Court of King's Bench of Alberta

Citation: Starratt v Chandran, 2023 ABKB 609

2023 ABKB 609 (CanLII)

Date: 20231027
Docket: 1201 08069
Registry: Calgary

Between:

JOHN STARRATT, JOHN STARRATT AS REPRESENTATIVE PLAINTIFF, PAULA HENRIQUES, PAULA HENRIQUES AS REPRESENTATIVE PLAINTIFF, JOHN STARRATT, JOHN STARRATT AS REPRESENTATIVE PLAINTIFF, JOHN ADAMEK, JOHN ADAMEK AS REPRESENTATIVE PLAINTIFF, DEEPAK SAINI, DEEPAK SAINI AS REPRESENTATIVE PLAINTIFF, WARREN NELSON, WARREN NELSON AS REPRESENTATIVE PLAINTIFF, KAREN SHADLOCK, KAREN SHADLOCK AS REPRESENTATIVE PLAINTIFF, PAUL RADDER, PAUL RADDER AS REPRESENTATIVE PLAINTIFF, DON DENNIS, DON DENNIS AS REPRESENTATIVE PLAINTIFF, SIMON OKKERSE, SIMON OKKERSE AS REPRESENTATIVE PLAINTIFF, JAMIE OSHIPOK, JAMIE OSHIPOK AS REPRESENTATIVE PLAINTIFF, BARB WILKINSON, BARB WILKINSON AS REPRESENTATIVE PLAINTIFF, SAM BACKLIN, SAM BACKLIN AS REPRESENTATIVE PLAINTIFF, DINESH SAINI, DINESH SAINI AS REPRESENTATIVE PLAINTIFF, SIVA KARATHOLUVU, SIVA KARATHOLUVU AS REPRESENTATIVE PLAINTIFF, PETER MCGRAW, PETER MCGRAW AS REPRESENTATIVE PLAINTIFF, JOHN KINDRAT, JOHN KINDRAT AS REPRESENTATIVE PLAINTIFF, CRAIG BISSCHOP, CRAIG BISSCHOP AS REPRESENTATIVE PLAINTIFF, DALJIT CHOONGH, DALJIT CHOONG AS REPRESENTATIVE PLAINTIFF, LEN GRANT, LEN GRANT AS REPRESENTATIVE PLAINTIFF AND COLIN O'BRIEN, COLIN O'BRIEN AS REPRESENTATIVE PLAINTIFF

Plaintiffs

- and -

SHARIFF H. CHANDRAN, also known as S.H. Chandran, Sri Chandran and Srinivansan Chandran, JENNIFER CHERRY, CHITRA CHANDRAN, OPAL INVESTMENT CORPORATION, PEWTER INVESTMENT CORPORATION, CITI CENTRE INVESTMENT INC., MULTUS INVESTMENT CORPORATION, BUILDING 906 INVESTMENTS LTD., VENTI INVESTMENT CORPORATION, BUILDING 614 INVESTMENT LTD., LUCROR INVESTMENT CORPORATION, DEERFOOT COURT INVESTMENTS LTD., BARRON BUILDING REDUX LTD., LUCAYA REGISTERED INESTMENTS LTD., LUCAYA REGISTERED CAPITAL LTD., LUCAYA GENERAL PARTNERSHIP, LUCAYA LIMITED PARTNERSHIP, GREENWICH LIMITED

