

CANADA / JUDGMENT

Eastern Platinum Limited v. Cameron

2020 BCSC 1490

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Supreme Court of British Columbia

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2020 BCSC 1490 Eastern Platinum Limited v. Cameron

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eastern Platinum Limited v. Cameron,

2020 BCSC 1490

Date: 20201006

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

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

T.M. Cohen, QC

C.R. Phillips

Counsel for the Defendant G. Cameron:

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K.A. Maw

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

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Place and Dates of Hearing:

Vancouver, B.C.

July 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 6, 2020

Introduction

[1] This is an application by the defendants David Cohen, Horng Dih Lee, Robert Gayton, Gordon Keep, J. Merfyn Roberts and Ian Rozier (the "Cohen Defendants") for orders:

- 1) under Rule 7-1(10), (11), and (12) of the Supreme Court Civil Rules ("Rules") requiring the plaintiffs to produce four categories of material and relevant non-privileged documents, as more particularly described in the reasons that follow; and
- 2) under Rule 7-1(8) requiring the plaintiffs to provide an affidavit verifying their list of documents.

The Nature of the Claim

[2] This dispute arises from a complex series of transactions involving certain South African mining assets.

- [3] The plaintiff, Eastern Platinum Limited ("EPL"), is a public mining company amalgamated under the laws of British Columbia. The plaintiffs, Eastplats Acquisition Co. Ltd ("EACL") and Eastern Platinum Holdings Limited ("EPHL") are wholly-owned subsidiaries of EPL, both incorporated in the British Virgin Islands.
- [4] The defendants are former directors or senior management of EPL.
- [5] 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").
- [6] Under South African law, mining operations are required to be carried on in conjunction with historically disadvantaged black economic empowerment partners ("BEEs"). In relation to the EPL Assets, the BEEs with interests held them through certain shareholdings (the "BEE Minority Interests") in EPL's corporate ownership. These corporations were established to hold the relevant mining assets, including Lion's Head Platinum (Pty) Ltd. ("Lion's Head") with respect to Mareesburg, Gubevu Consortium Investment Holdings (Pty) Ltd. ("Gubevu") with respect to CRM and Kennedy's Vale, and Afriminerals Holdings (Pty) Ltd. ("Afriminerals") with respect to Spitzkop.
- [7] The plaintiffs allege that a proxy battle took place in advance of the election of the EPL board at the Annual General Meeting on July 5, 2016, resulting in the defendants all being removed from their positions as directors or officers on that date. The plaintiffs allege that, realizing prior to the AGM that the defendant directors were not going to be re-elected, the defendants undertook a series of "unusual, suspicious and improvident transactions, the result of which caused significant loss and damages to EPL".
- [8] In a Notice of Civil Claim ("NOCC") filed by the plaintiffs on June 6, 2018, the plaintiffs described a two-step plan with respect to these transactions. First, they allege that the defendants caused EPL to execute a share purchase agreement dated June 28, 2016 with Hebei Zhongheng Tianda Platinum Co. Limited ("HZZ") which, if completed, would result in the sale of the CRM to HZZ for approximately \$50 million (the "HZZ Transaction"). However, they allege that the HZZ Transaction never completed after July 5, 2016, resulting in losses to the plaintiffs.
- [9] Second, the plaintiffs allege that the defendants caused EPL or its subsidiaries to enter into certain share purchase agreements with two offshore companies, Serina Services AG ("Serina") and Ingwenya Incorporated ("Ingwenya"), which were intended to "cancel" or "buy out" the BEE Minority Interests in Lion's Head, Gubevu and Afriminerals, to transfer those interests to Serina and Ingwenya and pay out certain funds in respect of those cancellations or buy outs, even though the BEEs were not parties to these agreements (the "2016 Serina and Ingwenya Transactions"). The plaintiffs allege that the 2016 Serina and Ingwenya Transactions placed the plaintiffs at risk of losing their mineral rights in South Africa because there had been no valid approval from the requisite South African entities

providing EPL with a waiver or exception from the applicable requirements for minimum BEE holdings.

