WHAT CONSTITUTES A JOINT VENTURE COMPANY?

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I. INTRODUCTION

Section 131(1) of the Companies Act 1993 contains what may be considered the essence of a company director's duties: to act in good faith and in what the director believes are the best interests of the company.[1] This duty is however moderated by the remainder of section 131.[2] The focus here is on s 131(4) of the Companies Act, which provides that a director of a company carrying out a joint venture between shareholders may, if the company's constitution permits, act in the best interests of one or more specific shareholders, rather than in the best interests of the company.

This provision represents a considerable departure from the principle contained in s 131(1). But in the years since the Companies Act came into force, there has been little judicial or academic commentary on it. This essay aims to provide an analysis of this provision, highlight its problems, and consider how it is best interpreted.

The first section considers the background to the passage of s 131(4). The second section analyses the uncertain nature of a 'joint venture' in New Zealand law and the issue of fiduciary obligations between those in a joint venture. The third section considers the particular issues raised by an incorporated joint venture, and discusses existing authority on s 131(4). The fourth section reflects on the difficulties raised by the fiduciary obligations of those in a joint venture relationship when set against the departure from a director's normal fiduciary obligations permitted by s 131(4). The fifth section seeks to promote clarity in relation to s 131(4) by considering a number of solutions to the issues raised.

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1 This section itself is of course problematic. See e.g. P Watts 'Editorial: Statutory Formulation of Directors' Duties – Some Issues' [December 2003] 12 *Company and Securities Law Bulletin* 95 at 95 for comment on the problems of s 131(1) setting up the concept of 'interests of the company' as distinct from the interests of the shareholders as a whole.

2 See ss 131(2), (3) and (4).

II. The Context of Section 131(4)

A. Introduction

Section 131(1) of the Companies Act 1993 imposes a general duty on directors of a company to act in good faith and in the best interests of that company.[3] Sections 131(2) and (3) vary this general rule in the case of a wholly owned or partly owned subsidiary. Section 131(4) provides a further variation:

> A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

It is s 131(4) that is the emphasis of this essay, as it raises a number of questions. What is a joint venture? How do we determine whether one exists in a particular case? What are the implications of this? It is these kinds of questions – and others – that this essay sets out to answer. But first we begin with the background to the provision.

B. The Genesis of s 131(4)

Shortly after its creation, the Law Commission was charged with the task of examining and reviewing the law relating to corporate bodies with a view to drafting a new Companies Act.[4] A draft Act was set out in the Commission's 1989 report on company law, and this draft is in many places very similar to the Companies Act that was passed in 1993 and is still in force today. There are however some important differences, and one of these is in s 101 of the draft Act, which states that:

> The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act in good faith and in a manner that he or she believes on reasonable grounds is in the best interests of the company.[5]

This 'fundamental duty' reflected what was understood as the position at common law and in equity.[6] By 1990, however, when the Law Commission published a further report,[7] this provision had expanded to recognize 'limited situations' such as joint venture companies where a constitution could expressly contemplate or require that a director put the interests of one of more shareholders ahead of the interests of the company.[8] Although not discussed in detail in the Law Commission's 1990 report, Peter Watts has expressed the view that this provision was 'fomented' from various

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3 See e.g. Hon Justice Tompkins 'Directing the Directors: The Duties of Directors Under the Companies Act 1993' (1994) 2 *Waikato L Rev* 13, 19–20 for comment on the common law context of s 131(1). Note also that s 169(3) of the Companies Act states that the duty in s 131 is a duty owed to the 'company' rather than to shareholders. It is perhaps a drafting infelicity of s 169(3) that it refers to the s 131 duty being owed to the company, when of course the s 131(4) duty is expressly owed to shareholders, rather than the company.

4 New Zealand Law Commission, *Company Law—Reform and Restatement* NZLC R9 (June 1989) ix.

5 New Zealand Law Commission, ibid, 241.

6 See e.g. A Beck and S Grant *Litigation Involving Companies*, (New Zealand Law Society Seminar, Aug–Sept 2004) 83.

7 New Zealand Law Commission, *Company Law Reform: Transition and Revision* NZLC R16 (Sept 1990)

8 New Zealand Law Commission ibid at 29.

common law cases, including comment in *Berlia Hestia (NZ) Ltd v Fernyhough,*[9] that nominee directors may act in the best interests of their appointer, as long as they also have a bona fide belief that acting in the best interests of the appointer will also advance the company's interests.[10] Section 131(4) has also been expressed to represent a 'codification' of various obiter common law statements, including that in *Berlia Hestia*.[11] Earlier English authority had been of the view that a director may act in the interests of a particular shareholder, but only if that director was free to exercise his or her judgment in the best interests of the company as well.[12] It is perhaps this approach that the New Zealand reformers wished to avoid.[13] In Australia, general authority has supported the view that a 'nominee' director could, in certain circumstances, act in the best interests of the person who appointed him or her,[14] and, more specifically, it has been identified that joint venture directors may, like the directors of wholly owned subsidiaries, 'be in a special position in that they may recognise obligations to the joint venture participants or to the parent company.'[15]

The Companies Bill had its first reading in Parliament in 1990. The relevant clause 109 largely repeated s 101 of the Law Commission 1989 draft Act, and did not include any provision as to joint venture companies. The Justice and Law Reform Select Committee, which reported back to Parliament in 1992 after two years considering the Companies Bill,[16] recommended that this provision be amended to provide that a director of a joint venture company be permitted to act in the best interests of a shareholder, even though such action might not be in the best interests of the company, if permitted to do so by the constitution – in other words, a provision very similar to that ultimately enacted.[17] The second reading of the Bill in Parliament included this term,[18] as – of course – did the Act ultimately passed.