PARTNERSHIP, PLATINUM 5 ACRES AND A MULE INC., 1376261 ALBERTA LTD., GLENMORE AND CENTRE RETAIL GP LTD., GREENBRIAR PLACE REAL ESTATE INVESTMENT FUND LIMITED PARTNERSHIP, GREENBRIAR HOLDINGS LTD., PLATINUM EQUITIES INC., ACCOLADE EQUITIES INC., TRUST HAVEN INC., 1623703 ALBERTA LTD, QUALIA REAL ESTATE INVESTMENT FUND I LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND LTD., QUALIA REAL ESTATE INVESTMENT FUND II LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND III LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND IV LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND V LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND VI LIMITED PARTNERSHIP, QUALIA VI INVESTMENTS LTD., QUALIA REAL ESTATE INVESTMENT FUND VII LIMITED PARTNERSHIP, QUALIA REAL ESTATE INVESTMENT FUND VIII LIMITED PARTNERSHIP, DEERFOOT COURT REAL ESTATE INVESTMENT FUND LIMITED PARTNERSHIP, DEERFOOT COURT REGISTERED INVESTMENTS LTD., GREENBRIAR REAL ESTATE INVESTMENT FUND LIMITED PARTNERSHIP, LANGDON CROSSING LIMITED PARTNERSHIP, PLATINUM LANDS CORPORATION, PLATINUM MORTGAGE INVESTMENT CORPORATION I, PLATINUM MORTGAGE INVESTMENT CORPORATION II, PLATINUM INVESTMENT TRUST, ACCRETIVE ASSET MANAGEMENT CORP., C & N REALTY MANAGEMENT LTD., FISH CREEK PARK LIMITED PARTNERSHIP, AND DAVID HUMENIUK

Defendants

2023 ABKB 609 (CanLII)

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] The Plaintiffs claim to have lost significant sums investing in or with the defendant companies, which will be referred to in these Reasons as the Platinum Defendants, associated with the individual defendant, Shariff Chandran. The Plaintiffs allege that their losses were caused by, among other things, negligent and fraudulent misrepresentations by Mr. Chandran and the Platinum Defendants.

[2] The Plaintiffs seek orders directing the Platinum Defendants to: (1) provide a further and better Affidavit of Records; (2) pay unpaid costs awards; and (3) answer outstanding

undertakings. The Plaintiffs further ask the Court to set a deadline by which all these things must be done.

Background

[3] This litigation has been extant for over a decade. The matter was case managed by Justice A.D. Macleod until his retirement. I was appointed case manager in early 2022.

[4] The essence of the Plaintiffs' claim is that they were induced by misrepresentations to invest in or with the Platinum Defendants in various real estate projects. The Plaintiffs allege that Mr. Chandran breached his fiduciary obligations and diverted funds and property from the various corporations for his personal benefit that should have accrued to investors. This was done through, among other means, manipulating property values. Various ancillary causes of action are also alleged.

[5] Much of the early fighting in this case concerned the production of records from law firms that provided services to the Platinum Defendants. The volume of records produced in this case by these law firms is significant.

[6] The law firm records were delivered to the Defendants' counsel so that they could be reviewed for privilege prior to being produced to the Plaintiffs. Justice Macleod directed that the records be produced in an Affidavits of Records by July 2, 2019. The Platinum Defendants delivered an Affidavits of Records, sworn by Mr. Chandran, prior to the deadline. An issue in the present application is the sufficiency of this Affidavit of Records.

[7] Counsel for the Plaintiffs conducted a questioning of Mr. Chandran on the Platinum Defendants' Affidavit of Records. At the questioning, Mr. Chandran took certain undertakings under advisement. By way of an Order dated October 16, 2019, Justice Macleod ordered the undertakings taken under advisement to be answered. The Platinum Defendants did not answer the undertakings.

[8] The present application comes on the heels of an application by the Plaintiffs for summary judgment against Mr. Chandran, not the Platinum Defendants, that was heard on April 5, 2023. I advised counsel during that application that the evidence before the Court did not provide a sufficient basis for granting summary judgment, even though Mr. Chandran did not adduce any evidence in opposition.

[9] Counsel for the Plaintiffs responded by alleging that the main obstacle his clients faced in providing this evidence was the dismal state of the Platinum Defendants' record production and failure to respond to undertakings. He explained that the Platinum Defendants' overbroad privilege claim and refusal to comply with the order to answer undertakings had prevented his clients from obtaining the disclosure necessary to provide the Court with evidence to support the summary judgment application.

[10] Rather than dismissing the summary judgment application, I adjourned it *sine die* to give the Plaintiffs an opportunity to secure and present the required evidence. The present application is part of an effort by the Plaintiffs to obtain the evidence that is required for them to renew the summary judgment application.

