



IN THE HIGH COURT OF AUSTRALIA  
PERTH REGISTRY

No. P6 of 2018

ON APPEAL FROM COURT OF APPEAL OF THE SUPREME COURT OF  
WESTERN AUSTRALIA

**BETWEEN:**

**COMMISSIONER OF STATE REVENUE**  
Appellant

and

**PLACER DOME INC (NOW AN AMALGAMATED ENTITY NAMED  
BARRICK GOLD CORPORATION)**  
Respondent

**RESPONDENT'S OUTLINE OF ORAL ARGUMENT**

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**Part I:**

We certify that this outline is in a form suitable for publication on the internet.

**Part II:**

1. The issues are whether Placer was a listed landholder corporation; and if so, whether the Commissioner's assessment of the value of Placer's land in Western Australia was incorrect.<sup>1</sup>
2. The Commissioner relied below on land valuation evidence and certain top down methodologies to contend that Placer was a listed landholder corporation. Her valuation of WA land was justified solely by reference to land valuation evidence that has now been abandoned.

**Listed landholder corporation**

3. The question is whether the value of Placer's land at the time it was acquired was greater than or equal to US\$7.68b.<sup>2</sup>
4. The statute requires land to be valued by applying ordinary principles of valuation. Those principles assume a hypothetical sale of the land, separately from any going concern business that Placer conducted, so as to ascertain the value of the land in exchange and not its value in use.<sup>3</sup>
5. What must be assessed is the value of the land; not the land and business.<sup>4</sup> As the Court of Appeal held, the Commissioner wrongly conflates land and business value and seeks to add business value to the value of the land.<sup>5</sup>
6. The top down methodology is a diversion from the statutory question,<sup>6</sup> as no provision requires the attribution of any value to the goodwill of Placer's going concern business.<sup>7</sup>

**Land Valuations**

7. The value of Placer's land could be, and was, addressed by both parties below by relying on their respective expert land valuations.
8. The Tribunal's decision was founded on Mr Lonergan's valuation, both in relation to the value of Placer's land generally and in WA.<sup>8</sup> The Commissioner has now abandoned any reliance upon the Lonergan valuation.
9. The consequence is that the only valuation evidence now before the Court is that which was provided by Placer's experts. Those valuations concluded that the value of Placer's land was less than the statutory threshold.<sup>9</sup> Thus, the only valuation evidence before the Court refutes the value of the land that the Commissioner seeks to arrive at by a top down methodology.

**Evidence of Substantial Goodwill**

10. The Tribunal treated goodwill as an evidentiary issue, concluding that there was no

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<sup>1</sup> Tribunal [27]-[30], CAB 24-25; and Tribunal [381]-[385] at CAB 96-98; CA [2] at CAB 125.

<sup>2</sup> RS[2].

<sup>3</sup> RS[17]; T[157]-[158] at CAB 55-56; CA[15] at CAB 129.

<sup>4</sup> RS[17].

<sup>5</sup> RS [15]-[17].

<sup>6</sup> CA[92] at CAB 153-4.

<sup>7</sup> T[354] at CAB 92; CA[74], [181] and [244] at CAB 148-149, 181 and 198.

<sup>8</sup> T[381]-[385] at CAB 96-98.

<sup>9</sup> Patel's valuation was \$5.694b, T[314] at CAB 84; Lee's valuation was \$5.253b, T[321] at CAB 85.

evidence of Placer having a substantial amount of goodwill. The Court of Appeal overturned this finding, holding that there was ample evidence that Placer had goodwill of substantial value,<sup>10</sup> and that many dimensions added value to Placer's going concern business beyond its land portfolio.<sup>11</sup>

11. An important aspect of Placer's going concern business was its proven ability to find and then develop new mining reserves to replace its existing reserves. This aspect of going concern value cannot possibly be captured by valuing its existing tenements.<sup>12</sup>

### **Murry**

12. The top down methodology assumes no material goodwill. That assumption is based on a misinterpretation of *Murry*, which leads the Commissioner to argue that the seller of an indistinguishable product can have no attractive force that brings in custom.

