Fiduciary duties in commercial transactions

- Vercoe: self-seeking and ruthless behaviour is expected in a commercial context. "In a fiduciary relationship, by contrast, self-seeking behaviour is required to be reined in on the grounds that special obligations of trust have been assumed by the fiduciary to the other party."
- Professor Weinrib: following Keech, the "high standard incumbent on a fiduciary" has spread from trusts to a variety of areas under its "colonizing sway".

Maclean v Arklow:

- Matakana island was sold in a receivership sale for 20 million. Arklow was going to separate the trees from the land, where the mature trees would be sold to Kanematsu while the younger trees and the mill would be sold to someone else. This was good for Arklow as it knew the receivers were willing to accept just over 20.7 million and Arklow would be able to receive the land for free as it would sell off the non-land assets.
- Far were investment bankers approached by Arklow who needed financing for the project. Arklow gave Far information on the express basis that it was confidential. Far made an offer on terms that if Arklow pays 5000 upfront, they will assist Arklow to fund the shortfall and provide services as a fiduciary for Arklow but cannot guarantee the money themselves. Mr Wingate did not like the terms and ignored it.
- Allegedly confidential info included: price to buy the assets from the receivers, valuations Arklow secured from forestry exports about value of mature and immature forests, value of the mill, fact Japanese company was interested in buying the mature forest, feasible scheme and Arklow was going to act and try to get the scheme across the line i.e. finance
- Whether merchant bankers can withdraw an offer a month later and conclude a similar deal with different buyers splitting up ownership of the different classes of assets.
- Far later concluded a similar deal later. Arklow later sues and initially wins at the HC
- However, Arklow loses in both the CA and PC that Far was a fiduciary to them.
  1) breach of confidentiality
  2) in the alternative, breach of fiduciary duty

Thomas and Blanchard JJ (Minority) CA:

- Blanchard J: Duty of loyalty existed because Far did not signal at the meeting they had "an intention of separately pursuing its own interests" in relation to the transaction. By agreeing to confidentiality, Far could not proceed independently "without first giving notice of termination" and a fiduciary duty arose from it
- Akin to HC's reasoning, blurred confidential business arrangements giving rise to a fiduciary relationship unless it is clear that the other party will exploit the opportunity and not going to act as a fiduciary.
- Thomas J: unless parties define their relationship at the outset that the merchant bank may exploit the opportunity for themselves, a merchant bank relinquishes its self-interest to clients or potential clients. It is not an arm's length transaction. Merchant banks cannot use the confidential information for its own benefit, nor can it appropriate the business opportunity explained by the client.
- The merchant bank is bound to fiduciary obligations in respect of that type of deal even if they do not ultimately act for the client proposing the deal.
- Thomas J: the obligation was limited to Far not furthering its own interests at Arklow's expense pending either formalisation or termination of that relationship.

- This is good for businesses as they do not need to be concerned about the risk that their ideas will be taken by someone when finding finance.
- Blanchard J: commercial practice of merchant banks supports a fiduciary duty of loyalty with clients
- Thomas J: the Court can be guided by practices in the industry in order to make determinations consistent with accepted industry practice. Industry practice can influence the reasonable expectation of the parties or when a party is sufficiently vulnerable to restrict the stronger party taking advantage.
- Can look at commercial custom in determining when people's consciences are bound and when it becomes unconscientious to exploit opportunities
- Majority in CA and PC: commercial reality which exists in NZ is just a gentlemen's agreement which is something accepted as a moral constraint on action but not necessarily an enforceable legal obligation.

Breach of fiduciary duties?

- FAR began pursuing its competing purchase plan before it withdrew its mandate proposal to Arklow on 15 July
- It got a head start in the race to buy the island, through its breach
- Thomas says no evidence FAR would have beaten Arklow without the BFD
- Blanchard says FAR would have lost the race even if no BFD
- Minority in CA: Far was subject to fiduciary duties in negotiations of the deal and cannot exploit the deal for themselves.
- There is a specific fiduciary obligation which arises between merchant bankers and prospective partners when outlining a deal where confidential information cannot be used for the bank's own purposes unless it was clear that the bank was not acting in the capacity of a fiduciary.
- The breach occurred when Far had a head start on competing bids by acting on confidential info and exploiting the opportunity in a way that is not allowed.

