IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P6 of 2018

BETWEEN:

**Commissioner of State Revenue**
Appellant

and

**Placer Dome Inc (now an amalgamated entity named Barrick Gold Corporation)**
Respondent

## APPELLANT'S REPLY

### *Part I: Publication*

1. The Appellant certifies this reply is in a form suitable for publication on the internet.

### *Part II: Reply*

2. The central issue in the appeal has, at all stages, been whether Placer at the time of its acquisition owned any property at law comprising goodwill that was of any material value. The Appellant's case has throughout been that, like other gold mining companies, Placer did not own any such property; that its non-land assets were an immaterial portion of its $12.8billion[1] of total non-excluded assets; and that the value of its land, being its only other asset of material value, was necessarily more than 60% of the value of its total non-excluded assets. The Respondent failed below, and fails in this Court, to meet that case: see [4] below.

*(a) The Respondent's submissions*

3. The Respondent's submissions in this Court misstate the Appellant's case before the Tribunal ("SAT"), the CA and this Court, and also inaccurately characterise the evidence in several material respects. In particular, the Respondent's submission[2] that the Appellant's case differs from her case before the SAT and the CA is both wrong and misleading. So too is the ancillary assertion that "the predicate for the [Appellant's]

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1 The amounts have never been in contest. See Respondent's Submissions ("RS") at [2]; Court of Appeal ("CA") at [16] (CAB 129).

2 RS at [6], [21], [37].

Filed on behalf of the Appellant

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argument is that a gold mining company *can have* no legal goodwill".[3] The Appellant's relevant submission is and has been that a gold mining company such as Placer has no property comprising goodwill that is of material value.[4]

4. The Respondent's fundamental submission is that its experts valued the land "directly," that their "direct" evidence should be accepted in preference to the evidence of experts called by the Appellant,[5] and that the "top down" approach to valuation is not a reliable means of arriving at a land value.[6] Apart from impugning it as a methodology, the Respondent does not engage with the Appellant's case. In particular, apart from the matters addressed at [8] below, the Respondent led no evidence of the essential element of goodwill as property, namely, the ability of the business to attract custom; all the evidence was to the contrary.

5. A fundamental flaw in the Respondent's argument is that the valuers it relies on for a "direct" valuation of the land proceeded on a basis which denies the existence of any valuable goodwill and rested on factual assumptions (as to the future price of gold), which led them to a conclusion inconsistent with the objective, arm's length transaction which was the best evidence of the value of all Placer's property.

6. The Respondent's "direct" land valuations are founded on its experts' DCF valuations,[7] the essential premise of which is that the present value of a business is equal to the discounted value of the future cash flows that all its assets (including any goodwill) in combination are expected to produce. It follows that any value attributable to the "intangible rights and privileges" the Respondent contends arise from Placer's "going concern business" and which reflect its goodwill[8] were necessarily captured in their experts' calculation of land value. The "goodwill" of $6.5billion recorded in Barrick's accounts is nothing more than an accounting entry reconciling the difference between the DCF valuations of all Placer's assets with the amount Barrick had actually outlaid to obtain ownership of those assets. It

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3 RS at [39] emphasis added.

4 See Appellant's Submissions ("AS") at [17], [19]. So much was accepted by both the SAT and the CA: see SAT at [378]-[381] (CAB 96-97); CA at [52]-[57] (CAB 141-143), [90]-[91] (CAB 153).

5 RS at [25]-[35].

6 RS at [39]-[42].

7 All valuers deducted from their DCF value of the enterprise the value of non-land assets to arrive at the so called "direct" value of land. None of the Respondent's experts suggested any amount should be subtracted from their DCF values on account of goodwill (although they did so in respect of all other non-land assets).

8 RS at [56]-[57].

makes no contribution to the expected future cashflows of the business and logically cannot relate to the "attractive force that brings in custom". It therefore cannot represent the value of "goodwill" which is property at law,[9] notwithstanding the Respondent's assertion otherwise.

*(b) The evidence claimed to support the existence of goodwill of material value*

7. The Respondent wrongly contends[10] that there is no challenge at an evidentiary level to the CA's conclusion that Placer had materially significant goodwill.[11]

8. The evidence upon which the Respondent relies as supporting a conclusion that it had goodwill of material value[12] does no more than support a conclusion that Placer had a large and profitable business, which does not inexorably lead to a conclusion that it had legal goodwill of material value. It does not follow from the alleged 'findings' identified by the Respondent at RS [47] that Placer had any goodwill of material value. The evidence supports a contrary conclusion, in particular:

   (a) Many of Placer's offices were closed and many of its employees,[13] and especially most of its senior employees[14] (as well as most of its board of directors), left its employment soon after the takeover. There was nothing unique about Placer's workforce; any major mining company could have operated its gold mines and exploited its tenements.[15]

   (b) No source of goodwill is to be found in any specialist technology or "innovative mining techniques" of Placer. Most of the technological projects that Placer had under way at the time of takeover were not implemented[16] and according to Mr Patel "no significant value" existed in Placer's technologies.[17] Accordingly, they made no material contribution to the value of Placer as a going concern.

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9 *FCT v Murry* (1998) 193 CLR 605 ("*Murry*") at 614 [21]; see [12]-[13] below.

10 RS at [23].

11 See AS at [33]-[37].

12 RS at [46]-[47], [55], [61].

13 11 offices were closed and 363 of 494 employees of Placer were laid off: Attach D and E to Placer's Notice of Acceptance of Revised Offer (ASFM 7-30, 33). See also SAT transcript ("SAT T") (Fisher) at 79.3, 80.1 and 81.2 (RFM 103-105), (Patel) at 168 (ASFM 37).

