De Facto Commercial Relationships: Still Dancing at Arm's Length?

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I INTRODUCTION

Describing a party as 'commercial' is a common prelude to courts refusing to grant relief in equity. Catch-cries of commercial certainty and the need for an unrestricted bargain — so important to classical economic theory — echo throughout court decisions and academic commentary. The message is that when the parties are commercial bodies dealing at arm's length, equitable obligations should be avoided. This is described in this article as the 'arm's length principle' — a presumption that commercial parties dealing at arm's length do not want for, or require, equity's protection. Although it is frequently utilized, it is infrequently explained.

This article examines the underlying rationale for the arm's length principle and the extent of its influence on three recent Supreme Court decisions: *Chirnside v Fay*;[1] *Paper Reclaim Ltd v Aotearoa International Ltd*;[2] and *Amaltal Corp Ltd v Maruha Corp*.[3] Between them, the arm's length principle has been both followed and ignored. In each, the Court considered whether fiduciary duties arose from relationships described as joint ventures. The facts range from a relationship that lasted mere months to another that lasted almost 20 years; one had an almost non-existent agreement, whilst another was written and detailed; one case involved dealings between individuals, and the other two involved dealings between significant companies (one of which was publicly listed). The Court found that fiduciary duties existed in two of the three cases, but considered only one to be a joint venture. Although there is a great deal of consistency between the three decisions, there is also a marked difference in the Court's use and omission of the arm's length principle as a reason for holding that no duties exist.

This article suggests that the arm's length principle represents the default standard of behaviour governing dealings between commercial parties, but nothing more. It should not be used to restrain equity's protection. On the commercial dance floor, parties may start off dancing at arm's length, but if they end up in a committed relationship (whether

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1 [2007] 1 NZLR 433 (SC), Elias CJ, Gault, Keith, Blanchard, and Tipping JJ ["*Chirnside*"].

2 [2007] 3 NZLR 169 (SC), Elias CJ, Blanchard, Tipping, McGrath, and Gault JJ ["*Paper Reclaim*"].

3 [2007] 3 NZLR 192 (SC), Elias CJ, Blanchard, Tipping, McGrath, and Anderson JJ ["*Amaltal*"].

traditionally betrothed or de facto), their experience on the dance floor should not preclude equity's protection.

II STANDARDS OF COMMERCIAL BEHAVIOUR

Expected standards of commercial behaviour vary in different contexts. Industry and regulatory standards, and contractual terms and relationships, all play a part in understanding a commercial party's obligations and the commensurate standard of behaviour that the law expects. That can range from the cut-and-thrust of a market-based sale and purchase transaction, where every player is expected to act in their own interests, to the fiduciary obligations of loyalty and fidelity, where the fiduciary cannot allow their own interests to conflict with the other.

Prior understanding of the applicable standard in any given commercial situation is of fundamental importance. Obligations imposed due to the status of a party are easily recognizable and carry few surprises. These include obligations imposed by a party's status within an industry (for example, banker or broadcaster) or those imposed by virtue of their status within a well-defined relationship (for example, partner or agent).

Issues more often arise when courts impose higher equitable standards of commercial behaviour in fact-specific circumstances. This is particularly prevalent in relatively new forms of commercial relationships, where parties' obligations are not well-defined and do not fit neatly into the status of partnership or agency. Without an obvious status, obligations of parties in these relationships are necessarily determined by fact-specific investigations. Examples include distributorships, franchises, and joint ventures. They are conceptually distinct from single market transactions. Instead they reside halfway: parties are neither clearly betrothed to act in the interests of a significant other, nor free to act purely in their own self-interest and interact with any other to whom they may take a fancy. Those parties are, in a sense, in a de facto commercial relationship.

The policy reasons for imposing fiduciary obligations in status-based and de facto relationships are the same. Exactly what those reasons are, however, is a murky issue; no definitive principle identifies the factual circumstances that require equity's intervention. A variety of tests have, at one time or another, found favour, although it is questionable whether the search for a unifying fiduciary principle will be fruitful. There appears to be some advantage in maintaining elasticity in definition:[4] "[a] test which

4 In an extra-judicial article, Thomas J makes the point that even if a fiduciary principle could be defined, it should not be, because without flexibility, the fiduciary concept would lose much of its utility: Thomas, "An Affirmation of the Fiduciary Principle" [1996] NZLJ 405. The learned author cites Lord Chelmsford in *Tate v Williamson* (1866) 2 Ch 55, 61: "the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise". See also Rotman, "Fiduciary Doctrine: A Concept in Need of an Understanding" (1996) 34 Alta L Rev 821, 830–832.

might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another."[5]

The elements (whatever they may be) go to the nature and function of the parties' relationship and whether it is of a sufficiently fiduciary character to deserve equity's protection.[6] It is the *relationship* that is the centre of the inquiry. The substance of any agreement between the parties plays an important role in that inquiry, but the existence of duties does not hinge on an agreement. The parties' relationship need not have been documented in a written agreement, nor even finalized. Fiduciary duties can arise even if parties commence business before the terms of their agreement are settled.[7]

Although the Supreme Court's approach may appear to have cemented the issue to a degree, at present, without a unifying fiduciary principle,[8] it can only be said that determining whether fiduciary duties arise in particular factual circumstances involves assessment of some (or all) of the following:[9]

a) Whether there is a relationship of mutual trust and confidence between the parties giving rise to an obligation of loyalty;[10]
b) Whether one party has undertaken to act in the other's interest, and not in their own self-interest;[11]

5 *Marr v Arabco Traders Ltd* (1987) 1 NZBLC 102,732, 102,743 (HC) per Tompkins J; see also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 ["*Hospital Products*"] per Gibbs CJ.

6 See Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452; see also Rotman, supra note 4, 832–834.

7 *Van Dijk v McCracken* (30 June 1987) unreported, High Court, Auckland Registry, CP198/85; *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 ["*United Dominions*"]; see also *Marr v Arabco Traders Ltd*, supra note 5, 102,745; *Gallagher v Schulz* (1988) 2 NZBLC 103,196; cf *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 ["*Arklow*"], in which the Privy Council found that Arklow never accepted the existence of a relationship, and in the parties' conduct "there was no mutuality giving rise to the undertaking or imposition of a duty of loyalty": ibid 6 per Henry J for the Board.

8 Flannigan proposed an alternative formulation of the fiduciary relationship as a 'limited access arrangement', a phrase which describes his view of the purpose of fiduciary duties: to restrain the opportunism of a party who is granted limited access to another's assets on the condition that they will act in the interests of that other. The term 'assets' is used here in a broad sense (including tangible and intangible property, business opportunities, and, seemingly, the beneficiary's own person). This author suggests that this concept is in many ways a reframing of the power, vulnerability, and expectations aspects of the fiduciary principles discussed above. The formulation has not been adopted by the New Zealand courts. See Flannigan, "The Boundaries of Fiduciary Accountability" [2004] NZ L Rev 215 ["Boundaries"].

9 See eg the combination used by the Privy Council in *Arklow*, supra note 7. Bean indirectly gives a partial explanation for the variation in principles, as he considers that there is a distinction between the principles applicable to vertical fiduciary relationships (as in an agency), which could more easily be based on an undertaking, and those applicable to horizontal fiduciary relationships (as in a partnership), which have mutual obligations and are more collaborative nature. Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (1995) 117–128.

10 *Chirnside*, supra note 1; *Marr v Arabco Traders Ltd*, supra note 5; *Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384; *United Dominions*, supra note 7. For other examples and discussion see Loke, "Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures" [1999] JBL 538, 551; Rotman, supra note 4, 841–842.

11 *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 ["*Bristol*"] per Millett LJ, affd *Arklow*, supra note 7. For other examples and discussion see Loke, supra note 10, 550–551; Rotman, supra note 4, 845.

c) Whether the beneficiary has a reasonable expectation that the alleged fiduciary will act in the beneficiary's interests;[12]
d) Whether one party has power and discretion such that the other party is in a vulnerable position[13] (although there is some debate as to whether this is an essential element of a fiduciary relationship);[14] and
e) Whether confidential information is imparted.[15]

The arm's length principle is a concept that overlaps the fiduciary principles. Courts, at times, consider the commercial sophistication of the parties and may refuse to impose duties on the basis that it is unnecessary to cloud commercial dealings with the additional (more stringent) standards that fiduciary duties impose:[16]

> [T]he 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.

III THE SUPREME COURT'S APPROACH

Chirnside v Fay

Messrs Chirnside and Fay commenced a joint venture to develop a commercial property site in Dunedin. The two men took on different roles. Both parties discussed and analyzed options to assess the viability of the project, but Mr Chirnside took primary responsibility to progress the project, as he had done in an earlier venture. Mr Chirnside entered

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12 Finn ascribes the "entitlement to expect" as arising from: what the fiduciary undertakes, or appears to undertake for the beneficiary; what is actually agreed between the parties; or legal prescription for reasons of public policy. Finn, "Fiduciary Law and the Modern Commercial World" in McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) 9 n 18.

