

JOINT VENTURES, PARTNERSHIPS AND FIDUCIARY DUTIES: UNITED DOMINIONS CORPORATION LTD v. BRIAN PTY LTD *

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INTRODUCTION

Courts of Equity have been reluctant to delimit comprehensively the relationships which may give rise to fiduciary duties,¹ although arguably the situations in which such duties arise have a consistent basis in the need to protect the interests of beneficiaries vulnerable to the fiduciary's abuse of power.² Australian courts have in the recent past encouraged an expansion of the range of circumstances in which fiduciary duties may arise. The importance of the recent decision of the High Court on appeal from the Supreme Court of N.S.W.³ in *United Dominions Corporation Ltd v. Brian Pty Ltd*⁴ is in clarifying the application of the fiduciary concept to the 'joint venture' relationship, and as the most recent of a line of Australian cases defining the range of the fiduciary doctrine. At the same time the decision addresses the difficult distinction between partnership and 'joint venture'.

The High Court in *Brian* confirmed that fiduciary duties may exist between joint venturers and indeed between those negotiating towards joint ventures prior to their reaching formal agreement. In reaching this result, the High Court undertook an examination of the nature of joint ventures which is potentially of considerable commercial significance. The decision of the Court of Appeal in *Brian* remains of interest despite the different approach taken by the High Court, in pointing to an approach to joint ventures which has a closer resemblance to American and Canadian approaches than does that of the High Court.

* (1985) 59 A.L.J.R. 676; (1985) 60 A.L.R. 741.

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¹ *In re Coomber: Coomber v. Coomber* [1911] 1 Ch. 723 per Fletcher Moulton L.J., 728.

² *Hospital Products Ltd v. United States Surgical Corporation* (High Court) (1984) 55 A.L.R. 417 per Mason J., 454 and per Dawson J., 488. On the historical origin of the jurisdiction as a remedy applicable to breaches of trust, *Ex parte Dale* (1879) 11 Ch. D. 772 per Fry J., 778.

³ [1983] 1 N.S.W.L.R. 490. The Court of Appeal's decision is noted by Baxt, R., (1984) *Companies and Securities Law Journal* 121-123; (1984) 58 *Australian Law Journal* 737-738.

⁴ (1985) 59 A.L.R.J. 676; (1985) 60 A.L.R. 741. The case is briefly considered in Austin, R.P., 'Commerce and Equity — fiduciary duty and constructive trust — two cases in the High Court of Australia' (1986) 6 *Oxford Journal of Legal Studies* (forthcoming). The most recent discussion of the nature of the joint venture is McPherson, B.H., 'Joint Ventures', paper delivered to the Equity Seminar, Faculty of Law, Australian National University, 30 May - 1 June 1986.

The wide use of the joint venture structure in Australia is likely to continue. Merralls points to the joint venture as providing a convenient structure for bringing together capital and talent on a large scale but also to achieve a satisfactory position under the tax and trade laws of Australia, the United States and other countries.⁵ The taxation benefits of joint ventures are significant. Provided that no partnership arises, then joint ventures are treated separately for taxation purposes, and may include both project expenditures and project revenue in the calculation of taxable income: such separate treatment is especially advantageous with respect to accelerated depreciation and deductions available under the mining provisions of the Income Tax Assessment Act.⁶ The joint venture structure allows the participants to offer separate security to their respective financiers⁷ and to limit their liability for the other's actions to the terms of the agreement,⁸ and also allows continued competition between the participants outside the scope of the venture.⁹ These advantages are, however, dependent on the assumption that the joint venture will not generally create a partnership between the venturers¹⁰: the decision in *Brian* puts that assumption in issue.

It remains open to question, however, whether the reasoning in *Brian* can be extended to joint ventures of a different form to that at issue in *Brian*. While the sharing of profits as intended by the venturers in *Brian* is common in property development, it is the splitting of product which is the characteristic feature of joint venture arrangements in mining and resource projects in Australia.¹¹ The width of application of the observations of the High Court in *Brian* as to the relation between joint ventures and partnership, and the validity of an extension of those observations beyond the obligations of joint venturers *inter se* to their liability to third parties and to the taxation context, are also matters of difficulty.

A further issue in the analysis of *Brian* must be faced at the outset. The reasoning of the High Court has placed in question whether the categorisation of a relationship as a 'joint venture' has legal significance!¹² For the purposes of this discussion, the term 'joint venture' is used in its commercial usage, to refer to a relationship between business associates where the parties did

⁵ Merralls, J.D., 'Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts' (1981) 3 *Australian Mining & Petroleum Law Journal* 1, 1.

⁶ Ryan, G.L.J., 'Joint Venture Agreements' (1982) 4 *Australian Mining & Petroleum Law Journal* 101, 127.

⁷ Austin, *supra* n. 4 at 10; Lehane, J.R.F., 'Joint Venture Finance and Some Aspects of Security and Recourse' in Vann, L.B.C. and Austin, R.P. (eds) *Law of Public Company Finance* (forthcoming).

⁸ *Supra* n. 6 at 128. Such limited liability may be contrasted with the mutual agency of every partner for the partnership in acts done in the usual course of the partnership business: Partnership Act 1892 (N.S.W.) s. 5, Partnership Act 1958 (Vic.) s. 9.

⁹ Davies, B.J. *Unincorporated Joint Ventures* (1983) 6, 8.

¹⁰ Ryan, *supra* n. 6 at 128.

¹¹ *Supra* n. 4 *per* Dawson J., 681; Ryan, *supra* n. 6 at 144; McPherson, *supra* n. 4 at 2-3. See text to n. 46 below.

¹² See text to n. 26 below.

not intend to enter a partnership.¹³ The creation of a joint venture will generally involve some joining of persons or companies in order to achieve a common goal, the joint venture frequently being structured as an unincorporated association. The participants often define the limits of their association by the specific purpose to be achieved, the venture agreement typically disclaiming any other legal or equitable relationship between them!¹⁴ Generally, the participants in a joint venture hold their interests in the property the subject of the venture as tenants in common, are severally responsible for the liabilities of the venture, and appoint a manager interposed between the participants and the operation of the venture!¹⁵

THE DECISIONS

The case arose from a joint venture for the development of a shopping complex in Queensland. The appellant, United Dominions Corporation Ltd ('UDC'), was both one of the joint venturers and the lender of the moneys required for the development on the security of a mortgage over the land. SPL, the prime developer and the purchaser of the development property, was appointed manager to the joint venture. Prior to the final settlement of the terms of the joint venture agreement — although after the respondent, Brian Pty Ltd ('Brian'), had already contributed to the costs of the project in accordance with the proposed arrangement — SPL as manager of the venture gave UDC a mortgage over the large part of the land subject to the joint venture to secure the moneys lent. However, unknown to Brian, UDC in taking the mortgage from SPL purported by means of a collateralisation clause to charge the joint venture land to secure the indebtedness of SPL arising from any other advances by UDC to SPL. Upon the successful sale of the development, UDC sought to invoke the collateralisation clause to satisfy debts owed by SPL in respect of other developments in which Brian had no involvement, laying claim to the profit which would otherwise have been distributed between the joint venturers.

Brian successfully argued in the N.S.W. Court of Appeal that UDC had been in breach of fiduciary duty in taking the mortgage upon such a basis without disclosing to the other joint venturers that it had done so, and that it was therefore inequitable for UDC to rely on the collateralisation clause to claim prior payment of its debt. The Court of Appeal unanimously held that a joint venture arrangement existed between the parties, and that the obligations under such joint venture extended from the negotiations when the venture was in contemplation through until the completion of the venture.

The High Court, dismissing UDC's appeal, held that the relationship between the parties was in fact that of partnership, although the partnership

¹³ *Supra* n. 6 at 129.

¹⁴ *Supra* n. 5 at 1; Harrison, F.L., 'Joint Ventures and the Trade Practices Act 1974: The American Approach and its Applicability to Australia' (1975) *Australian Business Law Review* 117, 117.

¹⁵ *Supra* n. 5 at 1.

was limited to the particular joint undertaking. The Court further held that such limitation did not deny that the relationship between the participants might be fiduciary, and affirmed that a fiduciary relationship may arise between potential partners or joint venturers prior to the reaching of a formal agreement. To the extent that UDC had been in breach of fiduciary duty in seeking, without the knowledge or consent of the other joint venturers, an advantage to itself by taking the mortgage on the basis of the collateralisation clause, the Court held that it could not rely on the mortgage to exclude Brian's right of a share of the profit under the joint venture agreement.

DEFINING THE RELATIONSHIP BETWEEN JOINT VENTURES AND PARTNERSHIPS

As to the nature of the joint venture, Samuels J.A. in the Court of Appeal recognised that 'there is little Australian or English authority defining the legal incidents of a joint venture in which the participants contribute in common funds to be employed in the joint accomplishment of a commercial undertaking'¹⁶ The Court of Appeal therefore looked to American authorities and to equitable principle as establishing within the particular circumstances of the transaction that the mutual obligations of the joint venturers were fiduciary in nature.

Samuels J.A. quoted from the American text *Williston on Contracts* as to the nature of the joint venture relationship:

a joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense. . . their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control!¹⁷

Joint ventures are of particular importance in American law because a corporation may not generally enter a partnership unless authority to do so is conferred by its charter or by prevailing statute, but may enter into joint venture arrangements without such specific authority!¹⁸ American authority sees the joint venture relationship as a contractual relationship, whether the contract on which the joint venture is based is express or implied!¹⁹ The American courts have emphasised that the joint venture arises upon the basis of the intention of the parties,²⁰ as determined by construction of the contract

¹⁶ *Supra* n. 3 at 505.

