See paras. 240-241, 292

Indexed as:

Visagie v. TVX Gold Inc.

Between
Hendrik M. Visagie, David Lean and James Stephenson,
plaintiffs, and
TVX Gold Inc., defendants

[1998] O.J. No. 4032

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Feldman J.

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Joint ventures -- Relations between parties -- Fiduciary -- Confidence -- Duration and termination -- Damages -- Assessment -- Where amount of loss difficult to estimate or determine -- Equity -- Equitable principles respecting relief -- Clean hands doctrine -- Application of.

This was an action by Visagie, Lean and Stephenson against TVX Gold for damages for breach of fiduciary duty and confidentiality, and for breach of contract. The plaintiffs obtained a time-limited exclusive right to negotiate the purchase of mines controlled by the Greek government. They provided TVX with information about the property under protection of a confidentiality agreement. The parties then entered into a joint venture funding agreement to seek to acquire the mines together. TVX was to provide the funding and the plaintiffs were to receive a minority interest in the property. When TVX learned that the Greek government was not prepared to allow the mines to be sold privately, it terminated its obligations under the joint venture pursuant to the terms of the

agreement. TVX announced that it was the successful bidder for the mines under a public tender process. The plaintiffs claimed entitlement to the interest specified in the agreement.

HELD: Action allowed. TVX was in breach of its contractual obligations under the confidentiality agreement when it acquired the mines for itself and not for the joint venture, by using the confidential information it had received. It also owed a fiduciary duty to the plaintiffs due to their relationship under the joint venture to pursue the business opportunity using shared information, contacts, personnel and developed expertise as to the mines and dealing with the foreign government. A fiduciary duty arose once the plaintiffs became vulnerable to TVX by turning over the confidential information and agreeing to allow TVX to look after their joint interests. TVX also breached the duty of confidence owed to them, which arose once they disclosed information they had developed about the mines which they treated as confidential and did not make public at any relevant time. A restitutionary remedy rather than a monetary award was required given the uniqueness of the gold property and the insurmountable difficulties in assessing its value. The appropriate remedy was a constructive trust over the joint venture interest after payment of the contributory share, even though this would mean that the parties continued as partners in the joint venture. The plaintiffs actions of paying secret commissions and misrepresenting facts to government authorities did not disqualify them from obtaining an equitable remedy due to unclean hands given that some of the actions were outside the joint venture and that TVX benefitted from their conduct. Their failure to advise TVX of their claim to an interest in any bid for the mines did not bar any equitable remedy since each of the parties was acting under legal advice on termination of the joint venture.

Counsel:

Alan J. Lenczner, Q.C., Ronald G. Slaght, Q.C., Lawrence E. Thacker, for the plaintiffs.
Bruce A. Thomas, Q.C., Timothy Pinos, Julie Thorburn and Anne Kim, for the defendant.

FELDMAN J.:--

TABLE OF CONTENTS

A. SUMMARY
- i) Facts
- ii) Issues
- iii) Result
- iv) Remedy

B. FACTS
- i) Background of the Mine

ii) The Plaintiff's Original Involvement With The Mines: The Curragh Connection
iii) Pursuit of the Mine by the Alpha Group
iv) Mr. Visagie's Analysis of the Gold Deposits at Kassandra
v) Plaintiff's Steps to Conclude an Agreement with the Greek Authorities for the Purchase of the Mines
vi) Plaintiff's Steps to Acquire Financing for the Acquisition
vii) The Background of TVX
viii)Dealings Between the Plaintiffs and TVX
ix) The Joint Venture Funding Agreement Between Alpha and TVX
x) Pursuit of the Mine by TVX on Behalf of the Partnership
xi) Termination of the Joint Venture Funding Agreement by TVX
xii) The Purchase of the Kassandra Mines by TVX
xiii)Expert Evidence
1) Confidentiality Agreements
Conclusion No. 1
2) Did Alpha add anything new and if so anything of value to the already available information about Kassandra?
Conclusion No. 2
3) Did the Alpha information become public through the April 1994 Kassandra Mines and Olympias Gold Project Information Circular or the October 1994 Kassandra Mines Offering Memorandum or otherwise before TVX made its bid?
Conclusion No. 3
4) Did TVX use the Alpha information in its bid for the mines?
Conclusion No. 4
5) Is there an industry practice regarding one party bidding on a property after terminating a funding agreement for that property with the other?
Conclusion No. 5
C. ISSUES
i) The Legal Effect of the Fact That Much of Alpha's "Confidential Information" Originated at and Appeared to Belong to Curragh
ii) Did TVX Breach the Confidentiality Agreement by Using Confidential Information from Alpha When it Purchased the Mines?
a) Was Alpha's Information Confidential?

b) Use of the Confidential Information by TVX
iii) Breach of Duty of Confidence
iv) Breach of Fiduciary Duty
D. REMEDY
i) Restitution
ii) Damages
E. OTHER DEFENCES
i) Estoppel
ii) Clean Hands
F. COSTS
A. SUMMARY

i) Facts

1 TVX Gold Inc. is a public Canadian corporation and the owner of the Kassandra mines in northern Greece. The Kassandra mines are now known to contain one of the richest deposits of gold in the world and were estimated by one expert to have a value of U.S. $800,000,000. In the 1980's and early 1990's the Kassandra mines were a money-losing operation consisting primarily of lead and zinc mines with some production of refractory gold, that is, gold which is difficult to extract and separate from other metals. A Greek government corporation had developed extensive plans for a process and facility to extract the gold for sale but was unable to proceed with them for financial reasons.

2 In October, 1993 the plaintiffs provided detailed information to TVX about the property and its potential under the protection of a Confidentiality Agreement. The plaintiffs, who had secured a time-limited exclusive right to negotiate the purchase of the mines from the Greek liquidator, promoted the opportunity on the basis that the currently money-losing lead and zinc operation could be developed and exploited profitably as a gold mining operation.

3 On November 25, the parties entered into a joint venture funding agreement under which they would together seek to acquire the mines from the liquidator ultimately controlled by the Greek government. TVX was to provide the funding and the plaintiffs were to receive a 12% carried interest and the option to take up a further 12% participating interest in the operation once acquired.

4 Once the joint venture funding agreement was in place, as agreed by the parties, TVX took control of the negotiations with the Greek government and attempted to make an acceptable bid for the mines. However, the Greek government made it clear over the next few months that it was not in fact prepared to allow the mines to be sold privately but only through a public tender process and eventually so advised TVX officially. TVX then terminated its obligations under the joint venture funding agreement with the plaintiffs, as it was entitled to do under its terms.

5 TVX proceeded to bid for the mines on its own account in the tender process, and was

successful. It ultimately paid U.S. $47,000,000 for the Kassandra mines.

6 When it was announced that TVX was the successful bidder for the mines, the plaintiffs came forward and claimed their 12% carried interest and the right to purchase a further 12% participating interest. In response, TVX denied that the plaintiffs had any interest in the mines. The plaintiffs sued for a declaration that TVX breached its fiduciary duty and duty of confidence to them as well as the Confidentiality Agreement and claimed as their remedy that TVX holds the entire mine as constructive trustee for them subject to reimbursement of TVX's investment to date.

ii) Issues

7 The issues for the court to decide in this case are:

1) Was the defendant, TVX Gold Inc., entitled to acquire the mines for its own account after terminating the joint venture funding agreement?
2) If not, what is the appropriate remedy for the plaintiffs?

iii) Result

7a

1) The defendant was not entitled to acquire the mines for its own account.
2) The defendant was in breach of its contractual obligations under the Confidentiality Agreement when it acquired the mines for itself and not on behalf of the joint venture, using confidential information which it received from the plaintiffs.
3) The defendant owed a fiduciary duty to the plaintiffs as a result of their relationship as joint venturers in respect of the acquisition of the Kassandra mines, a business opportunity pursued by them jointly pursuant to the joint venture funding agreement, using shared information, contacts, personnel and developed expertise on the mines and on dealing with the Greek government. The defendant's fiduciary duty to the plaintiffs not to pursue the mine except for their joint benefit survived the termination of the joint venture funding agreement.
4) The defendant breached its duty of confidence owed to the plaintiffs as a result of the disclosure by the plaintiffs of all of their information about the mines to the defendant. The plaintiff Visagie had developed credible theories respecting the potential gold reserves on the property and about how to exploit them profitably which theories were confidential to the plaintiffs and those to whom they disclosed the information and never made public at any relevant time.

[The Court did not number this paragraph. QL has assigned the number 7a.]

iv) Remedy

8 The appropriate remedy is that the plaintiffs are entitled to a 12% carried interest and having purported to exercise their option, a further 12% participating interest in the mines upon payment of the costs associated with that interest. Such interests are therefore held by TVX as constructive trustee for the plaintiffs.

9 Because of the nature of the fiduciary relationship between the parties which developed out of a joint venture where each had the duty to act in the best interests of the joint venture, as opposed to a trustee or agency relationship where the duty is to act in the best interests of the beneficiary or principal, any acquisition of the target property in breach of duty or in breach of their agreements is an acquisition in trust for the joint venture and owned in accordance with the ownership interests in the joint venture. Therefore the plaintiffs are not entitled to a remedy of constructive trust over the entire property, but are limited to their 12% carried and 12% participating interest in the mine.

B. FACTS

i) Background of the Mine

10 The Kassandra mines are located in the north of Greece near Thessaloniki in an area of the country with a history of mining going back many centuries. They were owned by a Greek company, The Hellenic Chemical Products & Fertilizers Co. S.A. (Hellenic), financed by the National Bank of Greece and ETBA, a Greek industrial bank.

11 The Kassandra property consisted of a number of mining concessions on which three mines and processing plants were operating in 1990. The older two mines, Madem Lakkos and Mavres Petres, began modern operations in 1953 and produced mixed sulphide ore which was processed at the adjacent Stratoni mill to produce lead and zinc concentrates. The Olympias mine and mill were opened in 1976. They also produced lead and zinc concentrates as well as pyrite concentrate. The pyrite concentrate contained arseno-pyrite which itself contained refractory gold, that is gold which is very difficult to separate from the other elements, in particular in this case, from the toxic arsenic. Special plants and processing methods were required in order to extract the gold at all and even more specialized plants and methods were needed to do so in an environmentally safe manner. As Hellenic was unable to extract the gold, it could only sell the pyrite concentrate in large batches from time to time to certain companies outside Greece which had the capability to process it.

12 Around 1985 Hellenic began to stockpile the pyrite concentrate and in 1987 it entered into an agreement with another Greek government company, METBA, wherein Hellenic agreed to supply the 140,000 tonnes of stockpiled concentrate in 1990 together with further production of 100,000 tonnes of concentrate per year up to 1999 plus additional quantities on request.

13 METBA (Aegean Metallurgical Industries (Metba) S.A.) was a Greek public sector company formed in 1980 to implement the decision of the Greek government of the time to erect a metallurgical complex in the area of the mines to process lead, zinc, sulphuric acid, phosphoric acid

and gold and silver. Eventually it was determined that the first project should be treatment of the Olympias pyrites for recovery of gold. METBA engaged consultants to study 12 methods of extracting refractory gold from the Olympias pyrite concentrates, ultimately focusing on three methods, roasting, bio-leaching (or bio-oxidation) and pressure oxidation. METBA engaged Sherritt Gordon to develop and design a plant on the basis of its chosen method to extract the gold known as pressure oxidation. It also entered into the contract with Hellenic to purchase the stockpiled pyrite concentrate as well as the ongoing production. In total METBA spent approximately U.S. $7,000,000 on the gold plant research.

14 However, METBA ran into problems and was unable to proceed with the gold plant project. The problems included inability to secure a site for the plant because of local opposition and loss of government support for continued funding. METBA was put into liquidation in 1991 and the liquidator attempted to sell the company internationally through Kidder Peabody in the fall of that year.

15 In its offering memorandum, Kidder Peabody suggested that the market for the gold recovered from the plant would be Greece itself, that is there was no concept of large quantities of gold to be sold on the international market. Although several qualified companies looked at the project, there were no bids. In fact TVX was one of the companies to whom the Kidder Peabody Memorandum was sent out. Because of the liquidation of METBA, the contract with Hellenic tying up the stockpile and output of the Olympias pyrite concentrate containing the gold, was terminated.

16 Hellenic itself was consistently operating the Kassandra mines at a loss which by the fall of 1993 was estimated at U.S. $1.2 million per month. Mining machinery, equipment and operations at the two older mines were very out of date and needed updating and replacement. Production levels at all three mines were low for several reasons and there were significant labour problems and costs associated with the mines. No gold from the property was being exploited.

17 In 1990 Hellenic retained Citibank with which it did business in Greece, to assist it in determining what direction to go with its lead and zinc mines at Kassandra. Citibank called in people from their New York office to do a valuation. One of those people was John Hammes, a very well qualified mining engineer and as he described himself, a mining businessman. At the relevant time he was a senior banker with Citibank dealing particularly with the bank's activities in investment banking in the mining industry. He is now retired from Citibank and was called as a witness at the trial by TVX. He visited the mines at that time and had discussions with people there about the operations. He also had operating reports on production, costs, material on exploration, material on reserves that was prepared, maps as well as general information on the company.

18 Based on all of that information a valuation of the mines was prepared. It was not, however, produced at the trial and there was no evidence of what the valuation was nor whether it took account of the gold potential of the property.

19 Citibank was then asked to prepare an offering memorandum to try to sell the company and

Mr. Hammes was also involved in the preparation of that document dated May, 1991 and which was a key exhibit at the trial.

20 Mr. Hammes' exposure to and information on the company are important because one of the key issues in the trial was whether the information that the plaintiff brought to TVX was confidential, proprietary information. The defendant claims that the plaintiffs' information consisted of publicly available documents and conclusions about the potential of the property which would be obvious to any experienced mining person.

21 Interestingly, armed with the information he had learned at the mine as well as his own expertise, Mr. Hammes had used the mine as a working example of how to do a mine valuation at the American Mining Congress annual spring finance seminar in April 1991. There he says he encouraged those in attendance to look at the potential for gold production and the possibility of a large copper deposit at Kassandra. I inferred from his evidence that although these potentials were identified by or to Citibank at the time, it made no attempt itself to identify or quantify possible new reserves of either mineral on the property. Mr. Hammes confirmed in his testimony that he was not able to find any results of exploration with respect to copper or gold deposits in the area that would enable him to put on tonnage or grade estimates.

22 In the Citibank Offering Memorandum itself, the property was presented as a lead and zinc operation with gold as an added attraction with the potential for further development.

23 The specific references to gold were identified by Mr. Hammes in his testimony. The "Introduction to the Executive Summary" identifies the stockpile of gold-bearing pyrite and the fact that it had been tied up until recently by a Greek state-owned entity (METBA). It goes onto say:

> This entity has been unable to secure a site for a gold refinery and Kassandra is now free to find other purchasers for the 170 thousand tonnes of stockpiled Olympias pyrite as well as ongoing production.

There is elaboration on the history with METBA including a statement that the average gold in the concentrate is 22 grams/tonne. The Memorandum goes on to say that "in management's opinion Kassandra could easily sell the gold-bearing pyrite on the open market." The basis for this representation attributed by Citibank to management is unclear as the evidence was that Hellenic was not easily selling the pyrite on the market on any regular basis up to 1985 before it began stockpiling, because there were few companies which had the proper facilities to extract the gold or deal with the arsenic. It is worthy of note that the Offering Memorandum does not suggest exploitation of the gold potential of the property by building a gold extraction facility or the possibility that METBA's work could be pursued.

24 The Memorandum later describes the Olympias ore body and says that "by-product silver ranges from 130-140 grams per tonne, and gold assays range from 5-10 grams per tonne at the Olympias deposit." Under "Exploration and Ore Reserves", the Memorandum says that Olympias

was discovered in 1969 and "exploration is still continuing to define the deeper extensions of the ore body ... The Olympias deposit contains substantial gold values in a refractory ore." On the next page under "Reserve Calculations" it states: "In addition to the large reserve at Olympias, a well-funded exploration program should find other new ore-bodies on the concessions." There is then a chart of estimated reserves showing ore grades including the grade for gold. When a calculation is done, this chart shows three to four million ounces of gold in the existing reserves. There is no mention at all in the document of gold in tailings, in porphyry copper deposits on the property or in the concessions that did not contain operating mines but which had been explored to some extent including Skouries, Fisoka, Piavitza and Mpachtsina (Baxina). Nor does the memorandum attempt to project and quantify the gold in the deeper extensions referred to. The focus of the Memorandum is on lead and zinc mining, reserves, prices and markets.

25 Mr. Hammes testified that the document was only a "teaser" to interest large qualified mining companies to go and look at the property for themselves and come to their own conclusions about its potential. He said that when he spoke to such parties he suggested the potential more directly. For example, he testified that he spoke to people in New York from a large mining company called BHP (Broken Hill Properties) about Kassandra. He told them that Kassandra was an old lead zinc mine that needed substantial refurbishing and a great deal of money spent and that the exploration potential had not been adequately looked at including for the refractory gold. He said he told them about the estimated reserves of three to four million ounces but that "looking at the geology and structure one would expect substantial extensions, but that these were not extensions which, using accepted reserve criteria, Citibank felt could be put into a volume like this." In other words, as a salesman for the company Mr. Hammes was suggesting to prospective buyers the potential that was there without making any firm representations. From his evidence it was clear that he did not have any figures to offer on gold potential, even had Citibank been prepared to suggest possible figures to interested parties.

26 Citibank was retained first by Hellenic to try to sell the mines and issued its Offering Memorandum in May, 1991. However, in mid-1992, Hellenic went into receivership under the liquidator, Ethniki Kephaleou. Citibank continued to try to sell the property for the liquidator and a tender process was then embarked upon in accordance with Greek law dealing with this liquidation.

ii) The Plaintiffs' Original Involvement With The Mines: The Curragh Connection

27 Mr. Lean was a metals trader who worked for Boliden Inc., a Swedish mining and smelting company in 1985. In that year he purchased 200,000 tonnes of arseno-pyrite concentrate from Kassandra as Boliden was one company which was able to process the concentrate to retrieve the gold. In 1989 Mr. Lean left Boliden to set up a trading operation for Curragh Resources Inc., a major Canadian based lead and zinc company.

28 Mr. Visagie is a geologist and M.B.A. who had worked with a number of resource companies

before joining Curragh Resources in 1986 as executive assistant to the Chairman. Before that he had worked for Dome Petroleum where the main thrust of his work was the evaluation of mineral properties.

29 In 1991, Mr. Lean suggested to Mr. Visagie that the Kassandra mines were for sale and that this represented a marketing opportunity for Curragh in respect of trading in concentrates. Shortly thereafter Mr. Visagie obtained and reviewed the Citibank Offering Memorandum, then he made three trips to Greece to investigate the mines. At that time he understood that the opportunity was to purchase a lead and zinc mine. He saw the references to gold in the Memorandum but did not note much about them. He did note that based on the figures in the Memorandum for annual pyrite production and its gold content, Olympias was producing 26,000 ounces of gold per year which he said was not a sizeable amount of gold for a gold mining company.

30 Mr. Visagie went first in July 1991 with Mr. Lean to the mine site for two and one half days, and recommended that further investigation be done. Then in August he returned with two consultants hired by Curragh, one from Hillsborough Resources Limited and one from Kilborn Inc.

31 In August 1991, Mr. Visagie prepared a written report in the form of an overhead presentation and recommendation to Curragh proposing immediate purchase of the mines. He listed methods to improve production including introducing the use of jumbo drills into the existing operation, laying off a significant number of workers and making a large capital investment in the operating mines. As part of the "basic operation" of the mines, he identifies both the current operation and the gold recovery project. As upside he refers to copper at Skouries and at Madem Lakkos. He also identifies gold diversification at Skouries and Madem Lakkos. In his comments under the heading "Deal Consideration", Mr. Visagie wrote:

> At present prices and operating practices, Kassandra is losing money. Unless gold recovery project is undertaken, Olympias mine is uneconomic.

His memorandum also identifies requirements to close a deal including confirmation of the viability of the gold leach process for extracting the gold from the pyrite concentrate. (Bio-leaching was the other viable method for refractory gold extraction using bacteria. Mr. Visagie favoured this method over the method chosen by METBA and Sherritt Gordon, of pressure oxidation. The third alternative of roasting was environmentally unacceptable.)

