COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Eastern Platinum Limited v. Ren,*
2024 BCCA 109

Date: 20240321
Docket: CA49103

Between:

Eastern Platinum Limited

Appellant
(Respondent)

And

Xiaoling Ren

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated April 28, 2023 (*Ren v. Eastern Platinum Limited*, 2023 BCSC 706, Vancouver Docket S-2013693).

Counsel for the Appellant:	C.E. Hunter, K.C. M.E. Evans
Counsel for the Respondent:	S.C. Bieber C.D.W. Grisdale T. Boyd
Place and Date of Hearing:	Vancouver, British Columbia December 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 21, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Eastern Platinum Limited ("EPL") appeals from an order granting the respondent leave to commence a derivative action against EPL's former CEO. The appellant argues the judge erred by: (1) failing to assess whether the benefits of the proposed derivative action justify the cost and convenience to the company of pursuing the claim; and (2) failing to defer to the EPL special committee's decision not to proceed with the proposed litigation.

Held: Appeal dismissed. The decisions impugned by the appellant are discretionary and therefore entitled to deference. The appellant has not demonstrated that the judge made a palpable and overriding error in assessing the relative benefits and costs of the proposed proceeding. The judge's decision not to defer to the special committee was based on his finding that a lack of evidence prevented him from assessing whether the special committee's recommendation was reasonable. There was no error in this approach.

Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] This appeal arises out of a long-standing dispute over the propriety of certain transactions engaged in by the appellant Eastern Platinum Limited ("EPL") concerning its mining operations in South Africa.

[2] The respondent Xiaoling Ren is a shareholder of EPL. She alleges that present and former directors of EPL, and its former Chief Executive Officer, were negligent and breached their fiduciary duties by authorizing the impugned transactions.

[3] Ms. Ren filed a petition in the Supreme Court of British Columbia seeking leave to commence a derivative action in the name of EPL against these individuals.

[4] In reasons for judgment dated March 16, 2023, indexed at 2023 BCSC 404, and Supplementary Reasons for Judgment dated April 28, 2023, indexed at 2023 BCSC 706, the judge granted Ms. Ren's application, but only in respect of EPL's former CEO, Ms. Hu.

[5] EPL now appeals to this Court to set aside the judge's order granting Ms. Ren leave to commence a derivative action.

[6] Ms. Ren has also brought an application to adduce fresh evidence in the form of updated financial records for EPL, and newly obtained documents to support the claims she seeks to advance through the proposed derivative action. At the hearing of the appeal, Ms. Ren advised that she was only seeking to rely on the updated financial records, specifically EPL's most recent statement of income (loss). EPL did not object to this fresh evidence. Therefore, I would allow the application to the extent of admitting Exhibit "A" and "B" of the affidavit of Ms. O'Gorman sworn November 9, 2023, comprising the Condensed Interim Consolidated Financial Statements of EPL for the three- and nine-months ending September 30, 2023.

[7] For the reasons that follow, I would dismiss the appeal.

Background

[8] EPL is a publicly traded company incorporated under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. Through a subsidiary company, Barplats Mines (Pty) Ltd. (“BML”), it owns a platinum and chrome mine located in South Africa, known as the Crocodile River Mine (the “Mine”). The Mine is EPL’s principal asset.

[9] The Mine was established in 1980 and was operational until 2013 when active mining ceased. From 2013 to 2020, activities at the Mine were limited to care and maintenance.

[10] The mining operations, when active, produced a large volume of tailings, i.e., material by-products of the primary mining operation. EPL anticipated that it could generate revenue by extracting and selling platinum group metals (“PGM”) and chrome from the tailings. EPL also maintained some hope that the Mine might again become operational at some point in the future.

[11] Prior to the Mine ceasing active operations, BML constructed a retreatment plant to process the tailings. It was operational from about 2008 until 2013, around the time that the Mine ceased its operations.

[12] In 2016, there was a change in control of EPL. Ka An Development Co. Ltd. (“Ka An”) acquired sufficient shares in EPL to enable it to take control of EPL’s board of directors, which it did by appointing directors at EPL’s annual general meeting held on July 5, 2016. As part of the change of control, Ms. Diana Hu was appointed as CEO.

[13] In 2017, EPL obtained a feasibility study prepared by Sound Mining (Pty.) Ltd. concerning the feasibility of extracting chrome from the tailings (the “Sound Mining Report”). The report projected that chrome could be extracted using existing retreatment equipment, and that the operation would generate a positive cash flow after 10 months of operation, break even after 25 months and ultimately generate profits with a net present value of CDN $3.82 million. The Sound Mining Report did

not address the possible revenues that might be realized from extracting PGM. EPL characterized the Sound Mining Report as the "base case" for further economic exploitation of the Mine, and more particularly the tailings.