Position of the Defendants

[11] At the hearing of this application and in a written submission delivered October 24, 2023, the Defendants objected to the Plaintiffs' application on the grounds that it was a "do over" of

2023 ABKB 609 (CanLII)

their April 2023 summary judgment application. They call it a "do over" because the Plaintiffs rely on some of the same materials and reiterate some of their complaints about the Defendants' conduct. The Defendants submit that when the summary judgment application was adjourned, the Court gave directions and counsel discussed a process counsel for questioning Mr. Chandran, the Plaintiffs' delivery of further affidavit evidence, and questioning by the Defendant on the Plaintiffs' existing evidence and such further affidavit evidence as may be filed. The Defendants contend that the Plaintiffs should not be permitted to abandon that approach.

[12] The Court gave no directions at the summary judgment application nor reduced any directions to an Order. More to the point, the Court's comments were contingent on the parties determining their preferred courses of action; specifically, choosing whether they would adduce additional evidence or conduct questioning. The comments on the procedure to be followed prior to rescheduling of the summary judgment application are best characterized as advice as opposed to directions. The Plaintiffs have chosen a different path which they say is a necessary first step to obtaining the information they require to make the summary judgment application. There is nothing preventing the Plaintiffs from bringing the present application nor will I second guess their choice. Following the Defendants' compliance with my directions in these Reasons, if the Plaintiffs still wish to pursue the summary judgment application, I expect the parties will revisit the procedure to be followed in advance of such application.

Conflict of Interest Allegations

[13] The Plaintiffs assert that Mr. Chandran cannot act as the corporate representative for the Platinum Defendants because he is in a conflict of interest. They allege that he used his position as the corporate representative in this litigation for the Platinum Defendants to prevent disclosure of records that were harmful to his personal interests. Specifically, they alleged that he used, among other means, an overbroad privilege claim to cause the Platinum Defendants to withhold financial records showing monies paid to him by the Platinum Defendants.

[14] The Plaintiffs' allegation that Mr. Chandran is in a conflict of interest and has used his position as corporate representative for the Platinum Defendants to frustrate the Plaintiffs' ability to obtain records to prove their case against Mr. Chandran will not be assessed at this time. Though I find it troubling that the Platinum Defendants' Affidavit of Records asserts privilege over a large volume of records that do not by their descriptions appear to be privileged, it is premature to inquire as to whether Mr. Chandran is at fault. The result of the present application is that the Platinum Defendants have a chance to provide a further and better Affidavit of Records. Should they fail to do so or should their new Affidavit of Records be deficient, at that stage, it would be appropriate to inquire whether Mr. Chandran acted to frustrate the Platinum Defendants' ability to comply with their disclosure obligations and what consequences should follow.

Alberta Securities Commission Sanctions

[15] The Plaintiffs assert that sanctions imposed by the Alberta Securities Commission (ASC) prevent Mr. Chandran from acting in the role of litigation representative for the Platinum Defendants. The ASC in ***Re Platinum Equities Inc***, 2014 ABASC 376 and ***Re Chandran***, 2014 ABASC 509 issued orders barring Mr. Chandran from acting as a director or officer of a corporation. Mr. Chandran asked the ASC for a "litigation carve-out" to allow him to assist the various Platinum corporations in litigation seeking to recover monies for investors. The ASC denied his request on the grounds that Mr. Chandran did not provide enough information to

2023 ABKB 609 (CanLII)

support his request. The Plaintiffs appear to have interpreted the ASC's director and officer ban and refusal to grant a litigation carve-out as precluding Mr. Chandran from assisting the Platinum Defendants in the present litigation.

[16] The ASC ban on Mr. Chandran acting as a corporate officer and director has no bearing on his capacity to act as a corporate representative for the Platinum Defendants in the present action. An ASC ban on an individual acting as a director and officer of a corporation precludes that individual from occupying the role of director or officer, as defined in the *Business Corporations Act*, RSA 2000, c B-9 ("ABCA"). Directors are responsible for managing the affairs of a corporation (ABCA s. 101(a)) and may delegate that responsibility to officers (ABCA s. 121(a)). Though an individual who acts as a corporate representative in a court proceeding, pursuant to Rule 5.4, is sometimes called an "officer," such a person need not be an "officer" in the sense contemplated by the ABCA. Accordingly, I find that the ASC ban on Mr. Chandran acting as a corporate officer and director has no bearing on his ability to assist the Platinum Defendants as their corporate representative, or otherwise, in the present matter.

