidence by which the alleged facts in it are to be proved. Further, where a party seeks to amend a pleading, the additional facts sought to be pleaded must be facts which give rise to a remedy in law: *Doerksen v. First Open Heart Society of British Columbia*, 2010 BCSC 1291 at paras. 24-26. The amendments should also not be "useless" in the sense they do not assist in enabling the real issues to be determined: *Langret* at para. 34. I will turn to each of these issues in turn.

1. Finder's Fee re: HZP Transaction.

[114] At paras. 19-22 of the Proposed ANOCC, the plaintiffs make allegations with respect to a finder's fee to be received by Mr. Rozier in 2014 from P.R. Finance, whose principal was Mr. Ray, in respect of the HZP Transaction and the participation of Mr. Rozier and Mr. Cohen in an independent committee of the Board to consider the finder's fee.

[115] The Cohen Defendants argue that the purpose of these proposed amendments is not clear as the HZP Transaction never completed and no finder's fee was ever paid. They argue that the allegations are either evidence or simply argument.

[116] While it is true that the HZP Transaction did not complete and a finder's fee was not paid, I am not convinced that these additional facts do not give rise to a remedy in law. In my view these facts relate quite clearly to the misrepresentation claim in the Proposed ANOCC that the alleged misrepresentations include representations made to the independent committee and specifically relate to a failure to disclose the relationship between Mr. Ray and Serina and Ingwenya or the relationship with Mr. Ray. Here I would refer to paras. 26, 29 and 136-140, which the plaintiffs specifically allege impacted the later decision to proceed with the 2016 BEE Buyout Agreements. Accordingly, these amendments are granted.

2. Buccaneer Termination Payment

[117] At paras. 46-49 of the Proposed ANOCC, the plaintiffs make allegations with respect to two termination payments made by EPL to Buccaneer in 2007 and 2016 in respect of services provided by Mr. Rozier. The defendants note that none of the defendants are being pursued for recovery of any of these payments and that the plaintiffs are not seeking to add Buccaneer as a party.

[118] While it is true that the plaintiffs are not seeking to add Buccaneer as a party, I am not convinced that the plaintiffs are not pursuing the defendants for recovery of at least the payment in 2016. I note that para. 49 of the Proposed ANOCC alleges negligence and breach of fiduciary duty in respect of the payment of the Second Termination Payment, and at paras. 121, 125 and 130 allege losses in respect of said negligence and breach of fiduciary duty. Accordingly, these amendments are granted.

3. Proxy Solicitation

[119] At para. 38 of the ANOCC, it is alleged that the defendants Mr. Rozier, Mr. Cohen and Mr. Lee engaged a proxy solicitation/communication firm to solicit votes at the AGM. The defendants assert this is not a material fact or even evidence going to any material fact.

[120] I agree with the Cohen Defendants that this paragraph is not a material fact; it may be evidence. In any event, the proposed amendment is denied subject to the plaintiffs' right to bring this to the attention of the Court in the event that the defendants assert that there was a failure to plead para. 38 as a material fact.

4. Information Circular

[121] At para. 55, the Proposal ANOCC alleges that the defendants failed to disclose the information circular filed on May 31, 2016, and the HZT Transaction, the BEE Buyout Agreements, the Escrow Agreements, the Maluti Consulting Agreement or the Indemnity Agreements.

[122] The Cohen Defendants argue this is evidence or argument. However, to the extent this paragraph also raises the related allegation that the Information Circular would have been material to shareholders deciding how to vote at the 2016 AGM, and further alleges that the defendants failed to act in good faith and favoured their own interests over EPL's, I am satisfied this paragraph is a material fact relating to the misrepresentation and breach of fiduciary duty allegation and is not merely evidence. Accordingly, these amendments are granted.

5. Relatedness of HZP and HZT

[123] At para. 57 of the Proposed ANOCC, the plaintiffs allege that some of the defendants knew about a connection between one of the HZP shareholders and HZT and that that was not disclosed to the Board. Further, they allege that the defendants conducted insufficient or no due diligence to ensure that there would have been sufficient funds, and indeed had reason to believe that they had insufficient funds.

[124] The Cohen Defendants again argue that these are not allegations of material fact upon which any cause of action is based. I cannot agree with that argument. The failure to complete the necessary due diligence on HZT, and the relationship of its shareholder with HZP, appears to be relevant to the negligence and breach of fiduciary duty allegations discussed above. Accordingly, this amendment is granted.

The Cameron Defendant Position

[125] Mr. Cameron, unlike the other defendants, was only appointed to the Board in 2015. Mr. Cameron, who is represented by separate counsel, takes the position that there are certain misrepresentation allegations in the Proposed ANOCC which are insufficiently particularized in accordance with Rule 3-7(18) of the Rules.

[126] Mr. Cameron cites *Sidhu v. Hiebert*, 2018 BCSC 401 at paras. 40-41, which sets out the applicable principles with respect to particulars in misrepresentation claims as follows:

[40] Rule 3-7(18) requires that a party alleging misrepresentations provide full particulars of each instance on which an alleged misrepresentation was made. This requires providing the factual underpinnings of the misrepresentations, which are: the nature of the misrepresentations, the circumstances in which they were made, when, how and by whom they were made, and how they were relied on to the detriment of the plaintiff.

