RECENT CASES – THEIR PRACTICAL SIGNIFICANCE

International Corona Resources Ltd. v. Lac Minerals Ltd.[1]

By L. M. Pearson*

The Facts

In 1980 International Corona Resources Ltd. (Corona), a junior mining company listed on the Vancouver Stock Exchange, held 17 claims over a prospective gold area in Ontario. Exploration work commenced in January 1981, and by May 1981 about 66 diamond holes had been drilled. Assay results were sent to Bell, the Corona geologist, and to the Corona office in Vancouver. Some of the results were communicated to the Vancouver Stock Exchange and were published in news releases and in the George Cross newsletter, a daily newsletter published in Vancouver. Pegg, a geologist employed by Lac Minerals Ltd. (Lac), a senior mining company listed on a number of stock exchanges, read about Corona's exploration programme and arranged a site visit which took place on 6 May 1981. Pegg and Sheehan, a Lac geologist, were shown core sections and logs with assay results. On 8 May Sheehan and Bell met, and with the agreement of Bell, Lac started to stake a number of claims to the east of the Corona property. Two other areas which Corona was making active efforts to acquire were discussed at that meeting: the Williams property, an area of approximately 400 acres contiguous to and to the west of the Corona property, and the Hughes property, an area surrounding both the Corona and Williams property. There was an exchange of correspondence in mid May concerning the possible formation of a joint venture between Corona and Lac to carry out exploration work in the area. On 30 June 1981 Bell and Dragovan from Corona met Sheehan and Allen, the president and chief executive officer of Lac, at Lac's offices in Toronto where a presentation was made to Lac of the results of Corona's exploration work to date, which disclosed a defined trend of potential mineralised ground extending to the north and west of the Corona property. After that meeting Corona and Lac embarked on a geochemical exploration of Corona's property. Meanwhile McKinnon, acting as Corona's agent in attempting to acquire an option on the Williams property, telephoned the owner and made an oral offer to her on 3 June 1981 to option her property. This offer was subsequently reduced to writing in the name of Hemglo Resources Ltd on 12 June 1981. On 3 July 1981 Sheehan made an oral offer on behalf of Lac which he subsequently reduced to writing by letter dated 6 July 1981. When McKinnon became aware of a competing offer he informed Bell and Corona made its own offer on 23 July 1981. Mrs. Williams rejected the Hemglo and Corona offers and

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1 (1986) 25 DLR 504.

after some negotiation with Lac its offer was accepted on 28 July 1981. At the time of the hearing there were producing gold mines located on both the Corona and Williams properties. Corona brought these proceedings in the High Court of Ontario alleging that in the course of dealings between the parties Corona took Lac into its confidence and that the parties entered into negotiations for a joint venture with the result that a fiduciary relationship was created between the parties, imposing on Lac a duty not to act to the detriment of Corona; that there was an agreement between the parties and that in breach of its duty and in breach of the agreement Lac acquired the Williams property for its own use. Corona claimed that Lac held the Williams property in trust for Corona and claimed damages as well.

THE ISSUES

Holland J. held that the parties had not entered into a binding agreement on 8 May 1981; the most that could be said about their relationship was that the parties had come to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement. In those circumstances the court had to determine the nature of the obligations imposed on each party, looking at industry practice, and the obligations imposed on recipients of confidential information and fiduciaries.

Industry Practice

Having considered the evidence of the geologist experts called by both parties, Holland J. concluded that the site visit and the information disclosed by Corona to Lac was of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to acquire the Williams property. The court therefore had to decide two questions: was there an accepted practice in the mining industry which by itself imposed any restrictions on a visitor following a site visit, and did any accepted industry practice impose fiduciary obligations on parties negotiating a joint venture?

In relation to the first question, Corona's experts agreed that it was standard in the industry that a site visit would impose an obligation on a visitor not to acquire any surrounding property without the permission of the host. Lac's experts disagreed. In view of the divergence of opinion Holland J. held that Corona had failed to discharge its burden of establishing such a generally accepted industry practice, applying the test stated by Ungoed-Thomas J. in *Cunliffe-Owen v. Teather & Greenwood*[2]

> For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.

2 [1967] 1 WLR 1421, 1438.

