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JOINT VENTURES AND FIDUCIARY OBLIGATIONS

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I INTRODUCTION

In New Zealand arrangements commonly described as joint ventures include real estate development and subdivision arrangements; financing arrangements; share farming arrangements; arrangements in the petroleum and mining industries; 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.

This paper attempts to address that uncertainty. First, it is shown that the joint venture has not been recognised by the law as a business association which is distinct from the partnership. Since it will be pertinent to determine in each case whether or not the "joint venture" agreement in fact creates a partnership, the rules for doing so will be reviewed.

The second part of this paper focuses only on those joint ventures which are not partnerships. The issue is whether the strict fiduciary standard of conduct will be imposed upon those joint venturers. Fiduciary principles are outlined briefly, and the special considerations relevant where fiduciary obligations are imposed on parties to a contract are examined. Finally, an approach to the question whether fiduciary obligations are owed to joint venturers is selected and applied.

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

II IS THE JOINT VENTURE A LEGALLY DISTINCTIVE BUSINESS ASSOCIATION?

A Other Jurisdictions

The term "joint venture" (or "joint adventure" - the two are synonymous) was first used in Scotland and England in the eighteenth century to describe trading voyages where two or more persons agreed to put money into a common stock.[2] English Courts did not develop the concept and cases using the term have mainly been concerned with whether the arrangement created a partnership. The term was not generally used to describe anything different from a partnership.[3]

American courts claim to have taken the initiative in recognising the joint venture as a legal association *sui generis*.[4] It is true that there is a vast amount of academic writing and caselaw tracing the development of the joint venture in America, but there is still no broadly accepted definition.[5] The result is that joint ventures, although recognised as a separate category of relationship, are largely governed by partnership principles.[6] For example joint venturers are probably mutual agents as are partners;[7] and joint ventures are treated partnerships for tax

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2 J D Merralls "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1981) 3 AMPLJ 1, 1.

3 G L J Ryan "Joint Venture Agreements" (1982) 4 AMPLJ 101, 101-105; Halsburys Laws of England (4ed, Butterworths, London, 1980) vol 35, para 8, p8.

4 Crane Co v Stokke (1937) 110 ALR 761 cited in W H E Jaeger (ed) Williston on the Law of Contracts (3 ed, Baker, Voorhis & Co.Inc, NY, 1959) vol 2, para 318, p548.

5 W H E Jaeger above n4, para 318, p549-550.

6 W H E Jaeger above n4, para 318B, p585; American Jurisprudence (2d, The Lawyers Co-operative Publishing Company, Rochester N Y, 1969) 46 para 4, p24-25; W H E Jaeger "Joint Venture or Partnership?" (1961) 37 Notre Dame L 138, 141-142.

7 W H E Jaeger above n4, para 318B, p590; Am Jur above n6, para 4, p24-25.

purposes[8] and for the purposes of liability to third parties.[9]

The recognition of the joint venture as a separate category of relationship perhaps initially arose only to avoid the rule of American partnership law that a corporate body cannot enter into a partnership.[10] But whatever the reason for it; the historical anomaly of treating a joint venture as a partnership yet recognising it as a separate legal category, has recently become the subject of criticism. [11]

In Canada, emphasis is not placed on whether the "joint venture" is a different type of business association from the partnership. The courts often neglect to categorise the relationship, and go directly to the question what principles should be applied to the relationship. Commonly an agreement called a "joint venture" by the parties will have partnership principles applied to it.[12] In the Canadian mining and petroleum industries, through customary usage, the joint venture has taken on special characteristics.[13] Joint venture law has become a rapidly developing field in this industry;[14] mining and petroleum joint ventures are discussed below.

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8 W H E Jaeger above n4, para 318B, p585.

9 W H E Jaeger above n4, para 318B, p589.

10 This prohibition on companies entering partnerships arises from the fear that directors will abdicate their responsibities and commit the company to a course of action by which assets may be jeapardised in an ultra vires manner: W H E Jaeger above n4, para 318B, p589; H W Nichols "Joint Ventures" (1950) 36 Virginia LR 425, 444-445;

11 A B Weissburg "Reviewing the Law on Joint Ventures with an Eye Toward the Future" (1990) 63 Southern California LR 487.

