Class action against Eastern Platinum Ltd. dismissed

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Justice Rady of the Ontario Superior Court of Justice (London) has dismissed a proposed class action against Eastern Platinum Ltd. (Eastplats) and certain of its former directors, finding, among other things, that that there was no reasonable possibility that the proposed plaintiff would succeed on his alleged claims. This is the first Ontario decision considering the test for leave to commence a secondary market securities class action since the Supreme Court of Canada released its decision in ***Canadian Imperial Bank of Commerce v. Green*** (Green) in December of 2015.

Eastplats asserted on the leave motion that the proposed action did not meet either branch of the test for granting leave to commence a claim for misrepresentation in the secondary market under the ***Securities Act*** (Ontario) (the OSA), which requires a proposed plaintiff to demonstrate that the claim is brought in good faith and has a "reasonable possibility of success." The proposed plaintiff's allegations were based on an Eastplats press release reporting a decline in production in Q1 2011, and analyst reports speculating as to the cause of that production decline. Justice Rady agreed that the proposed action had no reasonable possibility of success as it had been brought on the basis of mere speculation about the operations of the Crocodile River Mine (CRM), Eastplats' majority-owned platinum mine in South Africa, that was contradicted by the evidence.

Background

On April 15, 2011, Eastplats issued a press release announcing its production results for the first quarter of 2011. In discussing these results, Eastplats reported, amongst other things, that it had been impacted by the traditional slow start in January as well as the revision of support standards at CRM. On the following trading day, Eastplats' shares declined approximately 15 percent.

The proposed plaintiff brought an application for leave to commence a secondary market securities class action under the OSA. Based on his interpretation of the April 15, 2011 press release and other Eastplats public disclosures, the proposed plaintiff surmised that "cement grout pack supports" had been introduced at CRM at some point in Q1 2011; that this was a "material change" under the OSA; and that Eastplats had failed to disclose this change on a timely basis.

The application of the leave test

Justice Rady stated that the leave requirement in the OSA "requires a robust, meaningful examination and critical evaluation of the evidence (or the absence of evidence)." Referring to the Supreme Court of Canada's recent decision in Green, Justice Rady drew a parallel between the leave application and a motion for summary judgment in the sense that both require the examination and weighing of evidence.

The comprehensive evidentiary record filed by Eastplats, as found by Justice Rady, demonstrated with both affidavit and documentary evidence, including evidence from the South African regulatory authority, that cement grout pack supports were not in fact used at CRM in Q1 2011 and that the revised support standards implemented in Q1 2011 that were referenced in the April 15, 2011 press release did not include cement grout pack supports.

The applicant submitted in his written and oral argument that his filed evidence made it "arguably plausible" that he would have a reasonable chance of success at trial. Justice Rady did not agree. Her Honour concluded that there was no reasonable possibility that cement grout packs were implemented at CRM in Q1 2011, as the affidavit, documentary and transcript evidence of Eastplats' current and former employees – which was uncontradicted – categorically denied that cement grout packs were introduced at that time. Justice Rady stated that "unfortunately for the applicant, his interpretation is simply not supported by the overwhelming weight of the evidence that points to the opposite conclusion." More particularly, to accept the applicant's theory, Justice Rady held that she would have to "disregard what I view to be very compelling and persuasive evidence", and that to accept the applicant's position would require the court to conclude that it was more likely than not that Eastplats' affiants gave false evidence under oath, intentionally provided incomplete documentary evidence or falsified documents.

Relevance to future leave applications

Justice Rady's decision demonstrates that, based on the Supreme Court of Canada's decision in Green, leave applications and motions require a robust and meaningful examination of the evidence filed by the parties. In particular, Eastern Platinum shows:

- The leave threshold is more comparable to a motion for summary judgment than the low bar on a motion to strike.
- A proposed plaintiff must put forward more than speculative evidence, and "suspicion alone is not sufficient to surpass the leave threshold".
- A respondent is likely to have a harder time defeating leave if it does not put forward responding evidence to rebut the applicant's case.
- While a comprehensive responding record can be effective in showing the lack of merit to a proposed action, it is not necessary to put forward affidavit evidence from respondent directors and officers if the relevant evidence comes from other witnesses. Justice Rady found that testimony from Eastplats' CEO, a respondent, was "simply not necessary" in view of the other evidence marshalled from those with firsthand knowledge of what was happening at CRM.
- Expert evidence will be accorded no weight if the evidentiary record does not support the expert's assumptions. Justice Rady held that the applicant's mining expert's evidence was of no use as his fundamental assumption – that cement grout packs were introduced at CRM in Q1 2011 – was unsupported by the evidence.

**Alan D'Silva, Patrick O'Kelly, Dan Murdoch and Patrick Corney are counsel to Eastplats and the respondent directors.*