

CANADA / JUDGMENT

Ren v. Eastern Platinum Limited

2023 BCSC 404

COURT

Supreme Court of British Columbia

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2023 BCSC 404 Ren v. Eastern Platinum Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ren v. Eastern Platinum Limited,

2023 BCSC 404

Date: 20230316

Docket: S2013693

Registry: Vancouver

Between:

Xiaoling Ren

Petitioner

And

Eastern Platinum Limited

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

January 12 & 13, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2023

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Introduction

- [1] Eastern Platinum Limited is a publicly traded company incorporated in British Columbia. Through a subsidiary, it has the right to conduct mining operations at the Crocodile River Mine (the "Mine") in South Africa. The mining operations are its principal asset.
- [2] Xiaoling Ren is a shareholder of Eastern Platinum. She contends that present and former directors of Eastern Platinum acted negligently and in breach of fiduciary duty when they caused the company to enter into agreements with Union Goal Offshore Limited for the exploitation of mine tailings at the Mine. She contends that Eastern Platinum has suffered a loss as a result. Ms. Ren seeks leave to commence a derivative action in Eastern Platinum's name and on its behalf against these individuals.
- [3] Eastern Platinum opposes Ms. Ren's application for leave to commence a derivative action. It maintains that the application is simply the retooling of an earlier, failed application by another shareholder. That application was dismissed by Justice Nathan Smith in 2538520 Ontario Ltd. v. Eastern Platinum Limited, 2019 BCSC 1446 [253 SC], whose decision was upheld by a majority of the Court of Appeal at 2020 BCCA 313 [253 CA], leave to appeal to SCC ref'd, 39532 (27 May 2021). The principal of 2538520 Ontario Ltd. ("253") was Rong Kai Hong and I will sometimes refer to that proceeding as the "Hong proceeding".
- [4] Ms. Ren was moved to bring this application after she read a press release issued by Mr. Hong and spoke with his lawyers. She engaged the same lawyers, the firm Adair Goldblatt Bieber LLP ("AGB"), to bring this application. She commenced it while the appeal to the Court of Appeal was pending in the Hong proceeding. Through counsel, she offered to Eastern Platinum that if the petitioner were to succeed in the Hong proceeding, she would not pursue this application.
- [5] Eastern Platinum characterizes Ms. Ren's application as an abuse of process and maintains that, even if it is not, Ms. Ren has not satisfied two of the statutory prerequisites to her application. First, it maintains that the proposed derivative action is not in the best interests of Eastern Platinum. Second, it maintains that Ms. Ren has not established that her application is brought in good faith.
- [6] In outline, then, this is a straight-forward application. The issues are:
 - 1. Is Ms. Ren's application an abuse of process?
 - 2. Is it in the best interests of Eastern Platinum that the proposed derivative action be prosecuted?

3. Is Ms. Ren bringing this application in good faith by it pursuing for the benefit of Eastern Platinum?
 4. Taking everything into account, should I authorize Ms. Ren to prosecute the proposed action in Eastern Platinum's name and on its behalf?
- [7] There are three complicating features. The first is a lengthy, somewhat tortured procedural history encompassing this proceeding, the previous failed application, and other proceedings involving Eastern Platinum. The second is the sheer size of the application record, which consists of several thousand pages of material, much of it technical in nature, contained in seven 4" binders, exclusive of the authorities. The third is the presence of a relatively late-breaking development in the form of a letter to the company from a former senior officer, Mr. Lubbe, announcing his resignation, that a stranger unexpectedly sent to the petitioner's counsel. Ms. Ren relies on the letter as providing cogent evidence to support some of the proposed claims.

Statutory test for an application to commence a derivative action

- [8] Eastern Platinum is incorporated under and governed by the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. Section 232 authorizes the court to grant a shareholder leave to commence a derivative action in the name of and on behalf of the company. A decision to grant leave is discretionary, provided that four requirements set out in s. 233(1) are satisfied. It is common ground that the requirements in subsections (a) and (b) are satisfied in this case. The issue concerns the requirements in subsections (c) and (d), and the exercise of the court's discretion generally. The requirements in subsections (c) and (d) are:
- (c) the complainant is acting in good faith, and
 - (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.
- [9] Both requirements are reviewed in considerable detail in 253 SC and 253 CA. Speaking for the majority in the Court of Appeal at paras. 29-33, Justice Griffin identifies the good faith requirement as one that focuses on the primary purpose of the applicant seeking leave to bring a derivative action. The applicant's primary purpose must be to benefit the company. The onus of proof lies on the applicant and the court may consider both the applicant's stated belief in the merits of the proposed action and any evidence that indicates that the applicant may have ulterior motives.
- [10] As Griffin J.A. explains at paras. 34-38 and 110-111, the best interests requirement entails consideration both of the merits of the proposed derivative action and a weighing of the potential benefit from the action against the costs and inconvenience to the company of pursuing it. Consideration of the merits engages an assessment of both the proposed claim and any apparent defence. On balance, the court must evaluate the evidence with a view to determining whether the proposed claim has a reasonable prospect of success or is bound

to fail. The applicant must both plead a proper cause of action and have some evidence to support its case that the proposed claim has a reasonable prospect of success. The depth of assessment lies at a point on a spectrum between skimming the surface of the pleadings (insufficient) and a deep dive into the merits so as to try the case (excessive).

- [11] The analysis is not exhausted by consideration of the statutory requirements under s. 233(1). In the exercise of its discretion, the court must still consider the requirements as a whole in addition to separately; 253 CA at paras. 39-40. Justice Griffin observes:
- [41] It is conceivable that there may be cases where the requirements are met but so thinly established that in the end the court will exercise its discretion to not grant leave. More likely, however, if an application fails it will fail on one of the requirements of the test.

