JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	AUSTRALIAN COPPER PTY LTD v. MINING RESOURCE DEVELOPMENT CORPORATION PTY LTD [2015] WAMW 5
CORAM	:	ZEMPILAS M
HEARD	:	12 MARCH 2015
DELIVERED	:	5 MAY 2015
FILE NO/S	:	INTERLOCUTORYAPPLICATIONS IN RELATION TO APPLICATION FOR FORFEITURE 440937 AFFECTING EXPLORATION LICENCE 08/2115
TENEMENT NO/S	:	E08/2115
BETWEEN	:	AUSTRALIAN COPPER PTY LTD (Applicant) AND MINING RESOURCE DEVELOPMENT CORPORATION PTY LTD (Respondent)

Catchwords:

INTERLOCUTORY APPLICATION – Confidentiality directions – Implied undertakings – Commercially sensitive documents – Collateral purpose

INTERLOCUTORY APPLICATION – Admissibility of evidence – Evidence filed late

INTERLOCUTORY APPLICATION – Amendment of response – Amendment of particulars of response

Legislation:

s. 133, s. 135, s. 139 *Mining Act* 1978 (WA)
r. 114, r. 137, r. 152, r. 154 *Mining Regulations* 1981 (WA)
s. 50 *Interpretation Act* 1984
s. 16 *Magistrates Court Act* 2004
Part V *Magistrates Court (General) Rules* 2005

Cases referred to:

British American Tobacco Australia Services Ltd v Cowell (no 2) (2003) 8 VR 571

Riddick v Thames Board Mills Ltd [1977] QB 881

Hearne v Street [2008] 235 CLR 125

Hamersley Iron Pty Ltd v Lovell (1998) 19 WAR 316

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10

North East Equity Pty Ltd v Goldenwest Equities Pty Ltd [2008] WASC 190

Harman v Secretary of State for the Home Department [1983] 1 AC 280

Mobil Oil Australia Ltd v Guina Developments Pty Ltd [1996] 2 VR 34

Cazaly Iron Pty Ltd v Minister for Resources and others [2007] WASCA 60

Cadbury Pty Ltd v Amcor Limited (No 2) [2009] FCA 663

Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 2] [2010] WASC 217

Alcoa of Australia Ltd v Apache Energy Ltd and others [2014] WASCA 148

Sino Iron Pty Ltd v Mineralogy Pty Ltd [2014] WASC 406

Result:

First interlocutory application

1. *Application refused;*

2. *Application refused; and*

3. *Costs reserved*

Second interlocutory application

1. *Application granted;*

2. *Application granted; and*

3. *Costs reserved.*

Representation:

Counsel:

Applicant	:	Mr M N Solomon SC and Mr A Jones
Respondent	:	Mr M Hotchkin

Solicitors:

Applicant	:	DLA Piper Australia
Respondent	:	Hotchkin Hanly Lawyers

Interlocutory applications to be determined

1. Mining Resource Development Corporation Pty Ltd ("MRDC") is the applicant for forfeiture of exploration licence E08/2115, held by Australian Copper Pty Ltd ("AC"). MRDC claims AC did not comply with expenditure conditions in respect to E08/2115 for the expenditure year

ending 3 November 2013. AC has made two interlocutory applications in relation to the application for forfeiture and MRDC opposes those applications.

2. The interlocutory application dated 21 November 2014 ("first interlocutory application") seeks the following orders:

> 1. The proceedings be stayed on the grounds that:
>
> a. the commencement and maintenance of the proceedings constitutes an abuse of process; and/or
>
> b. the commencement and maintenance of the proceedings involves the misuse of information in respect of which Mr Hawker and Mr Green owe duties of confidentiality to the Respondent and the proceedings are being used as a vehicle by which the Application seeks to procure a benefit from that breach of confidence.
>
> 2. Alternatively, confidentiality directions be made in terms of Attachment "A" on the grounds that:
>
> a. in order to avoid the risk of an abuse of process, evidence tendered by the Respondent in the proceeding should not be permitted to be used for a collateral purpose; and/or
>
> b. the evidence tendered by the Respondent in the proceeding is confidential and commercially sensitive.
>
> 3. The Applicant pay the Respondent's costs of this application and of the proceedings.

3. Attachment "A" proposes directions as to the use of the evidence in the "Proceedings" generally, and specifically in relation to attachments AK33, AK34, AK35 and AK41 of the Affidavit of Andrej Kazimierz Karpinski dated 10 October 2014 ("AKK Documents"). "Proceedings" is defined as proceedings before the warden in respect of the application for forfeiture, including any interlocutory applications, and any proceedings for judicial review of the decision of the warden or the Minister. As to *any* evidence filed in the Proceedings, AC proposes both parties must keep it confidential and that it only be used for the purposes of the Proceedings. As to the AKK Documents, AC proposes that they only be disclosed to a list of people,

including only three representatives of each party to the Proceedings who have signed a Confidentiality Undertaking (set out as a schedule to Attachment "A").