[14] Rather than pursuing the extraction project identified in the Sound Mining Report, EPL entered into discussions with Union Goal Offshore Solutions Limited ("Union Goal") leading to a memorandum of understanding in late 2017 and a framework agreement dated March 1, 2018 (the "Framework Agreement"). The key elements of the Framework Agreement were:

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.

(Collectively the "Union Goal Transaction".)

[15] The plant contemplated under the Framework Agreement was expected to use new technology that would permit greater chrome extraction than the old technology contemplated under the Sound Mining Report. The Agreement only dealt with the extraction of chrome from the tailings, not PGM. EPL remained free to extract and sell PGM on its own account.

[16] The Framework Agreement included a put option that allowed either party to require a negotiation for the determination of the purchase price of the equipment. If no agreement was reached, EPL's debt to Union Goal would be cancelled and Union Goal was to repurchase the equipment at a default price equal to the costs incurred.

[17] The new plant was constructed and equipment purchased. The extraction of chrome began in February 2019.

[18] In November 2018, counsel for 2538520 Ontario Ltd. (“253”), a shareholder of EPL, wrote to EPL asking it to commence proceedings against the directors and officers involved in approving the Union Goal Transaction. The principal of 253 is Mr. Rong Kai Hong. Mr. Hong had previously attempted to gain control of EPL but lost a proxy battle that resulted in Ka An appointing new directors, as described above in para. 12.

[19] In response to 253’s request, EPL’s board formed a special committee to consider the allegations. The special committee was comprised of the then Board chair, Mr. Dorin, and two directors, Mr. Dentoom and Mr. Guan. Before the special committee completed its process, 253 filed a petition in the Supreme Court of British Columbia on November 2, 2018, seeking leave to commence a derivative action. The petition attached a draft notice of civil claim (NOCC) naming Ms. Hu and six other EPL directors. It alleged that the defendants negligently failed to conduct sufficient due diligence and breached fiduciary duties in entering into the Union Goal Transaction.

[20] 253 was represented in its petition proceeding by the law firm of Adair Goldblatt Bieber LLP (“AGB”). While the identity of counsel is not normally a relevant consideration, as I will explain further below, EPL has raised issues about AGB’s involvement in the current proceeding.

[21] The special committee subsequently recommended to EPL’s board that it would not be in EPL’s best interests to commence proceedings against the proposed defendants. On December 17, 2018, the board officially adopted the special committee’s recommendation.

[22] 253’s petition was heard by Justice Smith in June 2019. On August 27, 2019, in reasons for judgment indexed at 2019 BCSC 2019, Smith J. dismissed the petition (“*253 SC*”). I will address Smith J’s reasons in more detail below. Justice Smith’s principal ground for dismissing the petition was his finding that 253 had failed to establish that it was acting in good faith due to Mr. Hong’s previous failed attempt to gain control of EPL.

[23] 253 filed a notice of appeal. While its appeal was pending, it issued a press release describing its allegations and Smith J.'s conclusions. The press release invited other shareholders of EPL to contact AGB to "assist pursuing leave to commence a similar derivative action".

[24] The press release came to the attention of Ms. Ren, who retained AGB. While 253's appeal was under reserve in this Court, AGB wrote to EPL on Ms. Ren's behalf, again requesting that EPL commence an action against its directors, failing which Ms. Ren would seek leave to commence a derivative action.

[25] In response to Ms. Ren's request, EPL formed a second special committee comprised solely of Mr. Guan, who had been a member of the earlier special committee. Mr. Guan concluded that nothing in the new information he reviewed changed his view from the earlier special committee's conclusion that the proposed action was not in EPL's best interests.

[26] On November 26, 2020, in reasons for judgment indexed at 2020 BCCA 313, this Court dismissed 253's appeal ("*253 CA*"). I will discuss the Court's reasons below.

[27] On December 22, 2020, AGB filed a petition on behalf of Ms. Ren commencing this proceeding.

[28] On January 5, 2021, AGB received an unsolicited email providing a copy of a resignation letter written by Mr. Anton Lubbe to EPL on June 29, 2018 ("the Lubbe letter"). Mr. Lubbe had been a senior officer of EPL's subsidiary, BML, through which it owned and operated the Mine. The Lubbe letter alleged that Ms. Hu was in a conflict of interest due to her relationship with EPL's controlling shareholder, Ka An, and that Ms. Hu directed the negotiations with Union Goal in ways that were not in EPL's best interest. Mr. Lubbe identified numerous examples of conduct that caused him concern and that led him to state: "I feel obligated to resign as I do not wish to place myself any further in conflict with my fiduciary, safety and health responsibilities…".

[29] EPL admitted that the Lubbe letter was authentic. It says that Mr. Lubbe's allegations were investigated by the audit committee of its board of directors which concluded that Ms. Hu was not in a conflict of interest. The Lubbe letter was originally received in June 2018 and considered by EPL's audit committee in July 2018.

