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EFFECTIVE DRAFTING AND NEGOTIATION OF PROPERTY DEVELOPMENT AGREEMENTS

PROPERTY DEVELOPMENT LAW

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1. Introduction

In the past, the construction industry has been seen as lacking in trust between the participants and accordingly with each party defending itself against the others¹. Poor relationships between the principal, contractor and sub-contractors lead to problems that affect time, cost and quality as well as damaging long term relationships between the parties in a survey in North West UK. The participants were asked about issues such as trust and why it is important, some of the issues were:-

- (a) Honest Communications – the parties should be open and willing to share important information with the rest of the team and be honest giving information that reflects the real situation.
- (b) Reliance – the parties should be able to rely on the information that is given and to rely that when people say they will say something that they will do it – that promises will be kept. In construction there may be many specialist trades and not everyone will have expertise to understand what is being done and therefore will have to rely on the other person's experience and expertise.

¹ Trust in Construction – Achieving Cultural Change (Centre for Construction Innovation in the North West (UK) 01.2002

- (c) Reputation - trust tends to be given to people rather than companies or organisations and will rely on individuals rather than an organisation. Despite this, organisations can build reputations which impact on whether people feel comfortable working with them in projects.

The benefit of trust is that the construction industry is uncertain and if the information is clear and accurate then other people can rely on it. Where parties are reliable, there is more likely to be repeat business so that trust can increase profit both on an individual project and in the long term. Generally it is easier to build the personal relationships on smaller projects but by changing the culture within organisations, trust can be built on larger projects. Joint ventures and partnering contracts are two methodologies which have developed to bring "trust" into projects.

The culture of blame has led to inefficiencies as each party seeks to "cover its back" and to shift risk. The risk is shifted to the party which is in the weakest negotiating position within the contracts. It is often shifted to a party who has the least control over minimising the risk and the least ability to prevent the events occurring.

A number of structures have been developed to minimise the confrontational nature of the relationships between the parties in the projects, to improve the trust between the parties and to establish a more collaborative approach.

Despite the various attempts at creating a new construction paradigm, the basic outcome sought is:

- a reasonable profit for each participant including the owner, contractor, subcontractor and consultant;
- completion of the project in a timely manner;
- to satisfy the social responsibility of the participants; and
- to minimise long term costs for the operation of the building/infrastructure project.

The weighting of these goals depends on the nature of the project and the nature of the participation of the parties.

Where the parties anticipate that the project will be on-sold quickly with short term profit for the developer, long term maintenance costs may be considered to be less important. With an infrastructure project such as a road, the government or the concessionaire will consider that the maintenance costs are as important as the original construction cost and that a designer may utilise techniques or materials which have a higher initial cost but will substantially reduce long term maintenance.

