See paras. 70, 74

Indexed as:

Visagie v. TVX Gold Inc.

Between
Hendrik M. Visagie, David Lean and James Stephenson,
respondents (plaintiffs), and
TVX Gold Inc., appellant (defendant)

[2000] O.J. No. 1992

49 O.R. (3d) 198

187 D.L.R. (4th) 193

132 O.A.C. 231

6 B.L.R. (3d) 1

97 A.C.W.S. (3d) 124

Nos. C30885 and M25272

Ontario Court of Appeal
Toronto, Ontario

Carthy, Charron and Rosenberg JJ.A.

Heard: February 17-18 and 25, 2000.
Judgment: June 1, 2000.

(86 paras.)

On appeal from the decision of Madam Justice K. Feldman dated October 14, 1998.

Counsel:

Peter L. Roy, Timothy Pinos, Kathryn L. Knight and Maureen Helt, for the appellant.
Alan J. Lenczner, Q.C. and Lawrence E. Thacker, for the respondents.

The judgment of the Court was delivered by

1 **CHARRON J.A.**:-- This is an appeal and cross-appeal from the judgment of Feldman J. in an action for breach of a confidentiality agreement, breach of confidence and breach of fiduciary duty arising out of a joint venture between the parties for the acquisition and operation of certain gold mines in Greece. The appellant also brings a motion to introduce fresh evidence on the appeal. Further, the proposed fresh evidence forms the basis of a motion brought before this court by 1235866 Ontario Inc., a stranger to this litigation, seeking to set aside Feldman J.'s judgment and to be added as a necessary party to the action at a new trial. I will deal with this latter motion as part of these reasons.

A. OVERVIEW OF THE FACTS

2 The trial judge made an extensive and thorough review of the facts in her reasons for decision, indexed as Visagie v. TVX Gold Inc. and reported at (1998), 42 B.L.R. (2d) 53. I propose to give just a brief outline of those facts that are necessary to put these reasons in context.

3 In October 1993, the respondents, Hendrik M. Visagie, David Lean and James Stephenson, collectively referred to as the Alpha Group ("Alpha"), approached the appellant TVX Gold Inc. ("TVX") to propose that it become Alpha's joint venture partner for the purpose of acquiring certain mines in Greece known as the Kassandra mines ("Kassandra").

4 Alpha had gained much of its knowledge of Kassandra through the employment of two of its members, Visagie and Lean, with Curragh Resources Inc. ("Curragh"), a Canadian mining company. Visagie and Lean had both worked on attempts by Curragh to purchase the Kassandra properties until sometime in the summer of 1993. During the course of his employment with Curragh, Visagie had signed two agreements concerning the general protection of confidential information gained while in the employ of Curragh. Eventually Curragh's efforts to acquire Kassandra failed and Curragh went into receivership. (Curragh's residual assets were subsequently acquired by 1235866 Ontario Inc., the moving party on the motion to set aside Feldman J.'s judgment.)

5 Alpha took the position that it was entitled to pursue the matter on its own account since Curragh was no longer interested in acquiring Kassandra. At trial, Alpha took the position that Curragh's interest in acquiring Kassandra had ceased by the end of July 1993. Lean, who was an officer of Curragh at the time, testified that, following July 30, 1993, he had taken no more steps with respect to Kassandra on behalf of Curragh. Visagie, who, at different times, had been employed by and had acted as a consultant for Curragh, testified that he came to the conclusion that

Kassandra was valuable as a gold mine as a result of further work that he did in August 1993, at a time when Curragh was no longer pursuing its interest in Kassandra. (TVX seeks to introduce fresh evidence to establish that, contrary to Alpha's position, Curragh was still interested in acquiring Kassandra in August 1993.)

6 In the summer of 1993, Alpha was actively seeking financing, which it needed to acquire the mines. Eventually, it approached TVX. Before revealing any if its information, Alpha insisted that TVX sign a confidentiality agreement, which it did on October 26, 1993. Alpha then gave TVX its information about Kassandra. After some further inquiries, TVX entered into a joint venture funding agreement with Alpha on November 25, 1993. Under the terms of the agreement, Alpha was to bring to the joint venture what was referred to as "Proprietary Information" and an "exclusive right to negotiate the acquisition of all of the mining assets" of Kassandra for a price of US $32,000,000. TVX was to bring the ability to fund the acquisition and the expertise to develop Kassandra. The agreement further provided that Alpha was to receive a 12% carried interest and the option to take up a further 12% participating interest in the operation once acquired by TVX.

7 Once the joint venture funding agreement was in place, as agreed between the parties, TVX took control of the negotiations with the Greek government and attempted to make an acceptable bid for the mines. However, it became clear over the next few months that the Greek government was not prepared to allow the mines to be sold privately but only through a public tender process. TVX was eventually officially advised of this. On July 22, 1994, TVX terminated its obligations under the joint venture funding agreement with Alpha, as it was entitled to do under its terms. TVX bid for the mines on its own in the tender process and was successful, ultimately paying U.S. $47 million.

