

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : SERENDIPITY RESOURCES PTY LTD &  
ANOR v DEBNAL PTY LTD & ANOR [2022]  
WAMW 20

**CORAM** : WARDEN T W McPHEE

**HEARD** : 19 April 2022

**DELIVERED** : 30 August 2022

**FILE NO/S** : Applications for Exemption 581017, 594752,  
594753 and 594754, and Objections 582308,  
594899, 594900 and 594901

**TENEMENT NO/S** : E25/538, E25/539, E25/540 and E28/2580

**BETWEEN** : SERENDIPITY RESOURCES PTY LTD  
(First Applicant)  
  
AND  
  
RIVERSGOLD (AUSTRALIA) PTY LTD  
(Second Applicant)  
  
AND  
  
DEBNAL PTY LTD  
(First Objector; Objector in 582308)  
  
MIRAMAR (GOLDFIELDS) PTY LTD

(Second Objector; Objector in 594899 - 901)

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*Catchwords:*            *Exemption application; sections 102(2)(b), 102(3) & 102(4);  
Admissibility of evidence relating to events after the  
Expenditure Year; Subjective finance criteria.*

**Legislation:**

- *Mining Act 1981* (WA) (the Act): s102(2)(b), s102(3), 102(4), 102(5).
- *Mining Regulations 1981* (WA) (the Regulations): Reg154(1)

- Result:**
- 1) *Objection to Applications for Exemption upheld;*
  - 2) *Recommendation made to Minister to refuse Applications for Exemption;*
  - 3) *Consequential programming orders made.*

**Representation:**

*Counsel:*

Applicant : Mr Dalitz  
Objector : Mr Chandler

*Solicitors:*

Applicant : DLA Piper Australia  
Objector : Lawton MacMaster Legal

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**Cases referred to:**

- *Siberia Mining Corporation v Thomson No 3* [2022] WAMW 16
- *Siberia Mining Corporation Pty Ltd v O’Sullivan* [2020] WASC 214
- *Siberia Mining Corporation Pty Ltd v Wilson* [2015] WASC 322
- *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403
- *Commissioner Of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211 (14 November 2014)

**Introduction**

- 1 I have before me a number of Applications for exemption from the expenditure requirements of the Act in respect of certain tenements, being:
  - a. Application number 581017, dated 29 June 2020 in respect of E25/539, expenditure year ending 3 May 2020;
  - b. Application number 594752, dated 29 June 2020 in respect of E25/538;
  - c. Application number 594753, dated 29 June 2020 in respect of E25/540;
  - d. Application number 594754, dated 29 June 2020 in respect of E28/2580;

(the Applications).
- 2 The Applications as originally framed sought relief pursuant to Section 102(2)(a) – 102(2)(h) inclusive, and 102(3) of the Act.
- 3 At the hearing, as will be seen below, only the relief sought pursuant to section 102(2)(b) and 102(3) of the Act was pressed.
- 4 Save for a difference in timing of the tenement year, there was not any material difference in the manner in which the cases were advanced in respect of each tenement.
- 5 Ultimately, the same basis was advanced in each Application.
- 6 There are objections to the Applications, being:
  - a. Objection number 582308 dated 20 July 2020 in respect of E25/538;

- b. Objection number 594899 dated 20 July 2020 in respect of E25/539;
- c. Objection number 594900 dated 20 July 2020 in respect of E25/540; and,
- d. Objection number 594901 dated 20 July 2020 in respect of E28/2580.

(the Objections).

- 7 The matter was listed for hearing for two days on 19 and 20 April 2022.
- 8 The hearing proceeded on the first listed day. The second day was not required. I reserved my decision.
- 9 In broad terms I have found for the Objector.
- 10 My reasons for doing so are set out below. As a result of those reasons, I make by the publication of same, the following recommendation:
  - a. I recommend to the Minister that he refuse the Applications for Exemption in respect of each of the tenements in question;
  - b. The Objections should succeed;
  - c. I will hear the parties as to any further consequential orders which might be sought.

## **Background**

- 11 The first task is to detail the nature of the parties, given on its face, the matter appears to a degree, confusing in respect of the entities involved.
- 12 There is no dispute in respect of the comments I will make in this regard, and the information is taken largely from the Agreed Statement of Facts.

- 13 The First and Second Applicants are the holders of the relevant tenements, subject to a Joint Venture Agreement. There is an ownership split between the applicants, of 20% and 80% respectively.
- 14 Nothing turns on the precise ownership structure of the entities in question, save to note that the First Applicant appears to have elected not to take an active and distinct role in the conduct of the dispute before me.
- 15 It was content to take the same position as the Second Applicant, and was treated as such by counsel appearing for the Applicants. I approach the matter in the same manner, and infer there is a confluence of interests between the two.
- 16 Further, as will be apparent later in these reasons, the Second Applicant was a wholly owned subsidiary of a further entity, Riversgold Ltd, a listed ASX entity. Mr Simon Andrew is a director of the Second Applicant, and its parent entity, Riversgold Ltd.
- 17 Save where I am referring to something specific, I will simply refer to the collection of entities advancing the Applications, as the Applicants.
- 18 The Objectors too, have a relationship of some proximity. The First Objector is an entity whose sole director and shareholder is a Mr Allan Kelly. Mr Kelly is also a director of Miramar Ltd, which appears to be the ASX listed parent entity of the Second Objector. Mr Kelly is seemingly the sole director of the Second Objector.
- 19 Mr Kelly was formally employed by the Applicants as a geologist, and left in circumstances of some acrimony (it seems). He features as an asserted basis for some of the difficulties said to have been faced by the Applicant in meeting the expenditure requirements of the Act.
- 20 The Objectors it seems, have tenement holdings adjacent to, or in the vicinity of, the Applicants.

- 21 Again, in this case, given how the matters were conducted, there is nothing material which falls from this web of related entities and personnel, save perhaps for the issues associated with the end of Mr Kelly's tenure with the Applicants.
- 22 As indicated above, the Applicants seek exemptions on a number of different tenements held.
- 23 They may be further described (as referred to in the evidence), and with reference to the relevant expenditure year, as follows:
- a. Tenements E25/538 and E28/2580, which together make up what is referred to as the Queen La Page deposit, had an expenditure year of 21 September 2019 – 20 September 2020. These tenements had expenditure obligations of \$61,500 & \$81,000 respectively;
  - b. Tenement E25/540, which makes up what is referred to as the Venetian deposit, had an expenditure year of 21 September 2019 – 20 September 2020. These tenements had an expenditure obligation of \$30,000;
  - c. Tenement E25/539, which make up what is referred to as the Jaws deposit, had an expenditure year of 4 May 2019 – 3 May 2020. These tenements had an expenditure obligation of \$70,000.
- 24 Each tenement was the subject of an expenditure obligation, which it is accepted has not been met. It is helpful to note, given how the matter was conducted, and the nature of my findings, that the total aggregate expenditure required on the tenements in question was \$242,500, over the period May 2019 – September 2020.
- 25 The tenements comprise what was referred to by the Applicants as the Kurnalpi Project, and I will refer to them as that.

- 26 As I understood the case advanced by the Applicant, it was that exemptions were sought for the entirety of the obligation in question for each tenement. No issues of part compliance arose for consideration.
- 27 In this respect, whilst the relevant reporting in respect of the tenements referenced in some respects significant claimed expenditure, the fact of that claimed expenditure was not relied upon. That is a matter of some curiosity, however given the manner in which the matter was conducted, and the nature of my findings, I do not need to consider the implications of a party disowning the content of its Form 5 in such a manner any further.
- 28 Nevertheless, it appeared that it was not in dispute that the rent and rates for the tenements had been met, meaning in my opinion that those sums may be determined to have been expended in compliance with the relevant obligation.

### **Jurisdictional Issues**

- 29 There is no dispute as to the fact that the Warden's jurisdiction to address the Applications.
- 30 Pursuant to section 102(5)(a) of the Act the Warden has jurisdiction to hear an application for an exemption, in a matter consistent with the requirements of the Act.
- 31 Section 102(5)(b) of the Act provides that the hearing is conducted by the Warden is to result in a recommendation to the Minister. The Minister ultimately makes the determination.
- 32 It is not in dispute that the Applicant bears the onus of establishing an exemption for expenditure should be granted.