[30] On June 22, 2022, Ms. Hu resigned as a director and chief executive officer of EPL.

The Proposed Derivative Action

[31] The proposed derivative action, as set out in a draft NOCC, is described in some detail by the judge below. I will not reproduce his description, but will highlight some of the key features and allegations set out in the draft NOCC:

a) The NOCC names Ms. Hu and six other individuals as defendants, all of whom are alleged to have been directors of EPL at material times;

b) The NOCC alleges that the Union Goal Transaction will result in a loss to EPL in the range of $2–50 million, potentially leading to EPL's insolvency or takeover by Union Goal;

c) The NOCC alleges breach of fiduciary duty based upon the allegations set out in the Lubbe letter;

d) The NOCC pleads that the defendants caused EPL to enter into the Union Goal Transaction without conducting due diligence.

[32] The judge noted that the draft NOCC was very similar in form to the draft pleading presented in the 253 proceeding, including identical claims of negligence.

Legal Framework

[33] Sections 232 and 233 of the *BCA* provide the statutory authority for derivative actions:

Derivative actions

232 (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

Powers of court in relation to derivative actions

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(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.

…

[34] As can be seen, s. 233(1) establishes four conditions that must be met by an applicant seeking leave to commence a derivative action. In both the 253 proceeding and here, the dispute between the parties centered on the third and fourth conditions, i.e., whether the applicant is acting in good faith and whether the proposed proceeding is in the best interests of the company.

[35] The good faith requirement was succinctly described by Justice Griffin in *253 CA*:

> [29] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27–30.
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> [30] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].
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> [31] The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the proposed action. If this evidence is accepted by the court, it is a *prima facie* indication of good faith, but it is not necessarily determinative: *Jordan Enterprises* at para. 29; *Discovery Enterprises* (S.C.) at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.
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> [32] A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.
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> [33] A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Discovery Enterprises* (C.A.) at para. 7.

[36] Justice Griffin described the best interests requirement as follows:

> [34] The question of whether it appears to the court to be in the best interests of the company to prosecute the action includes consideration of the merits of the proposed action.
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> [35] In this regard, many of the authorities have adopted the language of Tysoe J. (as he then was) in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R (3d) 300 [*Primex* (S.C.)], var'd (1996), 26 B.C.L.R.(3d) 357, leave to appeal ref'd [1997] S.C.C.A. No. 4. He held that the court should consider whether "the proposed action has a reasonable prospect of success or is bound to fail" and whether the defence is "bound to be accepted": at para. 49; see *Discovery Enterprises* (C.A.) at para. 11. This Court in *Discovery Enterprises* (C.A.) approved the description of this requirement as requiring the applicant to show "an arguable case" (para. 10).
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> [36] The onus is on the applicant, not the respondent. The applicant has to not only plead a proper cause of action, but also have some evidence to

> support the case that its proposed claim has a reasonable prospect of success. This is why the authorities typically review the evidence of the merits of the proposed claim in considerable detail: see for example *Discovery Enterprises* (S.C.); *Primex* (S.C.); *Arkansas Teacher Retirement System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 [*Lions Gate*].
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> [37] What the authorities illustrate is that the approach to considering the merits of the proposed action lies somewhere on a spectrum. The court should do more than skim the surface of the pleadings and should consider the evidence but ought not to dive so deeply into the merits as to try the case.
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> [38] Other factors must also be brought to bear on whether the proposed action appears to be in the best interests of the company, namely whether the potential relief sought in the action makes it worthwhile to the company to undertake the costs and inconvenience of pursuing it: *Primex* (S.C.) at para. 49; *Lions Gate* at paras. 163–165; *Jahnke v. Johnson*, 2018 SKCA 59 at para. 68.

[37] Having described these essential conditions, Griffin J.A. noted that even when all of the s. 233(1) criteria are met, the court retains a discretion as to whether to grant leave to bring a derivative action. She noted at para. 40:

> …A common approach to the exercise of discretion in analogous circumstances is to consider the required factors as a whole, rather than separately. This is a sensible approach in derivative action applications as well.

The 253 Proceeding and the Reasons of the Judge Below

[38] It is useful to consider the reasons of Smith J. and this Court in the 253 proceeding alongside the reasons of the judge below. The decisions in the 253 proceeding provide important context and background to the present proceeding. EPL argued before the judge below that Ms. Ren's proceeding is an abuse of process because it was brought by AGB and it largely replicates the application that was previously dismissed.

253 SC

[39] Justice Smith noted that the draft NOCC submitted by 253 alleged both breach of fiduciary duty and negligence. However, he observed that the NOCC failed to particularize the allegation of breach of fiduciary duty (*253 SC* at paras. 26–27). Nor did 253 cite any evidence that would support such an allegation.