- [10] 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 a transfer of certain funds (the "Funds") to the Escrow Agent, even though they knew or ought to have known that the Funds were not required to be transferred to Serina and Ingwenya at that time by the terms of the 2016 Serina and Ingwenya Transactions.
- [11] The plaintiffs allege 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.
- [12] In their Response to Civil Claim, the Cohen Defendants plead, among other things, that the loans in respect of the BEE Minority Interests had been outstanding to Serina and Ingwenya and that the BEE Partners faced a significant risk of Serina and Ingwenya realizing on their security, which could have put the plaintiffs out of compliance with South African law. The Cohen Defendants further plead that the BEE Partners agreed to the 2016 Serina and Ingwenya Transactions, that Serina and Ingwenya were the registered and beneficial owners of the BEE Shares, or in the alternative had the right to acquire such ownership, that Serina and Ingwenya performed their obligations under these agreements, and that the agreements were entered into for valid business reasons, had been approved by the board of EPL and that the plaintiffs received valuable consideration.
- [13] The Cohen Defendants plead that the new management did not complete the HZT Transaction, and that such failure to complete caused loss and damage to the plaintiffs. They further allege that any injury, loss, damage or expense was caused by the plaintiffs' own negligent acts and omissions after July 5, 2016 under new management or, in the alternative, that the plaintiffs failed to mitigate any alleged damages.

Issue 1: The Demanded Documents

- [14] The documents sought by the Cohen Defendants on this application, under Rules 7-1(10), (11) and (12), all pertain to steps taken, or not taken, by the plaintiffs and their representatives after July 5, 2016, when the relevant defendant directors were removed from the EPL Board. The four categories of documents are as follows (the "Demanded Documents"):
- (a) all non-privileged documents pertaining to the steps taken by the plaintiffs to close (or not close) the HZT Transaction, and the decisions taken by the plaintiffs' new management in relation to the HZT Transaction, in the period between July 6, 2016 to September 1, 2017, including communications between the plaintiffs (and their representatives, including lawyers) and HZT (and their representatives, including lawyers);

- (b) all non-privileged documents pertaining to the in-person meetings and communications between the plaintiffs and their representatives (including lawyers) and the BEE Partners and their representatives (including lawyers), in the period between July 6, 2016 and present, regarding the 2016 Serina and Ingwenya Transactions and the corresponding Escrow Agreements, including, but not limited to, the right of Serina and Ingwenya to dispose of the shares that are the subject of these agreements, the BEE Partners' relinquishment of their rights to these shares, and the reverting of these shares to Serina and Ingwenya;
- (c) all non-privileged documents pertaining to the communications between the plaintiffs and their representatives (including lawyers) and the South African Department of Mineral Resources ("DMR"), from July 6, 2016 to present, respecting the 2016 Serina and Ingwenya Transactions and the implications impact of these agreements to the plaintiffs' compliance with the South African black empowerment rules; and
- (d) all non-privileged documents pertaining to the steps taken by the plaintiffs, from July 6, 2016 to present, to effect the share cancellations that are the subject of the 2016 Serina and Ingwenya Transactions, including steps taken by the plaintiffs, or their wholly-owned subsidiaries, to seek and obtain approval of the 2016 Serina and Ingwenya Transactions from the shareholders of the BEE Entities and if no such steps have been taken, all non-privileged post-July 6, 2016 documents pertaining to the plaintiffs' decision to not take such steps.

[15] In their proposed order on this application, the Cohen Defendants define "documents" as follows:

without limitation, letters, emails, facsimiles, memoranda, notes, and all other written records, of both external communications between the plaintiffs and parties external to the plaintiffs (such as DMR, Serina, Ingwenya, the BEE Partners, the BEE Entities, Joelson, etc.) and internal communications within or between the plaintiff companies and between the plaintiff companies and their wholly-owned subsidiaries.