C. The Wording of s 131(4)

Neither the Law Commission nor the Select Committee saw fit to include a definition of 'joint venture' in the Companies Act.[19] Perhaps these bodies saw the meaning as relatively clear – if so, they were unfortunately mistaken. As we shall see, the meaning of the term 'joint venture' is

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9 [1980] 2 NZLR 150, 166.

10 See Watts, above n 1 at 95.

11 See D O Jones, *Company Law in New Zealand: A Guide to the Companies Act 1993* (1993) 114.

12 See *Boulting v Association of Cinematology, Television and Allied Technicians* [1963] 2 QB 606, 627, per Lord Denning; cited in N Thompson, 'The Incorporated Joint Venture' in W D Duncan (ed), *Joint Ventures Law in Australia* (1994) 170, 187.

13 Thomas J commented in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 95 that courts in New Zealand and Australia have adopted a 'less uncompromising approach' than this in an effort to recognise commercial realities. Cited in R Grantham, and C Rickett (eds), *Company and Securities Law: Commentary and Materials* (2002) 478.

14 Thompson, above n 12 at 187.

15 Thompson ibid, 186. In Australia, s 180 of the Corporations Act 2001 (Cth) places a general duty of directors which can be seen as analogous to the general duty in s 131 of the New Zealand legislation, though the context of this duty is very different. Section 187 of the Corporations Act varies this duty in respect of subsidiary companies in a similar way to the New Zealand legislation, but the Corporations Act overall is silent on joint venture companies.

16 See Mr Rob Munro, 23 February 1993 NZPD, 13359.

17 Justice and Law Reform Select Committee, Report of the Justice and Law Reform Committee on the Companies Bill, 1992.

18 Hon D A Graham, 23 February 1993, NZPD, 13353.

19 They did, however, provide adequate definition of what a 'subsidiary' is: see Companies Act 1993 s 2.

far from settled, inside and outside the company law context.[20] Having discussed the origins of s 131(4) and how it differs from the general duty in s 131(1), it is to the question of definition we now turn.

III. The Joint Venture – Definition and Scope

A. Introduction

Joint ventures are an increasingly common way of carrying out business – 'in vogue', as one group of writers has put it.[21] Some of the reasons joint ventures have found favour include the sharing of risk, access to particular technology, markets or skills, and the ability to share another business' strategic advantages without having to expand one's own business.[22] The term is however not an easy one to define – the question '[h]ow does one know what constitutes a joint venture?' is not a new one,[23] nor one that is easy to answer.[24] It has been stated expressly in the Australian context that '[t]he term "joint venture" is not a technical one with a settled common law meaning'.[25] One definition of general application is as follows:

> An enterprise, corporation or partnership formed by two or more companies, individuals or organizations, at least one of which is an operating entity which wishes to broaden its activities for the purpose of conducting a new profit motivated business of permanent duration. In general the ownership is shared by the participants with more or less equal distribution and without absolute dominance by one party.[26]

This definition is of course so broad as to include many kinds of undertakings that we might not normally term 'joint ventures', and is not particularly useful for s 131(4).

In New Zealand commentary, the term most often arises in the context of partnership law.[27] *The Laws of New Zealand*, for example, subsumes its discussion of 'joint ventures' within the scope of partnership law,[28] though it is recognized, with a nod to Australian case law, that the term may refer to a joint undertaking or activity carried out through a medium other than a partnership.[29] One New Zealand writer asked in the 1980s whether an unincorporated joint venture dif-

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20 See further Watts, above n 1 at 95: 'the Act does not define a joint venture, which is a potential source of dispute'.

21 D Quigg, J Horner and D Baker, 'Joint Ventures and Strategic Alliances' [2002] NZLJ 98, 98. See also M Chetwin, 'Joint ventures – a branch of partnership law?' (1991) UQLJ Vol 16. No 2, 256, 256.

22 Quigg, ibid at 98. See also B J Reiter and M A Shishler, *Joint Ventures: Legal and Business Perspectives* (1999), ch. 2.

23 See e.g. J Taubman, 'What Constitutes a Joint Venture?' (1955–56) 41 Cornell LQ 640, 640.

24 'Finding a definition for the term 'joint venture' is an easy task. Defining a joint venture with any amount of consistency is much more difficult.' Reiter and Shishler, above n 22 at 17. These writers go on to note at 17 that businesspeople and lawyers often use the phrase 'joint venture' in very different ways.

25 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 10 per Mason, Brennan and Deane JJ (hereinafter *'United Dominions'*).

26 G R Young and S Bradford *Joint Ventures: Planning and Action*, (1973) pp 11–15 cited in E Herzfeld, and A Wilson, *Joint Ventures* (3rd ed, 1996), 3.

27 Even in 1956, commentary reflected a general view that 'the joint venture is a branch of partnership law', though a contrary view was emerging that a joint venture deserved its own legal classification. See Taubman, above n 23, 642 and generally. See however Herzfeld and Wilson, ibid, xv: 'The great majority of what the business world terms joint ventures are carried on through corporations' and further at 41.

28 P R H Webb 'Partnership and Joint Ventures' in Butterworths, *The Laws of New Zealand,* 20.

29 Ibid at 189 para 225, citing *United Dominions* at 10.

fered from a partnership,[30] and concluded that it did, though perhaps not by much: a joint venture was not a partnership, but neither was it some unique species.[31]

Partners, of course, owe each other fiduciary duties, and if the first key question of many judges and commentators has been 'what is a joint venture?'; the second has been 'do joint venturers owe each other fiduciary obligations?'. As we shall see, there has been some divergence on this point, though the New Zealand position now looks to be relatively clear.

B. Joint Ventures in the 1980s: The United Dominions and Commerce Commission Decisions

The leading Australasian case, which has guided much Australasian judicial and academic commentary over the last 20 years or so, is *United Dominions*.[32] In this case, the High Court of Australia was required to consider the question of whether parties to a property development joint venture owed each other fiduciary duties. The Court held that whether or not the relationship between joint venturers was fiduciary would depend on the form of the particular joint venture and the nature of the obligations the parties had undertaken in relation to each other.[33] The Court found that a fiduciary relationship did exist. Some comments, such as the observation that a fiduciary relationship could arise during negotiations between parties and before a formal contractual relationship was concluded,[34] and the observation that the term 'joint venture' has no settled common law meaning,[35] have proved of lasting significance.