8 In April 1995, after it was announced that TVX was the successful bidder, Alpha claimed its 12% carried interest and the right to purchase a further 12% participating interest. TVX denied that Alpha had any interest in the mines. Alpha brought this action later in 1995 for a) a declaration that TVX holds the whole of Kassandra in trust for Alpha as a result of breach of fiduciary duty and misuse of confidential information; or alternatively, b) a 12% carried interest plus a further right to purchase a 12% interest in Kassandra; and c) damages.

B. THE FINDINGS AT TRIAL

9 At trial, TVX advanced four defences to Alpha's claim:

a) TVX was entitled to terminate the joint venture funding agreement and acquire the mine on its own account as it did.
b) the information provided to it by Alpha was available in the public domain and was not confidential;
c) even if the information was confidential, TVX did not use the information in acquiring Kassandra; and
d) in any event, the information did not belong to Alpha but to Curragh and,

consequently, Alpha did not have standing to claim any relief.

10 The trial judge disposed of these four defences as follows.

a) The trial judge held that TVX was entitled to terminate the joint venture funding agreement according to its terms. The trial judge, however, held that, as a result of the relationship between the parties as joint venturers and the nature of their agreement, TVX owed a fiduciary duty to Alpha not to acquire Kassandra except for their joint benefit, which duty survived the termination of the joint venture funding agreement. Consequently, she held that TVX breached its fiduciary duty when it acquired Kassandra for its own account.

b) The trial judge found that the information provided to TVX by Alpha was not readily available in the public domain as contended by TVX. She held further that Alpha's information had the necessary quality of confidentiality to be worthy of protection in law.

c) The trial judge found that TVX used this confidential information in acquiring Kassandra in breach of the terms of the confidentiality agreement and in breach of its common law duty of confidence.

d) The trial judge rejected TVX's argument that Alpha had no standing to sue because the information belonged to Curragh and held that Alpha clearly had standing based on the agreements between the parties. The trial judge noted that no argument was advanced by TVX that it had entered into an illegal contract with Alpha with respect to someone else's information. She queried however whether the court, on its own motion, had an obligation not to enforce the contract for public policy reasons. She concluded that, without a complaint by Curragh and an action involving Curragh where the issues could be properly litigated, the court had insufficient facts upon which to conclude that the confidentiality agreement, to the extent that it concerned Curragh information, was an illegal contract.

11 By way of remedy, the trial judge held that Alpha is not entitled to a constructive trust over all of Kassandra but is entitled to a 12% carried interest and, having purported to exercise its option to purchase, a further 12% participating interest in Kassandra upon payment of the costs associated with that interest.

C. THE ISSUES ON THE APPEAL AND THE CROSS-APPEAL

12 On its appeal, TVX asks that the judgment be set aside and that Alpha's action be dismissed, or alternatively, that any damages found properly payable to Alpha be directed to be quantified by way of reference. TVX also seeks leave to introduce fresh evidence and, on the basis of this fresh evidence, seeks, as a further alternative, an order for a new trial.

13 Alpha cross-appeals, seeking a constructive trust over 100% of Kassandra, or alternatively

damages for the full value of Kassandra in the amount of US $800,000,000 or in the further alternative, damages in the amount of US $96,000,000 for the 12% carried interest and a further US $96,000,000 for the 12% participating interest (less certain developmental costs).

14 The issues raised by TVX on the appeal are essentially parallel to the defences it advanced at trial. They can be determined by answering the following questions.

1. Was the trial judge correct in holding that TVX owed a fiduciary duty to Alpha that survived the termination of the joint venture funding agreement?
2. Was the trial judge correct in finding that the information provided to TVX by Alpha was worthy of the court's protection?

a) did the information have the necessary quality of confidentiality?
b) should Alpha be precluded from benefiting from its own wrongful misappropriation of the information from Curragh? (The proposed fresh evidence is directed mostly at this inquiry.)

3. Was the trial judge correct in finding that TVX used confidential information belonging to Alpha in its acquisition of Kassandra?
4. Was the confidential information sufficiently valuable to warrant the remedy awarded?

15 Alpha's cross-appeal is entirely focussed on the appropriateness of the remedy granted by the trial judge. In large part, the cross-appeal hinges on the correctness of the trial judge's conclusion that TVX owed a fiduciary duty to Alpha that survived the termination of the joint venture funding agreement and is therefore related to question 1. The issues raised by the cross-appeal are otherwise answered under question 4 in the main appeal.

D. ANALYSIS

16 It is my view that the trial judge erred in finding that there was a fiduciary relationship between TVX and Alpha and that this fiduciary relationship survived the termination of the joint venture funding agreement. This conclusion rests mainly on a consideration of the facts, as found by the trial judge, but in the light of the decision of the Supreme Court of Canada in Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142 which was released after the trial of this matter. Consequently, I am of the view that nothing precluded TVX from acquiring Kassandra for its own account after terminating the joint venture funding agreement.