Breach of confidence – confidential information

- Blanchard J: the information disclosed in confidence, given general knowledge about Matakana, was incapable of it leading to a transaction with the receivers and the bank would have reached the same conclusion about price, value and feasibility via its own research. The information may have been used but did not cause Arklow's loss, hence no remedy could be given.
- Thomas J: The information was confidential and has value for a competitor as a "complete workable scheme". Far had used the information for a different purpose from the one conveyed to advance a competing deal which deprived Arklow the opportunity of becoming a successful bidder and galvanised Far into putting together their own deal. Hence, Far is liable for what it had achieved.

Why did CA majority and PC disagree?

- When people do not fall within the standard categories where a fiduciary duty arises, there is no strict legal test, nor is there a definition of the essential element of a relationship giving rise to a fiduciary duty of loyalty.
- Confidential information and fiduciary duties have been blurred and should be kept separate. The mere fact someone has imparted confidential information and therefore prevented from acting on that confidential information to the detriment of the person who gave it to you does not mean one becomes a fiduciary.
- Professor Finn: the actual circumstances of the relationship are such that one party is entitled to expect that the other will act in his interests for the purpose of its relationship. Relevant factors include: "Ascendancy, influence, vulnerability, trust, confidence or dependency"
- Sounds circular as asking is someone a fiduciary based on whether one is entitled to think of them as a fiduciary in the circumstances.
- Far's relationship with Arklow was that Far would keep the information confidential but it was going to do nothing until Arklow signed the contract. The relationship was nothing as Mr Wingate ignored Far's contract. Far had no discretion or ability to affect Arklow's rights in any way.
- Gault P: one party voluntarily disclosed information to the other where they were only at arm's length. Far required commitment from Arklow before it could provide advice
- There was only an offer made to act for Arklow. It never reached a point where fiduciary duties arose and Far could not reach its own deal
- There may be an industry practice where merchant bankers would not do a deal for themselves but such rules of practice are not equated with law. They may assist in coming towards the reasonable expectation for the parties but do not do so in this case.
- Key difference between majority CA and Blanchard & Thomas JJ is the weight they give to customary business mortality.
  Blanchard & Thomas JJ: there is an expectation of a fiduciary relationship even before a contract was signed between Far and Arklow as business custom creates an equitable obligation enforceable by the courts as the sort of thing which gives a person a legitimate expectation that the other party will act on their behalf.
- Majority CA: looked at the actual legal relationship concluded and found that Far only offered to create a contractual obligation to act for Arklow's best interests in securing money for the deal. As it did not exist, there was no fiduciary obligation.
- PC: same view, fiduciary obligations arise where one has a legitimate expectation that a fiduciary will not utilise their position in a way which is adverse to the interests of the principal. Citing Mothew, a fiduciary is someone who has undertaken to act for another in circumstances giving rise to a relationship of trust and confidence.
- PC agreed with CA majority: No evidential basis for a relationship of trust or confidence as Far did not undertake any obligation expressly or impliedly to act for Arklow. It had only made an offer to do so which Arklow viewed as unacceptable

- Arklow needed to show that there was a fiduciary obligation as its confidentiality argument did not succeed in preventing Far from taking the opportunity, even though Far admitted they held confidential information about the transaction.
- Arklow would argue that Far used the information because they were alerted to the opportunity of being able to divide the assets in such a way which enables Arklow to get the land for free.
- Far was told about how the deal was constructed where ownership of the forest can be split into different classes, the valuation of the forest and the price receivers were prepared to pay for the forest.
- However, Gault J in the CA held that no use of confidential information occurred as Far could have received the information themselves from the receivers and they could determine the value of the forest from other. Moreover, splitting ownership of forests is a common practice for financing.
- Moreover, Far was not necessarily galvanised to do the transaction because of Arklow. Far gained knowledge of the deal in June, Far withdrew its offer in July and it was not until November 1992 when Far completes the deal. By then, any advantage Far obtained would have been lost.