¹⁷ *Ibid.* per Samuels J.A., 506, citing *Williston on Contracts* (3rd ed. 1959) vol. II, s. 318B, pp. 598 et seq., also cited per Dawson J., *supra* n. 4 at 681.

¹⁸ *Frieda Popkov Corp. v. Stack* 198 Miss 826, 103 NYS (2d) 507 (1950); Henn, H.G., *Cases and Materials on the Law of Corporations* (1974) 81-82. Dawson J. recognises the importance of this factor in *Brian*, *supra* n. 4 at 681. McPherson, *supra* n. 4 at 2, questions the value of the joint venture category in Australia given the lack of such a restriction in Australian law.

¹⁹ *Neville v. D'Oench*, 327 Mo 34, 34 SW (2d) 491 (1930); Jaeger, W.H.E., 'Joint Ventures: Origin, Nature and Development' (1960) 9 *American University Law Review* 1, 6.

²⁰ *Hathaway v. Porter Royalty Pool* 296 Mich. 90, 295 N.W. 571 (1941).

between them, by their conduct, and by the circumstances of the transaction.²¹ American authority generally distinguishes partnership from the relation of joint venturers on the basis that a joint venture is usually formed to carry out a single transaction, while a partnership will generally 'carry on' a business.²² Further, American decisions have generally assumed that the principles governing the rights of the parties under joint ventures are similar to those under partnerships, and that the duties arising within the two relations are equivalent.²³

The Court of Appeal relied on the analogy between partnerships and joint ventures in defining the duties owed by joint venturers. Samuels J.A. observed that the courts have without precisely defining the joint venture 'tended to regard it as, or at least alike to, a partnership'.²⁴ Hutley J.A. held that 'persons so clubbing together as joint venturers had obligations, inter se, analogous to those of partners at will'.²⁵

THE HIGH COURT

The majority judgment of Justices Mason, Brennan and Deane in the High Court adverted to the difficulty of defining the concept of a 'joint venture', recognising that this difficulty is in part a consequence of the diversity of arrangements to which the term may be applied:

The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill.²⁶

²¹ Jaeger, *supra* n. 19 at 8.

²² *US v. Standard Oil* 155 F Supp 121 (1957), holding that a joint venture 'is in the nature of a partnership limited to a particular venture, not general in operation or in duration'; *West v. Peoples First National Bank & Trust Co* 378 Pa 275, 106 A (2d) 427 (1954); *Harmon v. Martin* 395 111 595, 71 NE (2d) 74 (1947) at 8; MacWilliam, D.A. 'Fiduciary Relationships in Oil and Gas Ventures' (1970) 8 *Alberta Law Review* 233, 233. Cavitch notes that while in practice joint ventures are usually restricted to a particular transaction, there is in American law no absolute restriction on the scope of the business or the duration of a joint venture: Cavitch, *Business Organizations* paras. 15.07, 13.05. Dawson J. in *Brian* points to this general distinction, albeit recognising that in American law 'a joint venture may comprehend a business to be continued over a considerable period of time and the distinction between a partnership and a joint venture is not always easy to discern': *supra* n. 4 per Dawson J., 681.

²³ *Ross v. Willett* 27 N.Y. Supp. 785 (1894), 786, holding that 'joint adventures and partnerships are governed by the same rules'; *Louis Werner Sawmill Co v. Vinson & Bolton* 220 Ala 210, 124 So 420 (1929); *Whitesell v. Porter* 309 Ky 247, 217 SW (2d) 311 (1949), holding that joint ventures and partnerships are 'so similar . . . that the principles which govern the rights and liabilities of members of a partnership apply and govern a joint venture and the responsibilities are tested by partnership rules'; *Grannell v. Wakefield*, 172 Kan 685, 242 P (2d) 1075 (1952). There is some authority in Anglo-Canadian law for the view that obligations under joint ventures and partnerships are coincident: *Ross v. Canadian Bank of Commerce* [1923] 3 D.L.R. 339 (Privy Council) *per* Viscount Cave, 342, observing that with respect to such obligations 'it appears to their Lordships to be immaterial whether the combination is called a partnership or a joint adventure'.

²⁴ *Supra* n. 3 at 505 citing *Reid v. Hollinshead* (1825) 4 B. & C. 867; 107 E.R. 1281 and *Ross v. Canadian Bank of Commerce*, *supra* n. 23.

²⁵ *Supra* n. 3 at 493.

²⁶ *Supra* n. 4 *per* Mason, Deane and Brennan JJ., 679.

The majority noted that the term ‘joint venture’ is ‘apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership’, although noting that in nature ‘such a joint venture. . . will often be a partnership’.²⁷

Whether a joint venture constitutes a partnership must initially depend upon the nature and duration of the relationship between the parties. ‘Partnership’ is defined in the Partnership Act 1892 (N.S.W.) s.1, Partnership Act (Vic.) s.5 as a relationship existing between parties carrying on a business for profit, although Dawson J. noted in *Brian* that the statutory scheme contemplated that there might be a partnership for a single undertaking.²⁸ Early authority was to the effect that the ‘carrying on’ of a business imported an element of continuity. In *Ballantyne v. Raphael*²⁹ the Supreme Court of Victoria held that the transaction of purchasing a block of land, subdividing it and selling it off would not satisfy the requirement of ‘carrying on business’ so as to found a partnership.

Dawson J. in *Brian* explained *Ballantyne v. Raphael* as establishing that ‘a single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business’, and cited *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd* as suggesting that ‘the emphasis which will be placed upon continuity may not be heavy’.³⁰ Such a view finds support in the decision of the High Court in *Chan v. Zacharia*, where Deane J. in reviewing the duties consequent upon partnership noted that ‘a partnership can be confined to one joint activity or be a continuing relationship between its members’.³¹ The High Court held that on the facts of *Brian* the relationship between the participants in the joint venture was that of partnership, although that partnership was limited to the one undertaking. Gibbs C.J. observed that the term ‘joint venture’ was used in the agreement between the parties ‘in the not uncommon sense of a partnership for one particular transaction’,³² while Dawson J. held that the development undertaken through the joint venture ‘was sufficiently extended to amount to the carrying on of a business’.³³

Whether a partnership exists in a particular case is of course a matter of substance and not form.³⁴ That a relationship, while termed by the parties

²⁷ *Ibid.*

²⁸ *Ibid.* 681.

²⁹ (1889) 15 V.L.R. 538; *cf* *Smith v. Anderson* (1880) 15 Ch. D. 247 *per* Brett L.J. 277-278: ‘the expression ‘carrying on’ implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated.’

³⁰ (1974) 131 C.L.R. 321 cited *supra* n. 4 *per* Dawson J., 681. Dawson J. also cites *Smith v. Anderson*, *supra* n. 29 and *Re Griffin ex parte Board of Trade* (1890) 60 LJ QB 235.

³¹ (1983) 154 C.L.R. 178 *per* Deane J., 196.

³² *Supra* n. 4 at 677.

³³ *Ibid.* 681.

³⁴ *Adam v. Newbigging* (1888) 13 AC 308 *per* Lord Halsbury, 315: ‘if a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership.’

a joint venture, may be in reality a partnership is clearly established by the authorities. In *Reid v. Hollinshead*³⁵ the Court held that a joint speculation in cotton which the participants had described in correspondence between themselves as a 'joint adventure' was in substance a partnership.

The leading case is *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd*,³⁶ where the High Court confirmed that where the constituent elements of a partnership exist the fact that the parties themselves define the arrangement as a joint venture will not be determinative.³⁷ The Court there identified a number of factors which would indicate the existence of a partnership: among them the sharing of profits; the existence of a common commercial enterprise with a view to profit; that the policy of the venture was a matter for joint agreement, and that differences of opinion were to be settled by arbitration; that an assignment of a half interest in the performance contracts which were the basis of the venture was attempted; and that participants were concerned with each other's financial stability as might be expected within a partnership relation.³⁸ These factors were cited with approval by the majority in *Brian*, and were treated as providing criteria for the existence of a partnership.

The distinction between the joint venture and partnership relation again arose in *Television Broadcasters Ltd v. Ashton's Nominees Ltd*.³⁹ Ashton's brought to Australia an overseas circus group, receiving financial support from TBL. When a loss was incurred and largely borne by TBL, the latter sued Ashton's arguing that the losses were to be shared equally as a result of the partnership which TBL claimed existed between the parties, or alternatively that there was an implied agreement between the parties that losses be shared equally. The factors enumerated in *Canny Gabriel* were applied by Mitchell J. in her judgment at first instance as a test to determine whether a partnership existed.⁴⁰ On appeal, the Full Court of the South Australian Supreme Court declined to express a concluded view as to whether a partnership in fact existed between the parties, and as to whether the doctrine of contribution might be applicable in general between joint venturers, but noted that 'the parties were parties to a joint venture, and it may well be in the absence of an agreement to be implied between them, as we have found, then equal contribution should have been ordered on equitable principles'.⁴¹ Their Honours then found that an agreement was to be implied between the parties by which the losses were to be shared between them in proportion to the contribution required of each to the costs of the tour.

³⁵ *Supra* n. 24.

³⁶ *Supra* n. 30 *per* McTiernan, Menzies and Mason JJ., 326-327.

³⁷ *Ibid.* 327; *cf.* *Adam v. Newbigging*, *supra* n. 34.

³⁸ *Ibid.*

³⁹ (1979) 22 S.A.S.R. 552.