> The burden lies on those alleging 'usage' to establish it . . .
>
> The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion, of even the most highly qualified expert, as to what it is desirable that the practice should be. However, evidence of those versed in a market — so it seems to me — may be admissible and valuable in identifying those features of any transaction that attracts usage . . .

On the second question, Holland J. concluded that there was a practice in the mining industry that while the parties were seriously and honestly engaged in negotiating a deal that each party would have a duty to the other not to act to the detriment of the other.

Breach of Confidence

The requirements considered by Holland J. to establish whether there was liability for breach of confidence were those stated by Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*:[3]

(i) The information must have the necessary quality of confidence;
(ii) It must have been imparted in circumstances importing an obligation of confidence; and
(iii) There must have been an unauthorised use to the detriment of the plaintiff.

(i) Did the information have the necessary quality of confidence?

Lac was not told by Corona that the information given was confidential. Applying the test in *Coco v. A. N. Clark (Engineers) Ltd.* that is 'whether the circumstances were such that a reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence.' Holland J. concluded that the information received by Lac on 6 May and 30 June 1981 was confidential. The nature of the information, a full disclosure of Corona's drilling programme by way of a site visit and a management presentation; the fact that all of the information provided was prepared by Corona itself; and the fact that while Corona had been attempting to attract investors and had published drill hole results, much of the information provided was private and had never been published, sufficed to give the information provided the necessary character. On the first point, the case was held by Holland J. to be similar to *Surveys & Mining Ltd. v. Morrison*[4] where the information disclosed consisted of the results of a drilling programme. *Surveys & Mining Ltd. v. Morrison* was also relevant on the third point: information which requires protection must not be something which is public property or widely known to the public.[5] In both *Surveys & Mining Ltd. v. Morrison* and *International Corona Resources Ltd. v. Lac Minerals Ltd.* some information had been disclosed to Stock Exchanges and to newspapers; in both cases, however, it

3 [1969] RPC 41, 47.
4 [1969] Qd. R. 470
5 *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948) 65 RPC 203.

was held that not all the information disclosed to the recipient had been so disclosed, and that that information was of the necessary character. There appear to be few limits to the type of information which can be protected by a claim for breach of confidence. Information of a commercial or industrial nature has been regarded by the courts as confidential if it is not generally publicly available;[6] certainly the results of exploration activity would be so regarded in Australia on the authority of *Surveys & Mining Ltd. v. Morrison.*

(ii) Did the circumstances impose an obligation of confidence?

Holland J. held that while there was no mention of confidentiality at the site visit on 6 May 1981, the information had been transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and was communicated in circumstances giving rise to an obligation of confidence.

In circumstances where there is no contractual or other special relationship, such as a fiduciary relationship or employer/employee relationship, the test applied by Australian courts in determining whether or not the recipient of confidential information is obliged to keep the information confidential is whether or not the information was disclosed for a limited purpose: *Interfirm Comparison (Australia) Pty. Ltd. v. Law Society of New South Wales;*[7] *Castrol Australia Pty. Ltd. v. Emtech Associates Pty.Ltd.*[8] If the information has been disclosed for a limited purpose the recipient of that information can be restrained from using the information for an extraneous purpose. Despite the comments of Fullagar J. in *Deta Nominees Pty. Ltd. v. Viscount Plastic Products Pty. Ltd,*[9] the Australian cases seem to suggest that the standard is an objective one — that is, whether a reasonable man standing in the shoes of the recipient of the information would realise that the information was being given to him in confidence : *Castrol Australia Pty. Ltd. v. Emtech Associates Pty. Ltd.; Mense v. Milenkovic.*[10] The purpose for which this information was being imparted by Corona was to assist in the process of negotiation of the joint venture, and not to enable Lac to take up the claims on its own behalf — the situation was, like that in *Coco v. A. N. Clark (Engineers) Ltd.* involving negotiations between an inventor and a manufacturer, 'redolent of trust and confidence'.[11] The equitable action for breach of confidence arises independently of any contractual obligation or common law proprietary rights in secret information. It therefore does not matter in this situation whether the relationship between parties negotiating towards a joint venture or some other business relationship can be characterised as being a fiduciary relationship. If the relationship between parties negotiating towards a joint venture is, however, a fiduciary relationship, the process

6 F. Gurry *Breach of Confidence* Clarendon Press 1984, 93.
7 [1977] RPC 137.
8 (1981) 33 ALR 31.
9 [1979] VR 167.
10 [1973] VR 784.
11 [1969] RPC 41, 51.

will be much simpler, obligations of confidence being imposed by the relationship itself.