Much of the comment in *United Dominions* on joint ventures was approved in the New Zealand case *Commerce Commission v Fletcher Challenge Ltd*.[36] In this 1989 case, the Court noted that it was questionable whether any legal definition or boundaries existed for the term 'joint venture', and that none of the recent Australian writing on the topic was able to offer a universally accepted definition. The best guidance, in the Court's view, was commentary describing the common qualities of a joint venture as being creatures of contract,[37] which created unincorporated associations, and which are not partnerships.[38] (It should be clear from the outset that the second of these does not apply to a company which is a joint venture, and the first does not apply inasmuch as a company constitution is a creature of statute as well as contract.) In discussing *United Dominions*, the Court went on to approve the Australian Court's comments that a joint venture relationship was not necessarily fiduciary, as the creation of fiduciary duties depended on the content of the obligations which the parties had undertaken.[39] In the Court's view:

30 Chetwin, above n 21 at 256.

31 Chetwin, ibid at 270–271.

32 *United Dominions*, above n 25.

33 *United Dominions*, above n 25 at 11 per Mason, Brennan and Deane JJ.

34 *United Dominions*, above n 25 at 11.

35 *United Dominions*, above n 25 at 10.

36 [1989] 2 NZLR 554. Herinafter, '*Commerce Commission*'.

37 In opposition to this finding, see the comments on *Chirnside*, infra n 53 and accompanying text.

38 *Commerce Commission*, 614.

39 *Commerce Commission*, 615, citing *United Dominions*.

> [S]ome care is needed in relation to any sweeping definition. The New Zealand commercial world on my perception has embraced the label "joint venture" without necessarily thinking deeply as to its meaning or implications.[40]

C. Joint Ventures Yesterday: Chirnside v Fay

The leading New Zealand case is now the recent Supreme Court decision in *Chirnside v Fay*.[41] From 1997, Chirnside and Fay were involved in a project to develop a commercial property. In 1999, Chirnside entered into a conditional agreement to purchase the site as trustee for a company to be formed. By this stage, there had been regular discussions between the parties as to the project, though no formal joint venture agreement had ever been concluded. The project was made feasible by the attraction of a major tenant in 2000, and Chirnside made the agreement unconditional. Chirnside then excluded Fay from the venture – without letting Fay know and with some untruth along the way – and carried out the development through a company he controlled.[42]

There were four different judgments, with the two main ones both traversing the question of definition of a 'joint venture'; and the question of fiduciary obligations between joint venture parties. Another key issue in the case – remedies – does not need to be covered here. Elias CJ's judgment was the first. She observed that 'the label "joint venture" may sometimes be used to describe what are in fact separate businesses operating at arm's length',[43] but this was not the case here. Here, the project to develop the site was 'indistinguishable from a single transaction partnership', and the fact the parties may have expected to make more formal arrangements through a corporate structure or partnership did not alter the nature of the relationship formed. In Elias CJ's view, '[w]here parties joint together in a joint venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues.'[44]

Two points made by Elias CJ deserve particular attention. The first is that, in noting that the parties may have expected to later form a company, Elias CJ recognizes that a company may be used for a joint venture, and that the company may be simply a vehicle for formalizing an already existing joint venture relationship. The second key point is that a venture to share profit is 'inherently fiduciary'. This is a strong statement, particularly in the light of commentary in *United Dominions45* and various New Zealand commentary[46] that a joint venture relationship *does not* necessarily imply fiduciary obligations. Most of the arrangements which warrant the name 'joint venture' involve some kind of sharing of profit, though this is perhaps primarily an indication that we must look beyond the labels used to the nature of the actual arrangements between the parties.

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40 *Commerce Commission,* 615. The Court went on at 616 to observe that 'it may be that partnership is simply a specialized development of one area of joint venture. In the end …. [t]he Court will look at the substance which is agreed.'

41 [2006] NZSC 68. Hereinafter *'Chirnside'*.

42 *Chirnside*, paras 2–3 and 61–68.

43 *Chirnside*, para 14, per Elias CJ.

44 *Chirnside*, para 14, per Elias CJ, drawing on *Meinhard v Salmon* 164 NE 545, 546 (NY CA 1928).

45 'One would need a more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language before it could be said by way of a general proposition that the relationship between joint venturers is necessarily a fiduciary one' *United Dominions* at 10 per Mason, Brennan and Deane JJ.

46 See e.g. S Ongley, 'Joint ventures and fiduciary obligations' (1992) 22 VUWLR 265 at 267: '[T]he non-partnership joint venture is not a category of relationship to which fiduciary obligations automatically attach'. See also N Rogers and G Nisbet, 'Joint Ventures and Equity – Fiduciary Aspects' in Duncan (ed) above n 12, 50, 69–70 for debate on whether commercial relationships should have any fiduciary aspect.

In Elias CJ's view, the 'distinguishing obligation' of a fiduciary was one of loyalty, and neither party to the joint venture was permitted to place himself in a position of conflict of interest with the venture.[47] Chirnside had done this, and breached his fiduciary duties to Fay.