⁴⁰ *Ibid.* *per* Mitchell J., 565.

⁴¹ *Ibid.* 576.

While a subjective intention of the parties to restrict a relationship to a 'joint venture' will not deny a partnership when the objective nature of the dealings between the parties is that of partnership, *Beckingham v. The Port Jackson & Manly Steamship Co*⁴² established that where the parties intend to avoid partnership and order the arrangements between them accordingly, the Court will recognise the objective quality of the arrangement as other than partnership. In that case the Court held that the parties had in substance avoided a partnership relation. Although the agreement between the parties involved the sharing of profits of the venture, and although certain outgoings were to be charged against the joint venture, the Court held that in fact the relationship was a lease of wharf space and an arrangement for management of the enterprise by the Steamship Company in exchange for an annual rental and a percentage share of admission charges. Street C.J., Kinsella and Sugerman JJ. looked to the intention of the parties:

If anything is clear about this agreement, it is that the parties sought to avoid the creation of a partnership, and, in particular, to prevent any authority from arising in the syndicate or its members to pledge the credit of the Steamship Company or the creation of any liability in the Steamship Company to third parties.⁴³

The factors which the Court here recognised — and more generally a reluctance to undertake the liability for the actions of the other parties to the relationship consequent upon partnership — are consistent with the substantial attractions of the joint venture over that of partnership for parties wishing to cooperate for a limited purpose in a commercial context.

In *Brian* the majority (Mason, Brennan and Deane JJ.) applied the test formulated in *Canny Gabriel*, and enumerated the features in the dealings between UDC, SPL and Brian which indicated the existence of a partnership. The agreement involved joint participation in a commercial enterprise with a view to profit; profits were to be shared; the property which was the subject of the venture was to be held upon trust; and the policy of the venture was to be reached by joint decision. The majority concluded that '[a]part from the absence of any reference in the agreement to 'partnership' or 'partners', the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership'.⁴⁴

It is submitted that the reasoning which led to the joint venture in *Brian* being classified as a partnership would not have direct application to joint ventures of a different form. In particular, the nature of a joint venture with an intended sharing of profit — such as that before the Court in *Brian* — differs from a joint venture involving the splitting of product. This distinction was clearly expressed by Dawson J. in *Brian*:

Perhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate

⁴² (1956) 57 S.R. (N.S.W.) 403.

⁴³ *Ibid.* 409.

⁴⁴ *Supra* n. 4 at 679.

a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit.⁴⁵

A joint venture of the former structure, based on the splitting of profit, clearly has much in common with the paradigmatic form of partnership. The traditional Australian view has been that joint ventures in the mining and petroleum industries, typically in the latter form, do not create partnerships, on the ground that the taking of separate shares of production does not constitute a joint profit.⁴⁶ The decision in *Brian* does not directly deny that view. Given the particular form of the joint venture at issue in *Brian* the finding of partnership in that situation need not extend to the typical mining and petroleum joint venture, although it will likely extend to most joint ventures for real estate development.

ANALYTICAL APPROACHES TO IDENTIFYING FIDUCIARY OBLIGATIONS

The decisions of the Court of Appeal and of the High Court in *Brian* indicate different approaches to the application of the fiduciary model to joint ventures.

It would have been open to the courts to approach the joint venture as a relationship which of its nature necessitated the imposition of fiduciary duties upon its participants. On this approach, the legal nature of the joint venture would be held to define the fiduciary incidents of the relationship.⁴⁷ American and Canadian courts appear generally to have adopted this approach.⁴⁸ American courts have allowed in principle that a joint venture arrangement may give rise to a mutual agency relationship between its participants, with the effect that each joint venturer is both principal and 'agent for the other joint venturers in the performance of acts that are within the general scope of the joint undertaking'.⁴⁹ In the leading case of *Meinhard v. Salmon* Cardozo J. treated the finding that a joint venture existed as determinative of the fiduciary obligations upon its participants.⁵⁰ A similar

⁴⁵ *Ibid.* 681.

⁴⁶ *Supra* n. 6 at 106, 131; Pritchard, R.L., 'Unincorporated Joint Ventures' in Vann & Austin, *op. cit.*

⁴⁷ Finn, P.D., 'Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures', *Australian Mining & Petroleum Law Association Yearbook*, 1984, 160, 161. For the basis of this approach in Finn's model of the fiduciary relationship, Finn, P.D., *The Law of Fiduciaries* (1977) ch. 1, pp. 1-5, and text to n. 94 *infra*.

⁴⁸ Williston, S., *A Treatise on the Law of Contracts* (3rd ed. 1959) #318C, 628; MacWilliam, *supra* n. 22 at 233; Henn, *op. cit.* 82. American authorities must be treated with caution in one respect. Australian and English courts have required that a relationship involve a fiduciary undertaking prior to allowing remedies for breach of fiduciary duty, particularly the constructive trust: American courts, by contrast, have generally been prepared to more readily impute the existence of a fiduciary duty as a conscious means of allowing the remedy of the constructive trust: MacWilliam, *ibid.* 234-235.

⁴⁹ Jaeger, W.H.E., 'Joint Ventures: Membership, Types and Termination' (1960) 9 *American Law Review* 111, 116.

⁵⁰ 164 NE 545; 249 NY 459 (1928).

reasoning was adopted in *Van Stee v. Ransford*⁵¹ and by the High Court of Delaware in *J Leo Johnston Inc v. Carmer*,⁵² while there is American authority that corporations which undertake an unincorporated joint venture are under reciprocal fiduciary duties⁵³. In the Canadian courts, *Midcon Oil & Gas Ltd v. New British Dominion Oil Co Ltd* confirmed that the joint venture relationship was fiduciary in nature, accepting in principle that fiduciary obligations are not limited to the 'four corners' of the agreement, although the majority on the facts of that case confined the scope of the duty within the express terms of the joint venture agreement.⁵⁴ The Court of Appeal in *Brian* adopted this approach of founding the fiduciary duty on the nature of the relationship, both Samuels J.A. and Hutley J.A. emphasising the analogy between joint ventures and partnerships in defining the duties owed by joint venturers.

The analytical approach which Finn prefers is to treat fiduciary duties, in the context of joint ventures, as consequent not upon the legal status of the parties, but upon the inherent nature of the obligations which they have undertaken.⁵⁵ On this approach, the essential question is whether the functions and obligations undertaken by a participant in a particular venture themselves attract fiduciary duties. This approach is consistent with the reasoning of the majority in the High Court, with its detailed examination of the particular features of the joint venture relationship between UDC and Brian. The majority thus defined the fiduciary obligations which may be imposed upon participants in a joint venture as consequent on the parties' undertakings in the circumstances of the transaction. This approach is linked with the recognition, noted above, that the concept 'joint venture' is itself not sufficiently precise in its boundaries to necessarily have the result that the relationship between joint venturers is fiduciary:

The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.⁵⁶

⁵¹ 346 Mich 116, 77 NW (2d) 346 (1956), 351.

⁵² 156A (2d) 499 (1959), 502, the Court holding that 'the relationship of joint venturers is fiduciary in character and imposes upon all of the participants the utmost good faith, fairness and honesty in dealing with each other with respect to the enterprise'.

⁵³ *Pan Am Trade v. Commercial Metals Co* 33 Del. Ch. 425, 94 A (2d) 700 (1953). Williston points to a competing inclination in the American courts to limit the mutual agency principle when applied to joint ventures more narrowly than when applied to partnerships: Williston, *op. cit.* s.318C, 629. American courts have therefore held that, where a joint venture is for a specific purpose and established by contract, the scope of the fiduciary duties upon the participants will be restricted according to terms of the agreement between them: *British American Oil Producing Co v. Midway Oil Co* 82 P (2d) 1049 (1938). There is Canadian authority to similar effect in *Pine Pass Oil & Gas v. Pacific Petroleum* 70 D.L.R. (2d) 1966.

⁵⁴ [1958] S.C.R. 314; 12 D.L.R. (2d) 705. The minority took a wider view of the duty, recognising its basis in equity and its extension to the subject matter of the joint venture, there imposing obligations of 'a refined sensibility to duty, the exclusion of all personal advantage and the total avoidance of any personal involvement in the interest being served or protected': *per* Rand J., Cartwright J. concurring, at 711. Ballem, J.R., 'The Scope of the Fiduciary Relationship' (1964) 3 *Alberta Law Review* 349, 354.

⁵⁵ *Supra* n. 47, 161.

⁵⁶ *Supra* n. 4 *per* Mason, Brennan and Deane JJ., 679.

Dawson J.'s judgment is clearest in the adoption of an approach based upon the particular undertakings of the parties rather than upon the nature of their legal relationship. His Honour suggested that 'even in partnership it is really the mutual confidence between the partners which imposes fiduciary duties upon them', and held that the relationship between joint venturers — although, unlike that of partners, not necessarily one of mutual agency — 'may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another'.⁵⁷

By extension of this approach, in other joint ventures which did not on the facts create a partnership between the participants, then the existence of fiduciary duties would fall to be determined by reference to the specific obligations undertaken in the joint venture agreement.

