

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

COR 166 of 2024

IN THE MATTER OF CALIDUS RESOURCES LIMITED (SUBJECT TO DEED
OF COMPANY ARRANGEMENT) (ACN 006 640 553)

B E T W E E N

**HAYDEN LEIGH WHITE AND DANIEL HILLSTON WOODHOUSE IN
THEIR CAPACITY AS JOINT AND SEVERAL DEED ADMINISTRATORS
OF CALIDUS RESOURCES LIMITED (SUBJECT TO DEED OF COMPANY
ARRANGEMENT) (ACN 006 640 553)**

Plaintiff

AND

**WEST COAST GOLD PTY LTD
(ACN 680 364 354)**

First Interested Party

SUBMISSIONS IN SUPPORT OF ADJOURNMENT

Date of Document: 13 December 2024

Filed on behalf of: the Plaintiffs

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A. OVERVIEW

1. The plaintiffs seek to adjourn the hearing of their originating process dated 25 October 2024 (accepted for filing on 29 October 2024) (**Application**) to allow a meeting of creditors to occur. The further meeting of creditors is to be called to allow creditors (including contingent creditors) to vote on amendments to the deed of company arrangement entered into on 9 October 2024 (**DOCA**) in relation to Calidus Resources Limited (Subject to Deed of Company Arrangement) (**Calidus**). The proposed amendments are to deal with the rights of those who hold options to acquire shares in Calidus.

FILED

13 DEC 2024

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2. In the circumstances, it is appropriate that the hearing of the Application be adjourned until after the meeting of creditors. Doing so allows the Court to deal with the Application in light of the DOCA as amended.

B. OPTIONS NOT DEALT WITH IN DOCA; CERTAINTY SOUGHT

3. There are over 176 million options on issue in Calidus: affidavit of Hayden Leigh White affirmed 25 October 2024 (**White 1**), HLW-59. The DOCA as approved by creditors at the second meeting of creditors on 27 September 2024 makes no allowance for how the options on issue are to be treated following the effectuation of the DOCA. It is clear that it was the intention of the proponent that after effectuation of the DOCA, there would not be any equity (or potential for someone to hold equity) arising from rights existing prior to the DOCA being executed.
4. However, as the DOCA does not expressly deal with the treatment of option-holders, while it may have been the *intention* or desire that there would not be any equity (or potential for someone to hold equity) arising from rights existing prior to the DOCA being executed, the *effect* and proper construction of the DOCA may not achieve that intention.
5. The view taken by the proponent is that the claims of option-holders are contingent creditors of Calidus, relying on *Smith (as trustee of the Smith Investment Trust) v Sandalwood Properties Ltd* [2019] WASC 109.¹ However, that position is far from clear, and even if the DOCA extinguishes the potential *creditor* claims of the option-holders (that is, the secondary obligation which arises upon non-performance of the primary obligation to issue shares) the primary obligation to issue shares may continue: i.e. *Smith* [154] (Vaughan J). In such a case, the option-holders may seek to be issued shares in the future, following effectuation of the DOCA.
6. Given the uncertainty surrounding the ongoing effect of the option-holders' rights after the DOCA has effectuated, amendments have been proposed to the DOCA to expressly deal with the rights of option-holders. This is understandable. It is antithetical to the transaction intended by the transfer of all the shares held in Calidus pursuant to s 444GA of the *Corporations Act 2001* (Cth) that option-holders may exercise their rights to be issued shares in the future. The proposed amendments bring important certainty to all parties.

¹ Affidavit of Lachlan James Chapman affirmed 13 December 2024 [3]

7. The plaintiffs intend to hold the further meeting of creditors in the week commencing 6 January 2025.² At that meeting, the creditors (including option-holders as contingent creditors) can vote on the proposed amendments which deal with the existing options on issue. It is appropriate that the Application is deferred until creditors (including option-holders as contingent creditors) have had that opportunity. The determination of the Application should be made in light of the “final” DOCA, including any amendments approved by creditors rather than with the spectre of amendments potentially being made in the future.

C. CONCLUSION

8. The adjournment should be granted, with the hearing adjourned until a date after 6 January 2025.
9. Order 5 made by the Hon. Justice Hill on 30 Oct 2024 provides for the advertising of the final hearing of the application (including any date to which it is adjourned), such that it is unnecessary to make further orders requiring advertising and notice of the adjourned hearing. The plaintiffs will advertise and provide notice of the adjourned hearing in accordance with those orders (including notice to option-holders).

Paul Edgar

Stefan Tomasich

² Affidavit of Lachlan James Chapman affirmed 13 December 2024 [5]