BUSINESS LAW

JOINT VENTURES, PARTNERSHIPS AND FIDUCIARY OBLIGATIONS

BY
LYNDEN GRIGGS*

INTRODUCTION

There is no doubt that the use of joint ventures to conduct various business enterprises is increasing in popularity. However, their use raises two substantial legal issues. When will the joint venture constitute a partnership, and if the relationship is not a partnership, will fiduciary duties attach to the participants in the joint venture?

The practical importance is that if a breach of fiduciary duty is established (because the parties of the joint venture are in partnership,[1] or because the situation[2] demands the recognition of fiduciary obligations) equitable relief will be available. Conversely, if there is no fiduciary obligation owed, the normal remedy that will be available (for breach of contract) is damages. The essence of the distinction is that equitable remedies will allow for restitution, the common law remedies, compensation.

A joint venture has been defined[3] as follows:

> "[A]n association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.[4]

Joint Ventures are used in a number of areas in Australia. These include:

1. mining syndicates,
2. property developments,
3. sharefarming arrangements,
4. manufacturing arrangements,
5. publishing agreements,
6. entertainment agreements,

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* LLB (Hons), LLM, Lecturer in Law, University of Tasmania.

1 Obviously if the joint venture is also categorised as a partnership fiduciary obligations will flow from that fact. "The relation between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived that that which exists between partners." per Dixon J., *Birtchnell v Equity Trustees, Executors & Agency Co. Ltd* (1929) 42 CLR 384 at 407-408.

2 It is important from an evidentiary perspective whether a fiduciary obligation has arisen from the relationship or the situation. In a case such as solicitor-client, the court will assume the obligations exist and then the burden will be on the party who claims that no fiduciary relationship exists to prove this. If however the relationship does not give rise to fiduciary obligations, the party asserting that there is fiduciary obligations arising from the situation will need to prove this.

3 The term joint venture is "not a term of art". See the comments by Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at note 1.

4 Per Samuels J. in *Brian Pty Ltd v United Dominions Corporation Ltd* [1993] 1 NSWLR 490 at 506; quoting from Williston, *A Treatise on the Law of Contracts*, (Baker, Voorhis & Co Inc., New York, 3rd ed., 1959), pp 555-556. The term joint venture is also defined in the *Trade Practices Act* 1974, s. 4J. For a list of the leading articles on the concept of the joint venture, see Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907 at note 5.

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7. industrial research and develoment agreements.[5]

Joint ventures will have a number of advantages, assuming that the arrangement is not considered to be a partnership. A co-venturer will not be responsible for the acts of the other parties and there will be no mutuality of rights and obligations that is such an important part of partnership law.[6] There are also taxation advantages[7] and subject to what is stated in the agreement, the interest of a co-venturer is assignable. Furthermore, as the joint venture is not regarded as an entity[8] there is some protection from actions brought against co-venturers.[9]

WHEN WILL A JOINT VENTURE BE SEEN TO BE A PARTNERSHIP?

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.[10] There are three elements in this definition:

1. Were the parties carrying on a business?
2. Was this business being carried on in common?
3. Was the business being carried on with a view to profit?

THE CARRYING ON OF A BUSINESS

Business is defined as every trade, occupation or profession.[11] In *Smith v Anderson*[12] it was considered that this required continuity of, or repetition of activity. As Brett LJ stated:

> "The expression 'carrying on' implies a repetition of acts and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business."[13]

Today the emphasis on this element will not be significant. As was stated by Dawson J. in the High Court decision of *United Dominions Corp Ltd v Brian Pty Ltd.*:[14]

> "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."[15]

Accordingly, the fact that a joint venture is a commercial arrangement for one transaction will not stop the parties being considered to be in a partnership.