Document Production History

[16] The plaintiffs produced an initial list of documents on February 4, 2019, which contained 432 documents listed in Part 1.

[17] The Cohen Defendants first made demands on the plaintiffs for further and better document production pursuant to Rule 7-1(10) and (11) on May 29, 2019, prior to examinations for discovery. The demands were framed differently than the Demanded Documents, although there was some overlap concerning requests for board resolutions and minutes from Gubevu, Lion's Head and Afriminerals concerning the cancellation, purchase and transfer of the shares held by the BEE Partners, and requests for documents concerning the right of Serina and Ingwenya to dispose of the shares, the performance of Serina and Ingwenya under their agreements in the 2016 Serina and Ingwenya Transactions and also the failure of the plaintiffs to complete the HZT Transaction.

- [18] On July 17, 2019, the plaintiffs advised that, subject to claims of privilege, they were not aware of any material or responsive documents relevant to the Cohen Defendants' request.
- [19] On July 31, 2019, the Cohen Defendants delivered a further demand for documents to the plaintiffs seeking the same categories of documents set out in the May 29, 2019 letter.
- [20] On August 23, 2019, the plaintiffs delivered an amended list of documents containing 104 new documents in Part 1. The plaintiffs did not produce any documents responsive to the documents sought in the May 29, 2019 and July 31, 2019 letters.
- [21] Following additional correspondence, on September 24, 2019, the Cohen Defendants sent a letter to the plaintiffs demanding "all documents relevant to the transaction with HZT and the transactions with Serina and Ingwenya generated post-July 6, 2016." The plaintiffs did not provide a substantive response.
- [22] On December 18, 2019, the Cohen Defendants filed and served a document production application with a draft order attached that used substantially similar language in describing the Demanded Documents as the draft order on the present application.
- [23] On December 19, 2019, the plaintiffs produced a second amended list of documents, which did not include any of the Demanded Documents.
- [24] On January 5, 2020, counsel for the plaintiffs emailed counsel for the Cohen Defendants and communicated an intention to produce the documents on consent, stating:
- I am writing regarding the attached Notice of Application. Based upon the relief that you are seeking, it appears to me that an application is not necessary.
- To the extent that any documents in the categories listed in paragraphs 1(a)-(e) and (g) or paragraph 2 (a)-(e) and (g) exist, the plaintiffs agree to produce those documents.
- [25] The categories of documents in paragraphs 1(a)-(e) and (g) and paragraph 2(a)-(e) and (g) referenced by counsel for the plaintiffs above are, subject to the deletion of certain categories of documents now no longer requested by the Cohen Defendants, virtually identical to the Demanded Documents.
- [26] Subsequently, on January 13 and 14, 2020, the parties entered into a document agreement (the "Document Agreement"), whereby the plaintiffs agreed to deliver a further third amended list of documents by February 14, 2020 listing, among other things, the four categories of Demanded Documents at issue on this application. The draft order, which is referenced and incorporated into the Document Agreement, contemplates production by the plaintiffs pursuant to Rule 7-1(10) (materiality) and Rule 7-1(11) (relevance), of all the Demanded Documents.
- [27] On January 12, 2020, counsel for the plaintiffs stated as follows in an email to counsel for the Cohen Defendants, stating:

As you can see from our Application Response, we do not agree that an Order is necessary or appropriate.

Other than that, the only point of divergence, perhaps, is on timing. I don't think that the end of January is going to be possible. Mid to late February is more realistic.

[28] On January 13, 2020, counsel for the Cohen Defendants emailed counsel for the plaintiffs and stated as follows:

We are prepared to adjourn our document production application generally, provided you agree, on behalf of the Plaintiffs, to the following:

1. The Plaintiffs will deliver a further amended list of documents by Friday, February 14, 2020 listing all documents in the Plaintiffs' possession or control in the categories set out in paragraphs 1(a)-(e) and (g) and paragraphs 2(a)-(e) and (g) of the draft order

We reserve the right to seek further and better documentary production from the Plaintiffs following receipt of the further amended list, and other relief we consider appropriate.

