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**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : BYRO EXPLORATION PTY LTD AND ANOR  
v ALEXANDER CREEK PTY LTD [2022]  
WAMW 25

**CORAM** : WARDEN T W McPHEE

**HEARD** : 6 & 7 September 2022

**DELIVERED** : 16 December 2022

**FILE NO/S** : Applications for Exemption 592781 and 592782,  
and Objections 592784 and 592785

**TENEMENT NO/S** : Exploration Licence E09/1507 and E09/1552

**BETWEEN** : BYRO EXPLORATION PTY LTD  
  
(First Applicant)  
  
AND  
  
COMPLEX EXPLORATION PTY LTD  
  
(Second Applicant)  
  
AND  
  
ALEXANDER CREEK PTY LTD  
  
(Objector)

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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, time required, corporate groups.*

**Legislation:**

- *Mining Act 1978 (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 Chandler  
Objector : Mr Gerus

**Solicitors:**

Applicant : Lawton MacMaster Legal  
Objector : All Mining 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)*
- *Serendipity Resources Pty Ltd & Anor v Debnal Pty Ltd & Anor [2022] WAMW 20*
- *Thompson v Siberia Mining Corporation Pty Ltd [2021] WASCA 115*
- *Jones v Dunkle (1959) 101 CLR 298*

- *West Australian Prospectors Pty Ltd & Anor v Summit Ventures Limited* [2022] WAMW 9
- *Oz Youanmi Gold Pty Ltd v St Clair Resources Pty Ltd* [2018] WAMW 5
- *Walker v Wimbourne* (1976) 137 CLR 1

## **Introduction**

- 1 The Applicant seeks a partial exemption from the expenditure requirements (the Applications) in respect of exploration licences 09/1507 and 09/1552 (the Tenements).
- 2 There are objections to the Applications, being objection number 592784 dated 18 December 2020 in respect of 09/1507, and objection number 592785 dated 18 December 2020 in respect of E09/1552 (the Objections).
- 3 The matter was listed for hearing for two days on 6 and 7 September 2022.
- 4 The hearing proceeded on the listed days and I reserved my decision.
- 5 In broad terms I have found for the Objector. My reasons for doing so are set out below. As a result of those reasons, I make by the publication of same, the following recommendations and Orders:
  - a. The Objections should be upheld;
  - b. I recommend to the Minister that he refuse the Applications for Exemption in respect of each of the Tenements;
  - c. I will hear the parties as to any further consequential orders which might be sought.
- 6 In summary, no basis for an exemption has been made out on the case before me.

## **Background**

- 7 The following information is taken from the documentary materials and is not controversial.

- 8 The relevant expenditure year for the Tenements in respect of the Applications is the period 23 October 2019 to 22 October 2020 (the Expenditure Year).
- 9 The Applicants are the registered holders of E09/1507 and E09/1552. The Applicants are wholly owned subsidiaries of Athena Resources Ltd (Athena).
- 10 Mr Edwards is the Managing Director of Athena, and the sole director of the two Applicants. Mr Wai is a director of Athena. Mr Newcomb at times has acted in senior roles, including as company secretary of Athena.
- 11 Mr Kelly is the employed geologist of Athena.
- 12 Ms Chen is an individual who was seemingly in control of the entity Goldway Mega Trade Limited (Goldway), a foreign corporate entity which appears to have invested significant funds in Athena in return for shares in that entity.
- 13 Mr Malony, is the chief geologist of the parent company of the Objector.
- 14 In respect of the finances of Athena, (and as asserted by the Applicant, by extension the Applicants), the following matters are agreed:
- a. At 30 September 2019 Athena had cash or cash equivalents of \$434,140;
  - b. By December 2019 Goldway had provided Athena with \$1,037,900 in funding;
  - c. At 31 December 2019 Athena had cash or cash equivalents of \$323,529;
  - d. At 31 March 2020 Athena had cash or cash equivalents of \$151,825;

- e. At 30 June 2020 Athena had cash or cash equivalents of \$17,992;
- f. In August 2020 Goldway provided Athena with a further \$260,000 in funding;
- g. At September 2020 Athena had cash or cash equivalents of \$135,525;
- h. At 31 December 2020 Athena had cash or cash equivalents of \$89,723.

15 The Objector challenged the bulk of the expenditure claimed in the Form 5 reports. Those reports claimed expenditure as follows:

- a. For E09/1507:
  - i. Exploration Activities: \$80,279.00;
  - ii. Annual rent and Rates: \$48,373.00;
  - iii. Administration: \$46,200.00.
- b. For E09/1552:
  - i. Exploration Activities: \$15,798.00;
  - ii. Annual rent and Rates: \$33,925.00;
  - iii. Administration: \$20,133.00.

16 The Applicants, prior to hearing, asserted that the Form 5 expenditure could be relied upon, and so, for its part sought an exemption for the balance of the shortfall of the expenditure required, which was:

- a. For E09/1507
  - i. \$56,148.00

b. For E09/1552

i. \$30,811.00

17 The Objector conceded only that the rent and rates portion of the claimed Form 5 expenditure was established.

### **Jurisdictional Issues**

18 There is no dispute in respect of the Warden's jurisdiction to address the Applications.

19 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.

20 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.

21 It is not in dispute that the Applicant bears the onus of establishing an exemption for expenditure should be granted.

### **Applicable Law**

22 In *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.

23 Following the publication of that decision, I handed down a further decision, being *Serendipity Resources Pty Ltd & Anor v Debnal Pty Ltd & Anor* [2022] WAMW 20. In that decision, I applied the principles set out in *Siberia No 3*.

24 At the commencement of this matter, I enquired with counsel appearing for both parties, whether there was any dispute as to the applicable

principles as I set out in those two earlier decisions, concerning the application of section 102(2)(b), 102(3) and 102(4) of the Act.

25 Both parties stated that no challenge would be made to the approach taken in *Siberia No 3*, and *Serendipity*.

26 That being so, I consider the approach set out in those matters is appropriate to apply to this matter.

27 Accordingly, I will simply refer to paragraphs [93 – 164] of *Siberia No 3*, without repeating them in totality.

28 In my opinion those views I have previously expressed in respect of the construction and operation of the relevant provisions, are equally applicable to this matter.

29 Most relevantly given how the matter was conducted the onus was on the Applicant in this matter when relying on section 102(2)(b) of the Act, to 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.

30 I will also restate 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. The onus is on the Applicant to establish that imperative of time, for the purpose in question.

- 31 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 *Thompson v Siberia Mining Corporation Pty Ltd* [2021] WASCA 115, 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.
- 32 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.
- 33 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.
- 34 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.
- 35 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.
- 36 I address those issues later in these reasons.

37 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.

38 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.

