

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ren v. Eastern Platinum Limited*,  
2023 BCSC 706

Date: 20230428  
Docket: S2013693  
Registry: Vancouver

Between:

**Xiaoling Ren**

Petitioner

And

**Eastern Platinum Limited**

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

Supplementary Reasons to *Ren v. Eastern Platinum Limited*, 2023 BCSC 404

## Reasons for Judgment

Counsel for the Petitioner:

S. Bieber  
C. Grisdale

Counsel for the Respondent:

C. Hunter, K.C.  
M. Evans

Written submission of the petitioner:

April 13, 2023

Written submission of the respondent:

April 14, 2023

Written reply submission of the petitioner:

April 20, 2023

Place and Date of Judgment:

Vancouver, B.C.  
April 28, 2023

**Introduction**

[1] Ms. Ren applied for leave to commence a derivative action against the former president and directors of Eastern Platinum Limited. The matter was argued over the course of two days in January 2023. On March 16, I issued written reasons for judgment in which I concluded that it is in the best interests of Eastern Platinum that a claim against only the former president, Diana Hu, for breach of fiduciary duty and negligence be pursued. Because this was not precisely the claim Ms. Ren had proposed to advance, I found that Ms. Ren should have an opportunity to consider whether she wished to advance it.

[2] In my reasons, indexed at 2023 BCSC 404, I stated:

[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.

[3] Ms. Ren duly submitted a draft notice of civil claim and memorandum of argument. Eastern Platinum filed argument in response, and I gave Ms. Ren leave to file a two-page argument in reply.

[4] In their written submissions, the parties raise three issues. One of them concerns the adequacy of the draft notice of civil claim proposed by Ms. Ren, and the other two issues are new.

**First issue: adequacy of Ms. Ren’s proposed notice of civil claim**

[5] Ms. Ren proposes to file a notice of civil claim on Eastern Platinum’s behalf as contemplated in para. 106 of my reasons. Eastern Platinum objects that the proposed pleading is improper because it “fails to properly plead a legal basis, contains improper evidence and argument, and uses inappropriately colorful language”, citing *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 44 and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2022 BCSC 540 at para. 8.

[6] Eastern Platinum’s objection has to do with the manner in which Ms. Ren proposes to plead the case. It is not an objection that the proposed pleading fails to state a cause of action against Ms. Hu. While the objection as to the manner of pleading may not be without substance, I do not think that it is one that should be addressed in this proceeding. If Ms. Hu wishes to take the point, she will be entitled to make an application in the derivative proceeding pursuant to Supreme Court Civil Rule 9-5. I do not think that I should attempt to address it in her absence.

[7] Eastern Platinum submits that the proposed pleading exposes it to an unnecessary risk that it will have to pay costs to Ms. Hu if she obtains an order that the pleading issued in its name is improper and should be struck (undoubtedly with liberty to amend). It acknowledges that Ms. Ren intends to fund the claim but says that it cannot be certain that she will not seek indemnification from the company at a later date. The answer to this is that, if Ms. Ren advances a claim for indemnification, she will have to persuade the court that her costs were reasonably incurred. The company is only at risk to that extent.

**Second issue: Ms. Ren asks that leave to commence the derivative action be granted *nunc pro tunc***

[8] This is a request raised for the first time in Ms. Ren’s written submission. It arises out of a concern that the claim may be statute-barred. Ms. Ren asks that “to the extent required ... leave to commence the proposed claim be granted *nunc pro tunc* to the date when the petition was filed, which was December 22, 2020”.

[9] In my reasons, I rejected Eastern Platinum’s argument that the proposed claim is bound to fail on a limitation defence. I stated:

[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 [Corp. v. McDougall]*, 2021 SKCA 127, the success of a limitation defence is no more than arguable and I cannot say that the proposed action is bound to fail.

[10] Eastern Platinum submits that leave should not be granted *nunc pro tunc* because Ms. Ren has delayed seeking such an order, the record is incomplete, the equities are unclear, and the order would prejudice Ms. Hu, who is not a party.

[11] The parties cite the following cases in which the possibility of a grant of leave, *nunc pro tunc*, is canvassed: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*Green*] at paras. 85-94; *CPC Networks*; *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings Limited*,

2018 ONCA 671 at paras. 25-51; *Sedgwick v. Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)*, 2022 ABCA 264 at paras. 78-85.

[12] I take the following points from these cases. The court has a power at common law to make an order *nunc pro tunc*, that is, an order with retrospective effect. It is a form of equitable relief granted in the court’s inherent jurisdiction; *Green* at para. 86. The power is one, as the Saskatchewan Court of Appeal stated in *Sedgwick* at para. 84, “to be used sparingly and not to defeat the general purposes of enactments such as leave / permission requirements”.

[13] In *Green*, Côté J. spoke for a majority and identified a list of factors to be considered in the exercise of the court’s inherent jurisdiction:

[90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice [citations omitted]. None of these factors is determinative.

[14] I reject Ms. Ren’s request for two reasons. First, the direction sought would not be legally effective, and there is therefore no good reason to make it. Second, any order that would be legally effective would be at Ms. Hu’s expense, by potentially depriving her of a substantive defence to the claim against her without notice, and that is not appropriate.

