Joint Ventures — a branch of partnership law?

Maree C. Chetwin
Lecturer in Commercial Law, University of Canterbury.

Introduction

The current popularity of joint ventures as a form of commercial activity has given rise to a number of important conceptual legal and accounting issues — namely, what constitutes a joint venture and aligned with this, whether an unincorporated joint venture differs from a partnership.

The advantages of the joint venture are only applicable if a partnership is not created. Not only are there taxation advantages[1] (in Australia) but there are other advantages[2] depending on the nature of the joint venture arrangements that exist between the parties. In addition, if a joint venture is held to be a partnership, fiduciary obligations can be imposed by virtue of partnership law rather than because of the joint venture relationship. It is not proposed to consider the position of joint venturers as fiduciaries.[3]

There are both incorporated and unincorporated joint ventures. The incorporated joint venture is formed by investors as a separate entity. Its characteristics are defined by statute and case law and it is not proposed to discuss this type in detail. The unincorporated joint venture is usually further categorised into those which are partnerships and those which are not. It is the unincorporated joint venture[4] which is not a partnership which poses definitional and conceptual problems.

Some Australian commentators[5] have questioned the need for a separate classification of joint ventures and suggest a joint venture is either a purely contractual creature or a partnership. These commentators, and the protagonists[6] of a separate classification, consider the concept of joint venture does not depend upon *a priori* notions derived from the American model or models from other jurisdictions.

This article considers whether there is a separate legal concept of joint venture in Australia and New Zealand. It is proposed firstly to consider

1 M.J. Walsh, "Partnerships — Joint Ventures and Taxation" Dec 1978/Jan 1979, Taxation in Australia vol 13, 485. G.L.J. Ryan, "Joint Venture Agreements" (1982) 4 Australian Mining & Petroleum Law Journal 101 at 127. A.J. Black, "Joint Ventures, Partnerships and Fiduciary Duties: United Dominions Corporation Ltd. v. Brian Pty. Ltd" 15 M.U.L.R. 708 at 709. J.D. Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) A.L.J. 907.

2 P.W. Knox, Mining Joint Ventures 1982, Taxation in Australia, vol 16, 805. Ryan, black & Meralls, supra n.1.

3 See e.g. P.D. Finn, Fiduciary Obligations (1977); Essays in Equity (1986); Finn (ed), Equity and Commercial Relationship (1987); Finn (ed.), A.J. Black (supra n.1); S. Corcoran & J.C. Tucker, Joint Venturers as Fiduciaries (1989) 2 Corporate & Bus. L.J. 34 at 38.

4 For the purposes of this artice, the term "joint venture" is descriptive of the unincorporated joint venture which is not a partnership.

5 See e.g., "Joint Ventures" the Hon Mr Justice B.H. McPerson, Equity and Commercial Relationships, Editor P.D. Finn 1987 at 19-36.

6 See e.g. R.A. Ladbury, "Mining Joint Ventures" (1984) 12 A.B.L.R. 312; J.D. Merralls Q.C., Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts (1988) 62 A.L.J. 907.

briefly the concept in other jurisdictions. Secondly, to examine the Australian and New Zealand situation and in doing so to consider briefly whether the courts have developed a concept which is distinguishable from partnership.

United States of America

Although it was not until the latter part of the 19th century that the Courts began to distinguish between joint ventures and partnerships, the Americans have claimed the credit for inventing and developing the joint venture.[7] Notwithstanding the vast body of case law and commentaries, the concept remains elusive. American writers[8] twenty-five years ago questioned the need for a separate classification of joint ventures. However, Taubman[9] acknowledges:

> "Nevertheless, the writers have not been able to undo the work of the American courts."

As is the case in other jurisdictions, numerous definitions have been proffered. Zenichi Shishido[10] discusses the various approaches to definition, among them that of the economist and that used in the antitrust context, and cites Bromberg's as the classic definition. Bromberg[11] states:

> "A joint venture is an association created by co-owners of a business undertaking, differing from a partnership (if at all) in having a more limited scope. In all important respects, the joint venture is treated as a partnership."

The American definition adopted by Samuels J. in the New South Wales Court of Appeal in *Brian Pty. Ltd.* v. *United Dominion Corporation Ltd.*[12] was that of Williston:

> "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 (of creating that status) or corporation; 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."

Although there is no universally accepted definition of a joint venture under American law, there is a degree of consistency as to the criteria.

Taubman[13] lists six criteria judicial decisions have enunciated as the *sine qua non* for the creation and existence of a joint venture:

1. an agreement.
2. joint interest.
3. sharing of profits and losses.

7 Ryan, supra n.1 at 108.

8 J. Taubman, "What Constitutes a Joint venture?" (1956) 41 Cornell L.Q. 641 citing Nichols (1950) 36 Va. L. Rev. 425 and comments and notes in (1951) 25 Tul. L. Rev. 382. (1950) 38 Calif. L. Rev. 860; (1949) 18 Fordham L. Rev. 114; (1936) 35 Mich. L. Rev. 297.