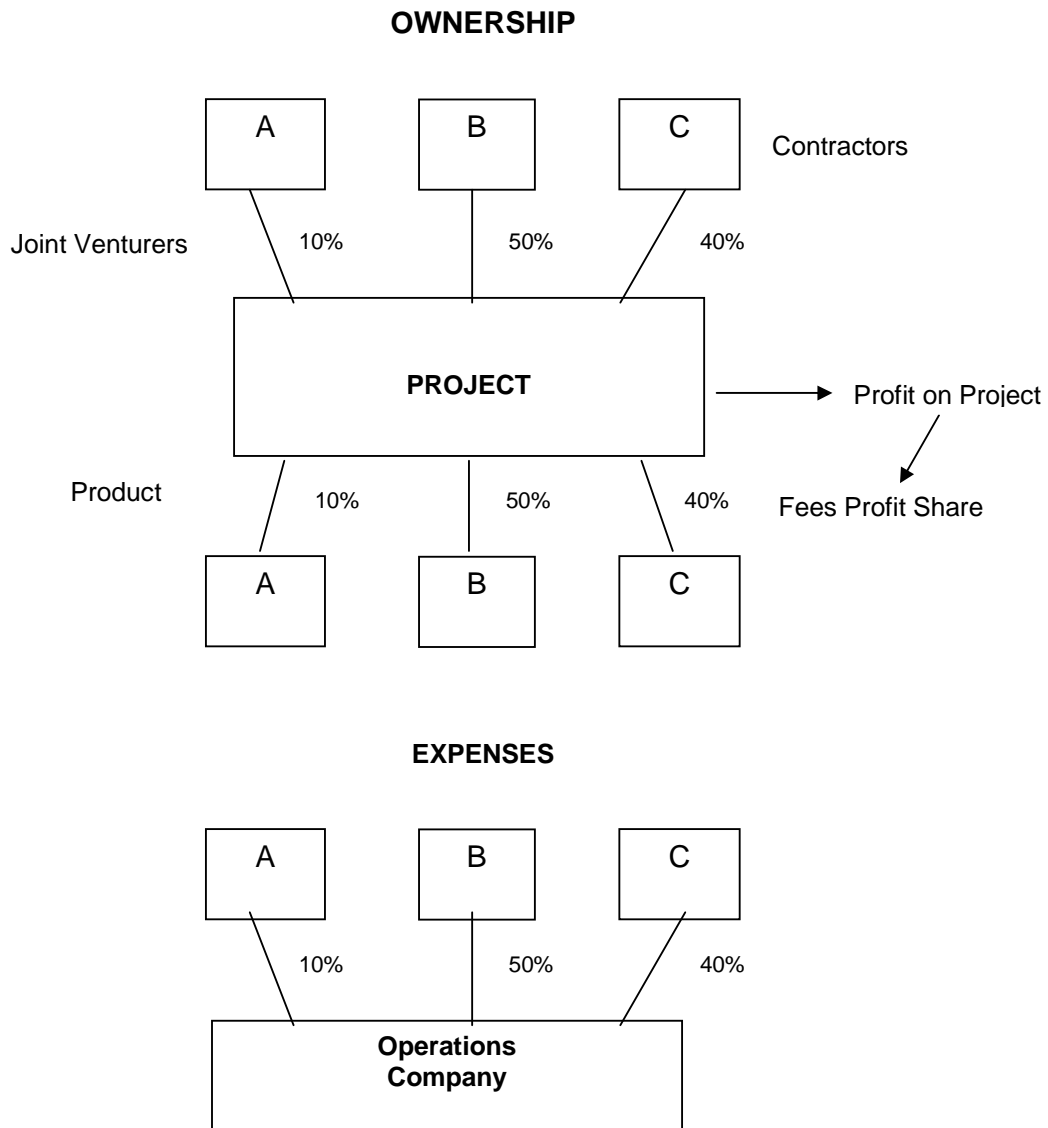
Some participants may have strong commitments to social responsibility for example ethical investment funds, churches and governments. Such principals may be willing to accept a greater cost for a project by having regard to the long term cost to society for issues such as being conscious of the source of materials, reducing long term energy costs, use of renewable or recyclable materials refusal, to use rainforest timbers etc. Many public companies have a social responsibility charter and reports relevant to that charter will be presented at the annual general meeting with as much importance as reports on financial performance.

2. Joint Venture

I will consider the Joint Venture as a structure for development contracts.

2.1 Structure

Diagram 1 – Joint Venture



The unincorporated joint venture has been used for many years particularly in mining projects as a means of participating jointly without creating a new legal entity and without sharing liability. Traditionally it was developed as a tax effective means of carrying out the project. As it was developed in answer to tax matters, it can still be seen by the tax office as having an element of tax minimisation and therefore may have greater scrutiny than other structures.

The partnering and other relationships contracts have been developed more from a culture of reducing risk and increasing trust between the participants. It requires greater cultural change within the participants and is usually not driven by tax considerations.

2.2 Tax Implications

The Australian Tax Office² considers that a joint venture is characterised by the following:

- Sharing of product outcome rather than the proceeds of sale or profits.
- Contractual agreement between the participants.
- Joint control.
- A specific economic project.
- Cost sharing.

Of these, the most important aspect is the sharing of the product of the outcome. In a mining joint venture, this may mean that the coal, iron ore etc which is extracted from the mine is taken to be owned by the participants in the joint venture in their respective percentages. In a joint venture operating a toll way concession, the participants own the concession revenue in their respective percentages. An arrangement which shares profit will be a partnership and not a joint venture.

The fundamental difference between an unincorporated joint venture and a partnership is that the joint venturers are only severally liable in the participation percentage and not jointly liable for the debts of the enterprise.

The other indication of a joint venture is that it is for a specific economic project rather than a continuous business. If there is continuous business, for example a number of different developments, then it is more likely to be characterised as a partnership. The ongoing operation of one project would not be characterised as a continuous business.

² GSTR 2004/2 Goods and Services Tax: What is a Joint Venture for GST Purposes

The traditional view was that a syndicate which comes into existence for a limited period or purpose would not be a partnership for income tax purposes. For example construction of residential buildings which were divided equally between the venturers after construction is not a partnership either at general law or for income tax purposes³. There are various provisions which may require a limited partnership to be treated as a company for tax purposes.

