Joint ventures and fiduciary obligations

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Joint ventures are becoming increasingly important in business endeavour. Sometimes such ventures give rise to partnerships. Where such ventures do not give rise to partnerships, a serious question arises whether a fiduciary relationship can be said to exist between the venturers. This paper examines some of the issues that arise in using fiduciary law in this context.

I INTRODUCTION

In New Zealand, arrangements commonly described as "joint ventures" include real estate development and subdivision arrangements, financing arrangements, farming arrangements, mining and petroleum arrangements, entertainment arrangements, and arrangements for the exploitation of a patent, tradename or copyright.[1] However there is uncertainty in the law as to what is meant by the term "joint venture", and as to the obligations that exist between joint venturers.

The New Zealand High Court has recently given some content to the term "joint venture". In *Marr* v *Arabco Traders Ltd*,[2] Tomkins J, following the High Court of Australia in *United Dominions Corporation Ltd* v *Brian Pty Ltd*,[3] expressed the view that the term "joint venture" is not a technical legal one. Rather it is used in ordinary language to connote an association of persons for a particular endeavour with a view to mutual profit, with each person contributing money, property or skills. In *Commerce Commission* v *Fletcher Challenge Ltd*[4] McGechan J supported this view. After considering the various authorities, his Honour said:[5]

> I think some care is needed in relation to any sweeping definition. The New Zealand commercial world in my perception has embraced the label "joint venture" without necessarily thinking deeply as to its meaning or implications. I suspect in many cases the pivotal motive has been to endeavour to avoid the creation of a partnership with its possibilities of joint and several unlimited liability. Obviously, to raise a joint venture something more is needed than mere co-ownership or contractual relationship. ...What is required to progress matters onward 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* at p 746.

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1 J Maxton "Joint Venture or Partnership?" (1987) 4 BCB 221.

2 (1987) 1 NZBLC 102 732.

3 (1985) 59 ALJR 676.

4 [1989] 2 NZLR 554.

5 Above n 4, 615-616.

> 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".
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> 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.

"Joint venture" is thus a loose term, used to describe a (generally unincorporated) business association which may or may not be a partnership.

When determining the obligations existing between joint venturers, the first step is to determine whether the joint venture agreement creates, in law, a partnership. A discussion of that issue is beyond the scope of this paper.[6] If a joint venture creates a partnership, it is well settled that fiduciary obligations will automatically be imposed on the parties.[7] However, the obligations existing between parties to a non-partnership joint venture are rather more uncertain. This paper attempts to address that uncertainty, and will discuss whether the strict fiduciary standard of conduct, which is presently imposed on partners, will be imposed upon joint venturers who are not partners.

The mining and petroleum joint venture has been singled out as an example of a non-partnership joint venture.[8] In Australia and Canada, as in New Zealand, the mining and petroleum joint venture has became a popular business vehicle and has assumed a "character of its own."[9] The typical characteristics of mining and petroleum joint ventures are as follows. Usually one of the parties is appointed as "operator" and manages the day-to-day running of the project. An operating committee comprised of representatives of the parties makes policy decisions and gives instructions to the operator. The property of the venture is usually held by the parties as tenants in common in specific proportions and the parties are severally liable for debts only to the extent of their proportionate interest. Each joint venturer is entitled to a proportionate share of the product of the venture. The joint venture then terminates and each party deals with the product separately.

It is said that the mining and petroleum joint venture is not a partnership because it does not satisfy the statutory definition. Section 4 of the Partnership Act 1908 states: "Partnership is the relation which subsists between persons carrying on a business in common with a view to profit." There are two arguments made in relation to joint

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6 See M C Chetwin "Joint Ventures - a Branch of Partnership Law" (1991) U Queensland LJ 256, 261-266.

7 *Birtchnell* v *Equity Trustees* (1929) 42 CLR 384; *Chan* v *Zacharia* (1984) 53 ALR 417.

8 G L J Ryan "Joint Venture Agreements" (1982) 4 AMPLJ 101; J D Merralls "Mining and Petroleum Joint Ventures in Australia : Some Basic Legal Concepts" (1981) 3 AMPLJ 1; R A Ladbury "Commentary" in P D Finn (ed) *Essays in Equity* (Law Book Company, Sydney, 1985) 37.

9 J D Merralls, above n 8, 2.

venture agreements, it is argued that the joint venture business is not being carried on "in common".[10] This is essentially because the venturers are severally and separately liable to third parties, and because each venturer severally and separately appoints the operator as its agent. The parties have no authority to bind one another as agents. Secondly, it is argued that the parties are not carrying on a business in common "with a view to a profit."[11] Each party receives the product of the venture separately in kind, and may sell it immediately or process it further before selling it. Profit from sale is thus not made jointly. For these reasons the mining and petroleum joint venture is probably not a partnership.

This paper argues that the non-partnership joint venture is not a category of relationship to which fiduciary obligations automatically attach. However, in certain circumstances the fiduciary standard of conduct may be imposed by the courts. First, general fiduciary principles are outlined. Secondly, since the joint venture is primarily a creature of contract, the special considerations relevant to the imposition of fiduciary obligations on parties to a contract are examined. Finally, one preferred approach to the question whether fiduciary obligations are owed between joint venturers is selected and applied.

II NON-PARTNERSHIP JOINT VENTURES: THE NATURE OF THE FIDUCIARY OBLIGATION

Fiduciary law has been developed by courts of Equity with the policy objective of maintaining the integrity of relationships which are regarded by society as requiring a high degree of commitment. It achieves this objective by placing an intense standard of conduct on the "fiduciary", which is rigourously exacted, and for which breach is remedied flexibly by the availability of both personal and proprietary remedies.