17 TVX remained bound, however, by the terms of the confidentiality agreement and by its common law duty of confidence not to use confidential information obtained from Alpha, except for the joint benefit of the parties. The trial judge's findings that Alpha provided TVX with information that had the necessary quality of confidentiality to be worthy of protection at law and that TVX used this information as a springboard in its acquisition of Kassandra are based on correct legal principles, are entirely reasonable and supported by the evidence. Hence I see no reason to interfere with these findings. I also agree with the trial judge's conclusion that there were insufficient facts

before her to conclude that the confidentiality agreement was illegal and unenforceable. Consequently, I would not interfere with the trial judge's conclusion that TVX breached the terms of the confidentiality agreement and its common law duty of confidence.

18 The remedy awarded by the trial judge was available not only for breach of fiduciary duty but also for breach of confidentiality and, in the circumstances of this case, was appropriate. I see no reason to interfere with the award or with the trial judge's refusal to quantify it in dollar amounts.

19 It is further my view that the fresh evidence should not be admitted. It does not meet the test set out in R. v. Palmer, [1980] 1 S.C.R. 759. I would therefore dismiss TVX's motion to introduce fresh evidence and dismiss the appeal. Finally, I would also dismiss the motion brought by Curragh's successor, 1235866 Ontario Inc. The issues raised by 1235866 Ontario Inc. can be properly adjudicated in the new action brought by 1235866 Ontario Inc. against TVX, Alpha and others and, in my view, it is not necessary to set aside this judgment to achieve a just result.

20 As indicated earlier, the arguments on the cross-appeal, in large part, are dependent on the existence of a fiduciary relationship between the parties. In view of my conclusions on this point and on the overall appropriateness of the remedy, I would also dismiss the cross-appeal.

21 I now propose to answer the questions set out earlier.

1. Did TVX owe a fiduciary duty to Alpha that survived the termination of their agreement?

22 TVX argues that the trial judge erred in finding that it had a continuing duty not to acquire Kassandra, except for the joint benefit of the parties, after the termination of the joint venture funding agreement. This ground of appeal hinges on the correctness of the trial judge's conclusion that TVX owed a fiduciary duty to Alpha as a result of their relationship as joint venturers and that this duty survived the termination of the joint venture funding agreement.

23 At pp. 78-96 of her judgment, the trial judge reviews in detail the dealings between Alpha and TVX from the time the parties first came together, through the course of their joint venture agreement, to the termination of the relationship. It is therefore not necessary to review this evidence here. Later in her judgment, the trial judge deals with the issue of fiduciary duty. Relying on Wonsch Construction Co. v. National Bank of Canada (1990), 1 O.R. (3d) 382 (C.A.), she concluded, at p. 122, that the parties owed fiduciary duties to one another because they were joint venturers. She described the mutual obligations arising from the agreement succinctly as follows (at p. 123):

> 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.

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. 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.

24 The trial judge held that TVX had a continuing fiduciary obligation not to compete in respect of the subject of the joint venture beyond its termination. She based her conclusion on the following factors: a) the duty of confidence owed by TVX to Alpha; b) the fact that the maturing business opportunity (the acquisition of Kassandra) was the same as that contemplated under the joint venture agreement, albeit in the form of a public tender process rather than a private sale; c) Alpha's vulnerability to TVX under the terms of the joint venture agreement; and d) the industry practice 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.

25 In my view, the trial judge erred in concluding that there was a fiduciary relationship between the parties. The duties owed by each party to the other during the currency of the agreement and after its termination, as described by the trial judge, arose from the terms of the agreement itself rather than from any fiduciary obligation imposed by law. The Supreme Court of Canada in Cadbury Schweppes, supra, makes it clear that fiduciary obligations are seldom present in a commercial context between parties acting at arm's length. Binnie J., in writing for the Court, quoted at pp. 163-4 the following from Frame v. Smith, [1987] 2 S.C.R. 99:

> Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, Jirna Ltd. v. Mister Donut of Canada Ltd. (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are

> adequate in such a case.

26 Binnie J. added at p. 164:

> To the same effect, see Lac Minerals per Sopinka J. at p. 595, Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 414, per La Forest J., and the comment of Professor Davies that "[s]trong evidence should be required before a breach of confidential information situation is metamorphosed into one of fiduciary relationship" [Davies, J.D. "Duties of Confidence and Loyalty", [1990] Lloyd's Mar. & Com L.Q. 4 at p. 7)]. [Emphasis added.]

27 Binnie J. further stated, however, that "where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context." He noted for example the case of Hodgkinson v. Simms, [1994] 3 S.C.R. 377, where a majority of the Supreme Court held that the vulnerability of clients to their professional advisors invoked traditional fiduciary principles. In Cadbury Schweppes, Binnie J. found "nothing in the relationship between a juice manufacturer and its licensee to suggest that the former surrendered its self-interest or rendered itself vulnerable' to a discretion conferred on the latter." On the question of vulnerability, he stated further at p. 165:

> In some sense, disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse. Such vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of a contractual term, express or implied [reference omitted]. In this case, the licensing arrangement expressly contemplated open competition upon termination, subject for a period of five years to avoidance of what came to be recognized as a useless limitation, namely mixing clam broth with tomato juice. While the law will supplement the contractual relationship by importing a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character. The respondents' demand to have the appellants' sales treated as an asset pirated' from the respondents by analogy with a trust estate goes too far.