If this is acceptable, please confirm your agreement on behalf of the Plaintiffs by return email

[29] On January 14, 2020, counsel for the plaintiffs responded: "I confirm this is agreeable".

[30] On February 14, 2020, the plaintiffs produced the third amended list of documents containing 1749 documents in Part 1 and 1085 documents in Part 4. Of the 1749 documents in Part 1, only 216 had document dates on their face that were on or after July 6, 2016.

[31] On April 3, 2020, the Cohen Defendants wrote to the plaintiffs advising that, based on their review of the documents in the plaintiffs' third list, there remained significant gaps in production of post-July 6, 2016 documents.

[32] On May 14, 2020, the plaintiffs responded, noting that documents "located to date" by the plaintiffs had been listed. It was not explained in the plaintiffs' response why the documents had not been located prior to that time.

[33] On May 28, 2020, the Cohen Defendants commenced this application.

[34] On June 15, 2020, the plaintiffs produced a fourth amended list of documents, which contained an additional 781 documents in Part 1 and 1163 documents in Part 4. Of the Part 1 documents, 173 had a document date on or after July 6, 2016.

[35] The Cohen Defendants assert on this application that critical gaps remain in the plaintiffs' production of documents dated on or after July 6, 2016.

Applicable Law

[36] In British Columbia, the Rules contemplate a two-tier approach to document production. In *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989, Mr. Justice Kent explained the two-tier approach as follows:

[18] In short, Rule 7-1 contemplates a two-tier document discovery process involving:

1. initial discovery that may be relatively narrow; and
2. further discovery on demand of broader classes of documents.

[19] The first tier of document discovery applies the "probative of material facts" test. It is much more narrow than any Peruvian Guano "direct/indirect, relating to matters in question/train of inquiry possibility" test.

[23] Subsections 7-1(10) and (11) provide for the second tier of the new document discovery process. They allow a party to demand the listing/production of additional documents or classes of documents beyond what has already been disclosed. But there is a major difference between the two subsections, namely,

- a demand under Rule 7-1(10) is for additional documents that should have been disclosed under subrule (1) i.e. documents that are probative of a material fact or any other document to which the party intends to refer at trial, whereas
- the additional documents that may be demanded under Rule 7-1(11) are for such additional documents within the listing party's "possession, power or control" and which "relate to any or all matters in question in the action" i.e. the Peruvian Guano discovery under the former rules with the addition of the word "power".

[24] A demand for broader discovery of documents under Rule 7-1(11) must be accompanied by:

- a written demand identifying additional documents or classes of documents with reasonable specificity, and
- an indication of the reason why such additional documents or classes of documents should be disclosed in the case.

[25] This "two-tiered" process of initial narrow discovery of documents followed by broader discovery of documents upon justifiable demand requires a rigorous assessment of the adequacy of any party's discovery of documents. Casual, pro-forma approaches should be avoided. Counsel have an ethical and professional duty to be diligent and to act with scrupulous integrity with respect to the pursuit and assessment of what documents must be produced and what documents need not be produced.

[26] Competent and ethical counsel can reasonably disagree in any given case on the materiality of certain facts or the relevance of documents related to such facts. Indeed, Rule 7-1 expressly contemplates such disputes being brought for and resolved by the court. But proper and professional conduct does not permit deliberate non-disclosure of documents which are required to be disclosed, nor knowing disregard of the Rules based on cynical assumptions respecting strategy or cost. The discovery of documents under the new rule demands good judgment and utmost integrity, perhaps even more so than in the past.