14 SAT T (Fisher) at 79.4-81.2 (RFM 103-105), (Patel) at 168 (ASFM 37), (Sokalsky) at 465-466 (AFM 143-144), 462-464 (ASFM 41-53).

15 SAT T (Fisher) at 81.5-7 and 82.2 (RFM 105-106), (Lonergan) at 556-557 (AFM 67-68).

16 Attach JP-1 to witness statement ("ws") Jay Patel at [17.1] (ASFM 47-48).

17 Except the "Hot Cure" process which Mr Patel valued at an inconsequential $17 million: (ASFM 49).

(c) Placer's management was considered inferior to Barrick's (indeed Barrick considered it could better manage Placer's assets) and no reference is made or value attributed to Placer's "management structures and systems" in any contemporaneous documents. In fact the evidence was that most head office functions were transferred from Placer's head office in Vancouver to Barrick's head office in Toronto.[18]

9. Further, apart from the purported synergies that did not and could not exist prior to takeover, none of the features relied upon by the Respondent were considered to be of material value to Barrick or a principal reason for the acquisition of Placer. As Barrick's 2006 Annual Report states "the acquisition of Placer Dome was attractive principally due to the proximity of both companies mining operations and the attractive pipeline of projects held by the combined company".[19] The only inference to be drawn from Barrick's contemporaneous records is that it was the 'synergies' to be achieved post-merger and Placer's mines and development projects (ie Placer's land), which would thereby increase Barrick's 'gold reserves, resources and production' that were the overwhelming source of value in the acquisition by Barrick.[20]

10. Despite the Respondent's assertion to the contrary,[21] the evidence cited does not support a conclusion that the value of "future properties" [22] was an "important aspect of going concern value".

11. The Canadian case of *TransAlta*[23] is cited by the Respondent as authority for its argument that Placer had valuable goodwill, but that decision supports the opposite conclusion. The Court held (at [6]) that, *inter alia*, goodwill "must arise from the expectation of future earnings, returns or other benefits *in excess of what would be expected in a comparable business*". The CA did not make any express finding that Placer enjoyed special

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18 Attach GEB-21 to ws Julie Robertson at 18 (RFM 119).

19 Attach GEB-21 to ws Julie Robertson at 17 (ASFM 53).

20 See Attach GEB-1 and GEB-3 to ws Jamie Sokalsky (AFM 9, 20, 125, 135).

21 RS at [49] fn 60.

22 The evidence of Mr Lee cited by the Respondent does not refer to let alone place any value on "future properties". He only valued exploration potential of existing properties. The evidence at RFM 39 is a submission to the US SEC and directed to goodwill "for accounting purposes", the principal elements of which were said to be "the ability to sustain and grow reserves and the ability to realize synergies from the business combination". The reference (RFM 38) to the "going concern value" was attributable to management's ability to "find additional mineral reserves" in the future "*at either its existing mineral properties or* by locating other prospective mineral properties". The evidence cited by the Respondent at RFM 119, 120 makes no reference to 'future properties' merely "finding new mineral reserves and synergies". Mr Sokalsky's evidence cited by the Respondent is to identical effect.

23 *TransAlta Corporation v The Queen* (2012) DTC 5041.

advantages over its competitors.[24] Moreover, the evidence was that the alleged 'competitive advantages' (i.e. innovative mining techniques),[25] had "no significant value" and there was no evidence of value in any other competitive advantage.

12. The "theoretical literature" and "empirical evidence" upon which the Respondent relies at RS [54] does not support a conclusion that it had legal goodwill of material value and rather confuses the issue which falls for resolution. The "theoretical literature" referred to is directed wholly to accounting theory and accounting standards. Similarly, the alleged "empirical evidence" are merely surveys of the application of accounting standards and the recording of goodwill on corporate balance sheets, not any examination of businesses to establish whether they had legal goodwill.

13. Further, the Respondent's submissions at RS [56] that the value of various intangible rights of Placer's business (i.e. its legal goodwill) are captured in the value of goodwill recorded in its accounts is not only flawed for the reasons at [5]-[6] above, it is in substance the characterization of goodwill that was rejected by this Court in *Murry* as an accurate statement of the legal definition of goodwill.[26]

14. The Respondent's submissions at RS [65]-[67] should be rejected. The relevant authorities were all cited with approval in *Murry* and the fact they pre-date *Murry* cannot therefore be a point of distinction. Further, the fact they concerned different statutory schemes is of no moment – if that was a point of distinction then *Murry* would equally not be authoritative in the present case. The point of principle arising from the authorities does not depend upon the peculiarities of the statutes under consideration.[27]

15. Finally, the Respondent challenged the assessments on the basis that it was not a landholder and that the assessments should be set aside entirely. If the Appellant is successful, the Respondent has failed to discharge its onus of proving the assessments were incorrect and there is no need for the matter to be remitted to the SAT.

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[24] Contrary to RS at [60]. The CA merely referred to the evidence in chief of Mr Fisher concerning the 'competitive advantages' enjoyed by Placer. However, in cross-examination Mr Fisher conceded that any large mining company could competently operate Placer's mines and Mr Sokalsky said that Barrick could better manage Placer's assets: AS at [35] fn 46.

[25] CA at [42] (CAB 138).

[26] *Murry* at 614 [21].

[27] The Respondent's reliance on *Clifford's case* (RS [67]) is entirely misplaced. The judgment cited is that of Starke J in dissent who disagreed from the plurality on the applicability of *Spencer* (see Latham CJ, Rich & Williams JJ at 367). The only caution adverted to by the plurality (at 361) was that in estate duty cases, unlike compensation cases (which includes *Spencer*), there is no actual transfer of ownership.

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