9 Ibid., at 642.

10 Zenichi Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint venture November 1987, 39 Hastings L.J. 63, at 66.

11 Alan R. Bromberg, Crane and Bromberg on Partnership S.35 (1968).

12 [1983] 1 N.S.W. L.R. 490 at 506.

13 Supra n.8 at 643-9.

4. control.
5. fiduciary relationship.
6. right to an accounting, unless the account is stated or simple.

Henn and Alexander[14] note there is difficulty in determining when the legal relationship exists. They consider most authorities would agree on the first four criteria listed above. However, they state others would add

5. fiduciary relationship; and
6. right to an accounting as consequences rather than prerequisites.

Williston[15] states that a joint venture must have a contractual basis. In addition, he states:

> "the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> (b) A joint property interest in the subject matter of the venture;
> (c) A right of mutual control or management of the enterprise;
> (d) Expectation of profit, or the presence of "adventure", as it is sometimes called;
> (e) A right to participate in the profits;
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise."

Under American law, the rules of partnership law apply to joint ventures[16]. However the courts recognise the joint venture as a separate concept.

The difference between a joint venture and partnership, is that the joint venture is usually formed to carry out a particular venture and is dissolved upon completion. It is regarded as 'a sort of temporary partnership' ".[17]

Also, in America it has generally been held that a corporation may not joint a partnership and this has been cited as the reason for a clear differentiation between a joint venture and a partnership. As Williston explains, the prohibition is based on considerations of public policy in that the officers and directors of the corporation may not be able to carry out their responsibilities and that the corporate assets may be jeopardized in an ultra vires manner.[18] Increasingly, however, corporate participation in partnerships is now permitted by statute.

Canada

The Canadian Courts have adopted the American concept. In *Central Mortgage & Housing Corp.* v. *Graham et al*,[19] CMHC was held liable, as a joint venturer, along with a builder which had breached an implied warranty of fitness. The houses in the project in question were part of a shell housing project initiated by CMHC to provide home ownership for low-income families. The idea and its promotion came from CMHC which actively sought municipal approval and directly enlisted con-

14 Harry G. Henn & John R. Alexander, Laws of Corporations (3rd ed) 1983 at 106.
15 Williston on Contracts, 3rd ed., 1959 at 563-5.
16 Supra n.5 at 649 and n.8 at 112.
17 Supra, n.15 at 106.
18 Supra n.15 s.318 at 598 et seq.
19 (1973) 43 D.L.R. (3d) 686.

tractors to work on the houses. It provided full financing and purchasers had to be approved by it. All plans and specifications were provided by CMHC. On these facts CMHC and the builder were held to be involved in a joint venture. Jones J. quoted with approval of the definition of joint venture from Barrett and Seago's Partners and Partnership, Law and Taxation[20]

> "Joint adventures may be defined as an association of two or more individuals, corporations or partnerships or some combination of these, for the purpose of carrying on a business venture. Of more recent years, this rather peculiar type of business organization has had increased use and attention. Joint adventures are quite common in building and construction work. A useful and practical result can thus be obtained in that the task might well prove too large for a single firm, corporation or group of individuals. Moreover, a combination of equipment is required together with a pooling of skilled and experienced personnel make this form of organisation an attractive one. Speaking in broad general terms, much of the law of partnership is applicable to joint adventures."

Jones J. then cited extensively from Williston[21] and applied the criteria as follows:

> "In my view, there was a contribution by both parties of money, property, skill and knowledge to a common undertaking. There was a joint property interest in the subject-matter even though evidenced only in the mortgages. The parties had a mutual control and management of the enterprise during the construction of the houses and in the sales. The arrangement was limited to this project. There is no doubt that Bras D'Or intended a profit from the project. While there was not a mutual sharing of the profits, Central Mortgage clearly had a financial interest at stake and was vitally concerned with the successful completion of the venture. The project was within the operations of Central Mortgage under the *National Housing Act*, R.S.C. 1970, c. N-10. This was made clear by the evidence of the officials of the corporation. Based on the evidence, the arrangement between Central Mortgage and Bras D'Or can be characterized as a joint venture. To the extent that Bras D'Or in carrying on the venture incurred liabilities then both parties were bound."[22]

In *Carleton Condominium Corp No. 11* v. *Shenkman Corp Ltd.*[23] Krever J. distinguished the above case on its facts and decided there was not "sufficient indicia of a joint venture as defined in Williston to lead to any other conclusion than that the relationship . . . was that of developer and mortgagee".

England

The English courts have not developed a separate concept of joint venture distinguishable from partnership.