A The Standard of Conduct

Once a person has been designated a fiduciary, Equity's most intense standard of conduct is imposed. The distinctive feature of this standard is the absolute prohibition on self-interested behaviour. This is a severe restriction on the fiduciary's freedom. "Fiduciary" is therefore a descriptive term for all relationships where the law totally proscribes self-interested conduct and imposes on one party to the relationship a duty to act with the utmost loyalty in the interests of the other party (or in the joint interest in the case of a partnership or joint venture[12]).[13]

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10 R A Ladbury, above n 8, 41; K M Hayne "The Need for a Joint Venture Code?" [1980] AMPLA Yearbook 362, 365.

11 R A Ladbury, above n 8, 40; G L J Ryan, above n 8, 137-142; J D Merralls "Mining and Petroleum Joint Ventures in Australia : Some Basic Legal Concepts" (1988) 62 ALJ 907, 909; *UDC* v *Brian,* above n 3, 681 per Dawson J.

12 P D Finn "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76, 83.

13 See P D Finn "The Fiduciary Principle" in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 27; L S Sealy "Some Principles of Fiduciary

However, New Zealand courts have in the past confused the fiduciary standard of conduct with the less stringent "good faith" standard of conduct.[14] The good faith standard allows a party to act self-interestedly but in doing so to have regard to the interests of the other party. Its main ground is contract law and it is often called the duty of "fair dealing". The person is required to weigh up conflicting interests rather than to act with undivided loyalty in the interests of the other party or in the joint interest.[15] This confusion of the two standards occurs when the court desires to impose a proprietary remedy, and the use of the "fiduciary" label is perceived as necessary in order to achieve this end. But this reasoning is fallacious, and there is a danger that the fiduciary standard will lose its distinctive quality.

B Method of Exacting the Standard

The method which the courts of Equity have developed to exact the rigorous standard of conduct placed on a fiduciary is draconian. To ensure adherence, the fiduciary is prohibited from placing him/herself in a position where the opportunity exists to prefer his/her interest over the beneficiaries'[16] interest. In this way all temptation is removed. The fiduciary is deterred from even contemplating making a profit from his/her position. It is irrelevant to liability whether the fiduciary *actually* acted dishonestly.

On this point, Finn has said that two overlapping proscriptions are imposed on fiduciaries.[17] Fiduciaries:

(1) cannot use their position to their own or to a third party's possible advantage or to the beneficiary's possible disadvantage (this is called misusing their position) and;

(2) cannot, in any matter within the scope of their service, have a personal interest or an inconsistent engagement with a third party (this is called conflict of duty and interest[18] and conflict of duty and duty respectively), unless this is freely consented to by the beneficiary or authorised by law.

Obligations " [1963] CLJ 119; D W M Waters *The Law of Trusts in Canada* (2 ed, Carswell, Toronto, 1984) 32.

14 *Petrocorp Exploration Ltd* v *Minister of Energy* [1991] 1 NZLR 1, 36 per Cooke P using the term fiduciary in an "elastic" sense as a duty of "good faith and reasonable cooperation"; *Kiwi Gold No Liability* v *Prophecy Mining No Liability* Unreported, 18 July 1991, Court of Appeal, CA 30/91; *Offshore Mining Company Ltd* v *Attorney General*, Unreported, 28 April 1988, Court of Appeal, CA 116/86; *Marr* v *Arabco*, above n 2, 102, 745.

15 P D Finn, above n 13, 4.

16 "Beneficiary" is used in the broader sense as the person in the relationship who is owed fiduciary duties.

17 P D Finn, above n 13.

18 *Bray* v *Ford* [1896] AC 44, 51 per Lord Herschell.

The above overlapping proscriptions state the obligation of the fiduciary in the most general terms. The courts have developed a number of more specific duties.[19] These specific duties do not apply uniformly to all types of relationships. Rather, the nature and scope of their application depends upon the circumstances.[20]

This strict method of exacting the fiduciary standard can be illustrated by the case of *Keech* v *Sandford*.[21] There a trustee used his position to obtain a leasehold after the lessor had failed to allow the beneficiary to renew. It was not proven that the trustee was disloyal and no loss was suffered by the beneficiary. But because the possibility existed that the trustee had been disloyal, the trustee was held liable for breach of fiduciary duty.

There are two justifications for this rule which proscribes possible conflict as well as actual conflict of interest and duty. First, there is the prophylactic justification - the fiduciary is strongly deterred from breaching his/her fiduciary duty. Secondly, there is an evidential justification. If the beneficiary was required to prove actual disloyalty (that is, that the fiduciary was swayed by his/her own interests rather than acting in the sole interests of the beneficiary), then in many cases the burden of proof would be too strict. Often the fiduciary holds all the necessary information. Therefore the rule is that, when the possibility existed that the fiduciary could have acted other than for the best interests of the beneficiary, the beneficiary is not required to prove actual disloyalty; it is presumed.

It has been suggested[22] that the above presumption that the fiduciary acted dishonestly is not an irrebutable presumption. Where it is *proven* that the fiduciary acted with utmost loyalty, then the fiduciary should not be held liable for breach of duty. In other words, to hold a fiduciary liable for breach of duty there must be a "real sensible possibility"[23] that the fiduciary acted for his/her own selfish interests, and not merely an hypothetical possibility.