The major judgment in the case was however that of Blanchard and Tipping JJ, given by Tipping J. These judges took the view that the High Court's finding of the existence of a commercial joint venture was reasonable on the evidence and should not be challenged.[48] This being the case, Blanchard and Tipping JJ went on to discuss the issue of whether there was a fiduciary relationship between the parties. The High Court had stated that the relationship of the parties was analogous to a partnership,[49] and both the High Court and Court of Appeal had found a fiduciary relationship.[50] Blanchard and Tipping JJ went further, stating that 'most joint venture relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership.'[51]

This comment should perhaps not be dealt with independently of its context; on the other hand, it is sufficiently striking to be likely to be cited in future judgments. Two particular points deserve attention. The first is that, like Elias CJ, Blanchard and Tipping JJ have taken the view that most joint venture relationships are 'inherently fiduciary'. This has great implications for the interpretation of s 131(4). The second point is that the relationship is seen as inherently fiduciary because of its analogy with partnership. Since s 131(4) only arises in the context of a joint venture between company shareholders – which is necessarily not a partnership – it could be argued that this statement has nothing to do with s 131(4) and only applies to partnership situations. This writer is of the view that this is placing too strict an interpretation on the judges' words. A joint venture between shareholders can be seen as analogous to partnership, without actually being a partnership.

Blanchard and Tipping JJ went on to observe that 'all fiduciary relationships, whether inherent or particular, are marked by the entitlement … of one party to place trust and confidence in the other.'[52] The judges cited *United Dominions* to the effect that 'a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms that are to govern the relationship between them.'[53] Returning to an analogy with partnership, Blanchard and Tipping JJ expressed the view that '[t]he very fact that the parties had not thought it necessary to enter into a detailed formal agreement before embarking on their joint venture suggests that each was reposing trust and confidence in the other as they had in their earlier venture.'[54] It was fallacious to think that there could be no joint venture until unless and until all necessary details had been contractually agreed.[55]

In Blanchard and Tipping JJ's view:

47 *Chirnside*, para 15, per Elias CJ.

48 *Chirnside*, para 69, per Blanchard and Tipping JJ.

49 Ibid, para 71.

50 Ibid, 72.

51 Ibid, 74.

52 Ibid, 80.

53 Ibid, 89.

54 Ibid, 90.

55 Ibid, 91. This raises an interesting point. While Blanchard and Tipping JJ are undoubtedly correct in stating that parties may not conclude a formal arrangements because they are in a relationship of trust, it is important to remember that the reverse may also be true: parties may not conclude a formal agreement because there is *no* relationship between them. It may be equally fallacious to find a joint venture where there was no contract, even if this would not have been the case in this fact situation.

> 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.[56]

Gault J agreed with Blanchard and Tipping JJ, further noting that the term 'joint venture' covers many kinds of arrangements, not all of which will give rise to fiduciary obligations.[57] Elias CJ's views as to fiduciary duty were supported by Keith J, who otherwise supported the judgment of Blanchard and Tipping JJ.[58]

D. Joint Ventures Today: Paper Reclaim and Maruha

Did the Supreme Court in *Chirnside v Fay* go too far? Perhaps, for in later cases the Court has retreated from the idea that all joint venture relationships are fiduciary in nature. *Paper Reclaim Ltd v Aotearoa International Ltd59* concerned the termination of a waste paper export contract. In the High Court, Nicholson J found that the relationship between the parties was a joint venture rather than a partnership or agency relationship, and that each party was required to act with reasonableness and good faith.[60] The Court of Appeal also labelled the relationship a joint venture. Giving the judgment of the Court, Blanchard J commented that the Courts below were too ready to label a contract of agency a joint venture. In his words: 'To style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution'.[61] The Court found that the agency relationship created obligations of loyalty from the agent to the principal, but not vice versa – no joint venture was found.[62]

Matters were taken even further in *Maruha Corporation and Maruha (NZ) Limited v Amaltal Corporation Ltd*,[63] in which judgment was given a scant month after *Paper Reclaim*. In 1985, Maruha and Amaltal incorporated a company called Amaltal Taiyo Fishery Co Ltd (ATL), in which Maruha held just under 25 per cent of the shares and Amaltal held the rest. An agreement between the shareholders called a 'joint venture agreement' provided that each party had the right to nominate two directors to the Board, and set out the nature of the fisheries operations to be carried out between the parties.[64] ATL was to keep books of account, but the company's accountant (who also acted for Amaltal) filed tax returns in such a way that deductions were allowed for depreciation to the benefit of Amaltal. Maruha was never told about these deductions, and there were adverse taxation and financial consequences to Maruha based on its arrangements with Amaltal.[65]

The Court was clear that if any fiduciary duty of loyalty was owed by Amaltal to Maruha it was breached. The only issue was whether such a duty existed in the circumstances. In the High

56 Ibid, 91, per per Blanchard and Tipping JJ.

57 Ibid, 52, per Gault J.

58 Ibid, 55, per Keith J.

59 [2007] NZSC 26. Hereinafter *'Paper Reclaim'*.

60 *Paper Reclaim,* para 30.

61 Ibid, para 31.

62 Ibid, para 33 and generally paras 30–36.

63 [2007] NZSC 40. Hereinafter *'Maruha'*.

64 *Maruha*, paras 4–5.

65 Ibid, paras 6–13.

Court, Priestley J had stated that the 1985 agreement in respect of ATL did not itself create fiduciary obligations; however, the terms of the agreement indicated an intention to repose mutual trust and confidence in each other.[66] Amaltal's responsibilities in respect of accounts, in the context of the commercial relationship as a joint venturer, imposed fiduciary obligations on it – particularly as Amaltal was a local company while Maruha was a foreign entity whose representatives did not speak English as a first language.[67] The Court of Appeal, on the other hand, commented that while there might be fiduciary duties between joint venturers in some cases, there were no such duties in this instance. In the Court of Appeal's view, the parties were in an 'arm's length commercial transaction' and there were none of the distinguishing features of a fiduciary relationship.[68]

It was argued in the Supreme Court that the relationship was fiduciary because the joint company was incorporated to replace a partnership that had formerly existed between Maruha and Amaltal and some of the terms of the partnership agreement had been carried through to the joint venture agreement in respect of ATL. The Supreme Court disagreed with this approach. In the Court's words:

> 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.[69]

Referring to its own decision in *Paper Reclaim*, the Court went on to say:

> The characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations. In our view, when commercial parties elect to use an unincorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature.[70]

However, even though the relationship as a whole was non fiduciary, aspects of it could involve fiduciary obligations of loyalty. Here, the accountant was the agent of Amaltal which was, in turn, the agent of Maruha in respect of accounting matters. As principal, Maruha was entitled to expect the accountant to act even handedly and impartially as between the two shareholder companies of ATL. Amaltal encouraged the accountant's disloyalty to Maruha and was in breach of a fiduciary duty.

