Resource Contracts—Confidentiality Agreements: Commentary

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INTRODUCTION

The challenge to any speaker at a conference such as this is to present a paper of intellectual substance which is nevertheless of practical relevance to the delegates. Mr Kirk has met the challenge with his careful, yet digestible, analysis of the issues arising in *Lac Minerals Ltd v International Corona Resources Ltd*[1] which he has followed by providing a comprehensive check list for those of us who may be called upon to draft or consider confidentiality clauses in resource project documentation.

Mr Kirk's paper raises many issues which would be worthy topics for this commentary. A number of these have been discussed by speakers at previous AMPLA conferences.[2] This commentary will, however, be limited to one particular aspect of the confidentiality issue. I wish to highlight the need for carefully drafted confidentiality agreements by examining the source, nature and scope of non-contractual confidentiality obligations.

Before embarking on that analysis, however, and in order to place the analysis in the context of the mining industry, it is necessary briefly to review the general principles concerning the nature of joint ventures.

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1. [1989] 2 SCR 574.
2. See, for example, P D Finn, "Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures" [1984] *AMPLA Yearbook* 160.

THE NATURE OF A JOINT VENTURE RELATIONSHIP

It is one of the most puzzling and unsatisfactory features of the law concerning the mining and resources sector that one of the most widely used terms is virtually devoid of legal meaning. I refer, of course, to the expression "joint venture". The following passage from the joint majority judgment in *United Dominions Corp Limited v Brian Pty Ltd*[3] is illustrative of the problems with the expression:

> "The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. Such a joint venture . . . will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a 'joint venture' and what should more properly be seen as no more than a simple contractual relationship may, on occasion, be blurred . . . The most that can be said is that whether or not the relationship between joint ventures is fiduciary will depend upon the form which the particular joint venture takes and upon the content or the obligations which the parties to it have undertaken."

There is, however, a practical advantage which arises from the absence of an established legal meaning attaching to the term "joint venture": it compels one on each occasion to analyse the incidents of the particular relationship between the parties in order to determine the legal character of the relationship. Where the parties have committed their agreement to writing, it is primarily the document which will define the relationship.

If, properly characterised, the parties stand in a fiduciary relationship to one another, a question may arise as to whether any written agreement is to be regarded as exhaustive of their respective rights and obligations or whether the law (used broadly and to include equity) will augment the document with the settled incidents of that class of relationship.

In *Hospital Products Ltd v United States Surgical Corp*,[4] Mason J held:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all-important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must

3. (1985) 60 ALR 741.
4. (1984) 156 CLR 41.

> accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract *in such a way as to alter the operation which the contract was intended to have* according to its true construction."[5]

As Bryson J held in *Noranda Australia Ltd v Lachlan Resources NL*:[6]

> "There is . . . a source of fiduciary obligations in the general law which is additional to the terms of the parties' agreements but there are in my opinion no grounds for imposing upon the parties wider obligations than those which by their agreement they imposed on themselves."

The concluding part of the quotation from the judgment of Mason J has been emphasised to highlight that his Honour's remarks were concerned with the alteration of contractual rights and obligations by the application of equitable principles concerning fiduciaries. It is clear that, in the absence of any agreement, or in respect of matters not covered by the agreement, equity will be left unconstrained to determine the parties' rights and obligations by reference to the accepted standards of fiduciary relationships.

Further, it is now clear that a fiduciary relationship may come into existence prior to the formalisation of the "venture" whether or not it is set out in written form.[7] Indeed, as La Forest J in *Lac Minerals* held,[8] fiduciary obligations may come into existence notwithstanding the parties never come to any agreement to consummate the subject matter of their negotiations.

Finally, not all joint ventures will place the venturers in such a relationship as to constitute them fiduciaries. In these cases, however, equity does not abandon the field of confidential information. I turn now to consider circumstances in which a non-contractual duty of confidentiality will arise.

NON-CONTRACTUAL SOURCES OF THE DUTY OF CONFIDENTIALITY

I leave to one side for the moment instances where an obligation of confidentiality arises by reason of a contract, whether express or implied.[9] This is the area which has been covered by Mr Kirk.