However in *Phipps* v *Boardman*[24] the trustees purchased shares in a private company purely in order to gain control of it so that they could make it a profitable investment for the beneficiaries (who themselves held a share interest in the company). The deal was profitable to the beneficiaries as well as to the trustees personally. It was *proven* that the trustees acted with the utmost honesty and loyalty in the sole interests of the

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19 Finn has identified eight specific fiduciary duties: P D Finn *Fiduciary Obligations* (Law Book Company, Sydney, 1977).

20 *NZ Netherlands Society 'Oranje' Inc* v *Kuys and the Windmill Post Ltd* [1973] 2 NZLR 163, 166 per Lord Wilberforce; *Birtchnell* v *Equity Trustees*, above n 7, 408 per Dixon J.

21 (1726) Cas temp King 61.

22 G Jones "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 LQR 472, 478.

23 *Phipps* v *Boardman* [1967] 2 AC 46, 124 per Lord Upjohn (dissenting).

24 Above n 23.

beneficiaries. Yet the majority in the House of Lords held that the trustees were liable to account for their profit.

This decision should not be followed. A fiduciary who can be shown to have acted loyally and in the interests of the beneficiary should not be held liable for breach of fiduciary duty, even if a profit was made. If Equity's method of exacting the fiduciary standard of conduct was relaxed in this way, there would be no dire consequences for the evidence justification which favours *prima facie* strict liability, because the onus would be on the fiduciary to show loyalty. As for the deterrence justification, it is questionable whether it is necessary to make an example of a fiduciary whose integrity has been proven, in order to deter others.[25]

C *Remedies Available for Breach of the Fiduciary Standard*

Remedies available for breach of a fiduciary duty are traditionally aimed at requiring the fiduciary to disgorge any gain made, that is, they are restitutionary. In *Aquaculture Corporation* v *New Zealand Green Mussel Co Ltd*[26] the Court of Appeal emphasised that, following the merging of law and equity, the full range of remedies, whether originating in common law or in equity, is available for breach of an equitable duty.[27] The restitutionary measure will be important when the beneficiary has suffered no loss. Following this decision the plaintiff can alternatively opt for the compensatory measure and perhaps even for exemplary damages.[28]

It is significant that both personal and proprietary remedies will be available. The personal remedies include requiring the defendant fiduciary to account in equity or to pay equitable damages. Proprietary remedies include the equitable lien and the constructive trust. These proprietary remedies are significant because they enable the beneficiary to pursue the specific property into the hands of third parties; and can give the plaintiff-beneficiary priority over unsecured creditors of the defendant where the defendant is insolvent.

The identification of persons who are subject to these unrelenting fiduciary rules becomes a vital concern. But first, since joint ventures are essentially contractual, it is necessary to consider the special problems that arise where fiduciary principles are imposed upon parties who are negotiating towards or who have concluded a contract.

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25 Perhaps this question of whether it is necessary to make an example of an honest fiduciary can only be answered by considering the facts of any particular case: G Jones, above n 22, 502.

26 [1990] 3 NZLR 299.

27 Above n 26, 301 per Cooke P.

28 The Court of Appeal declined to award exemplary damages in an action for breach of confidence because the award of compensatory damages in the particular case sufficiently punished the defendant. However it was suggested that exemplary damages may be awarded in other cases for breach of confidence: above n 26, 302 per Cooke P.

III CONTRACT LAW AND THE FIDUCIARY OBLIGATION

Contract law is primarily concerned with fulfilling the expectations of the parties. Classical contract theory favours principles of individualism and freedom of contract to achieve this end. The fiduciary obligation is a potential inroad into contract law. First, a liability issue arises: to what extent can fiduciary law create rights and obligations where contract law does not? Secondly, there is an issue in respect of remedy: in what circumstances can fiduciary law apply to give remedies beyond those available for breach of contract?

A Liability

The fiduciary standard of conduct, both when it is imposed on parties negotiating towards a contract and when it is imposed on parties who have already executed the contract, can give the parties rights and obligations not available at contract law.

1 Parties negotiating towards a contract

Classical contract theory takes the view that neither party owes any duties to the other party before the contract is made.[29] It is assumed that at the negotiation stage the parties will have equal legal freedom to bargain in their own self-interest, and in this way will reach true consensus without the law's interference. Fiduciary law, by imposing an obligation on the fiduciary to protect the beneficiary's interests, limits one party's freedom to unreservedly pursue his/her own self-interest when negotiating towards a contract.[30]

Yet fiduciary duties can probably be imposed on parties negotiating towards a contract. In *UDC* v *Brian*[31] it was held that the parties had eventually concluded a partnership agreement. But the alleged breach of fiduciary duty occurred *before* the partnership agreement was fully formalised. It was held that fiduciary duties existed at that time. Mason, Brennan and Deane JJ said in their joint judgment:[32]

> 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.

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29 P S Atiyah *An Introduction to the Law of Contract* (4 ed, Clarendon Press, Oxford, 1989) 108.

30 Duties of "good faith", which allow the pursuit of one's individual interests but curtailed by the maintenance of reasonable community standards, are another potential inroad to these principles of classical contract law: R E Hawkins "*LAC* and the Emerging Obligation to Bargain in Good Faith" (1990) 14 Queens Law Journal 65.

31 Above n 3.

32 Above n 3, 680.

The New Zealand High Court has given support to this proposition.[33]

The position is more controversial where parties are negotiating for a contract which is never concluded. In *Fraser Edmiston Pty Ltd* v *AGT (Qld) Pty Ltd*[34] the parties were negotiating towards a partnership but they never formalised their relationship. Relying heavily on *UDC* v *Brian*,[35] it was held that fiduciary duties were nevertheless owed.