4. The interlocutory application 11 March 2015 ("second interlocutory application") seeks orders to amend AC's Response and Particulars of Response to the application for forfeiture. In particular, within the Minute of Proposed Amended Particulars of Response AC seeks to delete a reference that the application be stayed, summarily dismissed or enjoined and instead seeks it be refused on the basis of an additional ground, namely:

> 10.2 the Applicant's dominant purpose in issuing and/or prosecuting the forfeiture application is to procure the resignation or removal of Mr Karpinski as director of Korab Resources Ltd including by obtaining and/or causing the publication of evidence of the alleged non-compliance with the ASX Listing Rules in order to undermine shareholder support and/or expose Mr Karpinski to an investigation for non-compliance with the ASX Listing Rules.

5. On the basis of the second interlocutory application, at the commencement of the hearing, counsel for AC indicated that order 1a and 1b in the first interlocutory application were no longer pressed because AC preferred to argue the issue outlined at 10.2 in the Minute of Proposed Amended Particulars of Response at the substantive hearing of the application for forfeiture. Accordingly, I will only consider the orders sought at 2a and 2b in the first interlocutory application, as well as those sought in the second interlocutory application. The parties agreed at the conclusion of the interlocutory hearing that;

   (i) the form of any orders, if made pursuant to the first interlocutory application, would be the subject of further submission and/or negotiation; and

(ii) the issue of costs be reserved.

Background

6. Bradley Green is the sole director and company secretary of MRDC and Mr Green and his wife are the sole shareholders in MRDC.

7. Mr Karpinski is the sole director and company secretary of AC and also the Executive Chairman of Korab Resources Ltd ("Korab") which is the parent company of AC.

8. Mr Andrew Hawker is a geologist who previously performed work for Korab and is also known to Mr Green.

9. MRDC lodged the application for forfeiture on 24 February 2014 and AC lodged its response on 26 March 2014, stating:

> 1. The expenditure commitment in respect of E08/2115 for the year ending 3 November 2013 is $121,000.00.
>
> 2. The Respondent has expended or caused to be expended in mining or in connection with mining on E08/2115 in excess of $121,000.00 during the reporting year ending 3 November 2013.
>
> 3. The Respondent has complied with the expenditure requirements of the Exploration Licence.
>
> 4. Further or alternatively, any non-compliance with the expenditure conditions on E08/2115 is not of sufficient gravity to justify forfeiture.
>
> 5. Furthermore, the application should be stayed or summarily dismissed as the Applicant previously provided consultancy services to the Respondent and the lodgement of this application constitutes a breach of fiduciary duty and/or is an abuse of process.(underlining added)

10. AC lodged an amended response on 27 June 2014 which, amongst other more minor changes, deleted the above underlined passage and replaced it with the following:

> on the grounds that E08/2115 was selected as a prospective exploration target using information (including exploration data), and the prosecution of the forfeiture application will involve the use of information (including exploration data), which is in the possession of the Applicant by reason of the previous dealings of Mr Green and Mr Hawker with the Respondent and in respect of which they owe a duty of confidentiality to the Respondent.

11. The amended response was supported by particulars filed on 3 July 2014, and evidence filed by both parties related to the response and particulars as filed. In particular, there was no reference by AC in its evidence to an abuse of process or collateral purpose. On 3 October 2014, the application for forfeiture was listed for hearing on 3 February 2015 but this date was vacated after AC filed the first interlocutory application on 21 November 2014. Instead the first interlocutory application was listed for hearing on 4 February 2015 and programming orders, prepared by AC's solicitors, were made on 21 November 2014 as follows:

> 1. [AC] file and serve any supplementary evidence in support of the interlocutory application…by 5 December 2014
>
> 2. [MRDC] file and serve any evidence in opposition to the interlocutory application…by 19 December 2014.
>
> 3. [AC] file and serve submissions in support of the interlocutory application…by 19 January 2015.
>
> 4. [MRDC] file and serve submissions in opposition to the interlocutory application…by 26 December 2015.

12. The affidavit of Mr Karpinski dated 21 November 2014 filed in support of the first interlocutory application asserted for the first time the application had been commenced by MRDC for a collateral purpose. Mr Karpinski stated [26]:

> "I believe that the Applicant's dominant purpose in pursuing these proceedings is to:
>
> 26.1 try and obtain evidence of the exploration activities which were undertaken or exploration results which were generated with a view to establishing that the activities or results should have been disclosed under the ASX Listing Rules; and

26.2 thereby:

26.2.1 establish that I am responsible for a breach of the ASX Listing Rules with a view to procuring a complaint or prosecution which results in me being disqualified as a director or losing the support of shareholders and removed as a director; and

26.2.2 facilitate a change of control of Korab Resources Limited."

13. In support of that assertion, Mr Karpinski referred generally to conversations he had with various people, including Michael O'Donnell about which he said [29]:

> "In or around January and February 2014, I met with Mr O'Donnell on 2 or 3 occasions…"

14. In a further affidavit filed on 5 December 2014, Mr Karpinski gave more detail about one conversation with Mr O'Donnell "*on or about 24 January 2014*" asserting that [11]:

> "During this meeting, Mr O'Donnell advised me that:
>
> 11.1 they want to call an EGM to have me removed;
>
> 11.2 they have a lot of stuff on me that would not be good if made public; and
>
> 11.3 a deal could be made, but that if I did not want to make a deal then things "could get nasty"."

