Discussion on Confidentiality and Rights to Intellectual Property in Exploration and Mining Ventures and Processing Industries.

1. It was suggested that the language used in *Seager* v. *Copydex Ltd* (1967) 2 All E.R. 415 was consistent with the approach of reliance by the courts on implied contractual terms. The question was whether the modern action for breach of confidence is an independent action or does it rely on implied contractual terms? If the latter, how would the action apply in context of stolen information?

Mr. Handley pointed out that the uncertainty as to whether confidential information is property and what is its precise juristic basis in areas outside trust and contract had not stopped courts acting pragmatically and giving proper relief in appropriate cases. He had no doubt that the courts would restrain the use of confidential information which had been stolen.

Mr. Snewin referred to the passage in *Seager's* Case (1967) 2 All E.R. 415 at p. 417 per Denning M.R.

2. In response to a question as to whether, in the context of confidential information, he saw any use by the English and Australian Courts of the general principle of unjust enrichment developed by the U.S. courts, Mr. Handley pointed out that thus far, the English and Australian Courts had been mainly concerned to work to solutions of cases in hand. They had left the formulation of a general principle until there was more case law.

3. In what circumstances was it considered that there would be a right of action for damages for disclosure of confidential information to third parties by employees, contractors, managing partners and directors, even where the discloser did not personally profit from disclosure?

Although there may be no case law, Mr. Handley considered that the negative duty of non disclosure of confidential information placed on such persons was matched by a positive duty on them to take reasonable care in dealing with material containing confidential information.

4. In answer to a question as to how the courts would deal with a conflict between a statutory duty of disclosure and a contractual or general law duty to preserve confidence, Mr. Handley indicated that the statutory duty would be held to prevail. He referred to *Smorgon's* Case A.T.C. (1979) 4039.

5. What was the disclosure obligation of a geologist engaged by a company who was asked to explore for gold and who discovered silver? Mr. Florence and Mr. Handley agreed that, irrespective of whether the geologist was working as an employee or a consultant, he would be under an obligation to disclose the silver discovery to the company engaging him.

6. Would an 'area of interest' provision in a joint venture agreement, which stated that the parties were free to compete outside the area of interest, only apply after information obtained by one party, pursuant to the joint venture, pertaining to an area outside the area of interest, was available to all joint venture participants?

Mr. Florence considered the answer would be affirmative. Mr. Handley considered that, although the courts would construe the provision against the party relying upon it, nonetheless, provided the provision was sufficiently clearly drafted, it would apply according to its terms.