In *LAC Minerals Ltd* v *International Corona Resources Ltd*[36] the Supreme Court of Canada debated the question whether a fiduciary relationship can exist between parties negotiating toward a partnership or joint venture where no agreement is ever concluded. Sopinka J said:[37]

> The parties had not advanced beyond the mere negotiation stage. Indeed, they had not as yet defined what precisely their relationship would be.

On this basis the facts were distinguishable from those in *UDC* v *Brian* where, at the time the fiduciary duties were imposed, "...the arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiation."[38] It was left open whether fiduciary duties might be imposed in other cases where negotiating parties did not conclude a formal agreement.

2 Parties to a concluded contract

Fiduciary duties more often arise in the case of parties to a concluded contract.[39] This is also controversial. The principle of freedom of contract states that the parties should be able to define and limit their obligations by the terms of their contract.[40] The law should not intervene by imposing further obligations, in particular burdensome fiduciary ones. This is especially so where the contract comprehensively sets out the parties' rights and obligations so that every contingency is dealt with, as is often the case with joint venture contracts.

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33 *Marr* v *Arabco* above n 2, 102, 745; *North City Corporation Ltd* v *Tower Corporation* Unreported, 9 May 1991, High Court Auckland Registry, Commercial List CP47/89, Chilwell J; *Van Dijk* v *McCracken* Unreported, 30 June 1987, High Court Christchurch Registry, CP 198/87, Tipping J; *Gallagher* v *Schulz (No 1)* Unreported, 1 June 1988, High Court Christchurch Registry, A 323/83, Williamson J.

34 [1988] 2 Qd R 1.

35 Above n 3.

36 (1989) 61 DLR (4th) 14.

37 Above n 36, 65.

38 Above n 3, 680.

39 *Daly* v *The Sydney Stock Exchange* (1986) 60 ALJR 371 (broker-client agreement); *Chan* v *Zacharia*, above n 7 (partnership agreement); *Moorgate Tobacco Co Ltd* v *Philip Morris Ltd (No 2)* (1984) 156 CLR 414 (licensor-licensee agreement); *Standard Investments Ltd* v *CIBC* (1985) 22 DLR (4th) 410 (bank-corporate customer agreement); *Lloyds Bank Ltd* v *Bundy* [1974] All ER 757 (bank-customer agreement).

40 J F Burrows, J N Finn, S Todd *Cheshire, Fifoot and Furmston's Law of Contract* (7 NZ ed, Butterworths, Wellington, 1988) 14.

In *Offshore Mining Company Ltd* v *Attorney General*[41] these contract principles were emphasised. The case involved a contract for the supply of gas, made between the Crown (as seller) and a group of joint venturers (the buyers). Arguments made by the joint venturers included that the Crown had acted in breach of an implied term or alternatively had breached a fiduciary duty. On the basis that negotiations had been lengthy and the parties had covered all aspects of the transaction in exhaustive detail, it was held that the express contract alone governed the parties' relationship.[42] Cooke P said:[43]

> ...the content of any general duties to the other contracting party has to be determined in the light of *the scheme and express provisions of the contract.*

In *Petrocorp* v *Minister of Energy*,[44] in the context of a joint venture contractual relationship, Cooke P expressed a willingness to find duties over and above those in the contract where the provisions in the contract are ambiguous. The Minister of Energy and the plaintiff oil companies were the parties to a joint venture operating agreement signed in 1986. The joint venture was engaged in prospecting for and extracting petroleum in Taranaki. Upon discovery of a significant reservoir of crude oil, the joint venturers applied for an extension of their license from the Minister of Energy. The Minister, on behalf of the Crown, declined the application and granted himself a mining license. One of the plaintiffs' arguments was that the Minister contravened fiduciary responsibilities owed to the other joint venturers, by misusing information which came to him as a member of the joint venture.

In the Court of Appeal it was held that the Minister owed obligations to the other joint venturers and that these obligations were expressly and unambiguously set out in the contract so that fiduciary law did not need to be resorted to.[45] Cooke P said:[46]

> ...it is unnecessary to resort to doctrines of fiduciary duty or implied term where the express provisions of the contract cover the matter. Nor do I think that there is any relevant ambiguity in the section or the agreement when each is fairly interpreted. If there were any relevant ambiguity, I would lean towards an interpretation to the effect the Minister, in acting for commercial purposes, owed a duty of loyalty and consideration to his fellow joint venturers, which might be described by the somewhat elastic term fiduciary duty.

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41 Above n 14.

42 *Offshore Mining*, above n 14, Bisson J upholding the comments of Grieg J in *Offshore Mining* Unreported, 2 May 1986, High Court Wellington Registry A466/83, 57-58.

43 Above n 14 (emphasis added).

44 Above n 14.

45 This decision was overturned by the Privy Council where it was held that the Crown's contractual obligations could not take effect so as to fetter the Minister's discretion to exercise his licensing powers under the Petroleum Act 1937: *Petrocorp Exploration Ltd* v *Minister of Energy* [1991] 1 NZLR 641.

46 *Petrocorp*, above n 14.