15. Mr O'Donnell filed an affidavit on 19 December 2014 in which he agreed he had a meeting with Mr Karpinski in about January or February 2014 and questioned him about expenditure on E08/2115. He said [13]:

> "I did not say to Andrej Karpinski that Brad Green or his associates wished to remove him from the Board of Korab or that I had any information that could be used against him."

16. On 3 February 2015 AC sought to lodge a further affidavit of Mr Karpinski in respect of the first interlocutory application, which was opposed by MRDC. The hearing of the first interlocutory application was adjourned on 4 February 2015, along with that issue, until 12 March 2015. During that

period the second interlocutory application was lodged and on 10 March 2015 AC sought to file two further affidavits of Mr Karpinski; one "supplementary" affidavit in support of the first interlocutory application and another in support of the second. MRDC again opposed any further affidavit material being filed in support of the first interlocutory application and agreed that the issue of whether either affidavit of Mr Karpinski dated 3 February 2015 or 10 March 2015 could be filed be determined in the course of the hearing of the interlocutory applications.

Should the affidavits of Mr Karpinski filed after 5 December 2014 be taken into account?

17. Amongst other matters, Mr Karpinski's affidavit of 3 February 2015 seeks to introduce further evidence of two conversations between Mr Karpinski and Mr O'Donnell which Mr Karpinski now states he recorded on his iPhone on 24 and 28 January 2014. Mr Karpinski purports to provide some excerpts from those conversations in support of his assertion that MRDC, in particular Mr Green, is motivated to remove him from the board of Korab.

18. The affidavit of 10 March 2015 purports to;

    - Explain why he did not refer to the recordings of the conversations in earlier affidavits, and

    - Introduce into evidence the transcript of the conversations.

19. Orders were made on 21 November 2014 programming the hearing of the first interlocutory application. These orders required AC to file and serve any further evidence in support by 5 December 2014. Mr Karpinski did file a further affidavit on 5 December 2014 but this did not refer to the existence or detail of the recorded conversations.

20. I accept I have a discretion to allow further evidence to be filed beyond the date allowed by the programming orders. In deciding whether to exercise that discretion I must have regard to the following factors;

    - Prejudice to either party in allowing or not allowing the evidence to be filed,
    - The probative value of the evidence sought to be adduced, and
    - The explanation for the delay in filing the evidence at an earlier time and for not complying with the orders of the court.

    In assessing these factors I must necessarily have some regard to the content of the affidavits AC is seeking be introduced into evidence.

21. As to the delay, Mr Karpinski says the following:

    - He did not listen to the recordings when swearing his affidavits of 21 November 2014 and 5 December 2014 because he thought his recollections were "*an accurate and adequate summary of the meetings*" (Affidavit dated 10 March 2015 [5.1]).
    - He wanted to keep the existence of the recordings confidential because he believed it might damage his reputation if revealed he made the recordings "*without consent*" (Affidavit dated 10 March 2015 [5.3]).
    - It was only after reading the affidavits of Mr O'Donnell and Mr Green that he realised they would deny his assertions.
    - He told his solicitors on 8 January 2015 about the existence of the recordings, after which an opinion was sought about their admissibility.

- He did not listen to the recordings in their entirety until 22 January 2015. He decided to prepare a supplementary affidavit on or about 28 January 2015 and then provided his solicitors written extracts from the transcripts on 2 February 2015.

- By the time he affirmed the affidavit on 3 February 2015, he had arranged for the recordings to be transcribed but had only "*reviewed edited and verified*" the passages he considered relevant (Affidavit dated 10 March 2015 [13]).

- He only managed to verify the transcripts of the meetings on 26 February 2015 and, due to the need to find alternate counsel, could only swear the affidavit annexing the transcript on 10 March 2015.

22. AC says there can be no prejudice to MRDC because the hearing on 4 February 2015 was adjourned which has given them ample time to obtain instructions on the contents of the affidavit sworn 3 February 2015. AC says they now only seek to adduce the "best evidence", the transcripts of the recorded conversations, into evidence. It says this is probative of Mr Green's collateral purpose to remove Mr Karpinski from the board of Korab.

23. MRDC says the recordings were deliberately withheld by Mr Karpinski and he should not now be allowed to rely on them. In any event, MRDC says the recordings have no probative value and do not contradict the content of Mr O'Donnell's affidavit. It says Mr Karpinski's interpretation of what Mr O'Donnell said has no probative weight and, because it was not included in affidavits filed pursuant to court orders, it should not now be allowed to form part of the evidence in support of the first interlocutory application.

24. Mr Karpinski relies on statements made by Mr O'Donnell in the conversations of 24 and 28 January 2014 in support of his assertion that Mr Green's dominant purpose is to have him removed from the board of Korab. In light of the suggested importance of the evidence, is difficult to accept that Mr Karpinski believed his recollections alone were "*an accurate and adequate summary of the meetings*", especially where he could not provide a conclusive date or time for either conversation and there is scant detail given of the words said by Mr O'Donnell in the affidavits filed on 21 November and 5 December 2014. It is difficult to accept he did not then seek to refresh his memory of conversations which occurred 10 months earlier, instead waiting until 22 January 2015 to listen to the recordings in their entirety, over a month after Mr O'Donnell's affidavit was filed. A truncated version of the evidence, in the form of Mr Karpinski's interpretation of the conversations and some selected excerpts, only came to light the day before the hearing of the first interlocutory application on 4 February 2015. Mr Karpinski's interpretation of the words used by Mr O'Donnell is not probative of Mr Green's purported dominant purpose.