13 This is referred to as a factor in a recent Court of Appeal decision *Pinpoint Pty Ltd v Cigna Life Insurance New Zealand Ltd* [2009] NZCA 41, [44]. See also *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22 ["*DHL International*"] per Richardson J for the Court, in which the Court of Appeal adopted a categorization of factors in a relationship, including vulnerability, which may cumulatively attract fiduciary obligations: "(1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

14 Vulnerability as a factor is discussed further in Part IV below. See also Bean, supra note 9, 134–138; Loke, supra note 10, 555; Rotman, supra note 4, 839, 842, 849.

15 Giving and receiving confidential information in itself does not establish a fiduciary relationship: see *Arklow*, supra note 7, 6. In some circumstances, however, imparting information in confidence can create fiduciary obligations: see *Attorney General v Blake* [2001] 1 AC 268 (HL) per Lord Nicholls.

16 *Hospital Products*, supra note 5, 70 per Gibbs CJ. See also ibid 142 per Dawson J; *DHL International*, supra note 13; *Auag Resources Ltd v Waihi Mines Ltd* (1995) 5 NZBLC 103,601 (CA) ["*Auag Resources* (CA)"]; *Arklow*, supra note 7; *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 63 (SCC) ["*LAC Minerals*"] per Sopinka J; cf ibid 39 per La Forest J.

into a conditional agreement to purchase the site. By then, Mr Fay had made contact with a prospective major tenant, which committed to the site and made the venture viable. Mr Chirnside then made the agreement to purchase unconditional and proceeded with the development through a company in which his family trust held the majority shareholding.

Mr Chirnside subsequently excluded Mr Fay from the development. He did not tell Mr Fay that he had done so, and avoided the issue when eventually confronted by Mr Fay. Shortly afterwards he told Mr Fay that he had sold the project because he could not finance it, but refused to give any details of the sale, citing confidentiality concerns. In fact, no such sale had occurred. Mr Chirnside avoided Mr Fay's demands for an account of profits, initially from the supposed sale and later from the development. Eventually, he denied that he had been in partnership with Mr Fay.

In the High Court,[17] William Young J held that the parties were in a commercial joint venture and that their relationship was a fiduciary one. The Court of Appeal held that the parties had not entered into a joint venture agreement, but had engaged in a joint enterprise.[18] The parties' conduct in that enterprise, without having entered into an agreement, was sufficient to impose fiduciary duties as they were already in positions of mutual trust and confidence. The Court identified the following relevant factors:

a) The project was not a one-off dealing — the parties had already mounted one agreed joint venture and their relationship was ongoing;
b) Each had something to contribute to the venture, so that there was a degree of mutuality;
c) Each contributed to the venture what was understood to be his part, insofar as it had advanced;
d) But for each party's contributions, the venture would not have reached the point where it could be concluded; and
e) There was a relationship of confidence, which would have been independently actionable if breached.

In separate judgments, the Supreme Court held that the parties were joint venturers who owed each other fiduciary duties of loyalty.[19] Although the Court of Appeal's 'joint enterprise without agreement' finding was not challenged by the parties, it was not adopted by the Supreme Court. All members of the Court proceeded on the basis that the parties were in a joint venture. The reasons of Tipping and Blanchard JJ, delivered by the former, are clear: "[b]y joint venture agreement it may be that [the Court of

17 *Fay v Chirnside* (20 December 2002) unreported, High Court, Dunedin Registry, CP36/01.

18 *Chirnside v Fay* [2004] 3 NZLR 637 as to liability; relief was considered separately.

19 *Chirnside*, supra note 1.

Appeal] meant a written agreement; but the absence of a written agreement does not preclude there being a joint venture."[20]

The bench was split with regard to the method used to find fiduciary duties, and it is difficult to discern whether a majority view exists. The reasons of Elias CJ (supported by Keith J on the finding of the duties) appear to place joint ventures as a status-based category of fiduciary relationship, finding that "joint venturers owe each other fiduciary duties of loyalty".[21] The Chief Justice later stated:[22]

> Where parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues. The label 'joint venture' may sometimes be used to describe what are in fact separate businesses operating at arm's length, with profits taken separately and directly by the participants instead of being realised by the venture itself (as is common in the case of mineral exploration or share-milking, for example). That is not the relationship found to have existed here. In my view the venture to acquire and develop the Speights site was indistinguishable from a single transaction partnership between Mr Fay and Mr Chirnside. The fact that the parties may have expected to settle their arrangements later more formally through a corporate structure (as they had done in their earlier joint venture), or through a partnership agreement, does not alter the character of the relationship already established and under way.

On one reading, this dictum can be restricted to ventures that are akin to partnerships (such as profit-sharing agreements). However, Elias CJ cited *Meinhard v Salmon*[23] in support, a decision from the United States, where fiduciary obligations exist as status-based obligations in joint venture relationships.

Gault J took a more traditional stance, finding that the relationship gave rise to fiduciary obligations of loyalty, but that it will not always do so. His Honour considered that the term 'joint venture' can cover a range of business relationships, and not all will necessarily give rise to fiduciary obligations. The parties in this case "had embarked upon a joint enterprise on which they were working together in pursuit of a clear objective".[24]

Tipping and Blanchard JJ held that the relationship was fiduciary, and made a number of relevant observations. Their Honours divided fiduciary relationships into two categories. The first covered inherently fiduciary relationships, described in this article as 'status-based relationships'. They considered that there was "a strong case for saying that most joint venture

20 Ibid [70].

21 Ibid [1].

22 Ibid, citing *United Dominions*, supra note 7, 5–6, 12, 14–16.

23 164 NE 545, 546 (NY CA, 1928).

24 *Chirnside*, supra note 1, [52].

relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership".[25]

The second category comprised of relationships that are not inherently fiduciary but may be classified as fiduciary if, on examination, the relationship's particular aspects justify such classification. This second category is described in this article as 'de facto relationships'. Tipping and Blanchard JJ noted that no particular formula or test had received universal acceptance, but went on to refer to a selection of principles from particular authorities.[26]

The first principle came from *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd*: the precise scope of fiduciary obligations must be moulded according to the nature of the relationship, and may apply only to part of a person's activities with another.[27] Lord Wilberforce, writing for the Board in *Kuys*, cited *Boardman v Phipps*[28] as authority for this principle:[29]

> [R]ules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular application to the exact circumstances of each case.

The second principle was from *Estate Realties Ltd v Wignall*:[30] a fiduciary relationship arises when one party is reasonably entitled to repose, and does repose, trust and confidence in the other, either generally or in the particular transaction.[31] Tipping J in *Wignall* cited Casey J in *Day v Mead*: the relationship between the parties "generated that degree of confidence and trust which ... justifies the intervention of equity".[32]

The last principle was from *Arklow Investments Ltd v Maclean*: the relationship must be one that gives rise to a legitimate expectation that the fiduciary will not utilize his or her position in a way that is adverse to the interests of the principal.[33] In that case, Henry J for the Board cited Millet LJ in *Bristol and West Building Society v Mothew*,[34] in particular, the Lord Justice's focus on the need for a relationship of trust and confidence.[35] Tipping and Blanchard JJ, having reviewed those authorities, apparently proceeded to identify the long-lost fiduciary principle:[36]

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25 Ibid [74].
26 Ibid [75]–[79].
27 [1973] 2 NZLR 163, 166 (PC) ["*Kuys*"].
28 [1967] 2 AC 46, 123 (HL) per Lord Upjohn.
29 *Kuys*, supra note 27, 166.
30 [1991] 3 NZLR 482 (HC) ["*Wignall*"].
31 Ibid 492.
32 [1987] 2 NZLR 443, 467 (CA).
33 *Arklow*, supra note 7, 4–6.
34 *Bristol*, supra note 11.
35 Ibid.
36 *Chirnside*, supra note 1, [80] (emphasis added).

> It is clear from the authorities that relationships which are inherently fiduciary all possess *the feature* which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; *all fiduciary relationships, whether inherent or particular, are marked by the entitlement* (rendered in *Arklow* as a legitimate expectation) *of one party to place trust and confidence in the other.* That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.

Tipping and Blanchard JJ went on to consider the particular circumstances, rejecting the strongly contractual proposition put forward by counsel for Mr Chirnside — that the test was whether Mr Chirnside had expressly undertaken or agreed to act for or on behalf of Mr Fay's interests.[37] Their Honours rejected the idea that a fiduciary relationship was confined to occasions of express agreement or undertaking:[38]

> At the very least the undertaking can be implicit from the circumstances, and the true principle, in our view, resides in the idea that the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement or undertaking is no more than a frequent manifestation of such circumstance.