The doctrine of the implied term has been developed by contract law as an extension of the courts' function of finding out what the parties have agreed upon. Such implied terms can have fiduciary content. But the rules for implying terms into the contract have been developed closely around the concern of fulfilling the parties' expectations. A term can be implied only if it is necessary to give business efficacy to the contract or if it is something so obvious that it goes without saying.[47]

Unlike implied duties, fiduciary duties are not solely premised on the fulfilment of the parties' expectations. Traditionally other considerations such as policy ones have been relevant.[48] In this way the court is given more discretion and is not limited by strict rules like those for implying a term into a contract. Fiduciary duties are therefore said to be "imposed" by the courts rather than "implied". It follows that fiduciary law can create liability where neither the express terms of the contract nor any implied terms are breached. This possibility conflicts with principles of contract theory.[49]

The conflict of principle is not quite so prominent where the very reason the parties entered into the contract was to secure the paramountcy of one party's interests; for example, in agency contracts, or bailment contracts. In those cases there will be no question of the law contradicting the expectations of the parties by imposing a fiduciary duty to act with selfless loyalty in the beneficiary's interests. Even on the narrow test of implying a term into the contract, duties with a fiduciary content would be held to exist. The conflict becomes acute where the contract was entered into to serve the joint interests of the parties,[50] or (even more controversially) their several interests. In such cases something more will be required before the courts will impose fiduciary obligations over and above the contractual ones.[51]

B Remedy

Upon breach of contract only the traditional contractual remedies are available. These are essentially compensatory and in personam. Remedies unleashed by the fiduciary doctrine can be restitutionary and in rem. Proprietary remedies are an inroad into the doctrine of privity of contract because they can have an effect on third parties.

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47 J F Burrows, J W Finn, S Todd, above n 40, 149-155.

48 E J Weinrib "The Fiduciary Obligation" (1975) 25 UTLJ 1, 15.

49 Recent New Zealand High Court decisions which discourage the imposition of fiduciary duties beyond those duties expressed and implied in the contract include: *Plateau Equipment Ltd* v *Marsden* Unreported, 28 February 1991, High Court Rotorua Registry CP 8/91, Doogue J; *Cable Price Corporation Ltd* v *McFaddyn* Unreported, 8 March 1991, High Court Christchurch Registry CP 37/91, Holland J.

50 For example licensing agreements, franchises or distributorships.

51 P D Finn, above n 13, 31.

IV THE COMMERCIAL/DOMESTIC DISTINCTION

A distinction is often made between commercial and domestic relationships.[52] In the commercial world, certainty is vital. People in business making decisions must be able to predict accurately the conduct which they will be held liable for, and more importantly, the remedial consequences of liability. The principle of fulfilling the parties' expectations, which contract law protects, is even more necessary in commercial relationships. For fear of upsetting business expectations, the courts are even more reluctant to impose fiduciary obligations on parties negotiating towards or who have concluded a commercial contract. But it is suggested that the courts are often blinded by this ultimate consideration and neglect to reason in a logical, step by step manner.

Hospital Products Ltd v *United States Surgical Corporation*[53] involved a manufacturer and distributor relationship. The High Court of Australia rejected completely any suggestion that a fiduciary element existed in the relationship. Gibbs CJ, Wilson and Dawson JJ placed much importance on the fact that the distributorship contract was essentially a commercial arrangement.[54] Gibbs CJ said:[55]

> ... 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 this court as important, if not decisive, in indicating that no fiduciary duty arose... .

The phrases "commercial" relationship, "arms length", and "on an equal footing" are misleading. These phrases have no content; they beg the question whether the parties stood in some special equitable relationship, since they do no more than state a negative conclusion.[56] The challenge for the courts is to develop criteria for determining whether the parties were in a "commercial" relationship, at "arms length", and on an "equal footing"; or whether the parties in fact stood in some special equitable relationship, for example a fiduciary one. It is because commercial transactions do not satisfy the specific criteria, not because they are "commercial", that they do not usually carry with them fiduciary duties.[57]

This reluctance of the courts to impose fiduciary duties on parties in a commercial setting seems to stem primarily from the understanding that a finding of fiduciary liability will unleash proprietary remedies which can have far-reaching consequences beyond the immediate parties. But once it has been found that the parties are in some special equitable relationship, for example a fiduciary one, proprietary consequences do

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52 The distinction is not a new one: See *NZ & Australian Land Co* v *Watson* [1881] 7 QBD 374, 382 per Bramwell J.

53 (1984) 55 ALR 417.

54 Above n 53, 433, 435 per Gibbs CJ, 470-471 per Wilson J, 491-492 per Dawson J.

55 Above n 53, 433.

56 R P Austin "Commerce and Equity - Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444, 454.

57 J R F Lehane "Fiduciaries in a Commercial Context" in P D Finn (ed) *Essays in Equity*, above n 8, 104.

not necessarily follow. The courts have a discretion as to remedy. It will be relevant to the question of remedy to inquire further into the specific commercial consequences of giving an in rem remedy. It is suggested that in the interests of certainty the courts need to develop specific guidelines as to exactly when proprietary remedies are appropriate.[58] Only then will the courts stop reasoning that no fiduciary relationship existed simply on the basis that the phrases "arms length" and "commercial transaction" seemed appropriate.

V DO FIDUCIARY OBLIGATIONS EXIST BETWEEN PARTIES TO A JOINT VENTURE?

A Selecting the Analytical Approach

There are two analytical approaches to the question whether fiduciary duties exist between parties to a voluntary or consensual relationship. First, there is the approach of categorising the relationship in question as one to which fiduciary duties presumptively apply. Secondly, there is the approach of focussing on the circumstances of the case. The appropriate approach for deciding whether fiduciary obligations should be imposed upon parties to a joint venturers agreement will be considered.