39 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**

40 The Application as framed, sought relief pursuant to section 102(2)(b), 102(2)(f), 102(3) and 102(4).

41 At the hearing, the case advanced was somewhat narrower, pressing only section 102(2)(b) and section 102(3) of the Act.

42 The Applications were put to me squarely on the basis of paragraph [29(d, e or f)] above by the Applicant. The Objector submitted that the case could only reasonably have been brought on the basis of paragraph [29(e)] above. In my view given my findings below, little turns on the distinction in this case.

43 The Application document itself, in respect of section 102(3) of the Act, stated plainly that the relevant funding shortfall arose as a result of the impact of Covid – 19. Paragraph 34 of the Applicant’s particulars asserted that:

- a. *“Goldway have confirmed that the delay in funding was a result of the Covid-19 virus in China that resulted in significant lockdowns”*

44 Further, paragraph 36 of the Applicant’s particulars asserted that:

- a. “. . . *the company is in the process of signing a mandate with a Perth broking firm to raise approximately \$2.3 million in new funding.*”

45 The entirety of the group of entities were treated as a coherent whole by the controllers of the Applicants, said to be consistent with the fact that the group was treated as a consolidated entity.

46 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 uniform collective for all circumstances.

47 In this matter, it is not in dispute that the tenement holders were the two named Applicants. Those entities are wholly owned subsidiaries of Athena.

48 In this matter as set out latter in these reasons, I consider that the manner in which the common director of Athena and the Applicants approached the question of the duties, obligations and resources of the Applicants and Athena, materially contributed to the inability to meet the required expenditure, in a manner which was not consistent with the obligations of the tenement holders to expend, and further, created impediments to the grant of relief sought.

49 In light of the decisions in *Siberia No 3* and *Serendipity*, in my view the Applicants case may be approached by asking the following questions:

- a. Did the Applicant need time during the reporting years to raise capital?
- b. What was the purpose of the capital raising?

- c. Were there any impediments to the necessary conduct of expenditure upon the tenements?
- d. Does any previous grant of exemptions for the tenements weigh in favour or against the grant of exemptions?
- e. Does the work done and money spent on the tenements weigh in favour or against the grant of exemptions?

50 Those questions are similar to the approach taken by the applicant in *Serendipity*, and an approach which I consider enables a consequential view to be taken as to the identification of the particular basis of exemption from the list in paragraph 29 hereof being asserted, and to then further determine whether the requirements of section 102(2)(b) of the Act are enlivened in the context of the case in question.

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

52 Counsel for the Applicant opened in the following manner<sup>1</sup>:

- a. *CHANDLER, MR: Now, part of the factual matrix is that specific on-ground work, that is, drilling, was planned on these exploration licences to be done during the year on both of the exploration licences but was not done. The explanation for this given by the applicants is that they did not receive all of the moneys they had bargained to receive during the expenditure year from a third party, Goldway Mega Trade Limited, and in the crudest of terms, the applicants ran out of money for their business during the year and did not do the work they planned to do on these licences. They did take steps to raise capital during the year, as it became*

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<sup>1</sup> Transcript of 6 September 2022, page 5.

*apparent that the promised moneys would not arrive in time and in the amount that had been agreed.*

- b. Now, the explanation for that is said to be COVID, but we don't rely on COVID as a specific ground of exemption. We rely on the further time is needed. That was the explanation given to the applicants about why the money did not arrive when it was supposed to and in the amounts it was supposed to. Now, if, for some reason, the further- time ground is not made out, then we rely on the same facts – the any-other-reason ground. Now, the relevant expenditure year begins, of the record, on the 23rd of October 2019, ends on the 22nd of October 2020*

53 And later<sup>2</sup>:

- a. . . . And things were planned to be done which required money. There was an expectation that money would come. It didn't. Coincidentally, the explanation was because of COVID. It doesn't really matter why. But I think the existence of COVID at that time is a notorious fact, just the existence of it. And then how the applicants reacted to it. They needed further time to raise more capital because of a lack of capital. And they, we say, reasonably expected to receive it. And reasonably accepted the explanation for why it didn't arrive.*

54 The Applicants' primary contention was that the financial position of the Applicants at the most material time (being during the Expenditure Year) resulted in the requirement to raise capital, for the purposes of permitting planning and or the conduct of exploration or mining operations on the Tenements.

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<sup>2</sup> Transcript of 6 September 2022, page 32.

55 It was put to me that there was a plan to conduct exploration on the Tenements, simply not the funds, and the reason there were inadequate funds, was that the expected funding did not flow from Goldway. Thus it was said that section 102(2)(b) of the Act was enlivened.

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

### **The Objectors Position**

57 The Objection, in particulars, set out the position clearly. It accepted that the rent and rates had been paid but did not admit the balance of the expenditure in the Form 5.

58 Particular emphasis was afforded to the amounts claimed by way of administration expenses, which amount to 20% of the expenditure requirement.

59 The particulars of the objection emphasises that the absence from the Applicants particulars, of detail of evaluative work required to be undertaken, detail of future operational work planned for beyond the broadest of frameworks and estimates, and detail of any fundraising activities.

60 In effect, the Objector says that the Applicant fails to meet the evidentiary requirements of the relevant statutory provisions.

### **Agreed Evidence**

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

62 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.

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

64 In addition, the following documentary evidence was received.

<b>EXHIBIT</b>	<b>DESCRIPTION</b>	<b>TENDERED BY</b>
1	Agreed Statement of facts. Mining Register Search M09/199 Dated 06/09/2022	Applicant
2	Affidavit Peter John Newcomb - 22/04/2022	Applicant
3	Affidavit of Edmond William Edwards 05 October 2021	Applicant
4	Affidavit of Edmond William Edwards 26 April 2022	Applicant
5	ASX Listing Rules 2013 - Previously MFI 9	Objector
6	Annual Financial Report Athena Resources 2019 - Previously MFI 2	Objector
7	Annual Financial Report Athena Resources 2020 - Previously MFI 3	Objector
8	Annual Financial Report Athena Resources 2021 - Previously MFI 4	Objector
9	Supplementary Prospectus dated 14/07/2021 - Previously MFI 5	Objector

10	Notice of placements to raise \$216,000 – August 2020 - Previously MFI 6	Objector
11	Notice of placements to raise \$280,000 – 03 December 2019 - Previously MFI 7	Objector
12	Notice of placements to raise \$391,000 – 27 September 2019- Previously MFI 8	Objector
13	Affidavit of Liam Kelly Affirmed 26 October 2021	Objector
14	Affidavit of Martin Moloney dated 10 November 2021	Objector

**Additional Evidence**

65 In this section I set out some notable parts of the evidence of a number of persons.

66 I do not traverse the entirety of the evidence given, nor the totality of the documentary material tendered in voluminous Affidavits, rather only those aspects which I consider of note in respect of my key findings as outlined below, or the nature and reliability of the evidence in question.