## Applicable Law

- 33 I attach as Schedule 1, the most relevant provision, being section 102 of the Act.
- 34 In a recent decision of mine, *Siberia Mining Corporation v Thomson [No 3]* [2022] WAMW 16 (*Siberia No. 3*), I considered in some detail the position in respect of the application of section 102(2)(b) and section 102(3) of the Act.
- 35 Following the publication of that decision, I considered providing the parties to this matter with the opportunity to make further submissions in light of the decision in *Siberia No. 3*, however, on balance, I considered that it was unnecessary to do so.
- 36 In my opinion, the Applicant's position would not have changed, nor the Objectors.
- 37 Considering the question in accordance with the obligation to conduct the hearing in accordance with Regulation 154(1) of the Regulations, in my opinion there was nothing to be gained in calling for further submissions, save to increase cost and delay.
- 38 Further, in my opinion the position of both parties as advanced, was broadly consistent with the position I took in *Siberia No 3* on the interpretation and application of the relevant provisions. It was rather simply the application of those principles, to the factual situation presenting in this matter which determined the issue in this case.
- 39 Accordingly, I will simply refer to paragraphs [93 – 164] of *Siberia No 3*, without repeating them in totality.
- 40 In my opinion those views are equally applicable to this matter, in respect of the construction and operation of the relevant provisions.

- 41 Most relevantly given how the matter was conducted, in my opinion the onus was on the Applicant in this matter when relying on section 102(2)(b) of the Act, to in effect, demonstrate the requirement of time to undertake one of the following activities for the tenements in question:
- a. Evaluating work done on the tenements; or,
  - b. Plan exploration on the tenements; or,
  - c. Plan mining on the tenements; or,
  - d. Raise capital to permit evaluation of the work done on the tenements; or,
  - e. Raise capital to plan or conduct exploration on the tenements; or,
  - f. Raise capital to plan or conduct mining on the tenements.
- 42 I will also state that in my opinion the words of the relevant provision are expressed in the imperative, namely that time is required to achieve one of the purposes listed above.
- 43 In respect of the application pursuant to section 102(3) of the Act, and as I indicated in *Siberia No 3*, I consider that the decision of his Honour Justice Tottle in *Siberia Mining Corporation Pty Ltd v O'Sullivan* [2020] WASC 214, affirmed on Appeal in *Siberia Mining Corporation Pty Ltd v O'Sullivan* [2020] WASC 214, requires me to consider the whole of the circumstances presented, including any material relied upon for the application pursuant to (relevantly) section 102(2)(b) of the Act, and any other relevant matters.
- 44 Relevant matters include facts matters and things post-dating the expenditure year, in circumstances where that evidence can be said to have related to material facts from the expenditure year.

45 In *Siberia No 3*, that latter consideration created a significant, and contentious issue, arising from the passage of time between the expenditure year, and the exemption hearing (being some 12 years). That issue does not arise in this case to the same degree, as the expenditure year in question was 2019/20.

46 I did not understand there to be any significant dispute between the parties as to the evidence sought to be advanced in support of the exemption application, including by reference to some information post-dating the expenditure year. That information related to asserted activities upon the tenements after the completion of the expenditure year, and to the date of the hearing before me.

47 I address those issues later in these reasons.

48 In my opinion though, the Objector's case was rather more simply stated and conducted, as set out below.

49 Given the nature of my findings below, I will also note that the decision of his Honour Justice Allanson in *Siberia Mining Corporation Pty Ltd v Wilson* [2015] WASC 322, is also applicable. In that matter, the Court made clear there was no overarching principle whereby a party which intentionally diverted funds from expenditure obligations to other activities, is not entitled to an exemption. There is no such proscription in the Act.

50 Rather, I must approach and consider the matter as it presents in evidence whilst applying the parts of section 102 of the Act which are relied upon.

### **The Application**

51 The Applicants, in written submissions and at the hearing, advanced the following basis' for an exemption:

- a. For the reason in s 102(2)(b) because Riversgold Ltd needed time during the reporting years ending 3 May 2020 and 20 September 2020 to raise capital for exploration on the tenements; or
- b. In the alternative, because Riversgold's success in overcoming technical and financial impediments to exploration by May 2020 and its subsequent active exploration of the tenements is a reason that justifies exemptions under s 102(3)

52 The period of time referred to was May 2019 – September 2020, which encompassed the whole of the period of time in question for expenditure upon all of the tenements in question.

53 In general terms, the tenements ought to be treated individually in respect of expenditure considerations, and it is entirely feasible, in a circumstances like this one, where there were slightly different periods of time relating to different tenement's expenditure years, that the individual tenements would be subject to different considerations, possibly leading to different outcomes in applications for exemptions for the different tenements.

54 That may be illustrated with reference to this case. Of the three deposits referred to as sitting on the tenements, only Jaws and Queen La Page featured in what might be loosely described as documentary planning material sought to be relied upon by the Applicants. The Venetian deposit did not materially feature.

55 Nevertheless, in my opinion, that issue of differential outcomes does not arise, as a result of the manner in which the Applicant conducted its case and my findings.

56 In the case before me, the Applicants approached the period of time in question as a single period in the context of the corporate behaviour of the Applicant companies. Further, the entirety of the group of entities, and the

Kurnalpi Project tenements were treated as a coherent whole by the Applicants.

- 57 In *Siberia No 3*, I made some comments on the manner in which certain collections of entities seem to proceed on an assumption that it is entirely appropriate and proper to treat such entities as a group for all circumstances.
- 58 Those comments remain applicable, however again, given the manner in which the matter was conducted by the Applicants and my findings, there is no need to delve further into that issue.
- 59 In framing its case, the Applicants articulated six issues which were said to be required to be addressed in order to reach a resolution of the pertinent questions.
- 60 They were as follows:
- a. Did Riversgold need time during the reporting years to raise capital?
  - b. Was Riversgold's purpose in raising capital to explore the tenements?
  - c. Did Riversgold face technical and financial impediments to exploration during the reporting years?
  - d. Did Riversgold overcome these impediments by May 2020 and then actively explore the tenements?
  - e. Does any previous grant of exemptions for the tenements for the current reasons weigh in favour or against the grant of exemptions?
  - f. Does the work done and money spent on the tenements weigh in favour or against the grant of exemptions?

61 The first and second issues concern the s 102(2)(b) reason. The third and fourth issues concern the s 102(3) reason. And the fifth and sixth issues concerned both reasons.

62 Counsel for the Applicant opened in the following manner:

*a. The core question in these proceedings is who is better placed to know whether a mining company has sufficient capital for exploration during a particular period, the company or a competitor? Throughout today I will refer to the applicants as Riversgold unless it's necessary to distinguish between them – Riversgold being Riversgold Limited, the parent of the second applicant.*

63 Thus the Applicant advanced a contention that section 102(2)(b) was enlivened in this case. The Applicant's primary contention was that the financial position of the Applicants at the time resulted in the requirement to raise capital, for the purposes of permitting planning and conduct of exploration or mining operations on the tenements.

64 The Applicant also relied upon section 102(3), and implicitly, section 102(4) of the Act.

### **The Objectors Position**

65 The Objections were couched in written submissions, on the following basis:

*a. First, during the relevant expenditure year/s the focus of the Applicants was on mining tenements or projects other than the four exploration licences (Affected Tenements) the subject of these "Exemption Applications";*

- b. Secondly, during the relevant expenditure year/s the Applicants had sufficient capital to satisfy their minimum expenditure obligations by exploration if they desired to do so;
- c. Thirdly, if the Applicants did need to raise capital to commit to exploring the Affected Tenements, it was for reasons unrelated to exploring the Affected Tenements;
- d. Fourthly, if the Applicants did need to raise capital to meet staff, administration, and corporate costs, as is suggested, this is because of poor business management practices not worthy of being rewarded by grants of exemption;
- e. Fifthly, if the Applicants claim they could not explore the Affected Tenements because of the resignation of an individual, Mr. Kelly, this is a dramatic example of poor business management by an exploration company listed on the Australian stock exchange;
- f. Sixthly, any reliance on COVID-19 associated restrictions are convenient for the Applicants but without substance.