Traditionally, courts of Equity found it necessary to categorise the legal relationship between the parties in order to determine whether fiduciary duties were owed. The rigid duty of loyalty owed by trustee to beneficiary could only be extended if the category of relationship which the claimant was in, was sufficiently analogous to the trustee-beneficiary relationship.[59] In this way the number of categories of relationship for which fiduciary duties and remedies were available grew.

Today the list of recognised categories includes in addition to the trustee-beneficiary relationship: the solicitor-client relationship, the doctor-patient relationship, the agent-principal relationship, the director's relationship to his/her company, and the relationship between partners. The categories are not closed,[60] and so it is open to the courts to recognise a new category.

By recognising a new category the courts make generalisations about the usual incidents of a relationship and conclude that, just like the usual incidents of the trustee-beneficiary relationship, those incidents warrant the imposition of the fiduciary standard of conduct.[61] But even for traditionally recognised categories of relationship, there may be exceptional cases where fiduciary obligations have been negatived.[62] This will occur when the usual incidents of that category of relationship are not present on the facts of

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58 The Hon Sir Anthony Mason "Themes and Prospects" in P D Finn (ed) *Essays in Equity*, above n 8, 242, 246.

59 D W M Waters, above n 13, 405.

60 *Guerin* v *The Queen* [1984] 2 SCR 335, 384.

61 P D Finn, above n 12, 89.

62 J C Shepherd *The Law of Fiduciaries* (Carswell , Toronto, 1981) 21-22; J R Gautreau "Demystifying the Fiduciary Mystique" (1989) 68 Can Bar Rev 1, 8.

the particular case. Therefore, it can be said there is a *presumption* that fiduciary obligations exist for the recognised categories of relationships, and that this presumption can be rebutted.

In America, although there is some confusion in this area, the joint venture is probably a recognised category of relationship from which fiduciary duties presumptively flow. The leading American authority is *Meinhard* v *Salmon*,[63] where Cardozo J said:[64] "Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of finest loyalty."

In Australia the point was decided in *UDC* v *Brian*.[65] The Supreme Court of New South Wales[66] found that joint venturers owe to each other fiduciary duties. Samuels JA adopted Cardozo J's statements in *Meinhard* v *Salmon* and extended the duties owed between partners to joint venturers. Hutley JA, also on the basis of analogy with partnership, held that the very nature of the joint venture relationship renders it fiduciary.

In the High Court this approach was rejected; Mason, Brennan and Deane JJ said:[67]

> 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 could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one... . 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.

Similarly, in New Zealand the joint venture is probably not a category of relationship to which fiduciary obligations presumptively attach.[68] The recent Court of Appeal decision in *Kiwi Gold NL* v *Prophecy Mining NL*[69] involved a case of an exploration joint venture. The parties to the joint venture agreement were Mr Atkinson (who later purported to assign his interest to Prophecy Mining), and Kiwi Gold Exploration Co Ltd (who later assigned its interest to Kiwi Gold No Liability). Mr Atkinson contributed the necessary licence to the joint venture, and Kiwi Gold was to provide the finance. It was a term of the contract that, pursuant to a work programme and budget which was to be prepared by Mr Atkinson and approved by Kiwi Gold, Kiwi Gold would contribute $70,000 towards exploration expenditure in the first year of the joint venture. Because the work programmes and budgets prepared by Mr Atkinson

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63 (1928) 164 NE 545.
64 Above n 63, 546.
65 Above n 3.
66 [1983] 1 NSWLR 490.
67 Above n 3, 679.
68 *Kiwi Gold No Liability v Prophecy Mining No Liability*, above n 14; *Offshore Mining Co Ltd* v *Attorney General*, above n 14, per Bisson J; *Marr* v *Arabco*, above n 2, 102 747.
69 Above n 14.

far exceeded the anticipated expenditure levels, they were not approved by Kiwi Gold. In the result, Kiwi Gold failed to contribute the $70,000 within the year. Prophecy Mining brought an action to recover this amount.

One of the grounds for the claim was that Kiwi Gold owed a fiduciary duty to Prophecy Mining to work towards a position where the $70,000 could be contributed within the first year. Thomas J at trial held that a fiduciary obligation arose in its own right as a result of the relationship of joint venture partners, and that this fiduciary duty had been breached. Casey, McGechan and McKay JJ reversed that decision on appeal. McKay J giving the judgment of the Court said:[70]

> *We do not regard the relationship between the parties in the present case as being sufficient of itself to establish fiduciary obligations*, but we agree with Thomas J that similar duties to act reasonably and in good faith can be implied into the contract itself.

Following this decision it is difficult to argue that in New Zealand the joint venture is a category of relationship to which fiduciary duties presumptively attach. Unfortunately the Court did not address the point directly. It is here suggested that the driving reason for the decision was that the case was able to be adequately disposed of by implying terms into the contract. McKay J found it unnecessary to impose fiduciary duties because he was able to imply terms into the contract which had a "similar"[71] content to any fiduciary duties that he would have imposed. It was unnecessary to use the fiduciary doctrine to get the distinctive proprietary remedy since those duties were never breached. The implication of the decision, that is that the joint venture relationship itself will not be sufficient to establish fiduciary obligations in future cases, was not fully considered.

Nevertheless, it is suggested that the decision was correct. In New Zealand, as in Australia, the term "joint venture" has not been clearly defined - relationships which come under the label "joint venture" vary extensively. Therefore it is difficult to make generalisations about the obligations existing between "joint venturers".[72] In many cases the joint venturers will have purposely set out not to create a partnership for the sole reason that fiduciary obligations will not be imposed upon them. In such cases fiduciary liability will have the undesired effect of contradicting the parties' expectations.[73]

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70 Above n 14, 12 (emphasis added).