25. The "best evidence" in the form of the transcripts only came to light two days prior to the adjourned hearing date of 12 March 2015. The transcripts of the recorded conversations do not directly contradict the evidence of Mr O'Donnell contained in his affidavit of 19 December 2014 or the evidence of any other witness.

26. According to the transcripts, Mr O'Donnell clearly raises concerns held by others, referred to as "shareholders" about Mr Karpinski's conduct, but at no time is Mr O'Donnell recorded as referring to Mr Green or anyone by name in that context. There is no evidence Mr Green is a shareholder in Korab. In fact, Mr Karpinski is recorded as saying, during the conversation

with Mr O'Donnell on 24 January 2015, "*Just don't tell them I said they're wankers because I don't know who they are*" (Affidavit of Andrej Karpinski dated 10 March 2015, AK1 page 15). While Mr O'Donnell is recorded handing Mr Karpinski a document on 28 January 2014, and the conversation thereafter confirms it is likely the same document attached to Mr Karpinski's affidavit of 21 November 2014 at AK09, Mr O'Donnell did not deny giving that document to Mr Karpinski; he said he could not recall giving it to him (Affidavit of Michael O'Donnell dated 19 December 2014 [15]).

27. In any event, Mr Green does not take issue that in the latter part of 2013, he did explore the possibility of having Mr Karpinski removed from the board of Korab on behalf of "disgruntled shareholders" (Affidavit of Bradley Green dated 19 December 2014, [5-13]), consistent with the recorded conversations between Mr Karpinski and Mr O'Donnell.

28. While at the time of the hearing on 12 March 2015, MRDC had had an opportunity to obtain instructions on the contents of Mr Karpinski's affidavit of 3 February 2015 (although less of an opportunity in respect of the affidavit dated 10 March 2015), Mr Karpinski clearly made a deliberate choice not to initially disclose the existence of the recorded conversations and partial disclosure did not occur until 3 February 2015, almost two months after AC was required to file all its evidence in relation to the first interlocutory hearing. AC did not seek leave to file evidence in reply prior to that date and had not sought orders to file evidence in reply within its programming orders, granted on 21 November 2014.

29. Taking all these factors into account, in particular the failure to comply with programming orders, the manner in which that failure occurred and the lack of probative value of the evidence, it would not be appropriate to exercise my discretion to allow the affidavits of Mr Karpinski dated 3

February 2015 or 10 March 2015 to be adduced as evidence in the hearing of the first interlocutory application. Accordingly, I have no regard to the evidence contained therein.

The first interlocutory application – Orders as to Confidentiality

30. AC relies on the following to give the warden power to grant the orders sought in the first interlocutory application:

    (i) statutory provisions within the *Mining Regulations* 1981 ("Regulations") and implied authority flowing from those provisions; and

    (ii) an extension of the implied undertaking not to use evidence disclosed in the course of proceedings for any other purpose.

Statutory provisions

31. In respect of statutory authority, AC points to r. 154. Initially, AC also sought to rely on r. 152 however, correctly in my view, AC accepted that regulation had more limited application to the resources of the court, and to the parties insofar as their resources related to the proceedings, rather than to the commercial interests of the parties generally.

32. Regulation 154 provides:

> ***154. Conduct of hearings generally***
>
> (1) In conducting any hearing the warden —
>
> (a) is to act with as little formality as possible; and
>
> (b) is bound by the rules of natural justice; and
>
> (c) is not bound by the rules of evidence; and
>
> (d) may inform himself or herself of any matter in any manner he or she considers appropriate.
>
> (2) Subject to subregulation (3), a hearing is to be conducted in public.

(3) If the warden is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the warden may direct that the hearing be conducted wholly or partly in private.

(4) If the warden gives a direction under subregulation (3) the warden may give directions as to the persons who may be present at the hearing.

(5) Irrespective of whether the warden gives a direction under subregulation (3), the warden may order that —

(a) any evidence given before the warden; or

(b) the content of any documents produced to the warden, during any part of the hearing is not to be published except in the manner and to the persons specified by the warden.

33. Hearing is defined in r. 137:

hearing means —

(a) a mention hearing; or

(b) the hearing of an interlocutory application; or

(c) the substantive hearing of proceedings

34. AC also points to s. 50 *Interpretation Act* 1984 which provides:

50. Statutory powers, construction of

(1) Where a written law confers upon a person power to do or enforce the doing of any act or thing, all such powers shall also be deemed to be conferred on the person as are reasonably necessary to enable him to do or to enforce the doing of the act or thing.

(2) Without prejudice to the generality of subsection (1), where a written law confers power —

(d) to give directions, such power includes power to express the same in the form of prohibitions.