5. (1984) 156 CLR 41 at 97. Mason J was in the minority on the question whether a fiduciary relationship did exist between the parties.
6. (1988) 14 NSWLR 1 at 17.
7. *United Dominions Corp Ltd v Brian Pty Limited* (1985) 60 ALR 741.
8. [1989] 2 SCR 574 at 667. La Forest J, however, was in the minority on the question of whether a fiduciary duty in fact arose in the circumstances of the case.
9. For an example of an implied term as to confidentiality, see *Parry-Jones v Law Society* [1969] 1 Ch 1.

Non-fiduciary situations

It has long been clear that equity will in certain circumstances intervene to impose and enforce obligations of confidentiality in the absence of either a contract or a fiduciary relationship:

> "The equitable jurisdiction in cases of breach of confidence is ancient: confidence is the cousin of trust."[10]

A cause célèbre was the case of *Prince Albert v Strange*,[11] in which the Lord Chancellor's opening remarks were:

> "The importance which has been attached to this case arises entirely from the exalted station of the plaintiff, and cannot be referred to any difficulty in the case itself."

Despite the Lord Chancellor's dismissive remarks, *Prince Albert v Strange* has been described as a "great case".[12] Certainly the facts were novel. It appears that Queen Victoria and the Prince Consort "had occasionally, for their amusement, made drawings and etchings, being principally of subjects of private and domestic interest to themselves". From the etchings, impressions had been made, usually on a private press but occasionally by Mr Brown, a printer at Windsor. It was alleged that Middleton, an employee of Brown's, had surreptitiously taken impressions from the etched plates and had made copies available to the defendants. The defendants produced a catalogue of the impressions, and advertised an exhibition of them. Prince Albert sought injunctions restraining the exhibition and the distribution of the catalogue and also orders for the delivery up of all copies of the catalogue and the impressions.

There was clearly no contract between the plaintiff and the defendants. Although the Lord Chancellor's analysis was primarily founded on the concept of the plaintiff's proprietary rights to the impressions, the Prince had no such rights to the catalogues. The Lord Chancellor continued his judgment in these terms:

> "But this case by no means depends solely on the question of property; for a breach of trust, confidence, or contract itself would entitle the plaintiff to the injunction. The plaintiff's affidavit states the private character of the work or composition, and negatives any licence or authority for publication . . . If, then, these compositions were kept private, except as to some given to private friends, and some sent to Mr Brown for the purpose of having certain impressions taken, the position of the defendant . . . must have originated in a breach of trust, confidence or contract in Brown, or some person in his employ, taking more impressions than were ordered, and retaining the extra number."[13]

It was the relationship of confidence, and its breach, which founded the equitable jurisdiction. The defendants, having failed to suggest any authorised means by which the impressions might have come into their

10. *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 46.
11. (1849) 18 LJ Ch 120.
12. By Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 46.
13. (1849) 18 LJ Ch 120 at 127.

possession, were fixed with the breach of confidence sufficient for the attraction of equity's jurisdiction in personam.

What principles give rise to the equitable duty of confidence? In an oft-cited passage, Megarry J in *Coco v A N Clark (Engineers) Ltd*[14] held:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself . . . must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

Megarry J, later in his judgment, expressed doubt as to whether, in relation to the third element, detriment must have been caused to the plaintiff. As it was not necessary for him to decide the point, he expressly left it open. As Meagher, Gummow and Lehane have observed,[15] "this escaped attention" in *Commonwealth v John Fairfax and Sons Ltd*[16] "and detriment as an essential element in equity was put forward as having Megarry J's imprimatur".

The arguments against requiring a plaintiff to demonstrate that detriment has been suffered as a consequence of an abuse of confidence are persuasive. Nevertheless the question appears to remain open.

Fiduciary situations

Although this paper, for convenience, examines fiduciary and non-fiduciary sources of the duty of confidentiality independently, they are closely related.

The fundamental interrelationship between the imparting of a confidence and the imposition by equity of fiduciary obligations is reflected in this proposition put by Mason J in *Hospital Products Ltd v United States Surgical Corp* where his Honour, speaking of fiduciary relationships, said:

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."[17]

Of course, fiduciary relationships can arise in various ways. For present purposes, it is interesting to note that a fiduciary relationship (carrying with it a duty of confidentiality) can be brought into existence by the very act of a confidence being imparted in appropriate circumstances.