71 McKay J took the view that duties to act "reasonably and in good faith" were "similar" to fiduciary duties. It is submitted that this is incorrect, the fiduciary standard is a stricter one: see above Part II A.

72 R A Ladbury "Mining Joint Ventures" (1984) ABLR 312, 326.

73 In many cases "[t]o apply to a particular joint venture the principles applicable to partnerships may well fix upon the participants precisely the liability they had sought to avoid": A J Black "Joint Ventures, Partnerships and Fiduciary Duties : *United Dominions Corporation Ltd* v *Brian Pty Ltd*" (1986) 15 MULR 708, 736. See above Part IIIA.

In addition, there are no strong policy factors which justify imposing fiduciary obligations on *all* joint ventures. The social utility of the joint venture relationship will not be jeopardised by having some joint venture relationships which are not fiduciary. In cases where no fiduciary obligations are imposed, the relations between joint venturers will simply be governed by the contract between them.

The more flexible approach is to focus on the circumstances in each particular case. This approach reduces the possibility that in some cases the joint venturers' expectations will be contradicted by the imposition of fiduciary duties. The contract and the surrounding circumstances are systematically examined. In this way the "focus on the circumstances" approach is similar to the contractual implied term doctrine.[74]

B Focussing on the Circumstances of the Case

1 The Test

The requisite elements which must be present on the facts before fiduciary obligations can be imposed have not been clearly identified. Many commentators have attempted to define the criteria.[75] As yet no universal, all-purpose test has been formulated. It has been questioned whether it is desirable to place limits on the fiduciary jurisdiction by adopting a test.[76] There is tension between the need for flexibility on the one hand and the need for certainty on the other. It is suggested that certainty is the overriding factor considering the wide-ranging effects that the fiduciary proprietary remedies (which as yet have no guidelines) have in this area.

An appropriate test in the context of joint ventures is the test of mutual confidence. The test of mutual confidence was first put forward in the case of *Birtchnell* v *Equity Trustees*.[77] That case concerned the relationship between partners. Dixon J said:[78]

> The relationship between partners is, of course, fiduciary. ...The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only.

In this way the partnership was recognised as a category of relationship to which fiduciary duties presumptively attach.

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74 The implied term approach differs because, apart from anything else, the remedy systems are different: above Part III A2.

75 E J Weinrib, above n 48; P D Finn *Fiduciary Obligations*, above n 19; J C Shepherd "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 LQR 51; T Frankel "Fiduciary Law" (1983) 71 Calif L Rev 795; J R Gautreau, above n 62.

76 *Coleman* v *Myers* [1977] 2 NZLR 225; *HPI* v *USSC*, above n 53, 422-422 per Gibbs CJ, 458-459 per Mason J, 488 per Dawson J.

77 Above n 7.

78 Above n 7, 407-408.

In *UDC* v *Brian*[79] the Court applied this test of "mutual confidence and trust" to the particular circumstances of the case. The majority said:[80]

> To transpose the words of Dixon J in *Birtchnell* (at 407-408), the participants in each of the then proposed joint ventures were "associated for... a common end" and the relationship between them was "based... upon a mutual confidence" that they would "engage in [the] particular...activity or transaction for the joint advantage only". It matters not, for the present purposes, whether that relationship is seen as that which may exist between prospective partners or joint venturers before the terms of any partnership or joint venture agreement have been settled or whether it is seen as a limited preliminary partnership or joint venture to investigate and explore the possibilities of an ultimate joint venture or ventures. On either approach, it was a fiduciary one.

In the New Zealand case of *Marr* v *Arabco*[81] this test of "mutual confidence" was given further support. Tompkins J said:[82]

> If the course of dealing indicates an intention to carry out a common purpose by a joint association in a way that involves mutual confidence in each other, fiduciary duties may well result. This of course is clearly the case where there is a partnership and where there is a joint venture agreement other than a partnership. It can also be the case where parties are negotiating to achieve either of those relationships ... .

The adoption of the test of "mutual confidence" creates much needed certainty in this area. But it must be applied subjectively rather than objectively.[83] In *Marr* v *Arabco*, Tompkins J applied the test of mutual confidence too subjectively. The subjective approach taken in *Marr* v *Arabco* has been criticised:[84]

> Certainly the prospect of a judicial inquiry into the hearts and minds of business associates for the purpose of ascertaining the degree to which they trust each other is alarming, as is the prospect of the courts explicitly recognising an objective test and in fact applying a subjective one.

The test which must be applied is whether a reasonable person in the circumstances would have reposed trust and confidence in the alleged fiduciary. Outward manifestations of the alleged fiduciary's intentions (for example, letters of intent, heads of agreement, any concluded contractual document), together with the surrounding circumstances, must all be examined in determining the parties reasonable expectations.

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79 Above n 3.

80 Above n 3, 680.

81 Above n 2.

82 Above n 2, 102 744.

83 Gibbs CJ in *Hospital Products* said that the existence of subjective trust and confidence can be neither a necessary nor a sufficient condition for the finding of a fiduciary duty: above n. 53, 433.

84 P L Loughlan "Fiduciary Liability and Constructive Trust: *Marr* v *Arabco Traders Ltd*" (1989) 7 Otago L R 179, 183.

Applying this test to the typical mining or petroleum joint venture, it may well be possible to impose fiduciary obligations on the operator or manager.[85] It has been said that, at least where the operator is acting under instructions from the operating committee, the operator is the "paradigm of a fiduciary agent".[86] Commonly the operator will be an agent for the purposes of making contracts with third parties. The operator may hold funds and/or property on the joint venturer's behalf. The operator is more likely to have access to information and technology rights. Such factors will lead joint venturers to place trust and confidence in the operator.