[40] With respect to the claim in negligence, Smith J. addressed EPL's reliance on the business judgment rule, which accords deference to a business decision made by directors of a corporation as long as it falls within a range of reasonable alternatives: at para. 35, citing *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 40. EPL submitted that the investigation and resulting recommendation of the special committee brought it within the business judgment rule. Justice Smith rejected that argument on the basis that EPL had failed to adduce any specific evidence of what the members of the committee considered in reaching their recommendation, and he was therefore unable to assess the reasonableness of the recommendation (at para. 41). In the circumstances, Smith J. was unable to conclude that the proposed action was bound to fail (at para. 44).

[41] Justice Smith went on to consider the good faith requirement and held that 253 failed to satisfy this element of the test. His finding was based largely on Mr. Hong's prior unsuccessful attempt to gain control of EPL. Justice Smith said:

> [57] In short, the CEO of the corporate petitioner, who 2538520 puts forward to give evidence on its behalf, clearly has or has had personal interests separate from whatever concern he may have for the best interests of EPL. He was involved in a failed bid to take over the company. He subsequently was rebuffed or ignored when he sought to enter into a transaction with the company. His efforts were rejected in favour of the very transaction that 2538520 now complains of.
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> [58] Those facts clearly suggest that Mr. Hong's personal interests, as opposed to the interests of EPL, are a significant motive for this proposed action. 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.
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> [59] Evidence of a personal interest may not be fatal to a leave application if it is outweighed by other evidence of good faith. But in the presence of clear evidence that suggests 2538520, through its CEO, is motivated by other interests, a mere assertion of belief in the merits of the claim accompanied by a bald profession of good faith is not sufficient.

[42] Justice Smith therefore dismissed 253's petition.

253 CA

[43] As noted above, this Court dismissed 253's appeal, although the decision was not unanimous as Justice Goepel dissented.

[44] On the issue of good faith, 253 argued that Smith J. had erred by: (i) failing to consider Mr. Hong's expressed belief in the merits of the proposed action; (ii) drawing improper inferences about Mr. Hong's motivations that were not supported by the evidence; and (iii) by finding that a derivative action was not appropriate because 253 wanted to protect the value of its shares in EPL.

[45] Justice Griffin, for the majority, rejected all three arguments and held that Smith J. did not err in finding that Mr. Hong was not acting in good faith. On the first point, Griffin J.A. held that Mr. Hong's belief in the merits was some evidence of good faith but it was not determinative. Justice Griffin found that on the evidence as a whole, it was open to Smith J. to find that Mr. Hong had ulterior motives and had therefore failed to establish that he was acting in good faith (at paras. 61, 65).

[46] Justice Griffin made a similar finding in respect of the argument concerning Mr. Hong's motivations (at para. 86). It is useful to note that as part of her analysis of this issue, Griffin J.A. addressed EPL's argument that it was inconsistent for Smith J. to find that 253 was not acting in good faith after having found that the claim in negligence was in the best interests of the company. Justice Griffin observed that Smith J.' s conclusion about the best interests of the company was "premature" (at para. 123) and based on "extremely thin" evidence (at para. 102). Regardless, she also held that Smith J.'s conclusions on best interests did not dictate the results of his analysis of the good faith requirement, which are separate elements of the test requiring discrete analysis (at paras. 90, 136).

[47] Justice Griffin also considered the recommendation of the special committee and concluded that she saw "no error in [Smith J.'s] criticism of the lack of documentation in support of those decisions" (at para. 132).

[48] Finally, on the third error alleged by EPL, Griffin J.A. held that contrary to EPL's argument, Smith J. did not equate the fact of a personal interest in share value with bad faith (at para. 143).

[49] As noted, Goepel J.A. dissented. He would have found that EPL was acting in good faith and he agreed with Smith J. that the proposed action was in EPL's best interests.

Judgement Below

[50] This brings me to the reasons of the judge below.

[51] The judge first addressed EPL's argument that Ms. Ren's application was an abuse of process. This argument was grounded on the basis that: the application was brought by AGB, the same counsel that had acted for 253 on its previous unsuccessful application; Ms. Ren allegedly had a relationship with Mr. Hong; and that her application was largely a replication of the earlier proceeding.

[52] The judge rejected the abuse of process argument. He noted that the 253 proceeding had failed for a reason that was personal to Mr. Hong and that Ms. Ren's circumstances were different (at para. 46). Further, the evidence suggested that Mr. Hong was at best an acquaintance of Ms. Ren with whom she had not spoken in years (at para. 48). Finally, the judge noted that the claim being advanced by Ms. Ren differed from that pursued by 253 in that it included a claim for breach of fiduciary duty based upon the allegations set out in the Lubbe letter (at paras. 49–51).

[53] The judge then addressed the best interests analysis. He found that the allegations in the Lubbe letter provide a reasonable evidentiary foundation to support a claim against Ms. Hu for breach of fiduciary duty, based in particular on her relationships with Ka An and Union Goal (at para. 57). However, he also found that the letter provided no support for a claim against the other proposed defendants (at para. 58).