12 Central Mortgage & Housing Corp v Graham (1973), 43 DLR (3d) 686 cited in J S Ziegal, R L Daniels, D L Johnston, & J G MacIntosh Cases & Materials on Partnerships and Canadian Business Corporations (2d, The Carswell Company Ltd, Toronto, 1989) vol 1, 72.

13 R Bartlett Mining Law in Canada (University of Saskatchewan, Continuing Legal Education, Law Society of Saskatchewan, Canada, 1984) 172; R G Powers "Limited Partnerships in the Oil and Gas Industry"(1978) 16 Alberta LR 153, 210.

14 "Annual Seminars on Oil and Gas Law" Petroleum Law editions, reported in Alberta LR.

In Australia the joint venture is used extensively for small and very large projects alike. But there is relatively little caselaw or legislation addressing the definition of "joint venture". Ryan was able to find only five Australian authorities which support the view that the "joint venture" and the "partnership" are distinct, mutually exclusive legal concepts.[15] In the two leading cases on the topic; Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd[16] and United Dominions Corporation Ltd v Brian Pty Ltd and Others[17]; the High Court of Australia held that agreements expressed as joint ventures were, on the facts, partnerships. But their Honours recognised that a joint venture need not be a partnership in other cases.

Little guidance as to the definition of "joint venture" can be had from these jurisdictions. The only jurisdiction which clearly distinguishes the joint venture from the partnership is the American jurisdiction. However it is submitted that drawing from the American law would be likely to produce confusion, since the authorities are by no means consistent.[18] Common law in England, Canada and Australia seems to regard the "joint venture" as something which may or may not be a partnership. The New Zealand cases have followed this approach.

B New Zealand Cases.

Despite the widespread use of the joint venture in New Zealand commercial practice, the author could find only two cases which directly addressed the issue of what a "joint venture" is.

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15 G L J Ryan above n3, 117.
16 (1974) 131 CLR 321..
17 (1985) 59 ALJR 676.
18 G L J Ryan above n3, 146.

In Marr v Arabco Traders Ltd [19], although ultimately Tompkins J did not find it necessary to categorise the relationship as a joint venture, a partnership or some other relationship[20], he adopted the following passage from UDC v Brian:[21]

> 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 that a partnership; such as a company, a trust, an agency or joint ownership. The borderline between what should more properly be seen as no more than a simple contractual relationship may, on occasion, be blurred.

In the more recent case of Commerce Commission v Fletcher Challenge & Ors[22] it was necessary to consider whether Fletcher Challenge and Brierly Investments Ltd were in a joint venture in order to determine whether they had breached the requirements of the Commerce Act 1986. The above passage from UDC v Brian[23] was again given support. McGechan J after considering the various authorities said:[24]

> I think some care is needed in relation to any sweeping definition. The New Zealand commercial world on 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,

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19 (1987) 1 NZBLC 102 732.
20 Above n19, 102 747.
21 Above n19, 102 744 citing UDC v Brian above n17, 679.
22 [1989] 2 NZLR 554.
23 Above n17, 679.
24 Above n22, 615-616.

> commercial...undertaking with a view to mutual profit": UDC v Brian Pty Ltd... . 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.

"Joint venture" then, is a loose term, used to describe a generally unincorporated business association which may or may not be a partnership. The question in each particular case is whether the agreement between the parties has created a partnership or not.

III DECIDING WHETHER THE JOINT VENTURE IS A PARTNERSHIP IN ANY PARTICULAR CASE

A *The New Zealand Partnership Act 1908*

The Partnership Act 1908 section 4(1) gives the following definition of a partnership: "Partnership is the relation which subsists between persons carrying on a business in common with a view to a profit."

Section 4(2) expressly excludes companies from the ambit of the definition. Section 5 lays down rules for determining the existence of a partnership: co-ownership of property does not of itself create a partnership, neither does the sharing of gross returns. But receipt by a person of a share of the profits, or of a payment contingent or varying with the profits of a business, is prima facie evidence of a partnership.

The statutory definition of partnership in section 4 can be broken down into three elements:

(1) a business must be carried on
(2) it must be carried on by persons in common
(3) it must be carried on with a view to profit

If one of these elements is not present then the arrangement under consideration is not a partnership.