66 It may be seen from the above that the Objector engaged in a comprehensive manner with the Applications.

### **Agreed Evidence**

67 The parties agreed a Statement of Facts. That document became Exhibit 1, and is reproduced as Schedule 2.

68 I will again state that the capacity of the parties to agree facts in such a manner greatly assists in the resolution of the dispute in question.

69 The parties, and counsel appearing, are to be commended for their approach.

70 In addition, the following documentary evidence was received.

| <b>Exhibit No.</b> | <b>Description</b>   | <b>Tendered By</b>     |
|--------------------|--|------------------------|
| 1.                 | Agreed Statement of Facts dated 14 April 2022                  | Applicant and Objector |
| 2.                 | Joint Venture Agreement dated 17 July 2017                     | Applicant              |
| 3.                 | Affidavit of Simon Andrew affirmed 14 May 2021                 | Applicant              |
| 4.                 | Supplementary Affidavit of Simon Andrew affirmed 22 March 2022 | Applicant              |
| 5.                 | Affidavit of Marion Emily Bush sworn 6 July 2021               | Objector               |

### **Additional Evidence**

71 Mr Andrew gave evidence in the matter for the Applicant. Mr Andrew is a director of both the Second Applicant, and the parent entity of the Second Applicant.

72 He swore two Affidavits in the matter and gave evidence in person.

73 In his Affidavits, he set out his view of the nature of the relevant corporate holdings of the Second Applicant and its parent, and their financial position.

74 Mr Andrew deposed to the broad approach of the Second Applicant and its parent, in seeking to advance the position of the listed entity, by way of further activity on the assets held, namely in the form of the Kurnalpi Project, some holdings in South Australia, and an asset in Alaska.

75 The Alaskan holding was said to be the site of work undertaken by an entity called Yukuskokon Professional Services LLC (Yukuskokon).

76 Mr Andrew deposed to the fact that monies were owed to Yukuskokon, and that that liability was the subject of a resolution, and an agreed



payment plan. That plan involved the provision to Yukuskokon of (contextually) significant sums from Riversgold Ltd.

77 Mr Andrew also deposed to the departure of Mr Kelly from the board of Riversgold Ltd, and the resultant dispute as to entitlements.

78 I note in this respect also, the emphasis Mr Andrew placed on the notion that Mr Kelly was the geologist relied upon by Riversgold Ltd previously.

79 In addition, following Mr Kelly's departure, Mr Andrew described the information held by the Applicants in this way<sup>1</sup>:

- a. *“Based on this document, I believe that when Mr Cossom commenced at Riversgold, the directory structure and organisation of existing exploration data was a mess and he focused on bringing some level of clarity and logic to the presentation of the data.”*

80 In addition to addressing the dispute with Mr Kelly, Mr Andrew deposed to the capital raising activities of Riversgold Ltd.

81 In his Affidavit he described the position, at least at one point, whereby Riversgold Ltd was being treated as a shell company<sup>2</sup>.

82 Ultimately, a key aspect of the evidence advanced in support of the Application was able to be found in Mr Andrew's Affidavit, where he said<sup>3</sup>:

- a. *“The capital raising was needed because Riversgold did not have funds to explore the Kurnalpi Project once it had met ongoing staff, administration, and corporate sots, and other costs including payments to Yukuskokon (which were made over the course of*

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<sup>1</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 66

<sup>2</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 75

<sup>3</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 78

*2019 and 2020), the repayment to Greenwich (which was made on 23 December 2019), and annual rent and rates payable in Alaska.”*

- 83 Mr Andrew deposed to, and annexed documentation, as to the liquid capital position of Riversgold Ltd at various dates.
- 84 Relevantly for the periods pertinent to the determination to be made, the following was said:
- a. As at 31 March 2019, Mr Andrew deposed to the cash position of Riversgold Ltd was \$348,000<sup>4</sup>.
  - b. As at 31 December 2019, Mr Andrew deposed to the cash position of Riversgold Ltd was \$670,000<sup>5</sup>.
  - c. As at 31 March 2020, Mr Andrew deposed to the cash position of Riversgold Ltd was \$599,000<sup>6</sup>
  - d. As at 30 June 2020, Mr Andrew deposed to the cash position of Riversgold Ltd was \$1,279,000<sup>7</sup>
  - e. As at 30 June 2020, Mr Andrew deposed to the cash position of Riversgold Ltd was \$1,867,000<sup>8</sup>
- 85 As indicated, Mr Andrew annexed a significant amount of financial documentation to his Affidavit material.
- 86 That included various Annual reports, which relevantly for reasons which will become apparent later in these reasons, include director’s remuneration reports.

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<sup>4</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 46

<sup>5</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 105

<sup>6</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 118

<sup>7</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 138

<sup>8</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, paragraph 150

- 87 Detailed as Schedule 3, are the summary images of the directors remuneration reports for the year ending June 2019, and the year ending June 2020.
- 88 Mr Andrew's Supplementary Affidavit, to a large degree, sought to adduce evidence of events following May 2021. That evidence relates to activities largely after the completion of the relevant expenditure years.
- 89 It was not objected to and was therefore accepted into evidence.
- 90 In light of the determination of his Honour Justice Tottle I have referred to above, to be considered, such material must be said to relate to material facts from the expenditure year.
- 91 Mr Andrew asserted that the Kurnalpi Project tenements had been the subject of significant expenditure following the expenditure years. It is not in dispute that the Kurnalpi Project was a significant asset of the Applicants. In my opinion it cannot be sensibly disputed that the Kurnalpi Project and what would happen in respect of it the future (i.e after the expenditure year) were live material matters for the Applicants at all times. It follows that evidentiary material which relates to it, must be considered to be admissible, with questions of weight to be assessed.
- 92 I discuss my views on the impact of that material later in these reasons.
- 93 In his evidence in chief, Mr Andrew also gave evidence that the Second Applicant's sole source of funds was the listed entity, Riversgold Ltd.
- 94 Mr Andrew was subject to cross examination.
- 95 I refer at the outset of this aspect of the discussion, to the following passage<sup>9</sup>:

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<sup>9</sup> 19/04/22 Hearing Transcript page 13

- a. *You're not familiar with all of the documents attached to your affidavit?---No.*
- b. *The documents attached were identified and selected by Riversgold's lawyers?---That's correct.*
- c. *And you did not independently identify them in the company's records?---Explain that question for me.*
- d. *Sure. You were told to look for documents and provide them to your lawyers. You did not identify them and give them to your lawyers?---No. That is correct. I was asked to source them.*

96 I will pause to note that witnesses seeking to adduce documentary evidence by way of Affidavit, ought to be familiar with, and be able to speak to documentation annexed to the Affidavit.

97 At best, the inability to do so potentially detracts from the weight able to be given to any such evidence. At worst, it might, in some circumstances, render the material inadmissible.

98 An example of the sort of consequence was demonstrated shortly after that passage<sup>10</sup>:

- a. *And exploration licence 25/538, I understand, is referred to as Queen Lapage?---That's correct.*
- b. *Then if we turn to page 458 and the following page 459 there's the details. Were you involved in preparation of this document?---No.*
- c. *So, again, you can't assist in explaining the exploration activities?--Not on the detail in this document, no.*
- d. *On page 459 an amount of over \$58,000 is claimed for administration and overheads. Can you explain how that figure was arrived at?---No. Again, as a – in a non-executive role, this*

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<sup>10</sup> 19/04/22 Hearing Transcript page 15

would have been up to the executive to – to prepare these – along with our tenement managers – to prepare these documents.