It is axiomatic that in a fiduciary relationship, one party is *entitled* to place trust and confidence in the other and rely on them not to act in a way contrary to their interests. That is the essence of the obligation of loyalty. But the tautology does not explain why the party is entitled to have that trust, confidence, and reliance in the other, when they would not be so entitled in any other commercial relationship. Their Honours did not review whether the parties had any other manifestation of the entitlement to loyalty, such as the power to affect the other party's legal position, or one party granting the other limited access to confidential information or other resources. Greater utility is found in Tipping and Blanchard JJ's observation that "[t]he history of the parties' relationship and equitable principle alike gave rise to an implication of equal sharing unless agreement was subsequently reached for a different outcome."[39] That Mr Chirnside and Mr Fay had previously undertaken a joint venture akin to a partnership, and had not discussed acting differently in this case, is a better indication of the position than a broad-brush statement about entitlement.

37 This draws on the work of Bean regarding antagonistic or collaborative transactions: Bean, supra note 9, 46–65.

38 *Chirnside*, supra note 1, [85].

39 Ibid [86].

Tipping and Blanchard JJ later made some general observations about the nature of a joint venture, which are relevant to the discussion of de facto commercial relationships:[40]

> The essence of a joint venture which is not yet contractual is that it is an arrangement or understanding between two or more parties that they will work together towards achieving a common objective. It is fallacious to think that there can be no joint venture unless and until all the necessary details have been contractually agreed. A joint venture will come into being once the parties have proceeded to the point where, pursuant to their arrangement or understanding, they are depending on each other to make progress towards the common objective. Each party is then proceeding on the basis that he or she is acting in the interests of all or both parties involved in the arrangement or understanding. A relationship of trust and confidence thereby arises; each party is entitled to expect from the others loyalty to the joint cause, loose as the formalities of the joint venture may still be.

Paper Reclaim Ltd v Aotearoa International Ltd

Aotearoa International Ltd and Paper Reclaim Ltd were in a longstanding business relationship. Aotearoa undertook the exclusive export of Paper Reclaim's waste paper from the mid-1980s until 2001, when Paper Reclaim advised that it believed there were no contractual arrangements, so that Aotearoa was no longer to hold itself out as Paper Reclaim's agent. Before then, Aotearoa had received a ten per cent commission on its sales of Paper Reclaim's waste paper, and if it purchased paper from a third party to export, it was required to share the profits equally with Paper Reclaim. The terms of contract were not documented, although drafts were prepared. Aotearoa maintained (and Paper Reclaim denied) that the work was pursuant to an oral contract made at a meeting in late-1984 or early-1985. Following that meeting, Aotearoa disestablished its small baling operation and concentrated on export sales.

In the High Court,[41] Nicholson J found that the oral contract established that the parties were in a joint venture which, although not a partnership, still involved fiduciary duties. The "nature, terms and object" of the contract between Aotearoa and Paper Reclaim required that the parties "act with mutual trust, confidence and loyalty in the performance of that contract and the joint venture relationship that it created".[42] Nicholson J held that the contract implicitly required the parties to act with reasonableness and in good faith to the other, and that

40 Ibid [91].

41 *Aotearoa International Ltd v Paper Reclaim Ltd* (19 March 2004) unreported, High Court, Auckland Registry, CP117/01.

42 Ibid [169].

these mutual obligations existed as an implied term of the contract, as well as fiduciary duties in equity.[43]

The Court of Appeal considered the parties were in a joint venture, but overturned Nicholson J's finding that Paper Reclaim owed Aotearoa fiduciary duties.[44] The parties had "entered into their arrangement at arm's length and on an equal footing".[45] Hence, the Court found the parties were in a position to contract in whatever terms they considered necessary to safeguard their respective positions. Neither party was under pressure to accept any particular terms. The Court found that equity did not need to intervene in what was a standard commercial contract. More specifically, "there is no need for equitable intervention where the parties are agreed ... that the contract itself contains an implied term to act reasonably and in good faith".[46]

The Supreme Court, in reasons given by Blanchard J, considered that Aotearoa was acting as agent for Paper Reclaim in the sale of its paper, but rejected the characterization of the relationship as a joint venture.[47] The Court recommended a cautious approach:[48]

> When parties have formed a contract the correct approach is first to decide exactly what they have agreed upon. Only then should the court consider whether any particular aspect of their agreement gives rise to a relationship which can properly be characterised as fiduciary, imposing an obligation of loyalty on one or both parties, which supplements the express or implied contractual terms. It is not enough to attract an obligation of loyalty that one party may have given up more than the other in entering into the contract or that the contract may be more advantageous for one party than for the other. Nor is a relationship fiduciary in nature merely because the parties may be depending upon one another to perform the contract in its terms. That would be true of many commercial contracts which require co-operation. A fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other.

The Court held that an agreement to act on another's behalf — to put their interests ahead of one's own — is common in situations where fiduciary obligations are owed, and identified partnerships as an example of such an agreement coupled with fiduciary obligations. The Court distinguished the position of parties to such an agreement from that of contracting parties

43 Ibid.

44 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188, [106]–[107] (CA), Anderson P, Chambers, and O'Regan JJ.

45 Ibid.

46 Ibid.

47 *Paper Reclaim*, supra note 2.

48 Ibid [31] (footnotes omitted).

that may cooperate but do so primarily to gain individual advantages.[49] The relationship of Paper Reclaim and Aotearoa was held to fall into the latter category, as the Court doubted whether any obligations governed the relationship other than those of a contractual nature and the one-way obligation of loyalty which Aotearoa as agent owed to Paper Reclaim as principal.[50]

The contractual terms referred to were those of the oral contract (the existence of which Paper Reclaim denied). The only terms apparent on the face of the judgment are that of exclusivity, price (through commission), and termination on reasonable notice. However, the Court's underlying approach to the assessment is illustrated in the passages above, and in its earlier discussion of the period of reasonable notice for termination of the arrangements (in a contractual claim). The parties had not agreed on an appropriate period, and the Court emphasized the commercial risk that the parties chose to take on by making an informal arrangement of a kind that was terminable on reasonable notice. The risk of disadvantage when the relationship was terminated was inevitable.

On balance, the Court's rejection of the claimed joint venture, with mutual obligations of loyalty, must be right. There was no sharing of ownership, inputs, outputs, or profit; each party undertook a very separate role (manufacture versus sales). Aotearoa was not vulnerable to the exercise by Paper Reclaim of any power, nor was there any shared undertaking with a view to mutual profit, other than in an ordinary supply chain sense. Interdependence is not enough to raise the standard of behaviour above the market standard, and an agency analogy was much more suitable than a partnership analogy to the facts of the case.

Amaltal Corp Ltd v Maruha Corp

Maruha Corp is a publicly listed Japanese commercial fishing company — the second largest in Japan, with revenues of around $12 billion per annum. Amaltal Corporation Ltd is a privately owned New Zealand commercial fishing company. Commercial fishing in New Zealand operates under a quota system, with restricted foreign ownership of quota. In 1985, following a 12-month partnership, Maruha and Amaltal entered into a joint venture agreement to facilitate access for Maruha to New Zealand waters. Together they incorporated a new company, Amaltal Taiyo Fishing Company Limited ("ATL"), with Amaltal holding just over 75 per cent of the shares, and Maruha the remainder. Each party appointed two directors. The joint venture agreement anticipated that Amaltal would provide existing fishing quota for ATL's use and share other resources such as local expertise, facilities, and permits, and Maruha would operate its fishing trawlers in New Zealand waters through

49 Ibid.

50 Ibid [33].

ATL. Amaltal continued to operate a separate fishing business with its own quota and permits.

In the course of business, ATL acquired further quota under a five-year lease-to-buy agreement, pursuant to a second joint venture between ATL and Maruha ("the Surimi Joint Venture"). The quota acquisition cost was funded by a loan guaranteed by Maruha. In order to ensure adequate cash flow was available to repay the loan, ATL and Maruha entered into a profit guarantee memorandum ("PGM"), whereby Maruha agreed to meet a minimum net profit for ATL. During the course of the five-year lease, Maruha made a number of payments to ATL in accordance with the PGM.

It was uncertain whether the Inland Revenue ("IRD") would accept a deduction for amortization of the lease, so two sets of accounts were prepared — one with the deduction and one without. The accounts, IRD returns, and calculation of the amount payable under the PGM were prepared by an accountant from Amaltal. Maruha's payments to ATL under the PGM did not allow for the amortization. Through reports from its ATL director and advice from its New Zealand accountants, Maruha became aware that ATL was writing off the cost of the quota, and that there was a significant risk that it would not be accepted by the IRD. In the first year, Maruha received both sets of accounts, but in subsequent years it received only the non-amortized management accounts.

ATL made annual advances to Amaltal in amounts roughly equivalent to the difference in ATL's tax position in the event that the amortization was not accepted by the IRD, and Amaltal was required to account to the IRD in respect of it. Maruha was aware of these advances, but may not have fully understood them. It apparently believed that the advances were to be used to pay the tax, rather than for the contingent possibility that the IRD would require the tax to be paid.