28 In my view, the same reasoning should apply to this case. The trial judge held that the dependency or vulnerability that is "indispensable to a fiduciary relationship" existed in the following way (at p. 125):

> 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.

29 The vulnerability described by the trial judge simply flows from the terms of the agreement freely entered into by the parties. This is not the kind of vulnerability that will serve to elevate the relationship between the parties to one that is fiduciary in nature. There is no suggestion that Alpha was not in an equal bargaining position vis-à-vis TVX. It would have been open to Alpha, if it had chosen to do so, to negotiate greater or different protection for itself than that provided by the confidentiality agreement and the common law duty of confidence in the event of a termination of the agreement and a subsequent purchase by TVX. It did not do so. Presumably, Alpha was content to give its confidential information to TVX, under the protection of the confidentiality agreement, and to let TVX take over the acquisition process, including all costs associated with it, in return for an eventual 2 x 12% interest in Kassandra in the event of a successful acquisition, on terms set out in the agreement. There is no reason why equity should intervene to rewrite the bargain. As found in Cadbury Schweppes, any resulting vulnerability, if exploited by TVX, can be remedied in the action for breach of confidence or for breach of the confidentiality agreement.

30 The incongruity of fiduciary principles in this context, in my view, comes into focus when one considers Alpha's arguments on the cross-appeal where it claims an entitlement to the whole of Kassandra as a result of TVX's wrongful conduct. The principles relied upon by Alpha in support of its claim are sound in a fiduciary context. As noted by La Forest J. in Lac Minerals Ltd. v. Int. Corona Resources, [1989] 2 S.C.R. 574 at p. 657, "[f]iduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted." Hence the remedy for breach of fiduciary duty is not necessarily commensurate to the loss to the beneficiary. It is a question rather of not allowing the fiduciary to profit from its misconduct. It is essentially on this basis that Alpha claims an entitlement to the entire gold mines, a result that was never contemplated by the parties. Just as Binnie J. held in Cadbury Schweppes, I too find that Alpha's claim to the entire asset, by analogy with a trust estate, simply "goes too far."

31 Another factor relied on by the trial judge in support of her conclusion that TVX owed a fiduciary duty not to acquire Kassandra mines on its own account after the termination of the agreement was the existence of an industry practice to that effect. She described the practice as follows (at p. 109):

> 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.

32 The Supreme Court in Lac Minerals (at p. 661) adopted the following definition of "usage" from Halsbury's Laws of England, vol. 12, 4th ed., para. 445, at p. 28:

> Usage may be broadly defined as a particular course of dealing or line of conduct

> generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.

33 Reference can also be made to the principle in Cunliffe-Owen v. Teather & Greenwood, [1967] 1 W.L.R. 1421 (Ch.) at 1438:

> "Usage" may be admitted to explain the language used in a written contract or to add an implied incident to it, provided that if expressed in the written contract it would not make its terms or its tenor insensible or inconsistent [references omitted].
>
> "Usage" is apt to be used confusingly in the authorities, in two senses, (1) a practice, and (2) a practice which the court will recognise. "Usage" as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognized usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.

The burden lies on those alleging "usage" to establish it.

34 With respect, it is my view that the evidence, which was accepted by the trial judge and reviewed by her in her reasons for judgment (at p. 109), does not meet the required test.

35 At the outset, it is particularly noteworthy that the experts disagreed on this issue. While I am not prepared to accept the appellant's contention that disagreement amongst the experts is necessarily fatal to a finding of usage or industry practice, it certainly raises a serious issue whether the practice in question is sufficiently certain and notorious to be recognized by the court as having a binding effect on the parties.

36 The trial judge relied mainly on the opinions of the plaintiffs' experts, Mr. McOuat and Mr. Lattanzi. She reviewed their evidence as follows (at p. 109):

> 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. 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.

37 Mr. Lattanzi indeed provided this opinion in answer to a single question on the issue during the course of his examination-in-chief but did not elaborate further or state the basis for his opinion. As noted by the trial judge, Mr. McOuat acknowledged in cross-examination that he was expressing a personal opinion only. It is important to note as well that Mr. McOuat also acknowledged in cross-examination that "a confidentiality agreement can be a stand-alone agreement." He stated that where the parties have an agreement "they've gone past an exchange of information on a confidential basis or an introduction of concept, and now they've reached a business arrangement." He also agreed with the suggestion that the practice he was describing applied "where parties haven't otherwise explicitly written something out in a legal contract."

38 Hence it would appear that Mr. McOuat was describing a practice which, in his personal opinion, would govern the conduct of parties who have not gone further and made a "business arrangement." Of course, an established industry practice can still have a binding effect on parties who have entered into a written agreement. As noted above, the industry practice may assist in the interpretation of the agreement or supplement it with an implied term. However, it seems to me that Mr. McOuat's testimony is more consistent with the opinions expressed by the two defence experts, Mr. Anthony and Mr. Farquharson, that, in the end result, the parties are governed by the agreement that they negotiated. While it may be common to find some kind of non-competition clause in the parties' agreement, a fact acknowledged by both Mr. Anthony and Mr. Farquharson, this does not mean that the courts will imply such a term when there is none, on the basis of "usage".