Attempts have been made to distinguish the joint venture from the partnership by arguing that one of the three elements in the statutory definition of "partnership" is missing for the joint venture.

For example in American law it has been seen that a distinction is made between joint ventures and partnerships but that there is no universally accepted basis for this distinction.[25] The basis used most frequently by judges and commentators to distinguish the joint venture from the partnership is that joint venturers are not "carrying on a business". The suggestion is that, unlike partnerships, joint ventures are limited to a single ad hoc business transaction.[26]

The Australian High Court has repeatedly rejected this distinction as untenable.[27] In UDC v Brian Dawson J said a single one-off undertaking may amount to "carrying on a business":[28]

> 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 suggests that the emphasis which will be placed upon continuity may not be heavy.

It is submitted that the position is the same in New Zealand and that the parties can be said to be "carrying on a business" even though their relationship exists to carry out

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25 Above Part II A.

26 W H E Jaeger above n4, para 318 p521, para 318B p593; Am Jur above n6, para 4 p26; A B Weissburg above n11, 521.

27 UDC v Brian above n17, 677, 681; Chan v Zacharia (1984) 53 ALR 417,431.

28 Above n17, 681.

one particular transaction only.[29] Support for this can be had from the Partnership Act 1908 itself. Section 35(1)(b) provides that if a partnership is entered into for a "single adventure or undertaking" then the termination of that adventure or undertaking will have the effect of dissolving the partnership. This is statutory recognition that a coming together of parties for a one-off business transaction can come within the definition of "partnership".

B Common Law

The Partnership Act 1908 is not a code; rules of the common law and equity continue so long as they are consistent with the Act.[30] At common law the intentions of the parties are paramount when determining whether the arrangement between the parties is a partnership. The intentions of the parties must be ascertained by looking at the agreement as a whole; the mere fact that the parties describe themselves as partners is not conclusive.[31] Conversely, the fact that the parties describe themselves as "joint venturers" will not be the conclusive that a partnership was not intended.[32] To find the true intentions of the parties the Courts look at the substance of the agreement rather than the label.[33]

In Canny Gabriel[34] the majority (McTiernan, Menzies and Mason JJ) held that the agreement which described the parties as "joint venturers" created a partnership because certain "indicia of a partnership" were present on the facts

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29 Re Abenheim, Ex parte Abenheim (1913) 109 LT 219, 220; National Insurance Company v Bray [1934] NZLR s67 cited in K L Fletcher (ed) Higgins and Fletcher The Law of Partnership in Australia and New Zealand (5 ed, The Law Book Company Ltd, Sydney, 1987) 31; Van Dijk v McCracken Unreported, 30 June 1987, High Court Christchurch Registry CP 198/87, Tipping J.

30 Partnership Act 1908, s3.

31 R C I Banks (ed) Lindley and Banks on Partnership (16 ed, Sweet & Maxwell, London, 1990) para 5-05, p61.

32 Above n31, para 5-03, p60-61.

33 Horne v Pollard [1935] NZLR s125.

34 Above n16, 326-327.

of the case. The factors included were:

(1) The parties were involved in a commercial enterprise with a view to a profit

(2) Profits were to be shared

(3) Policy was a matter for joint agreement and differences were to be settled by arbitration

(4) An assignment of a half interest in the "joint venture" contracts was attempted (although unsuccessfully)

(5) The parties were concerned with the financial stability of one another in a way which is common with partners.

These factors were cited with approval in UDC v Brian[35] as providing criteria to determine whether a joint venture agreement amounts to a partnership. There, in an agreement for the development of real estate, the parties called themselves "joint venturers". Mason, Brennan, and Deane JJ in their joint judgment found that the relationship exhibited all the indicia of a partnership: it was a common enterprise with a view to a profit, profits were to be shared, the joint venture property was held on trust, the participants indemnified the managing participant against losses, and the policy of the enterprise was a matter for joint decision. On this basis it was found that the parties were in law partners.

In Commerce Commission v Fletcher Challenge[36], McGechan J followed this broad approach and said:[37]

> In the end the matter is one of substance and intention. The Court will look at the substance which is agreed. If the indicia of a partnership are present, the arrangement may well be categorised as a partnership despite some contrary label.