35. AC submits r. 154(5) and s. 50 *Interpretation Act* read together empower a warden to make all such orders, at any stage of the proceedings, to protect the confidentiality of any evidence filed at any stage of the proceedings. It says that to restrict a reading of r. 154 to only apply to evidence at the time it is heard or tendered in court would be to ignore the intent and purpose of the regulation and the application of s. 50 *Interpretation Act*. I accept that proposition.

36. However, AC also submits the warden is not bound by the language of r. 154, which contemplates directions (or prohibitions) as to the *publication* of evidence or the content of any document produced as evidence during the *hearing*. Attachment "A" to the first interlocutory application suggests evidence filed in the Proceedings (including subsequent judicial review) (a) be kept confidential by the parties and (b) only be used by the parties for the purposes of the Proceedings. These proposed orders go beyond the scope of the language used in r. 154 in respect of the definition of hearing and the act directed or prohibited i.e. publication.

37. While s. 50 *Interpretation Act* assists in clarifying the power of a warden to achieve what is intended by r. 154, controlling the publication of evidence tendered preparatory to and in the course of a warden's court hearing as defined in r. 137, it does not broaden the scope of r. 154 in the manner suggested by AC in its proposed orders in Attachment "A". Regulation 154 only permits orders to be made in respect of the publication of evidence by the parties prior to or during hearings as defined in r. 137, which does not include subsequent judicial review.

38. A breach of an order made pursuant to r. 154 would constitute an offence pursuant to r. 114 of the *Mining Act* 1978 ("Act"). Such an offence would be prosecuted by police (s. 133) and would be punishable by a fine of up to $10,000.

Implied undertaking

39. It is a well-recognised principle that a party to proceedings is under an implied undertaking not to use information disclosed "as a result of the coercive processes of the court…otherwise than for the legitimate purposes of the litigation": *British American Tobacco Australia Services Ltd v Cowell (no 2)* (2003) 8 VR 571 [19].

40. The justification for such an undertaking was expressed by Lord Denning MR in *Riddick v Thames Board Mills Ltd* [1977] QB 881 [896]:

> "Compulsion [to disclose on discovery] is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party – or anyone else – to use the documents for any other ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."

41. The use of the word "undertaking" "is merely to indicate the way in which an 'obligation' which is 'imposed by law' as a 'condition' of discovery binds the disclosee highlights the substantive nature of the obligation. There is nothing voluntary about the 'undertaking'": *Hearne v Street* (2008) 235 CLR 125 [106].

42. As to the nature of the undertaking, it is:

> " that the party will not (i) make the contents of discovered documents public, (ii) communicate the contents of such documents to any stranger to the suit or (iii) use the documents or copies of them for any collateral purpose; that is, a purpose collateral to the purpose which production of the documents is intended to serve":

Hamersley Iron Pty Ltd v Lovell (1998) 19 WAR 316 [334].

43. The undertaking extends beyond discovery to all circumstances "where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court…to disclose documents or information": *Hearne v Street* [96]. It binds the litigant who receives the documents or information, but also others to whom they are given if it is known they were obtained in that manner: *Hearne v Street* [109], *Hamersley Iron Pty Ltd v Lovell* [334-335].

44. A party bound by the undertaking must apply to the relevant court for release from the obligation in order to use the documents or information for another purpose: *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR

10. This includes to report an alleged offence: *North East Equity Pty Ltd v Goldenwest Equities Pty Ltd* [2008] WASC 190.

45. A breach of the implied undertaking constitutes a contempt of court: *Hearne v Street*, *Hamersley Iron Pty Ltd v Lovell*. In the context of warden's court proceedings, contempt proceedings would not fall within the provision of s. 139 of the Act; instead they would be instituted by the aggrieved party pursuant to Part V *Magistrates Court (General) Rules* 2005 and could result in a penalty of a fine of up to $12,000 or imprisonment for 12 months or both (s. 16 *Magistrates Court Act* 2004).

46. When the undertaking ends, by reference to when the evidence is tendered at a hearing and its contents made public, is an issue that has been considered on many occasions. In *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 the undertaking was held to extend beyond the point at which evidence was read to the court in the course of the hearing. This view was approved in *British American Tobacco Australia Services Ltd v Cowell (no 2)* and *Hamersley Iron Pty Ltd v Lovell* [338-339]. Both cases sought to clarify and limit the obiter of Mason CJ in *Esso Australia Resources Ltd v Plowman* at 32-33.

47. The Victorian Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell (no 2)* made the observation that documents attached to affidavits are often passed into evidence but rarely are the contents of those documents made public [36]. This case discussed the merits of the practical options at the point evidence becomes part of the public record; either the party seeking continuation of protection could apply to the court for such an order, or once the document or information had gone into evidence during the hearing of the matter, the party seeking leave to use the document other than for the purposes of litigation could make application to the court.

> "The fact that, by reason of its tender, it has passed into "the public domain" may be a consideration when leave is sought to use the document otherwise than for the purposes of the litigation in which it was produced, but it does not per se gainsay the continuance of the undertaking." [37]

48. This approach would have "the added merit of avoiding debate about precisely when the document in question has entered "the public domain"" [37], a concept "of doubtful precision" according to Lord Roskill in *Harman's* case.