CARRYING ON A BUSINESS IN COMMON

For a partnership to be established it is necessary that the business be carried on by or on behalf of all the persons alleged to be partners. It is this mutuality of rights and obligations that is so crucial to the existence of a partnership.[16] Because of its importance

5 As noted by Walsh, "Partnerships – Joint Ventures and Taxation" (1978-1979) 13 *TIA* 478 at 488.
6 See the comments by Fletcher, *Higgins and Fletcher – The Law of Partnership in Australia and New Zealand*, (Law Book Co., Sydney, 6th ed., 1991) p 35.
7 Walsh, "Partnerships – Joint Ventures and Taxation", (1978-1979) 13 *TIA* 478 at 488; see also Ryan, "Joint Venture Agreements" (1982) 4 *AMPLA Journal* 101 at 127.
8 In this article I will be considering the position of the unincorporated joint venture. Obviously the co-venturers may decide to incorporate another entity to use as the vehicle for the conduct of the business. If this occurs the relevant statute and case law applicable will be that applying to corporations. See Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 54-56.
9 See the comments by Latimer, *Australian Business Law*, (CCH, Sydney, 1992) pp 592-593.
10 *The Partnership Acts*; NSW, s. 1; Vic, s. 5; SA, s. 1; Qld, s. 5; WA, ss. 4 and 7; Tas, s. 6; ACT, s. 6; NZ, s. 4; UK, s. 1.
11 *The Partnership Acts*; NSW, s. 45; Vic, s. 3; SA, s. 45; Qld, s. 3; WA, s. 3; Tas, s. 4; ACT, s. 4; NZ, s. 2; UK, s. 45.
12 (1880) 15 Ch. D. 247.
13 At pp 277-278.
14 (1985) 157 CLR 1.
15 At p 15; see also the comments by Fletcher, *Higgins and Fletcher – The Law of Partnership in Australia and New Zealand*, pp 32-33. The court in *Canny Gabriel v Volume Sales* (1974) 131 CLR 321 equating a commercial venture with a business.
16 See the comments by Fletcher, *Higgins and Fletcher – The Law of Partnership in Australia and New Zealand*, pp 32-36.

it is seen as the factor which may distinguish the joint venture from the partnership; the joint venturers carrying on business severally, property in a typical mining and petroleum joint venture being held separately by the participants as tenants in common.[17] "The only common aspects in the joint venture are the use of common assets and possibly contribution to common expenses and 'common' decision making through the operating committee, in each case related to one particular project."[18]

WITH A VIEW TO PROFIT

It has been argued that a joint venture is not a business being conducted with a view to profit.[19] There is no joint profit as such, but individual gain. Each participant receiving product rather than profit, as such there is no income on production. Indeed some participants may sell the product of the joint venture while others will process it further before sale.[20]

Dawson in the *UDC case*[21] said:

> "[P]erhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit."[22]

This contention may be disputed. The ultimate result of the joint venture will, (hopefully), be to make a profit. Therefore the view of the participants must be to make a profit, thus satisfying the definition within the *Partnership Acts*. The words 'in common' in the statutory definition indicating how the business is to be conducted, the phrase not attempting to "govern the ultimate disposal of the profit".[23]

In addition there is no doubt that the "primary function"[24] of the inclusion of this phrase was to exclude the non-profit sporting, religious and charitable organisations which abound in society today. As such I would argue that this ground should not be the determinative criteria as to whether the arrangement in question is a joint venture or a partnership.[25]

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17 See the comments by Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 42; Chetwin, "Joint Ventures – a branch of partnership law?', (1991) 16 *Uni of Qld LJ* 256 at 263.

18 Ladbury, "Commentary on Joint Ventures" in Finn (ed.) *Equity and Commercial Relationships*, (Law Book Co. Sydney, 1987) p 41.

19 At p 40.

20 As above.

21 (1985) 157 CLR 1.

22 At pp 15-16.

23 Fletcher, *Higgins and Fletcher – The Law of Partnership in Australia and New Zealand*, p 38; see also the comments by Chetwin, 'Joint Ventures – a branch of partnership law?", (1991) 16 *Uni of Qld LJ* 256 at 263 and Merrolls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907 at 909.