2023 ABKB 609 (CanLII)

Affidavit of Records

Numbering, Description, and Bundling

[17] The Plaintiffs submit that the Defendants' Affidavit of Records is deficient because it fails to number and describe the records. The Plaintiffs acknowledge that the *Rules of Court* permit groups of like records to be bundled, but they submit that the bundling practice evident in the Defendants' Affidavit of Records is not consistent with the *Rules*.

[18] Justice Côté explained in ***Dorchak v Krupka***, 1997 ABCA 89 at para 8 that an "affidavit of documents must show unambiguously what documents' existence it does or does not disclose." He referred to this in para 12 as the "rule of unambiguous identification." He concluded that unambiguous identification could be accomplished by either numbering or describing each record.

[19] Justice Côté went on to observe at para 16 that where "documents are grouped in some meaningful way" an index listing every single document is not necessary. He held at para 18 that "an affidavit listing such numbered bundles would suffice if its producible schedule briefly explained the basic nature or source of each bundle." ***Dorchak*** appears to permit bundling records of the same nature or from the same source.

[20] Following ***Dorchak***, a new version of the *Rules* was adopted. Rule 5.7 modifies the law discussed in ***Dorchak***. Rule 5.7 provides:

(1) Each producible record in an affidavit of records must

(a) be numbered in a convenient order, and

(b) be briefly described.

(2) A group of records may be bundled and treated as a single record if

(a) the records are all of the same nature, and

(b) the bundle is described in sufficient detail to enable another party to understand what it contains.

[21] The practice of bundling records is justified in ***Dorchak*** partly on the basis that sometimes, in cases with a large volume of records, it is too laborious to describe each individual record. This reality has been overtaken in most large-scale litigation by what is referred to as e-Discovery, in which document production is often outsourced to specialized service providers who make extensive use of technology including Artificial Intelligence (AI). In cases where record numbering and descriptions are generated by a computer, saving labour does not provide much justification for bundling.

[22] Today, bundling is most often seen in cases like the present one, where a party is required to produce hard copy records and is financially strapped. Ms. Hami, a legal assistant working for counsel for the Defendants, deposed that record production was hampered by the Defendants' lack of funds. Bundling, though often sub-optimal for the efficient resolution of disputes, is a justifiable expedient for under-resourced litigants. With that said, Courts must be alive to the potential abuse of the practice of bundling by recalcitrant litigants who use bundling as a strategy to conceal records and obstruct their adversaries.

[23] The following table provides representative examples of the entries for bundles in Schedule 1 to the Defendants' Affidavit of Records.

PRODUCED BY	**CORPORATION**	**PROPERTY**	**DESCRIPTION**	**DATE**	**PAGES**
BLG Box 2	Opal Investment Corporation	First Street Plaza	Marketing, Mortgage, Property Management, Qualia II-IR, Sale to Strategic, Settlement and additional documents	2005-2007	Box
BLG Box 7	614 Investment Ltd.	614 – 6 Avenue SW	Loan Statements, Mortgage Amending Agreement between Building 614 Investment and 614 Place Ltd., Amending Agreement between 1171097 Alberta Ltd., and Platinum Equities, Land Title Certificate, Marketing & Syndication, Offer to Purchase and Interim Agreement,		

2023 ABKB 609 (CanLII)

			correspondence from Barclay Street Real Estate dated Nov 7, 2011 enclosing: Non Waiver of conditions, Accepted Offer to Purchase, Pacific Investments dated Nov 2, 2011, copies of deposit, Order granted and filed November 1, 2011		
BLG Box 15	PenCor Mortgage	1411 – 33 Street NE	Mortgage – Pencor, PSA, Third party reports, appraisal reports, Offer to Purchase, Marketing, Operations budgets		Box

2023 ABKB 609 (CanLII)

[24] The bundles are not numbered, as required by Rule 5.7 (1)(a), nor is there any indication that the contents of the bundles are numbered. I direct the Defendants to number the records in their Affidavit of Records and number each page of the contents of each bundle. The number of pages in each bundle should be stated in the Affidavit of Records. Numbering the contents of each bundle is necessary so that on applications and at trial there can be certainty as to whether a record was produced as part of a bundle. The numbering of the contents of each bundle is part of the obligation in Rule 5.7(2)(b) to provide sufficient detail to enable another party to understand what it contains.