F. Comment

One significant point from *Chirnside* is the general observation that parties need not have finalised their contractual terms to have a joint venture relationship in equity. Perhaps more important, however, is the finding that a joint venture relationship can generally be seen as 'inherently fiduciary' – whether because of an analogy with partnership or because the parties have a common commercial objective and wish to share profits.[71] On the other hand, *Maruha* takes a view almost the

66 Ibid, paras 14–16.

67 Ibid, para 16.

68 Ibid, para 17.

69 Ibid, para 19.

70 Ibid, para 20.

71 *Chirnside*, paras 2, 71.

opposite, noting that the term 'joint venture' says nothing helpful about the relationship between parties, and that use of an incorporated company may well suggest that a non fiduciary relationship is intended. These somewhat contradictory promulgations have implications for the interpretation of s 131(4), and it is to this provision we now return.

IV. The Application of Section 131(4)

A. Introduction

Chirnside is of course a decision about an unincorporated joint venture, and therefore ignores s 131(4). The judges in *Chirnside* are not alone in this. Much of the commentary on joint ventures in both New Zealand and Australia has focused on unincorporated joint ventures and the conceptual links between joint ventures and partnerships.[72] Indeed, apart from a few comments in one short article,[73] one searches the literature in vain for any useful commentary on s 131(4). While it is recognised that a company may be an appropriate vehicle for a joint venture,[74] the unique problems of a joint venture company remain largely unexplored, and little assistance is to be gained from the one New Zealand judicial decision to comment on s 131(4). [75] The circumstances of the case are however set out at some length to illustrate some of the issues surrounding s 131(4) which will be teased out later in this essay.

B. Shell v Todd

The *Shell* case related to a long standing joint venture relationship. Todd Bros. Ltd and the Shell Oil Company entered into a joint venture agreement in 1955 in relation to the Maui petroleum field. Other parties later joined the joint venture, and Shell Todd Oil Services Ltd (STOS) was established to provide operator services to the joint venture over a range of petroleum fields. By 2002, a heads of agreement (HOA) had been reached whereby the 1955 joint venture agreement was terminated and a new agreement was to be completed, which included both core terms of the relationship between the parties and the future of STOS. The terms envisaged that Shell and Todd would continue to provide operational services to a number of petroleum fields through an unincorporated joint venture governed by a board to which Shell and Todd would appoint three directors each, with one of Shell's directors holding a casting vote if required. Shell was to procure a further entity (SIEP) to provide technical support and advice to STOS. The formal agreement envisaged by the HOA was not finalised at the time of this case.[76]

Todd and Shell came to be in dispute over SIEP, with SIEP offering only its standard terms and conditions, and Todd being unhappy with these. Shell came to the view that it could not continue to support STOS, and proposed that STOS be replaced as operator by a 100 per cent Shell owned company. Following a formal proposed resolution for STOS's removal, Todd sought an in-

72 See e.g. *Chirnside*, para 71; Chetwin, above n 21; Webb, above n 28.

73 See Watts, above n 1.

74 See e.g. J Stephens, 'Joint Ventures' in *Property Law – keeping ahead*, New Zealand Law Society seminar, (2006) 5.

75 *Shell (Petroleum Mining) Co Ltd And Ors v Energy Infrastructure Ltd And Ors* [2005] CA 70/05 (unreported, 3 August 2005). Hereinafter '*Shell*'. Reference to s 131(4) appears nowhere in the decision in *Maruha*, presumably because the dispute was between the shareholders in ATL, and did not concern the directors.

76 *Shell*, paras 2–10.

terim injunction seeking to prevent the directors of STOS voting on proposed resolutions whereby STOS would cease to provide operator services to the joint venture and another company would assume this role. The High Court granted an interim injunction to Todd which was appealed by Shell, essentially on the basis that there was no serious case.[77]

Under the HOA, STOS was to either remain an 'unincorporated joint venture' as nominee or bare trustee for Shell and Todd as joint venturers, or a full operating company. The HOA provided that nothing in the HOA or the relationship between the parties should be construed as creating a joint venture or fiduciary relationship between the parties. The joint venture was not to hold any assets for Shell or Todd: instead, each party would hold its respective interest in its own name.[78] The Court noted that it was somewhat anomalous that the agreement provided that there was to be no fiduciary element to the parties' relationship, when the venture conducted through STOS seemed to give rise to 'some degree of special relationship' between the parties,[79] and suggested that the overall venture could be described as 'unincorporated' on the basis that it involved a number of parties and that STOS, while an incorporated company, remained a nominee or bare trustee for the parties.[80] Governance of STOS rested with its board, and the Court rejected the notion that there was any real distinction between the roles played by the same persons as directors of STOS and members of the governance board established under the HOA.[81]

A number of causes of action were pleaded, but most relevant for our purposes was Todd's assertion that Shell's three appointed directors acting in favour of Shell's resolutions was a breach of s 131, in that although STOS was a joint venture and the relevant directors were nominees of Shell, the constitution of STOS did not expressly permit directors to act in a matter they believed to be in the best interests of a particular shareholder as required by s 131(4). Todd argued that the HOA did not contemplate any amendment to the STOS constitution to this effect either. STOS' directors must consider the interests of STOS first and only thereafter the interests of the joint venture parties. Shell, on the other hand, argued that the HOA militated against any fiduciary duties between the joint venture parties (a view which did not find favour with the Court) and that, s 131 being a subjective test, the Shell directors had in good faith come to a commercial assessment that STOS should not continue as earlier envisaged. The Court supported Todd's view that the absence of any provision in STOS' constitution permitting the company's directors to prefer the interests of a joint venture shareholder to STOS the company was significant; though it was not necessarily the case that the decision of the Shell appointed STOS directors to replace STOS as operator was not in the best interests of STOS. There was a seriously arguable case on this point.[82] On this and other arguments the Court decided that an interim injunction was appropriate and dismissed the appeal.