The Surimi Joint Venture was unsuccessful and the assets were dissolved by agreement, divided on the basis of the management accounts, which did not show the amortization, nor provide for the $5.2 million advanced to Amaltal. Maruha received its proportion of the quota on an unamortized basis, which required Amaltal to make payment (in respect of the amount amortized) to the IRD (unknown to Maruha). The IRD undertook an audit, and to the surprise of all, did not object to the amortization.

Maruha claimed that Amaltal breached its fiduciary obligations to it by having Maruha make payments on the basis that amortization was not deducted, even though ATL was deducting for the amortization. It claimed that Amaltal had represented to it that ATL was paying tax on the basis that there was no amortization and was concealing and taking the benefit of ATL's tax savings. Maruha also alleged that the advances to Amaltal were made without its knowledge, and made a similar claim in deceit.

Relevant to the arm's length principle is the fact that Maruha had the benefit of contractual protections and external advisors (including accounting and law firms) to look after its interests, and had also employed an accounting representative in New Zealand to review the ATL accounts. All had addressed the loan and amortization issues at some stage, but were found to have been misled as to their impact.

In the High Court, Priestley J accepted the claim of deceit.[51] In respect of fiduciary duties, his Honour found that the 1985 joint venture agreement did not in itself create fiduciary duties,[52] but went on to examine the parties' conduct during the course of the contractual relationship:[53]

> The joint venture *arrangements* were clearly obviously intended to be mutually beneficial to both parties. The various articles of the agreement indicate an intention to impose mutual trust and confidence in each other for the purposes of the joint venture. Amaltal was authorised by Maruha to act on behalf of both parties in the area of acquiring quotas and keeping accounting records for the joint venture company [ATL].

The use of the word "arrangements" rather than "agreement" is significant, as Priestley J refers to the roles taken by the parties in the operation of the joint venture company, rather than obligations under the joint venture agreement. These were matters consistent with the joint venture agreement but not expressly provided for in it. Priestley J's reasoning rests on Amaltal having undertaken specific and assumed responsibilities for ATL: completing its accounts and tax returns, and calculating the amounts owed under the PGM.

His Honour held that Amaltal's undertaking of these specific and assumed responsibilities gave rise to a relationship of trust and confidence, which itself gave rise to a legitimate expectation on Maruha's part that Amaltal would not use its position in a way adverse to Maruha's interests.[54] In the context of the commercial relationship as a joint venture, undertaking those responsibilities was sufficient to establish fiduciary obligations. They were what distinguished the case from that of an "ordinary arm's length contractual relationship" in which parties can be protected by contract, and where fiduciary obligations are rarely applied.[55]

Priestley J also referred to issues of vulnerability. Amaltal was familiar with the taxation affairs of fishing companies and New Zealand taxation matters, whereas Maruha was a foreign entity whose representatives in New Zealand did not have English as their first language. His Honour held that, given the assumed obligations, it was not sufficient for Amaltal to claim that Maruha could have engaged independent advice. Maruha

51 *Maruha Corp v Amaltal Corp* (19 October 2004) unreported, High Court, Auckland Registry, CIV-2003-404-1773.

52 Ibid [298].

53 Ibid [299] (emphasis added).

54 Ibid [300]–[303].

55 Ibid [304], citing *DHL International*, supra note 13.

"reposed trust and confidence in Amaltal and was reliant on Amaltal's conduct".[56]

The Court of Appeal upheld Priestley J's findings in respect of deceit, but rejected the claimed fiduciary duties.[57] Hammond J, writing for the Court, acknowledged that while in some circumstances it might be possible for there to be fiduciary duties between joint venturers, this was not such a case:[58]

> This is a case where the parties were patently in an arm's length commercial transaction. There were none of the distinguishing features of a fiduciary relationship. Each party had significant commercial clout and their own independent advisors; and perhaps most importantly of all, the very purpose of Mr Kawata being in New Zealand as Deputy-General Manager was precisely to look to the state of accounts between Maruha and Amaltal. There were joint managing directors, so each was actively involved in the administration of the Surimi JV — to the extent that both parties had to sign every cheque. Maruha was not in any way dependent upon Amaltal.

The Court also rejected the proposition that there was a fiduciary duty in relation to the tax and accounting functions that Amaltal undertook on behalf of the joint venture, notwithstanding Maruha's alleged reliance on Amaltal. Maruha's agent, Mr Kawata, "was in New Zealand precisely to monitor and safeguard these accounting and tax functions".

The bench of the Supreme Court[59] included four of the five Justices from *Paper Reclaim*,[60] and four of the five from *Chirnside*.[61] In reasons given by Blanchard J, the Court held that the entire relationship was not fiduciary, despite being a former partnership:[62]

> These were commercial companies who had elected not to continue as partners and, instead, to frame their relationship by internal and external rules applicable to a company supplemented by a contract between them in their capacity as shareholders. There is no warrant then for imposing upon them generally obligations not found in the company's own constitution, in companies legislation or in the terms of the contract. As partners they would have owed fiduciary duties to one another, but their relationship no longer took that unincorporated form. They had deliberately substituted the Companies Act regime for that of the Partnership Act.

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56 Ibid [306].

57 *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA), Hammond, O'Regan, and Robertson JJ.

58 Ibid [140]–[141].

59 *Amaltal*, supra note 3.

60 *Paper Reclaim*, supra note 2.

61 *Chirnside*, supra note 1.

62 *Amaltal*, supra note 3, [19].

The Court also rejected the argument that fiduciary obligations were owed by reason of the arrangement being characterized as a joint venture. The Court held that when commercial parties engage in a venture that can only "loosely" be called a joint venture and choose to use an incorporated vehicle to carry out that venture, "it is unlikely that [the parties'] relationship as a whole will be fiduciary in nature".[63]

However, the Court found that Amaltal owed Maruha fiduciary duties in respect of part of the relationship — the preparation of ATL's accounts and tax returns:[64]

> It is well settled that, even in a commercial relationship of a generally non-fiduciary kind, there may be aspects which engage fiduciary obligations of loyalty. That is because in the nature of that particular aspect of the relationship one party is entitled to rely upon the other, not just for adherence to contractual arrangements between them, but also for loyal performance of some function which the latter has either agreed to perform for the other or for both or has, perhaps less formally, even by conduct, assumed.

The Court concluded that the way in which the parties had allocated responsibility for tax and accounting functions meant that Amaltal was Maruha's agent when carrying out those functions. As principal, Maruha was entitled to expect that Amaltal's accountant would behave even-handedly and impartially, and be loyal to both shareholders. As an employee, the accountant was Amaltal's agent, and Amaltal (in relation to the accounting functions) was Maruha's agent. Maruha's ATL managing director was found to have had no firm grip on ATL's taxation position, but knew that Amaltal would be organizing ATL's accounting and taxation affairs. Although the Court acknowledged that Maruha had employed a watchdog to effectively undertake an audit of the position, it held that the fact that Maruha had checked Amaltal's work did not indicate any lack of entitlement to rely on Amaltal's faithful performance.

This finding of agency involves a conceptual two-step, as the parties to the Surimi Joint Venture (to which the PGM applied) were ATL and Maruha, not Amaltal and Maruha. Accordingly, any breach of agreement was made by ATL, not Amaltal. Instead, ATL's obligation of loyalty to Maruha under the Surimi Joint Venture was sheeted home to Amaltal through Amaltal's involvement in the management of ATL. The case may well now stand for the proposition that shareholders can acquire a fiduciary obligation of loyalty to the extent that they are involved in the management of the company.

63 Ibid [20] (footnotes omitted).

64 Ibid [21]–[22] (footnotes omitted).

A Common Approach?

There is some similarity in approach across the three decisions. In each, the Supreme Court looked closely at the roles that each party played within their respective relationships, and the parties' expectations as to how they would approach their tasks or undertakings within that role. The Court took account of the contractual positions, but did not hinge its analysis on contract. A fiduciary relationship was found in all three cases, but only in one were obligations owed both ways; the other two, although labelled a joint venture by one or both parties, were treated as arm's length dealings, except where one party undertook an agency role for the other. One of those agencies was of a familiar and uncontroversial type (a sales agent selling on commission); the other was less so.

There is a great deal of commonality in the fiduciary principles applied. Elias CJ, Tipping, and Blanchard JJ sat in all three decisions. In *Paper Reclaim*, the Court's unanimous decision referred to the principle described by Tipping and Blanchard JJ in *Chirnside*, that "a fiduciary relationship will be found when one party is entitled to repose and does repose trust and confidence in the other".[65] Finding fiduciary obligations by status or analogy also remains influential. That method was utilized by Elias CJ and Keith J in *Chirnside* to find that the arrangement was akin to a single transaction partnership, and, to a lesser extent, it was also used by the Court in *Amaltal* to find a relationship of agency through the shareholders' understandings of their conduct in the management of the company. From the three decisions, there is a possible tightening of the definition of 'joint venture' to draw it further into a status-based relationship. This fits with Elias CJ and Keith J's broad statement in *Chirnside* that joint venturers owe each other fiduciary duties. It also fits with the Court's rejection of the label 'joint venture' in both *Paper Reclaim* and *Amaltal*, on the basis that the arrangements were too loose to be called joint ventures — a point that would be irrelevant if the label meant nothing in terms of legal or equitable duties.[66]

In each case, the parties' contractual positions and commercial sensibilities played a role. The significance of the arm's length principle is obvious in the differences between the first instance and appellate decisions, and the results varied widely. Even in the Supreme Court the influence of the principle varied.