[25] The Plaintiffs submit that the contents of the bundles are not adequately described because there is not "sufficient detail to enable another party to understand what it contains" as required by Rule 5.7(2)(b). The descriptions indicate that the bundles contain a variety of types of documents that presumably relate to the corporation and property identified in the second and third columns. The Plaintiffs say that they have no way of knowing what is in each bundle without inspecting every page. Nor does the Defendants' Affidavit of Records further the purpose and intention of the *Rules* as set out in Rule 1.2 which is, among other things, to promote timely and cost-effective resolution of disputes.

[26] The adequacy of the descriptions provided is inextricably intertwined with the next question, which is whether the bundled records are "all of the same nature" as required by Rule 5.7(2)(a). There is no judicial consideration of the meaning of the term "of the same nature" in Alberta or in the other provinces and Federal Court where the same prerequisite to bundling exists.

2023 ABKB 609 (CanLII)

[27] The "same nature" requirement was adopted as a corrective to ***Dorchak*** which was viewed by the civil litigation bar as allowing over-bundling that "leads to cross-examinations on affidavits and prolongs examinations for discovery": Alberta Law Reform Institute, *Alberta Rules of Court Project: Document Discovery and Examination for Discovery,* Consultation Memorandum No. 12.2 (October 2002) at 27. The ALRI report at page 29 recommended the adoption of the "same nature" concept from the Federal Court Rules though without any explanation of what the idea meant. All that can be taken from the ALRI report is that "same nature" was intended to be more restrictive than the "meaningful grouping" concept in ***Dorchak***.

[28] A textual reading of Rule 5.7(2) also suggests that "same nature" is a narrower concept than "meaningful grouping." Records of a different nature – for example, an agreement and a photograph – may be gathered in a meaningful grouping if there is some other logic that connects the records. The Plaintiffs argued that records of the same nature means that they are the same type or class of record and should be from a defined period. For example, an appropriate bundle would be "Statements for CIBC Account 1234-56789 for 2022." Another example of an appropriate bundle would be "Invoices Issued by XYZ Corp in January 2023." Even in some situations it may be appropriate to bundle hard copy correspondence as, for example, "Correspondence Received by A.B.C. from September 1, 2021 to December 31, 2021." Such bundles can be succinctly described, are an efficient way to produce records for the producing party, and do not compromise the receiving party's ability to understand what is being produced. Such an approach is efficient and consistent with the purpose and intention of the *Rules* as stated in Rule 1.2.

[29] The Plaintiffs submit that Rule 5.7 should be interpreted consistent with its text and with a pragmatic and functional understanding of the record production process. Records of the "same nature" (i.e. homogeneous) can efficiently be "described in sufficient detail to enable another party to understand what it contains" whereas a bundle of disparate records (i.e. heterogeneous) requires a comprehensive description of the contents of the bundle to achieve the same effect.

[30] The Defendants contend that the bundles in their Affidavit of Records are of the same nature because each bundle relates to a specific corporation, specific property, and comes from a common source (a lawyer's file in most instances). The Defendants submit that what they have done is no different than the common practice under Rule 5.8 of bundling the contents of a lawyer's file when asserting a claim of privilege. An example of this practice that met with the Court's approval can be seen in ***Blough v Busy Music Inc***, 2018 ABQB 560 at para 77-79 where 219 pages from a lawyer's file were described as "solicitors' work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitors or their assistants" for the period September 18, 2012 to November 14, 2016. Justice Jones did not indicate whether he considered the contents of the lawyer's file to be comprising records of the "same nature."