Background

- [12] The Mine was established in 1980 and was operated until 2013, when active mining ceased. From 2013 through 2018, activities at the Mine were limited to care and maintenance. The mining operations had resulted in substantial mine tailings. Future prospects for the mine centred on the possibility of further activities to extract chrome and platinum group metals ("PGM") from the tailings. There was also the hope that mining might resume at some point.
- [13] In 2016, Mr. Hong was involved in an attempt to gain control of Eastern Platinum. His faction lost the proxy battle and new directors proposed by another shareholder, Ka An Development Co. Ltd. ("Ka An"), were elected. This slate included Diana Hu, who was appointed Eastern Platinum's chief executive officer.
- [14] In 2017, Eastern Platinum obtained a report from consultants, Sound Mining (Pty.) Ltd., concerning the feasibility of extracting chrome from the tailings. Sound Mining's report contained a financial projection that did not address possible revenues from the extraction of PGM. It forecast that the chrome extraction project could be undertaken with existing equipment, would generate a positive cash flow after 10 months of operation, break even after 25 months, and ultimately generate profits having a net present value of \$3.82 million. Eastern Platinum characterizes this as the base case for economic exploitation of the Mine, but says that it concluded it could do better.
- [15] Presumably at Ms. Hu's direction, Eastern Platinum entered into discussions with Union Goal Offshore Solutions Limited leading to a memorandum of understanding in late 2017 and a framework agreement dated March 1, 2018. Union Goal is a private company whose ownership is unclear. The framework agreement contemplated:
- a) Construction of a new plant, financed by a loan and initial payment of US \$3.6 million from Union Goal;
 - b) Purchase of equipment from Union Goal; and
 - c) Sale of recovered chrome to Union Goal.

- [16] The new plant contemplated under the framework agreement would make use of new technology that was expected to permit much greater chrome recovery than the old technology contemplated in the Sound Mining report.
- [17] The framework agreement limited Eastern Platinum's ability to exploit chrome from the tailings, but not PGM. Eastern Platinum was free to extract and sell PGM on its own account.
- [18] The framework agreement included a put option that allowed either party to require a negotiation for the determination of the purchase price and, if no agreement was reached, Eastern Platinum's indebtedness to Union Goal would be cancelled and Union Goal was to repurchase the equipment at a default price equal to the total costs incurred.
- [19] The framework agreement was supplemented by further agreements in August 2018. They did not stipulate the price of the equipment to be purchased by Eastern Platinum but rather stated (cl. 6.1.1 of the BML Equipment and Chrome Plant Agreement):

This amount shall be determined as soon as possible after the Final Delivery Date and it shall not exceed USD 42 million.

- [20] The new plant was purchased and installed, and production of chrome began in February 2019.
- [21] AGB began the Hong proceeding by filing a petition on behalf of 253 in November 2018. The petition proposed a derivative action raising two claims against Ms. Hu and six other directors of Eastern Platinum: a claim that they negligently failed to conduct sufficient due diligence in entering into the transactions with Union Gold; and a claim that they breached fiduciary duties by entering into those transactions.
- [22] The record upon which the Hong proceeding was decided was closed at the time of the hearing before Smith J. in June 2019. Justice Smith reserved judgment and dismissed the proceeding on August 27, 2019. He held that, while the claim for breach of fiduciary duty amounted to nothing more than unsupported speculation, there was sufficient substance to the negligence claim to satisfy the best interests requirement. He found that the application failed on the good faith requirement of the test for leave to commence a derivative action, because there was evidence that Mr. Hong's personal interests, as opposed to Eastern Platinum's interests, were a significant motive for the proposed action. Justice Smith concluded:
- [58] The most likely inference to be drawn from the evidence before me is that the proposed action is an attempt to continue Mr. Hong's unsuccessful takeover bid by other means or to obtain retribution for that bid's failure.
- [23] In the result, he found that the petitioner had failed to satisfy the onus of proving good faith.

- [24] 253 filed a notice of appeal. While the appeal was pending, on March 2, 2020, 253 issued a press release describing its allegations and Smith J.'s decision. The press release emphasized Smith J.'s conclusion that the proposed derivative action would be in the best interests of Eastern Platinum. The press release invited other concerned shareholders of Eastern Platinum to contact AGB "to assist pursuing leave to commence a similar derivative action [on behalf of Eastern Platinum]".
- [25] The press release came to Ms. Ren's attention and she contacted and retained AGB. After a hearing and while judgment was under reserve in the Court of Appeal, AGB wrote Eastern Platinum on Ms. Ren's behalf. The letter renewed the request that Eastern Platinum sue its directors, failing which Ms. Ren would seek leave to commence a derivative action. However, the letter also indicated that the application would be abandoned if the Hong proceeding were to succeed in the Court of Appeal.
- [26] On November 26, 2020, the Court of Appeal dismissed the appeal. For the majority, Griffin J.A. upheld Smith J.'s finding that the Hong proceeding failed to satisfy the good faith requirement. Justice Griffin doubted Smith J.'s analysis of the best interests requirement, terming his conclusion that the proposed claim was in Eastern Platinum's best interests "premature" (at para. 123). Justice Griffin further observed that, on the evidence, it would be "pure guesswork" to conclude that the proposed action in negligence had the potential to recover significant damages (at para. 124).
- [27] Justice Goepel dissented. He would have found that the proposed claim was brought in good faith and agreed with Smith J. that it was in the best interests of Eastern Platinum that it be pursued.
- [28] On December 22, 2020, Ms. Ren filed a petition commencing this proceeding.
- [29] On January 5, 2021, AGB received an unsolicited email from a stranger named Clive Brown providing a copy of the resignation letter written by Mr. Anton Lubbe to Eastern Platinum on June 29, 2018. Mr. Lubbe had been a senior officer of Eastern Platinum's subsidiary through which it owned and operated the Mine. In the letter, which I will describe in detail later in these reasons, Mr. Lubbe alleged that Ms. Hu was in a conflict of interest due to her relationship with Eastern Platinum's controlling shareholder, Ka An, and that Ms. Hu had directed the negotiations with Union Goal in ways that were not in Eastern Platinum's best interests.
- [30] Eastern Platinum admits that the Lubbe letter is authentic. It says that Mr. Lubbe's allegations were investigated by the audit committee in 2018, and that the audit committee concluded that Ms. Hu was not in a conflict of interest. Eastern Platinum does not provide details of the investigation. On being contacted by AGB, Mr. Lubbe declined to comment on the letter, stating that he had been reminded by Eastern Platinum's lawyers of confidentiality obligations owed to Eastern Platinum.

- [31] In 2021, EPL began extracting PGM from the tailings it was processing. It generated US \$3.43 million from PGM sales in the first nine months of 2021 and US \$9.64 million in the first nine months of 2022.
- [32] On June 22, 2022, Ms. Hu resigned as a director and chief executive officer of Eastern Platinum.