39 The following words of La Forest J. in Lac Minerals (at p. 661) are perhaps particularly apposite:

> I should mention that I have the greatest hesitation in saying that the only circumstances in which a legal obligation can arise out of a notorious business practice is when a contract results. The cases cited against implying terms in a contract have no relevance to negotiating practices. When the parties have reduced their understandings to writing, it is obviously the proper course for courts to be extremely circumspect in adding to the bargain they have set down (see, for example, Burns v. Kelly Peters & Associates Ltd. (1987), 41 D.L.R. (4th) 577, per Lambert J.A. at p. 601; Nelson v. Dahl (1879), 12 Ch. D. 568 (C.A.); Norwich Winterthur Insurance (Australia) Ltd. v. Con-Stan Industries of Australia Pty. Ltd., [1983] 1 N.S.W.L.R. 461 (C.A.).

40 The parties in this case have reduced their agreement to writing. It was open to them to include a non-competition clause that would prevent TVX from competing with Alpha for Kassandra. They have not done so. As stated above, the court "should be extremely circumspect in adding to the bargain they have set down."

41 I would therefore answer the first question in the negative and find that the trial judge was not correct in holding that TVX owed a fiduciary duty to Alpha that survived the termination of the joint venture funding agreement, which duty prevented TVX from acquiring the gold mine on its own account. Of course, as stated earlier, TVX was still bound by the terms of its confidentiality agreement. This leads to the next issue.

2. Was Alpha's information worthy of protection?

42 TVX argues that the trial judge erred in finding that Alpha's information was worthy of the court's protection. This argument is twofold.

43 First, TVX reiterates its position at trial that the commercially useful information about Kassandra was readily available in the public domain and that Alpha's additional contribution to this information, if any, did not have the necessary quality of confidentiality to be worthy of protection in law.

44 Second, TVX takes the position that Curragh, not Alpha, was the owner of the confidential information, if any, and that Alpha cannot be rewarded for its own wrongful act in disclosing this information.

45 On the first point, the trial judge rejected TVX's position. After an extensive review of the relevant evidence on this point, she concluded as follows (at p. 105):

> 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 some 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.

46 The appellant has not demonstrated that the trial judge's conclusions on this point are in any way unreasonable or unsupported by the evidence. I fail to see any merit to the argument advanced by TVX on this point. In its factum, TVX takes no issue with these findings other than to say that "[i]t is apparent from the Reasons for Judgment that neither the trial judge nor the experts appropriately differentiated between Curragh's information that had been misappropriated by Alpha and information that was not thereby tainted." Hence, in the factum at least, this first argument is simply collapsed into the second argument. In oral argument, counsel made reference to some items

of documentary evidence in support of his client's position but, in my view, has not shown any basis for interfering with the trial judge's finding that the information provided by Alpha had the necessary quality of confidentiality to be worthy of protection in law.

47 This leaves the argument that Curragh, not Alpha, is the rightful owner of the information. The argument advanced on appeal appears to be different from that advanced at trial. At trial, TVX argued that Alpha did not have standing to sue. This argument was rejected by the trial judge and it is not renewed on this appeal. Rather, TVX submits that the trial judge should have acted on her own motion and dismissed the action on grounds of public policy. It is argued that the trial court and this court should not reward Alpha for its own wrongful act in appropriating and disclosing confidential information belonging to Curragh.

48 After dealing with the question of standing, the trial judge addressed this issue at p. 112 of her reasons for judgment as follows:

> 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.

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 (Ont. 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. 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.

49 TVX submits in its factum that "the trial judge ought to have been more than merely troubled" and that "the claims both in law and in equity ought to have been dismissed on the strength of the

maxim that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." TVX submits further that "[t]he rights of Curragh or its successor vis-à-vis TVX ought to be determined if and when those claims are advanced" and that Alpha "should not be unjustly enriched merely because those claims have not yet been advanced."

50 I entirely agree with the trial judge's comment that for TVX to resist the enforcement of its contract with Alpha on the basis that the information was Curragh's when there was no concern raised at the time is somewhat disingenuous. Further, I see no basis for interfering with her conclusion that, on the facts before her, there was an insufficient basis to conclude that the confidentiality agreement was an illegal contract. Hence I am of the view that the trial judge was correct in refusing to dismiss the action on her own motion on this basis.

51 The question remains whether the proposed fresh evidence should be received and if so, what impact it would have on this issue.