C. Comment

While *Shell* is useful as a case study, two points limit its usefulness. The first is that the constitution of STOS did not expressly permit any director to act in the best interests of a shareholder, as

77 Ibid, paras 1, 6, 11–20.

78 Ibid, paras 30–37.

79 Ibid, para 39.

80 Ibid, para 38, 40–41.

81 Ibid, paras 45–46.

82 Ibid, paras 63–74.

is required by s 131(4). The provision therefore did not apply. The second is that this was an application for an injunction and not a substantive case. Certain aspects of a joint venture company are however illuminated by *Shell*. The first is that a joint venture carried out through a incorporated company may nevertheless be described as 'unincorporated' – as the arrangement was in this case by the parties themselves and, apparently, by the Court. If a joint venture company arrangement can be described as 'unincorporated', then the term used in this essay – 'joint venture company' – is probably to be preferred to any other.

D. Further Definitional Issues

In *Shell*, the parties had for many years described their arrangements as a 'joint venture' and the Court saw no reason to comment on this description. The Court was presumably assisted by the existence of clear contractual arrangements between the parties, notwithstanding the efforts to contractually exclude any fiduciary relationship when one clearly existed.[83] But as we have seen, the Companies Act does not define the term 'joint venture', and there is no definitive statement in common law. *Chirnside*, while offering some useful definitional statements, goes on to say that the conduct of the parties is as important – perhaps more important – than their contractual arrangements, and *Paper Reclaim* approaches the term 'joint venture' with caution.[84] So how do we know when a company is carrying out a joint venture between shareholders? By the constitution? By contract? By conduct?

The constitutional question can be raised first. The wording of s 131(4) provides that a director may only act in the best interests of a shareholder if expressly permitted to do so by the company's constitution. It would be reasonable, then, to suppose that the constitution might provide some guidance as to whether a joint venture exists.

Ideally it would, as the Court suggested in *Maruha*.[85] However, it is important to remember that it is very easy to set up a company, and the parties will not always give close attention to seeking full clarity in the arrangements between them. In the absence of a 'Table A' constitution in the Companies Act 1993, many parties use a 'standard form' constitution available through the Companies Office at the time of incorporation.[86] One example of this kind of constitution is Avon form CF–204(V2). The relevant provision of this commonly used constitution states that:

> Joint venture
>
> 22.3. If the company is carrying out a joint venture between its shareholders, a director may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company. [*See section 131(4)*.]

The first word of this provision illustrates this difficulty. It is unarguable that this provision permits a director of a joint venture company to act in the best interests of a particular shareholder rather than the company itself, but it does nothing to tell us whether or not a joint venture is intended or actually exists. In cases like *Shell*, where the constitution does not permit a director to act in the

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83 It is worth suggesting that this might have been a boilerplate clause which the parties may have overlooked at the time of signing.

84 *Paper Reclaim*, para 31.

85 *Maruha*, para 19, above n 69 and accompanying text.

86 See www.companies.govt.nz available at <http://www.companies.govt.nz/constitution-docs/AVON204/CONSTITUTION_V204.PDF>.

interests of a shareholder rather than the company, matters will be clear. In a situation where the constitution contains a provision like that contained in the Avon form, we will need to look more closely at the parties' arrangements to determine whether a joint venture actually exists.

The questions of whether a joint venture company can be determined to exist by contract or by conduct can, in the light of *Chirnside*, be dealt with together. As was noted in the judgment of Blanchard and Tipping JJ in *Chirnside*, the parties may have a joint venture relationship without ever having concluded a formal contract.[87] A joint venture may exist by contract or by conduct. It deserves to be noted, however, that *Chirnside* concerned a two party joint venture where such a finding was easily available. Many commercial relationships will be more complicated than this, as the Courts in *Paper Reclaim* and *Maruha* identified.

It should be clear that there may well be many situations where a constitution permits a director to act in the best interests of a shareholder rather than the company, but where it is unclear whether a joint venture exists between the shareholders. The one case to date on s 131(4) provides little assistance, and the lack of any clear statutory or common law definition exacerbates this lack of guidance or authority. In these circumstances, it is fair to say that the precise meaning of s 131(4) is unclear, and that further litigation is inevitable. But the lack of useful guidance as to how s 131(4) should be interpreted is only the beginning of our difficulties. As we shall see in the next part of this essay, s 131(4) may fundamentally alter the usual duties applying between directors, shareholders and their company.

V. The Fiduciary Complications of a Joint Venture Company

A. Relationships Between Shareholders

Chirnside could have meant that (most) joint venture relationships are 'inherently fiduciary', whether by way of analogy with partnership or by way of joint pursuit of a commercial objective with a view to a sharing of profit – which when read together, can perhaps be seen as different ways of describing the same thing. However, the Courts in *Paper Reclaim* and *Maruha* have departed from this approach, each taking the view that calling a commercial arrangement a 'joint venture' provides little guidance as to whether the parties owe each other fiduciary obligations.[88] Since s 131(4) refers to a 'joint venture between shareholders', the apparent effect of *Chirnside v Fay* could have been seen to be that the shareholders in a joint venture company would have fiduciary obligations to each other. In a normal company in which the directors are governed by s 131(1), shareholders have no fiduciary obligations to each other, save for the protection of minority interests,[89] or those they might otherwise assume (by an agreement between shareholders, for example).[90] But if by conduct or by contract, the company arrangement reflects a joint venture between the shareholders, then these shareholders would, following *Chirnside*, have fiduciary responsibilities to each other.

