See paras. 44, 118, 119, 120

Case Name:

Precious Metal Capital Corp. v. Smith

Between
Precious Metal Capital Corp., Plaintiff/Responding Party, and Gregory Charles Smith, Taghmen Ventures Limited, NHG Capital Limited, Gregory Jack Peebles, Haviland Management Inc., Haviland International Resources Inc. Limited a.k.a. Haviland International Resources Limited, Euro Americas Securities Limited, International Consolidated Minerals Limited, and Platinum Diversified Mining Inc., Platinum Partners Value Arbitrage Fund, L.P., Mark Nordlicht and Ancash Mining Ltd., Defendants/Moving Parties
And between
Gregory Charles Smith, Taghmen Ventures Limited, NHG Capital Limited, International Consolidated Minerals Limited, International Consolidated Minerals Inc. (formerly Platinum Diversified Mining Inc.) and Euro Americas Securities Limited, Plaintiffs by Counterclaim, and
Precious Metal Capital Corp., Steven Babcock, Gary Sugar, George H. Babcock, Babcock Consulting Limited and Plata Peru Resources Inc., Defendants to the Counterclaim

[2011] O.J. No. 3952

2011 ONSC 2962

72 E.T.R. (3d) 69

2011 CarswellOnt 9284

Court File No. 07-CL-7224

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: April 28-29 and May 9, 2011.

Judgment: September 2, 2011.

(125 paras.)

Tort law -- Fraud and misrepresentation -- Particular relationships -- Fiduciary relationship -- Motion by Ancash defendants for summary judgment dismissing plaintiff's action allowed -- Plaintiff claimed Smith and Peebles breached contractual, fiduciary and confidence duties to acquire mining property on own behalf -- Ancash defendants were successors in title to property -- No genuine issue for trial established, as agency relationship asserted by plaintiff did not exist in law or on facts given documentary evidence -- Peebles was contracted by plaintiff in respect of sale of other mining interests -- Information related to mine in question was in public domain -- Ontario Rules of Civil Procedure, Rule 20.04(2.1).

Motion by the Ancash defendants, Platinum Partners Value Arbitrage Fund, Nordlicht, and Ancash Mining, for summary judgment dismissing the action of the plaintiff, Precious Metals Capital, as against them. The plaintiff claimed a constructive trust arising from an alleged breach of fiduciary duty and duty of confidence owed in connection with its intended acquisition of a Peruvian mining property. The plaintiff claimed that it retained the defendant, Peebles, as its agent in connection with the acquisition and shared confidential information with Peebles and the defendant Smith. The plaintiff claimed that Peebles acquired the mine for his own benefit. The Ancash defendants were indirect purchasers of the mining properties from Peebles and Smith. The Ancash defendants submitted that their position was derivative to the issues raised by the statement of claim against of Peebles, Smith and related entities, and sought summary judgment accordingly.

HELD: Motion allowed. There was no genuine issue for trial. The agency relationship asserted by the plaintiff could not exist in law given the strength of the documentary evidence and the evidentiary record as a whole. Peebles contracted with the plaintiff to seek a potential source of financing for the plaintiff to sell its interest in other properties to another venture and fulfilled that obligation. The plaintiff had no proprietary interest in the property at issue and did not contract with Peebles as its agent to acquire any interest therein. The reasonable inference from the documentation was that the plaintiff knew that its agreement with Peebles did not relate to the mine in question. Any fiduciary or contractual duties were limited to the scope of the parties' agreement. The fact that Peebles acquired the property on his own account for sale into the same venture concerning the other properties was irrelevant to the plaintiff's position in that venture. No contractual or fiduciary duty was owed by Peebles or Smith regarding the mine at issue. No breach of confidence was established, as any information given by the plaintiff to Peebles regarding the mine was in the public domain and was not misused by Peebles or Smith. As no viable claim against Peebles or Smith was established, it followed that there was no claim against the Ancash defendants as their successors in title.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 20, Rule 20.04(2)(a), Rule 20.04(2.1)

Counsel:

Morris Manning, Q.C., for the Plaintiff.

Matthew Milne-Smith, for the Defendants, Platinum Partners Value Arbitrage Fund, L.P., Mark Nordlicht and Ancash Mining Ltd.

David S. Steinberg, for the Defendants, Gregory Jack Peebles, Haviland Management Inc., and Haviland International Resources Inc. Limited aka Haviland International Resources Limited.

Daniel S. Murdoch, for the Defendants and Plaintiffs by Counterclaim, Gregory Charles Smith, Taghmen Ventures Limited, NHG Capital Limited and Euro Americas Securities Limited.

REASONS FOR DECISION

P.A. CUMMING J.:--

The Motion

1 The defendants, Platinum Partners Value Arbitrage Fund, L.P., Mark Nordlicht and Ancash Mining Ltd. (collectively the "Ancash defendants") bring a motion for summary judgment under Rule 20, seeking a dismissal of the action as against them.

2 The other defendants do not bring like motions but agree that it would be an abuse of process to bring their own motions for summary judgment at a later time. They acknowledge that any motions for summary judgment should properly be heard together at the same time.

The Amended Fresh Statement of Claim

3 The plaintiff, Precious Metal Capital Corp. ("PMCC"), claims a constructive trust arising from an alleged breach of fiduciary duty and duty of confidence owed to PMCC in connection with a Peruvian mining property, the Pachapaqui mine. PMCC claims it retained the defendant, Gregory Jack Peebles ("Peebles"), as its agent in connection with the intended acquisition of Pachapaqui and further shared its confidential information about this mine with Mr. Peebles and the defendant, Gregory Charles Smith ("Smith"). PMCC claims that in breach of his said duties, Mr. Peebles acquired the Pachapaqui mine for his own benefit. The Ancash defendants were indirect purchasers of the mining properties from Messrs. Peebles and Smith.

4 The Ancash defendants assert that their position is derivative to that of Messrs. Peebles and Smith. That is, if there is not liability on the part of Messrs. Peebles and Smith on the basis of constructive trust arising from a breach of fiduciary duty and duty of confidence, then there cannot be liability on the part of the Ancash defendants.

Background

5 Pachapaqui is a zinc, lead, and silver mine in Peru which closed in 1994 due to Shining Path terrorist activities. The George Babcock family acquired Pachapaqui in 1995 and merged it into Plata-Peru Resources Inc. ("Plata-Peru") in 1997, a public company.

6 Mr. George Babcock (since deceased), the President and a director, was the controlling shareholder of Plata-Peru indirectly through a family controlled entity. His son, Steven Babcock, was an officer and former director. Steven Babcock referred to himself as Interim Vice-President Operations in a September 27, 2005 email. Mr. Gary Sugar, a lawyer, acted for Plata-Peru from 1999 to 2004, receiving shares for his services.

7 Plata-Peru was insolvent as early as 1999 and efforts were made to recapitalize or restructure. Sears, Barry and Associates prepared a so-called "43-101" compliant technical review report (in compliance with regulatory securities law) on Pachapaqui for Plata-Peru dated January 31, 2003 ("Sears Barry Report" -- Exhibit 11 to Affidavit of Gary Sugar dated March 3, 2011) which was disseminated to potential investors or buyers.