[54] The judge rejected EPL's argument that Ms. Ren's claim should be dismissed because she had not put forward a cogent claim for damages, properly grounded in the evidence. EPL relied on Griffin J.A.'s observation in *253 CA* (at para. 124) that there were too many gaps in the evidence in that case to permit a determination of

whether EPL would suffer damages as a result of the Union Goal Transaction. The judge noted that Griffin J.A. had been working from an evidentiary record that closed in June 2019 whereas the record before him had more current evidence. The judge's findings on this point are succinctly set out at paras. 77–78 of the reasons:

> [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.
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> [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.

[55] With respect to the proposed claim in negligence, the judge acknowledged (as did Griffin J.A. in *253 CA* at para. 131) that claims against directors based on negligence alone appear to be exceptionally rare (at para. 82). Directors are generally afforded protection if they in good faith rely upon work done by corporate officers, professional consultants, and the company's financial statements and other records: *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 69.

[56] The business judgment rule also affords protection to directors and, in this regard, EPL relied upon the appointment and recommendation of special committees. However, the judge found that the business judgment rule did not assist EPL in the circumstances of this case. He did so largely for the same reasons that Smith J. rejected this argument in *253 SC*, namely that there were gaps in the evidence about the information considered by the special committees in reaching their recommendations (*253 SC* at paras. 38–42). As the judge noted, Griffin J.A. found no error in this aspect of Smith J.'s analysis (at para. 88, citing *253 CA* at para. 132). The judge said: "The gap in the evidence before me remains and I come to the same conclusion".

[57] The judge observed that he viewed the proposed negligence claim "with scepticism" (at para. 89), however he concluded:

> [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.
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> [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.

[58] Next, the judge weighed the benefits of the proposed claims against the cost and inconvenience to EPL of pursuing the claims. He noted that the litigation would expose EPL to cost and inconvenience, including the need to make its records and witnesses available for discovery and trial and the imposition of significant time demands on company management, which would divert attention from the company's business affairs (at paras. 93–95). The judge also observed that the cost and inconvenience would increase according to the number of defendants and variety of claims pursued. This led the judge to find that while it was in EPL's best interests to pursue claims against Ms. Hu for breach of fiduciary duty and negligence, the claims against the other defendant directors were weak and did not justify the associated cost and inconvenience (at para. 99).

[59] Finally, the judge found that Ms. Ren brought her application in good faith and that her motives were not tainted by the fact that she is represented by the same firm who acted for 253 or that her decision to pursue a claim was informed by 253's earlier proceeding (at paras. 101–103).

[60] Based on his findings, the judge denied leave to commence a derivative action in the form set out in the draft NOCC before him. He directed Ms. Ren to

prepare and present a new draft NOCC for consideration setting out a proposed derivative action by EPL against Ms. Hu for breach of fiduciary duty and negligence.

[61] Ms. Ren did so and the judge convened a further hearing on April 13, 2023, to consider the new draft NOCC. On April 28, 2023, the judge issued supplementary reasons in which he found:

a) He was satisfied that the NOCC adequately pleaded a cause of action against Ms. Hu. The judge noted that there were potential issues in the pleading, specifically with some of the "inappropriately colourful language used", but it would be open to Ms. Hu to address that concern in the derivative action, for example by way of an application under Rule 9-5 of the *Supreme Court Civil Rules* (at paras. 5–6);

b) He denied Ms. Ren's request that leave to commence the derivative action be granted *nunc pro tunc* given concerns that the claim might be statute-barred. The judge was concerned that such an order might deprive Ms. Hu of a substantive defence available to her and noted that she was not a party to Ms. Ren's application and had no opportunity to address this issue (at para. 19);

c) The judge held that he was unable to address the objection, raised by EPL for the first time in its written submission, that Ms. Ren not be permitted to prosecute her action through AGB given their involvement in other proceedings against EPL and its corporate counsel. The judge held that Ms. Ren should have leave to commence the derivative action using AGB but on the basis that no further steps would be taken in the action until EPL had the opportunity to have its objection resolved (at para. 25).

Issues on Appeal

[62] EPL submits that the judge erred in:

a) failing to assess whether the benefits of the proposed derivative action justify the cost and convenience to the company of pursuing the claim; and

b) failing to defer to the special committee's decision not to proceed with the proposed litigation.

Analysis

Standard of Review

[63] A decision denying leave to commence a derivative action under ss. 232 and 233 is discretionary. Accordingly, absent an error in principle, the standard of review is deferential—such a decision may not be overturned unless there is a palpable and overriding error: *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at para. 69.