Chirnside v Fay

- Old building turned by property developers into housing for Harvey Norman. Whether entrepreneurs owed each other fiduciary obligations in engaging in dealings which led to a profit Chirnside kept for himself. Both spoke to planners and architects, did due diligence planning buildings and worked on a property development during a past joint venture where they incorporated a company
- Court found there was a joint venture to exploit an opportunity in which the parties owed each other fiduciary obligations and there is an expectation of mutual trust and confidence. There was an informal partnership and they undertook a joint venture where they agreed to split the profits and share expenses
- Chirnside spent more hours, negotiated with current owners Lionel Nathan who gets the contract to purchase the site.
- Once Chirnside knew Harvey Norman was going to be anchor tenant, Chirnside said nothing to Fay. Fay later asked about his shares of the profits, Chirnside replied that someone else concluded the deal which was a lie as Chirnside's company did the deal. Effectively cut Fay out once he knew the deal was going to work and sourced financing elsewhere.
- Project worked because Fay liaised with Harvey Norman regarding the car parking on a neighbouring site, which kept Harvey Norman as the anchor tenant and he also offered financial support.
- Fay would receive nothing if there was no fiduciary obligation as there was no formal agreement giving Fay anything. The fiduciary obligation in question is not to harm another party's interests by taking profits they have agreed to share from the fiduciary relationship.
- Chirnside argued that there was no formal partnership and that they were only negotiating towards a deal. At all times the risks, contracts, guarantees and expenses incurred were borne by and solely under the control of Chirnside. Fay only attended meetings as interested in joining a deal if Chirnside needed money to sign a contract. View that Fay

had not done much while Chirnside did more work. The parties proposed to work on a partnership deal but have not undertaken any obligations in the partnership

- Arklow – there was no undertaking nor any evidential basis for a relationship of trust and confidence and an undertaking of loyalty. Merchant bankers never undertook to be fiduciaries for Arklow as they only made an offer to do so, with the contract never being signed. The relationship contemplated never materialised. Logic that the absence of a formalised relationship between Fay and Chirnside means there was no fiduciary obligation not applicable here.
- SC: Fay and Chirnside have agreed to work together to exploit the opportunity. Even though it was not formalised, both parties went ahead and did things necessary that the proposed exploitation of the opportunity paid off
- Ricketts: the decision seemed to say any joint venture inherently creates fiduciary obligations despite being a common business label describing parties intending to exploit a business opportunity. It is not a legal term and joint ventures can be created by contract, a company or in a partnership.
- Possible no fiduciary obligation in contract as no point during obligations was anything set up where a relationship of trust and confidence had been impliedly or expressly created.
- Whether parties have taken steps in giving effect to the joint venture and if there was a legitimate expectation that fiduciary obligation arose out of trust and confidence and if there had been an undertaking whether express or implied
- Key question whether the parties undertook to be fiduciaries. Joint venture label irrelevant as some joint venture relationships are entirely contractual.
- SC: this was a single opportunity partnership, not an ongoing partnership, where the parties would share the profits of a business opportunity.
- Did not accept Chirnside's submission that the parties had not reached sufficient agreement to "to move this transaction from one of antagonism to one of collaboration."
- AUAG: unnecessary to consider whether joint ventures generally give rise to fiduciary obligations. Unnecessary to embrace competing philosophies of contractual freedom and the death of contracts created by legal & equitable obligations
- Fiduciary relationship because:
  - Worked together on feasibility calculations
  - Joint negotiations to purchase Speights Building
  - Working together with architects, council, and other advisors
  - Mr Fay liaises with Harvey Norman
  - Mr Chirnside introduced Mr Fay as a principal in the development
- Tipping J: the true principle is that circumstances must be one where one party is entitled to trust and confidence in the other
- Did not matter that the parties had not formalised their arrangements
- There is often an express undertaking but an implied undertaking is sufficient. Issue is whether one party had a legitimate expectation to think the other owed them fiduciary obligations.
- Chirnside argued that they may formalise the deal later and enter into an arrangement to exploit the opportunity as business partners and therefore become fiduciaries but have not

agreed to it. This was criticised as having a "strong contractual flavour" unreflective of equity.

