NEW ZEALAND

FIDUCIARY DUTIES BETWEEN POTENTIAL JOINT VENTURERS*

Chirnside & Rattray Properties Ltd v Fay (unreported, Court of Appeal, CA 34/03, 29 June 2004, Anderson P, McGrath & Hammond JJ).

Whether there was a fiduciary duty between the parties – Whether the lack of joint venture agreement was fatal to a claim of fiduciary obligations – What in principle is required for the fiduciary doctrine to be invoked

Facts and Nature of the Action

Chirnside and Fay were property developers involved in the development of part of a particular site (the Site). They had previously been associated in 1985 and had since had other business dealings with each other. In 1996, Chirnside and Fay decided to work together as property developers "if and when opportunities should arise for them". Prior to this dispute, they had completed one joint venture and considered other property developments.

In 1997, each party made independent approaches to the owner of the Site. In late 1998, Chirnside and Fay began to discuss together the possibilities of redeveloping the Site. Both considered the same potential anchor tenant for the redeveloped Site. Chirnside then entered into a conditional purchase agreement for the Site as "trustee for a company". Fay concurrently negotiated with the anchor tenant. Both parties then worked through the possible financial arrangements with the anchor tenant and continued to meet on the project until early 2000.

In July 2000, the anchor tenant committed to the development. Relations between the parties had deteriorated and Chirnside, having no formal agreement with Fay in relation to the project, brought in new investors (Rattrays), excluding Fay. This was not communicated to Fay. When Fay became aware of the situation, various correspondence passed between the parties. Fay alleged that Chirnside had "sold our project…we are partners in this project and you should have first got my authority to sell out". Chirnside responded saying that, although it had been discussed, they had never become partners in the project. Rather, all discussions between the two were brief and casual and no conclusions had been reached. Chirnside also stated that he had sole control of the negotiations and incurred all expenses involved with the project himself.

Fay alleged that the underlying relationship between he and Chirnside involved a joint venture giving rise to fiduciary obligations, which Chirnside had breached.

High Court Findings

In the High Court, William Young J considered that the central issue was whether the project, as a joint enterprise, was sufficiently advanced for any liability to attach. He was of the view that the relationship between Fay and Chirnside was a "loose arrangement" but that they had "performed enough" that they could be regarded as engaging in a joint venture associated with the project and that it did not matter that Fay was excluded from the joint venture before "all aspects of it crystallised"

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Grounds of Appeal

In the Court of Appeal, Chirnside and Rattray appealed the finding that Fay and Chirnside were joint venturers. Chirnside submitted that "New Zealand law should not impose fiduciary obligations on parties negotiating towards a joint venture nor on joint venturers who have not agreed that obligations in the nature of fiduciary obligations are owed between them". Appeals were also heard in relation to the quantum awarded by William Young J.

Court of Appeal Decision

Joint venture

The Court of Appeal stated that, at common law, there is no separate legal concept of a "joint venture". In everyday terms, a joint venture is a commercial term used to describe two or more persons associating together to a commercial end. Those persons may have the relationship regulated by contract, they may be partners, they may have a joint venture company or there may be no formal legal relationship between them at all.

The Court of Appeal also held that "the fact that there is in a commercial sense a joint enterprise, but no joint venture agreement yet entered into, is not fatal to a claim that there may nevertheless have been a fiduciary relationship at the relevant time". The Court of Appeal did recognise that this was traditionally an area where appellate courts have encountered some difficulty, although that difficulty was more in relation to application rather than principle.

Fiduciary relationship

The Court did not accept that there cannot or should not ever be a fiduciary relationship between parties negotiating towards a joint venture. It held that the accepted principle that a fiduciary duty may arise on the special facts of a case applied equally to an evolving joint venture. On this point, the Court of Appeal cited with approval *Marr v Arabco.* [1] The Court held that the real question, as a matter of law, is what in principle is required to be established for the fiduciary doctrine to be invoked.

The Court held that fiduciary law serves to support the integrity and utility of relationships in which the role of one party is perceived to be the service of the interests of the other by imposing a specific duty of loyalty. It held that the starting point must be whether there was a relationship of mutual trust and confidence between the parties giving rise to an obligation of loyalty. On this point, the Court of Appeal cited with approval the dicta of La Forest J in *Hodgkinson v Simms*[2] and quoted the dicta of Millett LJ from *Arklow Investments Ltd v McLean,*[3] in which dicta Millett LJ quoted with approval Dr Finn's classic work, *Fiduciary Obligations,*[4] stating that, "he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".

Application of law to facts

Applying these principles to the facts, the Court held that the relationship between Chirnside and Fay was such that they were obliged to act towards each other within appropriate bounds of loyalty

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1 (1987) 1 NZBLC 102, 732.
2 (1994) 117 D.L.R. (4th) 161 (SCC).
3 [2000] 2 NZLR 1 (PC).
4 (1977), p 2.

and good faith. The Court of Appeal found that it was clearly open to the High Court Judge to conclude on the facts that there was a joint venture of a commercial kind. The Court was not disposed to interfering with that finding, given that it was based on findings of primary fact.

In answer to the submission that the fiduciary relationship was not adequately analysed by the High Court, the Court of Appeal stated that the following factors established a fiduciary obligation in this case:

- The project was not a "one-off" association between Chirnside and Fay, as they had completed at least one previous joint venture (although the success of that venture was disputed).
- Both Chirnside and Fay had something to contribute and gain from the project, creating the mutuality that would be served by a joint venture.
- Both Chirnside and Fay did contribute to the project.
- The project could not have been concluded without both contributions.
- There was a relationship of confidence between Chirnside and Fay in relation to the project, which is actionable in itself if breached.

Appeal to Supreme Court pending

The recently established New Zealand Supreme Court (which replaces the Privy Council as New Zealand's highest appellate court) has granted Chirnside and Rattray leave to appeal the decision of the Court of Appeal. The grounds of that appeal are whether a fiduciary relationship existed between Chirnside and Fay and, if so, whether there was any breach of that fiduciary obligation. As at the date of this note, the Supreme Court has heard no substantive cases nor handed down any decisions. The decision of the Supreme Court will be of great interest, not just on the subject matter of this case, but also in providing some sense of the approach that the Supreme Court will apply to cases brought before it.