8 One potential investor in respect of Pachapaqui was the plaintiff, PMCC. However, PMCC's only assets were option agreements, in default, concerning gold or silver properties in Peru called San Luis and Millotingo.

9 Mr. George Babcock was an indirect shareholder of PMCC through an offshore company. Messrs. Steven Babcock and Gary Sugar are officers, directors and shareholders of PMCC. Mr. Sugar is the Chief Executive Officer of PMCC.

10 The defendant Mr. Peebles learned of three mining properties, being the San Luis and Millotingo options held by PMCC and the Pachapaqui mine held by Plata-Peru, in January 2005 in a discussion with the Babcocks and Mr. Peebles. Mr. Peebles says he had an office proximate to that used by PMCC in the same building at 65 Queen Street West in Toronto. (Mr. Sugar says that the initial discussion took place in a restaurant and Mr. Peebles did not share an office with PMCC at the Queen Street location until later.) Mr. Peebles, Steven Babcock and Mr. Sugar are all engaged in the business of mining ventures. There is common ground that Mr. Peebles learned of Pachapaqui by mid-January 2005.

11 Mr. Peebles was interested in buying Pachapaqui and travelled to London, England in March 2005, meeting with individuals to determine whether he could finance a purchase of Pachapaqui through the United Kingdom's capital markets.

12 Mr. Peebles sent an email (Motion Record of Ancash defendants, pages 520 to 524) dated May 29, 2005 to Mr. Ken Booth of Trio International (an advisor to Plata-Peru with respect to a possible sale of Pachapaqui) with a draft letter of intent from the defendant, Haviland International Resources Inc. ("Haviland IR") (a corporation owned by Mr. Peebles) to Plata-Peru as to an offer to purchase Pachapaqui. This letter of intent references, *inter alia*, Haviland IR having the Sears Barry Report with its estimates of reserves. It also references the "Pachapaqui Assets" being held by Babcock Consulting Ltd., Sucursal del Peru "who will cause them to be transferred at closing".

13 Mr. Peebles proceeded to buy Pachapaqui through his company, the defendant, Haviland IR, the transaction closing in early 2006. By prior agreement the mine was then transferred to the defendant International Consolidated Minerals Ltd. ("ICM"), controlled by the defendant Smith.

14 PMCC claims that PMCC retained Mr. Peebles as its agent to help PMCC purchase Pachapaqui from Plata-Peru. PMCC claims that Mr. Peebles breached his fiduciary duties to PMCC by acquiring this mine for his own benefit.

15 A written "letter of engagement" agreement had been entered into on May 20, 2005 between PMCC and the defendant Haviland Management Inc. ("Haviland M"), a company controlled by Mr. Peebles. The agreement states it is "Re: funding for Precious Metal properties".

16 The affidavits of the protagonists raise many points of disagreement on minor issues. However, the central, main factual point of disagreement relevant to the motion at hand is whether Mr. Peebles was retained by PMCC as its agent to purchase, or finance the purchase of, Pachapaqui by PMCC.

17 The affidavit of Mr. Sugar dated March 3, 2011 is adamant in stating that Mr. Peebles agreed at their very first meeting in January 2005, to assist as agent for PMCC in raising for PMCC the finances necessary to acquire Pachapaqui as well as the funding requirements for the existing San Luis and Millotingo properties. The affidavit of Mr. Steven Babcock dated March 2, 2011 makes the same allegation, specifically, that Mr. Peebles was engaged as agent of PMCC to raise funding "so PMCC could develop the San Luis and Millotingo properties and acquire Pachapaqui".

18 [References to Tabs of the Compendium of the Ancash defendants are noted as "CAD T**"]

The Agency Agreement

19 Mr. Peebles had learned in his discussions with Steven Babcock about PMCC's claimed ownership of San Luis and Millotingo. Mr. Peebles was not interested in acquiring these properties himself but agreed to act on PMCC's behalf in looking for potential sources of financing. Mr. Peebles had met with the defendant, Mr. Smith, in March 2005 and Mr. Smith had expressed an interest in acquiring the San Luis and Millotingo properties of PMCC.

20 The May 20, 2005 written agreement (CAD T 37) ("agency agreement") refers (para. 1) to

Haviland M providing consulting and advisory services for PMCC (and its successors and assigns) in relation to a U.S. $10 million financing. An initial U.S. $1.5 to $2 million was to be completed by a convertible debenture and up to $500,000 of equity to PMCC, with a proposed merger thereafter with a public listed company and the ongoing funding of it and its properties, referred to as the "Proposed Transactions".

21 This agency agreement was entered into some nine days before the draft letter of intent forwarded by Haviland IR (Mr. Peebles) to Plata-Peru seeking to purchase Pachapaqui.

22 The agency agreement includes an 'entire agreement clause' in para. 8 (h).

23 There is no reference to the Pachapaqui mine in the agency agreement. PMCC represents in paragraph 1 of the Agreement that it "owns the gold and silver properties" (being the San Luis and Millotingo properties), "as described in the due diligence binder" accompanying the letter of engagement.

24 The remuneration provision (para. 5) is dependent upon the "Proposed Transactions" having proceeded successfully and hence contemplates payment to Haviland M by PMCC's "successors and assigns" (*i.e.* the public listed company) upon completion of the Proposed Transactions.

25 Moreover, if Haviland M's services are terminated and the Proposed Transactions are completed within six months thereafter, the "successors and assigns" of PMCC remain obligated to pay the agreed upon compensation.

26 Reading the agency agreement in its entirety, three points are to be noted. First, it is apparent that PMCC states that it has a proprietary interest in only two properties, San Luis and Millotingo.

27 Second, if Haviland M's obligation extended beyond the stated tasks in the agency agreement (*i.e.* in respect of the placing of financing for the two PMCC properties) to also include attempting to obtain the purchase of Pachapaqui for PMCC, the reasonable inference is that such obligation would be expressly referenced. Mr. Sugar argues that some US $8.5 million of the prospective financing was intended to enable PMCC to purchase Pachapaqui. However, there is no reference to Pachapaqui in the agency agreement and the evidence suggests that $10 million is a sum that realistically relates to development of the San Luis and Millotingo properties. The evidentiary record establishes that San Luis and Millotingo were viewed as being of relatively minor value as compared to Pachapaqui, purchased by Mr. Peebles (Haviland IR) for some CAN $21 million. (In an email dated July 21, 2005 from Mr. Sugar to Mr. Peebles -CAD T 44- discussed below, Mr. Sugar gave a value to PMCC of $10 million and a value to Pachapaqui of $30 million.)