Although all parties were commercial, their levels of commercial sophistication differed — Messrs Chirnside and Fay were the least sophisticated, while Maruha would be the most sophisticated.[67]

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65 *Paper Reclaim*, supra note 2, [31].

66 Interestingly, the Supreme Court transcript in *Amaltal* reveals that the Court may retreat from this approach. In response to submissions from counsel that the joint venture was inherently fiduciary, Tipping J responded, "I'm not sure that the reasoning of the learned Chief Justice was that all Joint Ventures are per se inherently fiduciary. I thought it was more that this particular one between *Chirnside and Fay* was inherently fiduciary." *Amaltal Corp Ltd v Maruha Corp* [2007] 3 NZLR 192, transcript, 5 per Tipping J (emphasis in original).

67 In respect of the size and complexity of the parties' business operations.

Only *Amaltal* involved a formal written agreement. In the Supreme Court, the absence of a written agreement was seen by Tipping and Blanchard JJ to favour the existence of fiduciary duties in *Chirnside*, where equitable principles were used to fill any contractual void; in contrast, it ran against such duties in *Paper Reclaim*, where the parties were held to have chosen to take on a commercial risk by making an informal arrangement. However, the presence of formal contractual mechanisms and practices to safeguard Maruha's interests in *Amaltal* did not prevent the duties from arising.

Only in *Amaltal* did the parties have guidance from external legal and accounting advisors, as well as an accountant employed to safeguard Maruha's interests in respect of ATL's accounts. Yet receipt of that advice again did not prevent the duties from arising.

IV COMMERCE: KEEPING EQUITY AT ARM'S LENGTH SINCE AGES AGO?

The decisions illustrate the tension between the drive for commercial certainty and the need to guard against the risk of harm inherent in particular relationships. The reluctance (real or perceived) of finding that arm's length commercial parties owe equitable duties is the product of this tension, as well as the overall tension between equity and contract. Parties' expectations of behaviour are fundamental to the analysis of their obligations (whether those expectations are described in terms of trust, confidence, undertakings, or otherwise), and contract, by its nature, is the primary source of information about parties' expectations. The arm's length principle is another potential source of information about the parties' expectations: an assumption that commercial parties intend their relations will be governed by the market standard of behaviour, rather than any higher standard. It was captured by Priestley J in the High Court in *Amaltal*: "[f]iduciary obligations will rarely be found to exist in the context of arm's length commercial relationships where the parties reasonably expected contract to regulate that relationship exclusively".[68]

There is a related public policy element — the belief that there is an absence of vulnerability because two commercial parties somehow know what they are getting into, so that either equity's protection is not required, or they should have used contractual mechanisms for protection. This again relates to the underlying fiduciary principle, as vulnerability is sometimes a required element in a fiduciary relationship.

Thus, in the author's view, support for the arm's length principle ostensibly stands on two grounds: the parties' expectations,[69] and the

68 *Maruha Corp v Amaltal Corp*, supra note 51, [291].
69 See *Hospital Products*, supra note 5, 144–146 per Dawson J.

absence of vulnerability in commercial relationships.[70] Both deserve to be explored.

Parties' Expectations: Contractual or Commercial

Contract plays several roles in this inquiry. It is the primary source of information about the nature of the parties' relationship and their expectations of the applicable standard of behaviour. Contract can expressly inform whether parties intend to circumscribe the scope of their obligations to each other, or preclude fiduciary obligations altogether. Further, it can set out mechanisms by which parties have agreed to allow or protect against risk. Mason J discussed the interaction between contractual and fiduciary duties in *Hospital Products*:[71]

> That contractual and fiduciary relationships may coexist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

Essentially, the content of any equitable and contractual duties must fit together: "[a] fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."[72] There are a number of ways in which contract can affect fiduciary duties — parties may consciously agree to exclude the duties, circumscribe the scope of any fiduciary duties to defined terms, or authorize the fiduciary to act in a manner that would otherwise breach the duties, and arguably, a contractual

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70 "Fiduciary obligations should not readily be imported into a carefully-drawn 'arm's length' commercial contract where there can be no question of the protection of vulnerable members of society." *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571, 580 (HC) ["*Auag Resources* (HC)"] per Barker J; affd *Auag Resources* (CA), supra note 16.

71 *Hospital Products*, supra note 5, 97 dissenting.

72 *Auag Resources* (HC), supra note 70, 577. See also *Beckingham v The Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403, 410.

clause to exclude liability for consequential loss caused by a breach of fiduciary duty may also be effective.[73]

A clause specifically excluding fiduciary duties or partnership obligations from a particular joint venture will generally be effective.[74] Within limits, parties are free to negotiate the terms regulating their own behaviour.[75] This is shown by the courts' reluctance to resort to implied terms or negligence when parties have already expressly provided for a particular set of circumstances.[76] Provisions in a partnership agreement could conceivably exclude any fiduciary relationship arising in that partnership.[77] If a sufficiently restrictive modification of the parties' obligations alters the entire nature of the relationship, it may do more than alter the default rules — it may shift the relationship into an entirely new nominate category.

When the agreement creating the fiduciary duties also limits the scope of those duties, it is a limit of the scope of activities in which the parties have mutual trust and confidence so that actions outside that area are not taken in the capacity of fiduciary. In this way, fiduciary duties supplement rather than substitute contractual obligations, and consistency is maintained. In a similar vein, an agreement that expressly provides that the relationship of the parties shall be fiduciary in nature does not qualify other contractual provisions which allow the parties to pursue recognizable and distinct interests of their own.[78]

A fiduciary's liability can be limited by an agreement duly authorizing the fiduciary to act in a manner that would otherwise be inconsistent with the duty, either at the outset or during the course of the relationship.[79] If made at the outset, it is conceptually similar to a circumscription of the duties. If made during the course of the parties' relationship, it should be

73 See *DHL International*, supra note 13, 23: "it is at least arguable that the contractually agreed exclusion of liability ... should continue to govern any relationship in equity: why should [the plaintiff] derive benefits in equity for which it was not prepared to pay in contract?" The point was neither determined nor discussed in detail, but the Court expressly noted that it remained arguable. Compare *Penner v Yorkton Continental Securities Inc* (1996) 183 AR 5, 22 per Moore J: "[w]here there is a breach of fiduciary duty, exclusion clauses and verification clauses in the contract have no application. The fiduciary duty transcends these terms and it is abhorrent for contractual terms to abrogate that duty." See generally Feasby, "Fiduciary Obligations and Exculpatory Clauses" (1998) 36 Alta L Rev 923. The paucity of authority is perhaps because of the risk inherent in running a defence relying on such an exclusion.

74 For an example of an effective 'no partnership clause' preventing a partnership from arising in a joint venture, see *Midcon Oil & Gas v New British Dominion Oil Co* [1958] SCR 314. See also Maxton, "Joint Venture or Partnership?" (1987) 4 BCB 221, in which the author considers an agreement negating an intention to be partners to be a factor, but not necessarily a decisive one. One of the few examples of such a clause not being effective is *Russell v Austwick* (1826) 1 Sim 52; 57 ER 498, where an agreement between four parties with a no partnership clause was held to be a partnership so that two of the four taking up a business opportunity on their own were liable to account.

75 See the discussion in Flannigan, Boundaries, supra note 8. This analysis is applicable to the interaction between contract and a wide spectrum of default equitable or tortious rules.

76 See *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA), per Cooke P; revd [1991] 1 NZLR 641 (PC), but the President's comments are still valid.

77 *Chan v Zacharia* (1984) 154 CLR 178, 196 per Deane J.

78 *Noranda Australia Ltd v Lachlan Resources N L* (1988) 14 NSWLR 1, 16–17 (NSW SC) ["*Noranda*"] per Bryson J.

79 *Chan v Zacharia*, supra note 77, 204 per Deane J.

considered in the context of a beneficiary consenting to a breach of duty by the fiduciary.[80] Arguably, the agreement will not be effective unless the parties have given fully informed consent to the release of the obligations. In *Morgan & Banks Ltd v Gemini Personnel Ltd*,[81] the Court of Appeal considered it arguable (on a strike out application) that a fiduciary duty had arisen during the negotiating phase of the parties' relationship, in the manner of *LAC Minerals v International Corona Resources Ltd*[82] and *United Dominions Corp Ltd v Brian Pty Ltd*.[83] The subsequent detailed agreement, which included an 'entire agreement' clause, may have been secured by a breach of fiduciary duty. The Supreme Court touched on this issue in *Amaltal*, where it refused to find a fiduciary duty in the joint venture based on the parties' previous status as partners when they had then entered into a very detailed written agreement. It also touched on the issue in *Chirnside,* where it noted that the parties' fiduciary relationship was not of a type from which either party could withdraw. Importantly, however, the Court in that case also noted that withdrawal would "usually require appropriate arrangements to be made in consideration of the severance of the joint interests and the release of the parties from their duties of loyalty to each other":[84]

> The point, in short, is that joint ventures, like partnerships, can generally be brought to an end by appropriate notice. The previous joint venturers must, however, still act equitably towards each other in the steps necessary to bring the affairs of the joint venture to a conclusion which is fair to all concerned. The further the joint venture has progressed the more complex those obligations may be. Once the venture becomes contractual the contract will normally govern what is to happen on the termination of the venture or the withdrawal of a party from it. In the absence of contractual regulation, equitable principles will supply the solution.