67 Mr Newcomb did not evidence in the matter for the Applicant. His Affidavit is unremarkable and contains little information of any use in the determination of the issues at large in the proceedings.

68 Mr Edwards gave evidence in the matter for the Applicant and was the subject of extensive cross examination.

69 The key piece of evidence from Mr Edwards concerned the frank admission that the relationship with Goldway did not amount to an enforceable or binding agreement for future funding.



- 70 There was no written agreement, nor any terms which could be enforced. In his evidence, he initially referred to the relationship which Goldway as being in the Athena books as a loan<sup>3</sup>, however shortly afterwards it was referred to as an agreement for equity<sup>4</sup>. In the absence of documentation, it is difficult to reconcile that evidence of the distinctly different types of transactions.
- 71 The reasons proffered by Mr Edwards for the fact of it being unenforceable are of no moment. What is relevant is the fact that the Applicant, following the evidence of Mr Edwards was not able to advance a positive case relying on an expectation of ongoing funding coming from Goldway, which did not come.
- 72 Rather, on the case before me, Goldway is most likely to be properly regarded as a simple investor in Athena, at its (Goldway's) discretion, and in no way committed to the provision of any further funds than those which had been advanced.
- 73 That view is also consistent with the evidence of Mr Wai, who gave evidence of an oral arrangement for the advancement of funds in return for the provision of shares in Athena, though not the creation of any binding obligation.
- 74 That is also consistent with the manner in which Goldway appears to have developed its shareholding in Athena, consistent with its investments, or placements; it appeared to receive shares in return for funds as they were advanced. Goldway was under no obligation to provide further funds, and Mr Edwards was plainly aware at all material times of that fact.

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<sup>3</sup> Transcript of 6 September 2022, page 77

<sup>4</sup> Transcript of 6 September 2022, page 79

75 At times, Mr Edwards was evasive and argumentative in his evidence. An example is set out immediately below<sup>5</sup>:

- a. *And so the plan was to drill and test for magnetite, iron ore, and hematite iron ore?---Yes. Yes.*
- b. *And to drill and test for base metals?---Yes.*
- c. *Because no drilling had ever been done on 1507?---When?*
- d. *Well, once the mining release – sorry, I will rephrase that question. Once the mining lease was applied and granted and came out of - - -?---Yes.*
- e. *- - - the area of exploration licence 91507, the balance of the area had not been drilled at all?---How do you know that?*
- f. *Well, I'm putting to you that it hasn't been?---Well, that's incorrect.*
- g. *Right. So where was the drill?---The ore bodies to the north of 1507, had been stolen, those ones. Now, the question would be better - - -*
- h. *Sorry, what year - - -?---Better - - -*
- i. *What year were they drilled?---Earlier years. Right?*
- j. *So before 2011?---No. No. But - - -*
- k. *And so when were they drilled?---Look, I - - -*
- l. *When were they drilled by Athena, do you say?---I would be guessing.*

<sup>5</sup> Transcript of 7 September 2022 page 96

- m. Guessing (indistinct)?---No, I wouldn't be guessing. I know they've been drilled, right.*
- n. But you don't know when?---I – no, I can't tell you when. I – Liam will probably know, if you ask him. But the – I can tell you those northern ones were drilled. I know there was one hole that was drilled in 2009 or '10 in the (indistinct) Deeps – in the middle tenement.*
- o. But – anyway. So in 2010?---'10 or '11. Yes. In those early days. Yes.*

76 There were many similar examples during the course of the evidence of Mr Edwards.

77 Mr Edwards also displayed a concerning lack of knowledge of the financial activities of the company, of which he was the Managing Director, and, having regard to his personal holdings, and those of his service company (which provided services to Athena through the actions of Mr Edwards), one of the largest shareholders.

78 An example of the above is as follows<sup>6</sup>:

- a. Now, there's transaction costs of 10,000 in relation to the issue of shares?---Yes.*
- b. What was that for? Was that paid to a broker or is that paid to Mr Wai?---No. No. No idea would be - - -*
- c. No idea?--- - - - my answer to that.*

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<sup>6</sup> Transcript of hearing, 7 September 2022 page 105

79 It is also a matter of concern, that the precise nature of the financial interactions between the directors of Athena and Athena in respect of loan agreements with seemingly all of them, was entirely opaque.

80 No detail of any of the agreements referred to as loans from the directors were placed into evidence before me, and the financial administration of those arrangements might be politely described as ad hoc. On the case before me, the repayment obligations of those loans appeared to be completely discretionary.

81 Mr Edwards gave evidence that the detail of mining operations of the Athena was properly a matter for Mr Kelly, as he had little to no knowledge of it.

82 In Mr Edward's Affidavit<sup>7</sup>, he referred to fundraising activities he asserted had occurred. No substantial detail of those discussions were forthcoming. Mr Edwards said in cross examination<sup>8</sup>:

*a. So you and Liam were getting around - - -?---And meeting up with people.*

*b. Right. But you just told us you couldn't meet up with COVID?---No. We couldn't - - -*

*c. So you – sorry. Were you meeting up with people after all the COVID lockdowns ended?---Well, you're recalling Perth. Right? There wasn't really real tough lockdowns. You could actually go and talk to people at times. Sometimes you weren't allowed out around, but sometimes you were.*

*d. You can't remember who you spoke to or when you spoke to them, can you?---No. There's a list in that affidavit that Liam - - -*

<sup>7</sup> First Affidavit of Mr Edwards, exhibit 3, paras 46 & 47 (Trial Bundle page 30).

<sup>8</sup> Transcript of 7 September 2022, page 114

- e. *Okay. If I take you to – but now you can't remember it, but you can remember what's in the affidavit?---I can remember that, you know – well, yes. Okay.*
- f. *You have no recollection?---I can remember meeting up with people.*
- g. *So who gave you that information that you put in your affidavit?---What's that? The - - -*
- h. *About who you contacted and when?---Liam and I both read back through all our emails at that time and the people that we – you know, was a record in our emails to show who we had spoken to.*
- i. *But there's none of those emails in your affidavit, is there?---No.*
- j. *And you can't remember them otherwise, but - - -?---No.*

83 On the issue of the rigour of fiscal administration conducted, Mr Edwards evidence may be said to be able to be characterised by the following<sup>9</sup>:

- a. *Immediately under your name, there's a name D A Webster, and an associated company called Cobpen Co Investments Pty Ltd?---Yes.*
- b. *And he was paid \$36,000 in the year ended 30 June 2020. Correct?---I suspect it was the same as my situation. That was accrued, not paid.*
- c. *Okay?---So the - - -*
- d. *But. But - - -?---the wording there is not 100 per cent right.*
- e. *The wording is not 100 per cent in this aspect of the annual report, is it?---Yes.*

<sup>9</sup> Transcript of 6 September 2022, page 61

84 The report Mr Edwards was referring to was the directors report, contained in the Annual Financial Report for Athena (a listed ASX entity) in the year 2020.