28 Messrs. Sugar and Steven Babcock did advise Plata-Peru in a meeting August 3, 2004 that PMCC had retained the firm of Dominic and Dominic to raise U.S. $10 million "with main objective being acquisition of [Plata-Peru] assets plus two other projects in Peru". The proposed purchase price set forth in the letter of PMCC to Plata-Peru dated September 30, 2004 was US

$17,167,629 payable by the assumption by PMCC of liabilities of Plata-Peru of some US $10,500,000 and the delivery of common shares in PMCC. (Exhibits 15 and 17 to Dino Titaro affidavit sworn November 19, 2010). PMCC was unable to raise the funds necessary to implement the 2004 proposed acquisition. The signed engagement letter for Dominic and Dominic dated June 14, 2004 (Exhibit 21 to Mr. Sugar's affidavit) contemplated raising US $8.5 million; the signed engagement letter (Exhibit 21 to Mr. Sugar's affidavit; CAD T21) dated June 25, 2004 refers to raising US $1.5 million. Neither engagement letter speaks as to the underlying purpose in raising the intended equity financing. Neither engagement letter makes reference to either Pachapaqui or to San Luis and Millotingo.

29 Third, it is apparent (para. 5) that Haviland M is only remunerated if there is a successful financing. Moreover, paragraph 8(d) states that by "entering into or performing its obligations under the agreement Haviland M is not representing that it is or will be possible or advisable for the Placing or Proposed Transactions to proceed".

30 On the face of the agency agreement, it seems that Mr. Peebles is engaged simply to use best efforts to arrange $10 million financing, primarily via a new public company, to enable the commencement of development of the San Luis and Millotingo properties and his remuneration is consequential to his achievement in obtaining this financing. The undertaking to obtain financing is not tied to purchasing Pachapaqui. The provision for remuneration is not tied to any purchase of Pachapaqui.

31 The documentary evidence, as well as the evidence of Plata-Peru, the owner/vendor of Pachapaqui, supports the position of the Ancash defendants that PMCC was not an undisclosed principal in the purchase of Pachapaqui by Mr. Peebles' company, Haviland IR, and that the May 20, 2005 agency agreement did not relate to Pachapaqui.

The History of PMCC's Attempts to Acquire Pachapaqui

32 The evidentiary record establishes that PMCC had a definite interest in acquiring Pachapaqui or Plata-Peru and actively made attempts to do so in 2003 and 2004.

33 Mr. Sugar states about mid-2003 PMCC was provided with a copy of the Sears Barry Report on Pachapaqui, dated January 31, 2003, commissioned by Plata-Peru.

34 Mr. Sugar states in his March 3, 2011 affidavit (para. 31) that he prepared a summary of PMCC's mining projects in 2004 (Ex. 12 to his affidavit) which referenced the contemplated Pachapaqui acquisition.

35 A letter of September 30, 2004 (CAD T 23) from PMCC to Plata-Peru proposed an acquisition of Pachapaqui by PMCC by way of an asset sale or, alternatively, by way of an amalgamation. There was initial enthusiasm on the part of Plata-Peru to this possibility but Messrs. Steven Babcock and Sugar were unable to put together a financing to support an acquisition by PMCC.

36 A Report of PMCC (CAD T 29) (dated January 1, 2005 but apparently prepared much earlier in 2004) (hereafter the "January 1, 2005 PMCC Report") to interest potential investors in PMCC described the San Luis and Millotingo properties and then referenced "6. Potential Acquisition-the Pachapaqui Mine", stating:

> PMCC is currently negotiating to acquire the right to explore and develop the Pachapaqui mine area. PMCC believes that it will be in a position, subject to funding in the amount of US $8.0 to US $8.5 Million, to complete this acquisition in Fall, 2004.

37 An email (CAD T25) of December 7, 2004 by Mr. Dino Titaro, a director of Plata-Peru (appointed to the board of directors of Plata-Peru to represent one of Plata-Peru's major creditors), to Mr. Steven Babcock states that Plata-Peru has "heard nothing from you or Gary Sugar re your proposal to [Plata-Peru]". He states that his patience level was now exhausted and that Plata-Peru would be pursuing other alternatives. Mr. Titaro's email concludes:

> This letter is being sent to you to advise you of what will be happening and also to suggest that you and Gary should not be trying to sell [Plata-Peru] as part of your ongoing financing package as you do not have the board approval and major debtor approval to be able to deliver on this and I do not wish to see your group get penalized in your future dealings with potential financiers.

38 It is apparent that Plata-Peru was interested in selling Pachapaqui (and would have welcomed PMCC as the purchaser if it was in a financial position to buy the property) but was not interested in having PMCC sell Pachapaqui on Plata-Peru's behalf as this would reduce the net return to Plata-Peru because PMCC would, in effect, place itself as an intermediary to the sale.

39 Thus, the evidence establishes that by the end of 2004, from Plata-Peru's standpoint, PMCC was not going to be involved in receiving any remuneration arising from a sale by Plata-Peru of Pachapaqui to a third person. Messrs. Steven Babcock and Sugar were well aware of this position.

40 The minutes of a March 22, 2005 meeting of the directors of Plata-Peru (CAD T33), with Mr. Steven Babcock present, indicate that Plata-Peru was in negotiations with Canadian Zinc ("CZN") to purchase Pachapaqui. The record establishes (CAD T27, T28) through emails amongst the directors of Plata-Peru that Mr. Steven Babcock was involved in the negotiations with CZN (although some directors had expressed a lack of confidence in his involvement in the negotiations). Given the indirect Babcock family shareholding in Plata-Peru, it is apparent that the Babcocks had an interest in seeing Pachapaqui sold, irrespective of who was the purchaser. The documentary evidence suggests that Steven Babcock was not acting on behalf of PMCC in trying to acquire Pachapaqui after 2004 but rather was simply acting on behalf of Plata-Peru in its efforts to sell the mine.

The Purchase of Pachapaqui by Mr. Peebles

41 Mr. Sugar sent the January 1, 2005 PMCC Report to Mr. Peebles on February 28, 2005 (CAD T29).

42 The defendant Smith in his affidavit of January 11, 2011 states that he knew Mr. Peebles as a former counsel on his behalf in Canada in 2003. He states that about March 2005 Mr. Peebles advised him he was in negotiation to purchase Pachapaqui from Plata-Peru and that PMCC sought to sell San Luis and Millotingo. Mr. Smith had an interest in the San Luis and Millotingo properties.

43 At the request of Mr. Peebles, Mr. Sugar of PMCC delivered by FedEx to the defendant, Taghmen Ventures Ltd. (a company of the defendant Smith) ("Taghmen") on April 29, 2005 the "confidential due diligence binder in respect of PMCC (CAD T34)". This included a single paragraph in the Executive Summary referencing Pachapaqui, stating "PMCC has the opportunity to acquire ... the Pachapaqui mine ...". This paragraph and the Executive Summary were apparently reproduced from the earlier January 1, 2005 PMCC Report (but which in fact was apparently prepared much earlier in 2004, as referred to above in paragraph 36) which had stated:

> PMCC is currently negotiating to acquire ... Pachapaqui [and] ... believes that it will be in a position ... to complete this acquisition in Fall, 2004.

44 The reasonable inference is that the continuing references to Pachapaqui in both the January 1, 2005 PMCC Report and the Executive Summary thereof were outdated and perhaps inadvertent. If included intentionally, their inclusion at most represented a wishful fantasy on the part of Messrs. Steven Babcock and Gary Sugar. They knew by December 2004 that PMCC was not in a financial position to purchase Pachapaqui, and they knew that Plata-Peru was actively trying to sell Pachapaqui to CZN. Indeed, Mr. Steven Babcock, given his family's shareholding interest in Plata-Peru, was actively involved in the negotiations between Plata-Peru and CZN.