32 Finally under the heading "Timing", Mr. Visagie noted that "Cominco, BHP, Marc Rich and Billiton have visited the site. To date, interest is focused on the recovery of gold." In his testimony, Mr. Visagie said that he got that information from Mr. Tsilibaris, the Citibank representative in Greece. He also noted in his memorandum under "Timing" that "lead and zinc prices are soft but could change rapidly due to low inventories and the impending U.S. economic recovery." His recommendation was to negotiate and pay for a 90 day option during which time Curragh would do normal due diligence, undertake gold leach recovery pilot plant design, labour rationalization, marketing plans and application for government approvals. Mr. Visagie confirmed in

cross-examination that at the then current prices (1991), gold recovery was necessary to make the acquisition economic.

33 Mr. Visagie had received numerous documents from the mine as well as the Kilborn and Hillsborough reports, and he clearly used these in making his recommendations. The Kilborn report of August 1991 discussed the concepts of cutting staff and increasing production in all three mills, and in particular increasing production of the pyrite concentrate at Olympias and proceeding with a pressure oxidation plant or possibly a bio-oxidation plant to recover the gold. The Hillsborough notes of August 1991 suggest the use of jumbo drills and improved ground support plus manpower reduction.

34 Although Curragh did not make any bid for the mines at that time, the company maintained its interest in pursuing the purchase, and documents in the trial brief show that Curragh was in communication with Hellenic in January 1992 with respect to a forthcoming offer.

35 In January 1992 Mr. Visagie prepared a project evaluation of the Kassandra mines for Curragh. This document was produced late in the trial by subpoena to Anvil Range, a company which purchased a mine from Curragh in 1993 and apparently received with it certain files regarding Mr. Visagie including employment documentation and two bound reports on Kassandra which he had prepared, one in July 1991 and one in January 1992. Because these were delivered after Mr. Visagie had completed his testimony, he did not speak to these documents. However, they show the continuity of Curragh's interest in Kassandra and Mr. Visagie's involvement in evaluating and investigating it for Curragh.

36 In February, 1992, Mr. Visagie did some further analysis of the copper gold porphyry at the Skouries area of Kassandra. His academic interest had been copper porphyry. He sent a further memorandum to the Chairman of Curragh showing a favourable comparison of Skouries with other similar properties in terms of its gold and copper values. He also expressed the opinion that the current reserves there were only "the tip of the iceberg".

37 In March 1992 Mr. Visagie left the employ of Curragh and became a part-time consultant to the company initially for six months, then renewed in November 1992 until May 1993. In 1989 Mr. Visagie had signed a very broadly-worded confidentiality agreement with Curragh which included an obligation of non-disclosure not only for information he acquired while employed but also for information he developed while employed. By its terms the agreement remained in effect after the termination of his employment. In March 1992, his resignation agreement reiterated his responsibility to protect the private and confidential information of the company. Although that agreement speaks of leaving all company records behind, Mr. Visagie was permitted to retain certain documents in respect of the Kassandra mines including the Kilborn document and the Citibank Offering Memorandum.

38 In March 1992, after Mr. Visagie left the company as an employee, Curragh did submit a bid for Kassandra then withdrew it.

39 In the summer of 1992, while working as a consultant, Mr. Visagie made another trip to Kassandra to compare the Skouries copper gold-deposit with one in Mexico which he had reviewed for Curragh. In his report Mr. Visagie concluded that Skouries was economic and a hidden asset of Kassandra.

40 In August 1992, the liquidator of Kassandra issued an invitation for tender in respect of Kassandra with tenders to be received by September 25, 1992. The only bid was from Curragh but it was rejected because it was not in the form required by the bid documents. Throughout the summer and early fall of 1992 Mr. Visagie worked on the Kassandra project for Curragh and Curragh continued to pursue discussions with the liquidator throughout that period and into 1993. Mr. Visagie had some further involvement for Curragh in early 1993 but was also doing other work for Curragh during his last 6 months ending in early June, 1993.

41 Beginning with the explosion of the Westray Mine in May 1992, Curragh began to have serious financial as well as other problems and was seeking funds in order to maintain its operations. Curragh's interest in Kassandra by 1993 was premised in large part on its ability to purchase the mine on the basis of a substantial loan from the Greeks, only part of which would be used for the Kassandra purchase and the rest for Curragh's general purposes. In April 1993 Curragh had received the protection of the Companies' Creditors Arrangement Act.

42 By June 1993, Mr. Visagie had concluded his relationship with Curragh and he and Mr. Lean (who remained with Curragh for another month) had determined that they wanted to devote their efforts to acquiring the Kassandra mines themselves. Mr. Visagie prepared a memorandum titled "Alpha Project - Purchase of Omega" to interest investors in the project. This document is a good indication of Mr. Visagie's thinking and analysis of the mines and of their gold potential based on his exposure to and accumulated knowledge about the mines developed during his association with Curragh. It is clear throughout this document that there is a dual emphasis as there is throughout all the Curragh documentation:

1) good returns from the existing operations, zinc and lead, based on both improved mining methods and management and a return to traditionally higher prices in the market for those commodities;
2) the potential for very high profits from gold.

43 The mine is referred to in the document as a potential gold mine. The potential is based on:

* producing more gold from existing sources through higher mine production generally;
* extracting the gold through the bio-leach process and in particular using a pad, which Mr. Visagie described as his own improvement on the bio-leach concept which would increase the recovery of gold from the pyrite concentrate;
* exploring and developing potential new sources of gold on the property

including:

a) extensions to existing ore bodies,
b) two copper gold porphyries on the property,
c) a copper gold scarn,
d) gold in oxidized cap rock (at Skouries),
e) existing stockpiles,
f) gold in tailings which are the after product of the process of extracting the various concentrates from the ore and which are stored and on the property,
g) gold in slag heaps around the property some from ancient mining workings, and,
h) recovery of manganese from Olympias tailings.

Other than the stockpiles of pyrite concentrate, the Kassandra mines had not attempted to exploit any of these resources on its property at that time.

44 Mr. Visagie had met Mr. Stephenson, a Toronto lawyer involved and experienced in mining matters on a few occasions over the years. He approached him in July 1993 to be part of his "Alpha Group" to purchase these mines and to raise money to do so. He had him sign a letter containing strict obligations of confidentiality in respect of the information that he was disclosing to him about the mine and his analysis of the value of such an investment. The opening paragraph of the letter dated July 3, 1993 reads:

> The Alpha project was conceived by myself and my partner while I was working at Curragh Resources. Consequently, until it is evident that Curragh will not proceed with the investment, I am not willing to go forward with the project. In the event that Curragh elects to proceed with the project and it becomes unavailable, Alpha is terminated.

45 Up to the end of July, 1993 Mr. Lean continued to be employed with Curragh and to be involved in Curragh's final unsuccessful attempt to purchase the mine with the Greek loans already referred to. By the end of July Curragh was no longer pursuing any purchase of the Kassandra mines and it went into receivership later in 1993.

iii) Pursuit of the Mine by the Alpha Group

46 One of the legal issues raised by TVX is who owned the information which the plaintiffs brought to TVX, the plaintiffs or Curragh. Arising out of that is the factual question of when Mr. Visagie concluded that Kassandra was a gold mining opportunity as opposed to a lead/zinc mine or a polymetallic mine, i.e., was it while he was employed by Curragh or afterwards. In his evidence Mr. Visagie said that he only concluded that the Kassandra opportunity was as a gold mine after his

trip to the mine in August, 1993 which was after the conclusion of his relationship with Curragh and after that company was officially no longer a potential purchaser of the mines. He said that although he recognized the gold potential of the mines as an upside of a purchase all along, he did not put together his entire analysis of how the mine could be made profitable and be exploited as primarily a gold mine until he returned from his trip to Kassandra in August, 1993.

47 Once Mr. Visagie was no longer consulting for Curragh, he devoted his full time to Kassandra and to Alpha's project of acquiring the mines. On July 28 1993, the Alpha Group signed an agreement with Endeavour Financial Corporation wherein it was to be the financial consultant to Alpha in respect of the acquisition of Kassandra. The agreement also established an ongoing role for the Endeavour executives as executives of the mine after its acquisition in order to give further credibility to the project both for investors as well as for the Greek vendor.

48 At the beginning of August 1993 Mr. Visagie and Mr. Stephenson travelled to London where they met with Mr. Lean, Mr. Dunnet from Endeavour and Mr. Tsilibaris of Citibank.

49 Mr. Tsilibaris had an ongoing involvement with Kassandra throughout this story. He was the Citibank representative in Greece handling the Kassandra sale. The sale had been totally unsuccessful from 1991 when Citibank was selling on behalf of Hellenic through 1992 when the mines went under liquidation administration and Citibank was attempting to sell the mines on behalf of Ethniki Kephaleou the liquidator/administrator of the mines. Although many mining companies received the Offering Memorandum of 1991 as well as a revised version in 1992, and although many mining companies visited the mine for the purpose of investigating a possible purchase, there were no offers or bids for the mine except the various non-compliant or abortive offers submitted by Curragh in 1992 and 1993. Nor had there been any offers for METBA when it was offered for sale in 1991.

50 It came out in cross-examination of Mr. Stephenson that while in London in August 1993, the Alpha group came to an arrangement with Mr. Tsilibaris wherein he would be paid U.S. $1 million if Alpha was successful in acquiring the mine. In the summer of 1994 after TVX terminated its joint venture funding agreement with Alpha, and Mr. Tsilibaris was no longer with Citibank, TVX retained him to assist with its bid for the mines and promised him a fee if TVX was the successful bidder in the upcoming auction. Although Mr. Tsilibaris was an employee or associate of TVX at the time of the trial, he was not called as a witness.

51 After London, Mr. Visagie and Mr. Stephenson travelled to Greece where they signed a confidentiality agreement with Citibank in order to gain access to the mine information. Then Mr. Visagie met with Mr. Kokkonis the mine manager and for one and one half days they discussed all aspects of the mine including production, financial figures, updates, reserves, labour and metallurgy, which is the recovery of metals from ore.

52 On his return Mr. Visagie made a trip report which included the information provided by Mr. Kokkonis plus summaries of financial data. Except for the charts in Greek, the narrative and the

computer printouts of financial and production data were created by Mr. Visagie, using information obtained from his attendances at the mine together with his own developing analysis over the period of his exposure. In his evidence Mr. Visagie continued to characterize his view of the mine at that time as a base metal mine with upside for gold.

53 After meeting with the Endeavour people, a decision was made that Mr. Visagie would return to the mine with Mr. Marshall a mining engineer with Endeavour. They spent a week at the mine site. Mr. Visagie described this trip as very intensive in terms of examinations of the property itself, studying the drill logs at night, examining cross and long section charts and holding discussions with the mine geologist.

54 Mr. Visagie testified that this trip was the first time that he had a chance to review and analyze cross and long section charts of the property. He obtained copies of many of the cross and long sections from the mine, brought them back to Canada and later made them available as part of his information to TVX. These sections were not created by him but rather by the mine geologists over the years, who testified that the sections were up on the walls of their offices and available in the data room set up by Citibank to facilitate the sale of the mines. These charts were the information of the mine made available to interested potential purchasers of the mine.

55 After returning from this trip to Greece, Mr. Visagie said that his view of the mine had changed and he now felt that there was much more gold there than he had previously believed or estimated. He prepared a "Gold Resource Update" which showed potential reserves of over 10 million ounces of gold, an extremely significant gold mine.

56 This assertion by Mr. Visagie that his view changed as a result of this August 1993 visit to the mine was extensively challenged in cross-examination, in particular by references back to earlier documents that Mr. Visagie had written which showed that his focus on this property virtually from the outset was for its gold potential including, for example, his very early statement to Curragh management that without the gold the property would be uneconomic. Mr. Visagie was also referred to earlier reserve charts which he had prepared, where he had already identified approximately 9 million ounces of gold, although these numbers had to be extrapolated from the charts. His response was that he never did the calculation or came to a total in the same way he did after August 1993.

57 Although in giving his evidence Mr. Visagie may have overstated or possibly oversimplified by stating too baldly that his view had changed, I accept that on his second trip in August 1993, he examined charts of sections and other data that he had not analyzed or reviewed in depth before and that based on this more focused and in depth review he became so convinced of the presence and quantification of very large quantities of gold in different areas of the property that he now viewed the property as a "gold mine".

58 In arriving at this conclusion and finding, I am taking into account Mr. Visagie's personality displayed during his testimony and described by other witnesses. When speaking of the mines he

became almost passionate in describing the geology and the details of his analysis of each area and why he was so convinced of his conclusions. This tendency apparently did not endear him to many of the personnel at TVX who found him overbearing to the point of over-selling his ideas. Even at Endeavour, they were not as convinced of his analysis as he was and were not prepared to include in their own analysis document his conclusions regarding the extent of the gold on the property. Of course we are aware now from the TVX exploration of the property that he was correct in some of his projections, but even he had significantly underestimated the situation in some areas.

iv) Mr. Visagie's Analysis of the Gold Deposits at Kassandra

59 Mr. Visagie described in his evidence how a geologist such as the mine geologists who prepared the sections or himself, formulates a theory of mineralization by looking at the drill hole results which disclose the formation of the rock and the ore body, and extrapolates beyond the particular hole a picture of how the ore body extends.

60 With respect to the Olympias massive sulphide deposit, Mr. Visagie concluded based on his observation of manganese on the surface of the Olympias west deposit that there was more ore extending up to the surface and that it contained gold. Further he concluded that the gold in the deposit does not concentrate just in the lead and zinc which is how the mine was defined at the time. Third the mine had dug some step-out holes, that is holes far beyond the known areas and Mr. Visagie believed that the extension of the ore body to depth as opposed to surface both extended far beyond the step-out holes and that the extended ore body contained gold.

61 On this third point, Mr. Papantonis, the chief geologist at Olympias since 1978 had prepared the long section for Olympias west which was open ended at depth. He testified that he had come to a similar conclusion but had done no calculation of the tonnes or grades in the extension because sufficient data was not available in his opinion to do that calculation.

62 Mr. Visagie was cross-examined at length as to whether the possibility of a deep extension containing gold at Olympias was his own original idea. In particular he was confronted with the Olympias west long section which shows as open-ended the ore deposit of massive sulphides which contain all the valuable ore in this property and which was included in the Citibank Memorandum and in an earlier published article on Kassandra by Mr. Kokkonis which Mr. Visagie had read and which contained references to the Olympias ore body possibly containing a deep extension. Mr. Visagie responded that he came to his own conclusion about the possibility of a deep extension from his own observations. He confirmed his thoughts and arrived at his theory and the quantification of the gold in such an extension by studying the drill holes and the drill logs and by doing his own calculation of the depth based on that information and using his own method. Mr. Papantonis could not remember specifically discussing the deep extension with Mr. Visagie although he assumed he would have.

63 It also came out in his cross-examination that the long section of the Olympias east deposit prepared by the mine geologist showed the massive sulphides ending and not continuing to depth,

although Mr. Papantonis again testified that he had concluded from some drillings that the Olympias east deposit extended to depth but no figures could be attached to the reserves there. Mr. Visagie explained that he had concluded that the east deposit also continued to depth based on a successful drill hole further down which partly intersected the ore body but which he understood the mine had determined for its own purposes was uneconomic. Mr. Visagie testified that he came to his conclusions by performing his own analysis from his study of the available source material at the mine.

64 On the Olympias east deposit Mr. Visagie also applied his theories to conclude that there was more gold than originally estimated because the gold-bearing ore body extended both to surface and to depth beyond the outline of the existing ore body and that there was gold ore in a horizon which differed from the ore horizon of the lead and zinc. This was not disclosed in the drill-cores because the mine only used cores where the lead and zinc measured two metres. Therefore he deduced that some gold bearing ore had been overlooked. Mr. Visagie also concluded that the Olympias model would be applicable at other deposits in the area.

65 Mr. Visagie determined that the Olympias tailings pond which stored the waste products from the ore processing system which produced the concentrates contained gold and that the mine had not recovered that gold. He also believed that that gold would still be recoverable because the tailings pond was underwater and therefore not oxidized. The mine had been using tailings from Kassandra operations mixed with cement for backfill.

66 Mr. Visagie visited the Mavres Petres mine on his August trip. There were no drill cores there and the drill logs were not kept in good shape. However, he concluded that because it has a similar structure to Olympias, there was recoverable gold there which the mine had not recovered to date.

67 Another area is Piavitza which Mr. Visagie believed was similar in structure to Mavres Petres. It had manganese and drill holes which contained zinc but which had not been assayed for gold. The mine did not have the old drill logs readily available but sent them to Mr. Visagie in September. He studied them and determined that this large area was similar to Mavres Petres and Olympias and therefore had gold.

68 Mr. Visagie had obtained from a friend an article published in the Minerologist in 1963 which showed waste piled from ancient mines in the area. He also received another document from a geologist friend of Mr. Stephenson showing mineralization in the Kassandra area including at Fisoka. From these documents he concluded that mineralization over the whole Kassandra area was much more extensive than he had thought before.

69 Mr. Visagie also investigated the slag heap from Mavres Petres and Madem Lakkos consisting of about 1 million tonnes of smelter residue from the processing of pyrite which had occurred there from the 1950's to 1990 when production ceased at those mines. Mr. Visagie took a sample and had it tested in Ontario for gold content. The result was 3.95 grams of gold. He concluded that the owners had recovered the sulphur from the pyrite but not the gold. He also referred to a pyrite

stockpile at that location containing gold.

70 Mr. Visagie considered slag residue heaps from medieval mines for their potential gold content and concluded that they also contained gold.

71 In respect of the Fisoka area, Mr. Visagie looked at the drill records and noted that not all the sections had been assayed for gold and therefore concluded that the gold content there was underestimated by the mine. He also looked at the mineralization of the area and concluded that there had been little exploration there and therefore there was good potential in the area. On that trip he did not review Skouries.

72 Upon his return he put together the information he had collected and tabulated the gold he was fairly sure of. He also put together his thoughts on how to recover the gold. He noted that there was a beach formed from tailings from the mid 1980's from the Stratoni Mill that he concluded contained a small amount of gold. He also concluded that the gold grade at the Olympias mine was higher than previously thought. He noted that the mineral rhodochrosite which is a significant feature of the mineralization in the area could also be recovered from the Olympias tailings pond. He noted the grades for manganese in the area. He also took account of an area called Mpachtsina (pronounced Baxina) south of the Olympias step-out holes and in which he estimated the gold based on the drill holes. In this analysis Mr. Visagie explained that he did not include Piavitza for gold but rather for manganese as there were no assays and therefore his ideas were still theoretical.

73 He calculated the total gold that he believed existed on the property to be 10.5 million ounces, an amount not described by anyone before in connection with this property.

74 In cross-examination it became clear that Mr. Visagie had set out gold estimates in previous documents he had prepared in 1992 and 1993 both for Curragh and in his Omega document of June 1993. Although this made his suggestion in chief appear somewhat misleading, after hearing the entire cross-examination I do not believe this was intentional, but rather arose from the manner in which he responded to questions in examination in chief. I accept that his new total calculation, which put the gold quantity at over 10 million ounces for the first time, was done after his detailed analysis of mine records in August 1993 and followed his somewhat subtle shift in thinking about the mine to gold mine pure and simple.

75 Mr. Visagie also worked with the Endeavour people in September to produce the Endeavour Report to be used to attract investors for the project. However, the Endeavour Report did not incorporate all of his conclusions because Mr. Marshall of Endeavour took a more conservative approach. However, the report included what Mr. Visagie said was his conclusion that the technology choice for the gold plant at or near Olympias should be bio-leach. I interpret this characterization as referring to the fact that Mr. Visagie had researched the economics of that type of plant and prepared a model using assumptions from Kassandra information. In other words, Mr. Visagie did not think up the concept of bio-leach or that it would work for refractory gold but he analyzed the research on this technology and concluded that it was optimal for the site and the

proposed project.

76 The Endeavour Report also contained information and descriptions of the various areas of Kassandra and their potential which were his work and estimates.

77 It is clear that Mr. Visagie attended the mine and received all of his raw information from speaking to personnel at the mine, from reviewing documents provided by the mine both from the mine itself and from the company in Athens, from making his own observations of the Kassandra mines and property, from analyzing mine records including drill records, financial data, mine throughput records and production records, examining drill cores and from samples he took, one of which he had assayed for gold. He also received other documents and did research into methods of gold recovery. Finally he applied his expertise and experience in doing his analysis and preparing his conclusions with respect to the financial aspects of the current mine operations as well as the potential for gold production and recovery. He developed this new material both while he was working at and for Curragh as well as afterwards, and in particular he developed the final analysis of the extent of the gold resource at the mines after his August 1993 trip to the mines.