85 Further, in cross examination, the following exchange occurred<sup>10</sup>:

*a. But because you're going to India and presumably there's a lot of administration costs as well, and that's why it's 160,000 in administration and corporate costs approximately?---I will take your word for it. I don't know - - -*

*b. Well, no?---Yes.*

*c. I'm taking your word for it from your document?---Yes.*

*d. At paragraph 1.2(e)?---Yes. Look, what's specifically in there I couldn't - - -*

*e. Well, I'm asking you to go to 1.2(e). You spent \$160,000 - - -?---Yes.*

*f. - - - on admin?---That's what it says. Yes.*

86 Mr Edwards' approach to the resources of Athena may be considered to be informed by the following view he expressed when challenged on a payment he received<sup>11</sup>:

*a. You were repaying a loan?---But you can see from the admin I didn't get paid that quarter and I still have bills.*

87 It is not entirely clear to me on what basis the state of Mr Edwards' personal finances was relevant to the expenditure of Athena's (and the Applicant's) funds.

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<sup>10</sup> Transcript of hearing, 7 September 2022 page 105

<sup>11</sup> Transcript of 7 September 2022, page 112

88 Further, in respect of the resources that Athena had at its disposal, and when considered in light of the obligations of the Applicants to expend during the Expenditure Year, the following evidence of Mr Edwards is indicative of the approach<sup>12</sup>:

- a. *No drilling is done as promised on either of the tenements, is it?---No. That would be correct. We didn't - - -*
- b. *And notwithstanding that you have cash in the quarter of \$135,000 at the end?---What – are you suggesting - - -*
- c. *Well - - -?---you could start a drilling program with 130,000 in the bank?*
- d. *- - - you received 260,000 - - -?---Yes. But you wouldn't drill with 260,000 in the bank.*
- e. *Why wouldn't you drill with 260,000 in the bank?---That's a ridiculously low amount of money to get a drill rig on site.*
- f. *Well, what was estimated in the original plan - - -?---Yes. But they would have been done concurrent, you know, with different - - -*
- g. *So the way you've configured the exploration program would increase the costs. Sorry. Would decrease the costs or increase the - - -?---You would do – if you were drilling at 1552 you would drill 15507 and perhaps Byro South or whatever.*
- h. *So you would drill all across the projects. You wouldn't just drill - - -?---No. Not all of the, but the ones that Liam wanted to get holes in.*

89 And further<sup>13</sup>:

<sup>12</sup> Transcript of 7 September 2022 page 119

<sup>13</sup> Transcript of hearing, 7 September 2022 page 120

- a. *Can you please explain to the Warden what your strategy was and why you didn't drill these two tenements?---Well, because we hadn't got the full – the balance of the two million down. I don't – we didn't have enough money to justify, you know, going out and completing all that work.*
- b. *So it was more important that you pay the directors the 45,000 than it was to - - -?---Well - - -*
- c. *- - - do what you were supposed to do with drilling?--- - - - otherwise the company has to continue. You have to have a – if you're going to have a public company it has got to be funded.*
- d. *Yes?---Directors – well, at least the executive director has to be paid. The geologist has to be paid. The (indistinct) rates have to be paid. The rents have to be paid. The listing fees have to be paid. There's a lot of costs. Listing rules have to be paid.*

90 Mr Edwards regarded Athena and the Applicants as effectively the same entity<sup>14</sup>, which seems to have fostered what I must regard as problematic fiscal administration. For example<sup>15</sup>:

- a. *And so Johnny Wai gets 11,900 and Mr Newcomb get 10,000?---Except he put 30 grand in to get his 10 grand back.*
- b. *Except he put 30 grand in?---Yes.*
- c. *All right. So money was raised. And why the merry-go-round?---It was just when we needed money. Sometimes whoever – one of the directors or major shareholders had some money, we – we - - -*

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<sup>14</sup> Transcript of hearing, 7 September 2022 page 126

<sup>15</sup> Transcript of hearing, 7 September 2022 page 130



- d. *Yes?--- - - - kicked – kicked some in.*
- e. *Can I take you to the annual financial report for the year ending 2021; do you have that?---Yes.*
- f. *MF14, at page 30?---Yes.*
- g. *How much is repaid to directors?---60 grand in that period.*
- h. *And how much is paid to you?---20. So that was the balance that was owing previously.*

91 There were insufficient records placed before me to make any firm findings about the nature of those (opaque but plainly discretionary) transactions. It is however, sufficient in my view that those transaction were given precedence, relevantly, over the Applicants expenditure obligations of the Tenements during the Expenditure Year.

92 In respect of the absence of other fundraising activity, the following sums up Mr Edwards’ view<sup>16</sup>:

- a. *And you were just sitting on your hands waiting for it [funds from Goldway] to come?---No. We’re in the middle of COVID. Don’t you – the year 2020 was a COVID year. It was an exceptional year. Right?*

93 The final point to note from Mr Edwards evidence was the following, quite striking statement<sup>17</sup>:

- a. *Okay. Well, we will come to that. But you did claim overheads as well, didn’t you?---Yes.*

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<sup>16</sup> Transcript of hearing, 7 September 2022, page 113

<sup>17</sup> Transcript of hearing, 7 September 2022 page 100 - 101

- b. And you claimed the maximum amount of overheads you were entitled to at 20 per cent?---Yes.*
- c. And that wasn't based on actual overheads. It was just picking the maximum number?---Yes, and that's how I've always done it.*
- d. That's how you've always done it. Correct?---And that's how I was taught to do it as a youngster.*

- 94 Given its nature, that statement was truthful, however, in my opinion, for a man of Mr Edwards' experience, and in his position as the managing director of an ASX listed corporate entity, to state that he seemingly uniformly claimed on Form 5 administration costs, sums which bore no resemblance to the actual expenditure, is unable to be sensibly reconciled.
- 95 It casts a doubt over not just his reliability as a witness, but also a doubt as to the reliability of documentation which he was responsible for. The Form 5 is a representation to the Department of Mines, Industry Regulation and Safety (the Department) to inform it of the statutorily required expenditure on the tenements granted by the State. That it is required to be accurate cannot be sensibly disputed.
- 96 Relevantly for the purposes of the Form 5s in question in this matter, in light of the above, and my comments below in respect of Mr Kelly, I do not accept the content of the amounts claimed, save where there is third party verification, or an admission by the Objector.
- 97 In light of the matters referred to above, I find myself unable to accept the evidence of Mr Edwards on any key matter, save where it is verified by 3<sup>rd</sup> party documentation, or is an admission against interest.
- 98 Mr Wai gave evidence in the matter for the Applicant. Mr Wai was put as the individual who negotiated the relationship between Goldway and Athena. Notwithstanding that, there was very little detail forthcoming

about that relationship other than the generic notion that funds would be sent, in return for equity.