The proposed derivative action

- [33] The following description of the proposed action is based upon a draft notice of civil claim (NoCC) provided during the hearing. It differs in some respects for the NoCC originally proposed by Ms. Ren with her first affidavit sworn on December 15, 2020.
- [34] There are seven defendants: Diana Hu, George Dorin, Michael Cosic, Beilin Shi, Sheng (Sam) Wang, Xin (Alex) Guan, and Nigel Dentoom. This differs in one defendant from the action proposed in the Hong proceeding, in which Mr. Guan would not have been named as a defendant, and another person was named in his place.
- [35] The draft NoCC identifies Ms. Hu, Mr. Dorin, Mr. Cosic, Mr. Shi, and Mr. Wang as directors appointed in 2016. Mr. Dentoom was appointed a director on March 28, 2018 and Mr. Guan on April 26, 2018, in both cases after the framework agreement was concluded on March 1, 2018.
- [36] The draft NoCC states that Ms. Hu is the chief executive officer and a director of Eastern Platinum, although the evidence is that she resigned both positions in 2022.
- [37] The draft NoCC describes the Mine, the Sound Mining report (termed the "Technical Report"), and the framework agreement contemplating the construction of a "New Plant" to process the tailings. It describes the transactions contemplated by the framework agreement as the "Union Goal Transactions" and pleads that they will result in a loss to Eastern Platinum. In particular, it pleads as follows:
33. Notwithstanding the fact that the New Plant purported to more than double the exploitable reserves from the Tailings Facility, the Union Goal Transactions are financially detrimental to [Eastern Platinum], and demonstrably worse than use of the Existing Plant.
34. In particular, the Technical Report concluded that the net present value of using the Existing Plant is approximately \$3.8 million. In contrast, the Union Goal Transactions will result in a loss to [Eastern Platinum] of somewhere between \$2 million and \$50 million, and potentially its insolvency or takeover by Union Goal.
35. In addition, all of the financial benefit from the increase in exploitable reserves under the Union Goal Transactions will be derived by Union Goal, and not by [Eastern Platinum].
36. The detriment to [Eastern Platinum] of the Union Goal Transactions substantially outweighs any benefits to [Eastern Platinum] from those transactions.

- [38] The draft NoCC presented in the Hong proceeding contained similar though less particularized allegations. It did not contain the comparison set out in paragraph 34.
- [39] The draft NoCC advances a claim for breach of fiduciary duty based upon allegations attributed to the Lubbe letter, described as the "Whistleblower Letter". At para. 38, it pleads the following breaches of fiduciary duty by all the defendants:
- (a) Ms. Hu has a relationship with Union Goal and was in an undisclosed conflict of interest, in breach of her fiduciary duties to [Eastern Platinum], when she caused [Eastern Platinum] to enter into the Union Goal Transactions;
 - (b) Ms. Hu instructed Mr. Lubbe to manipulate the Technical Report to arrive at a net present value of less than \$10 million USD for the exploitation of the chrome tailings, which would be used to justify the Union Goal Transactions;
 - (c) Ms. Hu prohibited Mr. Lubbe from investigating and modelling the value, if any, that the Union Goal Transactions would create for [Eastern Platinum], despite Mr. Lubbe's preliminary view that the transactions were to [Eastern Platinum's] detriment;
 - (d) The defendants did not cause [Eastern Platinum] to take steps to enforce its rights under the Union Goal Transactions despite Union Goal not having satisfied its obligations under the agreements in breach of their fiduciary duties to [Eastern Platinum]; and
 - (e) The defendants caused [Eastern Platinum] to acquire equipment from Union goal under the Union Goal Transactions at a cost far in excess of the value of the tailings without having commissioned a study with respect to the same.

Paragraph 38 goes on to plead that, as a result of these acts and omissions, the defendants breached their fiduciary duties and were not acting in the best interests of the company in causing Eastern Platinum to enter into the Union Goal Transactions.

- [40] I note that the particulars (d) and (e) pertain to steps taken under the Union Goal Transactions and are not consistent with the plea that the defendants' breach of fiduciary duty lay in causing Eastern Platinum to enter into the Union Goal Transactions.
- [41] Beginning at paragraph 39, the draft NoCC pleads that the defendants caused Eastern Platinum to enter into the Union Goal Transactions without conducting sufficient due diligence. They plead that this was a dramatic change of course involving an investment of significant capital. They plead that the defendants breached the duty of care that they owed Eastern Platinum by failing to conduct sufficient due diligence, and that their negligence and breach of duty have caused damages to Eastern Platinum. The gist of this plea of negligence is identical to that contained in the draft NoCC presented in the Hong proceeding.
- [42] The draft NoCC seeks damages for negligence and breach of fiduciary duty. There is no claim for equitable relief.

The abuse of process issue

The law governing the abuse of process application

- [43] A proceeding may be judged an abuse of process where it is brought for a purpose or in a manner that is manifestly unfair or threatens to bring the administration of justice into disrepute; *Canam Enterprises Inc. v. Coles*, 194 D.L.R. (4th) 648, 2000 CanLII 8514 at para. 55 (Ont. C.A.) per Goudge J.A. dissenting, rev'd 2002 SCC 63 (aff'g dissent of Goudge J.A.). An attempt to relitigate an issue may constitute an abuse of process where it threatens the integrity of the adjudicative process; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51.
- [44] *Eastern Platinum* relies on *Bear v. Merck Frosst Canada & Co.*, 2011 SKCA 152 at paras 41 and 74, where the doctrine of abuse of process was applied to prevent the relitigation of an issue in the context of a proceeding seeking certification of a class action. A certification application having been dismissed, the same firm of lawyers brought fresh actions against the same defendants on behalf of different members of the same purported class. Speaking for the Court, Richards J.A. noted the potential for abuse in cases involving a single law firm able to draw fresh applicants from a pool of potential claimants following a failed initial application. He stated:
- [74] The lesson to be drawn from these authorities is that it is sometimes necessary and appropriate to look below the surface of class action proceedings in order to preserve the integrity of the administration of justice. Simply put, a defendant in a class action environment should not face a revolving door of representative plaintiffs who serially advance certification application after certification application until they (perhaps) find one that succeeds.
- [75] None of this is to say that, for each potential class action, there can or should be only one attempt at certification. Much, of course, will turn on the facts of individual situations and, obviously, there are examples of circumstances where more than one certification effort has been entertained. Nonetheless, courts need to be alert to the potential for abuse. In my view, concerns in this regard are substantially heightened when the same law firm acts in successive certification efforts. The door to abuse can be opened by the ongoing involvement of one lawyer or one firm when this fact is combined with the reality that new representative plaintiffs can be drawn from the pool of persons in the class previously proposed in an unsuccessful certification application.

[Emphasis added.]

