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# Breach of Confidence in the Mining Industry

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## Abstract

Breach of confidence is a legal action that recognises the economic value of information. It is relevant to the mining industry because it protects confidential information, including all manner of trade secrets. This article explains what is required to bring a successful breach of confidence action, by examining cases such as *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 and *Surveys & Mining Ltd v Morrison* [1967] VR 37, and describes how it applies to the mining industry.

## Introduction

Breach of confidence is a legal action that recognises the economic value of information. As the name would indicate, it provides some protection to the holder of valuable information, the value of which will be lost if the information becomes public. While the nineteenth century saw the development of breach of confidence through a number of cases which were heard in the English courts,<sup>1</sup> the modern law of breach of confidence can be said to have started in 1948 with the decision of the English Court of Appeal in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*.<sup>2</sup> The *Saltman Engineering* case is important because, prior to this, there was some argument that there must be a contract between the parties before liability for breach of confidence would exist. *Saltman Engineering* made it clear that breach of confidence is a distinct cause of action and liability exists quite separately from any other legal action.

## The different types of information covered by breach of confidence

The information may be conveyed orally or in writing. It may take many different forms. In the mining industry this would include, for example, diagrams of mine sites, graphs relating to prospective output, technical and conceptual drawings, photographs of ore bodies, designs of plant and equipment,

scientific data relating to the ore body. It would also include information that is not in material form, such as plans and ideas discussed in informal meetings between mining company employees, or between mining company employees and other parties. Here breach of confidence may be the only legal action available to protect the information.

There are four main classes of information covered by breach of confidence, although these may overlap to some extent.<sup>3</sup> The categories are personal information, such as marital secrets,<sup>4</sup> government information, such as tax office information or Cabinet discussions, artistic and literary secrets, such as the idea for a series of television programs,<sup>5</sup> and trade secrets.

## Trade secrets

This is the type of information that is of most relevance to the mining industry. Trade secrets ‘... consist of items or collections of information which, because of their inaccessibility to the rest of industry, confer a competitive

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<sup>1</sup> See, for example, *Prince Albert v Strange* (1849) 41 ER 1171, *Morison v Moat* (1851) 21 LJ Ch. 248.

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<sup>2</sup> (1948) 65 RPC 203. The facts of the case will be discussed in more detail later.

<sup>3</sup> The categories follow those set out by F. Gurry in his book *Breach of Confidence* (1998 reprint) Clarendon Press Oxford, 7-21 and Ch. V.

<sup>4</sup> Such as *Argyll v Argyll* [1967] 1 Ch. 302 which concerned the disclosure of marital secrets, i.e. the plaintiff's intimate affairs, following an acrimonious separation.

<sup>5</sup> This was the information at the centre of the dispute in *Talbot v General Television Corp Pty Ltd* [1980] VR 224.

advantage on the firm which possesses or uses them'.<sup>6</sup> Sometimes the confidential information may be the main asset of a business.

A wide range of information is covered. Technical secrets was the issue in the *Saltman Engineering Case*. Saltman Co, the plaintiff, had conceived the idea for some leather punches, and it asked another company to draw up plans for the punches. The second company instructed a third company, the defendant, to manufacture the dies in accordance with the plans provided by the second company. The defendant company then used the information to make leather punches for sale by themselves. The plaintiff was successful in a breach of confidence action. In *Ansell Rubber Co Ltd v Allied Rubber Industries Pty Ltd*<sup>7</sup> the court protected information relating to the design, construction and operation of a machine for manufacturing rubber gloves.

These two cases clearly indicate that protection will be given to information about new kinds of plant or equipment that are being used by a mining company, and even to information about new ways of using plant and equipment already in existence. In the same way protection will also be given to information about new or different ways of drilling, removing, storing, transporting, or processing ore.

Business secrets was the issue in *Rob v Green*.<sup>8</sup> The information concerned the customer list of the plaintiff's business. Although the information was available in public directories, the defendant was not allowed to take advantage of the labour undertaken by plaintiff in compiling the lists. *Surveys & Mining Ltd v Morrison*<sup>9</sup> was a case involving a geologist and a mining company. Confidential geological data had been made known to the geologist while he was employed as a consultant to the mining company. The geologist then rather hastily applied for certain mineral leases. In finding him liable for breach of confidence, the court inferred that it was the unauthorised use of the confidential information which led to those particular mining lease applications.

Other relevant information for the mining industry which may be subject to protection includes sources of supply, expansion plans, sales statistics and details contained in mining company contracts, for example on prices and costs.

