



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 347

BETWEEN:

GLENDINA PTY LIMITED ET AL

Plaintiffs

-AND-

NKWE PLATINUM LTD

Defendant

RULING

(In Chambers)

Application for specific disclosure under RSC Order 24 rule 7 in relation to engagement arrangements and fee payment responsibilities in respect of disputed claim for the award of costs of the proceedings under the indemnity principle

Date of Hearing: 11 August 2025

Date of Ruling: 12 August 2025

Appearances: *Samuel Riihiluoma* of Appleby (Bermuda) Limited for the Plaintiffs

Jonathan O' Mahoney of Conyers Dill & Pearman Limited for the Defendant

Ruling of Martin, J

Introduction

1. This is an application for specific disclosure of documents under RSC Order 24 rule 7 following the Court's appraisal of the fair value of the shares acquired by the Defendant from over 450 dissenting shareholders ("the Dissenters") who are the named Plaintiffs in these proceedings.
2. This is an unusual application because the court does not normally order disclosure after Judgment has been given in the case in order to make an award of costs, although the court undoubtedly has the power to do so under the express terms of RSC Order 24 rule 7, namely "*at any stage of the proceedings*". The Court has considered it appropriate to give a short written Ruling explaining the reasons for its decision in this particular case.

Background

3. After giving Judgment appraising the fair value of the shares in this case, the Court made a provisional order for costs in favour of the Plaintiffs, which was to become effective unless the Defendant applied for a hearing on the question of costs within 14 days of the date of Judgment. The Defendant so applied and has indicated it intends to raise a number of objections to the award of costs to the Plaintiffs. A hearing on those costs issues has not yet been listed¹.
4. The Defendant has made this application in support of one of the objections that it wants to raise at the costs hearing to the effect that the Plaintiffs should not be allowed any costs which have not actually been incurred by the Plaintiffs. It is a well-established principle that the party claiming recovery of costs must establish that he or she has actually incurred the cost and has either paid it or has incurred a liability to pay it. This is referred to as the "indemnity principle"² for short.
5. The Defendant says that the basis on which the attorneys and expert witnesses were instructed on behalf of the Dissenters remains unclear. In particular, the Defendant says the precise manner of the engagement of BBV Legal Pty Ltd (trading as Bowen Buchbinder Vilensky) ("BBV") and Appleby (Bermuda) Limited ("Appleby") on behalf of the Plaintiffs, how representation was organized through authorized delegates, and what the actual authority of those delegates or representatives was, is opaque. The Defendant says that these factual issues go to the question as to the actual responsibility for payment of the fees of the lawyers and the expert witnesses who presented the case on behalf of the Plaintiffs at the trial.

What disclosure is being sought?

6. The Defendant has sought orders for the disclosure of seven categories of documents in the following terms:

¹ The Defendant also intends to raise a number of other objections to the award of costs which it is not necessary to go into for the purposes of this Ruling.

² **Gundry v Sainsbury** [1910] 1 KB 645, 649, 651.

- (i) any documents evidencing an agreement between the Dissenters and/or any of them (on the one hand) and Appleby (on the other) which in whole or in part relate to Appleby's costs.
- (ii) any documents evidencing an agreement between the Dissenters and/or any of them (on the one hand) and BBV (on the other) which in whole or in part relate to BBV's costs.
- (iii) any documents evidencing any agreement or arrangement between the Dissenters and/or any of them and Appleby, or BBV, or Ms Mark or FTI or Mr van Zyl or SRA consulting which in whole or in part relate to the payment or incidence of the costs of providing expert evidence or other technical advice or assistance to the Dissenters or any of them.
- (iv) any documents evidencing any agreement between the Dissenters and/or any of them relating to the funding or incidence of, or indemnity against, any of the costs set out above.
- (v) any documents by which any of the Dissenters were appointed to represent any other dissenter, or otherwise given any agency, power of attorney, or authority to act in relation to those proceedings.
- (vi) any documents between the Dissenters and oblique or each of them or BBV or Appleby (on the one hand) and any third party (on the other) which in whole or in part relate to litigation funding in relation to these proceedings.
- (vii) any document which evidences any agreement between the Dissenters or any of them (or between any of them and a third party) concerning the distribution of any proceeds of the litigation other than pro-rata to shareholding or providing for a success fee.