Analysis

- [45] I agree with Eastern Platinum that the analysis in Bear is apposite and that, as with successive certification applications, there is a potential for abuse where successive applications for leave to commence a derivative action are brought by the same law firm. However, I am not persuaded that abuse is present in this case such that Ms. Ren should be assimilated to the position of 253 in the Hong proceeding.
- [46] It is important that the Hong proceeding failed for a reason that was personal to the petitioner in that case. The good faith issue turned on an assessment of Mr. Hong's motives, leading to a finding that left him unable to satisfy the good faith requirement. Ms. Ren's personal circumstances are different. There is no evidence that she was involved in the earlier, unsuccessful takeover attempt emphasized by Smith J.
- [47] Ms. Ren says that she came to read 253's press release because she holds a large number of shares of Eastern Platinum and monitors new releases related to the company. She says that she paid particular attention to the release because Mr. Hong is an acquaintance, although she had not spoken to him in years. After she read the press release, she read Smith J.'s decision, conducted independent research on the Internet to investigate the Union Goal Transactions, and contacted AGB, who provided to her the petition record that was before Smith J.
- [48] Eastern Platinum asks me to view Ms. Ren's account of how she came to be involved in this matter with suspicion. It describes her as "an individual with an admitted relationship to Mr. Hong", but this is not a fair reading of her evidence. Eastern Platinum did not apply to cross-examine Ms. Ren. and all that can be taken from her affidavit is the tenuous relationship implied by her description of Mr. Hong as an acquaintance with whom she had not spoken in years. There is no evidence to suggest that Ms. Ren had anything at all to do with any of the matters that called into question Mr. Hong's good faith.
- [49] A further novel aspect of this application is engaged by the Lubbe letter. It was not known to 253 at the time of the earlier proceeding. It opens the door to an argument on the best interest requirement - an argument that Ms. Hu was engaged in a breach of fiduciary duty - that was not available to 253 in the earlier proceeding because 253 did not have access to the underlying facts. 253's attempt to advance an unparticularized claim for breach of fiduciary duty was dismissed by Smith J. as an exercise in unsupported speculation, and the letter provides a basis for a more substantive claim.
- [50] Eastern Platinum submits that this proceeding was an abuse of process from the outset, and that the Lubbe letter is a late-breaking development that I can rely upon only if it entirely changes a necessary and critical aspect of the case, citing *Giles v. Westminster Savings Credit Union*, 2008 BCSC 1312 at para. 47. I disagree. In *Giles*, the plaintiffs in a former action were able to fully explore at a trial the factual and legal issues raised by different plaintiffs, and Sigurdson J. applied a strict test to hold that it would be contrary to the interests of justice to permit relitigation of the same questions on the basis of further

evidence (at para. 48). I do not think that the doctrine of abuse of process should be approached in a formalistic way that would permit consideration of the Lubbe letter if Ms. Ren was able to rely on it when she filed her petition, but only otherwise if it "entirely changes a necessary and critical aspect of the case". The question is whether this proceeding amounts to an abuse of process when the issue is argued, however it might have appeared at an earlier stage, before the Lubbe letter was obtained.

- [51] The presence of a particularized claim for breach of fiduciary duty, based on Mr. Lubbe's allegations, changes the character of the claim. In 253 CA at paras. 128-131, Griffin J.A. commented on the absence of such a plea advanced with any cogency in the Hong proceeding. She stated:
- [128] It is worth observing that here, unlike in many successful applications to commence derivative claims noted in the authorities, the proposed claim does not involve a concluded past transaction involving apparent misconduct tainted by director self-interest, dishonesty, or breach of fiduciary duty, such as misappropriation of a corporate opportunity as in *Primex* (S.C.).
- [131] The appellant did not refer to a single authority where leave was granted to commence a derivative action against the company's directors based in negligence alone. I do not suggest that such an application can never succeed. However, it appears exceptionally rare.
- [52] In conclusion, I decline to dismiss Ms. Ren's application for leave to commence a derivative action as an abuse of process. In my view, it is just that the application be heard on the merits for two reasons. First, 253's application failed on a ground personal to the petitioner in that case, and the argument in Ms. Ren's case is different. Second, the claim now advanced contains allegations of breach of fiduciary duty grounded in the Lubbe letter and the best interests requirement now falls to be assessed in light of the contents of the Lubbe letter.

Is it in the best interests of Eastern Platinum that the proposed derivative action be prosecuted?

The claim for breach of fiduciary duty

- [53] I begin with the claim for breach of fiduciary duty. It is trite law that the officers and directors of a company owe it a fiduciary duty to act honestly and in good faith with a view to the best interests of the company; BCA, s. 142(1)(a).

Significance of the Lubbe letter

[54] In my opinion, the Lubbe letter provides a reasonable evidentiary foundation for a finding that a claim against Ms. Hu for the breaches of fiduciary duty alleged in particulars (a) to (d) quoted above at paragraph [39] has a reasonable prospect of success. (I am assuming that particular (d) may be revised for consistency with the balance of the plea.) I do not think that there is evidentiary support for the broader claim for breach of fiduciary duty advanced against the other defendants or for the claim advanced in particular (e) in the draft NoCC.

[55] The Lubbe letter is dated June 29, 2018, after the framework agreement and before the implementation agreements were signed. It is addressed to Eastern Platinum's audit committee, to the attention of Mr. Cosic, and refers to Mr. Lubbe's discussions with Mr. Dorin. Both Mr. Cosic and Mr. Dorin are proposed defendants. In the letter, Mr. Lubbe is not complaining about the actions of Mr. Cosic or Mr. Dorin. He is complaining about the actions of Ms. Hu.

[56] In his letter, Mr. Lubbe states in part as follows:

As per discussions with George Dorin, and reporting to the Board of [Eastern Platinum], I feel obligated to resign as I do not wish to place myself any further in conflict with my [fiduciary], safety and health responsibilities as well as conflict of interest that I believe Diana has due to her relationship with Ka An, UG and a Mr. Sun. My personal reputation as an executive in the South African mining industry is also at risk.

During the course of my employment, Diana Hu in confidence alluded that the Chinese major shareholders has the intention of increasing its shareholding. That the major shareholder intends doing so through:

- i. Underwriting/supporting funding of [Eastern Platinum]
- ii. Converting investment in the company, such as the UG capital equipment into Equity

B) She hinted that the major shareholder may have already increased its shareholding

C) Diana instructed me that the model that Sound Mining develops must have an NPV less than USD10m, which will form the basis for the shareholders' purchase of the chrome in the TSF.

- a. I circumvented this by putting some of the value in the overhead costs

F) That capital purchases to be funded by UG, such as

- a. Bus
- b. Weighbridge
- c. Increase in density control tank from R1m to R10m for reducing variability to magnetic plant feed

[b]e funded by [Eastern Platinum], even though the principle of agreement is that such funding is to be done by UG. All these in accumulation will add to cash stress of [Eastern Platinum].