52 TVX seeks to rely on ten documents described in and attached to an affidavit by Yanos Gramatidis sworn on November 5, 1999. Mr. Gramatidis was Curragh's lawyer in Greece who, starting in September 1992, acted for the corporation in its attempts to acquire Kassandra. TVX submits that these documents were not in evidence at trial and only came its attention in January 2000 when it was served with 1235866 Ontario Inc.'s motion. TVX seeks to rely on this fresh evidence to show that Curragh was still pursuing its interest in acquiring Kassandra during the course of August 1993, at a time when Alpha had commenced its own pursuit for the acquisition of Kassandra. TVX argues that this is contrary to the position advanced by Alpha at trial that, by the end of July 1993, Curragh was no longer interested in acquiring the mines. TVX argues that Alpha, in taking this position at trial, "obviously intended to cleanse their pursuit of Kassandra from any taint of their fiduciary obligations to Curragh." It is argued that, given the manner in which Alpha presented its case at trial and the trial judge's concern over this issue, there is good reason to believe that the fresh evidence would have affected the outcome at trial. TVX argues further that Alpha, in failing to disclose these documents, deliberately misled the court and that, for this reason alone, a new trial should be ordered.

53 The Supreme Court of Canada set out a four part test for the admission of fresh evidence on appeal in R. v. Palmer, supra at 775:

(a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial.
(b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
(c) the evidence must be credible in the sense that it is reasonably capable of belief; and,
(d) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

54 Before determining whether TVX can meet this test, it would be useful to consider how the fresh evidence compares with the evidence at trial.

55 The crucial pieces of "fresh evidence", as relied on by TVX, are a series of letters involving Lean, Gramatidis, and the National Bank of Greece ("NBG"). The first letter, dated July 6, 1993, is from Gramatidis to the NBG enclosing the final draft of Curragh's Asset Purchase Agreement of Kassandra Mines with the condition that the agreement should only be effected upon the conclusion of the U.S. $60 million loan facility for Curragh by NBG. An almost identical letter (dated July 2, 1993) was in evidence at trial, and therefore it is hard to see what this letter would have added.

56 There is a further letter from Gramatidis to NBG dated July 22, 1993, which informs NBG that if it fails to respond to the Curragh offer by July 29, 1993, the Curragh proposal "should be deemed to be withdrawn". This letter was not in evidence at trial, but Feldman J. did have before her a letter from Lean to Gramatidis dated July 19, 1993 instructing Gramatidis to write the letter dated July 22 and instructing him as to what the contents of that letter should be.

57 A third letter sought to be introduced is from Lean to Gramatidis dated July 29, 1993, and was written in response to a letter from NBG to Gramatidis dated July 28, 1993 (which was in evidence at trial) explaining that NBG could not proceed with Curragh's proposal to purchase Kassandra until financing was in place. The July 29 letter instructs Gramatidis to respond to NBG that Curragh is "willing to enter into final negotiations". This letter follows a letter dated July 28, 1993, which was before Feldman J., in which Lean requests comments from Frame on Gramatidis' advice that Curragh go ahead with negotiations.

58 Gramatidis' letter (dated July 30, 1993) in which he carries out Lean's instructions is also sought to be introduced as fresh evidence, but it merely reiterates the points set out in the July 29 letter. Gramatidis then sends a follow-up letter to NBG on August 16, 1993 again requesting a response. Finally, NBG responds on August 19, 1993 with a letter that, while not before the trial judge, merely restates NBG's unchanged concern as to financing that was stated in the letter dated July 28, 1993 that was before the trial judge.

59 In addition to these letters (and accompanying fax cover sheets), the appellants seek to introduce a Draft Asset Purchase Agreement and a Draft Facility Agreement. The former was in evidence before the trial judge, and the existence and terms of the latter were set out in documents in evidence at trial.

60 In my view, TVX's motion fails particularly with respect to the first and fourth Palmer criteria.

61 Clearly these documents existed at the time of trial. There is nothing to indicate that they could not have been obtained from the files of Curragh or from Curragh's Greek counsel, Mr. Gramatidis, had any inquiries been made. Mr. Gregory Laing, Vice-President and Legal and Corporate Secretary for TVX, deposes in his affidavit filed in support of this motion that, in January 2000 when he was preparing to meet with Mr. Gramatidis over this documentation, he "mistakenly

believed that representatives of TVX Gold had approached Mr. Gramatidis in August or September of 1997 to obtain information on Curragh's involvement in Kassandra." In fact no approach had been made by TVX, and it is quite reasonable to wonder why this was not done.

62 Two reasons are advanced to explain TVX's lack of due diligence. First, Mr. Laing states in his affidavit that Mr. Gramatidis confirmed that he would have been duty bound not to discuss this matter by virtue of his obligations of confidentiality to his client Curragh. Second, TVX argues the evidence was not made available at trial due to Alpha's failure to disclose this documentation in an attempt to deliberately mislead the court.

63 I find no merit to these arguments. Surely, had Curragh been brought into the proceedings as an interested party, or one of its representatives as a witness, Mr. Gramatidis' duty of confidentiality would not have prevented disclosure of this evidence. Further, as noted by Alpha in its factum, TVX had "full access to Curragh's officers and directors, not the least through Walter Bowen, a senior partner of TVX's counsel, Cassels, Brock & Blackwell, and who was also a director of and counsel to Curragh." Curragh's existence or its pursuit of Kassandra was not a secret. TVX was fully aware of Curragh's existence long before trial and, indeed, in its Statement of Defence, pled that the confidential information was Curragh's.