The issue before the Court

7. The issue for the Court is how to manage the determination of the issue raised by the Defendant that goes to its potential liability to pay the Plaintiffs' costs of the appraisal proceedings.
8. The Defendant says that the appropriate course is for the Court to determine the question as part of the cost hearing itself so that the basis on which any award of costs is made resolved before any costs are presented to the Registrar for assessment or taxation. The Defendant says that disclosure of these documents is necessary and appropriate for the court to be able to determine the issue fairly. The Defendant says this is both a matter of procedural fairness under the RSC as well as the rules of natural justice.
9. The Plaintiffs say that this exercise is quintessentially a matter for the Registrar acting in her capacity as the taxing officer of the court. The Plaintiffs object to any order for disclosure being made at this stage. The Plaintiffs also object to the requirement that an Order will impose on them to incur the cost time and expense of conducting a fulsome disclosure exercise and engaging in a detailed review of the documents to protect against disclosure of privileged material before an award of costs has actually been made.

10. The Plaintiffs also say that the Registrar has all the necessary powers under RSC Order 62 Rule 20 (c) and (d) to make the determination as part of the taxation process and that an Order in the terms sought is both unnecessary and premature.
11. The Plaintiffs have filed evidence from Mr. Vilensky who is one of the attorneys at BBV who were engaged to act on behalf of the Plaintiffs and who instructed Appleby in these proceedings. Mr. Vilensky's evidence is that the Plaintiffs' costs and expenses (including the fees of the expert witnesses) have been paid by the Plaintiffs, that there is no funding agreement or success or contingency fee agreement existence and that all fees were incurred either on an hourly or a fixed rate basis and that there are no third-party funders involved³. Counsel for the Plaintiffs clarified that these fees and expenses have not been paid on a strictly pro-rated basis.

The Court's analysis

12. The Court is satisfied that the Defendant has raised an issue which was canvassed in the proceedings and that the various references to the way the Plaintiffs' representation was managed in the evidence are unclear and confusing⁴. This is not a representative action, nor a standard piece of commercial litigation involving a small group of parties who have engaged a set of lawyers to represent them. The Court considers that the standard form certificate signed by the attorneys and endorsed on the Bill of Costs to the effect that the costs claimed do not exceed the costs that the receiving party is required to pay the attorney⁵ is not sufficient to explain the vague and conflicting statements that have been made by the Plaintiffs as to their representation or to address the issue that has been raised by the Defendant.
13. The Court considers that the question whether the Plaintiffs have entered into an arrangement which might impinge upon the indemnity principle, such that the Plaintiffs might not be entitled to recover their costs in full or only on some more limited or restricted basis, is an issue which the Court ought to determine as part of its assessment of the appropriate order for costs as a whole.
14. The Court is of the view that the Registrar's powers under RSC Order 62 Rule 20 are intended to enable the Registrar to allow or refuse a claim on taxation and are not suited or designed to enable the Registrar to resolve a dispute over the legal liability to pay costs as a matter of overarching principle. Accordingly, the Court accepts the Defendant's submission that the appropriate forum to resolve the issue is at the costs hearing itself, not at the taxation hearing.
15. The Court is also satisfied that it is a legitimate use of the Court's powers to order disclosure of documents that are in the possession custody and control of the Plaintiffs that are necessary to resolve an issue in dispute between the parties fairly⁶.

³ Paragraphs 11-15 of Vilensky's first affidavit.

⁴ See the different explanations given by the Plaintiffs that are set out in the Defendant's skeleton at paragraph 20.

⁵ RSC Order 62 Rule 29 (5) (b) (iii).