Halsbury's Laws of England discusses "joint adventure" under partnership.[24] The basic English legal textbooks do not refer specifically to joint ventures. Lindley on the Law of Partnership[25] does not discuss

20 Vol. 1 (1956).
21 Supra n.15.
22 Supra n.19 at 709.
23 (1985) 14 D.L.R. (4th) 571.
24 (4th ed 1981) Vol 35, para 8.
25 N.L. Lindley, Law of Partnershp (15th ed. 1984) at 74.

joint venture description or criteria. Joint venturers are mentioned to illustrate that even if parties describe themselves as such they may still be partners. "Joint adventure" is defined in Jowitt's Dictionary of English Law, as "a partnership for one particular transaction."[26] Lewis[27] notes that the question whether or not a Joint Operating Agreement constitutes a partnership has not received much attention in England. In his view joint venture is a term which comprehends partnerships as well as other joint arrangements, but he does not discuss in detail the characteristics of "other joint arrangements".

Scotland

The early Scots joint adventure was similar to the modern Australian mining or petroleum joint venture but with time it lost its original distinct identity[28]. The modern joint venture concept is a particular variety of partnership. It is differentiated from partnership by its limited purpose and duration and by the fact there is no use of a firm name.[29]

> "There is a species of association in trade analogous to, or perhaps more correctly a variety of, partnership in which the partners use no firm or social name although they are associated in joint adventure or trade which is confined to a particular adventure, speculation, course of trade or voyage."[30]

Australia

Much of the comment has been in relation to the mining and petroleum joint venture. It is questionable whether this joint venture warrants separate treatment from other joint ventures. It is more readily distinguishable from partnership in that each participant disposes of its product, thereby not creating profit sharing.

The mining joint venture has been extensively used in Australia. It has evolved as a vehicle based on Australian law and practice. Ladbury[31] stresses that the mining joint venture is not a slavish adoption of the United States joint venture. Merralls[32] likewise states that the modern mining joint venture does not depend upon *a priori* notions derived from English, Scottish or American models. He notes that the fact that parties agree to form a joint venture may now have some juridical significance because of the conventional form and common provisions adopted. He advocates that instead of straining conventional concepts or applying unsuitable labels to new things it is preferable to recognise differences where they exist and to devise appropriate legal solutions.

26 2nd ed. (1977) vol 1, 1016.

27 G.M. Lewis "Comment: The Joint Operating Agreement: Partnership or not?" (1986) 4 J. of Energy and Natural Resources Law 80.

28 Ryan, supra n.1, at 106-8.

29 David M. Walker, Principles of Scottish Private Law (4th edition 1988) at 390.

30 Encyclopaedia of the Laws of Scotland (1931), Vol. II, s.67 at 32 and Bell's Principles s.392 cited by Samuels J. in *Brian Pty. Ltd.* v. *United Dominion Corporation Ltd. [1983] 1 NSWLR 490, 505. See also United Dominion Corporation Ltd.* v. *Brian Pty. Ltd. (1985) 60 ALR 741, 749 (Dawson J.).*

31 Commentary by R.A. Ladbury in *The Law of Public Company Finance* (eds. Austin and Vann)(1987), at 37.

32 Merralls, supra n.1 at 907.

> "The law of joint ventures is not being made in the court or the statute books but in the voluminous documents which order the complex exploration development and financing activities that modern mining and energy operations involve. The child of convenience is assuming a character of its own.[33]

The above quotation is cited in 1982 by Gerald L.J. Ryan[34] who gives his personal view that the Australian Courts are likely to recognise a joint venture concept in recognition of commercial pressure.[35] He notes the concept is likely to take time to emerge and will be similar to but not identical with partnership and that it will take time for a body of principles to emerge.

There are variations and areas of uncertainty but the distinguishing features of a mineral or petroleum joint venture are established.[36] These do not reflect the features of joint ventures from the jurisdictions discussed above.

It is proposed to consider briefly what distinguishes the Australian mining joint venture from partnership. If the advantages of a joint venture are to be achieved then the indicia of partnership should be excluded.

Partnership

The Partnership Act[37] states with deceptive simplicity that:

> "Partnership is the relation which subsists between persons carrying on business in common with a view to profit."

The statutory definition consists of three elements all of which must be present for there to be a partnership.

1. A business being carried on

The expression "carrying on" implies a continuity of acts. Many joint ventures are formed for one-off enterprises. However, this does not mean they are partnerships. "Business" within the Partnership Act can cover a separate commercial adventure which is short-lived. In *Re Abenheim, Ex parte Abenheim,* Phillimore J. stated:

> "It has been suggested to me that "business" does not mean an isolated adventure, but that it means the regular trade of people even though they may have two or three separate trades. I see no reason for construing it in this way.[38]

In *United Dominion Corporation* v. *Brian Pty. Ltd.* (the UDC case)[39] Dawson J. observed:

33 Ibid; at 908.

34 Supra n.1 at 123. Ryan cites from an earlier publication, Merralls, J.D., Q.C., Mining and Petroleum Joint Ventures in Australia: Some basic Legal concepts (1981) Australian Mining and Petroleum Law Journal, vol.3, 1981, 2.