[31] Given the longstanding practice in Alberta, reflected in ***Dorchak*** and ***Blough***, of bundling records received from a common source, I cannot read "same nature" as to restrict the practice of bundling only to situations where there is the same type or class of record such as bank statements or invoices. Records from a common source may be of the same nature, particularly where, as in the present case, there are other characteristics identified that connect the bundled records. Such an interpretation also maintains the flexibility that bundling provides for parties that are financially constrained.

[32] Though the disputed records may be bundled, that does not end the analysis. Rule 5.7(2)(b) imposes a duty on the disclosing party to describe the bundle "in sufficient detail to enable another party to understand what it contains." The approach to describing bundles must be adjusted depending on the context; the principle of proportionality that governs record production applies to the description of bundles. Where a bundle is comprised of homogeneous records (e.g. bank statements from a single account for a defined period) a terse description is all that is needed. The more heterogeneous the contents of a bundle, the more robust the description required. This is an example of what Justice Marion, writing about a different aspect of record production, called "common sense and proportionality": ***MBH v CKI***, 2023 ABKB 284 at para 40.

[33] The bundles in the present case appear to contain a mix of different types of records, so the principle of proportionality requires a more thorough description. The descriptions in Schedule 1 to the Defendants' Affidavits of Records seem to acknowledge this reality by providing something more than terse descriptions of the source of each bundle. The problem, however, is that the descriptions stop short of providing sufficient detail to understand what each bundle contains. Descriptions like "and additional documents" are particularly problematic. I direct the Defendants to provide a further and better affidavit of records with bundle descriptions that provide sufficient detail to enable the Plaintiffs to understand what each bundle contains.

Non-Disclosure of Relevant Records

[34] The Plaintiffs submit that the Defendants have withheld relevant and material records by making improper privilege claims. The Plaintiffs apply, pursuant to Rule 5.11, for an order compelling the Defendants to disclose the allegedly improperly withheld records. Rule 5.11 provides that:

> (1) On application, the Court may order a record to be produced if the Court is satisfied that
>
> > (a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or
> >
> > (b) a claim of privilege has been incorrectly or improperly made in respect of a record.
>
> (2) For the purposes of making a decision on the application, the Court may
>
> > (a) inspect a record, and
> >
> > (b) permit cross-examination on the original and any subsequent affidavit of records.

[35] The Defendants took the same approach to describing bundles in Schedule 2 to their Affidavit of Records as they did in Schedule 1. Schedule 2 sets out relevant and material records that they object to producing. The descriptions of records that the Defendants object to produce include the following types of records:

(a) bank statements;

(b) cheques;

(c) deposit slips;

(d) accounting records;

2023 ABKB 609 (CanLII)

(e) mortgages;

(f) purchase agreements;

(g) closing books;

(h) insurance;

(i) tax records;

(j) land titles records;

(k) concept plans;

(l) appraisals;

(m) court orders;

(n) caveats;

(o) marketing records;

(p) non-disclosure agreements;

(q) offers to purchase;

(r) offering memoranda;

(s) affidavits;

(t) reasons for judgment;

(u) releases;

(v) correspondence between counsel and third parties;

(w) guarantees;

(x) officers' certificates;

(y) corporate search reports;

(z) corporate registry filings;

(aa) minute books;

(bb) shareholders' register;

(cc) employment agreements;

(dd) annual corporate returns;

(ee) pleadings;

(ff) affidavits of service; and

(gg) writs of enforcement.

[36] The Defendants claim that most of the records they object to producing are either solicitor-client communications or records made for the dominant purpose of litigation. A small number of records disclosed on Schedule 2 are said to be irrelevant, but that begs the question why they were listed at all, given that only relevant and material records are to be listed on Schedule 2.

2023 ABKB 609 (CanLII)

[37] The documents listed above in para 35 (a) – (gg) by their descriptions do not appear to be subject to solicitor-client privilege or litigation privilege. Indeed, the descriptions suggest that the Plaintiffs have overreached in their privilege claims.