- [37] On applications that rely on the broader definition of relevance in Rule 7-1(11), courts have in many cases required some evidence of the existence and potential relevance of the additional documents prior to granting a production order: *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166 at para. 8; and *Eastern Platinum Limited v. Cameron*, 2019 BCSC 1515 at para. 27 [*Eastern Platinum*]. In *Kaladjian v. Jose*, 2012 BCSC 357 at para. 64, Mr. Justice Davies explained that the requirement for some evidentiary support in requests for additional documents prevents against unwarranted fishing expeditions based solely upon pro forma pleadings.
- [38] However, in *XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584, paras. 39-40, Mr. Justice Voith (as he then was) explained that there is no general requirement that a party seeking second tier production must in all cases put forth some evidence of the existence of a document or group of documents before production will be ordered. He noted that, in some cases, the requesting party will be unable to proffer any evidence of the existence of additional documents, but that this should not of necessity foreclose that party's access to further documents on the basis of the pleadings themselves. While cautioning that a court should be wary of "fishing expeditions", he also emphasized that it should be "equally wary of too readily impeding further discovery of documents."
- [39] Finally, it is well accepted that the two-tier document production regime is to be interpreted in accordance with the objectives set out in Rule 1-3(1), including in particular the objective of proportionality: *Przybysz v. Crowe*, 2011 BCSC 731 at para. 23; *Eastern Platinum* at para. 23.
- [40] Depending upon the specific facts of a particular case, the objective of proportionality can serve to justify either reduced or increased document production. For example, in *Whitcombe v. Avec Insurance Managers Inc.*, 2011 BCSC 204 at paras. 11 and 12 [*Whitcombe*], Master Caldwell (as he then was) found that the objective of proportionality justified increased production in a case involving allegations of misfeasance and bad faith, stating:

In my view, where, as here, the issues go beyond negligence and involve opposing allegations of misfeasance, proportionality must be interpreted to allow the parties a wider, more Peruvian Guano type disclosure in order to defend and protect their respective professional reputations and abilities to carry on in the business community.

Analysis

- [41] I note at the outset that the factual context of this case is significantly different from the authorities cited above. Unlike the above authorities, this is not an application to justify second tier production after first tier production has proved to be too narrow. Rather, on this application it is common ground that the plaintiffs previously agreed in the Document Agreement to provide both first and second tier production. Indeed, in their written argument the plaintiffs state that in providing the production in their third and fourth

amended lists they had applied "both the narrow and broad definition of relevance".

- [42] Thus, the principal issue on this application is not whether a sufficient evidentiary foundation for second tier production has been provided by the Cohen Defendants (although for the reasons that follow it will be apparent that my view is they have in fact done so), but whether a court order is required to ensure that the plaintiffs comply in practice with the broader scope of document production to which they have previously agreed.
- [43] Moving to the core of the analysis, it is my conclusion having reviewed all the relevant materials that a court order to ensure that the plaintiffs comply with the scope of production set out in the Document Agreement is merited in this case. I have reached this conclusion for at least four reasons.
- [44] First, I am concerned about the relatively low level of production by the plaintiffs to date of documents which were created after July 5, 2016. Although the plaintiffs have produced approximately 6,000 documents in this proceeding, less than 500 of those are documents which were apparently created after July 5, 2016. This is a surprisingly small relative number, given that the time span covered by the description of the Demanded Documents is approximately four years, which is longer than the relevant pre-July 5, 2016 timespan.
- [45] Counsel for the plaintiffs argues that the relatively small number of post-July 5, 2016 documents is largely explained by the fact that a significant number of these documents are privileged. This is not a claim I am able to assess on this application, although I understand from all counsel that the issue of the breadth of the scope of documents covered by privilege may be the subject of a future application so I will leave that for another day.
- [46] However, even taking into account the plaintiffs' assertion with respect to privileged documents, my view is that the Cohen Defendants are entitled, in light of the Document Agreement, to be reassured that no stone has been left unturned by the plaintiffs in their efforts to produce non-privileged documents. As will be apparent from the discussion that follows, I am not convinced that the plaintiffs have taken all the steps necessary to give that reassurance.
- [47] Second, I have concerns about the search methodology employed by the plaintiffs. Under the Rules, a "document" is stated to have an "extended meaning" and is defined broadly as including:
- a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device.
- [48] I have reviewed the plaintiffs' materials with respect to their search methodology and am not convinced that they have adequately conducted searches in accordance with the extended meaning of "document" under the Rules. For example, Ms. Hu, the CEO and President for the plaintiffs, deposed in her affidavit that she "searched [her] emails" with respect to communications pertaining to the BEE Partners, but she did not state that she had