35 R.A. Ladbury, Mining Joint Ventures (1984) Australian Business Law Review 312 at 315 also notes that Australian courts are likely to recognise the joint venture in response to pressure from the mining and petroleum industries.

36 Michael Crommelin, "The Mineral and Petroleum Joint Venture in Australia" (1986) J. of Energy and Natural Resources Law 65.

37 Partnership Act U.K. s.1., N.S.W. s.1., Vic s.5., Qld s.5, W.A. s.7, S.A. s.1, Tas. s.6, A.C.T. s.6, N.Z. s.4.

38 (1913) 109 LT 219 at p.220.

39 (1985) 60 A.L.R. 741.

> "[T]he requirement that a business should be carried on provides no clear means of distinguishing a joint venture from a partnership. There may be a partnership for a single adventure or undertaking, for the Acts provide that, subject to any agreement between the partners, a partnership, if entered into for a single adventure or undertaking, is dissolved by the termination of that adventure or undertaking: see, e.g. Partnership Act 1892 (NSW), s. 32(b). A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business: *Smith* v. *Anderson* (1880) 15 Ch D 247 at 277-278; *Re Griffin; Ex parte Board of Trade* (1890) L.J. QB 235 at 237; *Ballantyne* v. *Raphael* (1889) 15 VLR 538. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this Court in *Canny Gabriel Castle Jackson Advertising Pty. Ltd.* v. *Volume Sales (Finance) Pty. Ltd.* (1974) 131 CLR 321; 3 ALR 409, suggests that the emphasis which will be placed upon continuity may not be heavy."

In the *Canny Gabriel* case, the High Court of Australia equated "commercial venture" with the "business" of the statutory definition. The plaintiff finance company had advanced funds to a promoter of pop stars on the basis that the promoter would assign to it "a one half interest in the contents" and conduct the tours of the pop stars (Elton John and Cilla Black) on a joint venture basis. The contract which was held to be a partnership seemed to lack the repetitive element, but the judges recognised the legitimacy of the partnership in a single venture. Higgins and Fletcher note that it is possible the Australian interpretation of the business is not entirely in accord with that recognised in England.[40]

Ladbury[41] argues that parties to an exploration joint venture are not carrying on business "because their object is the obtaining of a capital asset as distinct from obtaining of stock for consumption or sale". It seems difficult to explain why a joint venture involving substantial cost, time and ultimate revenue does not constitute a "business". Notwithstanding that, the cases cited above indicate that this part of the definition will receive little emphasis.

2. *Carrying on a business in common.*

Whether or not a business is carried on in common depends on the test in *Lang* v. *James Morrison & Co. Ltd.*[42] "Is the person who carries on that business doing so as agent for all the persons alleged to be partners?" Higgins and Fletcher state "a further requirement is that there must be a mutuality of rights and obligations between the persons on whose behalf the business is carried on."[43] Otherwise, every agent would be a partner of her or his principal.

This element suggests a mutual agency and more recently is regarded

40 Higgins and Fletcher, The Law of Partnership in Australia and New Zealand (5th ed by Keith L. Fletcher) 1987 at 32.

41 R.A. Ladbury, Mining Joint Ventures (1984) Australian Business Law Review 312 at 320. This view was earlier put forward by Merralls (supra n.35) and criticised by Ryan in "Joint Venture Agreements" (1982) 4 Australian Mining & Petroleum L.J., 101 at 131-4.

42 (1911) 13 C.L.R. 1 at 11.

43 Supra n.40 at 34.

44 Supra n.40 at 750.

by commentators[45] as being the most important in differentiating between joint ventures and partnerships. The joint venture participants are carrying on business severally and not in common. All the business activity may be separate except for the use of a common facility. "The only common aspects in the joint venture are the use of common assets and possibly contribution to common expenses and "common" decision making through the operating committee, in each case related to one particular project."[46]

3. With a View to profit

A number of commentators argue that under a joint venture agreement each party takes its share of product and deals with it separately and therefore it is not a partnership as there is no view of joint profit. This is based on the dicta of Dawson J. in the *UDC case:*

> "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 a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit.[47]

However, there is no reason why a court would not construe a product as a profit as profit will be the ultimate result.[48] The participants will receive product from the joint venture and when this is sold it must be ultimately construed as profit.

It is not clear whether or not sharing of profits is essential for a partnership. Lindley on Partnership considers the sharing of profits is "rather an accident than of the essence of the partnership relation".[49] The implication of this approach is that the "in common" refers to the mode of conducting business and not with the disposal of the profit.[50]

Also of importance is the intention of the parties. However, it does not matter whether the parties call themselves partners or not. It is sufficient that the evidence shows the parties intended to produce those elements of relationship which are indicia of partnership.