64 Further, it is my view that TVX cannot simply rely on Alpha's disclosure obligations in answer to its own lack of due diligence. It is not at all clear to me from the material that there was any deliberate failure to disclose or any misleading of the court as alleged. Given the voluminous amount of material and the fact that it was located in various places, it is hardly surprising that some of it did not come forth. More importantly, as noted above, on their face, the new documents do not appear to add anything significantly different from the evidence that was before the court.

65 In his affidavit in support of the motion, Laing deposes that the fresh evidence shows that Curragh's interest continued through to at least August 10, 1993 and that NBG only responded negatively on August 19, 1993, at a time after Alpha had sent in an offer for Kassandra on August 15, 1993. However, it is clear from the August 19 letter that nothing had changed from the time when NBG indicated in its July 28 letter that the Curragh offer was unsatisfactory since that offer made no reference to the lenders of Curragh and their commitment to finance the $60 million facility related to the project. The Bank makes it clear that it will require "a bank guarantee to be provided by banks acceptable to us". It was also clear at trial that Curragh did not have that financing in July and did not have it in August and shortly thereafter, Curragh went into receivership. There is nothing obvious from this documentation that Lean was not speaking the truth when he said that Curragh realized by the end of July that they would no longer be pursuing Kassandra. The fact that there were some further attempts to have the Bank change its position into August is of not much moment when taken with all the evidence at trial and what actually transpired.

66 The trial judge also had before her a memo dated July 30, 1993 from Lean to Gramatidis

which instructs Gramatidis to "take no further action on this transaction other than to send the letter to the NBG in accordance with our earlier instruction of yesterday and to forward the amended draft agreements to us once you have received them from the NBG." Thus, it was clear at trial that there was at least some activity into August and therefore the "fresh" evidence count not have affected the result.

67 It is also worth noting that TVX has not offered affidavit evidence from any former officer or senior employee of Curragh to show that Curragh was actively pursuing the acquisition of the Kassandra mines in August 1993. Indeed, as stated above, upon careful reading the evidence is to the contrary.

68 For these reasons, I would dismiss TVX's motion to introduce fresh evidence and would answer the second question in the affirmative. The trial judge was correct in finding that the information provided to TVX by Alpha was worthy of the court's protection.

3. Did TVX use confidential information belonging to Alpha in its acquisition of Kassandra?

69 TVX submits that the trial judge erred in finding that it had used confidential information belonging to Alpha in its acquisition of Kassandra. This argument is also twofold.

70 First, TVX argues that the trial judge placed the onus on TVX to prove that it did not use confidential information that belonged to Alpha and, in doing so, erred in law.

71 Second, TVX argues that the evidence cannot reasonably support the trial judge's finding that TVX used Alpha's proprietary information as a "springboard" that led to the acquisition of Kassandra.

72 In support of its first argument, TVX relies on the following excerpt from the trial judge's reasons for judgment (at pp. 119-120):

> In Lac Minerals Ltd. 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. [[1969] R.P.C. 41 (Eng. Ch. Div.)], at p. 48, Megarry J. said this in regard to the burden on the confidence to repeal 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 confidence [sic] 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. [Emphasis added.]

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. Battista did not testify at all.

73 TVX argues that the trial judge failed to give due consideration to the fact that, in Lac Minerals, it was admitted by the defence that the information acquired from the plaintiff was of value and that it had made use of this information. Hence the inquiry in that case was not focussed on whether the defendant had used the information but on whether the use in fact made by the defendant was considered a permitted use. In this case, it is argued that the trial judge misplaced the burden on TVX to prove that it did not use the information.

74 In my view, when the above-noted excerpt is read in the context of the entire reasons on this point at pp. 118-122 it is apparent that the trial judge did not reverse the onus as alleged. She made an affirmative finding, based on the evidence before her, that TVX used the information provided to it by Alpha. In particular, immediately after stating at p. 120 that there was no evidence from TVX that it did not use the information, the trial judge states that "[i]n fact the evidence was to the contrary." She then reviews the evidence of use by TVX. Given this finding of use, the trial judge was correct in stating that it was then up to TVX to show that this use was permitted. The impugned statement in her reasons at p. 120 simply indicates that she sees no reason why the principle in Lac Minerals should be different for a defendant who, rather than admitting a use of the information and alleging that it was permitted, denies using it at all. In either case, once use is proven, the onus falls on the defendant to show that the use was permitted.

75 I also fail to see any merit in the second argument. In my view, the evidence set out in the judgment, coupled with the negative inference drawn against TVX by reason of Mr. Battista's failure to testify, provides ample support for the trial judge's findings. I see no reason to interfere and consequently, I would answer the third question in the affirmative. The trial judge was correct in finding that TVX used confidential information belonging to Alpha in its acquisition of

Kassandra.