- 99 Mr Wai asserted that he had been told by Ms Chen that the funds were delayed as a result of Covid. No evidence of emails or other communications were adduced in support of that position. Mr Wai is not associated with Goldway and cannot speak for it. That assertion as to the cause of the delay in funding is of no weight and I reject the associated submission.
- 100 Mr Kelly gave evidence for the Applicant. It will be recalled from my discussion above that Mr Edwards gave evidence to indicate that he had sat down with Mr Kelly to identify relevant information for the Affidavits, going through emails and records.
- 101 Mr Kelly's evidence on that issue was as follows<sup>18</sup>:
- a. *My question to you was did you sit down with Mr Edwards and check each other's notes?---No, no.*
  - b. *At any time?---No.*
  - c. *And when it came to working out dates when things happened, did you – did you do that?---No. All the dates that I've referred to are dates that relate to when things happened. Yes.*
  - d. *And did you provide a draft of your affidavit to Mr Edwards for him to look over?---No. That was given directly to Gary Wilton (sic, Gary Lawton).*
  - e. *So you didn't discuss it at all with Mr Edwards?---No, no.*

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<sup>18</sup> Transcript of hearing, 7 September 2022 page 136 - 137

- f. *So when Mr Edwards said he discussed it with you, is he mistaken or are you not recalling that you spoke to him?---We – we may have talked about it, but that wasn't the basis of the affidavit.*
- g. *So what did you talk about for the purposes of preparing your affidavit?---Goodness me. I think I hadn't prepared an affidavit, and it was about what the – the general – I suppose, the contents, not – not specific details. Rather, the – the coverage or the contents of the affidavit in terms of its structure, but not about the – the details of events or particular items. Yes*
- h. *So, for example, when you went in October of 2020 onsite to meet with Buxton Resources, and you identified the dates or what was done, did you discuss that with Mr Edwards for the purposes of either your or his affidavit?---No.*

102 I do accept from Mr Kelly, the evidence that he wrote the letters to the Department seeking extension of time on the Tenements in 2019. In this, it was it was Mr Kelly who provided, in letter form<sup>19</sup>, the undertaking to the Department as to the conduct of planned works, and that there was funding for the proposed works, which were proffered in support of a request for an extension of the tenure.

103 Mr Kelly in evidence said that there was \$20 million in expected funding, though that figure is not otherwise supported in evidence before me, and may well have been an error. It is not in any event, reliable.

104 Mr Kelly was not able to dispute the fact that the undertaking to the Department to conduct the works was not met, though sought to quibble about the fact of the statements he made, seeking to resile from the notion having given an undertaking, and that rather the representation to the Department retained a degree of qualification. I reject that submission. It

<sup>19</sup> Affidavit of Mr Kelly, exhibit 13, page 268 (Trial Bundle page 569).

might have been qualified in the mind of Mr Kelly, however was not qualified in the representation to the Department.

- 105 In my view the statements in the correspondence in question mean what they say. They represented to the Department that certain works would be done in a period of time, and that there was funding for those works at the time.
- 106 The works were not done in the time proposed, and given there was no reasonable basis to expect any funds at any time from Goldway, it is not clear on what basis the representation was made about the security of funding, unless he was referring to the sums held at the time.
- 107 Save for the issue in respect of the written communications with the Department, it is otherwise difficult to move past the clear statements from Mr Kelly that he had not spoken with Mr Edwards about the formulation of the evidentiary position, when he plainly had.
- 108 When tackled upon it, he sought to resile from the absolute denial, accepting that conversations had occurred, however maintained that it was to do with what might be described as form matters. In my opinion that contradicted Mr Edwards' evidence, given in cross examination, which amounted to a concession by Mr Edwards that he had prepared his Affidavit evidence in collaboration with Mr Kelly. In any event, the statement from Mr Kelly in cross examination that he had not spoken to Mr Edwards about the Affidavit at all, appears to have been misleading. That is not a trivial matter.
- 109 As a result, I find myself to be unable to accept the evidence of Mr Kelly on any key matter, save where it is verified by 3<sup>rd</sup> party documentation or amounted to an admission against interest.
- 110 Ms Chen of Goldway did not give evidence. That was of note, as it was said in the particulars and in submissions that the primary difficulty with

the Applicants financial position, arose as a result in the delay in expected funding from Goldway.

- 111 On the papers, Ms Chen was the individual said to be in charge of Goldway. Thus there was no evidence from Goldway.
- 112 The Objector asked me to draw an inference applying the rule in *Jones v Dunkle* (1959) 101 CLR 298 arising from that evidence. I have, in *West Australian Prospectors Pty Ltd & Anor v Summit Ventures Limited* [2022] WAMW 9 at [226 - 244], set out the application of the principle.
- 113 In light of Mr Edward's frank concession that there was no obligation on Goldway to advance any funds, it is not necessary to do so, though it seems to me to be somewhat doubtful, on a proper consideration of the circumstances, as to whether Ms Chen may be properly regarded as being "in the camp" of the Applicant on the case before me.
- 114 The Applicant's case had been advanced on the papers and in evidence, depending to a large degree on evidence from Goldway about the reason why the funds in question did not arrive. The apparent controller of Goldway seems to have declined, or been unable (it is not clear to me which) to assist the Applicant in that respect, which suggests that perhaps the relationship is not at all simple to characterise.
- 115 For all of that, a key aspect of the Applicant's case was the stated reason why the funds anticipated from Goldway did not arrive. Whilst in light of Mr Edwards' evidence it is difficult to see how the Applicant could ever overcome the difficulty of an absence of obligation on Goldway, the absence of any evidence from Goldway precluded the Applicant from establishing a key plank of its position, without the need for any further inferences of the nature sought.
- 116 Mr Malony gave evidence for the Objector. His Affidavit and evidence was unremarkable, and contains little information of any use in the

determination of the issues at large in the proceedings, save to adduce the materials which were used to cross examine Mr Edwards.

**Key Findings**

117 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.

118 They are as follows:

- a. The Applicants experienced a degree of financial strain in the most material period prior to and during the later parts of the relevant Expenditure Year;
- b. At all material times, on the case before me, the Applicants appeared to remain solvent;
- c. The liquid capital position seemingly available to the Applicants at various points, was as set out in paragraph 14 hereof.
- d. There was sufficient capital available to the Applicants at points throughout the course of the Expenditure Year, to expend the required shortfall sums (see paragraph 16 hereof) on the Tenements if that choice was made;
- e. The Applicants made a determination that they would not expend available capital upon the tenements, seemingly prioritising payments to the directors of the Applicants parent company;
- f. Part of that decision, was a desire on the part of the Applicants to conduct a comprehensive drilling program across the entirety of its holdings, rather than more modest drilling expenditure, which would have met the expenditure obligations, and was affordable.

