**Heightened Legal Duties in Joint Venture Agreements – What They Mean For the Parties**

*A brief outline of the extensive legal duties that can be imposed on parties to Joint Ventures.*

Joint ventures are of course a common feature of the commercial landscape, particularly in relation to large scale activities. Although some joint ventures are created by a verbal agreement (and possibly a shake of hands), most are the subject of detailed agreements and articles that regulate the parties' rights and obligations and the constitution of the JV vehicle.

Given that JVs are the product of commonplace commercial drivers such as the sharing and apportionment of risk and reward, it would seem sensible to regard them as typical commercial agreements just like any other. This would imply for example that generally they do not create rights and obligations unless such rights and obligations have been expressly negotiated and agreed between the parties.

However JVs are not in fact viewed by the courts as run of the mill agreements. Instead the courts have established that in certain situations the nature of the JV arrangement is such that is gives rise to significant fiduciary duties.

The courts are more likely to determine that fiduciary duties apply in a JV where the structure of the JV means that one partner is required to place a high degree of trust in the other. This was the position in a recent case where the JV (created to pursue a development project) was set up between two companies A and B but where A owned the relevant assets under the JV and C, a Director and Shareholder of A was effectively in control of the project.

In that case A went in to liquidation and B sought to recover payments from the C, the Director/Shareholder on the basis that C owed B fiduciary duties. Here the court decided that C did owe fiduciary duties to B (despite the lack of any contractual relationship between those two parties). Specifically the Court stated that C owed duties of good faith and duties not to do anything regarding the dealings in the JV revenues that favoured C himself or A to the detriment of B. This meant that C had breached these duties when he permitted payments to be made out of the JV revenues in advance of payments to B which were not proper payments of development expenses or payments that B had authorised. This also meant that C was not entitled to expend JV revenues in defending the litigation brought by C since A had no separate interest in resisting the claim – C was required to fund the litigation himself without the cost being shifted to A.

The court's findings therefore enabled the JV partner B to recover sums from the Director/Shareholder C despite the facts that A had been placed in liquidation and there was no direct contractual relationship between B and C.

Clearly these findings will have significant personal consequences where the JV partner is itself in liquidation and therefore unable to meet its liabilities under the JV agreement.

If the court determines that fiduciary duties do exist, these are likely to take any of the following forms:

- A duty of good faith between the JV parties;
- A duty on each party not to put itself in a position where its interests conflict with those of the JV;
- A duty not to make a secret profit from the JV or to put its own interests before those of the JV (also recognised as a duty of loyalty to the JV); and
- A duty to disclose to the JV any misconduct of which that party may be guilty.

If, having established the existence of fiduciary duties and a breach of one or more of them, there are a variety of effective orders that the court can make to remedy the situation. For example the court can order the unwinding of transactions carried out by the JV, it can require parties to account for profits they have made in breach of their duties, and it can declare that property held as a result of breach of duty is held in trust for the "innocent" party.

The application of fiduciary duties in JVs will always be dependent on the nature of the JV itself, and in particular the degree of control that each party has. If one party has, for one reason or another, a relatively high degree of control, it is more likely that the court will determine that fiduciary duties arise.

This means that it is best for JV parties to be aware that such duties may exist. Such duties should be addressed as far as possible through the negotiation and drafting of the JV agreement, and the parties should then ensure that they abide by such duties during the course of the JV project.