⁶ **Berkeley Administration Inc. Chequepoint International Ltd v Arden McClelland** 1990 WL 753506

16. In the Court's view, it is appropriate for the Plaintiffs to give disclosure as to their funding arrangements for the payment of the fees and expenses of conducting the litigation. This is an issue in dispute between the parties and the Court cannot resolve it without disclosure being given to the Defendant so that a proper hearing can take place with argument and submissions based on the actual documents, rather than relying on the different and conflicting statements that have been made on behalf of the Plaintiffs. The engagement documents referred to are acknowledged by the Plaintiffs to exist and are plainly within the Plaintiffs' possession custody or control. They are not 'speculative' documents nor is the Defendant using Order 24 rule 7 to engage in an impermissible 'fishing expedition'.

Privilege

17. The Court accepts the Defendant's submission⁷ that the contractual terms of the engagement letter are not the subject to a claim of privilege, except to the extent that they contain details as to the scope of advice sought, or matters which set out any advice given (or to be given) or matters that relate to the strategic advice as to the conduct of the litigation. The Court is naturally concerned to ensure that the Plaintiffs' rights to maintain privilege in respect of their communications with their lawyers are fully preserved.
18. Therefore, appropriate measures will need to be taken to ensure that any documents disclosed are redacted to remove any reference to legal advice sought by the Plaintiffs, or the scope of the engagement, or any other matter relating to the strategy for the conduct of the litigation. However, the Court is satisfied that the terms of the contract on which the attorneys and the experts were engaged are not privileged from disclosure, subject to the need to redact the documents for any of the areas of privileged material which might be contained in the engagement materials.
19. If the Plaintiffs object to the production of a particular document (or class of documents) these need to be identified with specificity in a schedule to the List as required by RSC Order 24 Rule 5.

Proportionality

20. To the objection taken by the Plaintiffs that this will be an expensive and time-consuming exercise that is disproportionate, the Court notes that the costs issue is likely to involve a sum that is as much as the value of the Judgment, and it is therefore not disproportionate to require the disclosure of these documents in the context of this litigation.
21. Further, if the evidence given by Mr. Vilensky is correct, then it seems likely that the disclosure of these items will not involve substantial volumes of documentation. The Court takes judicial notice of the fact that regulated professions are required to

⁷ **Dickinson v Rushner** [2002] 1 Costs LR 128 "*In principle, I cannot see why a letter merely setting out the terms on which the solicitor is to act for the client is privileged*" per Rimer J at paragraph 13, followed by Tribunal Judge Mosedale in **Behague v Commrs of Inland Revenue** [2013] UKFTT 596 (TC) at paragraphs 23-7, and see also the commentary in *Passmore on Privilege* (5th ed) at paragraphs 2-283 to 290 and the cases cited therein.

establish and follow client on-boarding procedures which include creating appropriate documentation to evidence their engagement to meet professional indemnity insurance requirements as well as compliance standards under international AML and ATF regulations. Client engagement letters are likely to be in similar form and are likely to be available in an electronic medium. These factors mitigate the concerns raised about the extent of the search and difficulty in providing disclosure on a timely and cost-efficient basis.

Order

22. The Court therefore Orders the Plaintiffs to disclose the documents set out in the seven categories listed in paragraph 6 above by List in common form within 45 days of the date of this Order, with a schedule of any documents in respect of which a claim is made for withholding production on the grounds of privilege, providing sufficient information to describe the document or class of documents and the basis of the claim for privilege in each case. This timeframe should be sufficient for the Plaintiffs to compile the information and allow a margin for any additional searches to be done if necessary.
23. The Defendant is to draw an Order to reflect the above terms as soon as possible.
24. In light of the uncertainty of the ultimate outcome of this ground of the proposed objections raised by the Defendant, the costs of the application will be reserved to the full costs hearing.

Dated this 12th August 2025



THE HON. MR. ANDREW MARTIN
PUISNE JUDGE