45 On May 8, 2005, Mr. Sugar emailed (CAD T36) Mr. Peebles, with a copy to Mr. Steven Babcock, a draft term sheet for the potential funding of PMCC by the defendant Taghmen of $1.5 million through convertible debentures. The term sheet referenced the "Use of Proceeds" by referring to the San Luis and Millotingo properties only. There was not any reference to Pachapaqui. It is noted that this May 8, 2005 email is some 12 days before the May 20, 2005 agency agreement is entered into.

46 As referred to above in paragraph 12, on May 29, 2005 (Mr. Peebles claims his computer inexplicably misdated the email as April 29, 2005) (CAD T35) Mr. Peebles emailed Mr. Ken Booth of Trio International Corp. ("Trio"), the investment banker for Plata-Peru, a draft form of offer on behalf of Haviland IR to purchase all the assets of Plata-Peru, including Pachapaqui.

47 On May 31, 2005, Mr. Booth sent an email (CAD T38) to the other directors of Plata-Peru, with a copy to Mr. Steven Babcock, which referenced the proposal received by Plata-Peru from "a London based group" (*i.e.* Haviland IR) to invest U.S. $1.5 million in Plata-Peru and purchase the assets of Plata-Peru for CAN $21 million by issuing shares of an AIM listed company.

48 Thus, Mr. Steven Babcock knew within 11 days of the executed May 20, 2005 agency agreement (relating to putting together a financing package in respect of the San Luis and Millotingo properties) between PMCC and Haviland M that Mr. Peebles was seeking to purchase Pachapaqui.

49 The next day, June 1, 2005, Mr. Booth gave a memo (CAD T39) to the Plata-Peru directors, with a copy to Mr. Steven Babcock. Mr. Steven Babcock participated in a teleconference of Plata-Peru directors without any indication that he was there on behalf of PMCC. That is, the notes label him as "Plata-Peru Shareholder". Mr. Steven Babcock's conduct contradicts any suggestion that PMCC is an undisclosed principal to the purchase of Pachapaqui by Haviland IR. The notes suggest that Mr. Steven Babcock regarded Mr. Peebles as acting independently and on his own account with respect to Pachapaqui. The memo states:

> The Haviland offer has been brought to Plata-Peru by Steve Babcock. Steve provided an overview of how Haviland learned about Plata-Peru and some of the people behind Haviland and the proposed deal. Greg Peebles out of Toronto and Philip Jamieson out of London are the principals behind Haviland. Peebles is a lawyer, who worked with Cassels, Brock and Blackwell until venturing out on his own to do financings.

50 Mr. Steven Babcock did not tell anyone that PMCC was behind Mr. Peebles as an undisclosed principal in the intended purchase of Pachapaqui by Haviland IR. If PMCC was at all involved, Mr. Babcock should have declared a conflict of interest on his part, given his involvement with Plata-Peru in its negotiations to sell Pachapaqui. His silence in this regard supports the inference that PMCC was not an undisclosed principal in the planned purchase of Pachapaqui by Mr. Peebles.

51 The formal letter of intent, dated June 2, 2005, to the Plata-Peru board of directors (CAD T40) by Haviland IR, subject to due diligence, to purchase Pachapaqui and all other assets of Plata-Peru, was accepted by Mr. George Babcock on behalf of Plata-Peru. This letter of intent refers to discussions with Plata-Peru and Plata-Peru providing all the relevant information. There is no mention of PMCC. There is no objection by Mr. George Babcock or anyone else (the reasonable inference being that Messrs. Steven Babcock and Gary Sugar would know about this letter of intent) on the basis that PMCC is involved in the proffered transaction.

52 Indeed, Mr. Booth's email of June 2, 2005 to the other directors of Plata-Peru, with a copy to Mr. Steven Babcock, states that "Greg Peebles ... is amending his proposal ...". Mr. Booth sets forth the details of what Plata-Peru could realistically expect as to shares being issued to it through Mr. Peebles' intended initial public offering, given a sale of Plata-Peru to Haviland IR for CAN $21 million.

53 Mr. Peebles (para. 24 of his affidavit of December 23, 2010) says that about mid-June 2005 he again went to London with Mr. Booth and Mr. Steven Babcock of Plata-Peru to meet with underwriters about his intended corporate acquisition of Pachapaqui and having a "nominated

advisor", a prerequisite to a corporation obtaining a listing on London's AIM Exchange, the capital market Mr. Peebles intended to access to finance the deal.

54 Mr. Peebles states that, while in London, he also met again with the defendant Mr. Smith. Mr. Smith advised he would be interested in Pachapaqui.

55 Mr. Peebles, Mr. Smith and Mr. Booth (representing Plata-Peru), worked out a deal whereby Mr. Smith would purchase Pachapaqui via a public company (which would ultimately be the defendant International Consolidated Minerals Limited ("ICM")) listed on the AIM Exchange, after Haviland IR's purchase of Pachapaqui from Plata-Peru.

56 Mr. Peebles required information on PMCC as it was to be a participant in the intended IPO that Mr. Peebles was devising through the defendant Smith with respect to San Luis and Millotingo. It had been intended in the May 20, 2005 agency agreement between Haviland M and PMCC that PMCC would sell its San Luis and Millotingo properties into a venture involving a public company as the vehicle to finance the venture.

57 At this point in time, the financing via a public company organized by the defendant Smith would involve two streams of properties into the contemplated venture: San Luis and Millotingo from PMCC and Pachapaqui from Haviland IR.

58 On June 14, 2005, Mr. Sugar emailed (CAD T42) Mr. Peebles a copy of the PMCC "Executive Summary" (now dated May 15, 2005) which was a copy of the Executive Summary dated January 1, 2005, (but prepared some time before in 2004, as referred to above in paragraphs 36 and 43).

59 The paragraph referring to PMCC having "the opportunity to acquire ... Pachapaqui ..." remained in the May 15, 2005 Executive Summary now being sent to Mr. Peebles. Eighteen minutes later Mr. Sugar emailed Mr. Peebles a copy of the PMCC Executive Summary with the paragraph referencing Pachapaqui omitted. Mr. Peebles says in his affidavit that, when he saw the reference to Pachapaqui in the earlier email, he went from his office next door to Mr. Sugar's office and told him to remove it as he was buying Pachapaqui.

60 In July 2005, Mr. Smith negotiated a mutual Confidentiality Agreement (on the Taghmen letterhead) with PMCC with respect to the possible sale by PMCC of its interest in San Luis and Millotingo. The Confidentiality Agreement, signed by Messrs. Sugar and Steven Babcock on behalf of PMCC, did not mention Pachapaqui.

61 Emails between Mr. Peebles and Mr. Sugar and Mr. Steven Babcock on July 15, 2005 and July 21, 2005 (CAD T44) set forth discussions as to who would get what percentage position in the eventual public company through the IPO. That is, Messrs. Sugar and Steven Babcock were concerned as to what they, as shareholders of PMCC, would receive through the contribution by PMCC of the San Luis and Millotingo properties to the overall venture.