24 Fletcher, *Higgins and Fletcher – The Law of Partnership in Australia and New Zealand*, p 36.

25 Ladbury, "Commentary on Joint Ventures" in Finn (ed.) *Equity and Commercial Relationships*, p 43 also contends that besides the absence of one of the three essential criteria, a joint venture differs from a partnership because:

1. The agreement is stated to be a joint venture rather than a partnership.
2. The agreement will provide that the participants cannot bind one another; in a partnership there will be mutuality of rights and obligations.
3. The agreement will provide that the participants will be severally liable whereas partners can be jointly liable.
4. The agreement will provide that the parties hold the assets as tenants in common, in contrast a partner will hold a share in the partnership assets.
5. The co-venturers appoint a manager to manage the project, rather than the partners managing the business.
6. Each co-venturer takes their share of the product whereas a partnership will generally share the proceeds of the product.
7. The joint venture agreement will vary numerous principles of partnership law, such as the prohibition against competition:

While in many cases a joint venture will be considered a partnership, there is also no doubt that the concept of the non-partnership joint venture has been accepted in Australia.[26] However, in many situations the joint venture will be considered a partnership or an arrangement which is analogous to a partnership.[27] If this is the case the fiduciary duties will flow from the existence of the partnership.[28] However, if the joint venture is not a partnership will the co-venturers hold fiduciary duties towards each other? It is this issue to which I now turn my attention.[29]

THE IMPLICATION OF FIDUCIARY DUTIES IN JOINT VENTURE ARRANGEMENTS

The critical feature of [fiduciary relationships] is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.[30]

Therefore in the context of the joint venture does the co-venturer undertake or agree to act on behalf of the other party?[31] In considering this issue the question arises as to whether dependence or vulnerability is a necessary aspect to establish the fiduciary relationship.[32] There are conflicting authorities. Dawson J. comments:

> "There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of *disadvantage or vulnerability* on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity in acting upon the conscience of that other.[33] (emphasis added)"

In the same case Gibbs CJ also considered that inequality of bargaining power was an important consideration, but that it alone was not sufficient to create a fiduciary relationship.[34]

There was a similar divergence in the Canadian case of *LAC Minerals Ltd v. International Corona Resources Ltd.*[35] Sopinka J. holding that dependence or vulnerabilty was indispensable to the existence of a fiduciary relationship,[36] whereas La Forest J. was

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26 See *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1.

27 See *Conny Gabriel Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 and *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

28 See *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384.

29 For other writings in this area see Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 and Finn, "Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures", [1984] *AMPLA Yearbook* 160. Participants in a joint venture will generally appoint on operator to oversee the running of the business; as to the role of this person see Dowsett, "Operator of a Joint Venture: Principal ar Agent" [1987] *AMPLA Yearbook* 269; McCann, "Role of the Operator Under a Joint Venture Agreement", [1982] 4 *AMPLA Journal* 256 and Bean, "The Operator as a Manager: A New Fiduciary Duty", [1993] *JBL* 24.

30 *Hospital Products Ltd v United Stotes Surgicol Corporation* (1984) 156 CLR 41 at 96-97 per Mason J, also see the comments by Gibbs CJ in the same case at 68-69; similar thoughts were expressed in Finn, *Fiduciary Obligations*, (Law Book Co. Sydney, 1977) p 201.

31 There is American authority to the extent that a joint venturer will owe fiduciary obligations because of the fact that that person is a joint adventurer. In *Meinhard v Salmon* 164 NE 545 ot 546 (1928) Cardozo J. said:

> Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty . . . not honesty alone, but the punctilio of on honour most senstivie, is then the standard of behaviour.

Wiese however comments that:

> The question of whether or not fiduciary obligations are on automatic incident of joint venture arrangements càn lead one a merry dance, as a few North American examples will illustrate. Wiese, "Commentary on Fiduciary Obligations of Operatars ond Co-Venturers in Notural Resources Joint Ventures", [1984] *AMPLA Yearbook* 189 at 191.