4. Was the remedy appropriate?

76 TVX argues that, even if the information provided by Alpha was confidential and worthy of the court's protection, it was not sufficiently valuable to warrant the remedy awarded. It argues that damages in the nature of a consultant's fee would be adequate.

77 The trial judge made a number of findings of fact in support of her conclusion that Alpha brought a new and novel approach to the mine, that this information was not public, it was confidential and it was valuable. She also held that TVX first became interested in acquiring Kassandra because of the information provided to it by Alpha and that it used this information as a springboard in the ultimate acquisition. Her findings need not be repeated here. The appellant has not succeeded in attacking any of them. Further, no basis is provided to support its contention that a consultant's fee would be an appropriate remedy.

78 In my view, the remedy is reasonable and entirely appropriate. It is the best remedy available to restore Alpha to the position in which it would have been if no wrong had been committed. Even in the absence of a breach of fiduciary duty, the remedy awarded is still available: see Lac Minerals, supra, at 643. There is no reason to interfere.

E. THE CROSS-APPEAL

79 On its cross-appeal, Alpha seeks a determination that they are entitled to a constructive trust over the entire Kassandra lands and project. This claim is based on fiduciary principles and Alpha argued in its factum that TVX has been unjustly enriched to the full extent of its interest in Kassandra and that the principles adopted in Lac Minerals, supra, require that Alpha receive the entire Kassandra project subject only to repayment to TVX of reasonable monies it has expended. For the reasons set out above, however, I do not believe that it is appropriate to apply fiduciary principles to this case. As such, there is no basis in law for the remedy sought by Alpha.

80 In the alternative, Alpha seeks a monetary quantification of the 2 x 12% award granted at trial. This request was made to the trial judge and was refused by her largely on the basis that there was no evidence on which she could confidently quantify the damages with any degree of certainty (at pp. 129-130). This court is certainly in no better position to do so than was Feldman J. Alpha submits that further litigation will be required to determine the monetary value of the award below if quantification is not made. That may well be the case, but this court is not the proper forum to determine a quantification of this award. The cross-appeal is therefore dismissed.

F. MOTION BY 1235866 ONTARIO INC.

81 As indicated earlier, 1235866 Ontario Inc. is a successor to Curragh in so far as it has acquired from the receiver of Curragh all of Curragh's residual assets. After the trial and after the judgment,

1235866 Ontario Inc. notified TVX that it was claiming the 12% undivided carried interest and the 12% undivided participating interest in Kassandra awarded to Alpha in this action. 1235866 Ontario Inc. also commenced an action against Alpha, TVX and others.

82 Subsequently, on July 28, 1999, TVX and 1235866 Ontario Inc. settled the action as between them and entered into an agreement. TVX issued a press release announcing that, if TVX succeeded in its appeal against Alpha, it was nevertheless agreeing to recognize the award made in this action in the hands of 1235866. The press release read in part as follows:

> On July 28, 1999 TVX entered into an agreement with 1235866 that will ensure that these new claims will not result in any additional diminution of TVX's interest in the Kassandra Mines. 1235866 has agreed not to pursue any claim against TVX for an interest in the Kassandra Mines beyond the interest which has been awarded to Alpha. In the event that TVX succeeds in its appeal of the October 1998 decision, or 1235866 is successful in its claim against Alpha, 1235866 will be entitled to 12% carried interest as defined in the agreement and the right to acquire a 12% participating interest upon payment of 12% of the aggregate amounts expended by TVX and its subsidiaries in connection with the acquisition, exploration, development and operation of the Kassandra Mines up to the date of exercise.

83 At the commencement of the hearing of the appeal, a motion was brought by 1235866 Ontario Inc. for an order setting aside the judgment in this matter on the basis that Curragh was a necessary party for the proper adjudication of the issues in this action. 1235866 Ontario Inc. relies on Rules 5.03(1), (4) and 5.04(2) of the Rules of Civil Procedure. These rules read as follows:

> 5.03(1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.
>
> 5.03(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.
>
> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

84 Rule 5.04(1) is also relevant to this motion. It provides that:

> 5.04(1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute in so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties.

85 The only significance of the evidence presented in support of 1235866 Ontario Inc.'s motion relates to the ownership of the confidential information as between Curragh, now represented by 1235866 Ontario Inc., and Alpha. That issue can be fully litigated in the new action. No purpose would be served in setting aside the judgment in this action and ordering a new trial. A new trial of this action would undoubtedly be joined with the trial of the new action. Given TVX's settlement with 1235866 Ontario Inc. in the new action for the same 2 x 12% interest in Kassandra that was awarded in this action, the only remaining lis in the joint trial would be as between 1235866 Ontario Inc. and Alpha. I would therefore dismiss the motion.

F. DISPOSITION

86 For these reasons, I would dismiss TVX's motion to introduce fresh evidence and its appeal with costs to Alpha. I would dismiss Alpha's cross-appeal with costs to TVX. Finally, I would dismiss the motion brought by 1235866 Ontario Inc. with costs to Alpha.

CHARRON J.A.
CARTHY J.A. -- I agree.
ROSENBERG J.A. -- I agree.