62 Mr. Sugar's emails to Mr. Peebles at this time sought only a 23.13% stake in ICM for PMCC in exchange for the transfer of San Luis and Millotingo. This position is inconsistent with the present PMCC claim that it had a 100% ownership interest in Pachapaqui through Mr. Peebles acting as its agent.

63 Mr. Sugar refers to the shares Mr. Peebles and Mr. Smith will receive. In my view, these references and Mr. Sugar's proposal as to how Peebles/Smith should receive compensation treat Peebles/Smith as at arm's-length parties to PMCC and the interests of Messrs. Sugar and Steven Babcock. The references are inconsistent with PMCC being an undisclosed principal to Mr. Peebles insofar as the acquisition of Pachapaqui is concerned, with Mr. Peebles acting merely as the agent of PMCC in respect of that purchase.

64 Moreover, the overall contemplated consideration to be received by Peebles/Smith for putting together the deal involving the purchase of PMCC by the new public company, together with the purchase of Pachapaqui by the new public company, is considerably more than the compensation contemplated payable to Mr. Peebles by the May 20, 2005 agency agreement for merely arranging the financing/purchase for the two PMCC properties, San Luis and Millotingo.

65 The remuneration provision (para. 5(c) of the May 20, 2005 agency agreement) of merely 6,000,000 shares for Mr. Peebles (with a total of 36,674,903 issued PMCC shares) in the contemplated new public company is inconsistent with the remuneration ultimately to be received by him because of the addition of Pachapaqui to the venture. This suggests that the May 20, 2005 agency agreement related only to the San Luis and Millotingo properties.

66 Pachapaqui is readily given a value by Mr. Sugar in the July 15 and 21 2005 emails of 3:1 as compared to the value of PMCC (San Luis and Millotingo). If Mr. Peebles was acting merely as agent for PMCC in the purchase/financing of Pachapaqui, it would seem logical that his compensation as suggested by Mr. Sugar in his July 15 and 21 emails would have been tied to para. 5 of the agency agreement, that is, Mr. Peebles would have been offered considerably less compensation than now being suggested by Mr. Sugar in July 2005.

67 Moreover, the language employed by Mr. Sugar in emailing Mr. Peebles on July 21, 2005 indicates that Mr. Peebles was not acting as agent for PMCC in the acquisition of Pachapaqui. Mr. Sugar references the subject of the email as "PMCC-Pachapaqui Peebles/Smith Position". He references Attachments as "Proposal For Peebles-Smith Position July 21, 2005".

68 Mr. Sugar goes on to state in his July 21, 2005 email to Mr. Peebles and Mr. Steven Babcock:

> Greg, as discussed, you and Greg [Smith] have asked for 15,000,000 shares in PMCC which would represent a 7.5% in the [new public] company after the acquisition of Pachapaqui, assuming a relative valuation of 1:3 PMCC: Pachapaqui.

> My comment is that this places the cost of your and Greg's entire position [in the new public company] on the PMCC shareholders, instead of allocating a portion of that burden on the Pachapaqui shareholders/owners. My suggestion is that we take your 7.5% position proportionately from each of PMCC and Pachapaqui by reducing each of their positions by 7.5%. The result to you and Greg remains exactly the same, but the cost is now shared equitably across all of the assets combined, instead of just being placed entirely on PMCC.

69 Mr. Sugar's position and argument in this email is inconsistent with PMCC being an undisclosed principal behind Mr. Peebles, with him being a mere agent acting on behalf of PMCC in the purchase of Pachapaqui. Rather, Mr. Sugar's position and argument is consistent with Mr. Peebles' position that he was purchasing Pachapaqui on his own account (via Haviland IR) and that he and Mr. Smith were being compensated as "Pachapaqui shareholders/owners" through contributing Pachapaqui to the new public company being put together by Mr. Smith.

70 On July 11, 2005, the Ontario Securities Commission (T45) granted Plata-Peru a variation of an earlier cease-trade order previously issued against Plata-Peru, referencing the agreement with Haviland IR.

71 Haviland IR advanced a $100,000 loan to Plata-Peru for working capital as provided under the letter of intent.

72 Messrs. Sugar and Steven Babcock as directors of PMCC signed a Directors' Resolution on August 12, 2005 (CAD T49) which is consistent with the May 20, 2005 agency agreement between Mr. Peebles and PMCC. The Directors' Resolution evidences the position of the Ancash defendants that PMCC had no interest in Pachapaqui and was not an undisclosed principal of Mr. Peebles in respect of its acquisition.

73 The Directors' Resolution provides that PMCC's existing shareholders would be given a valuation of U.S. $2,750,000 for 50% of San Luis and 100% of Millotingo in respect of the intended sale into the public company (to be ICM) venture. PMCC would sell 100% of Millotingo and 50% of San Luis. Messrs. Peebles and Smith would be issued 15 million bonus shares in PMCC with the total 40,444,449 issued shares of PMCC being sold to the AIM listed shell corporation for U.S. $4,000,000 worth of stock in the new public corporation. The Directors' Resolution recognizes that the acquisition of PMCC by the new public company would take place contemporaneously with the acquisition of Pachapaqui by the new public company.

74 The Plata-Peru shareholders accepted the proposed Haviland IR-Smith deal at a special meeting on December 6, 2005. Messrs. George Babcock and Steven Babcock attended the special meeting of Plata-Peru shareholders and supported the Haviland IR-Smith deal.

75 To this point in time, there had not been any suggestion of any role for PMCC in the intended acquisition of Pachapaqui by Haviland IR. The letter of intent had been signed six months earlier.

The circular had been published some six weeks earlier. Mr. Steven Babcock had been involved for Plata-Peru at every step of the intended sale of Pachapaqui to Haviland IR. PMCC had not raised any objection to the sale.

76 Some five minutes before the December 6, 2005 Plata-Peru shareholders' meeting, Mr. Sugar sent an email to Mr. Smith's London counsel claiming that the opportunity to buy Pachapaqui somehow "belong[ed]" to PMCC. Neither Mr. Sugar nor Mr. Steven Babcock brought PMCC's last minute objection to the attention of those at the shareholders' meeting. Plata-Peru's shareholders approved the sale to Haviland IR.

77 Haviland IR's purchase of Pachapaqui from Plata-Peru closed in January 2006 with the closing made effective as of December 31, 2005. By a separate agreement of the same date, Haviland IR sold Pachapaqui to ICM.

78 The contemplated acquisition by the new public company to this point in time was not an asset purchase of San Luis and Millotingo but rather a purchase of PMCC's share capital by way of a securities exchange. The contemplated transaction between PMCC and the new public company, ICM, now shifted to being an intended asset purchase agreement.

79 An Asset Purchase Agreement (CAD T52) between ICM and PMCC dated December 31, 2005 and signed by Messrs. Steven Babcock and Gary Sugar on behalf of PMCC refers to the transfer by PMCC of its interests in the San Luis and Millotingo properties for 2,750,000 shares of the purchaser, ICM. The 61 page Agreement does not make any reference to Pachapaqui. It simply refers to the sale of PMCC's business and its assets comprising the San Luis and Millotingo properties.