14. [1969] RPC 41 at 47.
15. R P Meagher, W M C Gummow and J R F Lehane, *Equity—Doctrines and Remedies* (3rd ed, 1992) p 872.
16. (1980) 147 CLR 39 at 51.
17. (1984) 156 CLR 41 at 96-97.

Mr Kirk included among his recommendations concerning the drafting of confidentiality agreements a suggestion that the parties agree in advance upon the remedies which they wish to be available should the terms of the agreement be breached. As he rightly points out, equitable remedies will only be available consequent upon a breach of the agreement in the event that the legal remedy of damages can be demonstrated to be inadequate. In the absence of a contract, the plaintiff may ground the claim solely in equity and seek direct access to the remedial armoury of that jurisdiction, including injunctions and, as was availed of in *Lac Minerals*, the constructive trust. Further, in appropriate cases, damages pursuant to *Lord Cairns' Act* may be available.[18]

THE SCOPE OF THE DUTY

In a paper delivered at the 1984 AMPLA Conference, Paul Finn, in analysing the nature of fiduciary obligations, posed the question: "Why is confidentiality protected in commercial and business relationships?" The author answered his own question in the following way:

> "The law's answer seems to be twofold:
>
> 1. to ensure the maintenance of the good faith which inheres in those mutual dealings in which an actual confidence has been given and received; and
> 2. to secure to the "owner" of confidential information the right to enjoy and in his own way the advantage of what is his and of what has been kept in a relatively secret state."[19]

If these are the purposes for which equity imposes a duty of confidentiality, what then is the scope of the duty and does it vary depending on whether or not it arises in the context of a fiduciary relationship?

To answer the latter question first, it appears (subject to the unresolved question as to detriment) that there is but one equitable duty of confidentiality for a given situation, whether the duty arises in the context of an ad hoc imparting of confidence or within a broader fiduciary relationship. One only has to consider for a moment the remarks made above concerning the interrelatedness between the act of imparting the confidence and the imposition of the duty (whether as an incident of a fiduciary relationship or independently) to see the reasons why the scope of the duty should be common to both sources of it.

This is not to say, however, that that equity may not adjust its demands to accommodate the requirements of particular classes of circumstance.

As to the scope of the duty, Megarry J suggested in *Coco v A N Clark (Engineers) Ltd*[20] that in a commercial context the duty may be not to use the information without paying a reasonable sum for it. This

18. *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203.
19. Finn, op cit at 163, n 2.
20. [1969] RPC 41 at 50.

formulation has been criticised as having the effect of depriving the discloser of the right to the confidential information and substituting in its place an entitlement to compensation for the use of the information.[21] As one commentator has recently observed:[22]

> "Although many aspects of the doctrine of confidence appear to protect the effort made to generate the information (that is, time and expense) rather than being focused on protecting its secrecy, this formulation of the duty will only be appropriate where the information is disclosed with a view to licensing or selling it. Thus it is not applicable to a [joint operating agreement]."

One aspect of the nature of fiduciary obligations was described by Gibbs CJ in *Hospital Products Ltd v United States Surgical Corp*[23] in the following way:

> "A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty."

That passage, of course, focuses on the defendant deriving a benefit through her or his fiduciary position. It almost goes without saying that the defendant may not use that position to cause harm to the person to whom the duty is owed.

In non-fiduciary situations, it appears, as noted above, that the scope of the duty is the same as that which arises in a fiduciary relationship, subject to the unresolved question of the need to demonstrate detriment to the plaintiff.

AVOIDABLE DIFFICULTIES BROUGHT ABOUT BY THE DUTY

In *Lac Minerals* La Forest J held:[24]

> "In establishing a breach of a duty of confidence, the relevant question to be asked is 'What is the confidee entitled to do with the information?' and not, 'To what use is he prohibited from putting it?' Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use."

For the drafter of joint venture documentation, therefore, particularly a drafter acting on behalf of the party likely to be receiving confidential information, it is essential to consider the possible uses the receiving party may wish to make of such information and ensure that such uses are expressed to be permitted. These are the drafting matters which are

21. *Seager v Copydex Ltd* [1967] RPC 349.
22. G M D Bean, "Duties of Disclosure and Confidentiality in JOAS" (1993) 11(2) *Journal of Energy and National Resources Law* 75 at 82.
23. (1984) 156 CLR 41 at 67.
24. [1989] 2 SCR 574 at 642.

with limitations on use of information, the scope of receiving party responsibility, and exceptions to prohibited disclosure.