G) Whilst the BML directors [i.e., directors of Eastern Platinum's subsidiary] were integral in negotiating the Framework Agreement with UG, we were sidelined when the subordinate agreements are negotiated. Changes that were made amongst other[s] were:

- a. BML's implicit right to PGM's were removed from the contract (Allowing UG to treat chrome product for PGM's at a later stage)
- b. Controls to limit the amount of PGM's in product has been removed.
- c. Penalties of R84m in favour of UG has been acceded to, with no counter protection for BML
- d. Agreeing with UG that should BML remove PGM's, then UG will not be responsible for the cost of deposition (Least could be that UG pays cost as per feasibility study, and any additional cost will be for BML's account)
- e. Although the FA agreement was signed and UG warranted 240 000 ROM tons per month capacity as well as operationally, they only designed for circa 220 000 ROM tons per month, materially affecting the returns for BML.

K) The USD40m capital value of UG's equipment is far more than what BML can recover from the TSF, and Andrea is trying to make a case that it might have future value for underground mining. It may be true, but will only accrue once the decision is made to go underground ([Eastern Platinum] has R3bn [of] assets that is currently value less as we are not mining. In terms of the timeliness for the put and call options, it is far [too] close in time, for [Eastern Platinum] to make such an investment decision.

L) When I [built] a model to show the value UG will accrue from the TSF agreement, I was told by Diana not to pursue same, as it has nothing to do with us. Currently their value, including the cost of the equipment, exceeds our[s] by multiple times. If they recover their capital investment with [Eastern Platinum] purchasing the equipment, then they have a free ride.

[Emphasis added.]

[57] As can be seen from the passages I have emphasized, the letter provides some support for allegations that Ms. Hu maintained relationships with the majority shareholder, Ka An, and with Union Goal and that, in her role as chief executive officer of Eastern Platinum, she gave directions in the negotiation of the framework agreement in the interests of Union Goal. The letter implies that Union Goal and Ka An are related, and that the advantages to Union Goal would ultimately enure to the benefit of Ka An by enabling it to increase its ownership interest in Eastern Platinum. An allegation that Ms. Hu was really acting for the benefit of Union Goal and Ka An is, in law, an allegation of a breach of the fiduciary duty Ms. Hu owed Eastern Platinum.

[58] The letter provides no support for a claim against the other proposed defendants.

- [59] Eastern Platinum submits that the letter is of no assistance because it is not admissible for the truth of its contents. I do not accept this submission. To show that her proposed claim has a reasonable prospect of success, Ms. Ren need only articulate a claim that is known to the law and establish that there exists a reasonable body of evidence that tends to support that claim. The Lubbe letter discloses a witness whose statements would tend to prove the proposed claim. At this stage, Ms. Ren is not required to prove that the proposed claim will probably succeed. That is not the law because it would place far too heavy a burden on a shareholder who does not have access to the company's employees and records. An application for leave to commence a derivative action is supposed to be determined expeditiously, in chambers, without resort to discovery; 2538520 Ontario Limited v. Eastern Platinum Limited, 2019 BCSC 570 at paras. 14-28.
- [60] Ms. Ren cannot be faulted for failing to obtain better evidence, in the form of an affidavit from Mr. Lubbe. She sought a statement from Mr. Lubbe and was advised that he is constrained by confidentiality obligations owed to Eastern Platinum. The company would not be so constrained. It has not tendered evidence from Mr. Lubbe or statements obtained from Mr. Lubbe that qualify or contradict his statements in the letter.
- [61] Eastern Platinum has not tendered an affidavit from Ms. Hu. She was the company's chief executive officer when Ms. Ren commenced this proceeding in December 2020 and continued in that office until June 2022, and I infer that her evidence, if exculpatory, was available to the company. Mr. Lubbe's allegations in his letter are unanswered, except for an assurance, in an affidavit made by Mr. Dorin in December 2022, that the audit committee investigated the allegations and concluded that Ms. Hu was not in a conflict of interest in respect of the negotiations with Union Goal or at all. I do not place much weight on this assurance because Mr. Dorin provides no details of the investigation and does not condescend to address specifics of the allegations.

Eastern Platinum's limitation argument

- [62] Eastern Platinum submits that the proposed claim is bound to fail because it is statute-barred. Taking into account a suspension of the limitation period for approximately one year due to the Covid-19 pandemic, the limitation period would run for approximately three years from that date the claim was discoverable by the company; Limitation Act, S.B.C. 2012, c. 13, ss. 6 and 8; Order of the Minister of Public Safety and Solicitor General, Ministerial Order 86/2020 (Emergency Program Act, R.S.B.C. 1996, c. 111, s. 10); Order in Council 655/2020 (COVID-19 Related Measures Act, S.B.C. 2020, c. 8, s. 3(8)(a)). Eastern Platinum submits that claim would have to be considered as discoverable by the company, within the meaning of s. 8 of the Limitation Act, no later than September 18, 2018, when 253 requested that the company commence proceedings against the directors.
- [63] Eastern Platinum cites *Ridel v. Goldberg*, 2019 ONCA 636 at para. 48 and *CPC Networks Corp. v. McDougall Gauley LLP*, 2021 SKCA 127 at para. 70, both cases decided under equivalent statutory provisions, for the proposition that the date of discoverability turns on what was

known to the company, not what was known to Ms. Ren. In fact, both cases adopt a nuanced analysis. If the law were that simple, then many derivative actions be statute-barred simply by virtue of the time taken up by the process of obtaining leave to bring them. In this case, more than two years have already passed since Ms. Ren filed her petition. But the law is not that simple.