For GST purposes, the parties may enter into an approved joint venture as a "GST joint venture", which means that the operator of the joint venture is responsible for the GST liabilities and entitlements arising from the operators dealing on behalf of the venture participants. The payments by the venturers to the operator are not considered to be a taxable supply for the purposes of the GST law. These joint venture provisions are similar to the GST group rules on the basis that it is operating in a similar way to a group by an unlimited basis. The GST joint venture is not treated as a single body for all GST purposes.

A GST joint venture will only be approved if:

- the venture is for an approved purpose;
- the venture is not a partnership, that is the income is not received jointly;
- each entity satisfies the participation requirements; and
- the application nominates an entity to be the joint venture operator, which need not be a party to the joint venture agreement.

The approved purposes reflect the common purposes of a joint venture including exploration or exploitation of mineral deposits, research and development, agriculture, generating transmission distribution of electricity etc. It can also specifically include the design, building or maintenance of residential/commercial premises subject to the counter-measures put in place to prevent abuse of the margin rules.

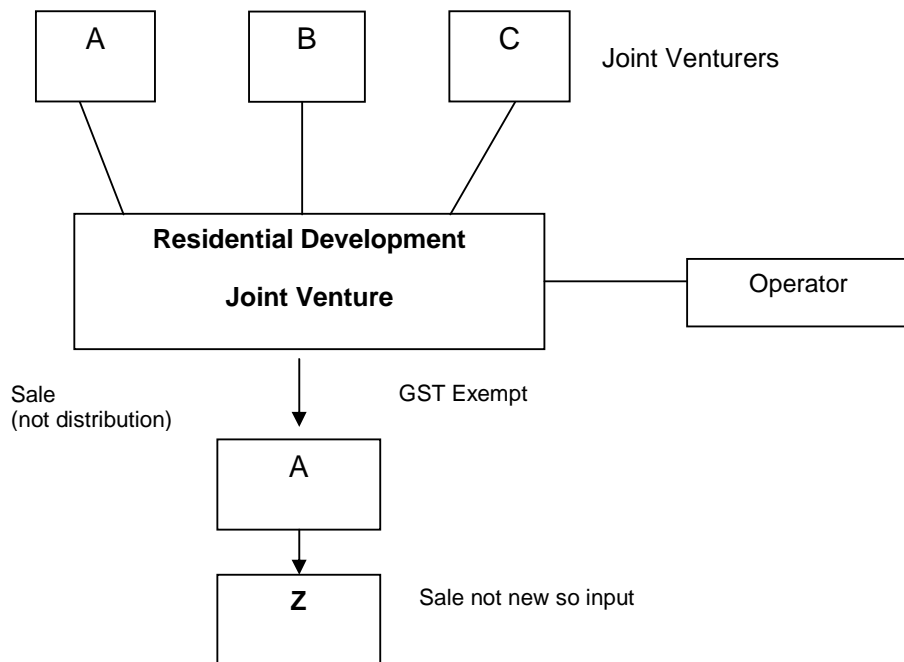
The participation requirements are that the entity:

- must participate or intend to participate in the joint venture;
- must be a party to the joint venture agreement;
- must be registered for GST purposes; and
- must account on the same basis as the other participants.

³ ARN Constructions 87ATC 4790

GSTR 2004/3⁴ deals with avoidance of GST on the sale of new residential premises. Its purpose was to prevent avoidance of GST through entry into a scheme under which the parties purported formed a joint venture for the construction and sale of residential premises. The operator purports to sell the completed premises to a participant in the joint venture. The operator argues that the sale is not a taxable supply under s.51-30(2) because it is a supply made by the joint venture operator of a GST joint venture to a joint venture participant. It is not a taxable supply if the participant acquires the things supplied for consumption, use or supply in the course of the activities for which the joint venture was entered into.

Diagram 2



The purpose of the scheme was to convert premises which were built from being "new residential premises" upon which GST would be payable to being a subsequent supply which is input taxed. The scheme relies on the transfer of the residential property from the operator to the participant as a GST exempt transaction on the basis that it is a supply within the joint venture. The proceeds for the sale of the residential premises to the third party is distributed amongst the participants as the participant pays for the residential premises to the operator the amount which the participant receives from the third party.

⁴ GSTR 2004/3 – 7 April 2004

The ATO has rejected the scheme referred to in the ruling. It agrees that the sale by the joint venture operator to the participant is a taxable supply and that Section 51-30(2) does not apply because either:-

- the arrangement is not a joint venture for GST purposes; or
- the participant does not acquire the premises for consumption or use of the supply in the course of the activities for which the joint venture was entered into.