Maruha, on the other hand, suggests that *Chirnside* cannot be applied to joint venture companies in this way. The Court took the view that a corporate structure was very different to a part-

87 See *Chirnside*, above n 53 and accompanying text.

88 *Paper Reclaim*, para 31, approved in *Maruha* at para 20.

89 See e.g. the comments in Grantham and Rickett, above n 13 at 727.

90 On shareholders' agreements, see generally Herzfeld and Wilson, above n 26, ch 7; Reiter and Shishler, above n 22, Appendix C.

nership, and that the decision to form a company operating under the Companies Act rather than remain in a partnership under the Partnership Act that a relationship that was of a non fiduciary nature overall was intended.[91] In other words, once the decision to incorporate is made, the relationship between parties (or shareholders) becomes immediately non fiduciary. The parties may, by the company constitution , by contract, or by conduct agree to fiduciary obligations, but in usual circumstances these cannot simply be implied into the corporate relationship. In a company that is a 'joint venture between shareholders', there is no ability to presume that the relationship between those shareholders is inherently fiduciary.

B. Relationships Between Directors and Shareholders

Where a company is a joint venture between shareholders and comes within the scope of s 131(4), the 'fundamental'[92] duty of a director to act in good faith and in the best interests of a director does not apply, except inasmuch as it may be imputed by common law. Instead, the director may act in the best interests of a particular shareholder. Putting aside the other duties of a director contained in ss 133–137 of the Companies Act and focusing only on s 131, a director of a joint venture company owes no duty of good faith to the company, but only to one or more particular shareholders. A director becomes a fiduciary of a particular shareholder rather than the company.

It needs to be noted, however, that s 131(4) is unlikely to affect the other duties owed by directors. The useful *Mountfort v Tasman Pacific Airlines of NZ Ltd*[93] recently considered the application of s 131(2) of the Companies Act, which allows a director of a wholly owned subsidiary to act in the best interests of a holding company, rather than the company he or she is director of, if the constitution permits. The Court viewed this as 'an ancillary rather than a core provision of the Companies Act' and commented that '[w]hile s 131(2) will relieve directors of the obligation to put the interests of the subsidiary ahead of those of the holding company, such a sidewind cannot relieve them of the fundamental obligation to cease trading upon insolvency.'[94]

C. Comment

So what does s 131(4) actually do? Reading the provision and *Chirnside* together, it could have been said that the directors of a joint venture company owe fiduciary duties only to particular shareholders (and not to the company), while the shareholders become fiduciaries of each other. This would have turned the 'standard' position under s 131 on its head. However, the comments in *Maruha* make it clear that a fiduciary relationship between shareholders will not be lightly or wantonly applied. All we can take from the current case law is that s 131(4) *may* affect the duty of a director to act in the best interests of the company but, following *Mountfort*, probably does not affect a director's other duties. The scope of s 131(4) would therefore appear to be very limited, and the provision can be seen as unlikely to provide a useful defence to any action by a director not made in good faith and in the best interests of the company as a whole. The answer to the question at the beginning of this paragraph is probably 'not a lot'.

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91 *Maruha*, para 19.

92 See s 101 of the Law Commission's 1989 draft Aft. NZLC, R9, p 241. This phrase does not appear in s 131 of the Companies Act.

93 *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104. Hereinafter '*Mountfort*'.

94 *Mountfort*, 126 para 82.

The question 'what is a joint venture?' remains, on current case law, virtually impossible to answer in any general sense. Joint ventures exist, but cannot be defined in any consistent way.[95] In addition, the question 'how do we know when a company is a joint venture between shareholders?' is no less nebulous. At present, it appears we may decide this by reference to the company's constitution, or to extrinsic contractual arrangements by the shareholders, or even conduct. In short, there is no clear test to decipher when a joint venture between shareholders is in place, and therefore no clear way of knowing whether s 131(4) applies in a particular situation.

This state of affairs is unsatisfactory. If s 131(4) may in certain cases alter the usual duties and obligations applying between directors, shareholders and a company, then it is necessary to have some certainty about when this provision should apply. But what are the options for remedying this uncertainty? As we will see in the next part of this essay, there are a number of options on the part of both Parliament and the courts.

VI. Solutions

A. Amendment of the Companies Act: Definition of Joint Venture

The first is to amend the Companies Act by providing a definition of 'joint venture'. This would allow those trying to interpret s 131(4) to know whether or not their joint venture arrangements came within the scope of the words 'joint venture' as used in s 131(4). However, there are two key difficulties with this approach. The first is that, as we have seen, the term 'joint venture' is very difficult to define. No satisfactory definition really exists at law, and while *Chirnside* has provided some useful guidelines, these are more in the way of general principles than the kind of crisp exposition that is needed for a statutory definition, *Paper Reclaim* and *Maruha* have in any event retreated from the more sweeping statements in *Chirnside*. The second difficulty is that, having decided on a definition, that definition will itself be subject to rigorous testing in the light of particular situations. A poor definition may invite more contentiousness than currently exists.

B. Amendment of the Companies Act: Constitution to provide whether company is a Joint venture

The second avenue is a simple amendment of s 131(4). Section 131(4) currently provides that a director may act in the best interests of a particular shareholder if permitted to do so by the constitution and if the company is carrying out a joint venture. This could be amended to provide that the constitution must not only permit a director to act in the best interests of a particular shareholder, but must also expressly state whether or not a joint venture exists. This approach, hinted at in *Maruha*,[96] would not solve the difficulty of defining a joint venture, but would allow those involved to be certain whether or not the s 131(4) regime is to govern their arrangements. This option would, in other words, allow some certainty as to the parties' intentions and would avoid the problems of the Avon-style standard form constitution, which envisages and allows for a joint venture company but provides no guidance as to whether a joint venture is intended or in fact exists.