searched any other potential sources for documents including, for example, corporate databases, hard drives or filing cabinets, nor did she state what instructions she gave to employees with respect to the scope of the document searches they should conduct. Further, Ms. Hu apparently limited her search only to emails that "refer to meetings with the BEE Partners", which is a more restrictive parameter than the wording set out in the Demanded Documents and appears on its face to exclude other documents that may have been relevant to meetings with the BEE Partners, such as internal memoranda and letter correspondence.

- [49] Along similar lines, Ms. Hu deposed that she used the following search parameters in conducting her search: DMR, BEE, Serina, Ingwenya and Investigation. As noted by the Cohen Defendants, Ms. Hu only applied a single search term ("BEE") that might be expected to generate documents pertaining to communications with the BEE Partners, as she did not search the individual names of the BEE Partners, their counsel, their representatives or the relevant South African companies in which the BEE Partners owned shares (i.e. Gubevu, Afriminerals and Lion's Head, who are expressly referenced in the NOCC). In this respect, I note that Ms. Hu's search did not even encompass the names of key individuals and entities named in the Cohen Defendants' pleadings. For example, Mr. Sisulu, the majority shareholder in Gubevu, Lion's Head and Afriminerals as of July 6, 2016, and also two other BEE Partners, Usiba and Khumbula, are expressly named in their Response to Civil Claim, yet were not included in Ms. Hu's search parameters.
- [50] Mr. Wallenius, EPL's CFO, also swore an affidavit with respect to his document search efforts in which he stated that he was "the person primarily responsible within EPL for taking steps to collect documents for production in these proceedings". Unfortunately, his evidence is equally concerning. Although the search terms he employed were marginally broader than Ms. Hu's (i.e. BEE, Black Empowerment, DMR, Department of Mineral Resources, HZT, Investigation, Serina and Ingwenya), I find that they too were overly narrow in light of the pleadings. Further, I find that the breadth of his search efforts also did not meet the standard required under the Rules. In particular, I note that, in collecting documents from current and former senior management personnel, he sought only emails and did not expressly request other documents or files. While he did explain that he searched his emails and his own files, he did not elaborate on what files he searched or whether this search included both electronic and paper files.
- [51] I pause to note that my purpose here is not to dictate to the plaintiffs what precise search terms they should employ in their document searches, but simply to emphasize that the searches should be sufficiently broad to encompass documents that meet the first (material) and second (relevancy) tier tests under Rule 7-1(10) and (11) with respect to the Demanded Documents. In this regard, I find that the limited category of search terms employed by the plaintiffs, and the limitation of searches to principally emails, certainly did not meet the standard for second tier production and likely did not even meet the standard for first tier production. In this respect, I believe the definition of "documents" included in the Demanded Documents is helpful, as it will provide the necessary clarity to corporate

directors and officers of the plaintiffs with respect to the scope of the search that is required.