FIDUCIARY OBLIGATIONS OF JOINT VENTURERS AND INTENDING JOINT VENTURERS

In the Court of Appeal in *Brian*, the starting point of Samuels J.A.'s reasoning had been a recognition of the duties owed between partners *inter se*, here citing *Birtchnell v. Equity Trustees, Executors & Agency Co Ltd*,⁵⁸ and concluding that fiduciary obligations are imposed in partnership 'in order to protect partners *inter se* from abuses which the commercial intimacy and inherent power of the relationship are capable of facilitating'.⁵⁹ Extending the duties owed between partners *inter se* to the situation of joint venturers, Samuels J.A. concluded that 'joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member'.⁶⁰ Noting that the relation of the parties to the joint venture in *Brian* 'was based upon a mutual confidence that they would engage in the activity already undertaken for their joint advantage only', Samuels J.A. further held that

the circumstances and the relationship of the parties amongst themselves were such that they were bound by obligations commonly called fiduciary as if they had been parties to a joint venture agreement. . . which was enforceable in every respect.⁶¹

Samuels J.A. allowed that such a fiduciary obligation might arise at an early stage of the relationship between intending joint venturers, holding that even if the situation had been 'merely one of continuing negotiation. . . it might well have sufficed to attract duties of a fiduciary character' by analogy with the obligations of good faith imposed with negotiations prior to the partnership.⁶²

Hutley J.A. equally accepted the existence of a fiduciary obligation between the participants in a joint venture, and was indeed prepared to base that

⁵⁷ *Ibid.* 681.

⁵⁸ (1929) 42 C.L.R. 384 *per* Dixon J., 407.

⁵⁹ *Supra* n. 3 at 507.

⁶⁰ *Ibid.* 506.

⁶¹ *Ibid.* Mahoney J.A. reaches a similar conclusion at 510.

⁶² *Ibid.* 506.

obligation not on partnership but on the nature of the joint venture relationship itself, citing American authority as to the duties of joint venturers *inter se*. In particular, Hutley J.A. relied upon the judgment of Cardozo J. in *Meinhard v. Salmon*, where His Honour characterised the obligations upon joint venturers as being ‘fiduciary duties akin to those of partners’, and held that ‘joint venturers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty’.⁶³ Adopting a similar reasoning, Hutley J.A. affirmed that

A joint venture is analogous to a partnership. The differences are not designed, as I understand it, in order to lower the standards of honour between the joint venturers. It is implied by law that partners shall be true and just in their dealings with each other. . . and the same rule should be laid down for joint venturers.⁶⁴

In the High Court, the finding of Gibbs C.J. and of the majority (Mason, Brennan and Deane JJ.) that the relationship between UDC, SPL and Brian was that of partnership necessarily founded the conclusion that the participants were under fiduciary obligations. It is clear law that partnership as a type of mutual agency⁶⁵ is a relationship of confidence⁶⁶. The fiduciary duty of the partner was authoritatively defined by Dixon J. in *Birtchnell v. Equity Trustees, Executors & Agency Co Ltd*,⁶⁷ holding that in consequence of the relationship of mutual agency between them partners are under that duty ‘which requires a fiduciary to refrain from engagements which conflict, or which might possibly conflict, with the interests of those whom he is bound to protect’, although his Honour noted that the nature and extent of the fiduciary duty is to be defined by reference to the scope of the partnership.⁶⁸ The fiduciary character of partnership is confirmed in *Chan v. Zacharia*, where Gibbs C.J. cited *Lindley on Partnership* as to the obligation of ‘perfect fairness and good faith’ owed by one partner to another, and Deane J. approved Dixon J.’s reasoning in *Birtchnell*;⁶⁹ while in *Hospital Products*^{69a} Mason J. instanced partnership as an example of a fiduciary relationship where the fiduciary’s obligation is to act in the joint interest of his principal and himself.⁷⁰

In *Brian* the High Court held that the fact that the formal joint venture between the parties came after the mortgage had been created was immaterial, concluding that a fiduciary duty may exist between the participants in a venture prior to the express definition of their relationship within a partnership or

⁶³ *Supra* n. 50 *per* Cardozo J., 546, 463. Hutley J.A. also cites *Scott on Trusts* (3rd ed. 1967) Vol. II, s. 170.21 at 1365-1374.

⁶⁴ *Supra* n. 3 at 497.

⁶⁵ *Re Biss* [1903] 2 Ch. 40 *per* Romer L.J., 61-62; Scamell, E.H. & L’Anson Banks, R.C., *Lindley on the Law of Partnership* (15th ed. 1984) 285, 371.

⁶⁶ *Cassels v. Stewart* (1881) 6 App Cas 64 *per* Lord Blackburn, 79; *Re Biss, ibid. per* Romer L.J., 61-62, referring to the principle that between partners ‘the utmost good faith is required by a Court of Equity’.

⁶⁷ *Supra* n. 58.

⁶⁸ *Ibid.* 408 citing *Aberdeen Railway Co v. Blaikie Bros* (1854) 1 Macq 461.

⁶⁹ *Supra* n. 31 *per* Gibbs J., 182 citing *Lindley on Partnership* (14th ed. 1979); *per* Deane J., 196.

^{69a} *Supra* n. 2

⁷⁰ *Supra* n. 2 at 456.

joint venture agreement. This holding is of fundamental commercial importance. It imposes a higher legal standard of obligation upon parties negotiating towards joint venture agreements than the level of business ethics accepted in commercial practice would likely require, even though the relationship of the parties has not reached its final form. Such a standard may be supported by reference to the justification of fiduciary duties as having an educative function in commerce.⁷¹ It is not, however, likely to be welcomed without reservation by the business community and its legal advisors: thus Lehane observed of the similar conclusion of the Court of Appeal that 'to impose, as the decision does, fiduciary obligations on persons who *intend* to become joint venturers may be somewhat excessive'.⁷² Arguably, the imposition of fiduciary duties prior to the reaching of a fully formed contractual agreement might impede the free movement of commercial negotiation, and deny a clear definition of the point at which negotiating parties deliberately accept mutual obligations.

The reasoning of the High Court in this respect has since been followed in the Supreme Court of Ontario in *International Corona Resources Ltd v. Lac Minerals Ltd*,⁷³ holding that a fiduciary obligation had arisen between parties negotiating towards a joint venture for minerals exploitation, where Corona had disclosed to Lac both the progress of its explorations and its desire to acquire the properties subsequently obtained by Lac, although no joint venture agreement was ultimately concluded.

THE REASONING OF GIBBS C.J.

Gibbs C.J. held that a fiduciary relationship existed between the parties UDC, SPL and Brian, since the relationship between the parties 'if not one of partnership, was one between persons who, intending to become partners, had already embarked on the partnership venture, of which the execution of the mortgage was an incident'.⁷⁴ Citing *Hospital Products Ltd v. United States Surgical Corporation*,⁷⁵ Gibbs C.J. held that

although it is not easy to attempt to define the circumstances in which a fiduciary relationship will be found to exist. . . there was, in the circumstances of the present case, a relationship between UDC and Brian based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed.⁷⁶

Gibbs C.J., moreover, undertook a full examination of the question of whether such obligations might exist between the participants in a joint venture although their relationship had not yet been finalised by formal

⁷¹ See text to n. 15 *infra*.

⁷² Lehane, J.R.F., 'Fiduciaries in a Commercial Context' in Finn, P.D. (ed.) *Essays in Equity* (1985) 95, 96.

⁷³ Unreported, Supreme Court of Ontario, heard Oct 1985 — Feb 1986, *per* R.E. Holland J., 82. Damages in favour of Corona were assessed at \$700 million: the decision is, naturally enough, presently under appeal.

⁷⁴ *Supra* n. 4 at 678.

⁷⁵ *Supra* n. 2.

⁷⁶ *Supra* n. 4 at 678.

documentation. Since Gibbs C.J. took the view that the ultimate relationship between UDC, SPL and Brian was that of partnership, his reasoning is addressed to the situation prior to the creation of a formal partnership. Although his Honour found — in agreement with Samuels J.A.'s findings in the Court of Appeal — that in *Brian* the parties had passed beyond the point of mere negotiation at the time when SPL granted the mortgage to UDC, and that it was therefore 'unnecessary to decide whether persons negotiating for a partnership always stand in a fiduciary relationship', he nonetheless observed that 'they may sometimes do so'.

Developing this reasoning, his Honour cited *Lindley on Partnership* to the effect that the 'obligation to fairness and good faith' is not confined to persons who actually are partners but 'extends to persons negotiating for a partnership, but between whom no partnership as yet exists'.⁷⁷ As Gibbs C.J. recognised in his judgment, the view of *Lindley on Partnership* on this issue had been criticised by Higgins and Fletcher as not supported by the authorities which Lindley had cited. Higgins and Fletcher, by contrast, argued that there would be a fiduciary obligation upon parties negotiating for partnership prior to the formation of the partnership 'only in special cases where there was a fiduciary relationship between the intending partners at the time they were negotiating the partnership contract'.⁷⁸ The fact that Gibbs C.J. adopted Lindley's view in *Brian* reinforces its status: such reinforcement is significant for partnership law as well as for the developing law of joint ventures.

Further support for the view taken by Lindley and adopted by Gibbs C.J. in *Brian* as to the duty of good faith imposed upon those negotiating to enter a partnership is provided by a series of nineteenth-century cases defining an obligation of 'utmost candour and honesty' upon promoters encouraging investment in a public company by prospectus. In the early case of *New Brunswick & Canada Railway Co v. Muggerridge*⁷⁹ Kindersley V.C. treated such obligation as owed by the promoters to those who would take up shares in the undertaking on the basis of his representations, and held that

promoters are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.⁸⁰

This obligation was confirmed in *Directors of Central Railway Co of Venezuela v. Kisch*⁸¹. That case involved the making of a false representation

⁷⁷ *Lindley on the Law of Partnership, op. cit.* 480. Gibbs C.J.'s discussion of this issue is at 677-678. His Honour cites in support of his adoption of Lindley's view *Fawcett v. Whitehouse* [1829] 1 Russ & M 132; 39 ER 51 and *Hichens v. Congreve* [1828] 1 Russ & M 150; 39 ER 58.