- e. *Okay. Do you know the minimum amount of expenditure for this tenement?---I do not.*

99 A further portion of the cross examination of Mr Andrew which was of particular importance, was as follows<sup>11</sup>:

- a. *Well, that wasn't my question. My question was during the year of, let's say, May 2019 to September 2020 Riversgold could have spent \$192,500 exploring those tenements?---*
- b. *We could have, but we would have potentially put the company into a position where it was perhaps not a going concern given some of the debts that were, sort of, ongoing and had to be – had to be sold for.*
- c. *Yes. Well, we will get to that. So your evidence is that you decided not to spend that money on this exploration program?---At that time, that's correct.*
- d. *Well, it was – you can't comment on that because you weren't a director at the time, so I won't ask you. But you make the same observation in paragraph 102?--- So I guess it's a question of how prudent you're going to be, in terms of – I mean, if we had spent the money and then had, say, \$50,000 in the bank, and then had to go and rely on equity markets, which again can be volatile and choppy for exploration companies.*
- e. *Is "precarious" a word you use?---It is, actually.*
- f. *Okay. So what do you mean by "precarious"?---Well, I think in the case of an exploration company, if you start to get down below,*

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<sup>11</sup> 19/04/22 Hearing Transcript page 28

*say, half a million dollars in cash, and you're covering day-to-day operating costs, monthly operating costs, rent, employees, then it starts to look precarious, in my opinion.*

100 The Applicants also advanced an assertion that one of the technical deficiencies faced by the Applicants was in respect of geological expertise, and the consequential difficulties in expending on the tenements in its absence. Mr Andrew, on that issues, said as follows in cross examination<sup>12</sup>:

- a. *So you did – the company, Riversgold, didn't need to raise any money to appoint Quarterback Geological Consultants, did it?---*  
*Not at that – not right at that point, no.*
- b. *And you weren't paying Quarterback Geological Consultants any money?---**There was no cash payment. Again, back to the point of making sure that we were prudent with the way we spent our money, we thought this was a good way of bringing in some very good geological expertise, whilst maintaining our cash balance. Obviously cash required to go and do further exploration work, but in terms of that going concern piece, it suited what we needed at the time.*
- c. *But you gave evidence earlier that one of the problems for the company was you didn't have any geologists; is that correct?---*  
*That's right.*

101 I consider that Mr Andrew gave evidence honestly, and in as forthright a manner as he could.

102 I largely accept the factual evidence he gave as to the financial state of the company, where that information was supported by documentation. Those matters were largely not disputed. I do not however, accept his opinions

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<sup>12</sup> 19/04/22 Hearing Transcript page 33

as expressed, as to the state of the Applicants finances as it was said to impact upon the capacity to undertake necessary expenditure upon the Kurnalpi Project tenements. Those opinions are, in this case, entirely subjective, as I discuss further below.

103 Further, and considered in detail, the cross examination as conducted, in my view established a number of important matters.

104 Firstly, and most strikingly, Mr Andrew had little to no firsthand knowledge of what might be said to the operational mining activities of the Applicant. That shortfall of knowledge, in my opinion, necessarily impacts upon the weight able to be given to the asserted activities after the expenditure year as well. That is not a criticism of the work he undertook for the Applicants, rather an observation on where his responsibilities with the Applicants seemingly lay.

105 Secondly, and in my view more importantly, it appears plain that the Applicant had sufficient capital in its holdings at the material time, to undertake the necessary expenditure over the course of the expenditure year for the respective tenements, had a choice been made to do so.

106 It is not a case where the available liquidity of the Applicants simply could not support the expenditure, or a material part of that which was required over the relevant time period.

107 The reason provided by Mr Andrew for not deploying that capital appeared to be a part of that I have referred to above (as follows)<sup>13</sup>:

*a. Okay. So what do you mean by “precarious”?---Well, I think in the case of an exploration company, if you start to get down below, say, half a million dollars in cash, and you’re covering day-to-day*

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<sup>13</sup> 19/04/22 Hearing Transcript page 28

*operating costs, monthly operating costs, rent, employees, then it starts to look precarious, in my opinion.*

108 Further<sup>14</sup>:

- a. *Okay?---So, as you would be aware, the exploration company is not generating revenue, so it's incredibly important that we – so we were well aware that expenditure was required, but we were also more aware that we had to maintain – ensure that the company was a going concern.*
- b. *What do you mean by “going concern”? You use that – just to be clear, what do you mean by - - -?---So it doesn't trade insolvent.*
- c. *Yes. Okay?---And any company that doesn't have revenue, it has debt.*
- d. *Yes?---At some point, without raising external funds, runs the risk of trading insolvent.*
- e. *But, sir, I've just taken you through the quarterly reports and - - - ?---*
- f. *You have.*
- g. *- - - I've taken you to the funds that you did raise. You did raise funds, which it would have allowed you to spend that money on these tenements during that year?---*
- h. *So we first of all, for a period August through to, I would suspect, February, made sure that the balance sheet was shored up with those funds raised. And then - - -*
- i. *Sorry, what do you by “shored up”?---Paid down the debt so there's no more debt on the balance sheet. As I said, no revenue to cover the cost of that debt.*

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<sup>14</sup> 19/04/22 Hearing Transcript page 25



109 He described himself as a non-executive director, and as such, gave evidence that I accept, that he had effectively no direct knowledge of the working operations of the Applicant. His role was plainly a finance one.

110 As indicated, in his cross examination, a significant amount of documentation was put to him, and he responded in frank terms that he had little to no knowledge of the content of the documentation, save what might be able to be gleaned from its face.

111 In the context of this case, it is somewhat curious that no other director or individual who might have had knowledge of the actual proposed operations of the Applicant was called by the Applicant, to explain that documentation, and provide some detailed evidence as to the operations which might be being undertaken, or was planned on the tenements in question.

112 From his evidence I also find that in effect, the practice of the Applicants was to seek to maintain what I will described as a floor of liquid capital, below which Mr Andrew and by inference the other directors, as no contrary suggestion was made, were reluctant to engage in spending.

113 For reasons which will become clear later in these reasons, I consider that last matter is crucial in the formulation of my overall view in this matter.

#### Ms Bush

114 Ms Bush was called by the Objector. She also gave evidence in person, and was the subject of brief cross examination.

115 The tenor of her Affidavit evidence concerned three main aspects, only one of which is of significance. Those matters were:

- a. The reported financial position of the Applicants, in light of publicly available information;

- b. A rebuttal of the reliance of Covid-19;
- c. A confirmation of the proximity of the Objectors holdings being adjacent to the Applicants.

- 116 As I have indicated, only the first of those issues is of real significant in light of the manner in which this matter proceeded.
- 117 I will note in passing that Ms Bush offered an opinion on the key issue in the matter, namely whether it was fiscally open to the Applicant's to conduct the expenditure based upon the fiscal resources seemingly available to them<sup>15</sup>.
- 118 Ms Bush's expertise are in geology, and seemingly what was described as mining finance. There was no evidence of any analysis undertaken by Ms Bush in coming to the view she expressed referenced immediately above, nor was she sought to be qualified as an expert in a relevant sense.
- 119 Accordingly, I expressly note that I do not place any weight on the expression of her opinion in respect of the financial capacity of the Applicants to meet the expenditure required at the relevant time.
- 120 The second aspect of her evidence was also not of great significance in the context of the case, rather simply because the Applicant's evidence in respect of the Covid – 19 issue was so sparse. In my opinion the Applicant's evidence simply did not rise to the level requiring consideration of the rebuttal evidence.
- 121 The final matter to consider was the contextually quite interesting (but largely irrelevant) evidence pertaining to the nature of the decision making of the Objector interests. Ms Bush it seems, a relatively highly placed member of the Objectors management team, was in disagreement

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<sup>15</sup> Affidavit of Ms Bush, Exhibit 5, paragraph 18

with Mr Kelly over the commencement of the objection / forfeiture process, because of the costs involved.

- 122 This evidence may have been relevant, as given the breadth of the Applicants case as pleaded, the Applicants may have been considering conducting a case based on allegations associated with the motive and conduct of Mr Kelly, and its impact upon the decision making of the Objectors.
- 123 That case, if it was intended, was not pressed by the Applicants, and so the precise nature of the decision making process associated with the decision of the Objectors to participate in this process, is not relevant to my determination.
- 124 In my opinion nothing of substance in respect of the matters in issue in this matter, fell from the cross examination of Ms Bush.