If an illustration was required of the need for care in drafting, it is provided in the case of *Noranda Australia Ltd v Lachlan Resources NL.*[25] The case concerned a dispute over the intended assignment of an interest in a project known as the Conjuboy Joint Venture. The original parties to the project were Geopeko, Noranda, Jones Mining and Peko. Noranda and Jones Mining were collectively called Conjuboy Associates. Peko, while a party to the agreement, was not a member of the joint venture.

In 1986 Geopeko sold to Lachlan its 50 per cent interest in the Conjuboy Joint Venture, and Lachlan assumed what had previously been Geopeko's rights and obligations in the project. Lachlan then sought to sell and assign its interest to Triako. Clause 14 of the joint venture agreement allowed such an assignment, provided that the approval of the other parties was obtained (such approval not to be unreasonably withheld) and that "a party shall not negotiate with any prospective purchaser or assignee not already a party without first notifying the other party of its intention and forwarding the other party the like opportunity to offer to purchase the interest proposed to be sold." Clause 7.8 of the joint venture agreement obliged the parties "at all times (to) act in relation to the joint venture in a bona fide manner to the intent that the relationship of the parties shall be fiduciary in nature".

While Lachlan made known to Noranda its intention to offer its interest in the joint venture to Triako, and initially indicated the range of prices for which the interest might be for sale, Lachlan's negotiations with Triako rapidly went beyond the information which had been given to Noranda and the sale agreement was entered into with Triako without Noranda's knowledge or consent. The case initially concerned the interpretation of clause 14. A further issue, however, concerned the duty of Lachlan to Noranda in negotiating with Triako, arising either from clause 7.8 or from the general nature of the obligations created by the joint venture agreement as a whole.

Bryson J, in the passage quoted, considered that where the parties have entered into a contract which in detailed terms is to govern their relationship, the equitable duty will mould itself to the parameters of the contract, rather than impose on the parties obligations beyond those which they have agreed upon between themselves.

In holding that, on a true construction of the contract, the fiduciary obligations imposed by clause 7.8 did not extend to the manner in which disposition of an interest in the joint venture was conducted, Bryson J held:[26]

> "One way of conceiving the limit of their fiduciary obligations is to conceive of it as the limit of the activities as to which the parties have mutual trust and confidence in each other. The enjoyment of the rights of ownership is not within this area."

25. (1988) 14 NSWLR 1.
26. (1988) 14 NSWLR 1 at 17.

In one way, this is merely an illustration of the principle that the same parties may be fiduciaries for certain purposes but not for others. One can readily imagine a situation where confidential information was disclosed within the framework of a joint venture project, giving rise to an obligation of confidentiality on the receiving party. Bryson J's ruling leaves open the possibility that the receiving party may make use of the confidential information outside "the limit of the activities as to which the parties have mutual trust and confidence in each other". If the scope of the equitable obligations is properly to be read down to lie within the confines of the contract, such use may not then be actionable as it would under general principles.

These principles are clearly relevant and important in the oft-encountered situation in which a joint venturer who is subject to confidentiality obligations wishes to negotiate, or simply explore the possibility of, a sale of its joint venture interest to an outside party.

There are many other instances of circumstances where conflicts will arise between the obligations on the receiver of confidential information and that party's pursuit of other business interests. Examples of these were, of course, given in Mr Kirk's paper. He also alluded to the problem of compulsory disclosure by operation of law. This particular problem has been the subject of previous AMPLA papers.

CONCLUSION

Mr Kirk opened his paper by remarking that "confidentiality agreements have become omnipresent wherever non-public information is disclosed in business transactions." While I would not go quite so far (*Lac Minerals* is itself an example of disclosure which was not protected by such an agreement), confidentiality provisions should certainly be on the checklist of every drafter of joint venture documents.

Equity imposes rigorous obligations on those who receive confidential information in certain circumstances. Where the disclosure occurs within the framework of a contractual relationship, the courts will construe the obligations of the parties by reference to the contract, with the role of equity operating within the boundaries of the parties' agreement.

Of critical importance, therefore, are the terms upon which the parties agree confidential information is to be disclosed. Mr Kirk's paper provides a helpful and practical guide to the considerations which the drafter must bear firmly in mind.