32 See Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 46-47.

33 *Hospital Products Ltd v United Stotes Surgical Corporation* (1984) 156 CLR 41 at 142.

34 At pp 69-70.

35 (1989) 61 DLR (4th) 14.

36 At p 63.

of the view that vulnerability was not a necessary ingredient in every fiduciary relationship.[37]

Whether this element of dependence or vulnerability is required may be crucial in determining if a joint venture carries with it fiduciary obligations.[38] The parties to these agreements will often have access to specialist legal and accounting advice and the documentation pertaining to these contracts can be complex and detailed. As Merralls[39] states:

> "The law of joint ventures is not being made in the courts or the statute books but in the voluminous documents which order the complex exploration, development and financing activities that modern mining and energy operations involve. The child of convenience is assuming a character of its own."[40]

My submission would be that the critical element in the establishment of a fiduciary relationship is that the fiduciary undertakes to act for or on behalf of the other person.[41] In many situations there will also exist the element of dependence such as solicitor-client, doctor-patient, parent-child;[42] however, the 'distinguishing characteristic of a fiduciary relationship is that its essence, or purpose, is to serve exclusively the interests of a person or a group of persons; or, to put it negatively, it is a relationship in which the parties are not each free to pursue their separate interests."[43]

Furthermore in *Noranda Australia Ltd v Lachlan Resources NL.*[44] Bryson J. in the Equity Division of the New South Wales Supreme Court held that a joint venture agreement between a number of corporate entities did entail fiduciary obligations. There were four parties to the agreement, Geopeko, Noranda, Jones Mining and Peko. Noranda and Jones Mining were collectively called Conjuboy Associates and held 50% of the participating interest. Geopeko held the other 50%. Peko, while a party to the agremeent was not a member of the joint venture. Geopeko wished to sell its 50% interest to Lachlan who wished to transfer the interest to Triako. Noranda objected to this final transfer. The joint venture agreement provided that "a party shall not negotiate with any prospective purchaser or assignee not already a party without first notifying the other party of its intention and affording the other party the like opportunity to offer to purchase the interest proposed to be sold".

On the facts of the case it is very difficult to see that there was any element of dependency or vulnerability vis-a-vis the parties to the agreement. Indeed the success of the venture depended upon the co-operation of all parties, each party also making a significant commitment and being in the position to protect its own interest.

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37 At p 39.

38 As Corcoran and Tucker comment:

> The absence of any possibility of undue influence may have been a major factor underlying the result in *Hospital Products*. In reading the decision one has the very strong feeling that the Justices felt that the large American company had every means of safeguarding its own interest but did not do so. This failure by the plaintiff to protect its own position appears to have been a factor which weighed against the intervention of equity. Corcoran & Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 47.

39 Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907.

40 Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907 at 908.

41 Thus adopting the test of Mason J. in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97. However Lehane comments that: "It is suggested, however, that the decision [*Hospital Products Ltd v United States Surgical Corporation*] does not noticeably advance the search for the principle on which the cases in this area of fiduciary obligation rest . . ." Lehane, "Fiduciaries in a Commercial Context" in Finn (ed.), *Essays in Equity*, (Law Book Co., Sydney, 1987) 95 at 102. See also Bean, "Duty of Disclosure and Confidentiality in JOA's", (1993) 11 *JERL* 75.

42 In the Canadian decision of *KM* v *HM* (unreported File No 21763, November 8, 1992) a parent owed a fiduciary obligation to a child which extended to not molesting her sexually.

43 Meagher, Gummow and Lehane, *Equity – Doctrine and Remedies*, (Butterworths, Sydney, 3rd ed. 1992) p 130.

44 (1988) 14 NSWLR 1.