### **Key Findings**

- 125 At this juncture it is appropriate to provide detail as to what I consider are the key findings relating to the factual matters the subject of the Applications.
- 126 They are as follows:
- a. The Applicants experienced a degree of financial strain in the most material period prior to and during the initial parts of the relevant expenditure years;
  - b. At all material times, on the case before me, the Applicants appeared to remain solvent;
  - c. A view was held within the Applicants, from a corporate governance perspective, that the Applicants would seek to maintain

a sum of money in the accounts of the Applicants, to ensure ongoing solvency, being a desired sum of \$500,000;

- d. The liquid capital position of Riversgold Ltd at various points, was as set out in paragraph [84] above;
- e. The remuneration seemingly paid to the directors in the financial year period July 2018 – June 2020, which comprised of a large portion of the period of time material to this dispute, was that referred to in Schedule 3;
- f. There was sufficient capital available to the Applicant throughout the course of the expenditure years, to expend the required sums on the tenements if that choice was made;
- g. The Applicants made a determination that they would not expend available capital upon the tenements, as they considered that having addressed other creditors of the Applicants, the funds available to meet the obligations, would not have permitted the Applicants to also maintain its desired capital reserve;
- h. There was no other major impediment to the expenditure on the tenements;
- i. The other reasons relied upon (difficulty in retaining expertise, and COVID-19) even taken at their highest, did not precluded the Applicants from expending the required sum on the tenements.

### **Consideration and Disposition**

127 Turning to the consideration of this matter, as indicated above, the Applicants articulated the position to be put by raising and considering a number of questions.

128 It is a useful manner in which to approach the matter, and I largely address those questions below.

129 I do so, predominately by reference (initially) to the requirements of section 102(2)(b) of the Act, but also section 102(3) of the Act.

*Did the company need to raise capital?*

130 The answer to this question on the evidence must be yes. There was no dispute between the parties that the Applicant was a mineral exploration company, with no cash producing asset or business activity.

131 Necessarily then, I consider that in order to ensure its ongoing solvency, there was a general imperative at all times, on the part of the Applicant to raise capital, or create lines of debt funding.

132 I note there was no real evidence of any efforts undertaken by the Applicants to obtain debt funding. There may have been good reasons for that, however they were not placed before me.

133 In my opinion however, whether or not the Applicants needed to raise capital as a general notion, is not the question before me.

134 The relevant question is within the terms of section 102(2)(b) of the Act, and whether time was required to raise capital for the purposes contained therein, and identified in these reasons at paragraph [41].

135 That is a distinct question from the notion that capital was required for the ongoing solvency of the entity in question as a general proposition.

*Was Riversgold's purpose in raising capital to explore the tenements?*

136 Another manner in which to determine this issue is to come to a view as to what was the purpose of the capital required to be raised.

- 137 On one level, the trite answer to this question may be simply put as the need to ensure that the Applicant remained solvent and a going concern.
- 138 As an extension of that reasoning, it was effectively said by the Applicants that given the Kurnalpi Project tenements were held by the Applicants, and the Applicants were involved in mineral exploration, all fundraising was directed to an end consistent with section 102(2)(b) of the Act.
- 139 In my opinion that reasoning does not follow.
- 140 The circumstances of the applicant entity must be considered in respect of the parts of the relevant provision being relied upon.
- 141 Simply asserting a generalised notion of the need for a corporate entity to have capital, and therefore an exemption pursuant to section 102(2)(b) of the Act should follow, creates a false principle similar to the sort the subject of Justice Allanson's decision in *Siberia Mining Corporation Pty Ltd v Wilson* [2015] WASC 322.
- 142 There is no such principle in the Act, and it plainly does not engage in the necessary way to establish the requirement of time for one of the express purposes I have referred to in paragraph [41] of these reasons.
- 143 Further, and considering the evidentiary position with a degree more care, a different picture presents from the evidence.
- 144 In my opinion, the evidence before me supports a conclusion that the overarching goal of the capital raising undertaken at the material time was to ensure the capital held by the company met the subjective internal finance criteria.
- 145 I say subjective internal criteria, as the evidence from Mr Andrew was in my opinion relatively unambiguous.

- 146 He indicated that the subjective desire of management of the Applicant was to hold a significant cash reserve in the Applicant. That evidence was undisputed, and I heard no other evidence, and so am content to accept it.
- 147 It is also consistent with the documentary financial position of the Applicant, and makes objective commercial sense, from a certain perspective, and when considered in isolation from other obligations.
- 148 What that means though, in the context of the requirements of the Act, is that I consider that the obligations to expend on the tenements were subordinated to that subjectively determined finance criteria of the Applicant.
- 149 I will add also, that despite making arrangements to pay the liability owed to Yukuskokon, and continuing to make remuneration payments to the Board, it appears that the directors declined to expend available funds on actual mining operations or exploration on the tenements subject to the Act.
- 150 As indicated, the exemption sought pursuant to section 102(2)(b) of the Act relied upon, uses the term “required”, when framing the time sought to capital raise, and further links the capital raising to the conduct of evaluative work, exploration work, or mining, or the planning thereof.
- 151 The Applicant’s case before me was that section 102(2)(b) of the Act was raised, relying on the capital raising limb. Whilst a faint effort was made to rely upon some documentation suggesting the planning of activities on the Kurnalpi Project, at some latter time, that material suffered from two serious difficulties.
- 152 The first of those difficulties, which I have alluded to above, was that Mr Andrew had not real knowledge of them.

- 153 Noting the content of one of those documents relied upon, namely SMA-35<sup>16</sup>, it is plain that Mr Andrew was not a party to that correspondence, though he did indicate he may have seen it.
- 154 In those circumstances, that document can be given very little weight. Contextually, Mr Andrew can identify it as a record of the Second Applicant, given he is a director, but he could not give evidence as to the truth of its content, or what its author intended in the writing of it.
- 155 The second serious difficulty, is that that material, if considered closely, shows information of a such general nature as to be of no weight at all in coming to a view as to whether the comments made therein can be regarded as a piece of operational planning, with any degree of certainty, or merely as hypothetical musings.
- 156 I note in this respect several other similar documents<sup>17</sup> which suffer the same difficulties.
- 157 It follows in my opinion, that there is no basis for any reliance upon section 102(2)(b) of the Act, save for the limb relating to capital raising. Time was not required to evaluate work done, nor to conduct planning for mining operations or exploration.
- 158 Considering the evidence before me, in my view the time sought to conduct capital raising, arose out of the desire and purpose to meet the subjective capital reserve requirements of the Applicant's parent entity, and therefore does not meet the requirements to enliven section 102(2)(b) of the Act in this case.
- 159 It is not for a Warden to set the corporate strategy of the Applicants as they are involved in the conduct of exploration or mining, save to emphasise that one of the obligations placed upon tenement holders, is the

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<sup>16</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, Annexure SMA-35 TB Page 485

<sup>17</sup> 1<sup>st</sup> Affidavit of Mr Andrew, Exhibit 3, Annexure SMA-39 TB Page 490



requirement to meet the expenditure obligations, consistent with the overarching purposes of the Act.

- 160 In this case, it is noted that the subjective liquid capital reserves of the company were eroded to a degree by a decision taken to meet the obligations owed to another entity, and the ongoing administration costs of the Applicants.
- 161 It appears from an analysis though (and in my opinion was not ultimately disputed by the Applicants as a matter of fact), that the Applicant could have met the obligations of expenditure, from funds available at the time, had they elected to do so.
- 162 I note also that in the corresponding time period, there were significant management fees and expenses incurred by management met by the company. I note also that the directors remuneration reports I have referred to, show the directors of the Applicants were provided with share options as well as their salary.
- 163 In my opinion on the case before me, the Applicants can be demonstrated as having the financial capacity to meet the obligations without suffering an immediate solvency risk, and as a result, in my view, it ought to have met those obligations, unless there was some other reason not to.
- 164 In this case, there was no objective solvency risk established, rather in my view the evidence demonstrated the management had determined not to hazard the available capital on the inherently risky prospect of mining exploration.
- 165 Ultimately, that is a matter for them in the exercise of their directors duties, however the obligations arising from the Act in respect of the expenditure requirements, remain irrespective of the subjective risk assessment conducted by the directors of the tenement holder.