Applying this approach to the facts, McGechan J concluded:[38]

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35 Above n17, 679.
36 Above n22.
37 Above n22, 616.
38 Above n22, 618.

> It was an association of the pair in a venture for mutual profit. It is within the Commission plea of "partnership or joint venture". Quite which does not matter, in view of the dual wording of the plea, but for any importance it may have I incline to the alternative of "joint venture". There is an "exclusion of implied relationships" clause in the draft agreement... specifically excluding partnership or agency. ...While not in law conclusive, its existence plus the resources exploitation nature of the activity make a joint venture categorisation more attractive.

To conclude, in deciding whether or not a particular relationship is a partnership, the starting point is the Partnership Act 1908. However, focussing on elements of the statutory definition of partnership as separate requirements is a rather narrow and artificial exercise.[39] The Act is not a code, and the courts have taken a broader approach to the question whether a particular joint venture relationship is a partnership.

C The Mining or Petroleum Joint Venture

An example of a joint venture agreement which probably does not create a partnership is the typical mining or petroleum joint venture agreement. It is likely that one or more of the indicia of a partnership will not be present in such agreements.

In Australia and Canada especially, the joint venture has become a common business vehicle in the mining and petroleum industries. Modern mining and petroleum projects bring together capital and talent on a large scale. Economic factors such as high capital costs, the need for economies of scale, and the need to spread investment risk by diversification have become influential in the industry. Traditional forms of business organisation are not suited to such projects. The need to develop a new form of business organisation was met by drafters, often using complex

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39 K M Hayne "The Need for a Joint Venture Code?" [1990] AMPLA Yearbook 362, 365.

contractual documents. Thus the mining or petroleum joint venture evolved and now assumes a "character of its own".[40]

Mining and petroleum joint ventures possess certain typical characteristics. Persons or companies wishing to achieve a common goal enter into the relationship, which is defined in an often lengthy contractual document. The scope of the relationship is usually limited to the purpose to be achieved and/or the duration of the agreement. The relationship is usually unincorporated.

The terms of the agreement typically provide for the appointment of an "operator" or "manager" who manages the day to day running of the project, usually one of the parties themselves. The operator is severally appointed and acts as the parties' agent for specified purposes. An operating committee comprising of representatives of the parties makes policy decisions and gives instructions to the operator. The property of the joint venture is usually held by the venturers as tenants in common in specific proportions (coupled with an agreement by the parties not to exercise their right to partition). The parties are severally liable for debts only to the extent of their proportionate interest in the joint venture. Each joint venturer is entitled to a separate share of the product in accordance with its proportionate interest, the joint venture then terminates and each party deals with the product separately.

Advantages of this type of business association are manifold. Perhaps the main contributing factor to the popularity of the joint venture are the significant tax advantages.[41] Other advantages are: the joint venturers

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40 J D Merralls above n2, 2.

41 G L J Ryan above n3, 127; A J Black "Joint Ventures, Partnerships and Fiduciary duties: United Dominions Corporation Ltd v Brian Pty Ltd" (1986) 15 Melbourne Uni LR 708, 709; R A Ladbury "Mining Joint Ventures" (1984) Australian Business Law Review 312, 316.

have limited liability to third parties; a joint venturer cannot bind its colleagues; each joint venturer can adopt its own accounting treatment of its interest in the joint venture; and each joint venturer can arrange its own financing and give security over its separate interest.

The above anticipated advantages assume that this type of joint venture is not a partnership, and drafters and members of the industry proceed on this basis. Australian commentators have suggested that the courts would be more willing to hold that this typical mining or petroleum joint venture is an entity quite distinct from a partnership and that partnership principles will not be applied to this kind of joint venture.[42]

Some Australian commentators say that typical mining and petroleum joint ventures are not partnerships because the business is not carried on "in common", but rather severally.[43] The argument concedes that in typical mining or petroleum joint venture, the property is held by the venturers as tenants in common, the venturers contribute to common expenses, and there is common decision making through the operating committee. Nevertheless the business is not being carried on "in common" because the venturers are severally and separately liable to third parties; each venturer separately and severally appoints the operator as its agent; the venturers receive their share of the product and sell it separately making a separate profit; there is separate accounting and tax treatment; and there are no common activities.