80 A series of emails (CAD T53) over January 4 and 5, 2006 between Mr. Sugar to Mr. Pawan Sharma, the lawyer for ICM, who was trying to complete the sale of San Luis and Millotingo from PMCC to ICM, establish that, in ICM's view, PMCC did not in fact own the San Luis and Millotingo properties (notwithstanding that PMCC warranted it had title to the assets in para. 6.2 of the Asset Purchase Agreement) and could not transfer ownership to ICM. Hence, ICM took the position that PMCC ultimately could not perform its obligations under the agreement to sell its purported mining property assets.

81 The reasonable inference from a subsequent series of emails dated May 17, 2006 and May 25, 2006 between two or more of Mr. Sugar, Mr. Babcock, Mr. Peebles and Mr. Sharma is that Messrs. Sugar and Steven Babcock misrepresented PMCC's rights to San Luis and Millotingo which prevented completion of the contemplated sale to ICM. PMCC, and Mr. Sugar, would get no benefit from the ICM contemplated venture. This caused Mr. Sugar (email May 17, 2006 from Gary Sugar to Steven Babcock -- CAD T56) to pursue his accusation, first suggested on December 7, 2005, claiming that somehow PMCC had an "interest in Pachapaqui" and that Messrs. Peebles and Smith had "misappropriated this property".

82 The evidence indicates that PMCC misrepresented to Mr. Peebles and Haviland M in the May 20, 2005 agency agreement (para. 1) and to Mr. Smith and ICM in the December 31, 2005 Asset Purchase Agreement (Preamble (A), paras. 6.2, 7) that it owned the San Luis and Millotingo mines. It would seem that Mr. Sugar hoped that PMCC would somehow be able to ultimately obtain title to San Luis and Millotingo so as to be in a position to complete the sale to ICM.

83 On December 7, 2005, (that is, the day after the special meeting of shareholders of Plata-Peru) Mr. Sugar emailed Mr. Peebles (CAD Tab "I" to the Peebles affidavit) about alleged outstanding issues to be dealt with. The email expressly refers to San Luis and Millotingo as being the assets to be acquired from PMCC by ICM in exchange for share consideration. The email then concludes with this paragraph:

> 5) Finally, we need to determine the consideration that PMCC is to receive for bringing this entire transaction, including the Pachapaqui opportunity to the table. Greg, we have a written retainer agreement whereby you are retained to acquire Pachapaqui for PMCC, not for yourself. PMCC spent two years putting together this package, and presented its business plan, technical reports on the three properties and other information to you and Smith. We have no problem with you guys taking the lion's share of the upside, but PMCC deserves some recognition for its role. It is completely unreasonable for you to exclude PMCC from its own deal.

84 Until the December 7, 2005 email from Mr. Sugar, there is no document seen in the record which suggests that PMCC was raising a claim against Messrs Peebles and Smith in relation to Pachapaqui. The documentary record is to the contrary. The historical record does indicate that PMCC was certainly interested and desirous of purchasing Pachapaqui and that it entered into discussions with Plata-Peru in 2003 and 2004 to this end. However, the record establishes that these discussions were not successful and that, by December 7, 2004, PMCC had been expressly advised by Plata-Peru (via Mr. Dino Titaro) that PMCC's previous expression of an intention to purchase Pachapaqui had not gone anywhere,

> and also to suggest that you and Gary should not be trying to sell [Plata-Peru] as part of your ongoing financing package as you do not have the board approval and major debtor approval to be able to deliver on this and I do not wish to see your group get penalized in your future dealings with potential financiers.

85 Plata-Peru proceeded to try to find other potential purchasers of Pachapaqui, negotiating seriously with CZN for some period of time and with Peebles/Haviland IR in 2005. There would be no point to Plata-Peru engaging PMCC as an agent to sell Pachapaqui as that would simply reduce any net return to Plata-Peru on the sale. Plata-Peru was interested in having a direct sale-purchase and that is what was achieved ultimately through the sale to Haviland IR.

86 PMCC took no steps to advance any claim to Pachapaqui before the sale to Haviland IR (with

an immediately follow-on transfer to ICM) closed in January 2006 (with an effective date of December 31, 2005).

87 Mr. Peebles did learn about the existence of Pachapaqui through his meetings with Messrs. Babcock and Sugar in January 2005. However, he was not under any contractual obligation to them in this regard. Moreover, the record indicates he was not told about Pachapaqui on a confidential basis. Indeed, the record establishes the industry generally had knowledge that Plata-Peru owned Pachapaqui, was insolvent, wanted to sell Pachapaqui, and had obtained the Sears Barry Report for the purpose of encouraging investors toward achieving the desired sale.

Analysis

1. The Agency Relationship Between Mr. Peebles and PMCC

88 Significant amendments were made to Rule 20 as of January 1, 2010. See *Healey v. Lakeridge Health Corp.* (2010), 72 C.C.L.T. (3d) 261 (Ont. S.C.), aff'd (2011), 103 O.R. (3d) 401 (C.A.).

89 The purpose of a summary judgment motion is to dispose of an action where a trial is not necessary. Rule 20.04(2)(a) provides that summary judgment shall be granted if the court is satisfied that there is "no genuine issue requiring a trial". Not all issues of material fact require a trial. The onus is upon the moving party to establish there is no genuine issue requiring a trial, but the responding party must "lead trump or risk losing". *Canadian Imperial Bank of Commerce v. Mitchell* [2010] O.J. No. 1502 (S.C.), at paras. 18-19.

90 Rule 20.04(2.1) confers authority upon the motion judge to: weigh the evidence; evaluate the credibility of a deponent; and draw any reasonable inference from the evidence when determining whether there is a genuine issue requiring a trial.

91 The moving party Ancash defendants' position on this motion is derivative of the issues raised by the statement of claim against Haviland M, Haviland IR, Peebles and Smith. Is there a genuine issue requiring a trial with respect to whether PMCC retained Haviland M (*i.e.* Mr. Peebles) to help PMCC purchase Pachapaqui and did Mr. Peebles owe and breach a duty of confidence to PMCC in that regard?

92 Whether or not the May 20 agency agreement obligated Mr. Peebles to act as agent in acquiring Pachapaqui for PMCC is a material fact, indeed, the central material fact, at issue. It is also, however, a question of law: on the facts available from the documentary evidence and the affidavits of the parties, can it be established in law that Mr. Peebles was an agent for PMCC in acquiring Pachapaqui? The issue in question, therefore, is one of mixed fact and law.

93 This means that a finding against PMCC does not mean I must make a finding of credibility against Messrs. Sugar and Steven Babcock. A finding of credibility would only be necessary if the plaintiff deposed material facts that contradicted the material facts deposed by the defendants.

Though the question of whether Mr. Peebles was their agent in acquiring Pachapaqui is a question of fact that is disputed between the parties, the answer to that question ultimately turns on whether there is a legal foundation for their assertion. There is no real dispute between the parties with respect to the facts being used to prove or disprove the agency relationship. As such, the task before me is not to decide which party is credible and which is not, but to decide whether there exists a legal foundation on the facts for the plaintiff's claim.