- [52] Third, I am concerned about gaps in the plaintiffs' document production which are apparent on the face of the evidentiary record. Specifically, I note that the Cohen Defendants have introduced evidence with respect to both documents and meetings during the period after July 5, 2016 where other documents are specifically referenced. Despite being referenced in those documents or meetings, or where it can be reasonably inferred that the plaintiffs must have further documents in their possession and control, they are not included in the plaintiffs' production
- [53] For example, the plaintiffs produced an email exchange between Mr. Daly, the BEE Partners' lawyer, and EPL's auditor Deloitte dated March 15-17, 2017, in which the Deloitte representative advised Mr. Daly that he was in the process of conducting an audit for the 2016 fiscal year and that he had received contact information from Mr. Wallenius, "who has been included in communication between you and Anton Lubbe" [emphasis added], one of the EPL onsite representatives in South Africa. The Deloitte representative goes on to say that EPL (through Mr. Lubbe and their counsel in South Africa) has been in contact with Mr. Daly to determine whether the BEE shares that were the subject of the 2016 Serina and Ingwenya Transactions were cancelled and what the current status of the transactions was.
- [54] Despite the express reference in the email exchange to other prior communications between Mr. Daly and Mr. Lubbe, the plaintiffs have not produced any such correspondence between Mr. Lubbe and Mr. Daly (or the BEE Partners directly) prior to or after the date of this email, and have also not produced any correspondence between the plaintiffs' counsel in South Africa and Mr. Daly or his clients respecting the status of the BEE Shares. Further, the plaintiffs have not produced any part of the Deloitte file, which involved reviewing the very transactions at issue in this litigation. While the plaintiffs may perhaps assert that these omissions are due to wide-ranging privilege claims, such an argument does not explain why all the other documents are covered by privilege, but not the March 15-17 email exchange.
- [55] An additional example is a letter produced by the plaintiffs from EPL to the DMR dated July 18, 2018 regarding EPL's BEE status. That letter referred to an email from Mr. Daly dated September 14, 2017 in which he allegedly stated that the Sisulu family had on June 20, 2017 "cancelled the agreement with Ingwenya and Serina, purportedly giving their shares in Gubevu back to the two companies from whom they had bought them, and have therefore apparently zero shareholding in Gubevu". Again, the plaintiffs have not produced the September 14, 2017 letter referenced here, or any internal EPL documents in respect of it, nor have they produced any subsequent communications with the BEE Partners and/or Mr. Daly with respect to the completion of the 2016 Serina and Ingwenya Agreements, the relinquishment of the BEE Shares or the reversion of those shares back to Serina and Ingwenya.

- [56] There are other examples adduced by the Cohen Defendants in the materials, but the foregoing are sufficient to support the concern that there are material gaps in production that need to be addressed by the plaintiffs.
- [57] A fourth and final reason why a court order is appropriate in this case is that the requested order is in my view proportionate and is not being used to justify a "fishing expedition". In this respect, I note that the Demanded Documents have been identified in the draft order "with reasonable specificity" and are not overly broad or vague: *Eastern Platinum* at para. 25. This is not a situation, as identified in *Lit v. Hare*, 2012 BCSC 1918 at para. 68 for example, where "what is sought are 'all documents not yet produced' in broadly defined categories." To the contrary, the four categories of Demanded Documents have been fairly narrowly drafted in relation to discrete topic areas and each category clearly relates to the broad defences pleaded by the Cohen Defendants, including that the plaintiffs have taken no reasonable steps to mitigate their losses and damage and also that the plaintiffs were negligent due to the acts and omissions undertaken by new management after July 5, 2016. All four of these categories have been raised previously and extensively by the Cohen Defendants as live issues in the litigation in prior correspondence between counsel and during the discovery process.
- [58] I also note that to the extent that the NOCC makes serious allegations of bad faith, breach of fiduciary duty and other misfeasance, this is the type of case where the objective of proportionality justifies some level of increased production in order to enable the defendants to fairly defend and protect their respective professional reputations and abilities to carry on in the business community: *Whitcombe* at paras. 11 and 12.
- [59] Finally, and most importantly, the plaintiffs have previously agreed to the breadth of disclosure set out in the Document Agreement. If they had concerns about proportionality, it is my view that these concerns should have been addressed prior to agreeing to the Document Agreement.
- [60] Accordingly, I conclude that an order in the form proposed by the Cohen Defendants with respect to the Demanded Documents is merited under the circumstances.