78 He also agreed in cross-examination that in order to substantiate any of his theories more drilling would have to be done. It was clear on the evidence that no potential purchaser of a mine would ever be doing further drilling before purchasing the mine so that the fact that more drilling would be needed to substantiate any of Mr. Visagie's analysis cannot in my view denigrate from the fact that Mr. Visagie did original work in order to produce the information contained in the Endeavour Report and his Gold Resource Update as well as of course his oral presentations and articulations of his ideas and theories about the mine.

v) Plaintiffs' Steps to Conclude an Agreement with the Greek Authorities for the Purchase of the Mines

79 Besides Mr. Visagie's work on the technical side to prepare information about the mines, the Alpha Group also took steps to engage professional assistance for their proposed dealings with the Greek liquidator and the largest creditor of Hellenic, the National Bank of Greece. On their first trip to Greece in August 1993 they made the agreement to pay a commission to Mr. Tsilibaris of Citibank if they were successful in obtaining the mines. Mr. Tsilibaris introduced them to Mr. Dryllerakis a lawyer for Citibank whom they engaged to act for them in their dealings with the liquidator. They also engaged Ernst & Whinney a firm they were introduced to at that time as well. Mr. Stephenson gathered tax and other information necessary to structure the proposed purchase of Kassandra.

80 Mr. Stephenson began immediately in mid-August to correspond with the liquidator and the Bank with respect to the terms of an offer by Alpha to purchase the mines. The Alpha Group wanted to have an agreement or some form of exclusivity in place as other mining companies were showing interest in the mines again in August 1993. It was becoming apparent as well that in light of the upcoming October elections in Greece, the new Government of Greece would be involved in

some way in the sale or the decision to sell.

81 The offer was for U.S. $32,000,000 with the transaction to close by the end of December 1993. Many of the terms of this offer were similar to ones that had been proposed earlier by Curragh, as Mr. Visagie and Mr. Lean had that knowledge and some documents as well. Of course at this time Alpha was not in a position to complete any purchase because it did not yet have the investor lined up to provide the funds. However on September 7, Mr. Dryllerakis reported that the National Bank of Greece had been in contact with him and was willing to proceed with a deal.

82 Throughout his correspondence with the various Greek entities involved in the transaction, Mr. Stephenson continued to represent that the Alpha Group already had its funding in place when it never did until late November when it signed the joint venture funding agreement with TVX. These misstatements were admitted by Mr. Stephenson in cross-examination.

83 Mr. Stephenson received the important response letter from the National Bank of Greece dated October 5 1993. In that letter the Bank expressed general agreement with the terms of Alpha's offer and stated that once the details were worked out with the liquidator,

> "we will support your offer if brought before the General Assembly of Creditors or to us in any way and we will vote for its acceptance and finalization ... we will not offer our support to any other proposal until your negotiations are finalized or fail and in anyway not beyond December 31, 1993."

Mr. Stephenson viewed this letter as an agreement by the Bank not to use their offer to bargain with others and to support them through their negotiations until December 31, 1993. The letter goes on to say that the Bank would use its best efforts with the Administrator to prepare the draft sale agreement in the context of the liquidation, although everything is subject to legislation. Further, the Bank would "promote the appropriate enabling legislation which must be enacted by the reconvened Parliament", although such legislation would be a political decision by the new Greek government and not in the control of the Bank.

84 The legislation issue referred to in the Bank's letter is the Greek legislation which governed this "special liquidation" which required two auction processes both of which had already been held. In a letter he wrote to Mr. Stephenson dated October 20 1993, Mr. Dryllerakis explained that the liquidator was not entitled to hold a third auction for the total assets of the mine, but at that point under general bankruptcy law could only sell off individual assets by public tender, unless by new legislation for this particular liquidation, a private sale of the assets as a whole was authorized. That authorization could combine endorsement by the Minister of National Economy or Industry and possibly the approval of the Court or the Creditors or the shareholders. He stated that "everybody agrees" that a change or supplement to the existing legislation would be required.

85 On October 10, 1993 a new socialist government was elected in Greece, one which was anticipated might look less favourably on the privatization of Greek resources and especially on any

reduction in Greek jobs.

vi) Plaintiffs' Steps to Acquire Financing for the Acquisition

86 In order to proceed with any deal to acquire the mines, Alpha needed financing. In September, Endeavour was able to interest one company called Sharps Pixley in providing some debt but no equity financing for the project. This was not considered to be very good progress by the Alpha partners who began to contact some potential investors on their own.

87 Because of the anticipated attitude of the new Greek government, the deal now struck with the National Bank of Greece, which believed from Mr. Stephenson that Alpha had its financing in place, the fact that the project now appeared larger than before, together with Endeavour's slow progress in finding an investor, the plaintiffs determined that they should look not for an investor as much as an industry partner to purchase the mine.

88 One of the people contacted was Mr. John Kearney, a man with considerable experience and expertise in the mining industry. Mr. Kearney was called by the plaintiffs to testify at the trial. He has degrees in law and economics from University College in Dublin and joined the mining industry in 1973. He was Chairman of Northgate Exploration Limited from 1992 to 1996, a company involved in gold, lead and zinc mining and exploration in various countries. Before that he was Chief Executive of Campbell Resources and Sonora Gold Corporation, both gold mining companies. He is also a director of the Mining Association of Canada. It was clear that Mr. Kearney is a very knowledgeable and experienced mining businessman in Canada and internationally.

89 Mr. Stephenson and Mr. Kearney had worked together on transactions in the past. Mr. Stephenson called him in September, 1993 and told him he had a very interesting opportunity but because he had signed a confidentiality agreement, he would not tell him where the opportunity was until Mr. Kearney signed Alpha's confidentiality agreement. Mr. Kearney was not prepared to do this until he knew the location of the property, because if he already knew about it, he did not want to be bound by any confidentiality limitations. After Mr. Stephenson told him the property was in Greece he agreed to sign because he knew he was not working on anything in Greece and he did not really know about any properties in Greece. He reviewed the confidentiality agreement carefully for about one half hour and found it satisfactory, particularly because it was limited to the project in question, and because Mr. Stephenson said that he and his colleague had done a lot of work on the property and had information, so it was not just a case of an introduction fee for identifying a property. He signed the agreement and the next day Mr. Stephenson returned with Mr. Visagie who had a report and a highlights sheet and who spoke for a few hours about the project. As a result they travelled to Greece, first to Athens and then to the mine.

90 In Athens they had five meetings with Citibank, with Mr. Tsilibaris and Mr. Dryllerakis, with Ernst & Young, with another mining company and with the National Bank of Greece. At that meeting they were still negotiating with the Bank and Mr. Kearney was presented as part of their team, even though he was not yet committed to the project at that point.

91 At the mine site he spent two and one half to three days with Mr. Visagie and Mr. Stephenson and also with Mr. Kokkonis the manager of the mine. They had an extensive tour of the entire site, the mines and mills, the geological office and the entire property. Mr. Kearney said that his impression was that Mr. Visagie had an extraordinary level of knowledge about the property, the financial aspects and technical detail. Mr. Visagie used every minute they were together to explain to him his theories about the geology and his plans for the improvement of the mine production as well as the gold, its location and quantification. Mr. Kearney also described how he in effect cross-examined Mr. Visagie about the basis for his conclusions on the amount, locations and grades of gold which he had set out in his gold resource update, for example the reserves at Olympias, the reality of the numbers in the extensions, the pyrite concentrate pile, the tailings grade and the two porphyry copper deposits, Skouries and Fisoka. Mr. Kearney said that in response Mr. Visagie would explain his reasoning, his ideas and explanations, and that they seemed satisfactory.

92 As a result, back in Toronto between October 15 and 18, 1993 Mr. Kearney met with Mr. Stephenson and discussed participation in the project. He proposed that a company with which he was associated, not Northgate, would invest U.S. $10,200,000 in the project. He was prepared to make this investment because he viewed the property as a unique opportunity in the world in mining because of the potential assets available at the price. The first potential was to turn around the lead and zinc mines and make them profitable; the second was recovering the gold from the existing pyrite stockpile and tailings; the third was to increase the total output of the mines; and most important, the potential for a much larger resource base as high as 10 million ounces of gold which he said is very large in mining terms. He also explained that when one buys a mine property based on existing reserves, the price reflects the value of those reserves as opposed to the value of the potential, which is a bonus for the price.

93 However, Mr. Kearney and Mr. Stephenson did not reach agreement because the amount of money he was offering was not sufficient, and it was left on October 20 that Mr. Stephenson would get back to him. In November, Mr. Visagie and Mr. Stephenson came to see him and told him they were proceeding with someone else although they would not tell him with whom. Mr. Kearney said he remained interested in the property but when he learned that it was up for auction again in the fall of 1994, he did not bid because he took the view that he was precluded from doing so by the confidentiality agreement he had signed with Alpha unless he did it with Alpha or with Alpha's consent.

94 I found Mr. Kearney to be a very knowledgeable, credible and helpful witness. As an experienced businessman and sometime legal adviser in the mining industry, his actions and his conclusions on the matters on which the experts were called to give opinions were credible and persuasive independent evidence called in respect of those issues: 1) whether the Alpha information contained in the Endeavour Report, the Highlights sheet and the Gold Resource Update as well as Mr. Visagie's oral presentation of his theories and analysis of the potential of the mine to be a very profitable and high producing gold mine were original, new and valuable information; 2) whether he believed he was free to pursue the Kassandra opportunity in 1994 having signed the Alpha

Confidentiality Agreement and having had disclosure of that information one year earlier in 1993.

vii) The Background of TVX

95 In the 1980's, TVX was a small gold and silver mining company with mining interests in South America. In 1991, TVX amalgamated with the wholly owned gold subsidiary of Inco, Inco Gold. From 1991 to 1993, Inco controlled the management and Board of TVX, with a corporate strategy of managing the assets it had with a view to their sale. In July 1993 Inco sold its interest in the company and the new management group, led by Mr. Batista as chairman, adopted a growth strategy with primary emphasis on precious metal exploration, development, mining and sale. Mr. Batista was also the largest shareholder with 14%. It was in July 1993 when Mr. John Hick joined the company as president.

96 Mr. Hick was a lawyer who had practiced in the corporate securities field in Toronto from 1978 until 1981 when he joined Placer Dome first as counsel then as Senior Vice President of Corporate in charge of acquisitions. He left in 1990 and eventually he joined the Grafton Group, a retail clothing business, as President and eventually as Chairman until 1993. In both of his major positions, Mr. Hick developed extensive experience in dealing with creditors, liquidators, receivers and all manner of credit and restructuring issues.

97 The other senior members of the management team in the summer and fall of 1993 were Mr. Jozsef Ambrus, Senior Vice President of Exploration, based in Chile and in charge of analyzing new exploration opportunities; Mr. Michael Werner, a mining engineer, Senior Vice-President of Operations, based in Toronto and primarily in charge of North American operations; Mr. Mozart Litwinski, Senior Vice President of Operations for South America, also a mining engineer; Mr. Vic Wells, Vice President Finance, based in Toronto; Mr. Flavio Godinho, responsible for legal matters in South America.

98 In October 1993, TVX had six gold mining interests but no ownership interests in any base metal mining operations. When the new group took over TVX in July 1993, the company was operating in the United States, Canada, Brazil and Chile. It was a public Canada corporation with its corporate head offices in Toronto and with shares listed on the Toronto and Montreal Stock Exchanges and subsequently on the New York Stock Exchange. The new TVX corporate strategy was to grow where the opportunities were to be found. It looked at several dozen opportunities for exploration or development in the second half of 1993 and 1994 in areas all over the world, and rejected most.

viii) Dealings Between the Plaintiffs and TVX

99 Around October 20, 1993 Mr. Stephenson approached his acquaintance, Ross McMaster of the investment dealer, Toronto Dominion Securities and asked him to suggest any qualified company which might be interested in purchasing the mine with Alpha. Mr. McMaster suggested Mr. Eike Batista of TVX Gold Inc.

100 Mr. Stephenson provided Mr. McMaster with its Confidentiality Agreement to sign and to have signed by anyone to whom information was disclosed. He also gave him the Endeavour Report and the Highlights Sheet of the project. It was agreed at trial that the Confidentiality Agreement, the Endeavour Report and the Highlights Sheet were faxed down to Mr. Batista in Rio de Janeiro following which, on October 22 Mr. Stephenson spoke to Mr. Batista on the phone and they arranged that he and Mr. Visagie would travel down to Rio to meet with TVX within a few days. They went on October 26, 1993.

101 Mr. Stephenson testified that in this conversation, Mr. Batista, who was not a witness, was very enthusiastic about the project and already talking about a deal and said it would be conditional on receiving EU (European Union, now European Community, EC) grants. Those grants were very attractive because a) they are non-refundable, and b) because Mr. Batista's father was a consultant to Portugal in obtaining such grants, and he felt his father could assist them with obtaining grants for Greece as well.

102 It is undisputed that in October 1993, TVX was unaware of the Kassandra mines' availability for purchase, it had no file open on Kassandra before receiving the first information from Alpha through Mr. McMaster and TVX would not have pursued the acquisition of the mines in 1993 unless Alpha had brought the opportunity to them.

103 At the TVX offices in Rio Mr. Stephenson and Mr. Visagie met with Mr. Batista, the Chairman, Mr. Hick, the President and Chief Financial Officer, Mr. Ambrus Vice-President Exploration, Mr. Godinho the house counsel, and two others, Mr. Yamamoto and Mr. Garcia. First, Mr. Hick entered into Alpha's Confidentiality Agreement on behalf of TVX. That Agreement is set out in its entirety as follows:

CONFIDENTIALITY AGREEMENT

> Gentlemen:
>
> In order to allow you to evaluate the possible participation with the Alpha Group in the acquisition of the Kassandra mining assets ("Kassandra"), division of HELLENIC CHEMICAL PRODUCTS & FERTILIZERS COMPANY SA, of Athens, Greece, we will deliver to you, upon your execution and delivery to us of this letter agreement, certain information about the properties and operations of Kassandra. All information about Kassandra furnished by us, whether furnished before or after the date hereof, and regardless of the manner in which it is furnished, in [sic] referred to in this letter agreement as "Proprietary Information". Proprietary Information does not include, however, information which is or becomes generally available to the public other than as a result of a disclosure by you. As used in this letter, the term "person" shall be broadly interpreted to include, without limitation, any corporation, company, partnership

and individual.

Unless otherwise agreed to in writing by us, you agree:

(a) except as required by law, to keep all Proprietary Information confidential and not to disclose or reveal any Proprietary Information to any person other than those employed by you or on your behalf who are actively and directly participating in the evaluation of the Proposed Acquisition or who otherwise need to know the Proprietary Information for the purpose of evaluating it and to cause those persons ("Representatives") to observe the terms of this letter agreement and

(b) not to use Proprietary Information for any purpose other than in connection with the consummation of the Proposed Acquisition in a manner which we have approved.

You will be responsible for any breach of the terms hereunder by you or your Representatives. In the event that you are requested pursuant to, required by, applicable law or regulation or by legal process to disclose any Proprietary Information, you agree that you will provide us with prompt notice of such request(s).

Unless otherwise required by law, neither you nor your Representatives will, without our prior written consent, disclose to any person (other than those actively and directly participating in the Proposed Acquisition) any information about the Proposed Acquisition, or the terms, conditions or other facts relating thereto, including the fact that discussions are taking place with respect hereto or the status thereof, or the fact that the Proprietary Information has been made available to you.

If you determine that you do not wish to proceed with the Proposed Acquisition, you will promptly advise us of that decision. In that case, or in the event that the Proposed Acquisition is not consummated by you, you will, upon our request, promptly deliver to us all of the Proprietary Information, including all copies, reproductions, summaries or extracts thereof or based thereon in your possession or in the possession of any of your Representatives.

Although the Proprietary Information contains information which we

believe to be relevant for the purpose of your evaluation of the Proposed Acquisition, we do not make any representation or warranty as to the accuracy or completeness of the Proprietary Information. We shall have no liability to you or any of your Representatives relating to or arising from the use of the Proprietary Information.

Without prejudice to the rights and remedies otherwise available to us, we shall be entitled to relief if you or any of your Representatives breach any of the provisions of this letter agreement.

Please confirm your agreement with the foregoing by signing and returning to the undersigned the duplicate copy of this letter enclosed herewith.

ALPHA GROUP
"J.A. Stephenson"
Accepted and Agreed as of October 27, 1993
TVX GOLD INC.
By: "J. Hick"

104 Then Mr. Stephenson began his presentation which took one half to three quarters of an hour, and as he talked he put documents on the table. He told them who Alpha was, and also described the involvement of Endeavour Financial Corporation and its executives. He introduced the project as an insolvent base metal mine in Greece which they saw as a large scale gold mine but which was not yet recognized by others. He told them that it was losing up to almost U.S. $1.5 million per month, and that with Mr. Visagie's theories and analysis it could be converted to a very efficient base metal mine and a large gold mine. He went through the Highlights Sheet, a version of which reads:

HIGHLIGHTS
of the
KASSANDRA PROJECT

Revised Sept. 14, 1993

1. The fact that the port facilities owned by Kassandra are adjacent to one of the mines and 20 km. from Olympias and that two major European smelters are within 250 km. by road and easily accessible by water, enables the property to capture full value of the transportation advantage.

In addition, better terms for concentrate may be available (although not necessary [sic] better prices) due to the flexibility of shipping and the ability to deliver on short notice which is important in a tight concentrate market.

2. Replacement value of the assets appears to be US $100 million, book value is US $50 million (see attached list of assets). There is a US $55 million value in gold in stockpiled concentrates, there are two porphyry copper deposits, there is significant gold value in the tailings, all of which indicate that the assets at US $32 million are a very low price for a world class project.
3. The current throughput is 1,425 tonnes per day which could be increased with small modifications as to milling to a capacity of 3,400 tonnes per day. The plant can be expanded to 4,500 tpd for between US $4 - US $6 million.
4. The operating history shows over 17 million tonnes of lead, zinc and silver ore have been extracted from the three operating mines and current reserves are still in excess of 17 million tonnes.
5. The concentrate stockpile contains in excess of 250,000 tonnes of refractory concentrate grading between 22 - 24 grams of gold per tonne and the Olympias tailings pond contains 4 grams of gold per tonne.
6. Identified gold on the site appears to be in excess of 10 million ounces.
7. As only 4% of the gold present is currently recovered and sold, under the program proposed gold production will increase to 200,000 ounces per year using a bioleach project. In addition a further 120,000 ounces per annum could be produced from the porphyry copper-gold deposit.
8. The incremental cost of gold production on the basis of a bioleach is only $88.00 per ounce of gold.
9. There is a relatively low cost to upgrade and increase base metal production.
10. The upgraded and expanded base metal production will be profitable at current prices and will bear all operating costs and the gold production will be profit when the gold plant is in operation at 200,000 oz./year, the payback is in 1 1/2 year ($40 - $50 m US/year positive cash flow).
11. There will be very high silver production, in the range of four million ounces per year.
12. There is very good access to EC programs for funding future expansion and projects as well as direct access to the National Bank of Greece for loans and facilities.
13. It is clear that this is a currency play since all wages are paid in a low Drachma and production is sold in US.
14. The base metal operation without gold has positive cash flow net of

> investment at today's prices. Since most of the lead and zinc producers are currently operating at a loss, it appears that the project will be one of the lowest cost producers.

Mr. Stephenson also described the correspondence with the liquidator and with the National Bank of Greece, the major creditor. He tabled each letter making the documents available to TVX to review and copy if they wanted to. TVX personnel took certain documents and made copies but no particular record was kept. However, TVX had included in its productions the October 5th letter from the National Bank of Greece and Mr. Dryllerakis' letter referred to above dealing with the legal requirements of the liquidation. Mr. Hick did not recall actually seeing those letters until they were back in Toronto. Mr. Stephenson advised that they had signed a confidentiality agreement with Citibank in Athens and obtained information from them. He also tabled general articles on carrying on business in Greece, then turned the floor over to Mr. Visagie.

105 Mr. Visagie then described the project and produced documents including the Citibank Offering Memorandum and the Endeavour Report. He used a location map to show the mines and mills, the ship-loading facility and each of the deposits. Then he made his presentation on each of the deposits. Using the Gold Resource Update as well as the long and cross sections, he explained his theory of the geology and why he believed there were the deep and shallow extensions as well as his quantification of gold in each area totalling the 10.5 million ounces. Besides Olympias, Madem Lakkos and Mavres Petres, the three operating areas, he also reviewed his analysis of Piavitza, Mpachtsina (Baxina), Skouries, Fisoka, the manganese potential, the Olympias tailings, the pyrite/gold stockpile, the Stratoni smelter slag and the very large area for new exploration. He concluded that the gold was a world class deposit and that in the Endeavour Report they had only evaluated 3.5 million ounces which were the known resource. He also discussed the porphyry copper deposits.