This ruling has caused some developers to be wary of using a joint venture vehicle for development. This should not be the case as the ruling has limited effect to prevent an unlawful scheme. On reviewing the structure of the scheme, the transfer from the operator to the participant is outside the joint venture purpose – it is not a payment between the participants and the operator to carry out the purpose of the joint venture. Under the nature of a joint venture, the participants own the product of the joint venture and therefore the product does not need to be sold by the operator to a participant.

Where the joint venture is properly (and lawfully) structured, the participant should be able to receive the product of the joint venture tax-free for on-sale. Where that product is residential premises, the participant would be entitled to keep those premises for its own use or to on-sell the premises with GST payable on the on-sale.

Another tax issue to consider are the Capital Gain Tax status of the land used in the Venture, particularly for any premises sold by the contractor.

2.3 Agreement

A property joint venture can link the participants commercially in a way to minimise disputes. For example, the participants may be:-

- landowner;
- principal contractor;
- designer; and
- significant subcontractor.

In this type of structure, the parties would enter into a joint venture arrangement under which they would agree to their participation in the joint venture, the joint venture may appoint an

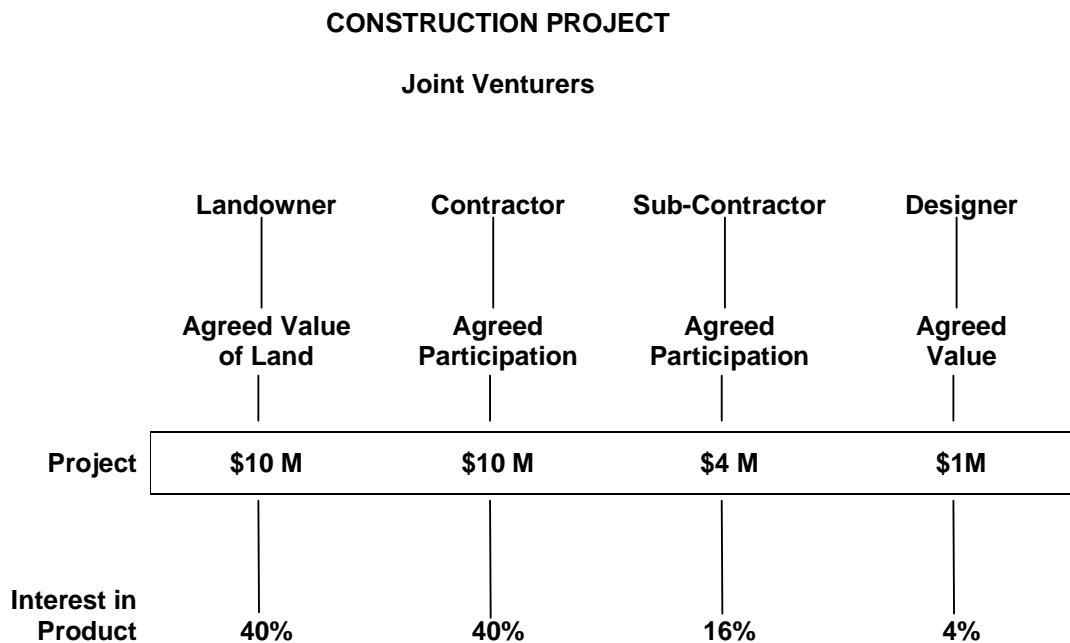
operator who would act as the project co-ordinator or that role may be undertaken by one of the participants (usually the contractor).

The benefit of the use of the joint venture is that the parties are commercially committed to each other and have a commercial reason to complete the project on time and within budget. The joint venture agreement would need to identify the participation interests.

It is easy to value the contribution by the principal as an agreed valuation of the land can be used. The valuation of the contribution by the other participants is often more difficult. It may be necessary to have final drawings to be able to value the work by the other participants and any change to those agreed drawings/contracts would require the approval of all participants.

Another structure is for each participant to contribute its labour up to an agreed level.

Diagram 3



Under this scenario, the cost of construction in excess of the agreed participation by the contractor and sub-contractor would need to be paid by the joint venture participants in their participation percentage or raised by external financing with the joint venture property as security. The participants would need to agree whether the participants would provide any other security or if there is recourse to other assets of the participants.

Often the value of the designers work will be determined at the commencement of the project. The participation by the contractor and sub-contractor however will be subject to a standard Construction Contract (upon which GST may not be payable if it can be structured to comply with Section 51-30(2) as a supplier within the joint venture).