- g. Complete reliance was placed upon the source of funds referred to as Goldway.
- h. The source of funds from Goldway, was ad hoc, unenforceable, and entirely dependent upon the whim of the individuals concerned. It was not a source of funding able to be objectively relied upon.
- i. No substantive effort was made to raise capital from any other source.
- j. There was a coherent though only conceptual plan to conduct exploration work upon the Tenements, at least at a high level though lacking in detail, and had been since the point of the applications for extensions of time to the Department in October 2019.
- k. None of the work warranted to the Department as proposed was actually undertaken in the Expenditure Year.
- l. No substantive steps to engage contractors was taken to prepare for that work.
- m. There was no other major impediment to the expenditure on the Tenements;
- n. On the case before me, the other reason relied upon (being the difficulties created by Covid-19) even taken at its highest, did not precluded the Applicants from expending the required sum on the tenements, nor preclude Athena from raising capital.

119 The above findings compel a conclusion that the Application ought be recommended for refusal. My reasons for that view are set out below.



**Consideration and Disposition**

120 Earlier in these reasons, I have referred above to a number of questions which when considered provide the answer to the matter. I detail those questions below.

121 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?*

122 The answer to this question on the evidence must be yes. There was no dispute between the parties that the Applicants and its parent were largely mineral exploration companies, with limited or no cash producing asset or business activity.

123 The Applicant does also possess a mining lease, however on the evidence before me, that asset does not at this time produce significant cashflow.

124 Necessarily then, in order to ensure its ongoing solvency, there was a general imperative at all times, on the part of the Applicants to raise capital, or create lines of debt funding. The Applicants obtain capital solely through Athena.

125 In this case, the fundraising efforts of Athena appeared desultory, and amounted largely to simply waiting to see if further funding would arrive from Goldway. Notwithstanding the faith of Mr Edwards in the relationship, there was simply no legal basis to expect that funding to continue to be provided.

126 In the particulars, the Applicant's asserted that Goldway had stated that the delay in funding arose from Covid-19. That position was not pressed with enthusiasm by counsel for the Applicant, and rightly so. There was no evidence in support of it at all, save the hearsay from Mr Wai which is of no weight.

- 127 Further, Mr Edwards himself accepted completely that there was no “agreement” with Goldway which was enforceable at all. It follows that the cause of the delay in any funding from Goldway can be safely said to be attributable to the absence of any obligation on them to provide any funding on any terms.
- 128 In the face of that situation, the management of the Athena do not appear to have taken any further steps to secure or raise funding.
- 129 The highest it could be put by Mr Edwards was that he conducted a number of meetings with people. The details of those efforts was largely absent from his evidence, and he could not recall it when pressed. It is therefore of no weight in context. No other detailed evidence was given of fundraising activities.
- 130 Despite indicating that he and Mr Kelly had collaborated (though Mr Kelly appeared to deny it) in the preparation of their Affidavits detailing some of the asserted fundraising activity, Mr Edwards could not recall any details. That is telling.
- 131 I note at this juncture that paragraph 47<sup>20</sup> of Mr Edwards’ Affidavit, is in identical terms to paragraph 13 of Mr Kelly’s Affidavit.
- 132 In those circumstances, I do not accept either Mr Edwards, or Mr Kelly’s Affidavit statements are reliable in this respect.
- 133 I have also referred above to the Applicants’ particulars referring to some kind of further fundraising being conducted by an unknown Perth broker. No evidentiary foundation for that position was placed before me.

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<sup>20</sup> First Affidavit of Mr Edwards, exhibit 3, page 47 (Trial Bundle page 30), Affidavit of Mr Kelly exhibit 13, paragraph [13] (Trial Bundle page 305).

- 134 It follows that the appropriate manner with which to characterise the efforts of the management of the Applicants to obtain funding in the Expenditure Year, was that they sat on their hands.
- 135 The relevant question however, 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 [29].
- 136 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.
- 137 That said, in my view the financial position of the Applicant and Athena must be a relevant consideration when considering the relief sought, in respect of both section 102(2)(b) and 102(3) of the Act.

What was Athena's purpose in raising capital?

- 138 This question is at the heart of the required consideration, as it then informs the issue of whether additional time is required to raise capital for the asserted purpose.
- 139 In my view, the Applicant entity's purpose must be considered in respect of the parts of the relevant provision being relied upon.
- 140 I said in *Siberia No 3* that 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. I remain of that view.
- 141 There is no such principle in the Act, and such an approach 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 [29] of these reasons.

- 142 Further, and considering the evidentiary position with a degree more care, a starkly different picture presents from the evidence in this case.
- 143 The Applicants had no source of funds than through the funding efforts of Athena, and seemingly, ad hoc discretionary loans from the directors of Athena.
- 144 In terms of funding from Athena, absolute reliance was placed upon the funding from Goldway, with nothing else being undertaken. That funding was not by way of an enforceable agreement on known terms.
- 145 Notwithstanding the fact of the proposed expenditure on the Tenements, and the undertaking given to the Department to undertake those works, no contracts with any service providers were placed into evidence before me, nor even any evidence of what might be described as operational planning or preparatory activities. The vague conceptual plan remained that, a plan in the broadest sense, on paper with no further steps taken. It was not budgeted, rather only estimates unsupported by any quotes from service providers.
- 146 In my view, the case before me compels a view that there was no certain ongoing funding, and effectively nothing was done to prepare for the works which had been said would occur, in the Expenditure Year.
- 147 Further, the funds which did flow into the coffers of Athena in the relevant period (which were not insignificant), were not used for purposes consistent with the expenditure requirements of the Act in respect of the Tenements of the Applicants.
- 148 In this context, the evidence of Mr Edwards was telling where the directors appeared to treat the resources of Athena as available to meet the administrative costs of Athena, as well as their needs as and when they considered it necessary, and in preference to meeting the expenditure

obligations of the Applicants. The fiscal administration and record keeping of Athena appears to be poor, at least on the case before me.