106 He then went on to discuss the economics of producing low cost gold by making the base metal operation neutral in terms of cost. As set out in the Endeavour Report, he proposed reducing the number of employees and increasing the amount of production from 170,000 tonnes per year to 935,000 tonnes per year. He described how the mine would also have to be modernized partly by replacing hand-held drills with jumbo drills and changing the roof support. He referred to graphs in the Endeavour Report which he had prepared to show the economics together with the investment plan using his figures including building the bio-leach plant for recovery of the gold. The cost for that plant was projected at U.S. $82,000,000.

107 At this point Mr. Hick said they were not interested in bio-leach as it was not possible to finance that process. Mr. Visagie then began to talk about the pressure oxidation technology developed and favoured by METBA, and began to discuss the work METBA had done on it, spending U.S. $7,000,000.

108 At that point Mr. Batista interrupted and said that he wanted to see the economics of how

much money he would make out of the project. Mr. Visagie turned to the Endeavour Report but Mr. Batista said he wanted to see it put up on the board. Mr. Visagie went to the board and put down illustrative cash flows for 100,000 ounces of gold per year, but Mr. Batista said he wanted to see the case for 200,000 ounces. This included U.S. $120,000,000 for the pressure oxidation gold recovery plant. Some of the costs Mr. Visagie used came from the Endeavour Report while others did not. Because pressure oxidation was not the technology favoured in the Report, that cost was not included there, nor were the cash flows for 200,000 ounces of gold. The cash flows which Mr. Visagie demonstrated were positive by year 4 and ranged over the period to year 15 from U.S. $46,000,000 to U.S. $70,000,000.

109 Mr. Batista was very excited with this presentation. Mr. Stephenson took over again and began to talk about the kind of deal Alpha wanted. They went to lunch and after lunch Mr. Visagie projected a small slide show of Kassandra and tabled about 100 documents including his June 1993 Omega Report and made them available for removal or copying by the TVX people. They also showed some core samples they had, and Mr. Ambrus approached Mr. Visagie with some questions on his theories about the geology.

110 They then began to discuss the terms of a deal. The plaintiffs' initial position was that Alpha would own a 50% interest in the mine project. That was rejected by TVX and over the next day they reached the point of discussing a 20% carried interest and a 4% participating interest which meant that Alpha would have to pay its proportionate share of all costs for that interest. An arrangement was made that day, Friday October 28, for Mr. Ambrus to come to Toronto to look at the balance of Alpha's documents and for representatives of TVX to make a visit to the mine in Greece a few days later.

111 In Toronto the following Monday Mr. Ambrus spent about two hours examining the documents in the Alpha data room and took with him an article on the Skouries porphyry copper deposit which was a subject he had specialized in during his academic studies. After his visit there were negotiations over the next couple of days before the site visit, between Mr. Stephenson with some participation by Mr. Visagie, and Mr. Hick and Mr. Craig the lawyer for TVX. All the correspondence which Alpha had had with parties in Greece including the liquidator, the Bank and Mr. Dryllerakis their lawyer was forwarded to Mr. Hick. This correspondence detailed the state of agreement between the Bank and Alpha in terms of its favoured status with respect to a deal up to December 31 1993, subject to the legalities of the necessary process.

112 Mr. Stephenson forwarded a first draft agreement, which was then modified and reformatted by Mr. Craig. In Mr. Craig's first draft he included as the opening words:

> You have advised TVX Gold Inc. ('TVX') that H. Visagie, D. Lean, J. Stephenson and McDonald (the 'Alpha Group') have been granted the exclusive right to negotiate the acquisition of all assets of the Hellenic Company of Chemical Products & Fertilizers A.E. ('Hellenic') from the liquidator of such

> assets being Ethniki Kephaleou, A.E. ('E.K.') with the support of the National Bank of Greece being the major creditor of Hellenic (all of such rights and interest held by the Alpha Group and hereinafter acquired from E.K. being hereafter referred to as the Kassandra assets). The Alpha Group have further advised TVX that they are prepared to assign to TVX an interest in the Kassandra Assets, all upon and subject to the terms and conditions hereafter set forth:"

113 These words with minor amendments remained in the final form of agreement. One of the defendant's major positions in this case is that TVX was only interested in the exclusive arrangement Alpha had with the National Bank of Greece and that was the only reason it entered into an agreement with Alpha and not because of the disclosure of any confidential information about Kassandra. Mr. Hick said that at the meeting in Rio before the Confidentiality Agreement was signed, Mr. Stephenson opened by saying that they had an opportunity, a deal almost done, that they were looking for financing and a large company that could bring credibility, and that time was of the essence because they had exclusivity for a period of time. Mr. Stephenson and Mr. Visagie said that the first thing that happened was the signing of the Confidentiality Agreement. Mr. Stephenson said he just gave them the correspondence and explained the terms and did not emphasize the exclusivity.

114 Although Mr. Hick's recollection of the meeting in Rio was very limited and was assisted by listening to the evidence of the plaintiffs, I accept that Mr. Stephenson certainly would have emphasized to TVX at some point that Alpha had negotiated an arrangement with the National Bank of Greece as major creditor in the liquidation. Further, I accept that he would have emphasized that the essential terms of purchase had been agreed including the U.S. $32,000,000 price and payment terms over time, and that an offer from Alpha in those terms before December 31, 1993 would be supported by the Bank and not "shopped around" to try to achieve a higher price from other potential purchasers. I also accept that Mr. Stephenson could well have used the term "exclusive" in describing the arrangement, and likely did so.

115 However, it is also clear on the evidence that the legal problem of how a private negotiated sale of the mines could be accomplished within the Greek liquidation regime was articulated and referred to in the correspondence that was tabled in Rio and delivered to Mr. Hick in Toronto at the beginning of the negotiations. Included was the letter from Mr. Dryllerakis to Mr. Stephenson of October 25, 1993 wherein he says that he met with the lawyer for Ethniki Kephaleou who was concerned: "that the whole process and progress we plan (prematurely in a certain way) may create the misunderstanding from our part that we are in the tracks of a structured legal procedure, which creates commitments and responsibilities both for Ethniki Kephaleou and the National Bank of Greece." Mr. Dryllerakis then goes on that he assured the lawyer that:-

> "we are aware of the situation, we understand that the route we are following is not authorized by the law and that, if the expected supplement of the law does

> not go through the Parliament, because the Greek government may take different approach in resolving the problem, the whole effort we will have made in the meantime will be useless and the time spent lost. I explained that still though my clients want to take this risk and proceed to the preparatory steps which will save substantial time, in case we go ahead in the near future."

116 In my view it is clear from the various correspondence that although the affected Greek parties (other than the newly elected government) were agreed that they wanted to facilitate an acquisition by Alpha, it was recognized by everyone that without new legislation there would have to be a tender process of some kind. Mr. Stephenson testified that he believed that if a tender was needed to "bless" the transaction, it might be a tender with a preferred bidder. I took that to mean a tender process intended to confirm the deal with Alpha. Although Mr. Hick denied in his testimony that he ever thought there would be any kind of auction or tender process, this ignores all of the references to the legal situation in the correspondence both in 1993 and 1994. I accept and find that everyone involved believed that any legal requirements would have been put in place by the Greek authorities had they wanted to conclude the private deal with the TVX-Alpha group.

117 I therefore do not believe that Mr. Hick and TVX were under any illusion about the nature or the solidity of Alpha's arrangement with the various Greek institutions in the fall of 1993. Mr. Hick was very experienced dealing with liquidators and insolvency situations. Although I accept that in his experience the major creditor would normally make the decision about disposition of assets, liquidation processes are always governed by law, and as a lawyer he knew that any applicable laws, referred to in the correspondence, would ultimately govern. Therefore TVX knew when it negotiated and signed the deal with Alpha that any "exclusive right to negotiate" which Alpha had was not something which was enforceable against the liquidator or the Bank, but was just an opportunity to have a head start or as Mr. Hick referred to it in his termination letter of July 1994, an "inside track".

118 The site visit proceeded on November 6 to 9, 1993 with Mr. Visagie and Mr. Godfrey McDonald, a consulting metallurgist and former associate of Mr. Visagie's at Curragh from the Alpha side and Mr. Werner, Mr. Ambrus and Mr. Chryssoulos a consulting minerologist who spoke Greek, from the TVX side. They attended at the mine site and did a full tour of the entire property which Mr. Visagie described in much the same terms as his visit with Mr. Kearney. They saw and discussed all of the mines and mills plus the tailings and slag deposits, the pyrite pile and the various areas for potential exploration. They also discussed the economics for improving the current operations, the future production and the gold plant. There were presentations by mine personnel and Mr. Visagie discussed again his geology ideas with Mr. Ambrus. The TVX people also had an opportunity to examine the site on their own. Mr. Visagie and Mr. Werner had a clash of personalities on the trip, and as a result of this trip TVX determined that it would reject as part of any deal any obligation to retain any of the Alpha group as employees of TVX on the project.

119 Mr. Ambrus and Mr. Werner reported to Mr. Hick upon their return from Greece. Mr. Hick

described the purpose of these reports to the court in this way:

> Well, the main purpose was to confirm some of the information we heard in Rio and to give us if you will, an impression or a view from people that we had confidence in, from the perspective of the geology and the potential, what was there and what the future potential was - , and what was the state of the operations and what could be or could not be done with them. So it was an analysis of what's there and what is their view on this as a potential investment. And I wanted that before we concluded an agreement with the group.

Mr. Ambrus reported to Mr. Hick that not only was it highly probable that the reserves were reasonably estimated, but also that the property had excellent potential and both he and Mr. Werner recommended pursuit of the acquisition. Mr. Hick therefore determined that he was going to recommend the acquisition to the Board. And on November 16, 1993, according to the Board minutes, Mr. Hick reported to the Board of Directors of TVX:

> Mr. Hick reported that the Corporation was looking at a prospect in Greece, being a lead/zinc/silver prospect, with large quantities of gold. The project included a mine which is in operation, but being poorly run. Mr. Hick reported that the transaction under consideration would involve a very low entry fee with tremendous upside -, particularly in view of the gold content. He did indicate that, if the project was proceeded with to conclusion, it would involve a purchase price in the order of $30-$35 million subject to negotiation as to amount and payment terms, $120,000,000 to build a plant to process the gold and approximately $35 million to upgrade existing facilities. He indicated that one of the important factors on a go-forward decision would be the availability of EEC grants to improve the economics of the project.

120 At this time TVX had only the information it had received from Alpha and the information which Messrs. Werner, Ambrus and Chryssoulos had learned from the 3 day visit to the mine. In his evidence, Mr. Hick said that the information he was relying on was from his own people. He was not prepared to acknowledge that the information received from Alpha had any value in his decision to proceed with an acquisition of the Kassandra mines at any stage.

121 TVX was continuing to negotiate the terms of an agreement with Alpha during this time, until ultimately the joint venture funding agreement was entered into in its final form on November 25, 1993.

ix) The Joint Venture Funding Agreement Between Alpha and TVX

122 The structure of the funding agreement provided that a joint venture company named Aegean would hold all of Alpha's interest in the Kassandra Assets, which interest had been defined in the preamble as "the exclusive right to negotiate the acquisition of Hellenic's mining assets", and

Aegean would conduct due diligence and acquire the assets. On signing TVX paid Alpha $163,000 for incurred costs and for that acquired a 10% interest in Aegean. TVX agreed to pay 100% of the funding required for the due diligence and to negotiate and complete the agreement in an amount not to exceed $1,500,000, subject to the right to terminate that obligation on 15 days' notice. Alpha granted to TVX the right to acquire an additional 78% of Aegean by providing a further U.S. $14,000,000 to Aegean to complete the acquisition of the assets, with Alpha retaining a 12% carried interest, that is, without requiring any payment. Within one year Alpha could elect to purchase a further 12% as a participating interest by bearing 12% of all costs.

123 The agreement provided further that on 15 days' notice, TVX could elect to terminate its obligation to fund the due diligence and negotiation costs. In that event, if Aegean or Alpha ended up purchasing the mines then Alpha was required to purchase back from TVX its 10% interest 10 days after such purchase.

124 The agreement contemplated a shareholder's agreement and a board structure, a right of first refusal, full access by both parties to all information on Aegean's activities, an agreed basis for payout of net income, and provided for negotiating employment arrangements for the Alpha group and Mr. McDonald after acquisition of the assets.

125 Neither TVX nor Alpha wanted Endeavour to be involved in the acquisition, and a termination letter was sent to Endeavour by Alpha the next day. The funding agreement provided TVX with indemnity in respect of anything which Alpha might owe to Endeavour for terminating their arrangement, and in a side agreement, TVX agreed to contribute $100,000 to any settlement that Alpha made with Endeavour. Ultimately Endeavour sued Alpha for breach of their agreement and the court was advised that a settlement was reached contingent on the outcome of this litigation.

126 Although the joint venture funding agreement contemplated Alpha purchasing the Kassandra assets in the event that TVX terminated its funding obligations before the purchase of the assets, it is silent on the issue of TVX purchasing the assets after termination.

127 Once the agreement was signed Mr. Stephenson wrote to Mr. Hick saying that he and Mr. Visagie would now "look but not touch", would take no steps without instructions from TVX and that they would "simply keep things moving ahead in Athens with their usual contact, Mr. Vassilis Tsilibaris at Citibank, N.A." It was understood and agreed that TVX would now proceed on behalf of the joint venture with the due diligence and with negotiations with the liquidator and the other necessary Greek entities for the purchase of the mines, and that the role of the Alpha group would be limited to whatever TVX asked them to do.

128 TVX began immediately to do its due diligence investigations of the mine and according to Mr. Hick ultimately spent hundreds of thousands of dollars by July 1994 when it terminated the funding agreement. The main expenditures were the due diligence and paying lawyers and others involved in or assisting with the negotiation process. TVX hired Mr. Papadopoulos as Athens Vice President in March and retained Mr. Dryllerakis as well as its own lawyer Mr. Karytinos as well as

their Athens auditors.

129 In early December Mr. Hick went to Greece for the first time and met Mr. Stephenson and Mr. Visagie there. Mr. Stephenson had introduced him to Mr. Tsilibaris of Citibank over the phone and Mr. Hick provided him with information about TVX so that he could correspond with the National Bank advising it to negotiate with the new Alpha/TVX group.

130 In Athens Mr. Stephenson introduced Mr. Hick to Mr. Dryllerakis, their lawyer, to Mr. Tsilibaris and others from Citibank, to National Bank of Greece people and to the Canadian Ambassador. Mr. Hick was curious why Mr. Tsilibaris who was with Citibank, seemed to be so helpful to them, and either in December or shortly thereafter in Greece, Mr. Stephenson told him about the $1 million dollar commission Alpha had agreed to pay Mr. Tsilibaris if they got the mine. In his testimony Mr. Hick said he was surprised and told Mr. Stephenson that was fine, it was his business, but TVX did not want any part of that arrangement.

131 While in Greece in December 1993, Mr. Hick developed an understanding that the Greek government controlled both the creditors and the liquidator and therefore was a very important player in the transaction. He further understood that the creditors and liquidator wanted to do a deal but it was not going to be straightforward because the new government was having second thoughts about selling the mines, about the terms of any deal and about who would be involved.

132 Mr. Hick testified however, that on his return from Greece in December 1993, he still believed that a negotiated deal could be done and that was why TVX did not cancel the funding agreement right away at that time. I note that in his trip report of November 18, 1993 to Mr. Hick, Mr. Werner indicated that he learned from a stockbroker he met there that because of the new government, whomever the previous negotiations were with would no longer have the power to finalize the agreement. In other words, Mr. Hick had this insight from his own employee before TVX signed the agreement with Alpha on November 25.

133 I accept from Mr. Hick that he may have gleaned a more educated understanding of the nuances of the situation of negotiating and completing an agreement for the assets with the relevant Greek entities from his trip to Athens in December. However, as stated above, I am satisfied that he and TVX were well aware before entering into the funding agreement with Alpha that what Alpha had was at most an "inside track" which had an official expiry date of December 31 1993, and not a "done deal".

134 I conclude that TVX first became interested in acquiring the Kassandra mines because of the information and presentation it received in Rio from Mr. Stephenson and Mr. Visagie about its gold potential; that TVX confirmed its acquisition decision based on its own visit to the mines; that TVX believed it was obliged to deal with Alpha if it wanted to proceed with the acquisition because for a time Alpha had the inside track with the Greek entities involved, and because having signed the Confidentiality Agreement and having received Alpha's information, TVX could not proceed without Alpha. I also find that TVX therefore negotiated and agreed to a very significant financial

participation for Alpha of the 12% carried interest and the 12% participating interest.

x) Pursuit of the Mine by TVX on Behalf of the Partnership

135 Following the December trip Mr. Hick asked Mr. Stephenson to do two things: first, to abstract the various correspondence with the National Bank of Greece and the liquidator to assist Mr. Craig, TVX's Toronto lawyer to prepare a draft offer in early January on his return from holiday; and second, to write to the National Bank of Greece to seek an extension of the December 31st deadline for TVX to submit the offer for the mines. The letter was dated and faxed on December 31st. The fact that TVX did not feel concerned about letting the deadline go by is a further indication that it viewed what Alpha had negotiated as an inside track only and not a done deal.

136 On January 7, 1994 TVX submitted its offer to Ethniki Kephaleou to purchase the mines for U.S. $32,000,000, drafted as a letter of intent pending final agreement. A copy of the offer was provided to Mr. Stephenson. TVX also asked Alpha to obtain three ten-kilogram samples of Olympias pyrite concentrate, Madem Lakkos/Mavres Petres zinc concentrate and Madem Lakkos/Mavres Petres lead concentrate, as well as mine documentation including cross and long sections, lay-outs of the ore reserve blocks and current mining plans. The samples and documentation were obtained and provided to TVX. Later in the spring TVX requested a further one ton sample of the Olympias pyrite.

137 These samples were requested by TVX because they had invested in some new technology for dealing with concentrates and they were supplying various concentrates to the inventor for testing. If the new technology had proved useful, then TVX would have used it at Kassandra. Ultimately, however, the project was written off, although the evaluation of the concentrates including the chemical analysis of the samples, the recoverability of the gold, and a lot of metallurgical information about the ores was information which TVX obtained but did not ever provide to Alpha.

138 The liquidator responded to TVX's offer to purchase on January 24, in a very non-committal letter indicating that TVX would have to deal with the government to obtain some of the assets and other terms which it had requested. In that letter as well it was clearly pointed out that at present, the sale of Kassandra mines could only be accomplished through an auction.

139 TVX continued its efforts to deal with the liquidator, the Bank and the government and to try to get them to agree to a sale. It retained Mr. Papadopoulos on a one year contract as Vice President of the company being incorporated known as TVX Hellas. His job was to co-ordinate matters in Greece and to continue to talk to key people and to make progress on the transaction. In March, Mr. Hick went to Greece and met with the Minister, Mr. Pahtas, where he tried to make the case for the sale. However, Mr. Pahtas was expressing interest in various options for developing Kassandra. TVX continued trying to make progress in April.

140 In May, Mr. Pahtas issued a notice to interested companies that the government was promoting an investment project at Kassandra mines including a gold plant which the EU would subsidize. The notice requested reliable international firms who wished to participate to meet with them. Along with the notice was an Information Circular on Kassandra Mines and Olympias Gold Project prepared by Mr. Demetriades, who had been employed for many years in a senior capacity at METBA including through the initial period of its liquidation, then had worked as a private consultant until 1996 when he was hired by TVX Hellas as its chief metallurgist.

141 Mr. Demetriades testified on behalf of TVX. He was retained by Mr. Pahtas in 1994 to prepare the Information Circular and to try to enlist interest in the project by international mining companies. The Circular described the mines and the pressure oxidation gold plant as recommended by METBA.

142 Mr. Demetriades testified about the circulation of this document to various international mining companies and as to discussions he had with some of them either at this time or earlier when he was with METBA. However, no representative of any company was called to testify about what information they received from METBA, from Mr. Demetriades, or from Citibank or the mine personnel in connection with a potential purchase of the mine. The evidence of Mr. Demetriades was of a general nature with respect to his discussions, as was the evidence of other mine personnel called by TVX on the issue of what information was available and more importantly given to potential purchasers of the mine both up to and in 1993, then in 1994 after this new initiative by Minister Pahtas.