(iii) Was there unauthorised use of the information to the detriment of Corona?

Holland J. held that Lac had not been authorised by Corona to bid on the Williams property, and that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona. The question of whether the use of the information was unauthorised will always be a question of fact; there is some doubt, however, whether it is also necessary to establish detriment to the discloser of the information. Meagher, Gummow & Lehane[12] argue that conceptually this action should be no different to claims for breach of fiduciary duty where it is not necessary to establish detriment. There is, however, High Court authority to suggest that detriment is necessary : *Commonwealth v. John Fairfax & Sons Ltd.*[13] That case concerned the publication of public or governmental secrets and the position may be otherwise where commercially valuable information is involved. While in most cases there will be some detriment to the plaintiff, the point may be important where the plaintiff is seeking an accounting for profits made by the defendant in circumstances where it has itself suffered no detriment.

Fiduciary Relationship

An alternative basis of liability in *International Corona Resources Ltd. v. Lac Minerals Ltd.* was that of breach of fiduciary duty: Holland J. held that Lac and Corona owed fiduciary duties to each other to act fairly and not to act to the detriment of each other and that Lac was in breach of that duty by acquiring the Williams property. The duties arose because the parties were negotiating towards a joint venture or some other business relationship. Holland J. based this conclusion on two steps: first, that a fiduciary duty exists between partners and joint venturers, and secondly, that that duty extends to intending partners, and on the authority of, *inter alia, United Dominion Corp. Ltd. v. Brian Pty. Ltd,*[14] to intending joint venturers. This raises two questions for the Australian lawyer. First, are fiduciary duties owed between participants in a joint venture, as the Australian mining and petroleum industry understands that term; and secondly, are fiduciary duties owed between intending joint venturers? Holland J.'s reliance on *U.D.C. Ltd. v. Brian Pty. Ltd.* as authority for the proposition that a fiduciary relationship may arise between intending joint venturers is questionable, that case establishing that the relationship which the parties labelled a 'joint venture' was in substance a partnership, formed for a single transaction, and that fiduciary duties were owed by the intending partners where the necessary relationship of mutual trust and confidence had arisen even before the formal agreement was executed.

12 *Equity — Doctrines and Remedies* 2nd. ed. Butterworths, 1984, 828.
13 (1980) 147 CLR 39.
14 (1985) 60 ALR 741.

Notwithstanding the *obiter* comments of Dawson J.[15] that the distinction between a partnership and a joint venture is, for practical purposes, 'the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants', there is as yet no explicit recognition by an Australian court that participants in a joint venture as it is understood by the mining and petroleum industry owe fiduciary duties. In the absence of such judicial recognition it is therefore necessary to go back to the basic principles to establish whether fiduciary duties are owed between joint venturers and intending joint venturers. This depends on analysing the nature of the relationship, to establish whether the relationship has those qualities of mutual confidence which are at the heart of the fiduciary relationship, rather than characterising the relationship as being, *e.g.* agency, partnership, or joint venture: *Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd.*[16]

> Such a characterisation is irrelevant to the question whether or not one or more parties to a relationship is subject to fiduciary duties. These flow, not from the formal legal status of the parties, but from what they are doing and have agreed or undertaken to do. A joint adventurer is not a fiduciary simply because he is a joint adventurer. Rather he becomes a fiduciary if, and to the extent that, in the joint venture he assumes functions, is involved in actions, which attract fiduciary, responsibilities. Furthermore it is clear that fiduciary duties can be imposed notwithstanding that the parties have not yet committed themselves to some legal relationship. The duty of confidence, for example, can protect information disclosed during negotiations for a venture — and can continue to do so despite the failure of those negotiations.[17]