## **The legal requirements in a breach of confidence action**

The plaintiff, the mining company, in a breach of confidence action must prove three things:<sup>10</sup>

### ***1. The information is confidential:***

There are varying degrees of secrecy and the requirement for confidentiality is not limited to information that is known only to the two parties involved. Material that is in the public domain, or common knowledge, cannot be protected, but in some circumstances information can remain confidential even if a number of people know about it. Thus if a large group of employees of a mining company are privy to the employer's trade secrets for the purpose of their employment, the confidentiality of the information is not necessarily lost. Once a product is in the marketplace, however, breach of confidence can do nothing to prevent what is known as 'reverse engineering'- the process of taking the product apart to determine its constituent parts. In addition once a new process, or way of doing things, for example a new method of transporting or processing ore or its byproducts, is publicised it is no longer confidential. It is arguable that such information contained in an "in-house" newsletter of the mining company might retain confidentiality, provided the newsletter had a strictly limited circulation, but publicity in any magazine with a wider audience would destroy this requirement.

### ***2. The information is communicated in confidence***

The person to whom the information is imparted must be aware that they are receiving it for 'a limited purpose'.<sup>11</sup> This may arise from a pre-existing relationship between the parties, for example from a contract. The contract may be commercial agreement, such as a joint venture, or it may be a contract of employment. In *Surveys & Mining Ltd v Morrison*, discussed above, Campbell J said that the relationship '... between a

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<sup>6</sup> F. Gurry, footnote 3 above, 7.

<sup>7</sup> [1967] VR 37.

<sup>8</sup> [1895] 2 QB 315.

<sup>9</sup> [1967] Qd R 470.

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<sup>10</sup> The three requirements were established by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

<sup>11</sup> See Gurry, footnote 3 above, 113-114.

consulting geologist and the mining company which employs him must necessarily be one of complete confidence'.<sup>12</sup>

Where there is no pre-existing legal relationship the test is whether the confidant was aware that the information was disclosed for 'a limited purpose'. These situations will include the case where one of the parties negotiating a contract, which does not eventuate, discloses confidential information. In *Coco v A N Clark (Engineers) Ltd*<sup>13</sup> the plaintiff had designed a moped engine and entered into negotiations with the defendant to manufacture the engine. The negotiations fell through, but the plaintiff claimed that the defendant used his design later on without his agreement. The court agreed that the circumstances were 'redolent of trust and confidence',<sup>14</sup> but the plaintiff lost the case because the design was not different enough from information already in the public domain to be categorised as confidential. In this sort of situation a mining company may enter negotiations which do not eventuate in a contract. During the negotiations information may be imparted which the mining company considers confidential, such as the particular specifications for plant and equipment or processing. The mining company may prevent the other party from using, or from passing on, this information providing it is suitably dissimilar from anything already in the public domain.

Certain difficulties arise where the confidential information comes into the hands of third parties. Where the third parties know that the information is confidential, they will be liable. An example is *Prince Albert v Strange* where the third party defendant publisher was liable.

In addition the third parties may be liable if they do not actually know the material is confidential, but they ought to know. In *Surveys & Mining Ltd v Morison* the associates of the defendant geologist, who were parties in the mineral lease applications, were also liable. The court fixed liability on the geologist's associates because it was found that they knew that the defendant geologist was a consultant to the plaintiff company. Even if they did not actually know the information was confidential, they should have had some suspicion of its origins. Another example of where this situation would arise

is when the third party receives information from the employee, or ex-employee, of a competitor. The third parties will be liable for any unauthorised use of the confidential information, whether they knew or ought to have known it was confidential, from the time they acquired it.

The problem area is where a third party receives information, innocent of the fact that it is confidential, particularly when the information is paid for. Here the innocent third parties will be liable from the time they become aware that the information is confidential, whether or not the information was paid for.<sup>15</sup> The innocent third parties may be given actual notice that the information is confidential, for example in the form of a writ for breach of confidence, or notice might be imputed to them from circumstances subsequent to acquisition.

### **3. There must be an unauthorised use of the information to the detriment of the plaintiff:**

There are some theoretical arguments that it is necessary for the plaintiff to show detriment.<sup>16</sup> In practice detriment may be shown by something as simple as hurt or embarrassment to the plaintiff. In *Prince Albert v Strange*,<sup>17</sup> the plaintiff won even though he suffered no material detriment. Detriment must, however, be shown in those cases where the government is the plaintiff,<sup>18</sup> and when any plaintiff can raise evidence of material detriment, such as loss of profits, it will have an effect on the remedy granted.

<sup>12</sup> [1967] Qd R 470, 473.

<sup>13</sup> [1969] RPC 41.

<sup>14</sup> *ibid*, 51, per Megarry J.

<sup>15</sup> *Fraser v Evans* [1969] 1 QB 349, per Lord Denning, 361. Note that this is in contrast to the situation where the third parties knew or ought to have known from the outset that the information was confidential; here liability arises from the time of acquisition.

<sup>16</sup> For discussion see Gurry, footnote 3 above, 407-408, and McKeough J. & Stewart A. 1997, *Intellectual Property in Australia*, Butterworths, Sydney, 4.13.