- 149 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.
- 150 Warden O’Sullivan’s view as expressed in *Oz Youanmi Gold Pty Ltd v St Clair Resources Pty Ltd* [2018] WAMW 5 at [27] was to the effect that it was for the moving party to explain why the relevant period of time was required.
- 151 That view must be correct, as any other position effectively enlivens the capacity of entities to take no step, and then simply proclaim the need for more time to raise capital to meet their expenditure requirements.
- 152 The Applicant’s case before me was that section 102(2)(b) of the Act was raised, relying on the capital raising limb.
- 153 The position put was that the reliance upon Goldway was reasonable. It was not. It could not be disputed by the Applicant that the funds supposedly promised, were completely voluntary. Absolute reliance in the manner which occurred on an unenforceable hope of further funding, was not reasonable.
- 154 Further, on the evidence before me, there was no suggestion that time was required to raise capital for evaluative work on the Tenements. No active steps appeared to have been taken by the Applicants in respect of the Tenements for a considerable period of time.
- 155 Similarly, the Tenements had not been explored to the extent required to undertake what might be described as mining operations. That was the

Applicants position, in a submission made to the Department that the Tenements ought to be extended.

156 That submission relevantly, included a firm undertaking that the necessary exploration work on the tenements would be undertaken promptly, if an extension was granted.

157 Extensions were granted, however no exploration work appeared to occur. The closest the Applicants might be said to have come was to have formed a view that in the absence of the financial ability to conduct complete and fulsome drilling activity across its entire holdings, no substantive activity would be undertaken on the Tenements.

158 It is of note, that the rent and rates were paid, with Mr Edwards' position in evidence on those matters being a clear understanding that they must be paid, or forfeiture would follow. That view suggests a belief that the required expenditure was less important than the rates, and a resultant view that the expenditure requirements were of lesser importance. It is not clear why such a view might be held.

159 I note also that in the corresponding time period, there were significant management fees and expenses incurred by management met by the company and loan repayments by Athena to the directors of Athena and associated entities to those directors.

160 In this case, there was no objective solvency risk established at the outset of the Expenditure Year, rather the evidence demonstrated the management had determined to rely completely on the provision of voluntary funding from a foreign source, and prioritise the need to meet the expenses of Athena and its management, over the obligations to expend on the Tenements of the Applicants.

161 The directors of the Applicants seemingly considered there was no need to take any further step than to simply await that voluntary funding. Coupled

with that was the decision to make payments upon what appeared to be entirely discretionary (though undisclosed to me) loan agreements between Athena and its directors.

- 162 The asserted paucity of funds in the hands of the Applicants arises on the case before me, as a result of the desultory fundraising efforts of Athena, the unreasonable reliance on Goldway, and the expenditure of funds on largely discretionary corporate costs ahead of expenditure obligations on the Tenements.
- 163 As I have indicated above, I do not consider that time was required as that phrase is used in the relevant provisions, as quite simply, Athena, and as a result the Applicants, did not reasonably utilise the time that they had.
- 164 Further, there is no satisfactory evidence before me that if and when further funds arrived, that any expenditure on the Tenements would occur given that few steps were taken to prepare for such an eventuality, and the heavy focus of Athena on meeting its perceived corporate costs.
- 165 Indeed, on the evidence available post dating the expenditure year, a limited amount of activity occurred, notwithstanding the fact that the funds from Goldway were said to eventually arrive.
- 166 If the Applicants position was accepted, it would result in a circumstance in this case where the directors of Athena could always seek an exemption on the Tenements, having undertaken no reasonable step to obtain funding in the relevant period, and undertaken no meaningful work of any kind on the Tenements, and continued to meet corporate costs of Athena, which to a large degree involved payments to the directors on discretionary loan agreements.
- 167 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].

168 In this case, the funds available to Athena were prioritised into the repayment of liabilities said to be owed to the officers of Athena, rather than the meeting of the expenditure obligations of the Applicant tenement holders.

169 It follows in my view that the purpose of the capital raising said to being undertaken (for which time was said to be required, limited as it was to waiting on Goldway for further funds), was to maintain the position of Athena and its officers, rather than to meet the expenditure requirements for the exploitation of the Tenements in question held by the Applicants.

170 In my view, that purpose is not consistent with the matters which enliven section 102(2)(b) of the Act, as set out in paragraph [29] of these reasons.

*Did the Applicant's face other impediments to exploration during the reporting years? & if so, did the applicants overcome these impediments?*

171 I have indicated above a view 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 (in evidence at least), were solely the difficulties said to be arising the Covid-19 pandemic.

173 The Applicant (through Mr Edwards' evidence) contended that the difficulties created by Covid – 19 ought be taken into account in respect of the difficulties in obtaining funding and in a very generalised manner, the conduct of any activity on the Tenements.



- 174 In this respect, a fair characterisation of Mr Edwards's evidence was largely to rely on an assertion of Covid-19 as an answer to any challenge made to him on the basis of the Applicants' inactivity.
- 175 For example, no evidence was led of any kind of detailed discussions had by the board of Athena with other sources of funding, or any other approach to financing the obligations. The highest it was put, was that unspecified discussions occurred, with largely unidentified persons, at unspecified times. Mr Edward, when pressed in cross examination, could offer no detail of those efforts.
- 176 When pressed on the absence of any detail as to the asserted other fundraising activities, Mr Edwards response was to assert Covid-19 as precluding any activity.
- 177 It was initially suggested that there would be evidence to support a contention that the funding from Goldway was negatively impacted by Covid-19, however that was simply not borne out by the evidence. Ms Chen was not called, and as a result, the assertion by Mr Wai that the funds were delayed by Covid-19 based on what he was supposedly told by Ms Chen, is of no weight at all.
- 178 I also reject the submission that any other fundraising efforts were made. On the case before me, no substantive efforts were made at all, and the Applicants sought to rely on the spectre of Covid-19 as a cover for their own inactivity.
- 179 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, nor do I accept a proposition that Covid-19 hampered the relevant fundraising efforts in any way.

- 180 There was also no evidence of anything that the Applicant's did to deal with the issue said to exist. The highest it was put was that Athena closed its office during Covid-19.
- 181 That fact does 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.
- 182 A further consideration, in my opinion, relevant to the requirements of section 102(3) and section 102(4) of the Act, was the manner in which the Tenements remained held by the Applicants at the relevant time.
- 183 I have already referred to the "*firm undertaking*" given to the Department that exploration activities would be undertaken in the Expenditure Year. That was simply not done, nor any cogent explanation given to the Department for that failure.
- 184 I have noted that Mr Edwards in his evidence made the quite startling claim that the administration expenses claimed in the Applicants Form 5, was simply a calculation of 20% of the expenditure required, and that was entirely consistent with his long established practice. It bore no resemblance to the work actually undertaken.
- 185 Counsel for the Applicant did not seek to defend that proposition, and rightly so. It was an admission from the Applicants key witness that the form filed was misleading, in that respect at least.
- 186 Whilst counsel for the Applicants quite properly resiled from relying upon it, the admission that the administration expenses which were claimed in the Form 5 by the Applicants at the behest of Mr Edwards, bore no resemblance to the actual expenses incurred, casts a pall over the reliability of the content of that document, as well as the reliability of the evidence of Mr Edwards generally.