[64] EPL does not take issue with the judge's articulation of the test for granting leave to commence a derivative action, rather its complaint is with the application of the test. In my view, both errors alleged by EPL involve questions of mixed fact and law. The issue of whether the judge adequately assessed the benefits of the proposed derivative action engages an element of the legal test for granting leave—whether the action is in the best interests of the company—but it of necessity also requires an assessment of the evidence going to both cost and benefit. The same is true for EPL's argument that the judge did not properly defer to the decision of the special committee. The question of what deference is owed to a special committee arguably raises a question of law; however, whether a judge should so defer in a specific case involves a consideration of the relevant facts, including the composition of the committee and the process it followed.

[65] Accordingly, the judge's decision on the two issues raised by EPL on appeal is subject to the standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

Weighing the Cost and Inconvenience Against the Potential Benefits of the Proposed Action

[66] EPL submits that the judge failed to assess the potential benefits of the proposed action to EPL. In support of its position, EPL cites the decision of Griffin J.A. in *253 CA*:

> [127] Without considering the potential to EPL of the proposed litigation, it could not be said that the litigation was worthwhile and in the best interests of EPL. Indeed, without analyzing the question of whether there is likely to be a significant loss suffered by EPL by reason of entering the Union Goal transaction (as compared to the position it otherwise would have been in), the court would be unable to conclude that the proposed action has a reasonable prospect of success…

See also: *Jahnke v. Johnson*, 2018 SKCA 59 [*Jahnke*] at para. 68.

[67] EPL argues that while the judge found that Ms. Ren had articulated a "legally plausible theory of damages" (at para. 78), he drew no conclusions about the potential upside to the litigation, thus rendering a meaningful analysis of the potential benefits impossible.

[68] For her part, Ms. Ren submits that EPL seeks to establish an unreasonably high threshold test by requiring an applicant in Ms. Ren's position to effectively prove its case on damages at the leave stage. Ms. Ren also cites Griffin J.A.'s reasons in *253 CA* which for convenience are reproduced again below:

> [37] What the authorities illustrate is that the approach to considering the merits of the proposed action lie somewhere on a spectrum. The court should do more than skim the surface of the pleadings and should consider the evidence but ought not to dive so deeply into the merits as to try the case.

[69] The judge was clearly alive to the need to balance the potential benefits against the likely cost and inconvenience to the company. The question however is whether he sufficiently assessed the benefits.

[70] I agree with Ms. Ren that an applicant at the leave stage is not required to prove its case in damages, either as part of the bests interests analysis or in the costs versus benefits weighing process. That would involve a "deep dive" into the merits of the claim which, as Griffin J.A. explained in *253 CA*, is not required.

[71] Further, it would be difficult, if not impossible, for an applicant to do so given that the leave application takes place at the very outset of the proposed action when the applicant has no ability to compel production of relevant documents and lacks any other rights of discovery.

[72] That said, as Griffin J.A. also held in *253 CA,* the best interests analysis requires the court to do more than simply skim the surface of the pleadings. The court must be satisfied both that the proposed action has a reasonable prospect of success and that the relief sought makes it worthwhile for the company to incur the cost and inconvenience of pursuing the claim. The onus is on the applicant to establish both: *253 CA* at paras. 35–38; *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R (3d) 300 at para. 49, var'd, but without comment on this principle, in (1996), 26 B.C.L.R.(3d) 357, leave to appeal ref'd [1997] S.C.C.A. No. 4; *Jahnke* at para. 40; and *Arkansas Teacher Retirement System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 at paras. 158–159.

[73] In my view, the judge did not err in finding that Ms. Ren met that burden.

[74] Under the heading "Is the proposed claim bound to fail for want of proof of damages?", the judge assessed EPL's potential damages based upon a claim for breach of fiduciary duty. He did so by way of a comparison between what EPL would have realized had it proceeded in accordance with the Sound Mining Report base case and its position as a result of the Union Goal Transaction.

[75] Under the base case, the judge found that EPL would have achieved profits with a net present value of CDN $3.82 million (at para. 72). He then went on to examine EPL's then present financial position under the Union Goal Transaction, which he noted was "not easy to discern from the publicly available records that are all the company has made available on this application" (at para. 73). However, based upon an EPL quarterly financial statement as of September 30, 2022, the judge determined (at para. 73):

a) EPL owed 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 agreed to extend the time for repayment to the third quarter of 2023;

c) EPL lacks sufficient working capital to pay the debt and its financial statement contains a note raising a concern about EPL's ability to continue as a going concern;

d) Union Goal owes EPL US$9.173 million for chrome supplied under the agreements. Half of that debt is not current, meaning that Union Goal is not making payments on time.

[76] The judge then considered a table prepared by EPL's chief financial officer indicating that EPL had only just begun to turn a profit in 2022, over two years later than what would have occurred under the base case.

[77] EPL argued that the Union Goal Transaction has put it in a position to potentially restart underground mining at the Mine. However, the judge held that this was largely speculative.