The need for informed consent to the removal of the fiduciary obligations was not considered in either case. Rejection of the alleged duties in *Amaltal* may have been attributable to the commercial sensibilities of the parties themselves, and to the assumption that both had the benefit of legal advice when entering into the joint venture so that they could be assumed to have

80 Compare *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399 (PC), where the Privy Council considered the position of a company that had assented to its former managing director "going it alone" in respect of an opportunity that the company could not afford. Lord Scarman for the Board saw little difference between the approaches, as his Lordship considered that from the date of the assent it could be viewed *either*, that it was a venture outside the scope of the relationship, *or* that the company had given its fully informed consent to pursue the matter no further and to leave the former director to do so. Ibid 403–404.

81 (30 June 1999) unreported, Court of Appeal, CA311/98.

82 *LAC Minerals*, supra note 16.

83 *United Dominions*, supra note 7.

84 *Chirnside*, supra note 1, [92]–[93] per Tipping and Blanchard JJ (footnotes omitted).

consented to any change in their obligations to each other.[85] That kind of assumption is the arm's length principle in action.

Informed consent requires that a beneficiary is fully informed or has received "full and frank disclosure of all material facts".[86] The burden of proving that full disclosure has been made lies with the fiduciary. The Privy Council discussed the meaning of informed consent in *Clark Boyce v Mouat*,[87] in the context of a solicitor who carried out a conveyancing transaction on behalf of two parties with conflicting interests:[88]

> Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act.

Interestingly, the Board noted that there may be cases where a fiduciary could not act contrary to his fiduciary obligations, despite having received the beneficiary's fully informed consent; there would be "some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both".[89]

Consent may be in respect of a breach or anticipated breach. In the case of an anticipated breach, there may be additional practical difficulties in proving there has been full disclosure of relevant facts. Litigation may ensue even if there has been full disclosure, particularly if the venture is successful.[90]

The need for fully informed consent is consistent with the principle that ordinarily, an agreement to exclude default rules of obligation must be explicit, and permeates other areas where there are contractual obligations between trusting parties.[91] If parties agree to limit the scope of a fiduciary's obligations, or allow a fiduciary to make commercial decisions in its own self-interest when dealing with beneficiary property, this does not

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85 No evidence of whether the parties had such advice is recorded in the judgment, but it may have been before the Court.

86 *Kuys*, supra note 27, 168 per Lord Wilberforce for the Board; see also *Chan v Zacharia*, supra note 77, where it is described as "the informed and effective assent of the person to whom the obligation is owed". The concept is identical; the various descriptions do not, however, provide any indication as to what is required of a fiduciary who seeks to obtain the beneficiary's consent. The hesitance is perhaps due to the prophylactic nature of the duties, and a resistance to clarify the methods of avoiding the duties.

87 [1993] 3 NZLR 641 ["*Clark Boyce*"].

88 Ibid 646 per Lord Jauncey for the Board.

89 Ibid 647, citing *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 per Richardson J (as he then was).

90 As, on one reading of the facts, was the case in *Queensland Mines Ltd v Hudson*, supra note 80.

91 See eg *Flight Park Tandems Ltd v Club Flying Kiwi Ltd* (2005) 2 NZCCLR 508 (HC).

necessarily exclude an obligation to act in the beneficiary's best interests.[92] As stated by Lord Bingham in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*:[93]

> The courts should not ordinarily infer that a contracting party has given up rights which the law confers upon him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him those rights unless they are so expressed as to make clear that they do.

The arm's length principle is the inverse of this rule. It is not a matter of the parties' agreement excluding default obligations, but rather, in the absence of agreement, courts presuming that the parties' arm's length position is reason to exclude fiduciary obligations which may otherwise apply. It is perceived that there is a lesser need for equity's protection.

In support of this proposition, it is sometimes said that fiduciary duties cannot be used to expand on the contractual obligations of parties,[94] relying on the dictum of the Privy Council in *Clark Boyce*.[95] That decision is often taken to have said that it is inconsistent to impose fiduciary duties where there are existing contractual relations; but that would be an overstatement. It is important to consider the position in light of the Board's decision in that case. In *Clark Boyce*, the plaintiff alleged that the defendant owed a positive obligation to advise on the wisdom of entering into a particular transaction. This was outside the scope of the defendant's contractual duties. The Board held that a breach of fiduciary duty "cannot be prayed in aid to enlarge the scope of contractual duties".[96] In that context this was correct, as to have found such a positive obligation would ignore the distinction between 'prescriptive' and 'proscriptive' duties, and would require equity to expand that which the solicitor was to do, rather than that which he was not to do. The Board's decision does not go so far

92 In *John v James* [1991] FSR 397 (Ch D), the Court found a joint venture existed between a publishing company and two songwriters (who had transferred the copyright in their material to, and placed their trust and confidence in, the publishing company). The publisher, in control of the process of maximizing returns, owed fiduciary duties to the songwriters but was entitled to make commercial decisions in its own interest in balancing expense and risk against prospects of success. Nicholas J held that this was not inconsistent with a fiduciary duty to act honestly and in the best interests of the songwriters regarding any exploitation which was carried out, in particular not to make any profit for itself: ibid 432–434.

93 [2003] 1 All ER (Comm) 349, [11] ["*HIH Casualty*"].

94 See eg Keane J's statement in *Grace Pacific Ltd v Noy Holdings Ltd* (14 July 2004) unreported, High Court, Christchurch Registry, CIV-2004-409-1234, [48] ["*Grace Pacific*"]: "[n]or will equity interpose where a contract falls short, in order to supply terms which with hindsight the parties wish that they had stipulated for." See also *Hospital Products*, supra note 5, 147 per Dawson J: "[w]here a relationship is such that by appropriate contractual provisions or other legal means the parties could adequately have protected themselves but have failed to do so, there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangements between them."

95 *Clark Boyce*, supra note 87.

96 Ibid 648.

as to suggest that fiduciary duties cannot exist in a contractual relationship, only that they will not mend failings in the parties' contractual dealings or extend the parties' obligations beyond the scope of what they have agreed. It does not deal with the parties' failure to agree on fiduciary issues. The issue is well put by Gault J in *Auag Resources Ltd v Waihi Mines Ltd*:[97]

> Contracts can and do modify the extent and nature of duties that would otherwise arise.... 'But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself'....

In the author's view, the usual rule is conceptually preferable: in the absence of agreement, parties should expect to be governed by default standards. The rules should be sufficiently clear so as to give the public guidance to shape their behaviour appropriately in advance, rather than to punish an unexpected breach. However, analysis of the appropriate default standard by reference to parties' expectations that a particular standard applies avoids the more fundamental policy issue of *why* the market standard should apply to dealings between the parties in those circumstances.

As well as a presumption that both parties understand that each will act in pursuit of its own interests, there is a further underlying presumption that parties entering an agreement at arm's length have adequate opportunity to prescribe their own mutual obligations, and that contractual remedies should be sufficient.[98] This goes to the issue of vulnerability (or rather the absence thereof) and its role in the fiduciary principle.

Equity's Protection of Vulnerabilities

The vulnerability of a party to an improper exercise of power is often identified as part of the fiduciary principle, and a basis for equity's protection. Cooke P (as he then was) once stated that "vulnerability is an important, indeed cardinal, feature of a fiduciary relationship".[99]

In almost all fiduciary relationships, the beneficiary is vulnerable to an improper exercise of a fiduciary's power. A partner, by the very nature of partnership, is vulnerable to her partner incurring unanticipated liabilities beyond the scope of what the partners had anticipated or agreed would be incurred. This kind of vulnerability is a consequence of the parties' mutual trust and confidence, and the risk that such trust and confidence will be abused. In the author's view, to the extent that it is said that equity imposes

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97 *Auag Resources* (CA), supra note 16, 103,604; quoting *Re Goldcorp*, infra note 105, 399–400; citing *Kuys*, supra note 27, 166; *Hospital Products*, supra note 5, 97; *Kelly v Cooper* [1993] AC 205, 214; *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, 543 (HL).

98 Kennedy, "Equity in a Commercial Context" in Finn (ed), *Equity and Commercial Relationships* (1987) 15. See also *DHL International*, supra note 13, 22; *Frame v Smith* (1987) 42 DLR (4th) 81, 137–138 per Wilson J; *LAC Minerals*, supra note 16, 60–61 per Sopinka J.