[15] Beginning with the first point, the *Limitation Act*, S.B.C. 2012, c. 13, addresses the commencement of actions. Section 6(1) provides:

**6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[16] The theory of Ms. Ren’s request for an order made *nunc pro tunc* is that the court might deem leave to have been granted on December 22, 2020 rather than in

2023. However, back-dating the granting of leave could not affect the operation of the *Limitation Act* in the derivative action that has not yet been commenced. Even if the granting of leave is back-dated, the fact remains that the derivative action was not commenced in December 2020, and it is the commencement of the derivative action that stops the limitation period from running.

[17] There is nothing in s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 to confer on the court the power to make orders in relation to the rights of the parties to the derivative action, where one has been authorized. The focus is on the court's power to regulate affairs as between the company and a complainant who is seeking or has obtained leave to pursue a claim in the company's name.

[18] In short, I do not think that the *Limitation Act* and s. 232 of the *Business Corporations Act* are consistent with an order in this proceeding that would cause the proposed derivative action against her to be deemed to have been underway for more than two years. *Green*, in which *nunc pro tunc* orders were granted, involved a different legislative scheme under which the proposed defendants were respondents to the leave application. The only *nunc pro tunc* order that I could make – which is the order requested – would be an order in this proceeding that would be legally ineffective to affect the running of the limitation period in the derivative action.

[19] Turning to the second point, Ms. Hu is not a party to this proceeding. Two of the factors considered in deciding whether to grant an order *nunc pro tunc* are the presence of prejudice to the opposing party and whether “the timing of the order is merely an irregularity”; *Green* at para 90. These factors assume the presence of an opposing party who has had an opportunity to make submissions, and a case in which the issue is simply one of timing. In this case, Ms. Hu has not had notice of the request and an opportunity to address the question of prejudice. If I could make an order that would be legally effective to affect the running of the limitation period in the derivative action, it would deprive Ms. Hu of a substantive defence to the claim against her. It would not be a simple matter of correcting an irregularity. I would not exercise my discretion to make such an order.

[20] Accordingly, I decline Ms. Ren's request that I grant leave *nunc pro tunc*.

**Third issue: Eastern Platinum asks that I order that Ms. Ren may not prosecute the derivative action through her present lawyers, who represent her in this proceeding**

[21] This is a request raised for the first time in Eastern Platinum's written submission. It says that Ms. Ren's lawyers act for Rong Kai Hong and 2538520 Ontario Ltd. ("253") in an oppression proceeding against Eastern Platinum, and in an action in Ontario against Eastern Platinum's corporate counsel. It submits that, in light of those retainers, it is inappropriate that the same lawyers represent Eastern Platinum in the derivative action. It asks that I direct that Ms. Ren be represented by different lawyers in the derivative action, citing *Intercontinental Precious Metals v. Cooke* (1993), 10 B.L.R. (2d) 203 (B.C.S.C.) at para. 59.

[22] Eastern Platinum adds the following:

23. EPL recognizes that the Court did not grant the parties leave to seek additional orders and that the direction sought potentially impacts the interests of Mr. Hong and 253. Accordingly, in the event that leave to commence a derivative action against Ms. Hu is granted, EPL seeks leave to make full submissions on this issue on notice to Mr. Hong and 253 at a later date.

[23] Ms. Ren opposes the direction sought by Eastern Platinum. It stresses, as Eastern Platinum has conceded, that the direction could adversely affect Mr. Hong and 253. It says that *Intercontinental Metals* is distinguishable because that case involved a single party maintaining a derivative action on behalf of the company while pursuing an oppression proceeding against the company, while Ms. Ren and Mr. Hong are different people. It denies that there is significant overlap between the derivative action and the oppression proceeding in this case.

[24] This is not an issue that I can fairly address on the materials before me. It requires further evidence and argument.

[25] There is a limitation issue and, if I am correct in my interpretation of the *Limitation Act*, the limitation period runs until the derivative action is commenced.

Commencement of the derivative action should not be further delayed for argument addressing the direction sought by Eastern Platinum concerning the conduct of the action. In my view, Ms. Ren should have leave to commence the derivative action through her present lawyers immediately, on the basis that there will be no further steps taken in the action through those lawyers until Eastern Platinum's objection to their involvement is resolved, and Eastern Platinum will be obliged to pursue resolution of the objection with all reasonable diligence.

**Disposition**

[26] For these reasons:

- a) Ms. Ren has leave to commence an action against Diana Hu by and on behalf of Eastern Platinum by filing a notice of civil claim;
- b) The notice of civil claim will state only the causes of action contained in the draft notice of civil claim submitted by Ms. Ren, though it may differ from the draft as counsel may advise having regard to the objections raised by Eastern Platinum in its written submission;
- c) Upon filing the notice of civil claim, Ms. Ren will take no further steps in the litigation through her lawyers, Adair Goldblatt Bieber LLP without further order of the court in this proceeding;
- d) Ms. Ren will provide the filed notice of civil claim to Eastern Platinum through its present counsel forthwith upon filing; and
- e) Within 30 days of receipt of the filed notice of civil claim, Eastern Platinum will file and serve motion materials for an application in this proceeding to address the identity of the lawyers who will represent it, on Ms. Ren's instructions, in the derivative action, and will pursue resolution of the application with all reasonable diligence.

[27] There is liberty for any interested person to apply in this proceeding for directions in connection with the conduct of the derivative action.



[28] Determination of the costs of this proceeding and any claims for indemnification for costs incurred in the derivative proceeding are deferred pending the outcome of the derivative action.

“Gomery J.”