- 166 If the directors of the Applicants considered the risk was too great for the nature of the return which might be available, that would seemingly be an entirely valid decision to make.
- 167 One of the consequences though, all other things being equal, was that the expenditure requirements on the tenements would not be met. In this, I do not read the exemption provisions in question as granting the directors the capacity to determine at what threshold of capital the risk of expenditure was prepared to be made.
- 168 That approach involves a wholly subjective assessment, which would in effect, result in a circumstance where directors of corporate entities (or indeed real persons) could always seek an exemption on the basis of a subjective determination of the economic merits of the exploration relative to the financial position of the entity in question.
- 169 That, in my opinion, is not how section 102(2)(b) of the Act operates, and is inconsistent with the well established purposes of the Act generally, see for example, *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403 at [21]-[25] per Pullin JA, and *Commissioner Of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211 (14 November 2014) per Buss P at [56].
- 170 It follows in my view that the purpose of the capital raising (for which time was said to be required), was to maintain the subjective internal financial criteria of the Applicants, not for expenditure on exploitation of the tenements in question. That purpose is not consistent with the matters which enliven section 102(2)(b) of the Act, as set out in paragraph [41] of these reasons.

*Did Riversgold face technical and financial impediments to exploration during the reporting years? & Did Riversgold overcome these impediments by May 2020 and then actively explore the tenements?*

- 171 In [126(h) & (i)] above I have indicated that there was no other impediment to the conduct of appropriate expenditure upon the tenement.
- 172 The matters raised in broad terms and relied upon by the Applicants, were the difficulties arising from a dispute between the Applicant and a Mr Kelly, and secondly, generic issues arising from the Covid-19 pandemic.
- 173 The dispute with Mr Kelly was referred to, in an oblique way, as giving rise to difficulties for the Applicant in conducting expenditure activities. This was because Mr Kelly was said to have provided geological services to the Applicant, and his departure caused a shortfall in expertise.
- 174 It appears clear that there was a difficult dispute between the Applicant and Mr Kelly.
- 175 As indicated, the Applicant relied upon the nature of the dispute, as I understood it, largely as a result of the loss of expertise.
- 176 I have noted above, that Mr Andrew appeared to be critical of the data held by the Applicants in respect of the geological resource. I infer that to be a criticism of Mr Kelly, though it was not expressly stated.
- 177 Nevertheless, I am not in a position to make any kind of determination as to the merits of that dispute, as the detail of the dispute was not explored in evidence before me, and I did not hear from Mr Kelly. No inference was sought to be established by the Applicants as a result of Mr Kelly's absence.
- 178 The Applicant simply alluded to the difficulty in obtaining geological services, however the evidence of that difficulty was sparse. In my opinion, it did not rise to the level of enabling me to come to a view that the Applicants undertook all reasonable steps to obtain geological assistance, and were unable to do so.

- 179 In addition, it is not clear, and was not established on the case before me that there was an impossibility of carrying out any meaningful expenditure at all in the absence of such expertise.
- 180 I am further fortified in my view by the corporate circumstances of the Applicant and its parent. It is an ASX listed entity. It is not, by way of contrast, a small, family held concern. In the circumstances, it may be expected that the Applicant could have moved with more precision and success in respect of obtaining the necessary skills if that is what was desired, and evidence of those steps placed in evidence before me. There was little to no evidence of any efforts made to obtain relevant expertise to facilitate expenditure.
- 181 What the evidence did demonstrate was that rather late in the piece, the Applicants were able to secure the services of a geological consulting entity, on a success fee type basis. That however is not evidence of the inability to locate and retain other consulting services for appropriate fees.
- 182 The Applicant also contended that the difficulties created by Covid – 19 ought be taken into account. In this respect, the fair characterisation of Mr Andrew’s evidence was that there was a concern as to the impact of the pandemic in respect of any capital raising exercise. That does not rise to the level of an event which precluded expenditure.
- 183 Faint reliance was placed upon the fact of the COVID – 19 pandemic in causing unspecified difficulties in the conduct of mining operations or exploration work.
- 184 Absent specific evidence as to the inability to conduct any relevant work or expenditure on the tenement for the course of the relevant year, I simply do not accept that there was an inability to meet the expenditure requirements for that basis.

185 No doubt some difficulties were experienced, as they were for all sectors and all industries. Nonetheless, the world continued to turn (and, turns still), and in this case, generalised assertions of difficulties do not rise the requisite levels of proving to the necessary standard, that work could not be done at all.

186 I do not consider that the impediments so described, when considered in light of the evidence, operated in any manner to preclude relevant expenditure activity upon the tenement. The evidence simply does not support such a contention.

187 It follows, that the steps taken to address them, are not determinative of the issue before me either, and do not give rise to a basis under section 102(3) of the Act to compel me to recommend the grant of an exemption, when considered in isolation, or with the other matters relied upon pursuant to section 102(2)(b) of the Act.

*Does any previous grant of exemptions for the tenements for the current reasons weigh in favour or against the grant of exemptions?*

188 It is not in dispute that the current holders of the Kurnalpi Project tenements have only held them for a very short period.

189 No other past activity was said to be of any relevance to the Applications.

*Does the work done and money spent on the tenements weigh in favour or against the grant of exemptions?*

190 This last question raised by the Applicants concerned squarely (again) the application of section 102(3) of the Act, and in my opinion, section 102(4) of the Act.

191 The Application under section 102(3) of the Act, and the alternative submission that the Applicant ought to be granted an exemption as a

result, requires, in my opinion a reconsideration of the whole of the circumstances presented.

- 192 In *Siberia No 3*, I indicated a view that section 102(3) operated to in effect require a Warden to consider again, the matters raised in a section 102(2) of the Act application afresh, with any other matters.
- 193 As set out in [60] of these reasons, I referred to the matters advanced in support of the Applicant's case. In respect of the application pursuant to section 102(3) of the Act, they were the matters referred to in paragraphs [60(c) - (f)].
- 194 In practical terms, the heart of the consideration pursuant to section 102(3) of the Act, was directed to the expenditure said to have occurred on the tenements following the expenditure year, and the technical issues I have described above.
- 195 In light of Mr Andrew's professed lack of knowledge in respect of the operations of the Applicants, I am left in a difficult position when considering how much weight to give the assertions of activity after the expenditure year.
- 196 In light of that, in my opinion, the evidence of the expenditure post-dating the expenditure year is not of sufficient weight to warrant an exemption for the expenditure year pursuant to section 102(3) of the Act, when considered in isolation, or in conjunction with the matters raised in support of their application pursuant to section 102(2)(b) and 102(3) of the Act.
- 197 Considering the matter again, I do not consider, that when viewed in light of all of the circumstances presented, and in particular, the broader approach required by section 102(3) of the Act, that the circumstances warrant a recommendation for an exemption. The fact that the Applicants may have expended in excess of the requirements in an aggregate sense,

following the defaulting year, cannot be of itself a reason to grant an exemption. Such a basis is not found in section 102 of the Act.

- 198 Further, when considered as part of the broader approach required pursuant to section 102(3) of the Act, in my opinion it is insufficient to justify an exemption from the obligation, when regard is had to the reason (as I have found it) that the expenditure did not occur, and the views I have expressed in respect of the other matters relied upon by the Applicants.
- 199 I turn now to consider the possible effect of section 102(4) of the Act, which is a mandatory consideration of the conduct of the holder in respect of the tenements in question, in respect of the recommendation to the Minister, in my opinion, to the date of the hearing before me.
- 200 As indicated above, in this case, the holder has had the tenements for a very short period of time. This matter concerned the second year of their holding.
- 201 Ultimately, it is difficult to escape a conclusion that the Applicant took possession of the tenement, however made a conscious determination not to expend available capital on the tenements in the form of the required expenditure, because the controllers of the Applicant did not wish to hazard the available capital in the expenditure year.
- 202 The evidence of expenditure post-dating the expenditure years, which I have considered in light of my views as expressed in *Siberia No 3*, are of insufficient weight for me, to compel a different conclusion.
- 203 It follows that there is nothing in the mandatory consideration the Minister must have regard to which alters my substantive views on the merits of the Applications, though ultimately, those are matters for the Minister.