Judicial Recognition of Joint Venture in Australia

The courts in Australia have recognised the mining joint venture. In an unreported decision in the Western Australian Supreme Court, *Mount Isa Mines Ltd.* v. *Seltrust Mining Corp.*,[51] it was held that a mining joint venture was not a partnership. It was stated that the terms of the arrangement as a whole must be considered. In the words of Rowland J:

45 R.A. Ladbury, "Commentary" Equity and Commercial Relationships, Editor P.D. Finn 1987 at 41.
46 Ibid., at 39.
47 Supra n.40 at 750.
48 See Ryan supra n.1 at 137-142; Lehane "Joint Venture Finance" The Law of Public Company Finance (1986) at pp 516-7.
49 15th ed, p.15.
50 Supra n.40 at 38.
51 Supreme Court of Western Australia, 5 July 1985. Noted by R.A. Ladbury supra n.31 at 41. The Court of Appeal delivered its judgment on 27 September 1985 and dismissed the appeal.

"Counsel for S.M.C. stated *Brian's* case places too much emphasis on the American authorities which relate a joint venture to that of a partnership. It seems to me however I need not become involved in that debate. This is not a case where one can ignore what the parties have said. Clause 2.5 expressly provides that a partnership does not exist. This by itself may not be sufficient to exclude such a possibility but *if it can be seen from the terms of the arrangement as a whole that ti is not a partnership then effect will be given to the statement of the parties that it is not.* Cf. *Australian Mutual Provident Society* v. *Allan* (1978) 52 A.L.J.R. 407. Many of the indicia for partnership are missing in particular the ultimate equitable interest in the whole of the assets referred to in *Canny Gabriel Castle Advertising Pty. Ltd.* v. *Volume Sales (Finance) Pty. Ltd.* (1974) 131 C.L.R. 321. At the end of the day each of the parties takes in kind the object of the venture i.e. nickel concentrate and there is no express restriction on the way in which each deals with that product. I make these comments only to indicate that the agreement not only states that it is not a partnership but its provisions indicate in fact that it is not and were it necessary to do so it can be distinguished both in this and other aspects from *Brian's* case." [52]

Despite the fact the Courts in Australia have drawn a distinction between partnership and joint venture in a number of cases the concept is imprecise.

The landmark decision in *Brian Pty. Ltd.* v. *United Dominion Corporation Ltd.* (the *UDC* case) concerned a joint venture in relation to land and it was held to be a partnership. Only Dawson J.[53] referred to the common use of joint ventures in the exploration for and exploitation of mineral resources and for that reason it could be regarded as of limited relevance to that type of joint venture.

Samuels J. in the New South Wales Court of Appeal below[54] quoted Williston's definition with approval. However, it was not adopted in the High Court. The court did not find it necessary to define joint venture and merely made observations. Mason Brennan and Deane JJ. with whom Gibbs C.J. and Dawson agreed, recognised the imprecision of the term "joint venture":

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. Such a joint venture (or, under Scots' law "adventure") will often be a partnership. The term is, however, apposite to refer to a joint undertaking or activity carried out through a medium other than partnership: such as a company, a trust, an agency or joint ownership. The borderline between what can properly be described as a "joint venture" and what should more properly be seen as no more than a simple contractual relationship may, on occasion be blurred. Thus, where one party contributes only money or other property, it may sometimes be difficult to determine whether a relationship is a joint venture in which both parties are entitled to a share of profits or a simple contract . . ."[55]

The Court acknowledged:

52 Ibid. Italics added

53 (1985) 60 A.L.R. 741 at 750.

54 [1983] N.S.W.L.R. 490 at 506.

55 (1985) 60 A.L.R. 741 at 746. (Italics added)

> *"One would need a more confined and precise notion of what constitutes a 'joint venture' than that which the term bears as a matter of ordinary language before it can be said by way of a general proposition that the relationship between joint venturers is necessarily a fiduciary one* (but cf per Cardozo CJ, *Meinhard* v. *Salmon* [1928] 164 NE 545 at 546). The most that can be said is that whether or not the relationship is fiduciary will depend upon the form which the particular joint venture takes and upon the content or the obligations which the parties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers from being a fiduciary one. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of that joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship (see, generally, *Birtchnell* v. *Equity Trustees, Executors and Agency Co. Ltd.* [1929] 42 CLR 384 at 407-9)."[56]

The italicised dicta of the High Court emphasises that they were talking in ordinary language and did not regard the dicta as being definitive. It is submitted the High Court was influenced by the American concept e.g. the definition cited above refers to "a view to mutual profit".

A feature that emerges from the above dicta is that, unlike the partnership, the existence of fiduciary duty is not necessary for a joint venture.