99 *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311, 315.

fiduciary duties to protect against that kind of vulnerability inherent in the nature of the relationship itself, Cooke P's statement must be correct. Thomas J in the Court of Appeal in *Maclean v Arklow Investments Ltd*[100] discussed this underlying notion:[101]

> Underlying all the cases is the notion 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 or her to place reliance upon the other and 'requires the protection of equity acting upon the conscience of that other'.

His Honour considered that in such circumstances it is appropriate for equity to intervene: "commonly held notions of justice require that persons who act in the affairs of another shall not be permitted to exploit or take advantage of their position at the other's expense".[102]

Vulnerability, however, is not exclusive to fiduciary relationships. In some sense, it exists in almost all commercial relationships. This should not be enough to elevate the standards of behaviour. In *Liggett v Kensington*,[103] McKay J (in dissent) addressed this point:[104]

> No doubt [the plaintiff] was "vulnerable" in the sense that he was dependent on the honesty of the people with whom he was dealing, but that is true in any commercial situation in which one person parts with his money without immediate delivery of goods or their specific identification.

That observation was echoed by Lord Mustill for the Board in the Privy Council's decision on appeal:[105]

> Their Lordships have not heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary the Company was obliged honestly and conscientiously to do what it had by contract promised to do. Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to Their Lordships) have adverse consequences far exceeding those foreseen by Atkin LJ in *Re Wait* [[1927] 1 Ch 606]. It is

100 [1998] 3 NZLR 680.

101 Ibid 722 dissenting (references omitted). This case was subsequently appealed to the Privy Council: [2002] 2 NZLR 1. The Board's decision did not address this issue, nor diminish Thomas J's dicta. In contrast, the test adopted by the Court of Appeal in *DHL International*, supra note 13, included vulnerability as a factor: whether "the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power". The word "peculiarly" invokes consideration of the parties' inherent or circumstantial prior vulnerability.

102 Ibid.

103 [1993] 1 NZLR 257 (CA).

104 Ibid 290 dissenting.

105 *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385, 400 ["*Re Goldcorp*"].

> possible without misuse of language to say that the customers put faith in the Company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.

Thus it is debatable whether vulnerability is a necessary component of the fiduciary relationship, or whether it simply accompanies, but is not causative of, fiduciary relationships. The debate was obvious in *LAC Minerals*,[106] where the Supreme Court of Canada was divided on this issue. That case concerned a yet-to-form joint venture between mining companies. The majority (Sopinka, Lamer, and McIntyre JJ) recognized that the parties had not proceeded past the negotiation stage, but distinguished *United Dominions*[107] as the plaintiff had not conferred any power on the defendant, and was not otherwise in a position of vulnerability. Sopinka J for the majority considered that dependence or vulnerability was indispensable to the existence of a fiduciary relationship, and would not exist between independently advised commercial parties unless it was gratuitously incurred:[108]

> While it is perhaps possible to have a dependency of [a physical or psychological type] 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 respondent] placed itself in a vulnerable position because [the appellant] was given confidential information, then this dependency was gratuitously incurred.

In the minority, La Forest J considered that vulnerability was not essential, and was not the hallmark of a fiduciary relationship, although it is an important indicator as to its existence.[109]

Vulnerability may exist even before the parties enter into a relationship, as a consequence of factual circumstances. This may be through factors associated with an individual, such as age or language abilities; or through pressures created by circumstance, such as those faced by a client in need of legal advice and the accompanying stress and time pressures. These factors, however, relate to a prior vulnerability rather than one consequent on the relationship. To the extent that vulnerability is a determinative element of the fiduciary principle, then, like the other identified factors, it must arise concurrently with the relationship. Before the parties enter into the relationship there is no fiduciary duty. In the fiduciary context, equity protects against "*exposure*, not *weakness*".[110]

Although the issue of consequential vulnerability is often present

106 *LAC Minerals*, supra note 16.
107 *United Dominions*, supra note 7.
108 Ibid 63, 68–69, Lamer and McIntyre JJ concurring.
109 Ibid 39.
110 Flannigan, "Commercial Fiduciary Obligation" (1998) 36 Alta L Rev 905, 917 (emphasis in original).

in non-fiduciary relationships, an absence of vulnerability can be perceived as reason to exclude fiduciary duties. This is where the concept of vulnerability interweaves with the arm's length principle. In *Auag Resources*,[111] Barker J in the High Court noted that a fiduciary obligation will often be identified from "the need to protect a vulnerable party from the improper exercise of some discretion and power".[112] It is not normally appropriate for presumably well-advised corporate parties entering into a joint venture to require the protection of equity: "[f]or a successful and wealthy international conglomerate to appeal to the safeguards the law provides for the illiterate, the elderly and the financially oppressed is to move into an entirely inappropriate field of discourse."[113]

Consideration of the parties' commercial sensibilities, and whether the relationship was commenced through an arm's length commercial agreement, is clearly consideration of whether a prior vulnerability exists.[114] Prior vulnerability alone is not sufficient to impose fiduciary duties; otherwise there would be no need for separate doctrines of unconscionability or undue influence.[115] Something more is required to satisfy those other fiduciary principles.

Generally what is at issue when considering vulnerability in a commercial setting is not whether one party was disadvantaged when entering the relationship, but whether neither party was disadvantaged, so that equity's protection is not required. As the vulnerability inherent in a relationship continues regardless of the parties' commercial sensibilities, it is unclear how the absence of a prior vulnerability negates the need for equity's protection. The potential for abuse by the fiduciary remains. The argument is that parties are either more prepared for the risk, or more able to protect themselves through contract. The fiduciary question should not be an assessment of the parties' "relative bargaining positions before the agreement, but about the relationship created on contracting and how it is carried out after agreement".[116]

Part of this consideration comes back to commercial parties having the opportunity to design contractual mechanisms to protect against the kind of harm that fiduciary duties protect against — that is, the use of the position to advance the fiduciary's interests, rather than the beneficiary's. However, this is a flawed argument. At best, contractual mechanisms only act as a warning system; a check that enables the beneficiary to satisfy herself that the fiduciary is indeed acting in her interest. They cannot

111 *Auag Resources* (HC), supra note 70.

112 Ibid 578.

113 Ibid, quoting *Qantas Airways Ltd v Dillingham Corp* [1987] ACL 35,162, 35,163 per Rogers J.

114 Such as unequal bargaining power, other circumstances, or inherent quality (for example, age and language difficulties).

115 Compare *Hospital Products*, supra note 5, 69–70 per Gibbs CJ: "[a]nother circumstance which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes."

116 Bean, supra note 9, 56.

prevent the possibility of the harm itself, as that would inevitably involve removing the feature which makes the relationship fiduciary.

The conclusion is that vulnerability inherent in the type of relationship that attracts the fiduciary label is relevant to the inquiry, but the parties' abilities and vulnerabilities that exist outside of the relationship are not (or rather, should not be) relevant. Those prior abilities and vulnerabilities say nothing about that which equity seeks to protect against through the use of fiduciary duties, and are better addressed through other means.

V IS THE ARM'S LENGTH PRINCIPLE STILL RELEVANT?

As this article has discussed, the impact of the arm's length principle can be substantial or insignificant — there is little consistency. It is generally applied as a reason to refuse relief, without much in the way of judicial analysis. As a corollary, it is also ignored or dismissed by courts when circumstances appear to warrant relief.

The approach taken in *Amaltal*[117] is apposite. The commercial parties' sensibilities, the contractual position, and commercial practice (of an appointed watchdog and independent advisors) would suggest that Maruha — an experienced, publicly listed, multinational company — would not require (or expect) equity's protection. However, the Supreme Court considered this no impediment to granting relief. On a cynical view, had the Court not found for Maruha on the issue in equity, it may have impacted or precluded the available relief under a finding in deceit alone (due to limitation issues and the unavailability of compound interest outside of equitable damages — a significant sum given the quantum and time elapsed).

So is the arm's length principle a judicial trump card, to be played or reserved at discretion to assist or prevent relief; or does it have a more principled role in the inquiry? In the author's view it does. To understand its role, one must reflect on why parties dance at arm's length on the commercial dance floor in the first place.

Why Dance at Arm's Length?

The answer to this question involves the economic principles that underlie the legal principles of freedom of contract. The pursuit of self-interest in the market is the very essence of the free market economic model. An equitable obligation to act only in the best interests of another is not compatible:[118]

117 *Amaltal*, supra note 3.

118 *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 180 (SCC) per La Forest J.

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest.... No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle. Put another way the law does not object to one party taking advantage of another *per se*, so long as the particular form of advantage taking is not otherwise objectionable.

The nature of commerce is that negotiating parties are presumed to be particularly aware that all participants are free to act in their own interests. A fiduciary duty of loyalty is also contrary to parties' expectations of the rules of negotiation. In terms of fiduciary principles, there is neither trust and confidence, nor any undertaking (express or implied), nor an expectation that one party will act in the interests of the other.