49. The use of express undertakings in place of the implied undertaking has also been considered in a number of cases.

50. In *Hearne v Street* Hayne, Heydon and Crennan JJ observed at [116]:

> "The point of insisting on an express undertaking, commonly employed in relation to documents which it is particularly desired to keep secret, is to bring explicitly home to the minds of those giving it how important it is that the documents only be used for the purpose of proceedings…At present this happens in exceptional circumstances for particular reasons. If it were necessary for that general practice to develop, it would be extremely cumbersome, and extremely wasteful of time, energy and money."

51. In the case of "trade rivals" it has been acknowledged that the implied undertaking may not be sufficient where, "once the documents are inspected by the principals of the trade rival the information which is revealed is known to the trade rival and cannot be forgotten": *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 [38]. That case involved access to the documents of the successful tenderer for a construction project by the unsuccessful tenderer and the court observed:

> "It is now commonplace in the courts for material to be made available only to the legal advisors of the parties and nominated experts. Of course such arrangements bring with them their own difficulties and are arrangements that should be adopted only when there is a need to do so…- each case will fall for determination according to its own facts. In particular the nature and the content of the disputed documents is a matter that will usually, if not invariably, be of great importance in forming a conclusion…Without knowing

> exactly what is in the disputed documents and without knowing how the information which is claimed to be confidential is presented in them, it is not possible to say why it is that the plaintiff's principals must have access to the documents." [40-41]

52. In assessing whether a document should attract additional protection beyond the implied undertaking, relevant factors would be the age of the information, the identity of the persons who will inspect the documents, the reason or reasons why the inspection of particular documents is necessary and the degree of commercial sensitivity involved: *Cadbury Pty Ltd v Amcor Limited* (No 2) [2009] FCA 663 [7], *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 2] [2010] WASC 217[58].

53. In *Cazaly Iron Pty Ltd v Minister for Resources and others* [2007] WASCA 60 the documents the subject of discovery related to on-going commercial negotiations for a State Agreement in respect to iron ore interests by a number of parties. The Court of Appeal observed that both the applicant and one of the respondents had competing applications for mining tenements and, as a result, could likely be in direct competition in relation to the supply of iron ore or in negotiations for a future State Agreement. As such the content of the disputed documents:

> "is likely to be of commercial advantage to the Applicant…If [the joint managing directors of the Applicant] were to be permitted to inspect the documents in question, the information which they would derive from them would not be forgotten and, as a result, the confidentiality of that information is unlikely to be preserved adequately by the implied undertaking…" [15, 20]

54. In *Buswell v Carles* [2013] WASC 54 Le Miere J declined to make an injunction preventing the defendant from disclosing the contents of the statement of claim on the basis:

> "it is unnecessary because the defendant is under a substantive obligation not to use the information in the statement of claim for a purpose unrelated to the conduct of the proceedings. A breach of the obligation may be enforced by proceedings for contempt. It is

> generally undesirable to make an injunction in terms which merely reflect an existing duty or obligation."

55. In *Alcoa of Australia Ltd v Apache Energy Ltd and others* [2014] WASCA 148 McLure P observed:

> "4. Ordinarily, the implied undertaking sufficiently protects the party giving discovery;…
>
> 6. the court may exercise its power to impose limitations, restrictions or conditions for the purpose of protecting the efficacy of the implied undertaking;
>
> 7. the implied undertaking may be insufficient protection in a variety of circumstances, including but not limited to, cases where discovered documents are relevant to a trade rivalry between the parties to the action." [57]

56. Therefore, AC says the orders sought in the first interlocutory application ought to be made by way of an express undertaking, in addition to the implied undertaking. AC did not specify whether orders constituting an express undertaking would be made pursuant to r. 154 or, as was the case in the WA authorities referred to above, pursuant to Rules of the Supreme Court, instead relying on an "implied" power.

57. Whether a warden could make orders pursuant to the Rules of the Supreme Court, either impliedly or explicitly, was not the subject of argument in the hearing of the first interlocutory application. Section 134(5) of the Act states a warden has "the like powers and authorities as are conferred upon the Supreme Court" in relation to "civil proceedings". This term is not defined but appears in the general context of s. 134 and arguably may not extend to applications for forfeiture of an exploration licence, which are regarded as performance by the warden of an administrative, rather than a judicial, function. The origin of an "implied" power to make such orders was not identified.

58. Breach of an express undertaking, expressed as an order of a warden pursuant to the Regulations, would constitute an offence pursuant to r. 114 punishable by a fine of up to $10,000.

Should the orders sought in the first interlocutory application be made?

a. in order to avoid the risk of an abuse of process, evidence tendered by the Respondent in the proceeding should not be permitted to be used for a collateral purpose

59. AC says the evidence establishes there is a possibility MRDC's dominant purpose in issuing and/or prosecuting the forfeiture application is to procure the resignation or removal of Mr Karpinski as director of Korab, therefore *any* evidence tendered during the proceedings should be protected by an express undertaking.