94 This is an important point, because the powers of a summary judgment motions judge pursuant to the new Rule 20 are not yet clear. Rule 20.04 (2.1) gives the motions judge authority to evaluate the credibility of a deponent, but this will not always be possible without the aid of *viva voce* evidence in the context of a trial. In such cases, a motions judge must conclude that there is a genuine issue requiring a trial. This is not such a case. It is not necessary for me to find Messrs. Sugar and Babcock lacking in credibility in order to come to my legal conclusion. The facts are clear in this case. The only fact in dispute is whether Mr. Peebles was an agent for PMCC in the acquisition of Pachapaqui, which can be proved or disproved from an application of the law to the facts.

95 In my view, and I so find, the agency relationship asserted by the plaintiffs cannot exist in law on the facts before me, given the strength of the documentary evidence, together with the evidentiary record as a whole, in contradicting Messrs. Sugar and Steven Babcock in their assertion. As such, a trial is not required in the case at hand. Summary judgment is properly to be given to the moving party defendants.

96 In my view, and I so find, PMCC did not retain Mr. Peebles (Haviland M) through the May 20, 2005 agency agreement, or otherwise, in respect of Pachapaqui. Mr. Peebles contracted to seek a potential source of financing whereby PMCC could sell its (purported) interest in the San Luis and Millotingo mines. Mr. Peebles fulfilled this contractual obligation by arranging the financing through ICM and a public financing. This deal between PMCC and ICM failed to close but this had nothing to do with Mr. Peebles.

97 Rather, the evidentiary record suggests that the deal failed because PMCC misrepresented its position as to ownership of San Luis and Millotingo. PMCC was apparently never in a position to close the transaction. Leaving aside the issue of any possible contractual claims as between PMCC and Mr. Smith/ICM relating to the abortive sale of San Luis and Millotingo, the record establishes that Mr. Peebles (Haviland M) fulfilled his obligations under the May 20, 2005 agency agreement.

98 The evidentiary record establishes that PMCC had no proprietary interest in Pachapaqui and did not contract with Mr. Peebles to act as its agent to acquire any proprietary interest in Pachapaqui. The fact that Mr. Peebles was acquiring Pachapaqui on his own account for sale into the same ICM venture is irrelevant to PMCC's position in seeking to sell San Luis and Millotingo to ICM.

99 The reasonable inference from all the documentation and evidence (other than the bald

assertions by Mr. Sugar in his December 7, 2005 email to Mr. Peebles) is that PMCC knew full well at the point of the May 20, 2005 agency agreement that Mr. Peebles was contracting only to sell/finance San Luis and Millotingo on behalf of PMCC and that the agreement did not relate to Pachapaqui.

100 Indeed, Mr. Steven Babcock, with his interest in both Plata-Peru and PMCC, knew full well of Mr. Peebles' proposal to purchase Pachapaqui by May 31, 2005 (CAD T38) and the reasonable inference is that Mr. Sugar would have been aware of this at the same time. All of the documentary evidence thereafter supports the reasonable inference that PMCC knew Mr. Peebles was at all times acting on his own account in acquiring Pachapaqui and did not owe any obligation to PMCC in respect of Pachapaqui. Indeed, the documentary evidence establishes that PMCC fully supported the acquisition of Pachapaqui by ICM via Haviland IR (Mr. Peebles), because ICM was the only viable route whereby PMCC could sell its (purported) interest in the San Luis and Millotingo properties.

101 It was only with problems surfacing in respect of PMCC being able to complete the sale transaction of the San Luis and Millotingo properties that Mr. Sugar asserted, in his December 7, 2005 email to Mr. Peebles, that under the May 20, 2005 agency agreement Mr. Peebles was "retained to acquire Pachapaqui for PMCC ..." All of the documentary evidence, together with Mr. Sugar's own actions, as seen in the evidentiary record for the period from May 20, 2005 to December 7, 2005, contradicts Mr. Sugar and PMCC in respect of Mr. Sugar's assertions in his December 7, 2005 email.

102 Indeed, the concluding paragraph of the December 7, 2005 email is inconsistent in its associations. On the one hand, it baldly asserts that "... we have a written agreement whereby you are retained to acquire Pachapaqui for PMCC, not for yourself ..." However, it concludes only with "PMCC deserves some recognition for its role".

103 No one ever suggested that PMCC was involved in Mr. Peebles' purchase of Pachapaqui. Mr. Steven Babcock, acting for Plata-Peru and not PMCC, was involved throughout the negotiations by Plata-Peru for the sale of Pachapaqui. PMCC was unable to buy Pachapaqui itself. PMCC had also been expressly told by Plata-Peru not to purport to sell Pachapaqui on its behalf as Plata-Peru wanted to maximize its net return from a sale of Pachapaqui by avoiding any intermediary. In his affidavit, Mr. Titaro states (para. 54) that "neither Steven [Babcock], George [Babcock] nor [Gary] Sugar had ever suggested that Peebles was a mere agent for PMCC during the almost year-long negotiations with Peebles".

104 In my view, the evidentiary record establishes that Mr. Peebles did not owe any contractual or fiduciary duty to PMCC with respect to Pachapaqui. His duties under the agency agreement related only to the San Luis and Millotingo properties (purportedly) owned by PMCC. The evidence on the record in the proceeding at hand indicates he fulfilled his duties in this regard.

105 There is no evidence supporting any asserted fiduciary relationship between Mr. Smith and PMCC. Any relationship was merely that of an arm's-length contractual relationship.

106 Mr. Peebles required information on PMCC as it was to be a participant in the intended IPO Mr. Peebles was devising through the defendant Smith. It had been intended in the May 20, 2005 agency agreement between Haviland M and PMCC that PMCC would sell its San Luis and Millotingo properties. The May 20, 2005 agreement amounted to a limited agency contract whereby Mr. Peebles agreed to use best efforts to put a financing arrangement in place whereby PMCC would sell its (purported) ownership interest in the San Luis and Millotingo properties to a public company (ultimately, ICM) to be created to finance a venture which would include those two properties.

107 By chance, the public company venture came to include the Pachapaqui property, acquired by Haviland IR (Mr. Peebles). This was seen as a 'win-win' situation for all participants, including PMCC and Messrs. Steven Babcock and Gary Sugar, until it fell apart from PMCC's standpoint because PMCC did not, in fact, own San Luis and Millotingo and could not fulfil its obligations under the asset-purchase agreement of December 31, 2005.

108 Given the nature of the obligations imposed by fiduciary duties, such duties are limited to the specific relationship in which they arise. *Galambos v. Perez*, [2009] 3 S.C.R. 247, at paras. 38-39. The May 20, 2005 agency agreement, construed as an agency agreement with a consequential fiduciary duty on the part of Haviland M (Mr. Peebles), defines that duty by the scope of the written agency agreement and that scope was limited to financing to be obtained for San Luis and Millotingo. Fiduciary duties are limited to the specific relationship in which they arise.