Issue 2: Affidavit of Documents

Applicable law

- [61] Under Rule 7-1(8), a court may order a party of record to serve an affidavit verifying a list of documents.
- [62] Mere "suspicions" are not sufficient to justify an order for an affidavit of documents. The circumstances in which an affidavit of documents may be ordered are:
- (1) when document production has been clearly inadequate, meaning documents that are significant to the defence or claim have been omitted from any list delivered under the Rule, and there is no adequate explanation or reason for the omission; or

- (2) when a party has displayed a dilatory or casual attitude to document production, giving the other party reasonable cause to suspect that, either deliberately or by wilful indifference, relevant documents may be hidden from them.

See *Copithorne v. Benoit*, 2010 BCSC 130, para. 12; *Grandmaison v. Berkenbos*, 2018 BCSC 1329, para. 35.

- [63] Where a case involves a large number of documents, some flexibility is required. In *Centura Building Systems Ltd. v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939 [Centura], the court stated as follows:
- [39] In large and complex cases like this one, document production tends to be a lengthy and ongoing process. The volume of documents involved is such that, no matter how diligent the original search, documents can be overlooked and come to light later in the process. Issues tend to develop and or clarify as the case goes on, which may lead to altered views about what is or is not relevant.
- [40] This case obviously involves thousands of documents covering a lengthy period. Thousands of documents have already been produced and more are apparently forthcoming. In the circumstances, I am not satisfied that, to this point, there has been inadequate or dilatory production sufficient to require an order for an affidavit verifying the lists of documents. The plaintiff's application for such an affidavit is dismissed.

Analysis

- [64] Although I have ordered that the Demanded Documents should be produced, I am not prepared at this time to order the plaintiffs to serve an affidavit verifying a list of documents, as I am not convinced that document production has been "clearly inadequate".
- [65] As noted in *Centura*, some flexibility is required in large and complex cases like this one. This is a complex case involving multiple entities and parties in different jurisdictions, and voluminous materials. In this respect, I note that the plaintiffs have listed almost 6,000 documents in this action, with 1749 documents being produced on February 14, 2020 and another 781 documents on June 15, 2020. These are not insignificant levels of production, and the record indicates an ongoing effort by the plaintiffs to continue to produce documents that may have been overlooked.
- [66] While there are clearly gaps in the plaintiffs' production to date, I am not convinced that their production has been "dilatory or casual", particularly in light of their assertion about a broad claim of privilege over documents created after July 5, 2016, which may at least in part explain the gaps in production.
- [67] Further, even if the Cohen Defendants' application on the affidavit were otherwise well founded, my view is that this application is premature at this stage. As a result of my decision on August 17, 2020, granting certain amendments to the NOCC, new causes of action and defendants have been added and the factual scope of the plaintiffs' claim has

expanded significantly. This will almost certainly result in further and expanded document production, including likely further production by the plaintiffs, and additional examinations for discovery. In addition, the upcoming September, 2020 trial date has been adjourned and it appears likely that any new trial date will not be scheduled until well into 2021, or possibly later.

[68] For all the above reasons, it appears that this matter is not sufficiently advanced in the discovery process to justify an affidavit verifying a list of documents at this time.

Conclusions

[69] The order under Rule 7-1(10), (11) and (12) requiring the plaintiffs to produce the Demanded Documents is granted.

[70] The order under Rule 7-1(8) requiring the plaintiffs to provide an affidavit verifying their list of documents is denied at this time, although the Cohen Defendants will be at liberty to apply at a later date for such a remedy, closer in time to the completion of the discovery process, if production of the Demanded Documents is not compliant with this order at that time.

Costs

[71] There has been mixed success on this application. Accordingly, costs will be in the cause.

"Taylor J."

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