187 All those matters, are further evidentiary contentions which when considered in this matter, weigh against the granting of an exemption pursuant to section 102(3) of the Act rather than for it.

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

188 It is not in dispute that the current holders of the Tenements have held them for a period of time.

189 Exemptions on expenditure have been granted on a number of occasions, and there is no dispute that when assessed over a period of time, and considered in an aggregate manner, the expenditure on the collective group of tenements, exceeds the sums required over the relevant period of time.

190 The detail of those previous exemption applications is not before me, in a manner which would enable me to draw any conclusion or inference from them. The fact of an exemption being granted is not a matter which, in the absence of the surrounding factual circumstances, weigh either in favour or against the granting of an exemption in the extent case.

191 In my view therefore, there is nothing placed before me in respect of previous exemptions which warrant an exemption in this case pursuant to section 102(3) of the Act.

192 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?

- 193 This last question raised by the Applicants concerned the application of section 102(3) of the Act, and in my opinion, section 102(4) of the Act.
- 194 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.
- 195 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.
- 196 In practical terms, the heart of the consideration pursuant to section 102(3) of the Act in this case, was to be found in counsel's opening I have referred to above, namely that the money simply ran out.
- 197 As I have set out above, in my opinion, the money was running out for the Applicants, as a result of the inactivity of Athena, and the decision to prioritise the expenses of Athena in a manner which caused prejudice to the Applicants capacity to meet its expenditure obligations.
- 198 Very little expenditure has occurred on the tenement, though Athena claims significant expenditure across the entirety of its holdings.
- 199 In *Siberia No 3*, I referred (at paragraph [405] of that decision) to *Walker v Wimbourne* (1976) 137 CLR 1. In this case, I can see no benefit to the Applicants in being treated effectively as the slaves of Athena.
- 200 Mr Edwards made clear that the Applicants had no substantive financial records of their own, undertook no transactions and there were no agreements between the Applicants and Athena.

- 201 It transpired that there was a bank account in the name of the Applicants, in order to process funds received from the Department from time to time. Mr Edwards said that he simply used that account to bank cheques from the Department, and that he otherwise treated such sums as being the funds of Athena. Quite on what basis that was done is not clear.
- 202 I am of the view that on the case before me, the interests and obligations of Athena were prioritised over the expenditure obligations of the Applicants arising from the Tenements.
- 203 That might well be in accord with the directors of Athena's strategic approach, however the fact of it cannot, in my opinion, detract from the obligation of the Applicants to meet their expenditure obligations on the Tenements.
- 204 A failure to meet those obligations is also not justified by reference to available funds being utilised to support the corporate expenses of the parent entity and expenditure on other tenements held by a group.
- 205 When considered as part of the broader approach required pursuant to section 102(3) of the Act, and having regard to the matters raised in the section 102(2)(b) of the Act application, and all other matters, in my opinion it is insufficient to justify an exemption from the obligations, 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.
- 206 Ultimately, I am unable to escape a conclusion that Athena made a conscious determination not to expend available capital on the Tenements in the form of the required expenditure in the Expenditure Year, but rather to ensure the administration and corporate costs of Athena were met.
- 207 The applicant for exemption in a matter such as this one, must establish that there was an imperative for time to raise capital for the relevant

purpose. In this case, the highest it can be said is that the capital raising efforts of the Applicant's parent (as desultory as it was), were undertaken to continue to meet Athena's largely discretionary administrative needs.

- 208 That is not a basis for an exemption under section 102(2)(b) nor section 102(3) of the Act for the Applicants in respect of the Tenements, either separately or together.
- 209 In light of the fact that no exemption was sought on the basis of 102(2)(f) or (h) of the Act, in my view the fact of other historic expenditure cannot be a basis, by itself, to be relieved of the obligation to expend on the Tenements in the Expenditure Year.
- 210 I do not consider there is any further matter relevant to the Minister's consideration pursuant to section 102(4) of the Act required to be addressed.

### **Conclusion & Orders**

- 211 For the reasons given above, I do not consider that the Applications give rise to any basis for exemptions as sought, nor any other, and will so recommend to the Minister.
- 212 Any party seeking any further or consequential order, is to file and serve a Minute of Proposed Orders, within 28 days of the publication of these reasons (in light of the season), with an accompanying short submission in support.
- 213 The matter may be placed into the list before me, not before 12 on 27 January 2023 for the determination of any remaining matters.
- 214 In any event, I direct the Mining Registrar to convey my recommendation to the Minister or his delegate, upon publication of these reasons, and without further delay.

215 I am grateful for the assistance of counsel appearing, and the work of their instructors.

SIGNED BY:

A handwritten signature in blue ink, appearing to be 'T. McPhee', written over a horizontal line.

Warden Tom McPhee  
16 December 2022

**Schedule 1**

BEFORE THE WARDEN HELD AT  
PERTH

Objections 592784 and 592785 to applications  
for exemption 592781 and 592782  
affecting E09/1507 and E09/1552

BETWEEN

**ALEXANDER CREEK PTY LTD**

Objector

and

**BYRO EXPLORATION PTY LTD COMPLEX  
EXPLORATION PTY LTD**

Applicant

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**AGREED STATEMENT OF  
FACTS**

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1. Byro exploration Pty Ltd (**Byro**) and Complex Exploration Pty Ltd (**Complex**) are wholly owned subsidiaries of Athena Resources Ltd (**Athena**).
2. Byro and Complex are the registered holders of E09/1507 and E09/1552 (**Tenements**).
3. At 30 September 2019 Athena had cash or cash equivalents of \$434,140.
4. Byro and Complex were required to or cause to be expended, \$231,000 on E09/1507 and \$100,667 on E09/1552 during the year ending 20 October 2020 (**Expenditure Year**).
5. By December 2019 Goldway Mega Trade Limited (**Goldway**) had provided Athena with \$1,037,900 in funding.
6. At 31 December 2019 Athena had cash or cash equivalents of \$323,529.
7. At 31 March 2020 Athena had cash or cash equivalents of \$151,825.
8. At 30 June 2020 Athena had cash or cash equivalents of \$17,992.
9. In August 2020 Goldway provided Athena with a further \$260,000 in funding.
10. At September 2020 Athena had cash or cash equivalents of \$135,525.
11. On 18 December 2020 Byro and Complex reported expending \$174,852 on E09/1507 and \$69,856 on E09/1552 during the Expenditure Year.
12. On 18 December 2020 Byro and Complex lodged applications for certificates of exemption (**Exemptions**) in the amounts of \$56,148 on E09/1507 and \$30,811 on E09/1552.
13. On 18 December 2020 Alexander Creek Pty Ltd objected to the Exemptions.
14. At 31 December 2020 Athena had cash or cash equivalents of \$89,7