143 In my view, this evidence as a whole is of little assistance on the issue of what information was exclusive to Alpha in 1993, and not made public subsequently. Clearly all mine and METBA information was not confidential to Alpha. What was confidential was the analysis performed by Mr. Visagie on the data including his quantification of projected gold values based on his theories of mineralization, the quantification of the costs and projected revenues based on the operational changes he was proposing and his own analysis of the benefits of the bio-leach process for this project as opposed to the pressure oxidation process preferred by METBA for extracting the refractory gold. I am satisfied that the same mine and METBA information was provided to all interested purchasers as was provided to Mr. Visagie to the extent that they asked for the level of detail that he did. However, that information alone is not what Alpha put together for its presentation to potential investors and partners and in particular is not what was presented to TVX.

144 Mr. Hick described the content of that Information Circular as just a regurgitation of what TVX had been told by Alpha and confirmed by Messrs. Ambrus and Werner when they talked to people at the mine. He said there was nothing terribly new. There were the assets, the reserves and the fact that there was potential. However, this description ignores the quantification of the gold potential done and presented to TVX by Alpha. What appears clear is that the entire emphasis of the Greek government in this sale document for Kassandra was no longer the lead and zinc potential as in the Citibank documents, but the gold potential with the addition of the refractory gold processing

facility on site; in other words the same emphasis and approach as Alpha had. However, the issue is whether the details of this document are co-incident with the important details of Alpha's presentation. Expert evidence was led on this issue.

145 Mr. Hick met with Mr. Pahtas again in June. At that time Mr. Pahtas made it clear that his government was not going to enter into a private sale agreement with the TVX/Alpha partnership, but that it was going to hold a public auction of the mines. Mr. Hick still wrote a further letter hoping to convince the Minister of the benefit of proceeding with them. However, the Minister responded to Mr. Hick in writing on July 5, 1994 that there would be a tender process with invitations to tender and conditions of sale to be issued soon and with the process to be completed by the end of the year and expressing the hope that their interest would remain strong during the tender process.

146 By this point in time TVX had spent hundreds of thousands of dollars according to Mr. Hick pursuing the Kassandra mines on behalf of TVX and Alpha pursuant to the November 25, 1993 agreement. In early July, he telephoned Mr. Stephenson and told him that he was not optimistic about being able to conclude an agreement to buy the Kassandra mines and wanted to discuss renegotiating their deal. Mr. Hick did not tell Mr. Stephenson that the Greek government had formally advised that there would be a public tender with the process to be completed before the end of the year. Mr. Stephenson told Mr. Hick that he would discuss renegotiating with TVX with his partners. They were all opposed to the idea, and he wrote on July 15, 1994 saying that they were comfortable with the existing agreement but were open to suggestions from TVX but only after matters had been settled with the Greek authorities so they would know what had been finally settled.

xi) Termination of the Joint Venture Funding Agreement by TVX

147 TVX responded with its termination letter of July 22, 1994 prepared by its lawyer, terminating the joint venture funding agreement of November 25, 1993 pursuant to paragraphs 4 and 9 of that agreement which provide:

> 4. So long as TVX has paid the initial payment set forth in paragraph 2 hereof, it shall be entitled to terminate its obligations to arrange for the funding of Aegean in accordance with paragraph 3 hereof at any time upon not less than 15 days' notice in writing to Alpha Group and to Aegean provided that it will be required to continue to arrange for the funds required by Aegean in accordance with Schedule "A" as amended for the expenditures scheduled to be incurred during the 15 day period following the giving of such notice of termination.
> 9. So long as Endeavour has not provided to Aegean, TVX and the Alpha Group a complete release in writing of any and all claims Endeavor may have under the Endeavour Agreement, TVX shall be entitled to give notice of termination in accordance with paragraph 4 hereof, but in such event shall not be required to

> provide or arrange for funds for Aegean during any period subsequent to the giving of such notice of termination.

148 The termination letter states that TVX has now been officially informed by the Greek government that the Kassandra mines will be subject to a "new open auction process the timing and terms of which have not yet even been set." Attached to the letter was a small typed enclosure saying: "Jim-please call me. John". Upon receipt of this letter Mr. Stephenson also consulted a lawyer, so that at this point in time both parties were proceeding in a calculated manner based on their legal advice.

149 Pursuant to Mr. Hick's invitation, Mr. Stephenson met with him on July 27, 1994 at his office to see if he would offer a renegotiation. Mr. Hick made no note of the conversation, but Mr. Stephenson immediately prepared a letter to his lawyer, although he sent it the following day, describing what was said at the meeting, and Mr. Hick confirmed that that letter is essentially accurate. At the meeting Mr. Hick said that TVX might bid at the auction and if they were successful, they might pay Alpha something on a non-contractual basis. He also said that Alpha was free to bid alone or with another partner. I accept that he offered to return any documents to Alpha and Mr. Stephenson said he would get back to him about that. In response to the issue of bidding at the auction, Mr. Stephenson was non-committal or did not respond. In other words, he did not protest nor did he actively acquiesce in what Mr. Hick was saying.

150 Although no evidence was given by either witness as to the content of the legal advice each received, it appeared and I infer from the evidence that while Mr. Hick was attempting to get Mr. Stephenson to agree at the meeting that each party was legally free to bid for its own account in the auction, Mr. Stephenson's position was to listen but not speak and not to make any commitment.

151 Mr. Stephenson took the position on cross-examination that the reason that Alpha did not bid in the auction either alone or with a partner was that its partner TVX was bidding for both of them and therefore it was unnecessary for Alpha to do so. He denied that Mr. Hick had terminated the relationship with Alpha in their meeting other than by terminating the funding agreement, and he further testified that he did not know whether Mr. Hick felt that Alpha had a continuing interest with TVX in spite of the fact that Mr. Hick had told him at the meeting that TVX might proceed to bid at the auction and that Alpha was also free to do so. He said that there was no reason for him to advise TVX of his view that they remained partners if TVX were to acquire the mines.

152 I do not accept that Mr. Stephenson did not know what Mr. Hick felt about whether TVX and Alpha continued to have an ongoing relationship in relation to the acquisition of the mines. It was apparent from his report of the meeting to his lawyer that he understood clearly that TVX had terminated the joint venture funding agreement and intended to proceed on its own, and that its position was that if TVX was the successful bidder, it might give Alpha something ex gratia, that is without any obligation to do so, and therefore not because they were still partners.

153 This approach was consistent with some of Mr. Stephenson's testimony in his

cross-examination. He was evasive on issues which involved personal embarrassment about his dealings with the Greek authorities and with others, as well as on certain matters directly in issue in the lawsuit. For example, he refused to acknowledge that from August to October 1993, Alpha was attempting to secure from the Greek authorities an exclusive position to negotiate for the acquisition of the mines, although it is clear from every document that this was the case.

154 I find that Mr. Stephenson understood in July 1994 that TVX intended to proceed with its bid for the Kassandra mines on its own and not in any partnership with Alpha. Although there was some suggestion that Alpha may have been able to enlist another industry partner with it to bid on the mines, it appears that Alpha did not try to enlist a new financial partner nor bid in the auction because Alpha decided that its best chance to secure an interest in the mines at that stage was to hope that TVX would succeed, then Alpha could assert its rights at that time.

155 The defendant takes the position that because Mr. Stephenson failed to advise Mr. Hick that if TVX bid for the mines, the parties were still partners, TVX acted to its detriment in proceeding with the bid and the plaintiffs are now estopped from asserting their claim.

156 However, in my view nothing turns on Mr. Stephenson's silence. Alpha had no obligation to take any position with TVX after TVX elected to terminate unilaterally, but was entitled to rely on its rights determined and governed by the two written agreements which they had entered into, and the obligations and duties which flowed from them.

157 Mr. Hick gave evidence that had Mr. Stephenson advised that Alpha took the position that it would retain an interest in the mines if they were acquired by TVX, then he would have acted differently in respect of that acquisition. He may have gone to court for a determination of TVX's rights, he may not have put the bid in in the form they did, or possibly not at all. He went on to say that as a consequence of Alpha's failure to inform TVX of its claim to an interest in the mines after the termination of the funding agreement, TVX has been harmed. However, he acknowledged that after TVX was chosen as the highest bidder in the auction, but before the subsequent negotiations which the Greek government required for improvement in the terms and eventual finalization of the sale agreement, Alpha asserted its 12% interest in a letter to TVX. But TVX did not go to court at that time, nor did it seek to resile from its agreement to purchase the mines but instead went forward with onerous further negotiations and closing requirements lasting over a period of several months in order to secure the purchase.

158 I therefore do not accept Mr. Hick's position on this point. TVX took legal advice before terminating the joint venture funding agreement and went forward to bid on the mines in the auction process, purportedly on its own account. If part of TVX's strategy was to set up an estoppel against Alpha by anything said in the meeting between Mr. Hick and Mr. Stephenson to allow TVX to proceed on its own, that strategy failed.

159 There was no reliance by TVX on anything said or not said in that meeting, nor on the evidence did TVX act to its detriment by purchasing the mines. TVX had already made the decision

that subject to its circumstances at the time, it would bid in the auction when it was announced, and Mr. Hick said so at their meeting. TVX had already retained for its own bid Mr. Tsilibaris, who had left or was leaving Citibank at that time to form his own consulting firm, as well as Mr. Dryllerakis, who had originally been Alpha's lawyer. TVX kept Mr. Papadopoulos on as Vice President of TVX Hellas with a one year contract. All three of these men had previously been retained to work for TVX in its partnership with Alpha.

160 Furthermore, had TVX wanted to satisfy itself further about its rights vis a vis Alpha after it terminated the joint venture funding agreement, it could have sought a written mutual release of all claims, and if Alpha had refused, then sought the assistance of the court in respect of the rights of the parties. Rather TVX was content to take its chances on the legal rights between the parties and proceeded with the bid on that basis.

xii) The Purchase of the Kassandra Mines by TVX

161 After the meeting in July 1994, TVX and Alpha had no communication until April 1995 after TVX was announced as the successful bidder for the mines, when Alpha's lawyer sent TVX a letter claiming and asserting its 12% interest in the mines. However, TVX retained all of its personnel working on the mines' acquisition in Greece and advised the Greek government of its interest in bidding in the auction and ultimately received an invitation to tender in October, 1994. TVX also received the liquidator's Offering Memorandum in connection with the tender which described the mines, the requirement that a gold plant be constructed as part of the bid and set out detailed conditions for the bid.

162 At that point TVX sent a due diligence team over to Greece to prepare a report to be used in order to formulate a bid in accordance with the tender requirements of the Greek government. That bid had to not only offer a sum of money for certain assets and ask for particular closing requirements as in a private offer to purchase, but now had to present a full business and financial plan with appropriate financial projections and undertakings in respect of building the gold plant, retaining certain numbers of employees, etc. Extensive evidence was given by the members of the team outlining their activities in Greece and what went into preparing the chapters that each of them wrote for the due diligence report. The purpose of this evidence was to show that TVX relied only on the due diligence it did in the fall of 1994 and not on anything provided by Alpha when it made its bid for the mines in the auction process. In other words, to show that TVX did not "use" any confidential information provided by Alpha under the Confidentiality Agreement.

163 In fact the members of the team who travelled to Greece were all people who had not been involved with the original attempt to purchase the mine, except for Mr. Michael Werner who headed the team and who also had travelled with Mr. Ambrus to Greece with Mr. Visagie in November, 1993. They were not given any of the Alpha documentation. They prepared their report which was used as the basis for the bid of approximately U.S. $47,000,000 that was submitted by TVX in December, 1994.

164 The bid itself was authorized by the Board of Directors of TVX before submission and the evidence was clear that Mr. Batista as Chief Executive of the company had the final say on all major decisions. Mr. Hick as well helped to prepare the bid and of course make the decision to proceed with it in its final form. Both the Board and in particular Mr. Batista and Mr. Hick were very aware of and familiar with the information that had been originally provided to TVX by Alpha. Mr. Werner and Mr. Ambrus were also very familiar with that information. In the bid itself, reference is made to the fact that TVX had completed two due diligence trips to Greece, and Mr. Hick confirmed in his evidence that the first of those trips was the one in November, 1993 with Mr. Visagie.

165 Mr. Hick also confirmed that the reference in the bid to TVX spending over $1 million on developing new technologies in respect of the Kassandra ores refers to the research project funded by TVX for which Kassandra ore samples were obtained by Mr. Visagie from the mines in the winter and spring 1994 and provided to TVX while the parties were still operating under their joint venture funding agreement. This is information never provided to Alpha.

166 Mr. Ambrus also had a role in the due diligence process in preparation for the bid. He did not go to Greece, but his delegate's job was to check on the gold grades at Olympias which he had questioned as too low based on the previous trip. Mr. Visagie had originally said the same thing. The result of the due diligence in 1994 was to confirm that the gold grades at Olympias were higher than they were believed to be. Based on the results of the 1994 due diligence, he reconfirmed his original recommendation to purchase the property. Therefore Mr. Ambrus built on the information he had obtained from his original visit in 1993 with Mr. Visagie after the Alpha presentation to TVX in Rio.

167 There were ultimately only two bidders in the auction, TVX and Newcrest Mining Limited, an Australian gold company. Newcrest put a condition in its original bid that it was subject to further due diligence, which condition was not in accordance with the invitation to tender. The due diligence which Newcrest still had not yet done included for example, confirmation of the gold grades and reserves, which of course, TVX had done twice and had had over a year to do.

168 In March 1995 TVX was announced as the successful bidder subject to further conditions to be negotiated required by the Greek government. The sale was concluded in December 1995.

xiii) Expert Evidence

169 Expert evidence was called by both sides on 5 issues:

1) the understanding in the mining industry about the purpose of confidentiality agreements;
2) whether Mr. Visagie's information was new or different in any way from the public information about the mines, and whether it added anything of value to the published information already available;

3) whether the Alpha information became public through the 1994 Information Circular or Offering Memorandum on Kassandra;
4) whether TVX used the Alpha information in its bid;
5) where a junior and a senior mining company enter into a funding agreement for the purpose of pursuing a mining opportunity, and the senior company terminates the agreement, the industry understanding if any as to whether the senior company may continue to pursue that opportunity for its own account.

170 The plaintiff's expert, Mr. McOuat also gave opinion evidence about the value of the mine at the time of the trial. No other expert report was tendered on this subject.

171 The plaintiffs called two experts. The first was Mr. Jack McOuat, President and Director of Watts, Griffis and McOuat Limited, Consulting Geologists and Engineers. Mr. McOuat received his degree in geological engineering in 1957 and has extensive experience in planning and supervising field programs, engineering investigations and feasibility studies all over the world in connection with mining projects as well as acting as technical adviser to international mining companies in their mergers and acquisitions. He has advised governments and financial institutions in respect of mining ventures and evaluations. He has numerous professional affiliations including as a Fellow of the Canadian Institute of Mining and Metallurgy. From his experience and affiliations he is familiar with mining practices in Canada.

172 Mr. Christopher Lattanzi received his B. Eng. (Mining) from the University of Melbourne in Australia in 1959. He has been a consultant to the mineral industry since 1967, and is now president of the mineral industry consulting firm of Micon International Limited. His experience and expertise is in due diligence for financial institutions seeking to lend for construction of mineral deposits. As president of his company he supervises all firm work including design and management of exploration programs, audit of mineral reserves and resources, all kinds of studies for clients such as feasibility, commodity, marketing and due diligence. In his consulting practice he has full familiarity with confidentiality agreements as they apply to proprietary information about mineral properties.

173 The defence also called two mining experts. Mr. Michael Anthony is a metallurgist and principal consultant with St. Barbara Consultancy Services, an independent consultancy firm based in London, England. He has an honours degree in chemical engineering. He was assisted in preparing his report by an associate consultant mining geologist. Mr. Anthony has 25 years experience in the metals industry and has been involved with the evaluation of projects in more than 20 countries around the world. He has been a consultant since 1986, principally involved with the assessment of metals operations and projects and is also very familiar with the use of confidentiality agreements in transactions.

174 Mr. Graham Farquharson is a professional engineer and has been president of Strathcona

Mineral Services Limited since 1974. His academic qualifications are a B.Sc. in mining engineering from the University of Alberta in 1964 and an M.B.A. from Queens in 1969. He has been responsible for the overall direction and management of Strathcona since the establishment of the consulting practice in 1974. Assignments have covered a wide spectrum in the mining industry including project management, project and company appraisals and evaluations, feasibility studies, operational reviews and administration of public and non-public mining companies. He has extensive experience in Canadian mining including gold mining, as well as international experience.

1) Confidentiality Agreements

175 Mr. McOuat testified that most companies use confidentiality agreements and that their purpose is to prevent the person who receives confidential information from using it without the consent or agreement of the person who provided it.

176 Mr. Lattanzi confirmed this industry understanding. He said that he agreed with Mr. Farquharson's report where he said that any confidentiality agreement usually has a clause which excludes from being considered confidential, information that is already in the public domain or that becomes public. In this case he said the idea of gold in the sulphides at Kassandra was not proprietary to Alpha, but Alpha's concept of how much gold was at Kassandra, how one would develop it, the economic outcome and the modernization of the mines were proprietary to Alpha. That information and those ideas should be treated as confidential by TVX until the information was in the public domain, that is generally known in the mining industry. He testified further that Alpha's information and ideas were not in the public domain by the time of the TVX bid in late 1994.

177 In cross-examination Mr. Anthony testified that although one purpose of a confidentiality agreement is to protect the person who provides confidential information, he emphasized, as someone whose clients often receive information, that it also protects the recipient so that that person's rights are not restrained should the information be known or become known to him. He agreed that junior mining companies who have information that they bring to senior companies need protection so that the senior company cannot receive the information then take the property for itself rather than in a joint venture with the junior company.

178 For the purpose of his written report Mr. Farquharson was asked whether it would be reasonable when TVX signed a confidentiality agreement for it to recognize that information it was receiving from Alpha was proprietary and confidential. He testified that confidentiality agreements always include the provision that if some information is in the public domain it is excluded. He went on to give the opinion that after reviewing the documentation it would be apparent to the recipient which information or ideas were generally known in the mining industry. Of course although this might appear to be a self-evident proposition, the fact that the experts in this trial disagree diametrically on the issue of what information presented by Alpha was new and what information was or became public, belies the acceptance of this observation. Furthermore, it raises

the serious practical issue for the industry, not addressed by any of the expert or other witnesses at this trial, as to how confidentiality agreements actually operate (short of seeking the assistance of the court to determine the issues) where there is no agreement as to what information is or becomes public.

179 Mr. Farquharson said that Alpha brought to TVX the fact that there was gold potential at Kassandra and that it had a time-limited exclusive arrangement to acquire the property. He said it was important to keep those matters quiet so that no new interest would be generated in the property as a major gold source waiting to be developed. He went on to say that after the termination of the funding agreement, all of the information became public in the liquidator's information circular. He further disputed that any of the information was proprietary to Alpha alone in any event, as it appeared to belong to Curragh.

180 In cross-examination he agreed that the purpose of confidentiality agreements is to protect the provider of the information. He commented that in his experience it is the major companies who seek to have the agreements signed more than the smaller ones.

Conclusion No. 1

181 The experts confirmed the general understanding of the parties that confidentiality agreements are used to protect both the giver and the receiver of confidential information, that information that is already public or becomes public is generally not protected, and that the specific terms of the agreement govern in each case.

2) Did Alpha add anything new and if so anything of value to the already available information about Kassandra?

182 Mr. McOuat first dealt with the Endeavour Report. He said it contains new and novel information from the previous Citibank Memoranda. In particular the highlighting of gold, and the construction of a gold recovery plant to produce eventually 150,000 ounces of gold at a cost of $88 per ounce which is extremely low; the opportunity to treat old tailings containing a high gold content of 4 grams per tonne; exploration potential such as copper/gold deposits with reserves of 83 million tonnes, grade of .54 copper and .82 gold with exploration targets; cash flows showing the impact of gold on the economics of the mines producing 4 times the projected cash flow of the base metal operation; turn-around of the base metal side with the concept to modernize the mines, change the mining method, bring in some new equipment to increase productivity and change the scale of the operation from 160,000 tonnes of total production to 900,000 to 1,000,000 tonnes per year. Mr. McOuat commented as well that from the previous documents, the mine owners did not seem to know about the new technology for processing refractory gold. Of course, this technology was being developed and pursued by METBA, a separate entity from Hellenic, and in cross-examination, Mr. McOuat acknowledged that pressure - oxidation and bio-oxidation technology were both well-known in the mining world in 1991 including by METBA.