The courts are generally reluctant to impose equitable obligations of a fiduciary nature on arrangements of a purely commercial kind where the parties are dealing at arms' length and on an equal footing, preferring to base liability for misuse of position or information on a breach of contract: *Hospital Products Ltd. v. United States Surgical Corporation.*[18] For the reasons suggested by Finn[19] the relationship between participants in a joint venture may well not be characterised in that way. Even if the courts do classify joint venturers as purely commercial arrangements of that type, the parties to a joint venture are in a position to protect their interests by including provisions relating to confidentiality[20] in the joint venture agreement. Breach of such provisions would give rise to liability in contract as was the case in *Hospital Products Ltd. v. United States Surgical Corporation.*

For intending joint venturers, however, where there is as yet no contractual relationship, the imposition of fiduciary obligations may be able to fill the gap. *U.D.C. Ltd. v. Brian Pty. Ltd.* clearly established that

15 *Ibid.* 750.
16 (1929) 42 CLR 384.
17 P. D. Finn 'Fiduciary Obligations of Operators and Co-venturers in Natural Resources Joint Ventures' [1984] *AMPLA Yearbook*, 161.
18 (1984) 55 ALR 417.
19 Finn *op.cit.* 162.
20 Such as those outlined in J. N. Gallimore 'Commentary on Fiduciary Obligations of Operators and Co-venturers in Natural Resources Joint Ventures' [1984] *AMPLA Yearbook* 183–186.

fiduciary obligations can arise before the contract is executed. While the comments of Mason, Brennan and Deane JJ.[21] and Dawson J.[22] appear to be limited to circumstances where the parties have embarked on the partnership business or venture before the precise terms of any partnership agreement have been settled the principle may be extended to the situation in which Corona was placed, needing to disclose sufficient information to enable Lac to make a decision to commit itself to a joint venture and in doing so running the risk of that information being misused. Certainly Corona was not dealing on an equal footing with Lac. It may well be appropriate to characterise the relationship as it then existed as requiring the imposition of at least the fiduciary obligation to refrain from taking unfair advantage of information received in confidence.[23]

THE REMEDY

Holland J. relied on *Guerin v. The Queen*[24] in which Wilson J. adopted the reasoning of Street J. in *Re Dawson; Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd.*[25]

> The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage. . . .
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> The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract . . . Moreover, the distinction between common law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he has deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he has deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he has deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before.

Applying that reasoning, Holland J. ordered that Lac return the Williams property to Corona since by its actions it had deprived Corona of the opportunity of obtaining the property.

Section 37(1) of the Conveyancing and Law of Property Act, R.S.O. 1980, c.90, provided as follows:

> Where a person makes lasting improvements on land under the belief that it is his own, he or his assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the

21 (1985) 60 ALR 741, 747- 748.
22 *Ibid.* 750–751.
23 Discussed by Finn *op. cit.* 160–167.
24 [1984] 2 SCR 335, 13 DLR (4th) 321.
25 (1966) 84 WN (Pt. 1) (NSW) 399, 404–406.

> court is of the opinion or requires that this should be done, according as may under all the circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

Applying that section Holland J. held that Lac was entitled to a lien on the property. Lac had spent some $203 978 000 on the property, including the cost of establishing a mill and mine on the property. Corona had constructed its own mill and mine on its property, at a cost in excess of $85 000 000. The total expenditure on capital improvements by both parties was therefore approximately $290 000 000. Had Corona developed both properties together it would have expended about $240 000 000. Deducting $50 000 000 from Lac's actual expenditure Holland J. ordered Corona to pay Lac $153 978 000 in return for the transfer of the Williams property, together with all sums paid to Mrs. Williams, with the exception of royalties, under Lac's contract with her dated 28 August 1981. Holland J. also calculated damages, being $700 000 000 assessed on the gain to Lac rather than on the loss suffered by Corona, in case some other court should decide that damages be awarded instead of the return of the property.

How would an Australian court approach the question of the appropriate remedy? It is important to note that the order for the return of the property was expressed by Holland J. to be the appropriate remedy for breach of fiduciary duty; no express consideration was given to the appropriate remedy for breach of confidence. In an action for breach of confidence the available remedies seem to be an injunction:[26] *Potters-Ballotini v. Weston Baker,*[27] *Harrison v. Project & Design Co. (Redcar) Ltd.*[28]; an accounting for profits, although rarely, given the difficulty in taking an account: *Peter Pan Manufacturing Corporation v. Corsets Silhouette Ltd*;[29] delivery up of documents or chattels: *Franklin v. Giddins*;[30] or damages (not concurrently with an account of profits): *Seager v. Copydex,*[31] *Talbot Ltd. v. General Television Corporation Pty. Ltd.*[32] While it is not at all clear on what doctrinal basis the courts award damages for breach of confidence,[33] the remedy certainly seems to be available.