95 Reiter and Shishler, above n 22.

96 *Maruha*, para 19.

C. Judicial Intervention: Constitution to provide whether company is a Joint venture

This kind of avenue could of course be pursued by judges. As noted above, s 131(4) has only been the subject of one decided case, and that case is easily put aside on the basis that s 131(4) did not apply as the constitution did not expressly provide for an alteration of directors' duties as s 131(4) requires. A future Court that is interpreting s 131(4) could require, in the interests of certainty, that the company constitution expressly state whether or not a joint venture actually exists. This would avoid the need for Parliamentary alteration of the provision. However, while a decision along these lines would add desirable certainty to the law, it could be seen as controversial on the basis that it adds an unanticipated judicial gloss on s 131(4). In a particular case, a finding of this nature at first instance might well be appealed, leaving it to an appellate court to decide whether interpretation along these lines should be supported in the interests of certainty or struck down on the basis that it is Parliament's job to amend an unsatisfactory provision.

D. Judicial Intervention: Arrangements between the parties

Another way for the judiciary to add some certainty to the law is for the courts to require the relevant shareholders to have clearly agreed that their arrangements constitute a joint venture – that there must be a clear shareholders' agreement or other contract which sets out whether or not a joint venture exists. The application of s 131(4) can then be determined on this basis, subject to the constitution being (at least) in Avon form or similar – that is, at least envisaging that s 131(4) may apply.

The difficulty with this approach, however, as with the previous one, is that it is somewhat incongruent with the approach taken in *Chirnside*. In that case, the Court found that a 'joint venture' arrangement existed through the conduct of the parties, and could (and often would) predate any formal contractual arrangements. It will be difficult for a Court to argue that while this principle should apply in a case like *Chirnside*, more express arrangements are necessary in the case of a joint venture company – if only because form should not overrule substance.

E. Judicial Intervention: A Presumptive Approach

It could be said that *all* companies with more than one shareholder represent a joint venture between shareholders and are, to some extent at least, 'joint venture companies'. One of the key benefits of a company is that involves the sharing of risk between different shareholders on a limited liability basis. Therefore, it is possible the courts could take a presumptive approach that if the constitution provides that a company might be a joint venture company, it probably is. This approach would however ignore the fact that s 131(1) is undoubtedly intended to be of general application and would go against the comments in *Paper Reclaim* that the term 'joint venture' should be applied with caution.[97] If virtually all companies are to be taken as joint venture companies and the duties of their directors to be altered, then the effect of s 131(1) will be severely diluted. For these reasons alone, this approach seems unlikely.

97 *Paper Reclaim*, para 31.

F. Amendment of the Companies Act: Repeal of s 131(4)

It is of course necessary to turn to one of most obvious options: the repeal of s 131(4) entirely. As has been noted above, what this section means is unclear and its application uncertain. In addition, there has been only one case involving this provision in the years the Companies Act 1993 has been in effect. If s 131(4) was revoked, would anyone notice or care?

One reply to this option might be that while s 131(4) creates some unwelcome uncertainty, it also allows for some welcome flexibility. It allows for a situation where particular shareholders may wish for a particular director to act in their interests, rather than the 'company's', and this flexibility could be desirable in certain circumstances. Revocation can be a blunt axe to yield.[98] Repeal remains, however, a clear option for improving certainty in this area of law.

G. Overview

It is important to be practical about law reform. Section 131(4) is problematic, but these problems have not yet arisen in the context of a decided case. It is not unrealistic to surmise that Parliament might not get involved until the courts point out the difficulties of s 131(4), and even then, law reform can be a slow and tortuous process. Even if the Law Commission was to step in before matters reach the courts, it is unlikely Parliament would see any incentive to act until problems have actually arisen.

This leaves us with the courts. It is to be hoped that any future judicial decision on s 131(4) will stretch beyond the facts of the particular case at hand and will look to providing some real predictive certainty as to the application and scope of this provision. Of the above judicial options, this writer believes the first is likely to provide more assistance. If a constitution must expressly provide that the arrangements between the shareholders constitute a joint venture, then this requires of parties a good degree of certainty about their arrangements. In the light of *Chirnside* and considering the arguments against judicial activism, there may be objections to this approach, but it squares with *Maruha* and can be defended on the basis that a company joint venture is a unique species, one that may significantly alter the usual obligations between those involved in a company. As such, certainty is to be desired, and an unwitting assent to alteration of these obligations – as is possible for a company with a standard form Avon constitution – is not to be desired.

VII. Conclusion

Most directors must act in good faith and in the best interests of the company to which they are appointed.[99] Under s 131(4) of the Companies Act, however, a director may put aside this duty (though not others) and act in the best interests of a particular shareholder if expressly permitted to do so by the company's constitution and if the company is carrying out a joint venture between shareholders. This essay has asked some questions about s 131(4) and found it wanting. What is a joint venture? How do we know when one exists? Does s 131(4) alter the usual fiduciary obligations between directors and shareholders in a company? These questions are not easy ones to answer, and the main intent of this essay has been to point out that there is a great deal of uncertainty in the current law, and that this uncertainty is undesirable.

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98 Watts, above n 1 at 95, expresses the view that 'the provision should be left as it is.'

99 Companies Act 1993 s 131(1).

This essay has also proposed a number of solutions to this uncertainty: some for Parliament, some for the courts. It remains to be seen which will demonstrate the will required to clarify the current uncertainty in the law of joint venture companies. Either way, one point seems certain: s 131(4) cannot remain as untouched as it has until now. Until such time as the scope of s 131(4) is clarified by the courts of Parliament, the onus is surely on the parties – and the lawyers advising them – to ensure their arrangements and obligations are crystal clear.