However, in *Midcon Oil & Gas* v *New British Dominion Oil Co*[87] the majority in the Supreme Court of Canada found against any breach of fiduciary obligation owed by the operator. The two parties were joint venturers engaged in a project for the exploitation, development and production of petroleum and natural gas. The majority found there was merely a duty upon the operator to act in good faith within the four corners of the agreement. The decision has been criticised and it has been suggested that the dissenting decisions of Rand and Cartwright JJ will be accepted as law.[88] The minority found that, in the particular circumstances of the case, fiduciary obligations did exist upon the operator:[89]

> The operator, so developing, exploiting and marketing a jointly owned produce for a joint benefit has reposed in him that reliance and confidence which constitutes a trust relationship.

2 The Scope of the Fiduciary Duties

But there is a difficulty with imposing fiduciary obligations upon the operator, or upon any joint venturer for that matter. Unlike partners, joint venturers usually anticipate that they will each carry on their own separate businesses. If these separate businesses are in the same or a related field to the joint venture business, then a

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85 R A Ladbury, above n 72, 328; J D Merralls, above n 11, 919; D A MacWilliam "Fiduciary Relationships in Oil and Gas Joint Ventures" 8 Alberta LR 233, 234; K M Hayne, above n 10, 371; E M Bredin "Types of Relationships Arising in Oil and Gas Agreements" (1962-1964) 2-3 Alberta LR 333, 339-340; P D Finn "Fiduciary Obligations of Coventurers in Natural Resources Joint Ventures" [1984] AMPLA Yearbook 106, 162; R Dunlop "Oil and Gas Development Contract Interpretation - Fiduciary Relation Between Operator and Non-Operator- Duties of Operator" (1960) 1 Alberta LR 466.

86 J D Merralls, above n 11, 920.

87 [1958] SCR 314.

88 G R Pellatt "The Fiduciary Duty in Oil and Gas Joint Operating Agreements: *Midcon* Reexamined" (1967-1968) 3 University of British Columbia Law Review 190. See also D A MacWilliam, above n 85, 241; *Canadian Aero Services* v *O'Malley* (1973) 40 DLR 3d 371 cited in P L Wiese "Commentary on Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures" [1984] AMPLA Yearbook 189, 194.

89 Above n 87, 329 per Rand J.

venturer's personal interests may frequently conflict with the interests of the joint venture. This is especially likely in a small jurisdiction such as New Zealand.

In view of these practical considerations, it is suggested that once it is found that the relationship is fiduciary, fiduciary duties to the other joint venturers will apply selectively.[90] The rule that a fiduciary must not engage in conduct in which it may have a personal interest in conflict with those of the other participants will not be given unbridled application.[91] The application of that rule will be limited by the bounds of the joint venture agreement.[92] In this way a fiduciary will not be liable for profit if there has been a conflict between its interests and the beneficiary's interests; the fiduciary will only be liable if there has been a conflict between its interests and the *actual undertaking* it has made to the beneficiary.[93]

Further, it is suggested that the rule that a fiduciary cannot misuse its position of trust (for example, by using information and opportunities for its own possible advantage) should not apply at all to joint venturers. This "misuse" rule has uncertain ambit and the courts have not yet fettered its potential.[94] It is suggested that the conduct which needs to be prohibited will be adequately covered by the "conflict" rule. The use by a fiduciary venturer for its own interests of information which falls within the scope of the joint venture, will be prohibited as a conflict of interest and duty.

These points were illustrated in the American case of *British American Oil Producing Co* v *Midway Oil Co.*[95] That case involved a detailed contract establishing a joint venture to exploit petroleum resources in a designated area. It was held that profit made by British American from a separate transaction fell outside the subject matter covered by fiduciary duties. Therefore no liability arose under the conflict rule. Had the duty not to misuse confidential information been imposed, then British American would most likely have been liable for breach. But by imposing only the conflict of duty and interest rule as it applied within the scope of the joint venture agreement, the Court effectively narrowed the scope for liability.[96]

VI CONCLUSION

The concept of a "joint venture" in New Zealand is wide. Joint ventures may in some cases be partnerships. Throughout this paper the term "joint venture" was used in the narrower sense as a business association which is not a partnership. Even using the

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90 The nature and scope of the application of fiduciary duties depends on the circumstances of each case. See above Part II B.

91 K M Hayne, above n 10, 371.

92 It is important to identify the "subject matter over which the fiduciary obligations extend": *Birtchnell* v *Equity Trustees, Executors & Agency Co,* above n 7, 408 per Dixon J.

93 P D Finn, above n 85, 169.

94 P D Finn, above n 85, 171.

95 (1938) 82 P (2d) 1049.

96 P L Wiese, above n 88, 191.

term "joint venture" in this narrower sense, the types of relationships which come under the definition can be many and varied.

For this reason no generalisations can be made as to the standard of conduct between joint venturers. One cannot assert that "joint venture" is one of the categories of relationships to which fiduciary obligations presumptively attach. If the joint venturers' relationship is fiduciary it is only because the circumstances of the particular case warrant the imposition of fiduciary obligations. This will depend upon whether the circumstances, viewed objectively, serve as a basis for a placing of trust and confidence in the alleged fiduciary. The scope of application of the fiduciary duties will in most cases be very limited.