A recent case, *Noranda Australia Ltd.* v. *Lachlan Resources NL*[57], emphasises the importance of the contractual provisions. A joint venture agreement in respect of a mining venture provided, inter alia, that the interests of any party might be assigned with the approval (not to be unreasonably withheld) of the other parties and the proviso stated:

> "PROVIDED THAT a party shall not negotiate with any prospective purchaser or asignee not already a party without first notifying the other party of its intention and affording the other party the like intention to offer to purchase the interest proposed to be sold."

One of the parties negotiated the sale of its interest without affording the other parties an opportunity to put an equal or better offer. The plaintiff sought to restrain the sale.

Bryson J. granted an injunction and held that on the construction of the agreement the fulfilment of the proviso was a necessary pre-condition for the existence of the right to assign.

His Honour noted the difficulty of the joint venture concept:

> "The relationship among members of the joint venture is difficult to characterize in a satisfactory way. The members took care not to create a partnership under the general law or under taxation law . . ."[58]

Clause 7.8 of the contract described the parties' relationship as fiduciary in nature and this was considered in relation to the right to assign. Bryson J. in considering the fiduciary duty and citing the observations in the *UDC* case held that the agreement was the prime source for determining

56 Ibid., at 746. (Italics added)
57 (1988) 14 N.S.W.L.R. 1.
58 Ibid, at 6.

the scope of any fiduciary obligations. The following passages are relevant:

> "There is as this submission would suggest, a source of fiduciary obligations in the general law which is additional to the terms of the parties' agreement but there are in my opinion no grounds for imposing on the parties wider obligations than those which by their agreement they imposed on themselves."

and

> "Although the parties are not partners the positions in which they stand in relation to each other would create a fiduciary relationship between the parties in some respects even if cl 7.8 were not in effect. However, in my opinion it would not be right to impose on the parties fiduciary obligations wider or different to those which in careful terms they imposed on themselves. The parties' agreement is the prime source for discerning the existence of a fiduciary obligation."[59]:

The Australian courts treat the joint venture as a distinct concept — it is not a partnership. Generally writers are in agreement as to the features. Merralls[60] lists the distinguishing features of a standard mining or petroleum joint venture as:

(1) The participants hold their interests in the assets committed to the venture in common and their liability is several
(2) An operation or manager is interposed between the participants and the operation and they have no authority to bind one another as agents.
(3) The participants receive the fruits of the venture separately and in kind.

Merralls considers the last feature is the main ground for distinguishing joint venture from partnership. However, as discussed above, this view is not unanimous.

There is no universally accepted definition of a mining and petroleum joint venture. It will only be when the features have been judicially approved that a settled definition can be stated.[61]

New Zealand

It is submitted the Australian mining and petroleum features are applicable to the same type of joint venture in New Zealand. O'Regan and Taylor state:

> "... internationally the petroleum and mining industry community generally have formed and contracted with joint ventures for many years and the joint venture agreements have developed into a form where they are relatively standard, in concept at least worldwide."[62]

They consider that the petroleum joint venture differs "from ventures in other industries in that they are cost sharing rather than profit sharing arrangements."[63]

59 Ibid, at 17.
60 See Merralls, supra n.1 at 909.
61 See e.g. Ladbury, n.32 at 38 and n.36 at 313.
62 P.W. O'Regan and T.W. Taylor, "Joint Venture and Operating Agreements" (1984) V.U.W.L.R. 85.
63 Ibid at 85.

Judicial Recognition of Joint Venture in New Zealand

Commerce Commission v. *Fletcher Challenge Ltd. & Ors*[64] (the Winstone case) is not a mining and petroleum joint venture case — it is a case on takeovers and mergers, the facts are set out below. McGechan J. considered at length recent case law and legal commentary on the meaning of joint venture.

The major New Zealand cement users were Fletcher Challenge Limited ("FCL") through a subsidiary and Brierley Investments Limited ("BIL") through its subsidiary, Winstone Limited ("Winstone"). Golden Bay Cement Company Limited ("GBL"), one of the two cement manufacturers in New Zealand was owned as to 75% by a United Kingdom company called Blue Circle plc ("Blue Circle"). FCL applied via its wholly owned subsidiary Greyfriars Investments Limited ("Greyfriars") for clearance from the Commerce Commission to acquire up to 100% of the issued capital of GBL. Winstone also applied for clearance to acquire 100% of GBL. Both were granted clearances to acquire up to 100% of GBL. There were discussions between BIL/Winstone and FCL as to a possible 50/50 partnership between the companies to own and rationalize the cement industry in New Zealand. In May/June 1987 Winstone became the successful bidder for the Blue Circle shares and picked up the outstanding minority interest over the remainder of 1987.

In late September FCL and Winstone visited the Commerce Commission to explain that FCL was acquiring 50% of GBL from Winstone. However, there was no documented agreement as at 30 September. On 23 December 1987 49.63% of the shares in GBL were transferred to FCL in the name of its subsidiary Greyfriars. The Commission brought a test case pursuant to Part VI of the Commerce Act 1986.