183 Mr. McOuat also focused on the fact that the Endeavour Report reflected a geological interpretation which he said is vital to the assessment of the potential of a deposit. From the gold resource update he concluded that Mr. Visagie's concept reflected a "startling change of approach to the whole Kassandra situation", in particular the total of 10.5 million ounces of gold with specific backup analysis of where it is located. He concluded that the information in the two documents was important and valuable information to someone in the mining industry.

184 He also expressed the view that even if the various elements that were in the Endeavour Report and the Gold Resource Update could be found in various publications around the world or by gathering together a lot of data, the product of Alpha represented "a unique appreciation of this deposit", and: "It's the interpretation, it's the scope, the modeling, and this sort of thing, and in the Endeavour Document, it not only illustrates the potential with an emphasis on the gold, but it discusses reasonably comprehensibly, especially in what you might call an offering memorandum, the approach that should be taken to not only confirm the gold resource, but also to renovate, improve, expand on the existing operations such that they too become profitable."

185 In cross-examination Mr. McOuat confirmed that with a selling document like the Endeavour Report, an interested party would proceed to investigate the input into the document, both the sources and the methodology, and if that was satisfactory, then would go to the next step of confirmation, a site visit, as TVX did.

186 Mr. Lattanzi also gave the opinion that the Endeavour document contained new and novel material, in particular, the geological concept regarding the potential for discoveries of gold and other minerals, the detailed technical development plan to modernize the existing base metal operation and to produce gold, and the projection of profitability and cash-flow. He said that the geological concept is the basis for the mineral industry and once derived, "is regarded universally in the mining industry as confidential and proprietary, because it is that concept which gives somebody the competitive edge."

187 He also commented that the information in the Highlights sheet would be of interest and significance to the mining world in 1993, focusing on the 10.5 million ounces of gold, the U.S. $32,000,000 cost to purchase as well as the $88 per ounce cost of gold production being very low. He also expressed the view that the quantification of gold by location on the property in the Gold Resource Update was new and novel to the mining industry in 1993.

188 In cross-examination Mr. Lattanzi agreed that while others had recognized the occurrence of gold at Kassandra, he had not seen in any documents a suggestion that anyone had quantified the occurrence as Alpha had.

189 The defence experts both expressed the view that Alpha added nothing new or original to the existing information about the Kassandra mines, their potential as a very large gold producer and the methodology for changing the mine to realize that objective.

190 Mr. Anthony's evidence was that there was a substantial amount of publicly available information about Kassandra in 1993 and that many mining companies knew about its gold reserves and potential. In his written report he implied that because the information was publicly available, TVX was one of such companies who knew about it. He expressed the view that the Endeavour Report contained nothing novel and that its approach was one which "anybody in the mining industry would have taken, based on information which was commonly and publicly available." He further stated that the Gold Resource Update was a document that had "no meaning at all" for someone in the mining industry because the figure of approximately 10 million ounces of gold includes both proven and speculative amounts. Furthermore he said that the fact that since its acquisition of the mines TVX has discovered that the property contains in excess of 10 million ounces and counting is co-incidental and not confirmatory of Mr. Visagie's analysis, in particular because the drilling to date has revealed several million ounces at Skouries which Mr. Visagie only estimated at two million ounces.

191 Mr. Anthony's independence as an expert called to assist the court as opposed to an advocate for the defendant was undermined in cross-examination. For example, he was asked about the 1991 Citibank Offering Memorandum as follows:

> Q. Do you agree with me it does not present Kassandra as primarily, and first and foremost, as a gold mine?
>
> A. Does highlight the gold content and the gold potential beyond. I don't think it's significantly different from the other major reports I reviewed, sir.

He was then taken through all the references in the document to gold as well as to lead and zinc, and was forced to acknowledge the lack of emphasis and information on gold, that there is no reference to many of the areas of gold interest such as Skouries, Fisoka or Piavitza as well as the fact that there is no suggestion of excellent potential for millions of ounces of gold in the document and no cash flow projections.

192 In his written report filed as an exhibit with the other three expert reports, Mr. Anthony concluded that prior to receiving Alpha's information TVX had "a substantial amount of publicly available information on Kassandra available" and that "it would be very familiar with refractory gold technology" and "would take it as read that the exploitation of Olympias ... would involve pressure-leaching as the default technology choice." He goes on to express the opinion that TVX's enthusiasm to speak to Alpha about Kassandra "and subsequently to sign confidentiality and joint venture agreements" was because of the exclusivity arrangement it had negotiated and "was not related to information." He said in examination in chief that his opinion had not changed after reading transcripts of all the trial evidence.

193 In cross-examination, however, Mr. Anthony acknowledged that the evidence both on discovery and at trial was that TVX had no file on Kassandra prior to its introduction by Alpha. He eventually said he did not intend in the report to suggest that TVX actually had information on

Kassandra before Alpha brought it to TVX.

194 He was also led through the history of the attempts by the owners to sell the property from 1991 to 1994, and acknowledged that in spite of his view that the gold development potential was so obvious to anyone, no company ever bid on the mine except for Curragh's non-compliant bid.

195 He was also taken through the history of the introduction of the property and its potential to TVX in late October 1993 through the attendance in Toronto, the site visit and the agreement with Alpha in late November. He did not seem to be fully aware that the Highlights sheet and the Endeavour Report were in TVX's hands before Alpha was invited down to Rio, nor was he aware of the cash flow presentation for 200,000 ounces of gold which Mr. Batista asked Mr. Visagie to present at the meeting in Rio. However, he agreed that the documents must have been of sufficient interest to TVX for Alpha to be invited to Rio. He also agreed with Mr. McOuat that it would be normal after a presentation for TVX to proceed to confirm the information provided as it did, and that except for a couple of articles that Mr. Ambrus got from a friend, all TVX had when it decided to proceed with Alpha based on the "low entry fee and tremendous upside" was the Alpha information and the information TVX learned from the site visit.

196 Mr. Anthony had been provided with a mediation brief prepared in this matter which apparently set out the TVX positions and arguments and he had discussed the matter with counsel and with Mr. Hick. In my view his report and his testimony bespoke an approach more suited to an advocate than an independent expert.

197 Mr. Farquharson was much more circumspect in his report and the presentation of his views on the issues. He did not go so far as to say there was nothing new or novel in the Alpha information. He commented that the concept in the Endeavour Report of increasing the mine production to produce more gold was an obvious one and one already recognized by METBA, as was the concept of using the bio-oxidation (bio-leach) method for extracting the gold, even though METBA preferred the pressure oxidation method. He allowed that the Gold Resource Update with its list of potential sources of gold on the property was useful as a basis for evaluation on due diligence. However, he felt that Mr. Visagie could not take credit for the concept of gold in the deep extension of Olympias but rather that belonged to the mine geologists who decided to drill the step-out holes there. He also focused on the fact that some of Alpha's information was developed by consultants for Curragh and used by Mr. Visagie. He also felt that an experienced mining person would have had big question marks about some of the items on the Gold Resource Update list and he would have heartily endorsed others. He agreed that 10.5 million ounces of gold in 1993 would have been one of the largest groupings of potential gold sources known. However, because much of the potential identified in the Gold Resource Update was not economic, it could not be considered as "potential".

198 He also agreed that no pre-1993 document quantifies or gives an order of magnitude of the potential and that in spite of the efforts of Kidder Peabody and of Citibank in the early 1990's,

neither METBA nor Kassandra were sold even though the existence of gold there was made known through their efforts to several large mining companies. He also agreed that prior to the Endeavour Report no document had a projected cash flow in it. He agreed that the one in the Endeavour Report would be a good starting point from which to do one's own assessment.

Conclusion No. 2

199 I conclude that the balance of the expert opinion which I accept is to a greater or lesser extent that Mr. Visagie did have some new and novel contribution to make to the existing information and perspective on Kassandra and that it had value. I conclude based on the evidence as well as the expert opinions that Mr. Visagie developed new information, new theories and new presentations of existing data so that he created new information which was confidential information to him until he disclosed it to others.

3) Did the Alpha information become public through the April 1994 Kassandra Mines and Olympias Gold Project Information Circular or the October 1994 Kassandra Mines Offering Memorandum or otherwise before TVX made its bid?

200 Mr. McOuat pointed out that the October Offering Memorandum a) contains no plan to make the lead/zinc operations economic with positive cash flow; b) does not refer to 10 million ounces of gold; c) does not refer to deep extensions of the Olympias ore reserve of 7.5 million tonnes; d) does not show shallow extensions of 2 million tonnes; e) does not show tailings of 2.4 million tonnes; f) does not show 10 million tonnes of ore reserves at Madem Lakkos and Mavres Petres; g) the gold grade is shown together as 3.1 grams while in the Gold Resource Update the two grades are shown separately as 2 grams and 7.5 grams, and the tonnage is also different; h) Skouries and Fisoka both show lower tonnage and gold grade. He concluded that the Offering Memorandum does not contain the same extent of information as the Endeavour Report and the Gold Resource Update, and further that Alpha's geological interpretation and the extent of the gold never got into the public domain in the summer or fall of 1994.

201 Mr. Lattanzi testified that the October 1994 Offering Memorandum does not contain the new and novel information which he identified in the Endeavour Report and the Gold Resource Update or Mr. Visagie's oral presentation to TVX, and he gave some examples similar to those referred to by Mr. McOuat. In cross-examination he was taken to the April 1994 Information Circular and agreed that it contained a description of the Olympias gold project including cash flows for the construction and operation of the gold plant which he agreed in broad terms addressed the same matters as the cash flows in the Endeavour Report as well as the cash flows which TVX had prepared.

202 Mr. Anthony was not asked to address this issue. Mr. Farquharson mentioned that after the termination of the parties' joint venture agreement, all of the Alpha information became available through the liquidator's information circular, which I took to mean the October 1994 Offering Memorandum. In his written report he said that Alpha's information should be treated as

confidential by TVX until it was generally known in the mining industry "as probably was the case when the Kassandra properties were put up for public auction in 1994." (emphasis added)

Conclusion No. 3

203 The Alpha concept of Kassandra as primarily a gold mine was finally articulated by the Greek government and liquidator in April and October, 1994. However, all of the detailed work done by Alpha including gold quantification is not fully replicated in the 1994 documents.

4) Did TVX use the Alpha information in its bid for the mines?

204 Mr. McOuat first commented that it would be very useful for a company to have the Endeavour and the Gold Resource documents one year before the October 1994 Offering Memorandum came out.

205 He also compared the TVX Due Diligence Report of 1994 with the Endeavour Report and the Gold Resource Update and concluded that there was not a great deal of new information in the TVX Due Diligence Report.

206 However, in cross-examination he agreed that there were in fact several differences in the proposed approach to be taken to operating the mines. For example, from the Due Diligence it appeared that TVX intended at that time to proceed with pressure oxidation rather than bio-oxidation as Alpha was recommending. He also agreed that TVX planned to close Madem Lakkos and Mavres Petres rather then continuing to operate them as contemplated in the Endeavour Report. Another difference in approach was that TVX intended to close the Stratoni mill, not expand it. Also TVX planned to produce 200,000 ounces of gold, not 150,000 ounces. He also agreed that TVX planned to treat labour differently than Endeavour had, not guaranteeing any jobs at all to the existing labour force. He noted that there is no mention of potential local opposition in the Endeavour Report but there is in the TVX Due Diligence study.

207 Mr. Lattanzi reviewed the TVX November 1994 Due Diligence Summary and concluded that there was no material difference between it and the information provided by Alpha to TVX in 1993. He referred to the common thread of the plan to modernize and make the operation profitable, although he recognized that there were differences in detail such as costs, the method of treatment of the gold, the concept of closing Mavres Petres and Madem Lakkos rather than mining them out, all of which he considered to be differences in emphasis. He noted that as of 1997, TVX was mining out the two mines and had not closed them, and as well, because TVX reports now show over 12 million ounces of gold, a significant part of which is not in the "potential" category, he concluded that Mr. Visagie's geological concept is validated.

208 On the issue of whether TVX actually used anything from the Endeavour document, Mr. Lattanzi said although someone may have thought of the same ideas eventually or perhaps some concepts in the Endeavour Report were based on work done by others, he believes that the common

thread of the three components of the geological concept, the development plan and the cash flow estimates run through the Endeavour document to the TVX due diligence studies (both 1993 and 1994) to the TVX bid. He said he saw no evidence that anyone else who saw the mine had arrived at those concepts.

209 Mr. Lattanzi agreed in cross-examination, however, that there are differences between the TVX Due Diligence 1994 document and the Endeavour document as outlined by Mr. McOuat, plus for example environmental matters, and he agreed as well that although he viewed certain differences as refinements of the Endeavour material, there was nothing specifically indicating that the TVX cash flow summary in its bid document was copied from Endeavour.

210 Mr. Lattanzi was also referred in cross-examination to the Newcrest bid for the mines. He agreed that in general the same common thread of mine expansion and modernization with the gold plant is there as well, but not in any detail.

211 The defense experts both gave the opinion that TVX did not use the Alpha information in its bid for the mines, but rather relied solely on its own due diligence work. Mr. Anthony was asked as were the other experts to look at the TVX Due Diligence Report (1994) and from that determine whether TVX used any of the Alpha information. He responded that there are general similarities in the approach but no specific similarities and a large number of differences. He also compared the Newcrest bid with the TVX bid and with the Endeavour document and found the Newcrest bid to be closer to the TVX bid than to the Endeavour because the former two were both bids.

212 In cross-examination he confirmed that his opinion on use was based only on the documents and not on knowledge of what information Mr. Batista or the board had. He also took the position that although TVX itself referred in its bid to the fact that it had performed two due diligence missions, and Mr. Hick confirmed in his evidence that the first was in November, 1993, that trip was not a due diligence trip by TVX. This was important in the context of what use TVX made in the bid document of the Alpha information which it had sought to confirm on its first trip to the mines. Mr. Anthony used his disagreement with the terminology of "due diligence trip" to avoid dealing with this point.

213 Mr. Farquharson also gave the opinion that "having read what TVX did both in 1993, and November 1993 and again in November 1994, and knowing some of the individuals that were involved, I feel quite confident in saying they arrived at their concepts of their own accord." He went on to say that the concepts were logical and any experienced mine operator would derive them from visiting the site.

Conclusion No. 4

214 The experts were not really able to assist the court greatly on whether TVX used any information it received from Alpha when it ultimately bid on the mines. TVX was clear in its evidence that from its perspective, it had made all its own inquiries and analysis and relied only on

its own work. The question for the court is what ultimate use or value to TVX was the original insight or head start which Alpha shared with TVX in October and November, 1993?

5) Is there an industry practice regarding one party bidding on a property after terminating a funding agreement for that property with the other?

215 The plaintiffs' experts and the defendant's experts disagreed on this issue as well.

216 Mr. McOuat testified positively that there is a practice in the mining industry that a senior mining company which has withdrawn from a funding arrangement with a geologist or junior mining company gives up all rights to the project and will not go after the project for itself without the other party. In cross-examination he acknowledged that he knew of no written articles on the subject and that it was his personal view but that the opposite approach flies in the face of both mining and common business practice.

217 Mr. Lattanzi also expressed the view that there is a practice within the mining industry that a provider of funds for a project who has terminated the funding is prevented from pursuing the opportunity on its own.

218 Mr. Anthony and Mr. Farquharson disputed any such practice. Mr. Anthony stated that there is no standard practice in the mining industry and that the parties are governed by the agreement that they negotiated.

219 Mr. Farquharson also said that there is no standard practice and everything is governed by the particular circumstances. He expressed surprise however, that this funding agreement did not have a non-competition clause for both a limited time and geographic area, which clause he said is very common in the industry and a fairly standard industry practice. He also expressed the view that in the mining industry when someone identifies an opportunity then some form of compensation, calculated in different ways, is owed to the originator of the idea.

220 In my view Mr. Farquharson's opinion is not that divergent from the opinions of Mr. McOuat and Mr. Lattanzi on this issue. Non-competition after termination of a funding arrangement, at least within some time and geographic parameters, is mining industry practice or expectation. Mr. Anthony is from England and may not be as familiar with industry practice in Canada as the other three gentlemen.

Conclusion No. 5

221 I conclude that there is a mining industry practice or understanding that after a senior mining company terminates a funding arrangement with a junior, the senior mining company does not compete with the junior for the property. The prohibition may be expected to be time-limited.

C. ISSUES

222 The plaintiffs base their case on three causes of action:

a) breach of the Confidentiality Agreement;
b) breach of confidence as a concurrent cause of action for the unauthorized use of Alpha's confidential information;
c) breach of fiduciary duty.

The defendant denies each of these breaches and the duties and also raises the following defences:

d) the plaintiffs' information belonged to Curragh and not to them and therefore they have no standing to enforce any rights in respect of that information;
e) the plaintiffs are estopped from relying on any alleged breach of fiduciary duty because Mr. Stephenson did not tell Mr. Hick that Alpha's view was that TVX was not authorized to bid on the mines for its own account;
f) the plaintiffs are not entitled to any equitable remedy because they do not come to the court with clean hands.

The final issue is:

g) if the plaintiffs succeed on any or all of their claims, are they entitled as a remedy to: i) a constructive trust over the entire property; ii) a constructive trust over their partnership portion of the property; iii) damages in lieu of i) or ii); iv) a finders' fee; or v) damages to compensate for the value of the confidential information?

223 Before analyzing the Confidentiality Agreement and the information provided, it is appropriate to deal at this point with the defense that the plaintiffs have no standing to enforce the agreement because all of their information belonged to Curragh.

i) The Legal Effect of the Fact That Much of Alpha's "Confidential Information" Originated at and Appeared to Belong to Curragh

224 It is very clear that Mr. Visagie gained all of his knowledge and insight into the Kassandra mines up to his August 1993 trips there, during his employment with and consultancy for Curragh. In fact most of the documents which Alpha tabled at Rio at the meeting with TVX were documents which were either generated by Mr. Visagie when he was at Curragh, were consultants' reports commissioned and paid for by Curragh, or were documents obtained by Mr. Visagie from the mine while he was with Curragh. Furthermore, the origin of Mr. Visagie's knowledge and of the Curragh documents was transparent to TVX. There was no secret made of the source or origin and TVX was told about Mr. Visagie's background and could see on their face that many of the documents which Alpha tabled were prepared for Curragh.

225 Both Mr. Visagie and Mr. Lean had entered into confidentiality agreements with Curragh or

a related company which provided that they could not unilaterally make use of information developed or generated during their respective employments, even after the termination of their employments or associations. Mr. Visagie and Mr. Stephenson both made it very clear in their testimony that they had no intention of proceeding with Alpha's pursuit of the mines if Curragh maintained any intent to do so. However, by the end of July 1993 it was clear that Curragh was not proceeding with any purchase of the mines, and the plaintiffs apparently decided that they were free to both pursue the purchase of the mines themselves and also to use all of the information they had acquired while with Curragh as well as documents and reports in their possession belonging to Curragh. There was no suggestion in the evidence that either of them had obtained the permission of Curragh to do either.

226 Based on these facts, the defendant's position is that the plaintiffs have no right in the information themselves and no standing to enforce Curragh's rights, and therefore to the extent that their claim is based on providing confidential information, it must fail.

227 The defendant relies on the decision of the English Court of Appeal in Fraser v. Evans, [1969] 1 Q.B. 349 where Mr. Fraser sought to enjoin the publication by the Sunday Times of a report he had prepared as consultant for the Greek Government under an obligation of confidentiality. The court refused the injunction in part because only the Greek government had standing to complain about the publication of the confidential information being the party entitled to the confidence because it was the owner of the information. Mr. Fraser had sold the report to them and he had no standing to complain.

228 The defendant submits that likewise the plaintiffs have no standing to complain of TVX's alleged use of confidential information because that information belonged to Curragh, not Alpha, and Curragh is not complaining, at least not in this court.

229 In my view the Fraser case has no application to the case before this court. The plaintiffs' standing is based on the Confidentiality Agreement, the Joint Venture Funding Agreement and the relationship between the parties based on the disclosure of the confidential information and the agreement to enter into a joint venture to acquire the mines. In Fraser, Mr. Fraser had no relationship with the Sunday Times, except that he actually gave them an interview about his report before he thought better of the whole situation. Because he had no legal relationship on which to sue, he needed a cause of action and standing to assert it. He had neither.