- [64] The test of discoverability under s. 8 of the Limitation Act requires actual or constructive knowledge of various matters including that "having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage". In my opinion, this test requires the court to consider whether the company could reasonably have been expected to bring the action in circumstances which may include significant influence over the company by the person it would sue.
- [65] Thus, in *Ridel*, the court emphasized at paras. 67-69 that the equivalent requirement under s. 5(1)(a)(iv) of the Ontario statute, the Limitations Act, S.O. 2002, c. 24, Sch. B, was satisfied more than two years before a derivative action was commenced because the investors who were pursuing the action through the company had both the requisite knowledge and the right, under a unanimous shareholder agreement, to assume control of the company and cause it to make a claim against the defendant at any time. In *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108 at paras. 421-422, varied without deciding this point, 2022 ONCA 509 at para. 60, Justice Sally Gomery for the Ontario Superior Court of Justice contrasted *Ridel* and held that, where the company was controlled by a fraudster, Lacasse, so that there was no practical route for the pursuit of the claims there in question, the time did not begin to run.
- [66] In *CPC Networks* at paras. 76-78, the Saskatchewan Court of Appeal cited Gomery J.'s reasoning in *Doyle Salewski* with approval. It further held at paras. 80-82 that there was an arguable case that the limitation period could be avoided by a grant of leave *nunc pro tunc*, with retroactive effect. In the result, the Court held that there was an arguable claim as to whether the claims that would be pursued in the proposed derivative action were statute-barred.
- [67] This issue was not thoroughly canvassed in argument. My task is only to decide whether the proposed claim has a reasonable prospect of success. I think that it is arguable that Eastern Platinum was not in a position to reasonably evaluate the possibility of a claim against Ms. Hu for breach of fiduciary duty in 2018 through June 2022, while she remained the company's chief executive officer. As in *CPC Networks*, the success of a limitation defence is no more than arguable and I cannot say that the proposed action is bound to fail.

Is the proposed claim bound to fail for want of proof of damage?

- [68] Eastern Platinum submits that leave should be refused because Ms. Ren has not put forward a cogent claim for damages, properly grounded in the evidence. This argument finds support in Justice Griffin's analysis in 253 CA where she stated:

- [124] I do not see how on the evidence before the court it can be determined that Eastern Platinum will likely suffer damages in relation to the Union Goal transaction or what the potential measure of the damages would be. There were too many gaps in the evidence before the judge and too many unanswered questions. It would be pure guesswork to conclude that a lawsuit claiming the directors were negligent in approving the Union Goal transaction might have the potential to recover significant damages and be worth the inconvenience to Eastern Platinum.
- [69] However, Justice Griffin was working from a record that closed in June 2019 and the record before me includes affidavits sworn as recently as December 2022.
- [70] Justice Griffin was discussing the negligence claim, but Eastern Platinum submits that a claim for breach of fiduciary duty is no different; there is only liability in relation to a breach of fiduciary duty that results in a loss; *Stirrett v. Cheema*, 2020 ONCA 288 at paras. 68 and 76; *Southwind v. Canada*, 2021 SCC 28 at para. 70.
- [71] While Eastern Platinum is correct that the court must always find a causal link between the breach of duty and the remedy sought, a plaintiff who establishes a breach of fiduciary duty may sometimes take advantage of presumptions that are unavailable in a case of simple negligence. For example, in a case where a fiduciary has breached a duty to disclose material facts, the fiduciary may be prevented from arguing that the outcome would have been the same regardless of whether the facts were disclosed; *Brickenden v. London Loan & Savings Co.*, [1934] 3 D.L.R. 465, 1934 CanLII 280 (P.C.); *Ruxton v. Kelly Peters & Associates Ltd.*, 58 B.C.L.R. 317, 1984 CanLII 255 (S.C.) at paras. 25-29; *Southwind* at para. 82.
- [72] If the allegations of breach of fiduciary duty are made out, there is a reasonable basis to infer that, but for the breach, Eastern Platinum would not have entered into the framework agreement but would instead have pursued the base case described in the Sound Mining report, achieving profits with a net present value of \$3.82 million. Ms. Ren submits that Eastern Platinum is worse off than it would have been under that scenario. Eastern Platinum submits that it is better off.
- [73] The details of Eastern Platinum's present financial position, for purposes of comparison, are not easy to discern from the publicly available records that are all the company has made available on this application. The most recent of Eastern Platinum's financial statements in evidence is a quarterly statement as of September 30, 2022. The following points are noteworthy:
- a) Eastern Platinum owes Union Goal US\$49.474 million, which is classified as a current liability;
 - b) The debt to Union Goal would have been due and payable in 2021, and then in 2022, except that Union Goal has agreed to extend the time for repayment and the loan is now due in the third quarter of 2023;

- c) Eastern Platinum lacks sufficient working capital to pay the debt and its financial statement contains the following note concerning the company's potential inability to continue as a going concern:

Based on agreed terms in the Framework Agreement with Union Goal, the actual payment amount and the timing of the payment have yet to be determined and are subject to good faith negotiations. These factors and uncertainties do raise significant doubt about the Company's ability to continue as a going concern. These consolidated financial statements do not give effect to adjustments to the carrying value and classification of assets and liabilities and related expense that would be necessary should the Company be unable to continue as a going concern and such adjustments may be material.

- d) Union Goal owes Eastern Platinum US\$9.173 million for chrome supplied under the agreements and approximately half that debt is not current, meaning that Union Goal is not making payments on time.

[74] The following financial results are extracted from a table prepared by Eastern Platinum's chief financial officer, Mr. Gingras. All figures are expressed in thousands of US dollars:

Fiscal Year

Revenue

Mine Operating Income/(Loss)

Net Income/(Loss)

2018

\$414

\$(13)

\$(26,266)

2019

\$39,242

\$5,524

\$(1,146)

2020

\$56,143

\$5,555

\$(9,396)

2021

\$68,198

\$9,618

\$(2,711)

YTD, Sept 30, 2022

\$55,110

\$11,980

\$299

[75] What Ms. Ren takes from these results is that the company has only just begun to turn a profit, when that should have occurred, under the base case, by March 2020. However, she concedes that the comparison is inexact, because Mr. Gingras' figures include revenues from the sale of PGM not included in the base case scenario, at least some of which could have occurred anyway, but probably in different amounts because Eastern Platinum is extracting the PGM from refined tailings under a different process than that contemplated in the base case. In 2018, Eastern Platinum contemplated that the Union Goal transactions provided a potential for superior extraction of PGM, but the evidence does not establish whether that potential has been realised.

[76] Eastern Platinum says that the Union Goal Transactions have put it into a position to contemplate restarting underground mining at the Mine. Mr. Gingras states:

10. In 2022, [Eastern Platinum] was able to leverage its PGM production and sales to obtain financing intended to fund the restart of underground mining of its Crocodile River Mine. On September 22, 2022, [Eastern Platinum] announced that it signed a finance facility agreement with Investec Bank Limited. The renewable 12-month revolving commodity finance facility is secured by PGM production from the tailings at the Crocodile River Mine.

On the evidence before me, it is impossible to assess whether a similar credit facility could have been obtained secured by the PGM production that might have resulted from the exploitation of tailings contemplated under the base case.