- 204 The final point to note is to reference the Applicants' opening, where the Applicant's submission concerned an assertion that the tenement holder is best placed to know whether there is sufficient capital to enable required expenditure.
- 205 That submission is undoubtably correct, with one important rider. The tenement holder does not operate in a vacuum. It is subject to numerous obligations, where there is no capacity to elect not to comply, or if there is non-compliance, there are entirely foreseeable consequences. This case presents a stark example.
- 206 In my opinion, the key piece of evidence in this matter fell from Mr Andrew, where he set what in my view amounted to a floor of liquid capital reserves, below which he appeared unwilling to descend, in respect of the actual mining operations of the Applicant.
- 207 It cannot be disputed that that decision was (and remains) open to the directors of the Applicants (or any entity) to make, and indeed, might be regarded as fiscally prudent in some circumstances.
- 208 Nonetheless, it does amount to a choice, and one of the consequences of that choice in this case was that the obligations arising from under the Act for the Kurnalpi Project tenements, were not met.
- 209 In response, the Applicant in this matter applied for an exemption. As indicated above however, the financial position of the company was such that it is not able to be said that it was not possible to reasonably conduct the necessary works on the tenement. Rather, the choice was made not to do so.
- 210 In my opinion, that decision is not in accord with any of the exemption provisions relied upon by the Applicant. Time was not required to raise capital for exploration or mining, or planning, or the raising of capital for those purposes.



- 211 Rather, time was required to raise capital to meet the subjective capital requirements of the Applicant.
- 212 As indicated, whilst that approach might in a range of contexts be fiscally prudent, it is not a basis for an exemption under section 102(2)(b) nor section 102(3) of the Act.

### **Conclusion & Orders**

- 213 For the reasons given above, I do not consider that the Applications give rise to any basis for exemptions as sought and will so recommend to the Minister.
- 214 Any party seeking any further or consequential order, is to file and serve a Minute of Proposed Orders, within 14 days of the publication of these reasons, with an accompanying short submission in support.
- 215 In any event, I direct the Mining Registrar to convey my recommendation to the Minister or his delegate, upon publication of these reasons, without further delay.
- 216 I am grateful for the assistance of counsel appearing, and the work of their instructors.



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Warden Tom McPhee

30 August 2022

## Schedule 1

### Division 7 — Exemption from expenditure conditions

#### 102. Exemption from expenditure conditions

- (1) Subject to this Act, on an application (an *application for exemption*) made, as prescribed, by the holder of a mining tenement (other than a retention licence) or his authorised agent prior to the end of the year to which the proposed exemption relates, or within the prescribed period after the end of that year, the holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates from the prescribed expenditure conditions relating thereto, in an amount not exceeding the amount required to be expended —
  - (a) in respect to any mining tenement other than a mining lease, in any one year; and
  - (b) in respect to a mining lease, subject to subsection (7), in a period of 5 years.
- (1a) An application for exemption may relate to more than one mining tenement.
- (2) A certificate of exemption may be granted for any of the following reasons —
  - (a) that the title to the mining tenement is in dispute; or
  - (b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor; or
  - (c) that time is required to purchase and erect plant and machinery; or
  - (d) that the ground the subject of the mining tenement is for any sufficient reason unworkable; or
  - (e) that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future or that at the relevant time economic or marketing problems are such as not to make the mining operations viable; or
  - (f) that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or
  - (g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions that are, for the time being impracticable; or

- (h) that —
- (i) the mining tenement is one of 2 or more mining tenements (*combined reporting tenements*) the subject of arrangements approved under section 115A(4) for the filing of combined mineral exploration reports; and
  - (ii) the aggregate exploration expenditure for the combined reporting tenements would have been such as to satisfy the expenditure requirements for the mining tenement concerned had that aggregate exploration expenditure been apportioned between the combined reporting tenements.
- (2a) In subsection (2)(h) —
- aggregate exploration expenditure* means expenditure —
- (a) on, or in connection with, exploration for minerals on the combined reporting tenements; and
  - (b) worked out in a manner specified in the regulations.
- (3) Notwithstanding that the reasons given for the application for exemption are not amongst those set out in subsection (2), a certificate of exemption may also be granted for any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption.
  - (4) When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.
  - (5) An application for exemption —
    - (a) where an objection to the application is lodged, shall be heard by the warden; but
    - (b) otherwise, shall be forwarded to the Minister for determination by the Minister.
  - (6) The warden shall as soon as practicable after the hearing of the application transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein and his report recommending the granting or refusal of the application and setting out his reasons for that recommendation.
  - (7) Where the warden finds that the reasons given by the holder of the mining lease are sufficient to justify the granting of a certificate of exemption and so recommends, or if the Minister is satisfied whether or not a recommendation is made by the warden, the Minister may grant a certificate of exemption in an amount not exceeding the amount required to be expended in respect of the mining lease in the period of 5 years from the commencement of the year to which the application relates.

## Schedule 2

BEFORE THE WARDEN  
AT PERTH

Objections 582308, 594899, 594900 and 594901  
to Applications for Exemption 581017, 594753,  
594752 and 594754  
Affecting E25/539, E25/538, E25/540 and  
E28/2580

BETWEEN

**SERENDIPITY RESOURCES PTY LTD**

First Applicant

**RIVERSGOLD (AUSTRALIA) PTY LTD**

Second Applicant

and

**DEBNAL PTY LTD**

Objector to Application 581017

**MIRAMAR (GOLDFIELDS) PTY LTD**

Objector to Applications 594753,  
594752 and 594754

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**AGREED STATEMENT OF FACTS**

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|                                  |               |                |
|----------------------------------|---------------|----------------|
| Date of document:                | 14 April 2022 |                |
| Filed on behalf of:              | The Parties   |                |
| Date of filing:                  | 14 April 2022 |                |
| Filed by:                        |               |                |
| DLA PIPER AUSTRALIA              | Telephone:    | (08) 6467 6000 |
| Level 21, 240 St Georges Terrace | DX:           | 130 Perth      |
| PERTH WA 6000                    | Reference:    | 388340-10      |

- 1 On 11 January 2005, the first objector (**Debnal**) was incorporated. Since then, Mr Allan **Kelly** has been its sole director, secretary and shareholder.
- 2 On 21 September 2016, the Minister granted E25/538, E25/540 and E28/2580 to the first applicant (**SRPL**).
- 3 On 24 February 2017, **Riversgold** Ltd was incorporated as Alcam Gold Pty Ltd. The company became public and changed its name on 9 June 2017.
- 4 On 30 May 2017, the second applicant (**RAPL**) was incorporated. Since then, RAPL has been Riversgold's wholly-owned subsidiary.
- 5 On 10 October 2017, Riversgold listed on the Australian Securities Exchange (**ASX**) with Kelly as its managing director.
- 6 On 8 January 2018, SRPL transferred an 80% interest in E25/538, E25/540 and E28/2580 to RAPL.

- 7 On 4 May 2018, the Minister granted E25/539 to SRPL.
- 8 On 31 May 2018, SRPL transferred an 80% interest in E25/539 to RPL.
- 9 Since the respective transfers, E25/538, E25/540, E28/2580 and E25/539 have been part of Riversgold's Kurnalpi Project in the Eastern Goldfields of Western Australia.
- 10 E25/538 and E28/2580 host a gold deposit known as Queen Lapage. E25/539 hosts a gold deposit known as Jaws. E25/540 hosts a gold deposit known as Venetian.
- 11 At all material times, Riversgold also owned resource projects in South Australia and Alaska.
- 12 On 15 March 2019, Kelly resigned as Riversgold's managing director.
- 13 On or about 26 March 2019, Riversgold accepted Kelly's resignation.
- 14 At 31 March 2019, Riversgold had cash or cash equivalents of \$348,000 and an estimated Q2 2019 cash outflow of \$220,000.
- 15 On 4 May 2019, the relevant reporting year for E25/539 started. The minimum commitment was \$70,000.
- 16 On 9 April 2019, Kelly served a statutory demand on Riversgold for alleged entitlements.
- 17 On 30 May 2019, Kelly and Riversgold settled their dispute.
- 18 On 14 June 2019, Riversgold agreed to pay US\$166,436 to Yukuskokon Professional Services LLC by instalments to settle Yukuskokon's claim for unpaid drilling fees from 2018.
- 19 In Q2 2019, Riversgold raised \$100,000 through issue of a convertible note and \$218,000 through issue of shares.
- 20 In Q2 2019, Riversgold engaged a geologist, Mr Mark Cossom.
- 21 At 30 June 2019, Riversgold had cash or cash equivalents of \$407,000 and an estimated Q3 2019 cash outflow of \$240,000.
- 22 On 22 July 2019, Cossom prepared an exploration plan for the Project, which would cost \$187,000.
- 23 In July 2019, Riversgold paid US\$60,000 to Yukuskokon.
- 24 On 6 August 2019, Miramar Resources Ltd was incorporated. Since then, Kelly has been a director of Miramar.