109 The scope of an agency relationship, and hence the nature of the consequential legal duties, is determined by the terms of the agency agreement entered into. *Seaboard Life Insurance Co. v. Bank of Montreal* (2002), 23 B.L.R. (3d) 163 (B.C.C.A.); *Tombill Gold Mines Limited v. Hamilton* [1954] O.R. 871 (S.C.), aff'd [1955] O.R. 903 (C.A.), aff'd [1956] S.C.R. 858. An agent is not prohibited from acting for his personal benefit in a transaction, if the transaction does not come into conflict with his engagement as an agent.

110 The central issue in this case is whether Mr. Peebles was acting as an agent for PMCC in respect of purchasing Pachapaqui. Clearly, Messrs. Sugar and Steven Babcock take the position in their affidavit evidence that he was. In my view, the documentary evidence and evidentiary record contradict this assertion by Messrs. Sugar and Steven Babcock. The documentary evidence, together with the evidence as a whole with the exception of the assertions by Messrs. Sugar and Steven Babcock, strongly support Mr. Peebles' position that he was not acting as an agent with respect to the purchase of Pachapaqui.

2. Breach of Confidence

111 PMCC submits that Mr. Peebles committed the tort of breach of confidence by using confidential information disclosed by PMCC for his own personal benefit. Like the agency issue, this again is a question of mixed law and fact: whether Mr. Peebles committed the tort is a question of fact, but the determination of this question turns on whether the facts satisfy the legal

requirements for finding breach of confidence. Once again, I find that this issue can be addressed in the context of a summary judgment motion.

112 PMCC claims that it gave Messrs. Peebles and Smith confidential information concerning Pachapaqui, consisting of the Sears Barry Report, the various versions of the PMCC report, some of which contained a reference to Pachapaqui as being an opportunity for PMCC, and the fact that Pachapaqui was for sale.

113 However, none of this information was confidential and Mr. Peebles received the pertinent information in question from Plata-Peru, the party that had commissioned the Sears Barry Report and the only party entitled to claim ownership of it. Although Mr. Peebles first learned of Pachapaqui being possibly available for sale in early 2005 from meetings with the Babcocks and Mr. Sugar, this was well before Mr. Peebles entered into the agency agreement dated May 20, 2005. Given their equity interest in Plata-Peru, the Babcocks were self-interested in it being sold to anyone.

114 The duty of confidence is an equitable doctrine intended to address circumstances where a recipient has misused confidential information to appropriate for himself a corporate opportunity developed through the effort and ingenuity of another party and not otherwise available from public sources. *ERSS Equity Retirement Savings Systems Corp. v. Canadian Imperial Bank of Commerce* (2002), 8 B.C.L.R. (4th) 340, at para. 13 (S.C.).

115 There are three requisite elements to establishing a claim in tort for breach of confidence. First, the information at issue must have the necessary quality of confidentiality about it; second, the information must have been communicated to the defendant in confidence; and third, that information must have been misused by the defendant to the detriment of the plaintiff. *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574.

116 To be confidential, the relevant information must not be in the public domain. *Edac Inc. v. Tullo* (1999), 107 O.T.C. 81 (S.C.), at para. 47. PMCC cannot copy widely-disseminated information about Pachapaqui contained in the Sears Barry Report and render it confidential simply by placing a "confidential" attribution in PMCC's own report. Plata-Peru intentionally widely disseminated the pertinent information about Pachapaqui in the public sphere because Plata-Peru wanted to attract investors. PMCC cannot unilaterally appropriate to itself this information and then claim that it is "confidential" information and that Mr. Peebles (or anyone) is in breach of a duty to PMCC by using the information to his own advantage.

117 In the instant situation, the evidentiary record establishes that Pachapaqui was well-known in the mining community given the extensive efforts of Plata-Peru to market the property. The Sears Barry Report was done for the express purpose of promoting the property openly to potential investors. PMCC first learned of Pachapaqui because Plata-Peru was openly promoting it for sale. The existence of a business opportunity for PMCC does not, in itself, constitute confidential information. *Rogers & Rogers Inc. v. Pinehurst Woodworking Co.* (2005), 14 B.L.R. (4th) 142 (Ont.

S.C.), at para. 86.

118 Information is considered to be in the public domain if it is known generally to that component of the general mining community interested in properties with the particular minerals potential seen with Pachapaqui.

119 As well, the only party entitled to a claim of confidentiality for information is generally the owner thereof. Plata-Peru, not PMCC, was the owner of the information with respect to Pachapaqui contained in the Sears Barry Report and was quite prepared to give the relevant information to Mr. Peebles or to anyone else (such as CZN) interested in purchasing the mine. PMCC had simply learned of the Sears Barry Report from Plata-Peru as a result of the overlapping relationships between Plata-Peru and PMCC.

120 Finally, a plaintiff cannot succeed in a claim for breach of confidence if the defendant has not misused the information in question to the plaintiff's detriment. *Abode Properties Ltd. v. Shickedanz Bros. Ltd.* (1999), 254 A.R. 91 (Q.B.), at paras. 47-51. In the case at hand, PMCC had no realistic opportunity to buy Pachapaqui, because of its lack of funds. It had failed in its attempts to acquire Pachapaqui over 2003 and 2004. In December 2004, Mr. Titaro explicitly told PMCC that Plata-Peru was not interested in any further discussions because PMCC was simply not able to raise the money and proceed. No evidence is offered that PMCC could raise at any time any of the required money to purchase Pachapaqui. Plata-Peru was never told by PMCC (*i.e.* Steven Babcock and Mr. Sugar) of any purported role of PMCC in Haviland IR's purchase of Pachapaqui.

121 In my view, the evidence establishes that PMCC was not, in fact, an undisclosed principal in the purchase of Pachapaqui by Haviland IR from Plata-Peru. The evidence establishes that Mr. Peebles was not an agent at any time on behalf of PMCC with any duty to seek to acquire Pachapaqui for PMCC.

122 The record suggests that the PMCC intended sale of San Luis and Millotingo to Mr. Smith failed because PMCC did not, in fact, have a valid interest in those properties. In any event, PMCC's breach of contract claim against Mr. Smith for allegedly breaching an obligation to fund PMCC so that it could restore its interest in those properties has no relevance to PMCC's claim against Mr. Peebles for the alleged breach of his fiduciary duties.

123 In my view, PMCC does not have a viable claim against Mr. Peebles in respect of Pachapaqui. There is no documentary evidence suggesting a fiduciary relationship between the defendant Smith and PMCC. The Ancash defendants are successors in title to Mr. Peebles regarding Pachapaqui. PMCC cannot stand in a stronger position against the Ancash defendants than it does against Mr. Peebles.

Disposition

124 For the reasons given, the motion of the Ancash defendants is granted. In my view, and I so

find, there is no genuine issue requiring a trial in respect of these defendants. Summary judgment is granted in favour of the Ancash defendants, dismissing the action as against them.

Costs

125 If the parties cannot agree upon costs, the Ancash defendants may make a written submission as to costs within ten days of the date of the release of these reasons for decision. The plaintiff has ten days after receipt of the Ancash defendants' submission to respond and the Ancash defendants have three days after the receipt of the plaintiff's submission for any reply submission.

P.A. CUMMING J.

cp/e/qlrxg/qlvxw/qlana