It is suggested that the existence of mutual agency[44] in the joint venture agreement will have an important bearing on

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42 G L J Ryan above n3, 123; R A Ladbury "Commentary" in Finn P D (ed) Essays in Equity (The Law Book Company, Australia 1985) 37, 38.

43 R A Ladbury above n42, 41; K M Hayne above n39, 367.

44 Whether a relationship of agency exists will depend not on the terminology employed by the parties to describe their relationship but

the question whether the business is being carried on "in common". If the parties clearly are not agents for each other then the arrangement will probably not be a partnership on the basis that the business is not being carried out "in common".[45]

Even if joint venturers in the mining and petroleum industries can be said to be "carrying on a business in common", they are not carrying it out "with a view of profit". This is the most common basis advanced by Australian commentators for distinguishing a mining or petroleum joint venture from a partnership.[46]

In the typical mining or petroleum joint venture, each venturer receives a share of the product of the venture: oil or gas if it is a venture to work a mine or well or a share in the prospecting discovery if it is an exploration venture. Each individual venturer may sell this share of the product or process it further before sale.

The argument assumes that "with a view of profit" means with a view of joint profit, and that profit made by each individual venturer after having received the share of the product, is not joint profit.

The further assumption is made that the receipt of a share of the product is not equivalent to sharing in the "profit" of the joint venture. Section 5 of the Partnership Act 1908 gives assistance in the interpretation of the word "profit" here. For the purposes of determining whether a

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on the true nature of the agreement: Halsbury's Laws of England above n3, Vol 1(2) para 1, p4.

45 Lang v James Morrison & Co Ltd (1911) 13 CLR 1, 11 cited in R L Pritchard "Unincorporated Joint Ventures" in R Vann and R P Austin (ed) The Law of Public Company Finance (The Law Book Company, New South Wales, Australia, 1986) 494, 502.

46 UDC v Brian above n17, 681 per Dawson J; G L J Ryan above n3, 137-142; J D Merralls "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 ALJ 907, 909; Ladbury above n42, 40.

relationship is a partnership, section 5 makes a distinction between the sharing of profits in subsection 5(1)(c), and the sharing of gross returns in subsection 5 (1)(b). This suggests that "profit" means the net gain resulting after payment of all outgoings. Therefore "profit" in section 4 does not mean simply the product of the joint venture.

Cases commonly cited in support of this argument include the English cases of Hoare v Dawes[47], Coope v Eyre[48], and Gibson v Lupton[49]. In those cases "joint adventures" were held not to be partnerships because what the parties intended to divide between themselves was the goods purchased, rather than the profits from resale.[50]

The following discussion is concerned with those joint venture agreements which do not create partnerships. The term "joint venture" will only be used in this narrower sense as something which is not a partnership.

IV 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.

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47 (1780) 1 Doug 371.
48 (1788) 1 H Bl 37.
49 (1832) 9 Bing 291.
50 R C I Banks above n31, para 5-13, p65.

A The Standard of Conduct

Once a person has been designated as a fiduciary, Equity's most intense standard of conduct is imposed. The distinctive feature of this standard is the absolute prohibition of self-interested behaviour. This is a severe restriction on the fiduciary's freedom. "Fiduciary" is essentially 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[51]).[52]

However New Zealand courts have in the past confused the fiduciary standard of conduct with the less stingent "good faith" standard of conduct.[53] 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.[54] 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

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

52 P D Finn "The Fiduciary Principle" in T G Youdan (ed) Equity, Fiduciaries and Trusts (The Carswell Company, Ontario, Canada, 1989), 27; L S Sealy "Some Principles of Fiduciary Obligations " [1963] Cambridge Law Journal 119; D W M Waters The Law of Trusts in Canada (2 ed, The Carswell Company Ltd, Toronto, Canada, 1984) 32.

53 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 The Attorney General, Unreported 28 April 1988, Court of Appeal, CA 116/86; Marr v Arabco above n19, 102 745.

54 P D Finn "The Fiduciary Principle" above n52, 4.

in order to achieve this end. But this reasoning is fallacious, and there is a danger that the fiduciary standard will losing its distinctive quality.