[78] The judge did acknowledge that given the state of the evidentiary record, it was difficult to engage in a more complete comparison of EPL's actual financial position under the base case versus the Union Goal Transaction. That would require expert evidence based on an analysis of financial records not limited to the company's public reporting (at para. 77). Nonetheless, the judge again found that Ms. Ren had articulated a "legally plausible theory of damages suffered by the company that finds some support in the evidence before the court" (at para. 78).

[79] While the judge did not say so in so many words, it is apparent that he was of the view that there was an arguable case to be made, again based upon the

available evidence before him, that the Union Goal Transaction placed EPL in a materially worse financial position than if it had proceeded with the base case.

[80] The judge then weighed the potential benefits of the claims against the cost and inconvenience of EPL pursuing the action. I have referred to the various factors considered at para. 55 above. The weighing exercise is necessarily fact-based and involves the exercise of the judge's discretion. Respectfully, EPL is effectively asking this Court to reweigh the factors considered by the judge. That is not the role of this Court.

[81] EPL has not established that the judge made a palpable and overriding error in assessing the relative benefits and costs of the proposed proceeding. Therefore, I would not accede this ground of appeal.

Deference to EPL's Special Committee

[82] EPL submits that the judge erred in failing to defer to the recommendation of the special committee against proceeding with the proposed action. It submits that the special committee's decision should have informed the application of the business judgment rule. EPL cites the decision of the Ontario Court of Appeal in *Pente Investment Management Ltd. v. Schneider Corp.* (1988), 42 O.R. (3d) 177 (Ont. C.A.) as a leading decision setting out the relevant principles:

> [36] The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision…This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction…
>
> [37] A common method used to alleviate concerns that a conflict of interest exists between directors, who may be major shareholders, and the interests of a minority or non-voting group of shareholders, is the creation of a special committee from among the independent members of a board who do not

> have a conflict. The purpose of a special committee is to advise the Directors and to make a recommendation as to what the Board should do…
>
> [38] …If a board of directors has acted on the advice of a committee composed of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies. The burden of proof is not an issue in such circumstances.

[83] EPL submits that the court should defer to a special committee where it is established that the members of the committee are independent and properly informed based upon a sufficiently rigorous process, and that the committee's decision falls within a range of reasonable alternatives. EPL submits that the special committee's decision here satisfies all of these criteria.

[84] Ms. Ren submits that EPL continues to rely on the inadequate evidentiary foundation that led Smith J. in *253 SC* to decline to defer to the special committee.

[85] I touched briefly on Smith J's reasons for doing so at para. 40 above. However, it is useful to consider them in more detail as the judge here relied on Smith J.'s decision in coming to a similar conclusion.

[86] The process and decision of the initial special committee established by EPL following the receipt of 253's letter requesting that EPL commence an action against its directors were described in the affidavit of Nigel Dentoom, a member of the committee. Justice Smith had this to say about Mr. Dentoom's evidence:

> [39] …The problem with that evidence is that none of the documents referred to are exhibited in Mr. Dentoom's affidavit. Similarly, no detail or further documentation is provided about the discussions or the assessment referred to in the following paragraphs of Mr. Dentoom's affidavit:
>
> > 19. In addition to reviewing documents, the Special Committee also conducted interviews with Ms. Hu and Mr. Wallenius, members of management who it considered were positioned to provide useful information about the decision to enter into the Framework Agreement. The Special Committee also received information about the board's assessment of the Framework Agreement and its process generally at the material times through Mr. Dorin.
> >
> > 20. Finally, the Special Committee received feedback from independent directors who had been on site to review the project firsthand. The Chairman of the Board had visited the site in February

> 2018, while the Chairman of the Audit Committee had visited the site in October 2018. Both independent directors were given extensive tours of the project, viewed activities on site, and met with site management concerning progress and updates. These site visits were in accordance with the Board's decision to have an independent director visit the project at least once annually to inspect its progress firsthand.
>
> [40] The effect of the business judgment rule is that if, after consideration of relevant and reasonably available information and advice, the directors made a reasonable business decision, a claim against them cannot succeed even if others might have come to a different conclusion or their decision turns out to be wrong. But it does not prevent the Court from finding directors negligent if they failed to use reasonable care in obtaining necessary information, or failed to consider facts that they knew or should have known, or ignored important information that was in their possession.
>
> [41] There is no specific evidence of the information or documents the directors or the special committee considered beyond Mr. Dentoom's very general description. That material may well support the special committee's assessment, or it may contain evidence that 2538520 can point to as showing the negligence and lack of due diligence that it alleges. In the absence of that material, or at least some of it, the Court is in no position to assess the reasonableness of the special committee's decision.
>
> [42] The documents and other material that Mr. Dentoom obliquely refers to are entirely within the control of EPL. By not putting any of it into evidence, EPL asks the Court to simply accept on faith the conclusion of the special committee. The deference that the Court should show the special committee does not go that far.