"The nature of the mining joint venture created by the whole document, the size of the parties' commitments if there is to be any success and the dependence of the parties on continued support and co-operation of the other parties to my mind tend to some degree to support the view that the parties would confer on themselves a real rather than a nominal opportunity to interpose their own offers before assignment to some new member . . ."[45]

His honour also held (in granting the injunction to prevent the transfer) that the co-venturers did hold fiduciary obligations but that the scope of these duties were to be determined by the agreement.[46]

While not every joint venture agreement will give rise to fiduciary obligations[47] it is submitted that this will often by the case given the increasing infiltration of fiduciary relationships into commercial and non-commercial areas. While Australian courts have generally been cautious in extending equitable doctrines into commerce[48] the New Zealand Court of Appeal has shown less reluctance. In *Elders Pastoral Ltd v Bank of New Zealand*[49] the appellants persuaded the respondents to lend money to a farmer on the basis of a stock mortgage. The mortgage allowed the sale of stock, but required the proceeds to be paid to the bank. Elders knew of this clause in the contract. When stock was sold the proceeds were received by the appellants as the farmer's agent, and applied in reduction of a debt due to it. It was held that as regards the bank Elders was a fiduciary; consequently a constructive trusteeship arose.[50]

Similarly in Canada the courts have shown an increasing willingness to find fiduciary duties in commercial cases, it being commented that ". . . generally speaking, a fiduciary relationship will be found to arise where a party (the fiduciary) has undertaken a task on behalf of another (the principal), and that undertaking contains features attracting the interest of equity."[51]

The High Court in *United Dominions Corporation Ltd v Brian Pty Ltd*[52] has also found that fiduciary obligations can exist between potential joint venturers. In this case the respondents, Brian and Security Projects, were joint venturers in various land development projects. Some of these developments were financed by borrowings from the appellant. One of the developments realised a substantial profit but UDC claimed it

45 At p 11.

46 See the comments at (1988) 14 NSWLR 1 at 17.

47 See the comments by Meagher, Gummow & Lehane, *Equity – Doctrine and Remedies*, p 132.

48 For example in *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41 at 70, Gibbs CJ commented that:

> [t]he fact that the agreement 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 . . .

Contrast the comments by Mason J. at 99-100 of the same case. See also Meagher, Gummow and Lehane, *Equity – Doctrine and Remedies*, p 133.

49 [1989] 2 NZLR 180.

50 Meagher, Gummow and Lehane comment that "The steps in the reasoning [of the New Zealand Court of Appeal] are by no means readily apparent and the conclusion is, it is suggested, very difficult to justify." Meagher, Gummow and Lehane, *Equity – Doctrine and Remedies*, p 133.

51 McLachlin B., "Evolution of Equity in Canada: recovery of Rights for Civil Wrongs", Paper delivered to the 1993 International Symposium on Trusts, Equity and Fiduciary Relationships, Vancouver, Canada, February 1993, pp 8-9. Sealy identified what he considered were the features that attract the interest of equity in determining whether fiduciary obligations arise out of a particular situation; these being:

(i) the holding of property,
(ii) the undertaking of a job to be done,
(iii) the obligation not to profit, and
(iv) undue influence. Sealy, "Fiduciary Relationships", (1962) *Camb LJ* 69 and "Some Principles of Fiduciary Obligations", (1963) *Camb LJ* 119.

Corcoran & Tucker, "Joint Ventures as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 47 consider that there may be a fifth category, this being "business practice".

52 (1985) 157 CLR 1.

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was entitled to retain all moneys because of collateralisation clause in a mortgage given by Security Projects before the joint venture agreement was formally concluded. Brian argued that the clause was in breach of the fiduciary duty owed to it.

The Court held that UDC and Special Projects, by applying the joint venture land to the mortgage without the knowledge or consent of Brian, had breached the fiduciary duty owed to it. The relationship exhibited all the indicia of a partnership.[53] In addition the fact that the joint venture agreement had not been formally executed was not relevant.