⁷⁸ Higgins, P.F.P. and Fletcher, K.L., *The Law of Partnership in Australia & New Zealand* (4th ed. 1986) 50. Higgins and Fletcher observe that in *Fawcett v. Whitehouse* the negotiator held to be under a fiduciary duty to the other participants was agent for the others prior to the entry into the partnership, and that the fiduciary duty arose from that agency rather than from the negotiations towards partnership, while in *Hichens v. Congreve* the defendant was again within an agency relationship which would found a fiduciary duty irrespective of partnership.

⁷⁹ (1860) 1 Dr & Sm 381.

⁸⁰ *Ibid. per* Kindersley V.C., 381.

⁸¹ (1867) LR II H. of L. 99.

as to the available capital of a railway company by its promoters, the Court holding that no misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company. In particular, Lord Chelmsford L.C. held that potential shareholders 'ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess', and further held that where the promoters of a company 'are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey', then 'the utmost candour and honesty ought to characterize their published statements'.⁸² While Higgins and Fletcher argue that this case turned upon fraudulent misrepresentation and provides no authority as to any fiduciary obligation upon those negotiating towards partnership,⁸³ and while such a view is consistent with the reasoning of Lord Romilly, it is submitted that it fails to take account of the strong emphasis in the judgment of Lord Chelmsford L.C. upon the duties of candour and good faith upon the promoter in consequence of the vulnerability of potential subscribers dependent on the information which the promoter conveys. Gibbs C.J. in *Brian* supported his use of the company promoter cases on the ground that 'there is an analogy between the position of company promoters and that of persons who invite others to join in a partnership'⁸⁴: the analogy is persuasive in that both situations involve a similar vulnerability of the potential participant, based on the fact that his decision will likely be based at least in part on information which he is given by those encouraging his participation.

Gibbs C.J. found further support for his view in an *obiter* observation of Lord Atkin in *Bell v. Lever Bros*⁸⁵ where his Lordship suggested that an intending partner would be under a duty irrespective of contract to disclose material facts, given that contracts of partnership are 'expressed by the law to be contracts of the utmost good faith'. On this view, the joint venture relationship is implicitly treated as *uberrimae fidei*, imposing upon the parties obligations of the utmost good faith. Such obligations have long been recognised in the context of insurance law⁸⁶ and in agency relationships.⁸⁷ The consequence of holding a contract or relationship *uberrimae fidei* in nature is to allow that an associated transaction is voidable for nondisclosure not amounting to misrepresentation.⁸⁸

⁸² *Ibid.* 113. Lord Romilly concurs in the result at 125, but seems to take as the basic ground of his decision contractual misrepresentation.

⁸³ Higgins & Fletcher, *op. cit.* 50.

⁸⁴ *Supra* n. 4 at 677.

⁸⁵ [1932] AC 161 *per* Lord Atkin, 227, cited *ibid.*

⁸⁶ *Carter v. Boehm* (1766) 3 Burr 1905 *per* Lord Mansfield C.J., 1909; *Lindenau v. Desborough* (1828) 8 B&C 586 *per* Bayley J., 592; Hasson, R.A., 'The Doctrine of *Uberrima Fides* in Insurance Law — A Critical Evaluation' (1969) 32 *Modern Law Review* 615.

⁸⁷ *Halsbury's Laws of England*, Vol. IX, para. 288.

⁸⁸ *Ibid.* Vol. XXXI, para. 1053.

If a joint venture is held to be of such a nature, it follows that a joint venturer must disclose to the other participants any special circumstances of the venture — including, on the facts of *Brian*, the creation of an encumbrance over the property of the venture — where a failure to disclose such circumstances would mislead potential participants as to the effect of entry into the venture. The requirement of disclosure consequent upon holding the joint venture relationship to be *uberrimae fidei*, although of different roots as to legal principle, would in practical effect be coincident with the obligations of disclosure following from the application of the rule against conflict of interest to joint ventures. Its breach would however found common law rather than equitable remedies, which would often be of lesser commercial effectiveness than the proprietary remedies, especially the constructive trust, available in equity.

THE REASONING OF THE MAJORITY AND OF DAWSON J.

The majority reasoned that where the form which the joint venture took was essentially that of partnership, then ‘the joint venturers will be under fiduciary duties to one another. . . which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship’.⁸⁹ The majority concluded on the particular facts of *Brian* that although UDC was lender of the moneys for the venture, its having such function ‘did not absolve it from the ordinary fiduciary obligations of a partner’.⁹⁰

Their Honours held on the facts that by the time SPL gave the mortgage to UDC ‘the arrangements between the joint venturers had passed to far beyond the stage of mere negotiation’, since agreement to participate in the venture had been reached albeit its details were not yet finalised, and since financial contributions had already been made or agreed to be made by the parties. The majority rejected UDC’s submission that no fiduciary obligations would arise between the parties until the joint venture agreement was finalised, holding that

a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of the partnership agreement have been settled.⁹¹

The majority therefore held that on the facts of *Brian* the relationship between the parties might be treated either as inchoate in nature, such as ‘may exist between prospective partners or joint venturers before the terms of any partnership or joint venture agreement have been settled’, or as a fully formed

⁸⁹ *Supra* n. 4 at 679.

⁹⁰ *Ibid.* 680.

⁹¹ *Ibid.*

but limited 'preliminary partnership or joint venture to investigate and explore the possibilities of an ultimate joint venture or ventures'.⁹² On either basis, the relationship was in their Honours' view fiduciary in nature.

Dawson J. took a similar approach, observing that 'it is quite clear that a fiduciary relationship may arise during negotiations for a partnership or . . . joint venture, before any partnership or joint venture agreement has been finally concluded if the parties have acted upon the proposed agreement'.⁹³ Dawson J. viewed this proposition as the corollary of the fact that fiduciary obligations arise from the placing of confidence within a relationship: while the fact of a concluded agreement might support the existence of a relationship of confidence, such a concluded agreement is not a necessary prerequisite to the existence of such a relationship of confidence.

JUSTIFICATIONS FOR IMPOSING FIDUCIARY DUTIES UPON JOINT VENTURERS

While in *Brian* the High Court held that the fiduciary obligations upon UDC followed from the existence of a partnership relation, the question of the circumstances in which fiduciary duties will be imposed upon the participants in joint ventures where the indicia of partnership are less clearly satisfied remains open. The High Court's reasoning seems on the whole consistent with the view that although a particular joint venture did not establish a partnership it might nonetheless give rise to fiduciary duties. Whether it did so would depend upon the nature of the participants' undertakings, as qualified by the joint venture agreement and by any understanding between them prior to the conclusion of such agreement. It is submitted that, to the extent that a particular joint venture involves an ability to affect the interests of another, and an express or implied undertaking to act in the interests of that other, then the imposition of fiduciary duties upon the participants is consistent with principle.

One must here look to the wider doctrinal basis of holding a relationship fiduciary in character. Finn follows Sealy in holding that the fiduciary concept is essentially descriptive, 'providing a veil behind which individual rules and principles have been developed', rather than being 'definitive of a fixed class of relationships to which fixed rules and principles apply'⁹⁴. In Finn's view, a person will likely fall within a fiduciary category when 'carrying on particular activities which require the law's regulation'⁹⁵. It follows from such a model that fiduciary relationships originate in particular circumstances, each fiduciary duty 'itself defin[ing] the type of relationship to which it applies'

⁹² *Ibid.*

⁹³ *Ibid.* 682

⁹⁴ Sealy, L.S., 'Some principles of Fiduciary Obligations' [1963] *Cambridge Law Journal* 119; Finn, *op. cit.* 78.

⁹⁵ Finn, *op. cit.* 2.

and setting 'its own standard of acceptable conduct from the fiduciary to whom it applies'⁹⁶.

It may be suggested that such obligations are based on the fiduciary's having expressly or impliedly undertaken an obligation 'to act in the interests of another person'⁹⁷, equity holding him in conscience to that obligation. It follows that the mere power to affect the interests of another will not in itself create a fiduciary duty, unless combined with the fiduciary's undertaking 'to act in the interests of another and not his own'⁹⁸. The fiduciary's representative status is thus the essence of the fiduciary role⁹⁹, his duty to act 'as though his interest was that of the beneficiary of the undertaking' being the consequence of that status¹.

Even when not of the nature of partnership, the joint venture would appear to be consistent with such a characterisation of the fiduciary relationship, at least where the participants offer any generalised undertaking, express or implied, within the terms of the joint venture agreement, to 'subordinate their individual interests to their collective — or common — interests' within the scope of the venture². Arguably, such characterisation extends further to circumstances where the joint venturers offer narrower undertakings, in accepting particular obligations in carrying out the venture.

FIDUCIARY DUTIES IN COMMERCIAL RELATIONSHIPS

The imposition of fiduciary duties upon joint venturers in *Brian* raises a further issue. The imposition of fiduciary duties within essentially commercial relationships is a matter of some difficulty of doctrine and of policy³. The High Court had to address competing principles: on the one hand, equity's commitment to holding the fiduciary to his undertaking to act in the interests of his beneficiary, and on the other hand the principle that the parties to a contract ought to be able to define and limit their obligations in their dealings with each other by the terms of their contract⁴. The courts have allowed this latter principle continued application to dealings between parties of commercial experience and at arm's length.