<sup>17</sup> *Prince Albert v Strange* (1849) 41 ER 1171. Queen Victoria and Prince Albert had made some etchings which they arranged to have printed for their personal use. Through an employee of the printer the etchings came into the hands of the defendant who proceeded to publish a catalogue containing the etchings. The court granted an injunction ordering the defendant not to publish the catalogue.

<sup>18</sup> *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39,40.

## Defences

### 1. *Just cause or excuse*

In certain circumstances the defendant may be able to escape liability by showing that the breach of confidence reveals an 'iniquity', such as fraudulent or criminal behaviour on the part of the plaintiff. In other words the disclosure is justified. As well as crimes and frauds, 'iniquity' includes 'any misconduct of such a nature that it ought in the public interest to be disclosed to others'.<sup>19</sup> Thus in a breach of confidence action with a mining company as plaintiff, the defendant, an employee for example, may claim that the confidential information was revealed because it showed that the mining company was endangering its employees or harming the environment. Even so, the 'public interest' requirement does have a limiting effect on the use of the defence.

The court will also take into account the nature of the disclosure, and to whom it was made - usually it should be made to 'one who has a proper interest to receive the information'.<sup>20</sup> Sometimes a wider disclosure will be acceptable, as occurred in *Lion Laboratories Ltd v Evans*.<sup>21</sup> In this case the defendants were ex-employees of the plaintiff company which manufactured the Intoximeter, a breath-testing device used by the British police. The plaintiff was unsuccessful in preventing the defendants from going to the press with information that government tests had found the Intoximeter to be unreliable. Because of the possibility that motorists might be wrongly convicted, and because the government seemed determined to support the device despite earlier media reports casting doubts on its efficiency, the English Court of Appeal found the disclosure to the media was, in the circumstances, justified.

### 2. *Legal compulsion*

A confidant may be obliged by law to divulge information. This may be the result of a provision in an act of parliament or by an order of the court. An example of the former is where banks are obliged to supply the Australian Tax Office with information relating to the income of depositors. An example of the latter is where the court orders a journalist to identify an anonymous source of information which becomes the subject of a legal dispute. The relationship between the journalist and

the source is one of confidence, the name of the source being the confidential information.



## Remedies

### 1. *Injunctions*

In many breach of confidence cases the plaintiff mining company may not be seeking monetary compensation, but would rather keep the information out of the public domain altogether. This may be achieved by an injunction which is a court order either restraining the defendant from doing something or compelling the defendant to do something. There are two types of injunction that may be obtained by the plaintiff, *interlocutory injunctions* and *final injunctions*.

Interlocutory injunctions operate to retain the status quo until the trial takes place. The plaintiff may wish to keep the confidential information, such as personal photographs, private. No amount of compensation would undo the harm suffered by the plaintiff if the defendant publishes the information and publication prior to the trial defeats the purpose of having a trial at all. An interlocutory injunction prevents the defendant from misusing the information prior to the trial for breach of confidence.

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<sup>19</sup> *Initial Services Ltd v Putterill* [1968] 1 QB 396, per Lord Denning MR, 405.

<sup>20</sup> *id.*

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<sup>21</sup> [1984] 2 All ER 417.

Final injunctions are only granted once the trial has taken place and the plaintiff has succeeded. The terms of the injunction vary in each case depending on the type of information and the nature of the defendants' activities. The duration of the final injunction will be assessed in the recognition that the information may eventually lose its confidential nature with the passage of time.

### ***2. Account of profits***

An account of profits is a remedy that strips the defendant of the profits made as a result of the infringement. If successful the plaintiff mining company may obtain both an injunction and an account of profits, but cannot have damages and an account of profits. The mining company has to make a choice based on whether damages or an account is the best outcome. Because of the difficulties associated with the remedy, not least of which is determining exactly how much profit, if any, the defendant made at the expense of the plaintiff, it is in fact little used.

### ***3. Damages***

Where there is a contract between the confider and confidant, damages are awarded for the breach of contract. Where there is no contract, the court seeks to return the plaintiff to the pre breach of confidence position. Damages may include past losses, future losses, loss of profits, or loss of royalty payments. Damages may also be awarded in addition to an injunction.

## **Conclusion**

Breach of confidence applies to the mining industry in many ways. Breach of confidence affects the relationship between the mining company and its employees, consultants, contractors, sub-contractors, suppliers of services and equipment. In the same way it affects the parties to a joint mining venture and licensing agreements. A wide range of information may be covered including, for example, promising geological survey results, discovery of minerals or hydrocarbons, ore treatment processes, equipment design, specifications in contracts of supply or service, and tender documents. Where the information is an idea rather than something in material form, breach of confidence may provide the only avenue of legal protection.

The usefulness to the mining industry of this relatively unknown legal action should not be underestimated. It has great potential to protect the economic worth of mining company information - and while information is secondary to the main focus of a mining company's operations, the seepage of confidential information with an intrinsic value will ultimately have an effect on competitiveness.