> "A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospecitve partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled.[54]

This decision can be contrasted with the Canadian decision of *LAC Minerals Ltd v International Corona Resources Ltd.*[55] The respondent owned mining rights and was in the process of drilling exploratory holes. The appellants approached the respondent about forming a joint venture. In response to this approach the respondent disclosed the results of its exploratory drilling. It was clear from this information that the adjacent property would have a strong possibility of containing mineral-bearing deposits. Because of the appellant's competing bid the respondent was unable to obtain the mining rights to the land. The Supreme Court of Canada held that the defendant was in breach of duty not to use confidential information. However, on the issue of fiduciary obligations between the two parties, a majority of the Court held that no fiduciary duty arose. Importantly the element of vulnerability or dependence, necessary in the court's opinion for a fiduciary obligation, was not apparent. In the words of Sopinka J.:

> "While it is perhaps possible to have a dependency of [a physical or psychological] between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers . . . If [the respondents] placed itself in a vulnerable position because [the appellants were] given confidential information, then this dependency was gratuitously incurred."[56]

The issue of commercial joint ventures was also considered in the English decision of *Elton John v James.*[57] The case involved a claim of a fiduciary duty being owed by a publishing company to songwriters. The songwriters having transferred the copyright in their material to the publishing company. It was held that the parties were in a fiduciary relationship, the writers having placed their trust and confidence in the publisher. As Bean[58] comments:

> "The *Elton John* case can be seen as giving rise to a general principle that is applicable in cases where one party controls either the whole or a part of the process of maximising returns. Analogously to the pool of profits in *Elton John*, co-venturers in a [joint operating agreement] all share in the same pool of the

53 At p 11 per Mason, Brennan and Deane JJ.
54 At p 12 per Mason, Brennan and Deane JJ.
55 (1989) 61 DLR (4th) 14.
56 At pp 68-69; Lamer and McIntyre JJ concurring.
57 [1991] 18 FSR 397.
58 Bean, "The Operator as a Manager: A New Fiduciary Duty", [1993] *JBL* 24.

> produce produced. Thus where any co-venturer is in control of the management of one part of the exploration, development or production process he could be said to be under the same fiduciary duty to act honestly in the best interests of the joint venture."[59]

These developments all indicate that the fiduciary relationship will continue to play an important role in delineating the role of the participant in a commercial transaction.

CONCLUSION

At the present time there is not a particular body of law applicable to joint ventures in Australia.[60] They are essentially a "creature of contract."[61] They will in some circumstances constitute a partnership and fiduciary obligations will flow from that relationship. As to whether a joint venture agreement (not being a partnership) will lead to fiduciary obligations between the participants is a question that can only be considered in light of the particular facts of the situation. I would submit that vulnerability and dependency will not be considered a crucial element, the probative aspect to consider is whether one or both parties are required to act for or on behalf of the other party.

Considering the recent Australian cases, particularly *UDC v Brian*, one can say that the 'pure contract' view of joint ventures will be susceptible to being displaced by equitable considerations. Such considerations may give rise to the imposition of fiduciary obligations, particularly where the joint venture shares significant similarities with a partnership or where it encompasses any relationship that equates with or is akin to the established categories of relationships attracting fiduciary obligations.[62]

In conclusion, in many cases the co-venturer will be acting for and in the interests of the other participants. The fiduciary obligation will then be established.

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59 At p 31; Bean also comments at footnote 41 that "in a joint venture where the parties had different parts to perform the managerial fiduciary duty would apply requiring them to act in the interests of the joint venture".

60 As Merralls comments: "Though conventional concepts and contractual provisions are emerging, they are not yet so widely accepted that the law governing joint venture arrangements can be expounded in terms peculiar to their special needs.", Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907 at 923.

61 Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 *ALJ* 907 at 923.

62 Corcoran and Tucker, "Joint Venturers as Fiduciaries", (1989) 2 *Corp & Bus LJ* 34 at 58.