B Method of Exacting the Standard

Not only is a rigourous standard of conduct placed on a fiduciary; but the method which the Courts of Equity have developed to exact this standard is draconian. To ensure adherence, the fiduciary is prohibited from placing himself in a position where the opportunity exists to prefer his interest over the beneficiary's[55] interest. In this way all temptation is removed. The fiduciary is deterred from even contemplating making a profit from his position. It is irrelevant to liability whether the fiduciary actually acted dishonestly.

On this note Finn has said that two overlapping proscriptions are imposed on the fiduciary:[56]
A fiduciary -
(1) cannot use his/her position to his/her own or to a third party's possible advantage or to the beneficiary's possible disadvantage (this is called misusing his/her position) or;
(2) cannot, in any matter within the scope of his/her service, have a personal interest or an inconsistent engagement with a third party (this is called conflict of duty and interest[57] and conflict of duty and duty respectively)
unless this is freely consented to by the beneficiary or authorised by law.

The above overlapping proscriptions state the obligation of the fiduciary in the most general terms. The Courts have

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55 "Beneficiary" is used in the broader sense as the person in the relationship who is owed fiduciary duties.
56 P D Finn "The Fiduciary Principle" above n52.
57 Bray v Ford [1896] AC 44, 51 per Lord Herschell.

developed a number of more specific duties.[58] The fiduciary duties do not apply uniformly to all types of relationships. Rather, the nature and scope of their application depends upon the circumstances.[59]

This strict method of exacting the fiduciary standard can be illustrated by the case of Keech v Sandford[60]. 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 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, then the beneficiary is not required to prove actual disloyalty; it is presumed .

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

59 NZ Netherlands Society 'Oranje' Inc v Kuys and the Windmill Post Ltd [1973] 2 NZLR 163, 166 per Lord Wilberforce; Birtchnell v Equity Trustees (1929) 42 CLR 384, 408 per Dixon J.

60 (1726) Cas temp King 61.

It has been suggested[61] that the above presumption that the fiduciary acted dishonestly is not an irrebuttable 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"[62] that the fiduciary acted for his own selfish interests, and not merely an hypothetical possibility.

However in Phipps v Boardman[63] 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 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

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

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

63 Above n62.

fiduciary whose integrity has been proven, in order to deter others.[64]

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. In Aquaculture Corporation v New Zealand Green Mussel Co Ltd[65] 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 are available for breach of an equitable duty.[66] 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.[67]

Both proprietary and personal 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

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64 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 n61, 502.

65 [1990] 3 NZLR 299.

66 Above n65, 301 per Cooke P.

67 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 n65, 302 per Cooke P.

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.

V 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 on 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.[68] It is assumed that at the negotiations 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

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

an obligation on the fiduciary to protect the beneficiaries' interests, limits one party's freedom to unreservedly pursue his/her own self-interest when negotiating towards a contract.[69]

Yet fiduciary duties can probably be imposed on parties negotiating towards a contract. In UDC v Brian[70] 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:[71] "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." The New Zealand High Court has given support to this proposition.[72]

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[73] the parties were negotiating towards a partnership but they never formalised their relationship. Relying heavily on UDC v Brian[74], it was held that fiduciary duties were nevertheless owed.

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69 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. See R E Hawkins "LAC and the Emerging Obligation to Bargain in Good Faith" 14 (1990) Queens Law Journal 65.

70 Above n17.

71 Above n17, 680.

72 Marr v Arabco above n19, 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 above n29; Gallagher v Schulz (No1) Unreported, 1 June 1988, High Court Christchurch Registry, A 323/83, Williamson J.

73 [1988] 2 Qd R 1.

74 Above n17.

In LAC Minerals Ltd v International Corona Resources Ltd[75] 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:[76] "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."[77] 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 upon parties to a concluded contract.[78] 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.[79] The law should not intervene by imposing further obligations, for example 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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75 (1989) 61 DLR (4th), 14.
76 Above n75, 65.
77 Above n17, 680.
78 Daly v The Sydney Stock Exchange (1986) 60 ALJR 371 (broker-client agreement); Chan v Zacharia above n27 (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).
79 J F Burrows, J W Finn, S Todd Cheshire and Fifoot's Law of Contract (7ed, Butterworths, New Zealand, 1988) 14.