230 In this case the plaintiffs do not lack standing to sue. However, the fact that they appear to have made use of confidential information and proprietary documents belonging to Curragh without authority to do so is prima facie troublesome to the court when they seek to enforce rights based on that very information. Of course, for TVX to resist the enforcement based on the fact that the information was Curragh's when there is nothing in the evidence to suggest any contemporaneous concern or question about any rights of Curragh when TVX received the information and dealt with the plaintiffs, is somewhat disingenuous.

231 No argument was advanced by the defendant that it had entered into an illegal contract with the plaintiffs in respect of someone else's information and therefore their contract was unenforceable by the court. Although the court of its own motion may be obliged for public policy reasons not to enforce an illegal contract: Menard v. Genereux (1982), 39 O.R. (2d) 55 (H.C.), this is not a situation where the parties were seeking to perpetrate a fraud on a third party. There has been nothing secret about Alpha's existence nor about its attempts to purchase the mine both alone and with TVX, nor about this lawsuit. Furthermore, the express written intentions of the plaintiffs were not to compete with Curragh for the mines.

232 The disclosure by Alpha and the use by both parties of Curragh's confidential information may be a breach of contract or even a tort if Curragh could show damage, but without a complaint by Curragh and an action with Curragh where the issues are tried and the facts found, I am not satisfied that this court has sufficient facts to make a finding that the Confidentiality Agreement to the extent it covers Curragh information is an illegal contract or one which the court should not enforce between Alpha and TVX. Counsel for the plaintiffs confirmed in argument that if Curragh wished to make a claim against either party for use of its confidential information, it could seek to do so.

ii) Did TVX Breach the Confidentiality Agreement by Using Confidential Information from Alpha When it Purchased the Mines?

233 The parties entered into two written binding contracts with the intention that these contracts would govern their relations in respect of the subject matter of the contracts, the acquisition and joint ownership of the Kassandra mines.

a) Was Alpha's Information Confidential?

234 The first contract was the Confidentiality Agreement executed by Mr. Stephenson and Mr. Hick on October 27, 1993 in Rio at the beginning of the meeting there between Messrs. Visagie and Stephenson for Alpha and Messrs. Batista, Hick, Ambrus and others for TVX. Before executing this agreement, TVX had received from Mr. McMaster of TD Securities in Toronto the Endeavour Report, the Highlights sheet and this Confidentiality Agreement. Both the Endeavour Report and the Highlights sheet were prepared by or on behalf of Alpha together with Endeavour in the fall of 1993 based on mine information, site visits including the recent one by Alpha and Endeavour and input from Mr. Visagie and from the Endeavour people describing their view of the opportunity to purchase the Kassandra mines. The Highlights Sheet in particular encapsulates the Alpha perspective on the opportunity.

235 The Confidentiality Agreement opens by stating its purpose as between the parties:

> "In order to allow you to evaluate the possible participation with the Alpha Group in the acquisition of the Kassandra mining assets ("Kassandra"), division of HELLENIC CHEMICAL PRODUCTS & FERTILIZERS COMPANY SA, of

> Athens Greece, we will deliver to you, upon your execution and delivery to us of this letter agreement, certain information about the properties and operations of Kassandra."

236 After the agreement was signed and the presentation began, there were in summary five categories of information presented to TVX:

1. documents including sections and drawings obtained from the mines pursuant to a confidentiality agreement signed by Curragh or by Alpha with Citibank;
2. documents obtained from METBA apparently without signing any confidentiality agreement dealing with METBA's development of the gold plant project including information on the bio-leach and pressure-oxidation methods of retrieval of refractory gold from pyrite concentrates and including much relevant financial information in respect of such a plant;
3. documents obtained by or prepared for Curragh analyzing various aspects of the mine assets prepared by outside consultants such as Hillsborough and Kilborn or by Mr. Visagie himself;
4. documents and oral analysis of that information including calculations of the potential gold resource on the property including in concentrates, in tailings as well as in unexplored areas of the property, calculations of the economics of making the lead and zinc operation financially viable and a base for production of concentrates from which to extract very large quantities of gold, detailed financial models and projections for all aspects of the operation into the future based on the construction and operation of a bio-leach gold plant and a pressure oxidation gold plant;
5. correspondence with the liquidator and the National Bank of Greece as well as related correspondence with Greek lawyers in respect of the commitment by the Bank to Alpha referred to as the exclusive right to negotiate the purchase of the Kassandra mines up to December 31, 1993 for U.S. $32 million.

237 All of this information was defined by the Confidentiality Agreement as proprietary to Alpha and therefore covered by the obligations imposed on TVX in respect of proprietary information under this agreement. In Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd., [1963] 3 All E.R. 413 at 415 (C.A.), Lord Greene M.R. stated: "The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge."

238 The definition of proprietary information is made subject to the proviso that:

> "Proprietary information does not include, however, information which is or becomes generally available to the public other than as a result of disclosure by you."

As a result of the definition, the parties have agreed that information which is prima facie not Alpha's, such as mine cross and long sections, is still proprietary information to Alpha under the agreement unless it is public.

239 Before Alpha was able to obtain any information from the mines, either through Citibank, through the liquidator or through the National Bank of Greece, it was required to sign a confidentiality agreement with the mines. In contrast, Mr. Demetriades said that METBA gave out its information freely to anyone who requested it without the necessity of signing any confidentiality agreement. The plaintiffs took the position that the requirement of a confidentiality agreement meant that any information so obtained was not generally available to the public and therefore as between Alpha and TVX, it remained proprietary information to Alpha.

240 I disagree. In my view, the information obtained from the mine is in the same category as the METBA information even though mining companies and other interested parties had to sign a confidentiality agreement with the mine or Citibank to gain access to the information. That is, it is information which is "generally available to the public", the mining industry being the relevant public. There was no suggestion in the evidence that any interested mining company was refused an opportunity to sign the agreement and then obtain information.

241 In the New Shorter Oxford English Dictionary, (Oxford: Clarendon Press, 1993) at p. 2404, one meaning of "public" as a noun is: "A section of the community having a particular interest in or special connection with the person or thing specified." In the case of Bendix Home Systems Limited v. Clayton et al., [1977] 5 W.W.R. 10 at 24 (B.C.S.C.), MacFarlane J. found on the evidence that the information which departing executives took with them to start a new competing company was not confidential because "most of the matters would be within the knowledge of most of the knowledgeable people in the industry or would be matters which could be ascertained upon inquiry". To similar effect is the finding of the Ontario High Court in Cradle Pictures (Canada) Ltd. v. Penner et al. (No. 2) (1977), 34 C.P.R. (2d) 34 at 45 that the information for which confidentiality was claimed in respect of a photography business was known or available to any professional photographer. In other words, when examining the confidentiality of information in the context of its notoriety or availability in the public domain, one looks at the relevant public as opposed to the general public which has no interest in or reason to have access to such information.

242 Therefore the mine and METBA information which Alpha disclosed to TVX was generally available to the public and not protected by the agreement.

243 The other information provided was the correspondence with the Greek authorities in respect of the exclusive right to negotiate the acquisition and Mr. Visagie's written and oral analysis of the mines' gold resource and how to make the mine run as a profitable gold mine and exploiting the lead and zinc as well. This information was not generally available to the public at the time of the Agreement as it was controlled by Alpha, and to the extent it was controlled by the Greek authorities, there is no evidence that it was made available by them to anyone.

244 The defendant's position on Mr. Visagie's information is:

1) Alpha's information contained nothing new nor different from the mine information and other published information about the mines. The defense also points to published articles about the mine over the years which were gathered for this lawsuit, as well as the Citibank Memoranda of 1991 and 1992 and the information that mining companies would have had access to by visiting the mine over the years that it was on the market for sale, as other ways in which Mr. Visagie's geological and financial analysis of the mine were generally available to the public.

245 I reject this submission as unsupported by the evidence. Neither the published articles, to the extent that the court was referred to particular ones, nor the Citibank Memoranda contained the analysis of Mr. Visagie. Nor is there evidence of what any particular mining company may have been told when visiting the mine. However, it is clear from the evidence that Mr. Visagie spent many hours and much effort analyzing the data he did receive and formulating and recording his theories of where the gold was and the quantity in each area. Furthermore he prepared detailed cash flow and other financial analyses with respect to proposed future mine operations after the institution of new labour, drilling (jumbo drills) and other efficiencies set out in detail in the documents, the evidence, and described to TVX at the Rio meeting. He also studied and analyzed the two competing methodologies for extracting the refractory gold and recommended the bio-leach method which was initially rejected by TVX but which is now the choice for the gold plant to be constructed by TVX Hellas. Mr. Visagie did not provide this information to any company visiting the mine site except those approached by Alpha.

246 2) The defendant's second submission is that Mr. Visagie's theories about mineralization were speculative and not of value, while his ideas about how to run the mine efficiently and profitably by increasing mine output, using jumbo drills, new roof support and building a gold bio-leach plant were so obvious that any mining professional would see them immediately. Also the significant gold resources that have been revealed through exploration by TVX have not been in accordance with Mr. Visagie's predictions, and therefore his work was of no value.

247 In cases where information is disclosed in circumstances where the disclosure is clearly intended to be confidential and kept in confidence but where there is no agreement entered into, the courts have been obliged to articulate a test for determining if information has the necessary quality of confidentiality to be worthy of protection in law. In Fraser et al. v. Thames Television Ltd. et al., [1983] 2 All E.R. 101 at 121-122 (Q.B.) the court articulated the requirement this way:

> ... the idea must have some significant element of originality not already in the realm of public knowledge. The originality may consist in a significant twist or slant to a well-known concept. This is ... consistent with the statements in Saltman's case and Coco's case that novelty in the industrial field can be derived

> from the application of human ingenuity to well-known concepts ... To succeed in his claim the plaintiff must establish not only that the occasion of communication was confidential, but also that the content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of being realized in actuality.

248 And in Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. supra at 415 Lord Greene M.R. stated referring to work done on materials available to anyone, that

> "what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

249 In Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 at 47 (Ch.) Megarry J. put it this way:

> Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts.

250 Finally in Ansell Rubber Co. Pty. Ltd. v. Allied Rubber Industries Pty. Ltd., [1972] R.P.C. 811 at 825 (S.C. Vict.), the court discussed the attributes of a trade secret and concluded:

> All of its separate features may have been published, or capable of being ascertained by actual inspection by any member of the public, but if the whole result has not been achieved and could not be achieved, except by somebody going through the same kind of process as the owner, it will not fail to qualify by reason of the publication.

251 Much of the evidence and argument in this case was focused on the issue of whether Mr. Visagie's information met this test. Of course, because of the definition of "proprietary information" contained in the Confidentiality Agreement, there is in fact no need for the plaintiffs to prove that their information does meet this test in order to determine whether TVX breached its contractual as opposed to its common law and equitable obligations.

252 However, based on the expert testimony of Mr. McOuat and Mr. Lattanzi, which I accept on this issue, the evidence of Mr. Kearney of his impression of Mr. Visagie's knowledge about the mines and the opportunity and my own view of the evidence, I find that Alpha brought a new and novel approach to the mine through the geological concept of the property as a 10.5 million ounce gold producer, the plan for modernization of the lead/zinc operation together with construction of the gold plant as well as the cash flows for the project. Mr. Visagie put together the assets of

Kassandra and METBA into the concept of a large gold production operation in a way that no one else had up to that time. I find that the information of Alpha was confidential information and not public and that it therefore was valuable information. Furthermore, although without drilling Mr. Visagie did underestimate the size of the Skouries deposit, he identified it as an area of significant potential size. His identification of tailings and his focus on Olympias were not wrong. There is no evidence that the fact that there is at Kassandra more or other gold than he identified denigrates the value of his insight.

253 3) The defendant's third submission is that in any event, once the April 1994 Information Circular was made available to the mining industry and the mines were clearly advertised as a gold project, any new insight of Mr. Visagie's was in the public domain at that point. The October 1994 Offering Memorandum also contained the Alpha information.

254 With respect to the April 1994 Information Circular, counsel points to information about ore reserves and gold grades at Madem Lakkos, Mavres Petres and Olympias, gold content of reserves at Skouries and Fisoka, the exploration potential of Kassandra including the deep extension at Olympias, a discussion of the economic necessity for the gold plant, cash flows for the gold plant, information about Piavitza and other exploration potential as indicating that any new concepts of Alpha were publicized by the Greek government in the spring of 1994.

255 It is apparent that the 1994 Information Circular takes a much different approach to the mine than the Citibank Memoranda, which hardly mentioned gold. In the final paragraph of the introduction, the document states:

> "The new Greek Government has announced its intention to proceed with the implementation of METBA's GOLD PROJECT ... as the only way for securing the viability of the KASSANDRA MINES."

However, I cannot find that the document contains all of Mr. Visagie's theories and analysis, nor does it present the information or the conclusions in the same way. It certainly does not quantify the potential gold resource as 10.5 million ounces; for example the reference to the deep extension at Olympias is that "drilling shows very encouraging results" but contains no attempt at quantification. (p. 12) Again I refer to and accept the opinions of Mr. McOuat and Mr. Lattanzi that the two 1994 Greek government documents do not contain all of the Alpha original and confidential information.

256 I therefore find that the not all of the confidential proprietary information provided by Alpha to TVX was ever made public and therefore it remained covered by the terms of the Confidentiality Agreement throughout the relevant period.

b) Use of the Confidential Information by TVX

257 Under the terms of the Confidentiality Agreement, TVX agreed "not to use Proprietary Information for any purpose other than in connection with the consummation of the Proposed

Acquisition in a manner which we have approved".

258 The position of TVX was that it sent over its due diligence team in order to prepare a due diligence report to use in formulating its bid in accordance with the requirements of the October 1994 Offering Memorandum, and that in formulating that bid, and in its decision to make the bid, it made no use of any information it may have received from Alpha the year before.

259 In Lac Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.), Mr. Sheehan of Lac acknowledged that the information Lac received from Corona was of value in assessing the Williams property. TVX specifically denies that Alpha's information was of any value. The TVX witnesses who testified may well perceive that because they went to the mine themselves and did their own cash flows and other analyses and because they did not get along with Mr. Visagie and believed he was constantly "selling" the property in pressing his theories on them, that in fact they did not use any of the Alpha information. However, I must reject their perception of the situation.

260 As Mr. Ambrus testified, they went to the mines to confirm the information which Alpha first gave them. Their own bid document refers to two due diligence trips, the first being the one with Mr. Visagie of November, 1993. They bought the property in part for the "tremendous upside" which was the potential for much more than the proven reserves of gold, variously described as 2.5 to 4 million ounces. That upside was pointed out to TVX and quantified to its executives as potential of 10.5 million ounces total in October, 1993.

261 Mr. Batista, who made the ultimate decision on behalf of TVX did not testify. He held the largest share in the company, and was the ultimate decision-maker in respect of the purchase of the Kassandra mines. His unexplained failure to attend to testify at this trial, in particular on the key issue of what use TVX made of the information and concepts originally brought to it by Alpha about the development of the mines and about the gold potential, remained unexplained throughout the trial. The court is entitled to infer that his evidence on this crucial point would not have assisted the defence: Claiborne Industries Ltd. v. National Bank of Canada (1989), 59 D.L.R. (4th) 533 at 546 (Ont. C.A.).

262 In Lac Minerals LaForest J. set out the burden put on the recipient of confidential information at 24-25:

> 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. In Coco v. A.N. Clark (Engineers) Ltd. supra, at p. 48, Megarry J. said this in regard to the burden on the confidee to repel a suggestion of confidence: "In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by any one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was

> bound by an obligation of confidence." In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted. Lac has not discharged that burden in this case.

In my view, it is only logical to impose the same heavy burden on the confidee who denies any use of the information, to show that it did not use that confidential information when it made the very acquisition which was the purpose of the disclosure of the information in the first place.

263 There was no evidence from TVX that it did not use in its bid any information provided to it by Alpha originally or information gathered during the period from November 25, 1993 to July 22, 1994 while they were partners in the venture. Significantly, Mr. Hick did not so testify, and Mr. Batista did not testify at all.

264 In fact the evidence was to the contrary. The "tremendous upside" was first revealed and developed by Mr. Visagie in his Gold Resource Update and in the Highlights Sheet where the figure of 10.5 million ounces of gold was first presented and in his fulsome oral explanation and presentation of each gold-bearing area of the property and of how he calculated or estimated the gold content of each.

265 Here TVX acquired the very property with a very similar plan and the same purpose as suggested by Alpha, that is, to develop it as a very large gold mining and extraction operation. They did not, for example, go to the mine to do due diligence, discover oil on the property, then abandon the gold concept and buy the property in order to develop it as an oil well. In such a circumstance, perhaps a confidee might be in a position to demonstrate that it did not use the confidential information when it purchased the property.

266 LaForest J. again addressed this situation in Lac when he pointed out that once Lac received Corona's information, it was "uniquely disabled from pursuing property in the area for a period of time". (p. 25) In this case, because of the joint venture relationship and the evidence that Alpha was content for TVX to bid on the property as long as it did so on behalf of the joint venture, TVX was in fact authorized by Alpha to use the information but only in accordance with the terms of the Confidentiality Agreement, that is for the joint acquisition and not for itself alone. When TVX acquired the property for itself, excluding Alpha, Alpha suffered a detriment.

267 Also as in Lac, I find that the information provided by Alpha "was the springboard that led to the acquisition of the ... property." (p. 20). TVX learned of the property and all the information about it from Alpha, then built on that information immediately and continuously over the next months, plus continued to use Alpha's contacts in Greece until it bid for the property in December 1994.

268 I accept that the TVX people did not believe they were relying on Mr. Visagie's views on the potential of the gold resource at Kassandra, and were quite adamant about relying only on their own

people. However, once they had Mr. Visagie's analysis presented to them, and they proceeded to seek to confirm it along with the viability of the other suggestions in the Endeavour Report for modernizing the operation, increasing the mine output, building the gold plant, exploiting gold sources on the property not heretofore utilized such as the tailings, TVX cannot claim to have disabused itself of the Alpha information when it went forward with a bid containing similar recommendations for proceeding to make the operation economic. Therefore any such bid by TVX necessarily made use of the confidential information provided by Alpha.

269 Finally TVX used the knowledge it gleaned about the mines and the ores while doing its further due diligence investigation over the period it was seeking to do its private deal with the Greek government. In other words, armed with the Alpha information, TVX then was able to pursue its due diligence beginning in November 1993 and continuing throughout 1994. As Mr. Hick said, hundreds of thousands of dollars were spent by TVX before it terminated its agreement with Alpha. Alpha's information also included its contacts in Greece who became TVX employees or consultants on the project and continued in their roles right through the fall of 1994 for the TVX bid, and who had developed expertise and valuable relationships over the time of the partnership. Because of its head start TVX was able to make an unconditional bid for the property in December, 1994, something which no other mining company did and which the only other bidder was unable to do.

270 And as with the Williams property in Lac, the plaintiffs' information "put [TVX] in a preferred position vis-a-vis others with respect to knowledge of the desirability of acquiring the [Kassandra] property." (per Sopinka J. at p. 72) TVX knew the value of the Kassandra mines in the fall of 1993, and used that knowledge in its decision to continue its pursuit of the acquisition after terminating its funding obligation with Alpha.

271 I therefore find that the defendant used the proprietary information of the plaintiff in breach of the Confidentiality Agreement, in that it used the information to acquire the mines for itself and not for the joint venture which was the only authorized use TVX could make of that information.

iii) Breach of Duty of Confidence

272 The plaintiffs also frame their action on the basis of breach of the common law and equitable obligation of confidence which co-exists with the parties' contractual obligations subject to any limits which have been agreed to by the parties in the contract: Cadbury Schweppes Inc. v. F.B.I. Foods Ltd. (1994), 93 B.C.L.R. (2d) 318 (S.C.); aff'd on this point by B.C.C.A. in (1996), 138 D.L.R. (4th) 682 at 694-695; (judgment pending in the S.C.C. on the issue of remedy).

