

Joint Venture

Construction Law Terms: A to Z

By Huw Wilkins

J is for Joint Venture

What is a joint venture?

A joint venture is a business arrangement in which two (or more) parties agree to pool their resources for the purpose of accomplishing a specific task (or tasks).

A number of the UK's major infrastructure projects are being undertaken through joint ventures. For example:

- A number of joint ventures are involved in Hinkley Point C, including a joint venture between Bouygues and Laing O'Rourke for the main civil engineering and construction works.
- A number of the Crossrail packages were awarded to joint ventures. A joint venture between Costain and Skanska was awarded two packages – one for Paddington Station and another for Bond Street Station.
- Four joint ventures have been awarded contracts for HS2, including "Align JV" which is made up of Bouygues Travaux Publics, Sir Robert McAlpine and Volker Fitzpatrick and was awarded the £1.6bn contract for the Chiltern Tunnels and the Colne Valley Viaduct.

Why enter a joint venture?

Each party will have its own reasons for forming a joint venture, but some of the more commonly cited reasons are:

- Contractors with different areas of expertise may enter into a joint venture in order to meet the tender requirements.
- An international contractor may form a joint venture with a local contractor where there are legal, or project, requirements for local representation (such requirements are common in the Middle East).
- Some projects may be too large, or too commercially risky, for one entity to undertake by itself and so it may look to form a joint venture to share the risk.

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Potential structures for joint ventures

In England and Wales, there is no law specifically relating to joint ventures. But for parties considering entering a joint venture, the first thing for them to consider is how to structure their arrangement.

At the highest level, the choice is between:

- an incorporated joint venture; and
- an unincorporated joint venture.

Incorporated joint ventures

An incorporated joint venture is a structure whereby the parties create a separate legal entity as a vehicle for the joint venture. In this structure, the joint venture partners each own shares in the joint venture company, and the relationship is governed by the Articles of Association. The parties would be well advised to also enter into a shareholders agreement.

Being a company in its own right, the joint venture will be able to enter into contracts, open bank accounts, employ staff, own plant and undertake the work. The company will also benefit from limited liability, and the protection of the “corporate veil” (although, where contractors form a joint venture for a particular project, the employer will invariably require parent company guarantees from each shareholder in the joint venture company).

Unincorporated joint ventures

An unincorporated joint venture is one where the relationship is purely contractual. Because the joint venture does not have its own corporate vehicle, each of the joint venture partners will enter into contracts so that each joint venture partner will be liable to the employer and each other under the terms of those contracts.

Do members of a joint venture owe each other a duty to act in good faith?

The case of *Russell -v- Cartwright*¹ arose out of a framework joint venture agreement in respect of property development. The Court found that the parties to the joint venture did not owe each other any fiduciary duties – such duties arise only where someone is entrusted with such a degree of confidence that they must put their own personal interests aside (for example, a director owes certain fiduciary duties to their company).

Examining the joint venture agreement, the Court found that whilst there were certain express duties of good faith, these were limited in their scope, and there was no express overarching duty of good faith. The Court also held that there was no implied duty of good faith. Mrs Justice Falk noted that determining whether a term should be implied is an objective exercise, rather than one based on the parties' subjective intentions and she found that:

- whether a contract is “relational” is not determinative of whether a duty of good faith should be implied;
- it was “neither obvious nor essential to the proper working of the contract to imply some broader obligation of good faith”;
- the existence of express good faith obligations “indicates that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms”; and
- whilst an implied term must be capable of being clearly expressed, “the precise extent of the alleged good faith obligation was never satisfactorily explained”.

1. [2020] EWHC 41 (Ch)

What to consider when thinking of entering into a joint venture

Whether parties choose an incorporated or unincorporated joint venture, they will need to consider a whole raft of issues, including the following:

- Who will undertake what roles within the joint venture, including who (if anyone) will be the “leader”, undertaking the administrative and management role?
- How will the joint venture be funded and how will resources be purchased and owned (or hired to the joint venture)?
- How will decisions be made? The joint venture parties will need to put in place a structure for administering the project on a day-to-day basis, but there will also need to be a structure in place for high level management and making strategic decisions. This will potentially involve a joint venture board which will meet at regular intervals.
- Depending on the number of participants to a joint venture, and their respective financial interests, it may be possible (or even likely) that there will be instances of “deadlock”. A mechanism will need to be in place to resolve deadlock situations.
- How will liability between the members be shared? Will liability for claims brought against the joint venture be allocated based on:
 - fault (i.e. whichever joint venture party's actions prompted the claim will be liable for the claim); or
 - according to the parties’ financial interests in the joint venture, irrespective of fault?
- When and how will a party be able to leave a joint venture of its own volition and, potentially more importantly, can a party be jettisoned from the joint venture if it is not performing, or otherwise in default?
- How will disputes between the joint ventures to be resolved? Joint venture agreements commonly include tiered dispute resolution mechanisms, whereby the parties will first try to resolve any dispute at project level, before being escalated to senior management and then more formal dispute resolution procedures.
- How will the joint venture will come to an end?

There are a number of other factors to be considered, including the regulatory (e.g. health and safety) regime, accounting rules, tax implications and HR issues, and advice should be taken on all of these matters so that parties give their joint venture the best possible chance of being a success.

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