60. First, it says there is evidence of a connection between Mr Green, Mr Hawker, Mr O'Donnell and others, including unidentified shareholders, which has not been explained by MRDC. There is also evidence Mr Green, Mr O'Donnell and others were concerned about Mr Karpinski's prior dealings in respect of another company, his management of Korab and compliance with ASX and ASIC requirements and that Mr Green had previously considered how to remove Mr Karpinski from the board of Korab.

61. Second, it says the reluctance of MRDC to sign confidentiality orders and the conduct and evidence generally of Mr Green and Mr Hawker, raises further suspicion about their intentions and regard generally for confidential information, which gives rise to a need to reinforce their obligations.

62. Third, it says the forfeiture application has no real prospect of success.

63. Fourth, it says the documents and information obtained during the proceedings may be useful to MRDC in facilitating a complaint to the ASX or ASIC.

64. Fifth it says there is uncertainty about the extent and duration of the implied undertaking such that an express undertaking is required.

65. MRDC says there is no evidence of a collateral purpose, only Mr Karpinski's opinion or speculation about such a purpose. It also says AC has not specified which evidence it claims MRDC may obtain during the proceedings which may be useful in facilitating a complaint to ASX or ASIC. It points out that no such complaint has been made by MRDC and that either body would have the ability to investigate a complaint without the need for MRDC to provide an evidentiary basis for it. MRDC does not take issue that the implied undertaking applies in any event.

66. The starting position is the implied undertaking applies to all evidence filed pursuant to court orders by both parties in the course of proceedings. It is only in exceptional or unusual cases that an express undertaking would be required in addition to the substantive obligation imposed by law. Any breach of the implied undertaking would be dealt with by proceedings for contempt, which carries a higher penalty than breaching a warden's order would attract.

67. The evidence before me on behalf of AC in support of this aspect of the first interlocutory application is vague, speculative and lacking in detail. It is insufficient to establish that anything more than the implied undertaking is required. In particular there is no cogent evidence of:

    (i) the existence of a collateral purpose on the part of MRDC,

(ii) the nature or identity of particular documents or information which MRDC might use to further a collateral purpose, or

(iii) a relationship of commercial competition between the parties which would require an express undertaking of a general nature.

68. In fact, in order to establish that a relationship of commercial competition exists between the parties, AC submits that MRDC desires the land the subject of E08/2115 in order to develop the resources of the tenement in direct competition with AC. This submission depends on MRDC being motivated by the outcome of the application for forfeiture i.e. obtaining priority to apply for the tenement. However, this is clearly at odds with AC's submission that MRDC's dominant (and collateral) purpose in issuing and/or prosecuting the forfeiture application is to procure the resignation or removal of Mr Karpinski as director of Korab. It is difficult to reconcile the two submissions. As a consequence, if weight is given to one, it detracts significantly from the other.

69. As to when the implied undertaking ends, the authorities make clear it continues until, and in some circumstances after, the evidence enters the "public domain" (if it even becomes part of the public record at all), at which time, if there is any uncertainty, the party seeking to use the information or evidence for another purpose would need to persuade the warden to release them from the undertaking or the other party could seek continuation of the protection. It is premature, and unnecessary, to make such orders now.

70. As to the form such orders would take, I do not need to resolve that issue.

b. the evidence tendered by the Respondent in the proceeding is confidential and commercially sensitive

71. In the alternative, or in addition, AC says four particular documents, the AKK Documents, should be the subject of orders made pursuant to r. 154 because they are confidential and commercially sensitive.

72. AK33 is a contract called the Ashburton Agreement, executed 23 November 2012 between AC, Korab and Sergyi Antonenko which expired on 23 November 2013. It permitted Mr Antonenko to carry out activities connected with mining on E08/2115 during the reporting year ending 3 November 2013 pursuant to s. 118A of the Act, and these activities form the basis of some expenditure AC claims to have expended on the tenement (AKK Affidavit dated 10 October 2014 [46-64]).

73. AK34 is entitled Ashburton Downs Project Annual report E08/2115 Year ended 3 November 2012 and includes headings such as Geological Background, Previous Work, Work Completed, Expenditure and Proposed Programme for Ensuing Year.

74. AK35 is entitled Ashburton Downs Project Combined Annual Report Year ended 31 December 2013 and includes E08/2115 amongst other tenements. The headings are similar to AK34.

75. AK41 is a document entitled Overhead Expenditure in respect of Korab relating to the period 4 November 2012 to 3 November 2013. It lists income and outgoings and allocates a proportion of a total sum to expenditure on E08/2115. It was generated by Mr Karpinski using "Quickbooks" accounting software (AKK Affidavit dated 10 October 2014 [71]).

76. As to why AC says the AKK Documents are confidential and commercially sensitive, it relies on the subsequent affidavits of Mr Karpinski.

77. In the affidavit dated 21 November 2014, Mr Karpinski affirmed that the AKK Documents are "particularly confidential and commercially sensitive" [8], in particular the "Mineral Exploration Reports" contained within AK34 and AK35, which have been lodged with DMP but which are not publicly available, and which [9];

    - Have "taken substantial time and cost to compile", and
    - Are "valuable in assessing the prospectivity of, and planning an exploration program in respect of, E08/2115".

    No further detail is provided in this regard.