[87] The judge here referred to these passages from Smith J.'s reasons as well as Griffin J.A.'s finding that Smith J. had not erred in his conclusion. The judge had before him a further affidavit of Mr. Dentoom, essentially confirming his views as set out in his affidavit filed in the 253 proceeding, as well as the affidavit of Mr. Guan, the sole member of the special committee established to consider Ms. Ren's request. Despite the concern expressed by Smith J. about the sufficiency of the evidence before him, EPL did little to address that concern. Instead, Mr. Guan simply deposed:

> 12. I have read and carefully considered Ms. Ren's petition and supporting affidavit. I reviewed those materials in the context of my previous detailed consideration of the Union Goal project and transactions, my ongoing knowledge of the transaction and project as a director of the company, and also in light of the subsequent steps taken by EPL as detailed in its public disclosures. Nothing raised by Ms. Ren or by my own consideration has changed my position. My view remains that the directors

> acted appropriately, that the transaction is in the company's best interests, and that it is not in the company's best interests to commence the proposed claim.
>
> …
>
> 14. Moreover, given the financial success of the project to date and the clear support of EPL's shareholders for the directors, I am confident that a proposed claim in relation to the Union Goal transaction is not in the best interests of EPL. The company is generating increasing revenue and is generating profits. I am unaware of any harm to EPL due to its relationship with Union Goal. Moreover, none of Ms. Ren's concerns change the analysis already undertaken by EPL. The special committee's reasoning from the 253 petition remains applicable here and the conclusions set out in Mr. Denton's affidavit in that proceeding continue to reflect my view of the proposed claims and to reflect my recommendation as special committee.

[88] Based upon his review of the evidence, the judge stated (at para. 88):

> 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.

[89] In my view, EPL has not demonstrated any basis for interfering with this finding.

[90] As can be seen from the excerpts taken from Mr. Guan's affidavit filed in this proceeding, he relied to a large extent on the reasoning and recommendations of the earlier special committee. Given Smith J.'s finding that he could not defer to the decision of the first committee, a finding that this Court again declined to interfere with, and absent any new information or considerations, it was open to the judge to reach a similar conclusion.

[91] There are two additional reasons that support rejecting this ground of appeal.

[92] First, EPL's argument that the non-production of the documents underlying the special committee's process and recommendations is not a ground for refusing to defer to the committee misconstrues the problem identified by both Smith J. and the judge in this case.

[93] I agree with EPL that there is no hard and fast rule requiring a company to produce all documents that were considered in or that informed a special committee

process. Indeed, Chief Justice Hinkson dismissed an application in the 253 proceeding to compel production of the documents referred to in Mr. Dentoom's affidavit and for cross examination of Mr. Dentoom (see 2019 BCSC 570). The Chief Justice said:

> [16] The petitioner contends that the documents that they seek disclosure of are "relevant to the matters at issue in the Petition, and in many instances the documents requested are referred to explicitly in the affidavits filed by [the respondent]. In many other instances, the documents evidence analysis or meetings that are specifically referred to in the affidavits filed by [the respondent]."
>
> [17] For better or worse, the respondent proposes to rely upon affidavits whose content the petitioner may assert is insufficient to overcome its leave application. That will be for the judge who hears the petition to determine. At this stage in the proceedings, and particularly in the context of a proposed derivative action, more than the desire to go on a fishing expedition is required to warrant the document disclosure sought by the petitioner. I find that the request for document production has not been justified, and dismiss that aspect of the petitioner's application.

[94] As reflected in the Chief Justice's observations, given the early stage at which a leave application is brought, full disclosure is neither necessary nor appropriate. However, the absence of compulsory disclosure does not undermine the importance of a sufficient evidentiary record to enable the court to assess the rigour and reasonableness of the committee's process and conclusions. Both Smith J. in the 253 proceeding and the judge here concluded that EPL had not met that burden. Again, EPL has not established any basis upon which this Court could come to a different conclusion.

[95] Second, the failure of both special committees to specifically address the allegations in the Lubbe letter further diminishes any deference that can be shown to the committees' processes and decisions. For example, in his affidavit sworn in the 253 proceeding, Mr. Dentoom deposed that the special committee reviewed a variety of documents including "models and other materials" leading to the Union Goal Transaction.

[96] One of the allegations made in the Lubbe letter was that Mr. Lubbe was instructed by Ms. Hu to effectively manipulate certain models. The failure to produce

any of the documents relied upon by the special committee meant that both Smith J. and the judge here were unable to assess the the special committee process, including whether it meaningfully considered the serious allegations made by Mr. Lubbe.

[97] For all of these reasons, I am unable to accede to this ground of appeal.

Conclusion

[98] I would allow Ms. Ren's fresh evidence application to the extent of admitting Exhibit "A" and "B" of the affidavit of Ms. O'Gorman sworn November 9, 2023. However, I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"