[38] Solicitor-client privilege "must arise from communication between a lawyer and the client where the latter seeks lawful legal advice": ***R v McClure***, 2001 SCC 14 at para 36. Solicitor-client privilege only attaches to confidential communications between a lawyer and a client: ***Alberta v Suncor Energy Inc***, 2017 ABCA 221 at para 36. Many of the records listed in Schedule 2 do not appear to be confidential, having been exchanged between counsel for the Defendants and counsel for counterparties to transactions. A closing book, for example, is a collection of material agreements and documents compiled by counsel for one party to a transaction and often provided to both parties to the transaction as evidence of the transaction's completion. Similarly, agreements are, by definition, signed by more than one party and are thereby not confidential as between lawyer and client. The idea that such documents in final form (as opposed to draft form) could be solicitor-client privileged is puzzling. Similarly, documents such as offering memoranda which are provided to potential investors would not appear to have the quality of confidentiality required for solicitor-client privilege to attach. Other categories of documents are not solicitor-client privileged because they have been filed on or obtained from the court record (e.g. pleadings, affidavits, orders, etc.) or another public source (e.g. land titles office, corporate registry, etc.) and are, accordingly, not confidential.

2023 ABKB 609 (CanLII)

[39] Litigation privilege only applies to documents whose dominant purpose is litigation: ***Lizotte v Aviva Insurance Company of Canada***, 2016 SCC 52 at para 23. Many of the documents listed in Schedule 2 do not appear to have been created for the dominant purpose of litigation. Rather, the documents appear, from the descriptions, to be part of real estate transaction files. The Defendants did not provide the Court any evidence or reasoned argument to substantiate their claims of litigation privilege.

[40] Still other records would seem, from their descriptions, to contain no legal advice and not have been prepared for the dominant purpose of litigation (e.g. accounting records, bank statements, insurance records, tax records, mortgages, marketing records). Indeed, it is hard to imagine how these records are privileged.

[41] The question now is how the privilege claims are to be vetted. The Plaintiffs have already questioned Mr. Chandran on the Affidavits of Records, so there is little to be gained by directing that as a potential remedy. There remains the possibility that I review the many boxes of records to assess the privilege claims pursuant to Rule 5.11(2)(a). However, as set out in ***Canadian Natural Resources Limited v ShawCor Ltd.***, 2014 ABCA 289 at paras 67-68 requiring a judge to review voluminous records for privilege is not a good use of "institutional capacity" and should be a last resort. I may also appoint a referee, pursuant to Rules 6.44-6.46, to inspect the records and provide a report to the Court.

[42] As a first step, I direct the Platinum Defendants to review the records set out in Schedule 2 afresh with the benefit of these Reasons. Any changes in designation of records should be reflected in a further and better Affidavit of Records. Records which are determined to not be privileged shall be produced to the Defendants by December 15, 2023.

Undertakings

[43] When Mr. Chandran was questioned on the Platinum Defendants' Affidavit of Records, counsel for the Plaintiffs requested 75 undertakings; 4 undertakings were refused and the balance were taken under advisement.

[44] The undertakings taken under advisement may be broadly characterized as seeking information and records concerning the flow of funds to and between the various Defendants. The records requested include bank statements, trust accounting records, financial statements, loan and mortgage documents, accounting records, and similar records. Some of the undertakings also sought to have Mr. Chandran make inquiries and provide the resulting information or records to the Plaintiffs.

[45] The appropriateness of the undertakings is not an issue before the Court. On October 16, 2019, Justice Macleod granted an order as follows:

> The Platinum Defendants shall produce all records that are required to respond to the undertakings taken under advisement at the questioning upon Affidavit of Records held August 14, 2019, within 30 days of the grant of this Order, a copy of which are attached as Schedule "A" to this Order.

[46] Justice Macleod's order was not appealed and the undertakings have not been answered.

[47] The Plaintiffs' Application seeks an order "Directing the Platinum Defendants to provide the Undertakings directed to be answered in the Order granted [on October 16, 2019] and filed October 17, 2019, including costs of the application to compel this to be done."