- Elias CJ: fact parties may later settle their arrangements in a corporate structure or via a partnership agreement "does not alter the character of the relationship *already established and underway*". Obligation of loyalty meant none could place themselves in a COI

Arklow (Using law from Chirnside)

- (Arklow) arguing on Tipping J: limited fiduciary obligations can arise from an implied undertaking where Far could not compete against Arklow on the deal. For the PC and CA to suggest Far would only have fiduciary duties if it had expressly undertaken them would be inconsistent with way Tipping J defines fiduciary obligations. Arklow may emphasise commercial practice where the bank would have been bound to a fiduciary obligation not to exploit the opportunity.
- In Arklow, there was nothing which would give rise to a legitimate expectation of an entitlement or an implied undertaking that there was a fiduciary obligation between them. Distinction as there was a prospective contract where merchant bank would have become a fiduciary if it was signed.
- Court rejected the argument that there was a legitimate entitlement between parties due to an implied undertaking found in normal business practice. This was because it was too far ranging a fiduciary relationship and imposition on commercial affairs to understand specific relationship had that specific duty of loyalty
- Blanchard J in Arklow confined the fiduciary duty of a merchant banker to only not exploit the deal. Merchant banker could say upfront that they may exploit the business opportunity and are not bound by a fiduciary obligation
- In Chirnside, although there was no formality, it reached a point where there was a single issue partnership, where Chirnside became a status based fiduciary due to the understanding between them.
- Chirnside thought Fay might join them later but at that point Fay had not placed any money, hence Chirnside thought there hadn't been an implied undertaking of a fiduciary obligation.
- If trying to argue that there was a fiduciary obligation – scrutinise contract, need to figure out if contractual relationship brings any fiduciary obligations.

Amaltal v Maruha (SC)

- Commercial fishing 'joint venture', set up under joint company
- General relationship not fiduciary; former partnership was replaced with company
- BUT Amaltal was a fiduciary for Maruha in respect of accounting and tax returns, which it had undertaken for the joint company in one aspect of the relationship
- Amaltal through its accountant conceals tax deduction, to its benefit (higher payment from Maruha)
- Joint venture label is unhelpful as a guide in determining whether the parties owed fiduciary obligations to each other – re Rickett. Commercial parties using incorporation as a vehicle for a loose joint venture are unlikely to have a relationship as a whole which is fiduciary in nature. This is because the parties are exploiting the opportunity by incorporating a different entity.

- Even in commercial relationships of a nonfiduciary kind, there can be aspects which engage fiduciary obligations of loyalty. This is due to the nature of a particular aspect of the relationship where one party is entitled to rely on the other for the loyal performance of a function which they have agreed to perform for the other, even if less formally by conduct.

- What did the parties agree to do and how have they structured the exploitation of the business opportunity:
    - Status-based fiduciary obligation eg formal partnership
    - Chirnside: informal single issue partnership. Analogous to status-based relationship, effectively undertook fiduciary obligations
    - Amaltal: mostly nonfiduciary, contractual business opportunity undertaken by a separate company with particular aspect where one party was acting as a fiduciary. There was a legitimate expectation for one party that the other does not act against the principal's interests. Whole arrangement not necessarily fiduciary.
- Paper Reclaim Ltd v Aotearoa International Ltd (SC)
- Styling a contractual relationship as a joint venture can distract and should be applied with caution. If there was a contract 1) decide what they have agreed upon 2) consider whether any particular aspect of their agreement gives rise to a fiduciary obligation which imposes a duty of loyalty and supplements contractual terms.
- Fiduciary relationship will be found when one parties reposes trust and confidence on the other – through an express or implied agreement to act on behalf of another and thus put another's interest before their own.

- Whether commercial parties move from a arm's length relationship of ruthless antagonism into a collaborative framework through fiduciary obligations
    - Problem question on fiduciary obligations,
    - comparison question where compare the cases
    - think deeper and can easily state status based vs ad-hoc in Chirnside
    - what happened in cases and why decisions came out the way they did and what do they tell us about future cases