The Commission put forward three causes of action. Of relevance here is the second — namely that there was a partnership or joint venture between Fletcher Challenge and Winstone which required clearance as a fresh merger or takeover proposal.

McGechan J., noted that the concept of partnership was well understood but there was much less certainty as to the joint venture. His Honour stated he suspected the pivotal motive for using a joint venture "has been to endeavour to avoid the creation of a partnership with its possibilities of joint and several unlimited liability".[65] The participants to a joint venture typically provide that they are to be severally liable proportionately, in accordance with their interests in the joint venture, for debts and losses. However, as far as third parties are concerned, liability will depend on the law of agency. Ryan points out that if parties to a typical mining joint venture appoint a manager jointly this could raise "the possible problem of joint principals being liable jointly for the acts of their agent."[66]

In considering the definition and boundaries for a joint venture McGechan J. warned against American authority:

> "The American writings should perhaps be used with care in light of the observations of Dawson J. in *United Dominions Corporation Ltd. (known as*

64 (1989) 4 NZCLC 64,973.
65 Ibid at 65,027.
66 See Ryan n.1 at 143.

AMEV-UDC Finance Ltd.) v. *Brian Pty. Ltd.* (1985) 60 ALR 741, at 749 as to the "single business transaction" orientation of American thinking on the concept."[67]

Notwithstanding the warning, it is unfortunate the definition adopted followed the *UDC* case which was influenced by American authority as is evidenced by "with a view to mutual profit". The absence of a view to mutual profit is regarded as being a distinguishing feature between the Australian mining and petroleum joint venture and the American joint venture.

It was held that what is required to progress a contract to joint venture status is:

> ". . . some contractual "association of persons for the purposes of a particular trading, commercial . . . undertaking with a view to mutual profit" (*UDC* v. *Brian Pty Ltd* op. cit. 746. There must be that further joint effort or input with a view to profit resulting, or as put more concisely by the High Court of Australia (above) "a joint undertaking or activity."
>
> Once the matter is so stated, as indeed the High Court of Australia appears to recognise, there may well be an overlap between so called joint venture, and partnership as classically understood. Indeed, it may be that partnership is simply a specialised development of one area of joint venture. *In the end the matter is one of substance and intention. The Court will look at the substance which is agreed."*[68]

McGechan J. regarded it as noteworthy that the majority in the *UDC case* did not regard the existence of fiduciary duty as necessary for a joint venture. His Honour further noted the observations of the Court in the *UDC case* were "quoted with apparent approval by Thompkins J. in *Marr* v. *Arabco Traders Ltd.* (1987) 1 NZBLC 102,732 at p. 102,744 in connection with questions of fiduciary duty."[69]

A further indicator of a joint venture was the single venture projects:

> "There is some temptation to categorise single venture projects e.g. a mineral search or exploitation as a joint venture rather than a partnership. For my part I think that is some guidance. However, like labelling, it is merely an indicator, and is not conclusive; . . .[70]

With respect, this seems to contradict the earlier statement quoted above that the American writings should be used with some care . . ." as to the "single business transaction" orientation of American thinking on the concept".

His Honour concluded that a joint venture agreement had been reached:

> "This was not mere fortuitous co-ownership as would have occurred if somehow each side independently purchased 50% without reference to the other. It was a situation created as the result of deliberate agreement and consequential transfer from the one to the other. Nor was this a situation of mere passive co-ownership, as if each had advanced money and was interested merely in a return. It was a more dynamic situation in which jointly held GBL would be restructured and operated so as to achieve greater efficiencies in the cement

67 Ibid at 65,026.
68 Ibid at 65,028; Italics added.
69 Ibid at 65,027.
70 Ibid at 65,028.

> manufacturing industry. To put the situation colloquially, the pair "had plans" for GBL, to be jointly worked through for the benefit of both, and with input from both. It was an association of the pair in a venture for mutual profit. It is within the Commission plea of "partnership or joint venture"."[71]

For the purposes of the decision it did not matter whether the arrangement was a joint venture or partnership but his Honour inclined more to the alternative of joint venture for two stated reasons namely:

(1) the clause in the draft agreement excluding partnership or agency,
(2) ". . . plus the resources exploitation nature of the activity."[72]

In addition to the above two criteria, from the dicta cited, McGechan J. in differentiating the joint venture from the partnership, identified three further criteria namely: liability, questions of fiduciary duty and the one-off venture.

It was held clearance was given to the original FCL proposal construed as relating to an FCL acquisition independent of Winstone. There was no clearance given to the joint venture proposal, under which each of FCL and Winstone ended up owning 50%, as joint venturers. In the implementation of the latter, at least to the civil standard, there was a breach of s.50.