If the claim is based on breach of fiduciary duty, a further remedy is available: the defendant may be held to account as a constructive trustee in respect of the acquisition by him of property in breach of his duty. That remedy has Australian support in *Timber Engineering Co. Pty. Ltd. v. Anderson,*[34] *Mansard Developments Pty. Ltd. v. Tilley Consultants Pty. Ltd.*[35] and the decisions of Mason and Deane JJ. in *Hospital Products Ltd.*

26 If an injunction is sought consideration needs to be given to its duration; in some of the cases duration of the injunction has been limited to the period of time it would take the defendant to achieve the same result without the advantage of the plaintiff's information. See *Deta Nominees Pty. Ltd. v. Viscount Plastic Products Pty. Ltd.* [1979] VR 167; *Talbot v. General Television Corp. Pty. Ltd.* [1980] VR 224.

27 [1977] RPC 202.

28 [1978] FSR 81.

29 [1963] RPC 45.

30 [1978] Qd. R. 72.

31 [1967] RPC 349.

32 [1980] VR 224.

33 See discussion in J. Kearney *The Action for Breach of Confidence in Australia* (Legal Books Pty. Ltd.) 1985.

34 [1980] 2 NSWLR 488.

35 [1982] WAR 161.

v. United States Surgical Corporation, and American support in *Ohio Oil Co. v. Sharp*.[36] While there is no equivalent in Australian legislation of section 37(1) of the Conveyancing and Law of Property Act, that provision may simply restate the common law principle that the constructive trustee is entitled to due allowance for the time, energy, skill and financial contribution that he has expended or made: *Re Jarvis*.[37] The principle has been stated by Jacobs J. in *Palmer v. Monk*[38] as follows:

> The Court of Equity does not penalize a person dealing with a trustee in breach of trust; nor does it penalize a constructive trustee. It merely requires that such a trustee, or such a person, do equity; and equity, as I understand it, involves a restitution so that the beneficiary is in the same position as he or she would have been, if the transaction had not been effected or sought to be effected.

The Full Court of the Supreme Court of Western Australia applied that principle in *Mansard Developments Pty. Ltd. v. Tilley Consultants Pty. Ltd.* in holding that a company controlled by Bond, manager of the appellant, and Tilley, controller of the first respondent, a consulting engineer which contracted with the appellant for its property development, which acquired land within the area of the appellant's proposed project held that land as constructive trustee subject to a lien to secure the amount of its expenditure in acquiring the land and was entitled to an indemnity from the appellant for the purchase price actually paid and for interest payments under its mortgage.

CONCLUSION

International Corona Resources Ltd. v. Lac Minerals Ltd. is a decision of a single judge of the High Court of Ontario, from which an appeal has been lodged. Notwithstanding the fact that it is therefore of very limited authority as a precedent in any Australian court, the decision does raise several relevant questions for the Australian mining and petroleum industry. In holding that while there was no accepted industry practice which of itself imposed restrictions on a visitor following a site visit, there was an obligation imposed by industry practice on parties negotiating a joint venture that each party would not act to the detriment of the other, the case raises the question of the extent to which industry practice in Australia would impose any such restrictions or obligations. No answer to that question is possible in this paper, since it depends, in the words of Ungoed-Thomas J, on the 'evidence of those versed in the market'. Holland J'.s conclusion on the issue of the claim for breach of confidence would be equally possible in an Australian context; his conclusion on the question of whether fiduciary obligations are owed by intending joint venturers would also be possible, although the issue appears to be less certain in Australia than it appeared to be for Holland J. The remedy applied by Holland J. was but one of the available remedies, and while damages may have been a more appropriate remedy there does not appear to be any authority which would prevent an Australian court coming to a similar conclusion.

36 (1943) 135 F. 2d 303.
37 [1958] 1 WLR 815.
38 [1962] NSWLR 786, 790.