Fiduciary duties do not arise by agreement.[119] Instead they arise from, and apply to, the relationship between the parties. While commercial parties may expect that in negotiations or other transactional dealings, all parties act in their own interests, once the relationship commences, one party effectively willingly exposes a weakness to the other in circumstances where fiduciary duties would otherwise be imposed. By this time those expectations are likely to have changed, so that the party exposing a weakness may have placed trust and confidence in the loyalty of the other. The fundamental issue is whether the relationship requires equity's protection.

The protection offered by fiduciary obligations is no less necessary to restrain opportunism in the commercial world[120] than in the non-commercial world.[121] Mason J (in dissent) explained this in *Hospital Products*:[122]

> But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

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119 *Noranda*, supra note 78, 17. They may of course arise from the platform of an agreement.

120 See Flannigan's views as to the purpose of fiduciary duties being to restrain the opportunism of a party who is granted limited access to another's assets on the condition that they will act in the interests of that other. He considers the status of the parties, commercial or otherwise, to be irrelevant. Flannigan, Boundaries, supra note 8, 216–217, 232.

121 See Finn, supra note 12, 16.

122 *Hospital Products*, supra note 5, 100 dissenting.

Bean takes the view that in collaborative associations, there can be no presumption that the parties are acting in their own interests — where there is a joint goal, one should presume that the parties aim to serve their joint interest.[123] This may, however, be one step too far. All business involves some degree of a joint goal, interdependence, and exposure to disastrous results if one contracting party fails to perform its obligations. A joint goal as a bare prerequisite would be a very low threshold for elevating the standard of behaviour, and the utility gained from self-interested transactions may be unnecessarily limited. There is also a considerable degree of utility in having a single standard of behaviour for parties when negotiating or commencing a relationship, regardless of any joint goal. Normally such negotiations are governed by the market standard, unless the parties earlier agree to negotiate in good faith, or commence their relationship without any prior agreement as to how they will behave (and so risk a finding of pre-agreement fiduciary duties).[124] A presumption based on their goals may well inhibit their abilities to take on commercial risk by circumscribing or excluding loyalty or good faith obligations.

This kind of 'certainty of obligation' at the negotiating table reflects our system's penchant for status-based obligations. A party which does not have any other status in negotiations (not as bank, solicitor, agent, trustee, or partner to the other party) has a status as a 'commercial party'. The market standard is the default standard of behaviour for that status in the same way that the fiduciary standard is the default standard for an agent when dealing with his principal. Flannigan appears to consider that status-based relationships have limited utility, and that it would be preferable for each relationship to be considered against the underlying fiduciary principle on a fact-specific inquiry in each case.[125]

The author disagrees. This observation does not reflect the development of our legal framework, and more significantly, removes the certainty which status-based obligations allow. Such certainty has considerable utility in helping individuals make quick decisions about their dealings with others, and cannot be discounted as a "convenience",[126] or a "modest signalling function",[127] as Flannigan contends. An approach solely based on first principles or on the facts of each case is simply impractical and would create confusion and greater scope for dispute.

The certainty allowed by the signalling function of status-based obligations creates expectations of behaviour, which enables those dealing with status-based fiduciaries to have trust and confidence in them. It also involves the fiduciary's implicit acknowledgment of the existence of those

123 Bean, supra note 9, 53.

124 See *United Dominions*, supra note 7.

125 Flannigan, Boundaries, supra note 8, 229: "[i]t therefore may be preferable to detach ourselves from our remaining dependence on the status ascription of fiduciary responsibility, and move to a fact based limited access test for all cases."

126 Ibid 229 n 33.

127 Ibid 228.

obligations by merely being in his or her role.[128] In *Chirnside*, Blanchard and Tipping JJ made this observation:[129]

> It does not, for present purposes, matter whether one sees the fiduciary obligation as one which is imposed by reason of the nature of the relationship, or as one which, in the light of that relationship, is impliedly accepted. In some cases, essentially the traditional categories, the implied acceptance rationale may be apposite and in others, of the particular kind, the imposition rationale may be preferable.

Their Honours' distinction between status-based and de facto fiduciary relationships in the acceptance–imposition concept can be understood by considering that status-based duties are so well known that those who take up a role with that status will be well aware of the duties which attach to the role, whereas those dealing in the de facto sense do not have that advantage. Commercial parties dealing with each other have different expectations compared to when they are dealing with other parties. This observation, however, does not require courts to shrink from imposing equitable duties when the situation so requires.

The benefits derived from the certainty of status-based obligations are not a sufficient reasons to limit obligations only to status-based relationships. Where the underlying harm is the same and the circumstances deserve relief, equity must not be so precious as to refuse relief because the parties do not fit into a particular status or have not formalized their position.

What Remains of the Arm's Length Principle?

In the end, the commercial status and sophistication of the parties is relevant to the inquiry. It gives a starting point — the default standard of behaviour that applies to those parties in the absence of something more. Keane J's description in *Grace Pacific* is apt: "[e]quity will only accord fiduciary status to a commercial relationship, however, where there is some distinctive reason that compels the conscience."[130]

There must be some reason to shift the standard from the market standard, where commercial parties deal with each other at arm's length. This is the core presumption that, in the author's view, the arm's length principle should represent — the default position from which the aggrieved party must show an exception. At present, the same applies in respect of good faith obligations.

This is not the final role for the parties' commercial sensibilities. In

128 Flannigan is on firmer ground with his proposition that underlying the fiduciary principle is a concept that allows limited access arrangements to be shielded from self-interest.

129 *Chirnside*, supra note 1, [87].

130 *Grace Pacific*, supra note 94, [46].

considering the parties' expectations of behaviour — including whether one (or both) has trust and confidence that the other will act in his interests, or expects that they will in good faith take account of each other's interests — sophisticated commercial parties may well have a higher level of distrust and think less of each other. In a way, this is the opposite of Lord Mustill's comments in *Re Goldcorp*.[131] While high expectations may not create fiduciary duties when there were none, low expectations may prevent them from arising.

Fundamentally, in the author's view, the commercial status or sophistication of the parties is not a trump. At most, it is a factor to be balanced against other indicators of the parties' objectives and expectations in their dealings with each other. On balance, it is a fairly minor factor. More significant are the contractual terms, relationship status (or lack thereof), and the parties' conduct towards each other.

After these factors have been exhausted — such that a party can be said to have entered a relationship at arm's length, not expecting anything to change (and nothing did) — would the commercial sensibilities become relevant. Even then, it is only in a marginal sense, as it is simply the recognition that there is no distinctive reason to elevate the standard of behaviour above the default standard.

What, in the author's view, is not a valid approach is to presume that because parties are commercial, no equitable duties will arise; or that it should be more difficult for equitable duties to attach to de facto commercial relationships than to other types of non-traditional status-based relationships. Equitable duties are present throughout commerce. The parties' commercial sophistication (or lack thereof) does not affect the matters that equity seeks to protect through the use of fiduciary duties. It does not matter if a partnership, agency, or solicitor–client relationship is entered into between sophisticated parties of equal bargaining power and with equal access to advice — the duties are still imposed. The fact that they may have dealt with each other at arm's length at commencement does not in itself negate the role of fiduciary obligations in regulating the harm inherent in the relationship. That harm can arise in the commercial context, despite contractual mechanisms for protection, the parties' size, or their commercial nous. The relationship either requires protection from that inherent harm, or it does not.

The risk faced is an overextension of that doctrine. The self-interested nature of commercial dealings is important to the integrity of the economic system. We are all vulnerable to others acting in their own interests, in preference to our own. Achieving efficiency through competition requires this vulnerability. Equity's protection must be given carefully; only to those select relationships that deserve to be protected against such self-interest. But if the nature of the relationship requires such protection, the parties'

131 *Re Goldcorp*, supra note 105.

commercial sophistication or experience does not absolve that need. It is a harm only equity can protect against.

In a way, on the commercial dance floor, parties start off dancing at arm's length. The imagery is of being guarded, wary of letting others take an improper advantage. Through experience with their dancing partner they may develop levels of trust, particularly in their honesty and integrity, but to let down their guard in this period of courtship is to do so at their own risk. To impose a legal obligation on a dancing partner to behave at a higher standard, some greater level of commitment is required. It may be that they become betrothed in a traditional relationship, and thus be entitled to the loyalty and fidelity of their dancing companion. Alternatively, if the parties become sufficiently committed without having conversed about their intentions, or having conversed and decided to avoid a traditional relationship, they may still become entitled to that level of loyalty and fidelity, at least in parts of their dealings. The parties must be committed in substance if not in form; a quick whip around the floor would not normally suffice. Importantly, if those levels of trust and mutual confidence arise, then duties and expectations of loyalty and fidelity are not excluded simply because the parties are experienced or have danced before. While experience may slow or prevent them placing trust in each other, it does not protect them once they have let themselves step closer.