In Offshore Mining Company Ltd v The Attorney General[80] 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.[81] Cooke P said:[82] "...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." (Emphasis added).

In Petrocorp v Minister of Energy[83] 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 mining 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, among other reasons, as a member of the joint venture.

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80 Above n53.
81 Offshore Mining above n53, Bisson J upholding the comments of Grieg J Offshore Mining Unreported, 2 May 1986, High Court Wellington Registry A466/83,57-58.
82 Above n53.
83 Above n53.

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.[84] Cooke P said:[85]

> ...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.

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.[86]

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.[87] In this way the court is given more discretion and is not limited by strict rules like those for implying a terms into a contract. Fiduciary duties are therefore said to be "imposed" by the courts rather than

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84 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.

85 Above n53, 36.

86 J F Burrows, J W Finn & S Todd above n79, 149-155.

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

"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.[88]

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 parties' 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 beneficiaries' 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,[89] 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. [90]

B Remedy

Upon breach of contract only the traditional contractual remedies are available. These are essentially *in personam* and compensatory. 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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88 Recent New Zealand High Court decisions which discourage the imposition of fiduciary duties beyond those duties express 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.

89 For example licensing agreements, franchises, distributorships.

90 P D Finn above n52, 31.

VI THE COMMERCIAL/DOMESTIC DISTINCTION

A distinction is often made between commercial and domestic relationships.[91] In the commercial world, certainty is vital. Businesspersons 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 and Others[92] 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.[93] Gibbs CJ said:[94]

> ...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", "on an equal footing" are misleading. These phrases have no

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

92 ALR 55 (1984) 417.

93 Above n92, 433, 435 per Gibbs CJ, 470-471 per Wilson J, 491-492 per Dawson J.

94 Above n92, 433.

content; they beg the question of whether the parties stood in some special equitable relationship, since they do no more than state a negative conclusion.[95] 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 as a matter of fact satisfy the criteria, not because they are "commercial", that they do not usually carry with them fiduciary duties.[96]

This reluctance of the courts to impose fiduciary duties on parties in the 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 not necessarily follow. The courts have 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 guide-lines as to exactly when proprietary remedies are appropriate.[97] Only then will the courts stop reasoning that no fiduciary relationship existed simply on the basis that phrases "arms length" and "commercial transaction" seemed appropriate.

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

96 J R F Lehane "Fiduciaries in a Commercial Context" in P D Finn (ed) Essays in Equity above n 41,104.

97 The Hon Sir Anthony Mason "Themes and Prospects" in P D Finn (ed) Essays in Equity (The Law Book Company, Australia 1985) 242, 246.

II 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 attach. 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 now be considered.

Traditionally, Courts of Chancery 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.[98] 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[99], and so it is open to the courts to recognise a new category.

By recognising a new category the courts in effect make generalisations about the usual incidents of a relationship and conclude that, just like the usual incidents of the

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98 D W M Waters above n52, 405.

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

trustee-beneficiary relationship, those incidents warrant the imposition of the fiduciary standard of conduct.[100]

But even for traditionally recognised categories of relationship, there may be exceptional cases where fiduciary obligations have been negatived.[101] This will occur when the usual incidents of that category of relationship are not present on the facts of 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[102] where Cardozo J said:[103] "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.[104] The Supreme Court of New South Wales (Court of Appeal Division)[105] 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 the partnership, held that the very nature of the joint venture relationship renders it fiduciary.

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100 P D Finn above n 51, 89.
101 J C Shepherd The Law of Fiduciaries (The Carswell Company Ltd, Toronto, Canada, 1981) 21-22; J R Gautreau "Demystifying the Fiduciary Mystique" 68 Can Bar Rev 1, 8.
102 (1928) 164 NE 545.
103 Above n102, 546.
104 Above n17.
105 [1983] 1 NSWLR 490.

In the High Court this approach was rejected; Mason, Brennan and Deane JJ said:[106]

> 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.[107]

The recent Court of Appeal decision Kiwi Gold NL v Prophecy Mining NL[108] involved 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 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.

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106 Above n17, 679.

107 Kiwi Gold No Liability v Prophecy Mining No Liability above n53; Offshore Mining Co Ltd v The Attorney General above n53 per Bisson J; Marr v Arabco above n19, 102 747.