[41] As stated in *Harris v. Ray Kissack Memorial Housing Society*, 2003 BCSC 1476 at para. 11 [Harris]:

[11] According to Rule 19(11) a plaintiff who relies on misrepresentation is required to plead "full particulars", which are to include "dates and items if applicable". See *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 at para. 4 (S.C.). The reference to "dates" suggests that the intent of Rule 19(11) is to require a plaintiff who pleads misrepresentation to identify for the defendant, where feasible, the particular instance or instances on which the misrepresentations were allegedly made.

[127] I pause to note that, during the course of the hearing, the plaintiffs revised their Proposed ANOCC to remove references to Mr. Cameron in paras. 22, 26, 113, 145 and 146. Nonetheless, Mr. Cameron takes the position that substantial deficiencies remain in the Proposed ANOCC with respect to particularity. In particular, Mr. Cameron asserts that the relevant paragraphs in the Proposed ANOCC:

- do not specifically state the dates when the alleged misrepresentations took place;
- do not adequately differentiate between the timeframes when Mr. Cameron was a director in earlier times;
- do not particularize which specific entities or transactions and misrepresentations were made in respect of;
- do not give particulars with respect to the alleged omissions in para. 136; and
- do not give sufficient particulars with respect to alleged reliance by the plaintiffs on the misrepresentations.

[128] In *Mayer v. Mayer*, 2012 BCCA 77 at para. 215, the Court of Appeal stated that the fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, giving the opposing parties fair notice of the case to be met and enable all parties to take effective steps for pre-trial preparation. Taking into account this purpose, and the principles I cited with respect to particulars set out in *Hiebert* above, it appears to me as a matter of first impression, but without deciding the matter, that Mr. Cameron has a strong argument that the misrepresentation claims in the Proposed ANOCC have not been sufficiently particularized.

[129] However, I do not accept Mr. Cameron's further assertion that the appropriate remedy at this stage in the proceedings is to deny the proposed amendments altogether. Such a remedy would be premature. Having reviewed the decisions cited by counsel for Mr. Cameron respect to the particulars of misrepresentation that must be pleaded, my view is that those cases are clearly distinguishable from the present application. Unlike those cases, this is not a situation where demand for particulars has been made or refused or partially responded to, nor is there an application before me at this time for further and better particulars.

[130] The Rules are clear that Mr. Cameron has the right to demand particulars. To my knowledge he has not done so, despite being served with the Proposed ANOCC in March 2020. Mr. Cameron argues that:

This court ought not to grant leave to allow amendments that will generate an immediate demand for particulars.

[131] I am not persuaded by this argument, as the demand for particulars is precisely what the process set out in the Rules contemplates. It will, of course, be open to Mr. Cameron to bring a later application if the response to demand for particulars does not in his view meet the standard set out in the case law.

[132] Mr. Cameron also relies on Rule 9-5(1)(a) of the Rules, which enables the court to strike whole or part of a pleading. Again, there is no application before me to strike pleadings, and accordingly such an argument is also premature. That said, I do note that Mr. Cameron relies on *Century Services*, in which the Court of Appeal did consider Rule 9-5(1)(a) in the context of an application to amend pleadings.

[133] However, the facts in that case were different from this case, as the issue there was that the proposed amendments were directly inconsistent with a prior admission in pleadings already filed. This is not the case here where there is no direct inconsistency on the face of the pleadings. Accordingly, Mr. Cameron's argument is not accepted at this time, subject to his right to demand further and better particulars and to bring a subsequent application if, in his view, the plaintiffs have not complied with the Rules in responding.

Conclusion

[134] Taking into account the foregoing analysis, the orders granted on this application are as follows:

1. The plaintiffs' application to amend the NOCC is granted unconditionally with respect to the following paragraphs of the Proposed ANOCC: 5, 10, 17, 18, 23, 24, 31, 32, 34, 37, 40, 43, 44, 50, 56, 58, 59, 61, 65, 70, 75 to 79, 101-102, 105-106, 117(b), (g) and (h), the title above 118, 119, 121 (except 121(p), (q), (s) and (t)), 122 (except the reference to the Consulting Agreement), 123-124, 125 (except the reference to the Termination Payments and Run-Off Insurance), 127, 129, 131, 134 (except the reference to the Consulting Agreement, the Termination Payments and the Run-Off Insurance), the second sentence of 141, 142-143 (except the reference to the Consulting Agreement), 144 (except the reference to the Termination Payments and the Run-Off Insurance).
2. The plaintiffs' application to amend the NOCC is granted, subject to the right of the defendants to raise a limitation defence at trial with respect to the following paragraphs of the Proposed ANOCC: 6, 12, 19-22, 25-27, 29-30, 35, 45-49, 51-55, 57, 60, 68, 71-73, 83-87, 90 (a) and (b), 91-92, 94-98, 107-116, 117(c), (d), (i), (j), (k), 121(p), (q), (s), (t), the reference to the Consulting Agreement in 122; the reference to the Termination Payments and Run-Off

Insurance in 125, 130, 132, 136-140 and the reference to the Termination Payments and Run-Off Insurance in 144 -146.

3. The plaintiffs' application to amend the NOCC with respect to the following paragraphs of the Proposed ANOCC is adjourned on the basis set out in these reasons with respect to the Sterling Action: 90(c), the words "or Sterling" in 91, the reference to "Sterling" in 92, the words "and Sterling" in 95, the inclusion of Mr. Lee in 111-113, 115-116, 126 and 145-146.
4. The plaintiffs' application to amend the Proposed ANOCC with respect to para. 38 is denied.
5. Maluti and Jazz are added as additional defendants in these proceedings and the style of cause is amended accordingly to reflect these additions.

[135] Costs will be in the cause.

"Taylor, J."

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