[77] The Mine's prospects are unclear. Ms. Ren submits that insolvency looms, and that is certainly one possibility. It is also possible that Eastern Platinum will be able to refinance its indebtedness to Union Goal and generate profits from the sale of PGM that would not have been available to it under the base case. There are other possibilities. A convincing comparison of the company's actual financial position to that under the base case would require expert evidence based on an analysis of financial records not limited to the company's public financial reporting.

- [78] Despite these uncertainties, in my opinion, Ms. Ren has articulated a legally plausible theory of damage suffered by the company that finds some support in the evidence before the court. She has not proved that the company has suffered loss and damage, but that is not the test. I cannot say that the proposed claim for breach of fiduciary duty is bound to fail on the basis that Eastern Platinum has not suffered a loss. I find that this claim has a reasonable prospect of success.
- [79] Accordingly, I conclude that Ms. Ren has established the existence of a claim for breach of fiduciary duty against Ms. Hu that has a reasonable prospect of success. I am not persuaded that the same can be said of a claim for breach of fiduciary duty against the other proposed defendants.

The negligence claim

- [80] I turn to consider whether the negligence claim has a reasonable prospect of success.
- [81] The gist of the negligence claim is that the directors negligently failed to conduct sufficient due diligence in causing the company to enter into the Union Goal Transactions. Eastern Platinum committed itself to the transactions by entering into the framework agreement. In my view, the claim is bound to fail against Mr. Guan and Mr. Dentoom because they only became directors after the framework agreement was signed.
- [82] As Justice Griffin pointed out in a passage quoted above at paragraph [51] (from 253 CA at para. 131), claims against directors based on negligence alone appear exceptionally rare. The law affords certain protections to directors. They are entitled to rely upon the work properly delegated to corporate officers and employees, and trust that the work has been performed well; *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 69, 1995 CanLII 76. Section 157(1) of the BCA protects them from liability where they have relied upon, in good faith, the company's financial statements, written reports of professional persons retained by the company, factual representations of corporate officers, and records, information or representations that provide reasonable grounds for their actions.
- [83] Directors are also afforded the protection of the business judgment rule. It affords deference to directors' decisions that lie within a range of reasonable alternatives; 253 CA at para. 130; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 40. The business judgment rule assumes that the directors are impartial and not self-interested. To assure the availability of the rule in respect of potentially controversial decisions, corporations typically appoint a special committee of disinterested directors to make a recommendation that can be adopted by the full board.
- [84] Eastern Platinum relies on the appointment of special committees in this case, but I reject that argument for the following reasons.
- [85] 253 requested that Eastern Platinum sue the directors by letter dated September 18, 2018 from AGB to five directors. It referred to the framework agreement and related transactions and alleged that they were not in the best interests of the company, and that the directors of

the company had acted negligently and in breach of fiduciary duty in this regard. Eastern Platinum's board appointed Mr. Dorin, Mr. Dentoom and Mr. Guan as a special committee to consider the request, with Mr. Dorin as a non-voting member and Mr. Dentoom and Mr. Guan as the voting members. All three were independent of management. There was no reason to view Mr. Dentoom and Mr. Guan as potential defendants at this stage, because they were only appointed after the framework agreement was signed. They were apparently disinterested directors.

- [86] The special committee considered a draft notice of civil claim and supporting affidavit provided by AGB. It met eight times, interviewed witnesses and reviewed corporate records. It concluded that it would not be in the company's best interests to sue the proposed defendants and recommended that an action not be commenced.
- [87] Following receipt of Ms. Ren's request that the company commence a derivative action on June 29, 2020, Eastern Platinum again appointed a special committee, this time consisting only of Mr. Guan, who had not been identified as a proposed defendant in the Hong proceeding. Mr. Guan remained of the view that Eastern Platinum should not sue the directors.
- [88] Giving judgment in the Hong proceeding, Smith J. discounted the decision of the first special committee as a consideration favouring the defence of the proposed derivative action. In his view, it did not carry weight because the information relied upon by the special committee was not made available to the court for its independent review; 253 SC at paras. 38-42. Justice Griffin found no error in this aspect of Justice Smith's analysis; 253 CA at paras. 132. The gap in the evidence before me remains and I come to the same conclusion. I cannot defer to the judgment of the special committee and, on that basis, conclude that the proposed negligence claim is bound to fail. As Justice Griffin observed, however, Eastern Platinum's failure to show that the proposed derivative action was bound to fail "does not necessarily mean that the appellant [253] showed that the claim had a reasonable prospect of success".
- [89] Overall, I view the proposed negligence claim with scepticism. As Justice Griffin observed in a passage quoted above at paragraph [51] (from 253 CA at para. 131), it is an exceptionally rare kind of claim. The business judgment rule remains a formidable obstacle, notwithstanding my rejection of Eastern Platinum's argument based on the appointment of the special committees. The premise of the proposed claim is that approving the framework agreement having regard to the information available to the directors was a decision falling outside the range of reasonable alternative courses of action. While this may be possible in relation to Mr. Dorin, Mr. Cosic, Mr. Shi, and Mr. Wang, it is a high hurdle to surmount. It may be a slightly lower hurdle in relation to Ms. Hu based on her greater involvement in the transaction.

[90] The proposed negligence claim is legally plausible and has some support in the evidence. Further evidence would have to come from Eastern Platinum, which has declined to produce it for reasons it has not made explicit. In the circumstances, the absence of evidence weighs against the company's position that the claim is wholly without merit. For the reasons I have already addressed in relation to the proposed claim of breach of fiduciary duty against Ms. Hu, I do not think that the proposed negligence claim is bound to fail on a limitation defence. Nor do I think that it is bound to fail on the basis that Eastern Platinum has not suffered a loss, although it is relevant to an assessment of the strength of the claim that the presumptions that can sometimes be invoked in a case of breach of fiduciary duty would be unavailable here.

[91] On balance, I conclude that the proposed negligence claim has a reasonable prospect of success as against Ms. Hu, Mr. Dorin, Mr. Cosic, Mr. Shi and Mr. Wang, though I view the claim as substantially weaker than the breach of fiduciary duty claim against Ms. Hu.

Weighing the benefits of the claims against the costs and inconvenience to Eastern Platinum of pursuing them

[92] The proposed claims would expose Eastern Platinum to costs and inconvenience including the following.

[93] The company would be obliged to make its records and witnesses available to Ms. Ren's counsel for the purpose of discovery, factual analysis, and trial preparation. As usually occurs in commercial litigation, the process would be protracted and could be expected to place significant demands on management. At least one expert would be engaged to deal with the quantification of damages, and that process would entail a deep dive into the company's financial records. It can be assumed that the company and Ms. Ren's counsel would continue to deal at arm's length and that another set of lawyers would be involved.