In the recent unreported High Court decision *Prophecy Mining NL* v. *Atkinson & Anor*[73] Kiwi Gold NL sought to avoid a joint venture agreement entered into with Prophecy Mining (in more favourable economic conditions) relating to the exploration of a mining licence whereby Kiwi Gold was obliged to contribute a critical $70,000 towards the venture within one year of Kiwi Gold NL being listed on the NZ Stock Exchange. The High Court held, inter alia, (without citing authority) that although the joint venture is a contractual agreement this did not preclude the imposition of a fiduciary duty to act reasonably and in good faith in the implementation of their joint undertaking and this would be implied into the contract itself.

Thomas J. in construing the agreement stated:

> "Such a fiduciary obligation arises in its own result, as a result of the relationship of the joint venture partners. But I also consider that it is a proper implication to be implied in the contract itself."[74]

The reference to partners was not in terms of the Partnership Act but rather as an alternative to participants or members. The High Court treated the joint venture agreement as something other than a partnership.

In the recent Court of Appeal decision *Petrocorp Exploration Ltd. & Ors* v. *Butcher*[75] (an appeal from judicial review proceedings) the joint venture was also regarded as something other than a partnership. The appellant companies were parties to a joint venture agreement with the respondent, the Minister of Energy. The Court of Appeal declared the Minister of Energy's grant of a petroleum mining licence to himself to be unlawful.

71 Ibid at 65,030.
72 Ibid.
73 Thomas J., HC — Auckland, CP 2264/88; 8/8/1990 cited in Capital Letter, Vol 13, 37-5-D.
74 Ibid, at 12.
75 CA 240/89; 14/8/1990 cited in Capital Letter, Vol 13, 31-8-C.

Of relevance here is the dicta of Sir Robin Cooke:

> "In accordance with common Australasian practice, the joint venture operating agreement includes provisions that it represents the entire understanding of the joint venturers in relation to the matters dealt with therein and that it should not be construed as creating any partnership. They are in sections 14.02(c) and 14.04(a). But there is some natural analogy to a partnership, as is borne out by the use of the expression 'partners' by the Minister and others, and the agreement creates a relationship where good faith and reasonable co-operation are called for."[76]

Conclusion

Internationally, the joint venture is an increasingly popular form of enterprise organisation. As has been predicted by earlier commentators,[77] the courts in Australia (and New Zealand) have recognised the joint venture concept but it is taking time for the criteria to emerge.

Joint venture law in Australia has developed in relation to the mining and petroleum industries. The participants intend that the joint venture is something different from a partnership and this has been endorsed by the courts. Joint ventures in the mining and petroleum industries are easier to distinguish because of the taking of product, their elaborate structure and complex agreements. However, joint ventures are not confined to this industry as is evident from the *Commerce Commission case.*[78]

It is critical that agreements are clearly drafted and cover all possible eventualities. The agreements should deal fully with all aspects especially those which could lead to future disputes. As it was put by Dawson J. in the UDC case:

> "... the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law ..."[79]

The importance of the contractual provisions was spelt out in *Noranda Australia Ltd.* v. *Lachlan Resources NL.*[80]

In that case, and in others cited above the Courts have stressed the importance of a clause specifically excluding partnership or agency. Despite such a clause in the earlier *Canny Gabriel case*[81] (discussed above) the joint venture was held to be a partnership. However the court identified a number of other factors indicating the existence of a partnership. The case is not without its critics.[82]

The writer does not define joint venture. Some definitions have

76 Ibid at 40.
77 Supra n.35 & 36.
78 Supra n.64.
79 Supra n.39, at 750.
80 Supra n.57.
81 (1974) 131 CLR 321.
82 Corcoran & Tucker, supra n.3 at 37.

emphasised joint control[83] but, joint control could also be indicative of a partnership. Ryan[84] cites definitions, one of which is Ladbury's:

> "For the purposes of this paper I use the expression 'joint venture' to describe a form of unincorporated business association which is not a partnership, the terms and conditions for the conduct of which are established by contract in various agreements the principal agreement being the so called joint venture agreement."

This writer prefers this definition in that it does not follow American definitions, it emphasises a joint venture is not a partnership, the importance of contractual terms and is not confined to the mining and petroleum industries. Additional criteria the writer would emphasise in such a definition would be "a joint undertaking or activity" (*UDC case*) and the individual gain of the participants.

The joint venture is something other than a partnership. The activity of a joint venture is joint but little else is intended to be joint — in the words of Bryson J., "Joint" is a solecism in the expression "joint venture"."[85]

83 E.g. The Commission of the European Communities has generally defined joint ventures from the criteria of competition law as "undertaking jointly controlled by two or more economically independent firms". 52 Halsbury's Law of England 19.393, 19.394. See also International Accounting Standard 1/E-28.

84 Supra n.1 at 123.

85 Supra n.57 at 5.