⁹⁶ *Ibid.* 4, 78.

⁹⁷ For definitions consistent with such a formulation: Sealy, *supra* n. 94 at 122; Finn, *op. cit.* 2, 201; *Walden Properties Ltd v. Beaver Properties Ltd* [1973] 2 N.S.W.L.R. 815 *per* Hope J.A., 833.

⁹⁸ *United States Surgical Corporation v. Hospital Products International Pty Ltd* (N.S.W. Court of Appeal) [1983] 2 N.S.W.L.R. 157, 207-208; *Hospital Products* (High Court), *supra* n. 2 *per* Gibbs C.J., 432, 435; *per* Mason J, 455; *per* Deane J., 474; Austin, *supra* n. 4 at 4.

⁹⁹ *Phipps v. Boardman* [1967] 2 A.C. 46 *per* Lord Upjohn, 123; *NZ Netherlands Society v. Kuys* [1973] 2 All E.R. 1222 *per* Lord Wilberforce, 1225; *Walden Properties Ltd v. Beaver Properties Ltd*, *supra* n. 97 *per* Hope J.A., 833; *Hospital Products* (High Court), *supra* n. 2, *per* Mason J., 454.

¹ Pellatt, G.R., 'The Fiduciary Duty in Oil and Gas Joint Operating Agreements: Midcon Reexamined' (1967-1968) 3 *University of British Columbia Law Review* 190, 190.

² *Supra* n. 47 at 168.

³ For a wider approach to the issue of the application of equitable doctrines to the regulation of commerce, Austin, *supra* n. 4.

⁴ The classic expression of this view is *Printing & Numerical Registering Co v. Sampson* (1875) LR 19 Eq 462 *per* Jessel M.R., 465, pointing to a 'paramount public policy' of 'freedom of contract', *cf.* Atiyah, P.S., *The Rise and Fall of Freedom of Contract* (1979).

The High Court had previously recognised that contractual and fiduciary duties are not mutually exclusive. In *Chan v. Zacharia* Deane J. observed that a fiduciary relationship existed in a partnership, although 'as between the partners, the rights and duties of the members of a partnership are primarily contractual, flowing from the express or implied terms of the particular partnership agreement'⁵. The issue of the application of fiduciary duties to commercial relationships was again considered by the High Court in *Moorgate Tobacco Co Ltd v. Philip Morris Ltd*⁶ and in *Hospital Products Ltd v. United States Surgical Corporation*⁷ prior to arising with respect to joint ventures in *Brian*.

Moorgate Tobacco involved no general rejection of the possibility that fiduciary duties might exist within a commercial relationship. The appellants had not argued that the relationship of licensor and licensee in itself created fiduciary obligations between them, but rather that such duty arose from their particular dealings. Deane J., for a unanimous High Court, recognised that fiduciary obligations might arise within a commercial relationship, although 'the rights and obligations of the parties were as defined by the agreements' and although 'neither party was under any obligation to avoid any conflict between its own interests . . . and the interests of the other party or the joint interests of them both'. Indeed, his Honour observed that a 'continuing relationship between the parties under the agreements' with 'shared objectives' may support the implication of 'an undertaking by one party to act on behalf of the other in relation to a particular matter or venture'⁸, although he found that such an undertaking had not been established on the facts as found.

The decision in *Hospital Products*, where the relationship of the parties was that of manufacturer and distributor, required a fuller examination of the issue. The majority held that the commercial quality of the relationship, which resulted from negotiation between parties at arm's length, suggested that it was not fiduciary in nature. The implication of the majority's reasoning, Deane J. reaching a similar conclusion on this point, is that fiduciary principles are inappropriate means for the legal regulation of commercial dealings.

Thus Gibbs C.J. observed that 'the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by the Court as important, if not decisive, in indicating that no fiduciary relation arose'⁹. Wilson J. noted the reluctance of the courts to allow 'the extension of equitable principles into the domain of commercial relationships' where the parties are dealing at arm's length¹⁰. Dawson J. similarly concluded that it would be

⁵ *Supra* n. 31 per Deane J., 196.

⁶ (1984) 56 A.L.R. 193; (1985) 59 A.L.J.R. 77.

⁷ *Supra* n. 2.

⁸ *Supra* n. 6, 207.

⁹ *Supra* n. 2, 433.

¹⁰ *Ibid.* 470-471.

undesirable to extend fiduciary duties to commercial relationships, and indicated that to impose such duties ‘where the parties are dealing at arm’s length from one another’ would in his view be anomalous¹¹.

The characterisation of parties to a commercial transaction as being ‘at arm’s length’, on which the majority placed considerable reliance in *Hospital Products*, is arguably of limited analytical value. As Austin rightly points out, such a description is not a justification of the conclusion that a fiduciary obligation is not warranted in the circumstances, but no more than a restatement of that conclusion: being at arm’s length is ‘simply a corollary of not being in a special relationship’¹².

Both Wilson and Dawson JJ. found the reluctance of the courts to import equitable doctrines into commercial dealings to be illustrated by the earlier decision of *New Zealand & Australian Land Co. v. Watson*¹³ where Bramwell J. warned against the introduction of ‘the various intricacies and doctrines associated with trusts’ into commercial transactions. Dawson J. further suggested that fiduciary obligations would be more uncertain than the parties’ obligations at common law: his Honour observed that to allow equitable remedies

would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them¹⁴.

In reaching their conclusion the majority allow little express attention to policy factors: these would include, in favour of imposing fiduciary duties, the desirability of securing the standards of commercial morality¹⁵. However, it may be that in recognising the historical reluctance of the courts to apply fiduciary concepts to commercial settings their Honours indirectly accept considerations of economic policy implicit in such reluctance¹⁶. The most basic of these considerations lies in the assumption that the strictness of fiduciary obligations would unduly restrict the ability of commercial parties to serve their own interests¹⁷, and would consequently be contrary to a social policy favouring commercial enterprise.

Mason J., dissenting, was in contrast to the majority in *Hospital Products*, not prepared to accept that the categorisation of a relationship as commercial was sufficient in itself to exclude obligations of a fiduciary nature. His Honour observed that fiduciary obligations may exist at the same time as and consistently with the terms of a contractual relationship, so that ‘every such

¹¹ *Ibid.* 493.

¹² Austin, *supra* n. 4 at 19.

¹³ (1881) 7 Q.B.D. 374.

¹⁴ *Supra* n. 2 at 494.

¹⁵ Weinrib, E.J., ‘The Fiduciary Obligation’ (1975) 25 *University of Toronto Law Journal* 1, 6-7.

¹⁶ As to the economic analysis of common law doctrines, Posner, R.A., *Economic Analysis of Law* (1972); Posner, ‘Utilitarianism, Economics and Legal Theory’ (1979) 8 *Journal of Legal Studies* 103; Weinrib, E.J., ‘Utilitarianism, Economics and Legal Theory’ [sic] (1980) 30 *University of Toronto Law Journal* 307.

¹⁷ Weinrib, *supra* n. 15 at 18.

transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship¹⁸. It followed that commercial relationships may in particular circumstances allow 'the creation of a relationship in which one party comes under an obligation to act in the interests of another'¹⁹. His Honour held that the dealings between USSC and HPL had established a limited fiduciary relationship, and that such a relationship was not inconsistent with the parties' contractual arrangements²⁰.

Mason J.'s reasoning differed from that of the majority in his pointing to a change in the nature of commerce over time, and to the value of imposing fiduciary duties in complex commercial transactions in order to allow equitable remedies to the aggrieved party, noting

the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being the means to that end.²¹

This approach allows that as a matter of law commercial dealings may give rise to fiduciary duties. However, as Lehane has suggested, it may be that in most cases such transactions 'do not, as a matter of fact, satisfy the criteria . . . which lead courts to characterise a relationship between parties as fiduciary', given that each party will be acting and will be recognised as acting in its own interests²².

DISTINGUISHING *HOSPITAL PRODUCTS* FROM *BRIAN*

The effect of the adoption of contractual reasoning by the majority in *Hospital Products* is to limit the extent to which equitable obligations are to be recognised within commercial transactions between parties dealing at arm's length. On this reasoning, the rights and obligations undertaken by parties in such circumstances are exhaustively defined by the terms of the contract between them, while their remedy for breach is restricted to contractual damages²³.

The question then arises as to why that reasoning which denied the existence of fiduciary obligations in *Hospital Products* was not also applicable in *Brian*, with the result that the parties would have been treated as under merely contractual obligations. Such an approach would have found support in several features of the transaction between UDC and Brian, particularly that the joint venture agreement had a contractual base and that it was entered into between parties possessed of commercial experience and dealing at arm's length²⁴, while

¹⁸ *Supra* n 2. at 457.

¹⁹ *Ibid.* 456-457.

²⁰ *Ibid.* 456.

²¹ *Ibid.* 457.

²² Lehane, *supra* n. 72 at 98.

²³ *Supra* n. 47 at 162.

²⁴ *Cf. Keith Henry & Co v. Stuart Walker & Co* (1958) 100 C.L.R. 342; *Jirna v. Mister Donut of Canada* (1974) 40 D.L.R. (3d) 303, where it was held that no fiduciary relationship arose from a franchise agreement entered by parties at arm's length and on an equal footing; Finn, *op. cit.* 201-202.

Brian had access to financial and legal advice²⁵. Arguably, it was open to the parties to protect their interests in the terms of their agreement, by stipulating their rights and obligations²⁶.