[48] The Defendants submit that Justice Macleod's Order absolves them of responsibility for providing records responsive to the undertakings. Paragraph 2 of the Order provided that if the Defendants did not produce the records required to answer the undertakings, then they could provide the Order to "all law firms that entered consent orders granted in this action ... in order to seek their compliance with providing the relevant and material records directly to counsel for all other parties in this action." Paragraph 3 goes on to say that if the Defendants fail to produce relevant and material records, the Plaintiffs shall bring an application for third party production. The Defendants say that this is exactly what happened, both parties now have access to the same records, so they have no ongoing obligation to answer the undertakings.

[49] That is not how litigation works nor is it how Justice Macleod's Order reads. Just because Justice Macleod, perhaps anticipating non-compliance by the Defendants, provided alternative remedies for the Plaintiffs, does not mean that the Defendants are freed from their responsibility to provide the records that respond to the undertakings. The Order imposes the obligation to produce records in paragraph 1 and does not provide any relief from that obligation if the Plaintiffs take the steps contemplated in paragraphs 2 and 3.

[50] Given that the Plaintiffs availed themselves of the option afforded in paragraph 2 of the Order, a pragmatic solution is required that provides with the Plaintiffs the records and certainty they are entitled to and does not require the Defendants to duplicate work by producing all the records already delivered to the Plaintiffs by the Defendants' former law firms. Accordingly, I direct the Defendants to go through the list of undertakings and for each undertaking: (a) confirm that the requested records have been provided to the Plaintiffs by either the Defendants or a third party and identify in which bundle listed in the Affidavit of Records such records may be found; (b) where the records have been provided by the Defendant or a third party but not listed in the Affidavit of Records, provide a further and better Affidavit of Records; and (c) where the records

2023 ABKB 609 (CanLII)

have not been provided, produce the records pursuant to a further and better Affidavit of Records or give reasons why the records cannot be produced. I direct the Defendants to provide these responses and/or a further and better Affidavit of Records to the Plaintiffs by December 15, 2023.

Unpaid Costs

[51] The Plaintiffs seek an order "Directing the Platinum Defendants to pay the Plaintiffs the costs as directed in Orders previously granted in this Action forthwith, or upon such terms as this Honourable Court may direct."

[52] One order awarding the Plaintiffs costs specified that the costs were due within 30 days of the date of the order. The other costs awards are silent on the timing of the payment of costs. Pursuant to Rule 10.29(1) the general rule is that "the unsuccessful party must pay the costs forthwith...." A further order that the Defendants pay costs adds nothing to the existing directions of the Court. The Plaintiffs may pursue enforcement proceedings in respect of the unpaid costs if they wish.

[53] The Plaintiffs also suggested that certain monies paid into Court in this action should be paid out to the Plaintiffs to cover past costs awards. This matter was not the subject of their application and was only raised in argument; nor did they put any evidence before the Court concerning the amount of money or its provenance. The Defendants for their part raised the spectre that the Canada Revenue Agency may have a claim in respect of the money paid into Court. Though I decline to make any order at this time in respect of the money being held in Court, should the Plaintiffs make an application on notice to appropriate parties for payment of the money in Court, supported by evidence, I will consider the matter.

Conclusion

[54] The Defendants' seemingly overbroad privilege claim and refusal to answer undertakings may have frustrated the Plaintiffs' ability to advance this action. The Plaintiffs submit that the Defendants' actions are intentional and that Mr. Chandran's actions are an abuse of process and that he should be characterized as a vexatious litigant. While there is certainly some evidence to support this view, the Defendants' difficulties are attributable in significant part to their financial incapacity. For the moment, I decline to make any conclusions as to whether the Mr. Chandran is a vexatious litigant or has acted in bad faith.

[55] The parties may speak to costs at the next appearance.

Heard on the 3rd day of October, 2023 with additional written submissions received on October 18 and 24.
Dated at the City of Calgary, Alberta this 27th day of October, 2023.

Colin C.J. Feasby
J.C.K.B.A.

2023 ABKB 609 (CanLII)

Appearances:

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for the Plaintiffs

Clive Llewellyn, Llewellyn Law
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2023 ABKB 609 (CanLII)