78. In the affidavit dated 5 December 2014, Mr Karpinski affirmed he is concerned that "the information in relation to the prospectivity of the land the subject of E08/2115 and the business affairs of Korab Resources Limited and its subsidiaries will be used by [MRDC] in the conduct of these proceedings" [32.3]. However, it is difficult to see how Mr Karpinski can complain about documents disclosed in the course of this application being used in the course of the application.

79. AC points out the application by MRDC for forfeiture of E08/2115 includes a remedy to procure from AC a valuable mining asset, therefore the very nature of the application suggests a rivalry for the tenement. AC says it is a matter of common sense that MRDC and AC operate in the same industry, are competing for the same tenement therefore must be competitors or trade rivals. If MRDC are successful in their application and acquire the tenement, the information collectively contained in the AKK

Documents will assist them to exploit the tenement and give them a commercial advantage.

80. MRDC submits the affidavits of Mr Karpinski do not identify which parts of the AKK Documents are commercially sensitive and why, but instead simply make bald assertions and general statements about their status. In relation to AK33 and AK41, it points out such documents are not normally considered confidential, particularly where it is old accounting information and an expired commercial agreement. It also submits there is no evidence as to what the business activities of either AC or MRDC are such that I can determine whether they are trade rivals.

81. Based on the authorities referred to above, I must determine whether something more than the implied undertaking is required by reference to:

- The nature of the relationship between AC and MRDC, and
- The nature of the AKK Documents.

82. AC is involved in exploration for minerals in WA and the content of AK34 and AK35 makes clear it is not simply concerned with copper. While there is no evidence of the nature of the business of MRDC, its name and the fact it brought the application for forfeiture of E08/2115, gives rise to an irresistible inference it is also concerned with the development of mineral resources in WA and specifically on E08/2115. On that basis I am satisfied AC and MRDC could be in commercial competition in the future for the development of mineral resources on E08/2115.

83. Is the nature of the AKK Documents, either collectively or separately, such that, given this potentially commercially competitive relationship, something more than the implied undertaking is required to protect the

information contained in them being used in a way which may give MRDC a commercial advantage in respect of E08/2115?

84. AK33 is a commercial agreement which has now expired. There is no evidence this document or anything contained within it might give MRDC a commercial advantage in future exploitation of E08/2115, either on its own or in combination with the other AKK Documents.

85. AK34 and AK35 contain some details of the results of exploration activities on E08/2115; in particular, results of historic mineralisation reports conducted by previous tenement holders, some general observations by AC as a result of reinterpretation of those historic results and site visits, results of assay by AC (results either negative or still pending) and general future planned exploration activities on the part of AC. Mineralisation would remain relatively unchanged from 2012 to present time so neither document could be described as outdated information. However, the information about mineralisation is general in nature and much of it obtained by previous tenement holders. There is no evidence what specific information could be used by MRDC, if successful in acquiring the tenement in the future which, once revealed, could not be forgotten. There is no evidence how persons who could access this information, including Mr Hawker (a geologist), could potentially use it to develop a plan for exploration, thus giving some commercial advantage over other exploration companies, such as AC.

86. AK41 is a non-specific list of income and outgoings generated by a computer software package. It is old information and again there is no evidence this document or anything contained within it might give MRDC a commercial advantage in future exploitation of E08/2115, either on its own or in combination with the other AKK Documents.

87. Having regard to the nature of the commercial competition between the parties and the nature of the AKK Documents, I am not satisfied it is "appropriate for the purpose of protecting the efficacy of the implied undertaking" to make any further orders pursuant to r. 154.

The second interlocutory application – Amendment of Response and Particulars of Response

88. Regulation 152(1)(h) provides a warden may "allow a party to amend its application, objection, response or particulars under regulation 144." It is not in dispute it is an exercise of a warden's discretion to allow such an amendment.

89. MRDC submits the proposed amendments do not give rise to an arguable issue because they are badly framed, incompetently particularised and lacking an evidentiary basis. Even if the amendments did give rise to an arguable case it says I must also have regard to other factors such as delay, cost and waste of the court's and parties' resources: *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2014] WASC 406.

90. AC says the amendments make clear allegations in regard to collateral purpose and that it is not a new issue, as it was raised in the context of the first interlocutory application on 21 November 2014 and the proposed amendments merely seek to include it as one of the issues to be considered during the substantive hearing of the application for forfeiture. AC says the amendments will cause no delay as the matter is not yet set for hearing and would be a matter they would seek to raise with the Minister after the hearing in any event.

91. As stated above, at this stage in the proceedings there is no cogent evidence of the existence of a collateral purpose on the part of MRDC. However, some evidence may give rise to an inference of such a purpose and further

evidence can be filed prior to the matter being listed for a substantive hearing. The issue is not new and the allegations have been ventilated in another form since November 2014. Allowing the proposed amendments will not cause any further delay of the substantive hearing but will define, once and for all, the issues to be determined.

92. Accordingly, I exercise discretion to allow the proposed amendments pursuant to r. 152(1)(h).

Orders

First Interlocutory Application

I make the following orders:

1. Application refused;
2. Application refused; and
3. Costs reserved

Second Interlocutory Application

I make the following orders:

1. Application granted;
2. Application granted; and
3. Costs reserved.

Warden