13. In *Box*, *Hepples* and most recently in *Murry*, this Court rejected the narrow conception of goodwill founded on patronage that the Commissioner is now advancing in favour of a broader added value concept. It includes every positive advantage, and whatever adds value; and different businesses will derive their value from different sources. It also includes privileges or advantages that differentiate an established business from a business just starting out.<sup>13</sup>

14. The plurality in *Murry* did not use the word "custom" in the sense of patronage, repeat custom or customer relations. Rather, the references in *Murry* to an attractive force that brings in custom are references to whatever generates, or is capable of generating value, income or earnings for the business.<sup>14</sup>

15. The narrow patronage-based definition of goodwill was rejected in *Commissioner of Territory Revenue v Alcan*.<sup>15</sup>

16. The Appellant's arguments about goodwill are out of step with international jurisprudence<sup>16</sup> and international commercial practice and corporate law requirements regarding financial statements; and it is at odds with the empirical evidence.<sup>17</sup>

### **Top Down methodology**

17. This methodology starts with the value of Placer's business as a whole, and purports to deduct the value of non-land property that can be separately valued, leaving the value of land as the residual.<sup>18</sup> It was rejected by the Court of Appeal for numerous reasons, additional to those mentioned above.

18. First, it was neither practical nor feasible to identify and value every attribute of Placer's business that contributed to the total value of its going concern business, when many of those attributes did not correspond to specific assets or identifiable property that could be separately valued.<sup>19</sup> This accords with *Murry's* description of goodwill as including all the external and internal sources of the earnings of a business although

<sup>10</sup> RS[46] and [47]; CA[95]-[96] at CAB 155, [226] at CAB 194, [245]-[246] at CAB 198.

<sup>11</sup> CA[36]-[48] at CAB 137-140.

<sup>12</sup> See, e.g., T[69]-[70] at CAB 34-35, CA[45] at CAB 139; and RS[49] and footnote 60.

<sup>13</sup> RS [51]; *Murry* at [15]-[20], [48], [50] and [61].

<sup>14</sup> *Murry* at [23].

<sup>15</sup> (2008) 24 NTLR 33 at [107], [115], [122], [133], [135] and [141]-[143].

<sup>16</sup> RS [52]-[53].

<sup>17</sup> RS [54], and RFM at pp 25-34.

<sup>18</sup> RS [21].

<sup>19</sup> RS [21] and [40]; CA [57] and [60], (CAB 142-144), CA [90] (CAB 153), and [225] (CAB 194).

many of them may not be able to be individually quantified.<sup>20</sup>

19. Secondly, the assumption that there was no goodwill or intangible value of any kind was contrary to all the evidence.<sup>21</sup> The outcome of the gold price issue itself supports there being considerable non-land intangible value.<sup>22</sup>
20. Thirdly, the methodology assumes that land is the residual, which cannot be reconciled with *Murry's* case and the evidence. As *Murry* observed,<sup>23</sup> the usual and the accepted way to value goodwill is as a residual; and given the inherent nature of goodwill this is probably the only way.<sup>24</sup>
21. Fourthly, there was no evidence that any *Spencer* purchaser deciding what to pay for land would adopt a top down methodology to value the land. Instead, the evidence was that Barrick, Placer and other industry participants valued land directly.<sup>25</sup>
22. Fifthly, the methodology adds any differential to the value of the land presently held by Placer as some kind of enhancement to the land value. That approach was squarely rejected in *Murry*.<sup>26</sup>
23. Sixthly, the methodology is invalid because it fails to take account of the status of Placer's rights to conduct its going concern business as property rights under Canadian and US law.<sup>27</sup>

#### Value of Western Australia land

24. The top down methodology does not address the value of land and chattels in WA. The assessment valued Placer's land in Western Australia at \$1,015,900,000, with the result that duty of A\$54,852,300 was payable, and Placer contended that this was incorrect. The Tribunal relied upon Lonergan's valuation to uphold the Commissioner's valuation of WA land. However, the Court of Appeal rejected Mr Lonergan's valuation as erroneous and the Commissioner has now abandoned any reliance on it.
25. The case that the Commissioner now advances cannot justify the assessment of duty which was incorrectly based upon Mr Lonergan's rejected valuation.

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<sup>20</sup> At [29].

<sup>21</sup> RS [47]-[49] and footnotes 58-60; CA [95] (CAB 155), [226] (CAB 194), [245] (CAB 198).

<sup>22</sup> RS [46]; CA [226] (CAB 194), [248] (CAB 199).

<sup>23</sup> At [49].

<sup>24</sup> RS [41].

<sup>25</sup> RS [42].

<sup>26</sup> At [4], [23], [24], [30] and [34]-[36].

<sup>27</sup> See the cases referred to in RS [52] and [53].