[94] Eastern Platinum is headquartered in British Columbia and the Mine is in South Africa. The distance would increase the burden on the company, which would be pursuing a lawsuit in British Columbia in respect of activities undertaken half a world away.

[95] The claim would distract Eastern Platinum's directors and senior officers from the pursuit of its business affairs. Mr. Dentoom resigned as an independent director in October 2019 and deposes that the time commitment associated with his work on the special committee was the primary reason for his decision to leave the board. It is fair to infer that the company's involvement in litigation over past transactions may make it unattractive to at least some individuals who would otherwise have much to offer the company as highly qualified independent directors.

- [96] The cost and inconvenience associated with the lawsuit would increase according to the number of defendants and variety of claims advanced. According to the draft NoCC, Mr. Shi resides in Perth, Australia, Mr. Guan resides in Beijing, China, Mr. Dentoom resides in Essex, U.K., Mr. Cosic resides in Toronto, Ontario, and the three remaining proposed defendants reside in the Lower Mainland of British Columbia.
- [97] Eastern Platinum submits that the proposed negligence claim would be pointless because it has agreed to indemnify all its directors for any costs that are not covered by directors and officers insurance. It maintains that prosecuting the proposed action risks imposing substantial indemnification costs on the company.
- [98] I am not persuaded that the potential costs associated with an obligation to indemnify defendant directors are material. Neither the indemnities nor the insurance policy are in evidence and the extent of the company's exposure is unclear.
- [99] Taking into account the relative strength of the claims having a reasonable prospect of success, and the costs and inconveniences I have identified, I think that it is in the best interests of Eastern Platinum that a claim against Ms. Hu for breach of fiduciary duty and negligence be pursued, but not the negligence claims against the other proposed defendants. The breach of fiduciary duty claim is apparently the strongest, and it is only a claim against Ms. Hu. If she is to be sued for breach of fiduciary duty, the negligence claim should be included because it has a reasonable prospect of success. A claim against Ms. Hu alone will be relatively simple in scope, and will minimize the cost and inconvenience to the company. On the record before me, including a negligence claim against Mr. Dorin, Mr. Cosic, Mr. Shi, and Mr. Wang would add substantial cost and complexity in exchange for the addition of a relatively weak claim.

Is Ms. Ren bringing this application in good faith by it pursuing for the benefit of Eastern Platinum?

- [100] Ms. Ren owns 4.8 million shares comprising about 3.5% of the outstanding shares at the end of 2022. In her first affidavit made in December 2020, she states that she has serious concerns that Eastern Platinum has been mismanaged by the proposed defendants. She deposes to her concern that the claim proposed by 253 is not being pursued, despite Smith J.'s finding that it appears to be in the best interests of the company. She offers reasons for her concern, referencing matters raised by Mr. Hong in 253's materials and further public disclosures since the hearing of 253's petition. She concludes her affidavit as follows:
28. I am acting in good faith to advance this claim on behalf of [Eastern Platinum]. I believe that the claim should be pursued. I am pursuing leave to commence a derivative action for the sole purpose of pursuing remedies on behalf of [Eastern Platinum], and for no other or improper purpose.

- [101] Eastern Platinum submits that Ms. Ren lacks good faith because "the reason for her petition is the urging and opinions of a party that this Court has already found to have ulterior motives". The underlying premise is that Ms. Ren's opinion and motivation cannot be considered as genuine because she was persuaded to her position by arguments advanced by 253. This is unsound. Ms. Ren's opinions and motives are her own, regardless of how she came to hold them.
- [102] Eastern Platinum submits that Ms. Ren and 253 "must be taken to share the same interests" because they are both represented by the same firm. All that can be inferred from the joint representation is that neither party nor the law firm discerned a conflict of interest within the scope of the retainer. It does not follow and there is no evidence that Ms. Ren had anything to do with Mr. Hong's unsuccessful takeover bid and the other matters that grounded Smith J.'s concerns as to his good faith.
- [103] I accept Ms. Ren's evidence of her motives and find that her application for leave to commence a derivative action is brought in good faith.

Taking everything into account, should I authorize Ms. Ren to prosecute the proposed action in Eastern Platinum's name and on its behalf?

- [104] The proposed action includes defendants and claims that should not be pursued in the best interests of Eastern Platinum. However, it is in the best interests of the company that a claim against Ms. Hu for breach of fiduciary duty and negligence be pursued. If that claim is to be pursued, it would be on the basis of an NoCC that differs from the NoCC I have described in these reasons.
- [105] Ms. Ren should have an opportunity to consider whether she wishes to advance such a claim and, if so, to propose a fresh NoCC setting it out. Eastern Platinum should have an opportunity to respond. To be clear, assuming a reasonable pleading consistent with these reasons, I anticipate authorizing a derivative action in the exercise of my discretion. I am not inviting further evidence and argument addressing the issues canvassed in these reasons.

Disposition

- [106] Leave to commence the derivative action proposed at the hearing is denied. Ms. Ren may prepare and submit for the Court's consideration a fresh draft notice of civil claim setting out a proposed derivative action by Eastern Platinum against Diana Hu for breach of fiduciary duty and negligence and including the following particulars of the alleged breach of fiduciary duty:
- (a) Ms. Hu has a relationship with Union Goal and was in an undisclosed conflict of interest, in breach of her fiduciary duties to [Eastern Platinum], when she caused [Eastern Platinum] to enter into the Union Goal Transactions;

- (b) Ms. Hu instructed Mr. Lubbe to manipulate the Technical Report to arrive at a net present value of less than \$10 million USD for the exploitation of the chrome tailings, which would be used to justify the Union Goal Transactions;
- (c) Ms. Hu prohibited Mr. Lubbe from investigating and modelling the value, if any, that the Union Goal Transactions would create for [Eastern Platinum], despite Mr. Lubbe's preliminary view that the transactions were to [Eastern Platinum's] detriment;
- (d) The defendants did not cause [Eastern Platinum] to take steps to enforce its rights under the Union Goal Transactions despite Union Goal not having satisfied its obligations under the agreements in breach of their fiduciary duties to [Eastern Platinum].

[107] Ms. Ren may submit her fresh draft notice of civil claim through the registry to my attention under cover of a memorandum of argument not exceeding five pages in length. Eastern Platinum may submit a written memorandum of argument not exceeding five pages in length in response. Either party may request a further oral hearing as they may be advised, in which case I will decide whether one is warranted.

[108] No order will be entered at this time.

"Gomery J."

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