273 The three criteria for establishing breach of confidence have been met in this case: 1) As discussed above, the information imparted had the necessary quality of confidence about it, and although some of Alpha's information was public and other of it became public before TVX bought the mines, some of it never became public including the quantification of a potential of 10.5 million ounces of gold and the locations of it; 2) the information was imparted in confidence; 3) there was

unauthorized use of the information by TVX when it bought the property for itself alone, which use was to the detriment of Alpha: Coco v. A.N. Clark (Engineers) Ltd., supra, at p. 47, approved in Lac Minerals Ltd. v. International Corona Resources Ltd., supra, at p. 20. The plaintiffs have therefore also established their action for breach of confidence by the defendant.

iv) Breach of Fiduciary Duty

274 It is well accepted that joint venturers owe fiduciary duties to one another. The following statement was approved by the Ontario Court of Appeal in Wonsch Construction Co. v. Danzig Enterprise Limited (1990), 1 O.R. (3d) 382 at 391:

> It seems now accepted that joint venturers owe fiduciary duties to each other similar to those owed by partners: Hogar Estates Ltd. v. Shebron Holdings Ltd. (1979), 25 O.R. (2d) 543 (H.C.J.). In general, the fiduciary duties owed by a joint venturer to another joint venturer involve the "reciprocal obligations of good faith and loyalty as regards the common interest in the common venture": Hitchcock v. Sykes (1915), 23 D.L.R. 518 at 521 (S.C.C.), per Duff J. In particular, the duties include (a) the duty of full disclosure; (b) the duty not to make secret profits; and (c) the duty not to compete with the business: Meinhard v. Salmon (1928), 164 N.E. 545 (N.Y.C.A.), per Cardozo J. See generally S. Goldenberg, "Fiduciary Duties of Co-Venturers and Partners" in Fiduciary Duties, Law Society of Upper Canada, 1986.

275 The joint venture funding agreement of November 25, 1993 clearly made the parties joint venturers in relation to the acquisition and ongoing ownership and operation (sharing of profits) of the Kassandra mines. Therefore, neither Alpha nor TVX could seek to acquire the Kassandra mines for its own account during the currency of that agreement. That would be a breach of the duty of good faith and loyalty each owed to the other.

276 However, before the mines were acquired TVX had the right to terminate its obligation to fund the acquisition. Alpha had no express right to terminate its obligations under the agreement. The agreement does provide for what happens to the joint venture company, Aegean, if TVX exercises its right to terminate. First the Alpha Group must purchase from TVX its interest in Aegean if either Alpha or Aegean buys the mines. Second the Aegean Board of Directors' representation reverses, with TVX having only one Board member and Alpha three. Therefore the joint venture funding agreement contemplates that if TVX terminates its obligations, either Aegean or Alpha may proceed to purchase the mines. There is no provision that contemplates TVX proceeding to buy the mines.

277 Therefore the agreement by its terms contemplates that Alpha's fiduciary obligation not to acquire the mines does not survive the termination of the agreement by TVX. The question for the court is whether in all the circumstances, the fiduciary obligation of TVX not to compete with the business did survive its termination of the joint venture.

278 There is some significant Ontario authority which holds that the fiduciary obligations of partners not to use information acquired during the partnership or to compete with each other in respect of the matters for which the partnership was formed do not survive the dissolution of the partnership: Sinclair v. Ridout and Moran, [1955] O.R. 167 (McRuer C.J.H.C.), and Nufort Resources Inc. v. Eustace et al. (1985), 29 B.L.R. 282 (Ont. H.C.).

279 However, the correctness of Sinclair was doubted by Chief Justice McEachern of British Columbia in Davis v. Oullette (1981), 27 B.C.L.R. 162 (B.C.S.C.) following the decision of the Supreme Court of Canada in Canadian Aero Service Limited v. O'Malley, [1974] S.C.R. 592 where Laskin J. stated in relation to directors and senior officers of a corporation at 619:

> ... I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

In Apollo Canada Dust Suppression Services Inc. v. Diachem Industries Ltd. (1991), 39 C.P.R.(3d) 223 (Ont. Gen. Div.), Rosenberg J. reviewed the state of the law on the issue and concluded that the cases do not support the general proposition in Nufort that fiduciary duties do not survive the termination of a partnership or joint venture. Also in the Wonsch case, the Ontario Court of Appeal specifically held that the Canaero principle of extension of fiduciary obligations beyond the termination of the relationship that gave rise to them applies in the case of a joint venture situation. The court held that "there is no rule of general application and that each case must be tested on its own particular facts." (p. 391) The factors to which the court may look to determine whether the fiduciary obligation survives the termination of the joint venture are: 1) duty of confidence, 2) the nature of a maturing business opportunity and of the leaving party's relationship to it, 3) the timing of the breach following the termination, 4) circumstances of the termination, 5) vulnerability, and 6) industry practice. See: Lac per Sopinka J. at p. 63 and per LaForest J. at p. 35, and Canaero at p. 620.

280 Having regard to these criteria, in my view the following are the relevant factors in this case:

281 1) There was clearly a duty of confidence owed by TVX to Alpha because the relationship began and was based on the disclosure of confidential information by Alpha (the junior company) for the express purpose of allowing TVX (the senior company) to consider purchasing the mines with Alpha as joint venturers. The relationship began with the disclosure by Alpha of both the existence of the opportunity to purchase the Kassandra mines, together with the disclosure of Mr. Visagie's unique perspective on the opportunity to purchase the lead and zinc operation and turn it into a gold mine. That perspective was not recognized nor put forward by anyone else until the

Greek government did so in April 1994 in the Information Circular which combined the METBA and Kassandra opportunity into one. Alpha also provided to TVX detailed and specific confidential information about the mines and the opportunity some of which was never made public.

282 2) Because the mines were going to be made available through a public tender process, there was clearly a maturing business opportunity, but in a different form than was contemplated by the joint venturers. It was not an opportunity which was 'originated and brought to fruition' by the joint venture (see Canaero, p. 619). However, the acquisition of the mines was the sole purpose of the joint venture, although the intention was that it would be through private negotiation, possibly "confirmed" in some way by legislated process of some kind which could include an auction.

283 In my view the fact that the mines were going to be offered for sale in a different manner than the joint venturers hoped does not remove that sale from the category of "maturing business opportunity" in this case. The sale was going to proceed forthwith so that there was no gap in time during which TVX's exposure to Alpha's information and contacts would become stale or because of which any restriction on TVX would be unfair. Also, the property was the same one which the joint venture had been seeking and in fact was now being offered on the same basis as the joint venturers had contemplated, that is for construction of a gold mine. All of the information disclosed by Alpha to TVX and the contacts and head start it had in connection with the purchase had been turned over to the joint venture for use by TVX over a period of eight months. Therefore the fact that TVX did not terminate its funding obligation until the concept of a private deal for the mines was dead is not a factor which relieved TVX of its fiduciary obligations to Alpha in respect of the acquisition of the mines.

284 3) Alpha had become vulnerable to TVX once it turned over all its confidential information, entered into the funding agreement and agreed to leave TVX to look after their joint interests for eight months. They had agreed that the entire due diligence and negotiation process would be conducted by TVX on behalf of the joint venture. Consequently all new information learned in the due diligence and all contacts made in the Greek government and at the mines enured to the benefit of TVX alone. Furthermore all the contacts that Alpha had established and passed on to TVX including Mr. Tsilibaris and lawyers and accountants working on the deal, were taken over by TVX during that period. TVX also put in place for the benefit of the joint venture an executive structure in Greece through Mr. Papadopoulos who remained on with TVX Hellas in order to continue to pursue the acquisition after the termination of the joint venture.

285 As Sopinka J. observed in the Lac case, the one feature which is indispensable to a fiduciary relationship is dependency or vulnerability (p. 63). It is clear that once the joint venture relationship was entered into, Alpha gave up all active involvement in the project of acquiring the mines and relied solely on TVX to pursue the transaction for the benefit of both. Alpha was totally at the mercy of TVX's discretion before termination, but perhaps more significantly, became vulnerable to the advantage which TVX had gained over Alpha because of its exclusive involvement over the period of the joint venture.

286 4) There is a practice in the mining industry that upon the termination of a funding agreement between a senior and a junior company, the senior does not for a period of time pursue the acquisition of the mining property for its own account. This practice was reflected in the joint venture funding agreement which did not delineate any circumstances under which TVX could purchase Kassandra after it elected to terminate its obligation to fund, nor any consequences for Aegean or Alpha if it did, because that event was not contemplated by the parties. To the extent that Mr. Hick told Mr. Stephenson after his termination letter that both parties were free to bid in the auction, this suggestion was contrary to industry practice, and by saying it, Mr. Hick could not unilaterally abrogate TVX's fiduciary obligations.

287 In my view, all of the factors point to the conclusion that this is a case where the fiduciary obligation not to compete in respect of the subject of the joint venture did extend beyond the termination of the joint venture funding agreement. If TVX wished to bid on the mines in the immediate tender process in the fall of 1994, it was obliged to do so on behalf of the joint venture and not for its own account alone.

D. REMEDY

i) Restitution

288 The plaintiffs seek the remedy of disgorgement of the entire property by TVX with a constructive trust over the entire Kassandra mines subject to repayment by the plaintiffs to TVX of all monies which it has expended on the mines to this point in time. This was the remedy awarded in the Lac Minerals case ultimately for Lac's breach of confidence in use of the confidential information of Corona to acquire the Williams property, the majority of the Supreme Court of Canada having found there was no fiduciary obligation in the circumstances. However, LaForest J., who would have granted the remedy not only for breach of confidence but also for breach of fiduciary duty, discusses the basis for awarding a restitutionary remedy at 45-46 as follows:

> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by LAC, Corona would have acquired the property. In Air Canada v. British Columbia (judgment pronounced May 4, 1989 [now reported at 59 D.L.R. (4th) 161 at pp. 193-4, 36 B.C.L.R. (2d) 145, [1989] 4 W.W.R. 97]), I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his

> benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense". In my view the fact that Corona never owned the property should Not preclude it from the pursuing a restitutionary claim: see Birks, An Introduction to the Law of Restitution (1985), at pp. 133-9. LAC has therefore been enriched at the expense of Corona.

289 One issue which at first appears problematic in this case is the "but for" test that is emphasized in Lac as a sine qua non of the restitutionary remedy, that is, "but for" the actions of Lac, Corona would have acquired the Williams property. That is because Corona was actively negotiating with Mrs. Williams for the property, unbeknownst to it, in competition with Lac.

290 In this case there can be no such finding that "but for" TVX proceeding to bid for the property for its own account after terminating its obligations under the funding agreement, Alpha would have acquired it. In fact the opposite is true, because Alpha elected not to try to pursue the property on its own and made no attempt to do so. Whether it would have been able to find and interest a new industry partner in joining with it, and if so whether they could have put together a bid in the available time and whether that bid would have been successful against the bid of Newcrest or any other parties who may have emerged without TVX are all wholly speculative inquiries, and in my view irrelevant in this case. Had TVX elected not to bid in the auction, Alpha would have got nothing, but that would have been in accordance with its expectations and its bargain. There would have been no breach of any duty or obligation by TVX.

291 In Lac the parties had never reached any arrangement to do business together so that Corona, as the junior mining company with the information, was legitimately continuing to try to acquire the Williams property for itself. Here the parties were in a joint venture to acquire the property with Alpha in the passive role for eight months. Alpha had reposed its trust and confidence in TVX to pursue the property in their joint interest. In that circumstance, the issue is not whether Alpha could have or should have started all over again and successfully bid in the auction. Any bid by or on behalf of the joint venture would have been a bid which protected Alpha's interest in the property. Therefore "but for" TVX breaching its fiduciary duty and proceeding to acquire the property for itself, the acquisition would have been for the benefit of the joint venture and therefore for both parties according to their respective interests.

292 In my view, although this is a proper case for a restitutionary remedy, it would not be appropriate or consistent with principle, authority or the expectations of the plaintiffs in the circumstances to award the entire property to the plaintiffs. They were never in a position to acquire the property other than with a partner who provided the financing. In this type of case the plaintiffs should be put in the position they would have been in had the defendant not breached its duty to them, that is with their joint venture interest. This is exactly what they were looking for when their lawyer wrote to TVX in April 1994 after TVX was announced as the successful bidder.

293 In my view the decision of the Ontario Court of Appeal in Olson v. Gullo, [1994] 17

O.R.(3d) 790 is applicable and determinative of the result in this case. There the plaintiff and defendant had formed a partnership to develop a tract of land. The defendant however bought and sold for his own account 90 acres of that tract and made a secret profit of $2.5 million. The trial judge awarded the entire profit to the plaintiff on the principle that the defendant could not profit from his wrongdoing, that is his breach of fiduciary duty to his partner. However, the Court of Appeal allowed the appeal holding that in partnership law, a partner is obliged to account to the partnership for any secret profit that is made so that the defendant was required to disgorge the entire profit not to the plaintiff, but to the partnership, and was not excluded from sharing in it to the extent of his partnership interest.

294 In his analysis Morden A.C.J.O. quotes with approval at p. 801 from Ellis, Fiduciary Duties in Canada (1993) at p. 12-4.2 as follows:

> Effectively the Court [in Sutton v. Forst (1924), 55 O.L.R. 281 (C.A.)] differentiates agency, where the agent acts under a condition of exclusivity for another's best interest, with the partnership, where the partners act with a fiduciary responsibility to one another. The difference is key: the former requires selfless disinterest in the agent's own pursuits; the latter requires a concurrent mix of self-interest with loyalty to the partnership. This in itself creates a dilemma not extant under the agency relationship because enforcement against self-interest is premised on the absence of gain by the agent. In the case of the partner, the very relationship is premised upon mutual gain and therefore complete forfeiture is, in the circumstances, not envisaged by the premise upon which the relationship is built and therefore unduly penal.

This observation recognizes the important difference between the nature of most fiduciary obligations such as the agent, trustee or professional whose actions (subject to the right to compensation) must be solely for the benefit of the principal, cestui que trust or client, and the partner who is obliged to act in the best interests of the partnership and therefore whose interest is partly for himself as one of the partners.

295 Morden A.C.J.O. completes the analysis in this way at p. 802:

> I have no doubt that stripping the wrongdoing partner of the whole of the profit, including his or her own share in it, is a strong disincentive to conduct which breaches the fiduciary obligation. Further, as a host of equity decisions have shown for at least two centuries, the fact that this would result in a windfall gain to the plaintiff cannot, in itself, be a valid objection to it.
>
> I do not, however, think that it can accurately be said that the defaulting partner does profit from his wrong when he receives his preordained share of the profit. With respect to this share, the partner's conduct in the impugned transaction does

> not involve any breach of duty. Under the terms of the relationship, with respect to this share, it was expected that the partner would act in his own interest. To the extent that there is a dilemma, I resolve the issue, in accordance with what I consider to be the more appropriate principles and authorities, against the forfeiture of the wrongdoing partner's interest in the profit.

ii) Damages

296 A further issue is whether there is any other reason why it would be more appropriate in this case to make a compensatory award of damages reflecting the full value of the property, rather than a restitutionary award. In my view this is the type of case, like Lac, involving a gold mine where the value is a moving target and therefore the damage is "virtually impossible to determine with any degree of certainty". In Lac the Supreme Court adopted the description of the Ontario Court of Appeal as follows:

> ... there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

The court therefore concluded: "To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would, in my view, be unfair and unjust." (p. 49)

297 In this case the problem is compounded by three extra factors: a) The only witness who gave opinion evidence as to the value of the mines at the date of trial was Mr. McOuat on behalf of the plaintiffs. His figure of U.S. $800,000,000 was an estimate based on a rule of thumb for valuing gold mines. b) He did not give any opinion as to the value of a 12% or a 24% interest in the mines. There are normally many factors which affect the value of a minority interest of this type. c) The defendant led no evidence at all as to the value of the mines except that Mr. Hick pointed out that the market cap of TVX at the time of the trial, that is the public's value of the entire company, was 162,000,000 outstanding shares at $5.00 per share or approximately Can. $800,000,000. However, the TVX annual and interim reports do support a very high value for the Kassandra asset.

298 This is not a case as suggested by the defendant, where damages should be limited to either a finder's fee or damages as compensation for the value of the confidential information, because of the breaches of equitable obligations and the nature of the breach of the Confidentiality Agreement

which was to use the information to acquire the property for itself. The reasoning of LaForest J. in Lac at p. 25 is applicable here:

> Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidee is not to use the confidential information in its possession without paying compensation for it or sharing the benefit derived from it. Where, however, as in the present case, there is only one property from which Lac is being excluded, and there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information.

299 In my view the appropriate remedy in this case is the restitutionary remedy. This will leave the parties as partners in the joint venture. Counsel for the plaintiffs expressed concern to the court about this possible outcome given the animosity that now exists between the parties. However, these are business people who may have had to face a situation like this even had things gone more smoothly up to the acquisition of the property, and they certainly would have to have faced issues of value if one were ever to buy out the other. In any event, as no evidence was led by either side on the value of the plaintiffs' partnership share, the court is not in a position to establish such a value.

300 In my view, a constructive trust over Alpha's joint venture interest in the property, 12% carried and 12% contributing, after Alpha pays its contributory share, is also the appropriate remedy in this case for the breach of confidence as well as for the breach of fiduciary duty. As was the case in Lac, there are three factors which militate in favour of this remedy: 1) the uniqueness of the Kassandra property; 2) the virtual impossibility of valuing it and furthermore the lack of evidence available to value the minority interest; and 3) the fact that but for TVX's breach in taking the property for itself, Alpha would have received its joint venture share. (p. 52)

E. OTHER DEFENCES

i) Estoppel

301 For the reasons set out above under "Termination of the Joint Venture Funding Agreement by TVX", the plaintiffs are not estopped from asserting their claim because of Mr. Stephenson's meeting with Mr. Hick on July 27, 1994 and Alpha's failure to warn TVX that it took the position that if TVX bid, it was on behalf of both of them.

302 TVX had already decided before the meeting, subject to any change in its own circumstances, that it intended to bid in the auction, and therefore did not rely on anything said or not said at the meeting. After first suggesting to Alpha that they renegotiate their agreement, which suggestion was rejected, TVX relied on its own legal advice in making the unilateral decision to

terminate its funding obligation under the agreement and still be free to bid in the auction. Whether that advice was correct or incorrect, Mr. Stephenson's failure to express his opinion to Mr. Hick does not found the basis for an estoppel where TVX decided to take a position which overlooked its obligations in respect of the confidential information it had received from Alpha and its fiduciary obligation to Alpha. This was not a situation where TVX was under an inadvertent mistaken belief as to its legal rights.

303 Finally, TVX did not act to its detriment by bidding and acquiring these extremely valuable mines at a very low price relative to that value. See: Litwin Construction (1973) Ltd. v. Pan et al. (1988), 52 D.L.R. (4th) 459 at 469-470 (B.C.C.A.). Furthermore, TVX was always limited in its ability to acquire the mines except with Alpha. It did not act to its detriment by proceeding to acquire them on that basis. In all the circumstances it is neither unjust nor unfair that TVX bear the consequences of its own strategy. Litwin, supra, at p. 468.

ii) Clean Hands

304 The defendant submits that such actions by Alpha as misrepresenting certain facts to the Greek authorities, agreeing to pay a secret commission to Mr. Tsilibaris while he was working for Citibank, agreeing to pay a commission to Mr. McMaster in his personal capacity and breaching its agreement with Endeavour, disqualify Alpha from seeking or obtaining an equitable remedy from this court.

305 The difficulty with this argument is that these actions by Alpha were not "in the transaction" with TVX. They occurred as part of Alpha's dealings with others in relation to its interest in Kassandra. Second, the fact that TVX learned of some of them at a relatively early stage in their relations and likely benefitted from them is a factor which the court may consider in exercising its discretion whether to grant an equitable remedy. See: Sang Lee Investment Co. Ltd. v. Wing Kwai Investment Co. Ltd., The Times 14 April 1983, 127 S.J. 410, No. 28 of 1982 (P.C.). For example, the necessity for termination of Alpha's obligations to Endeavour was part of its agreement to proceed with TVX, and not something about which TVX can now complain.

306 The defendant also points to Alpha's conduct after the termination of failing to advise TVX of its position that any bid for the mines would be for both parties, and silently "waiting in the weeds" for TVX to be the successful bidder before making its claim.

307 I view this conduct by Alpha in the context and the circumstances after the termination, where both parties had sought legal advice and were acting in accordance with that advice and both were taking positions and strategies with each other accordingly. In all the circumstances between the parties, it is not conduct which in my view disentitles the plaintiffs to an equitable remedy in this case.

F. COSTS

308 The costs of the action shall follow the event, subject to any matters which the parties may wish to bring to my attention in that regard. If there is any issue outstanding as to the form of order, or costs, such issue may be brought before me within one month of release of these reasons.

FELDMAN J.