108 Above n53.

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 J, McGechan J and McKay J reversed that decision on appeal. McKay J giving the judgment of the Court said:[109]

> 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.(Emphasis added).

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"[110] 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.

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109 Above n53, 12.

110 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 IV A.

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".[111] 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.[112]

In addition, there are no strong policy factors which justify imposing fiduciary obligations on <u>all</u> joint venturers. 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 not 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.[113]

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111 R A Ladbury above n41, 326.

112 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 above n41, 736.

113 The implied term approach differs because, apart from anything else, the remedy systems are different: above part V A2.

B Focussing on the Circumstances of the Case

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.[114] 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.[115] There is tension between the need for flexibility on the one hand and the need for certainty on the other.[116] It is suggested that certainty is the overriding factor considering the wide-ranging effects that the fiduciary proprietary remedies (which as yet have no guide-lines) 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[117]. That case concerned the relationship between partners. Dixon J said:[118]

> 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.[119]

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114 E J Weinrib above n87; P D Finn Fiduciary Obligations above n58; 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 n101.

115 Coleman v Myers [1977] 2 NZLR 225; Hospital Products above n92, 422-422 per Gibbs CJ, 458-459 per Mason J, 488 per Dawson J.

116 D R Klinck "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on International Corona Resources Ltd v Lac Minerals Ltd" (1987-1988) 33 McGill LJ 600,624.

117 Above n59.

118 Above n59, 407-408.

119 For confirmation that the partnership is a category of relationship to which fiduciary duties attach presumptively see Chan v Zacharia above n27.

In UDC v Brian[120] the Court applied this test of "mutual confidence and trust" to the particular circumstances of the case. The majority said:[121]

> 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 ventures 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[122] this test of "mutual confidence" was given further support. Tompkins J said:[123]

> 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.[124] In Marr v Arabco, Tompkins J applied the test of mutual confidence too subjectively. His subjective approach was been criticised:[125]

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120 Above n17.
121 Above n17, 680.
122 Above n19.
123 Above n19, 102 744.
124 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 n92, 433.
125 P L Loughlan "Fiduciary Liability and Constructive Trust: Marr v Arabco Traders Ltd" (1989) 7 Otago LR 179, 183.

> 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.

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.[126] 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".[127] 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 repose trust and confidence in the operator.

However in Midcon Oil & Gas v New British Dominion Oil Co[128] the majority in the Supreme Court of Canada found against

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126 R A Ladbury above n41, 328; J D Merralls above n46, 919; D A MacWilliam "Fiduciary Relationships in Oil and Gas Joint Ventures" 8 Alberta LR 233, 234; K M Hayne above n39, 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.

127 J D Merralls above n46, 920.

128 [1958] SCR 314.

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[129] and it has been suggested that the dissenting decisions of Rand J and Cartwright J will be accepted as law.[130] The minority found that, in the particular circumstances of the case, fiduciary obligations did exist upon the operator: [131]

> 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.

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 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.[132] The rule that a fiduciary must not engage

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129 G R Pellatt "The Fiduciary Duty in Oil and Gas Joint Operating Agreements: Midcon Reexamined" (1967-1968) 3 Universtiy of British Columbia Law Review 190.

130 D A MacWilliam above n126, 241; P L Wiese "Commentary on Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures" [1984] AMPLA Yearbook 189, 194;

131 Above n128, 329 per Rand J.

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

in conduct in which it may have a personal interest in conflict with those of the other participants will not be given unbridled application.[133] The application of that rule will be limited by the bounds of the joint venture agreement.[134] 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.[135]

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.[136] It is suggested that the conduct which needs to be prohibited will be adequately covered by the "conflict" rule. For example, 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[137]. 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

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133 K M Hayne above n39, 371.

134 It is important to identify the "subject matter over which the fiduciary obligations extend": Birtchnell v Equity Trustees, Executors & Agency Co above n59, 408 per Dixon J.

135 P D Finn above n126, 169.

136 P D Finn above n126, 171.

137 (1938) 82 P (2d) 1049.

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 the Court effectively narrowed the scope for liability.[138]

VIII 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 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. Once it is found that the relationship is fiduciary, the scope and application of the fiduciary duties will in most cases be very limited.

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138 P L Wiese above n130, 191.

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