Austin suggests that the High Court's decision in *Brian* may indicate an increased acceptance of Mason J.'s approach in *Hospital Products*²⁷. In the writer's view, the different results in the two cases may be explained without postulating such a change of attitude on the part of the majority in *Hospital Products*. The decision follows rather from the finding that the joint venture in *Brian* was in substance a partnership: such finding would be sufficient to displace the reluctance to recognise fiduciary obligations in a commercial setting by placing the dealings of UDC and Brian within an established fiduciary category. It might be observed that if this were the basis of the High Court's reasoning in *Brian*, then it makes no allowance for any difference in nature between partnership as based in the mutual confidence of the partners, and a joint venture between corporate entities seeking to protect their individual interests within a fully documented joint venture agreement.

The effect of the finding that Brian and UDC were in partnership was to render it unnecessary for the Court to address the more difficult question of whether fiduciary concepts are the appropriate mechanism for the control of joint ventures if the parties' dealings do not establish a partnership. Whether the courts will recognise fiduciary obligations between joint venturers in these circumstances seems to be an open question. The competing factors are two: on the one hand, the reluctance to import fiduciary duties into commercial dealings noted above; and on the other, the fact that the joint venture, even where it does not amount to a partnership, has a consistency with established fiduciary relationships which licensing and distributorship agreements lack, based in the acceptance of mutual obligations by the participants²⁸.

There is much to be said in favour of Mason J.'s approach in *Hospital Products* as desirable in principle, and as extending the availability of equitable remedies to commercial transactions. *Brian* is clearly not authority against the acceptance of his Honour's reasoning in future decisions of the High Court. It remains that on its particular facts, and given the finding that the particular venture created a partnership, *Brian* does not itself evidence a present acceptance of Mason J.'s reasoning in *Hospital Products* by the High Court.

THE SCOPE OF THE FIDUCIARY DUTY AND THE RULE AGAINST CONFLICT OF INTEREST

Once the existence of a fiduciary duty upon the participants of the joint venture had been established, the logically subsequent question for the High

²⁵ Austin, *supra* n. 4 at 9.

²⁶ Finn, *op. cit.* 12.

²⁷ Austin, *supra* n. 4 at 8.

²⁸ Finn, *supra* n. 47 at 162.

Court in *Brian* was whether such a duty had been breached²⁹. In order to answer that question, it was necessary for the Court to delimit the boundaries of the fiduciary duty, to 'identify the nature of the particular fiduciary relationship and to define any relevant obligations which flowed from it'³⁰. The scope of such duties will depend upon the scope of the undertaking implicit in the particular relationship³¹, as modified by any contractual restriction of the obligations owed between the parties where the fiduciary obligations exist in connection with a contractual relationship³².

The existence of a fiduciary duty in consequence of a partnership or joint venture will *prima facie* require that the fiduciary does not act against the interests of the other parties to the relationship without their informed consent³³. Such application of the rule against conflict of interest to a joint venture relationship, particularly where the relationship is in substance a partnership, find support in the established applications of the rule to partnership³⁴ and to agency³⁵.

The Court of Appeal had treated UDC's breach of fiduciary duty as founded in a conflict of interest³⁶. The High Court's reasoning as the rule against conflict of interest is consistent with that of the Court of Appeal. The High Court confirmed that where one party to the venture gains an advantage additional to the benefits known to the other parties, then he will not be permitted to retain that benefit where he has failed to disclose it to the other participants.

Gibbs C.J. held that once the fact of UDC having been under a fiduciary duty was established, UDC's breach was in 'obtain[ing] for itself an advantage at the expense of and without the knowledge or consent of Brian'³⁷. The

²⁹ As to the proper sequence of approach to the question of whether a fiduciary duty has been breached, *Phipps v. Boardman*, *supra* n. 4 *per* Lord Upjohn, 127; *Industrial Development Consultants v. Cooley* [1972] 2 All E.R. 162; Finn, *op. cit.* 241.

³⁰ *Supra* n. 31 *per* Deane J. at 195; Pellatt, *supra* n. 2 at 196; Shepherd, J.C., *The Law of Fiduciaries* (1981) 35; Goff, R. and Jones, G., *The Law of Restitution* (2nd ed. 1978) 493.

³¹ *In re Coomber*; *Coomber v. Coomber*, *supra* n. 2 *per* Fletcher Moulton L.J., 729; *Phipps v. Boardman*, *supra* n. 1 *per* Lord Upjohn, 129; approved *NZ Netherlands Society v. Kuys*, *supra* n. 1 *per* Lord Wilberforce, 1225; approved *Hospital Products Ltd v. United States Surgical Corporation*, *supra* n. 2 *per* Mason J., 458.

³² *Supra* n. 1 at 196.

³³ *Supra* n. 47 at 167; MacWilliam, *supra* n. 22 at 233. As to the wider rule against conflict of interest, *Bray v. Ford* [1896] A.C. 44 *per* Lord Herschell, 51-52; *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All E.R. 379 *per* Lord Russell of Killowen, 386; *Phipps v. Boardman*, *supra* n. 4 *per* Lord Upjohn, 123; *Queensland Mines Ltd v. Hudson* (1978) 18 A.L.R. 1; (1978) 52 A.L.J.R. 399 *per* Lord Scarman, 401 (Privy Council); *Chan v. Zacharia*, *supra* n. 31 *per* Deane J., 198-199.

³⁴ Browne, D. (ed.) *Ashburner's Principles of Equity* (2nd ed. 1933) 322; Finn, *op. cit.* 235-236; *Russell v. Austwick* (1826) 1 Sim 52; *Cassels v. Stewart* (1881) 6 App Cas 64 *per* Lord Selbourne, 73, *per* Lord Penzance, 77, *per* Lord Blackburn, 79.

³⁵ *Halsbury's Laws of England*, Vol. I, para. 787; *Bank of Upper Canada v. Bradshaw* (1867) LR 1 PC 479 *per* Lord Cairns, 489; *Parker v. McKenna* (1874) 10 Ch App 96 *per* Lord Cairns, 118. That such application was justified in these early cases upon grounds of morality rather than on the basis of the legal nature of the agency form supports an extension of the reasoning to joint ventures as analogous relationships of trust.

³⁶ *Supra* n. 3 *per* Hutley, J.A. 496, 497; *per* Samuels J.A., 508.

³⁷ *Supra* n. 4 at 678.

majority (Mason, Brennan and Deane JJ.) treated the issue in rather greater depth. They looked first to the scope of the fiduciary duty, noting that the expectations both that the land purchased with the funds of the joint venture 'would be held available to be devoted to any ensuing joint venture', and that Brian 'as an accepted joint venturer who had already made financial contribution towards the proposed hotel joint venture, was and would remain able to participate in the net profits in accordance with its share in the relevant joint venture', were fundamental to Brian's participation in the venture³⁸. The majority held in consequence that the land which was the subject of the joint venture was within the scope of the fiduciary duty.

The majority then defined the nature of UDC's fiduciary duty, as had the Court of Appeal, by reference to the obligation to avoid any conflict of interest, as a duty 'to refrain from pursuing, obtaining or retaining for itself or himself any collateral advantage in relation to the proposed project without the knowledge and informed assent of the other participants'³⁹. Having so defined the fiduciary duty upon UDC, the finding that it had been breached by UDC's taking of a collateral mortgage over the property subject to the venture — as an attempt to apply that property 'to their own collateral purposes in a manner which involved the obtaining of a collateral advantage for themselves' and which was potentially and actually 'destructive of the whole interest of the other joint venturers' — necessarily followed:

In combining to apply the property to their own collateral purposes and in giving and obtaining those collateral advantages without the knowledge or consent of Brian, SPL and UDC each acted in breach of its fiduciary duty to Brian.⁴⁰

THE OBLIGATION OF DISCLOSURE

The decision of the Court of Appeal is particularly illuminating as to the obligation of disclosure following from the finding that joint venturers or intending joint venturers are under fiduciary obligations: this issue is treated by the High Court in less depth, and without disapproving the Court of Appeal's reasoning. The Court of Appeal's approach indicated that the requirement of disclosure imposes rigorous demands: the Court held that, where the parties to the transaction were under fiduciary obligations and hence subject to the rule against conflict of interest, then full and fair disclosure would be necessary in order to absolve the fiduciary of breach where a term of the interest of one of the parties was 'adverse to the common interest'⁴¹ or where the venture agreement gave 'a peculiar advantage' to one of the parties⁴².

American law is to similar effect, placing joint venturers under a duty of full and honest disclosure of everything affecting the relationship: *Sime v.*

³⁸ *Ibid.* 680.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Supra* n. 3 *per* Samuels J.A., 506, quoting Duff J. in *Hitchcock v. Sykes* (1913) 49 S.C.R. 403, 407.

⁴² *Ibid. per* Mahoney J.A., 512. Hutley J.A., 497 concurs in holding that there was a duty of disclosure upon both respondents UDC and SPL.

*Malouf*⁴³ establishes in American law that the duty arises with the opening of negotiations for the formation of a joint venture, and creates a more demanding disclosure requirement than that within a merely contractual relationship.

The Court of Appeal further held that merely to give the beneficiary of the fiduciary duty the relevant documents may not be sufficient to discharge the duty of disclosure: if those documents are complex, some explanation of their effect may be required. Mahoney J.A. pointed out that on the facts of *Brian*, 'the obligation of good faith did not require that SPL or UDC take the plaintiff and its advisers through each term of the mortgage document', but only that they draw attention to a term allowing a party 'a particular advantage over and above that which it would take as a member of the joint venture in ordinary circumstances'⁴⁴. That the term was not unusual in a particular class of transaction would not, in Mahoney J.A.'s view, exclude such obligation of disclosure where the term gave a participant such special advantage⁴⁵. On the facts of *Brian*, the Court of Appeal held that simply to hand over a draft mortgage document containing the collateralisation clause was insufficient disclosure to deny the breach of fiduciary duty involved in its insertion.