- 25 On 7 August 2019, Cossom prepared a revised exploration plan for the Project, which would cost \$528,750.
- 26 On 28 August 2019, Simon Andrew became a director of Riversgold.
- 27 On 29 August 2019, Riversgold announced capital raising of \$1.9m through a placement for \$400,000 and rights issue for \$1.5m.
- 28 On 21 September 2019, the reporting years for E25/538, E25/540 and E28/2580 started. The minimum commitments were \$61,500 for E25/538, \$30,000 for E25/540, and \$81,000 for E28/2580.
- 29 At 30 September 2019, Riversgold had cash or cash equivalents of \$173,000 and an estimated Q4 2019 cash outflow of \$714,000.
- 30 In October 2019, Cossom resigned.
- 31 On 17 October 2019, Riversgold raised \$400,000 through the placement.
- 32 From 18 October 2019 to 15 November 2019, Riversgold conducted a rights issue which raised \$665,188.
- 33 From November 2019 to February 2020, Riversgold conducted a rights issue for the shortfall of \$834,812, which raised \$295,000.
- 34 On 23 December 2019, Riversgold repaid the convertible note.
- 35 At 31 December 2019, Riversgold had cash or cash equivalents of \$670,000 and an estimated Q1 2020 cash outflow of \$456,000.
- 36 In January 2020, Riversgold engaged a geologist, Ms Rebecca Gower.
- 37 On 28 February 2020, Riversgold paid US\$50,000 to Yukuskokon.
- 38 On 11 March 2020, the World Health Organisation declared Covid-19 a pandemic.
- 39 From 19 to 27 March 2020, the State of Western Australian introduced regional travel restrictions in response to the Covid-19 pandemic.
- 40 At 31 March 2020, Riversgold had cash or cash equivalents of \$599,000.
- 41 On 3 May 2020, the reporting year for E25/539 ended. SRPL and RAPL reported expenditure of \$19,104.
- 42 On 19 May 2020, Riversgold raised \$1,532,499 through a placement to be completed in two tranches: \$720,744 and \$811,755.



- 43 On 28 May 2020, the second objector (MGPL) was incorporated. Since then, Kelly has been its sole director and secretary and Miramar has been its sole shareholder.
- 44 On 29 May 2020, the State reduced the regional travel restrictions.
- 45 In May 2020, Riversgold agreed to partially divest its Alaskan assets.
- 46 In May 2020, Gower prepared a 12-month exploration plan for the Project.
- 47 On 26 May 2020, Riversgold completed the first tranche of the placement.
- 48 On 5 June 2020, the State ended the regional travel restrictions for the Kimberley.
- 49 In June 2020, Riversgold engaged Quarterback Geological Consultants Pty Ltd, which revised the exploration plan for the Project.
- 50 On 29 June 2020, SRPL and RAPL lodge exemption application 581017 for E25/539 for the reporting year ending 3 May 2020.
- 51 At 30 June 2020, Riversgold had cash or cash equivalents of \$1.279m.
- 52 On 20 July 2020, Debnal objected to application 581017.
- 53 In August 2020, Riversgold mobilised a field crew to undertake sampling on the Project.
- 54 On 13 August 2020, Riversgold completed the second tranche of the placement.
- 55 On 14 August 2020, Riversgold paid US\$25,000 to Yukuskokon.
- 56 On 20 September 2020, the reporting years for E25/538, E25/540 and E28/2580 ended. SRPL and RAPL reported expenditure of \$35,465 for E25/538, \$19,965 for E25/540, and \$39,609 for E28/2580.
- 57 At 30 September 2020, Riversgold had cash or cash equivalents of \$1.867m.
- 58 On 1 October 2020, Riversgold paid US\$31,347 to Yukuskokon.
- 59 On 22 October 2020, Miramar listed on the ASX with Kelly as its executive chairman.
- 60 In November 2020, Riversgold engaged Vincent Bellandi as exploration manager.
- 61 On 22 January 2021, SRPL and RAPL lodged exemption applications 594753 for E25/538, 594752 for E25/540, and 594754 for E28/2580, each for the reporting year ending 20 September 2020.
- 62 On 27 January 2021, MGPL objected to applications 594753, 594752 and 594754.

**Schedule 3**

**Affidavit of Mr Andrew, Exhibit 2, SMA 61; TB 692 - 693**

The details of the remuneration of each Director and member of Key Management Personnel of the Company is as follows:

| 30 June 2020              | Short Term Benefits | Post-Employment Benefits     | Other Long Term Benefits      | Total            | Proportion Performance Related |
|---------------------------|---------------------|------------------------------|-------------------------------|------------------|--------------------------------|
|                           | Base Salary         | Superannuation Contributions | Value of Options <sup>3</sup> |                  | Total                          |
|                           | \$                  | \$                           | \$                            | \$               | %                              |
| Simon Andrew <sup>1</sup> | 65,329              | -                            | 13,407                        | 78,736           | -                              |
| Xavier Braud <sup>2</sup> | 3,333               | -                            | 413,536                       | 416,869          | -                              |
| Simon Bolster             | 583                 | -                            | 402,883                       | 403,466          |                                |
| Justin Boylson            | 124,593             | 11,875                       | 13,407                        | 149,875          |                                |
| Michael Davy              | 25,185              |                              | 13,407                        | 38,592           |                                |
| Rod Webster               | 16,505              | -                            | 3,128                         | 19,633           | -                              |
| Aaron Colleran            | 21,130              | -                            | -                             | 21,130           | -                              |
| Kevin Hart                | 14,600              | -                            | -                             | 14,600           | -                              |
| <b>Total</b>              | <b>271,258</b>      | <b>11,875</b>                | <b>859,768</b>                | <b>1,142,901</b> |                                |

<sup>1</sup> Includes consultancy fees amounting to \$40,000.

<sup>2</sup> Includes consultancy fees amounting to \$1,667.

<sup>3</sup> The Company issued options to the Directors approved by shareholders. The fair value of Options issued as remuneration is calculated using a Black-Scholes Option Pricing model with the fair value allocated to each reporting period to vesting date.



Remuneration Disclosures

| 30 June 2019                | Short Term Benefits |               | Post-Employment Benefits     | Other Long Term Benefits | Total          | Proportion Performance Related |
|-----------------------------|---------------------|---------------|------------------------------|--------------------------|----------------|--------------------------------|
|                             | Base Salary         | Cash Bonus    | Superannuation Contributions | Value of Options         |                |                                |
|                             | \$                  | \$            | \$                           | \$                       | \$             | %                              |
| Rod Webster <sup>1,2</sup>  | 106,000             | -             | -                            | 11,303                   | 117,303        | -                              |
| Allan Kelly                 | 289,368             | 25,000        | 22,167                       | 14,431                   | 350,966        | 7.1%                           |
| Jeff Foster                 | 30,000              | -             | 2,850                        | 14,431                   | 47,281         | -                              |
| Aaron Colleran <sup>2</sup> | 17,617              | -             | 633                          | -                        | 18,250         | -                              |
| Kevin Hart <sup>2</sup>     | 10,950              | -             | -                            | -                        | 10,950         | -                              |
| <b>Total</b>                | <b>453,935</b>      | <b>25,000</b> | <b>25,650</b>                | <b>40,165</b>            | <b>544,750</b> |                                |

Remuneration Disclosures (Continued)

<sup>1</sup> The Company issued options to the Directors in lieu of pre-IPO services provided. The fair value of Options issued as remuneration is calculated using a Black-Scholes Option Pricing model with the fair value allocated to each reporting period to vesting date.

<sup>2</sup> The Company issued options to the new Directors with various vesting conditions for performance based incentives