The consequence of such an approach in practice is that each intending participant in a joint venture would be well-advised to address his mind to whether any term of the venture agreement or associated documentation could constitute a special advantage, and if so draw it specifically to the attention of the other participants in the joint venture. Joint venturers will consequently be required — at least where there is any possibility that a fiduciary relationship may follow from the mutual obligations of the parties — to look not only to their own interests, but also to the knowledge of the other venturers of the legal and commercial results of the particular features of their arrangement, where any such feature may be of special benefit to one party.

Such a result is consistent with equitable principle, and with the nature of an obligation of full disclosure. It is however likely to be the source of some uneasiness in commercial circles, as ultimately requiring the parties to a joint venture either to restrain their inclination to gain the fullest advantage from the terms of their relationship, or to be prepared to disclose the particular terms of the venture agreement by which they have gained such advantage.

REMEDIES

The nature of the remedy granted in *Brian* followed from the particular circumstances of UDC's breach of fiduciary duty, which had created an

⁴³ 95 Cal App (2d) 82, 212 P (2d) 946 (1949), 213 P (2d) 788 (1950).

⁴⁴ *Supra* n. 3 at 511.

⁴⁵ *Ibid.*

encumbrance over the assets of the joint venture to the disadvantage of Brian. The majority in the High Court held that the consequence of UDC's breach was that UDC was unable to rely upon the collateralisation clause in order to deny Brian's assertion of its right to its share of the proceeds of the sale of the land subject to the joint venture. In reaching this result the majority relied upon *Thorne v. Thorne*⁴⁶ as to the effect of a breach of duty in the grant of a mortgage as rendering the mortgage unenforceable against the person to whom the duty was owed, concluding that despite the fact that the collateralisation clause had been incorporated as one of the terms of the joint venture:

All that Brian need assert against UDC is its entitlement to its share of the surplus proceeds of sale under the joint venture agreement, to which both UDC and it were parties. UDC cannot resist that claim by relying upon the 'collateralisation clause' which it obtained and retained in breach of the fiduciary duty which SPL and it owed to Brian for the reason that, to the extent of those clauses, the three mortgages were and are unenforceable by UDC against Brian⁴⁷.

Austin suggests that the commercial nature of a transaction may better be treated as relevant to the form of remedy granted, rather than as relevant to the question of whether a commercial relationship was fiduciary in nature⁴⁸. It seems to this writer that the High Court in *Brian* gave little indication of adopting such an approach in any general form. The High Court's recognition that Brian was entitled to relief, but that such relief should be other than by constructive trust, nonetheless indicates a flexibility as to remedy where the fiduciary duty has been established but the nature of the breach does not require the grant of a proprietary remedy.

CONCLUSION

While it is of course the decision of the High Court which is of binding authority in Australia, the decisions of both the N.S.W. Court of Appeal and of the High Court in *Brian* are of considerable interest as to equitable principle, both as to the nature of the fiduciary concept and as to its application in a commercial setting.

The treatment in the NSW Court of Appeal and in the High Court of the duty of disclosure, and the recognition that the obligation of disclosure will extend to negotiations leading to a joint venture when they give rise to fiduciary duties, are consistent with principle and may be supported in policy as encouraging a higher standard of commercial morality. Mahoney J.A.'s conclusion, not disapproved by the High Court, that such disclosure may require that a joint venturer draw the other parties' attention to a term of the agreement giving him a special advantage seems consistent with the fiduciary's duty of good faith, and with the nature of 'full' disclosure. The

⁴⁶ [1893] 3 Ch. 196, 203-204.

⁴⁷ *Supra* n. 4 at 680-681.

⁴⁸ Austin, *supra* n. 4 at 21.

requirement of disclosure, and its extension to negotiations prior to reaching a concluded contract, is however likely to be the source of some uneasiness among a commercial community which expects each party to a transaction to protect its own interests.

The High Court's approach confirms that the existence of fiduciary duties is to be established not only by the legal status of a joint venture but by the obligations undertaken by the parties in a particular relationship. Although the High Court's decision is in terms limited to the situation where a joint venture objectively creates a partnership between its participants, its reasoning is consistent with the proposition that a joint venture might give rise to fiduciary obligations although it did not in fact establish a partnership: the existence of such obligations would be determined according to the terms of the joint venture agreement, and according to any understanding between the parties prior to such agreement. Although the question is an open one, it would seem likely that the courts will reach a similar result in joint ventures which do not in fact create partnerships. It is to be noted that the result in *Brian* was reached although the joint venture was established in a commercial setting and on the basis of contract: the decision in *Brian* in this respect may be contrasted with *Moorgate Tobacco* and *Hospital Products*.

The conclusion that joint venturers may in particular transactions be subject to fiduciary duties seems desirable both in principle and in practice. The imposition of a fiduciary relationship upon the joint venturers finds support in the justifications in social policy for imposing obligations of good faith upon fiduciaries, such imposition functioning as a means of protecting the integrity of a common commercial relationship⁴⁹. Austin observes that there can be little commercial objection to the imposition of fiduciary duties upon at least some joint venturers, where such implication depends upon special circumstances of which businessmen may be made aware⁵⁰.

In any case, the joint venturers' liability *inter se* may be limited in practice where the parties to the joint venture have set out their rights and obligations in specific terms within the joint venture agreement: by doing so they may have restricted the scope of the duties owed so as to render less likely the breach of such duties⁵¹. In particular, if the venture is held to be in substance a partnership, the specific terms of the joint venture agreement may have altered the obligations owed between the partners by agreement, in accordance with the Partnership Act 1892 (N.S.W.) s.24, and the Partnership Act 1958 (Vic.) s.28.

The High Court's recognition in *Brian* that joint ventures are sufficiently various to deny them a single legal character is a practical recognition of the variety of commercial and legal advantages which participants may seek from

⁴⁹ Weinrib, *supra* n. 15 at 15.

⁵⁰ Austin, *supra* n. 4 at 18.

⁵¹ McPherson, *supra* n. 4 at 16; Wiese, P.L. 'Commentary on Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures', *Australian Mining & Petroleum Law Association Yearbook* (1984) 189, 190.

a joint venture arrangement, and of a consequent variability of joint venture forms. It gives, however, less attention than might have been hoped to the situation of joint ventures where the product rather than an intended profit is divided between the participants.

The High Court's reasoning differs from that of the Court of Appeal in its implications as to the relation between the joint venture and the partnership forms. It has been noted above that the intention of the parties will only be sufficient to avoid a partnership where the objective characteristics of the particular relationship are not those of partnership. The consequence of this principle is that in some circumstances the establishing of a joint venture — although understood by the parties to be a joint venture, and to be created for a limited purpose — may amount at law to partnership. In a sense the decision of the High Court in *Brian* is simply an application of this well-established rule.

It is however unclear how widely the decision in *Brian* ought to be interpreted. This is a matter of central importance to joint venturers with respect to its taxation implications and as to the possible liability of a joint venturer to third parties for the actions of the other venturers. McPherson has found in *Brian* support for the wider proposition that an association for business purposes, whatever its duration, where founded on mutual trust and confidence 'presumptively attract[s] the rules of partnership law. . . unless displaced by the agreement of the parties or surrounding circumstances'⁵². On such an approach, the class of joint ventures not creating partnerships would clearly be restricted.

Such a reading of *Brian* must be questioned to the extent that, despite the width of some *dicta* in the judgment, the case turned upon the issue of whether fiduciary duties were owed between the venturers *inter se*. It is by no means clear that the High Court in *Brian* intended to identify the joint venture structure at issue as a partnership for the purposes of taxation or liability to third parties. Further, as noted above, the fact that *Brian* involved a joint venture in real estate development, where the participants intended a splitting of product, involved similarities to partnership which are by no means so obvious with respect to mining and petroleum joint ventures where the parties take separate shares of the product.

It would be difficult to reconcile any wider interpretation of the holding in *Brian* as to the relationship between joint venture and partnership with the intention of the parties to a joint venture. It is not unlikely that in selecting a joint venture structure the participants in a particular undertaking may have sought to avoid the consequences of partnership, particularly as to the mutual agency between partners and the associated liability for actions of the other partner within the scope of the partnership⁵³, and as to taxation. A joint

⁵² McPherson, *supra* n. 4 at 15, 22.

⁵³ Nichols, H.W., 'Joint Ventures' (1950) 36 *Virginia Law Review* 425, 449.

venture would seem to its participants to contemplate their acting in large part in their own interests, rather than merging their separate interests as in partnership⁵⁴. To apply to a particular joint venture the principles applicable to partnership may well fix upon the participants precisely the liability they had sought to avoid.

To take a wider view of *Brian* would have the effect that relationships viewed by their participants to be joint ventures might in reality be latent partnerships, only to be recognised as such upon litigation. The wider the scope of the cooperation between the parties to a joint venture, the more likely it would be that their relationship would create a partnership between them, even if the rights and duties following from such partnership were limited *inter se* by the terms of the joint venture agreement. It is suggested that such a view of the decision ought not be accepted, since it would largely deny the commercial benefits of the 'joint venture' structure⁵⁵.

⁵⁴ Merralls, *supra* n. 5 at 12.

⁵⁵ Ryan, *supra* n. 6 at 144.