2.4 Advantage of Joint Venture

The main advantage of the joint venture is the high degree of co-operation and participation required to negotiate and administer a joint venture. This high degree of co-operation is likely to increase the trust between the parties, there are more likely to be regular meetings to discuss issues and to resolve problems and because of the contractual relationship under the joint venture agreement, the parties may have a less adversarial approach to each other.

It is a relatively simple structure that can be used on small projects.

3. Contracts

The joint venture agreement deals with the relationship between the various parties to the development. It will deal with issues such as the contribution by the participants, administration of the joint venture and distribution of the product from the joint venture. It may include the appointment of the operator.

The purpose of entering into the joint venture agreement is to ensure that the participants work collaboratively in the best interests of the development. To minimise disputes and maximise the overall profit from the development.

To undertake this, the parties may enter into a partnering agreement and are likely to enter into a Construction Contract with one of the participants. Each of these documents will need to be reviewed carefully having regard to the joint venture.

3.1 Partnering Agreement

As I have previously stated, development contracts or Construction Contracts have traditionally been drafted in an adversarial environment. Various methods have been used to reduce the adversarial nature in the construction industry. In large infrastructure projects, Alliance Contracts are often used, however, the nature and cost of the alliance contract means that it is not suitable for smaller ventures.

In the UK and in the USA, Partnering Agreements have been used to increase trust and to foster a closing working relationship between the parties. The nature of the construction industry in Australia is more confrontational, adversarial than in the UK or the USA. Perhaps because of the

smaller market and fewer players in that market means that each party is looking to maximise its profit often at the expense of the other.

Partnering Agreements have been put in place to overcome that adversarial relationship.

A Partnering Agreement or charter can be incorporated within the joint venture document or as a separate arrangement between the parties to govern the relationship. Generally, the Partnering Agreement sets out the aims of the project and there are workshops between the principals of each of the parties and also with the people who will be involved in the project on a day to day basis such as supervisors, certifiers etc.

The Partnering Agreement and the workshops will work through how the parties will work collaboratively and how the negotiation process will work. The parties may agree that comments made within the Partnership Committee in the course of negotiation of a potential claim cannot be used in evidence against a party. This may encourage the parties to talk about potential errors at an early stage so that problems can be fixed before they become great. It can also encourage a party to put forward alternate methods for construction or alternate materials which can be discussed in an open way without fear of a claim for negligent design etc.

3.2 Construction Contract

Generally in a joint venture in addition to the partnering agreement, a standard Construction Contract is used. As part of the partnering workshops and the negotiation up to the signing of the joint venture, it is likely that the parties will have developed more detailed information about the development such as the scope of work, costings and the time frames for construction. These 3 items are the matters which are likely to cause a dispute and the more information which is known prior to the Construction Contract being let, the less likelihood of dispute.

3.2.1 Time

Generally, the contract will include a program setting out time with critical dates. In a standard Construction Contract (for example the AS suite of contracts) the contractor will be entitled to an extension of time where there is a delay outside the control of the contractor which affects its critical path. It is irrelevant under the standard contract whether the contractor could reschedule works to minimise or prevent the delay. A prudent contractor will usually include a "float" within the program. This ensures that the contractor has some leeway before being in default for delay. Generally this "float" is not disclosed to the principal.

Under a joint venture and particularly within a partnering arrangement, the parties would expect the contractor to disclose the float and for the contractor to have a positive obligation to

reschedule works to minimise delays. For example, usually a contractor will build into the program time for inclement weather based on rainfall patterns etc. The contract should identify that the program includes an allowance for a stated number of wet days and that the contractor is only entitled to an extension of time if that number of wet days is exceeded. It is useful for the program to include an allowance for wet weather so that the date for practical completion is a realistic date and is not likely to be extended greatly due to inclement weather.

Sometimes the contractor may be able to reschedule work so that the inclement weather or other factor does not in fact cause a delay. For example, under the program concrete may be required to be poured on a day on which it is raining. It may be possible for workers to be utilised on another part of the project which is under cover. If the delay is caused by a delay in delivery of materials, workers may be able to be redeployed.

Where there is a positive obligation on the contractor to minimise extensions of time in this way, the contract needs to clearly express that obligation and to identify the components within the "float".

Time requirements are enforced by way of liquidated damages. It is often very difficult to assess a genuine pre-estimate of the likely damage. With the construction of residential apartments, the damage may be the interest charged by the development financier but this may not be adequate in the current economic environment. The construction facility may have a repayment date and if construction is not completed by that date, the joint venture may be in default and need to either refinance at a higher interest rate or pay penalty interest. These factors would need to be considered in determining the amount of liquidated damages.

Where construction is of retail shops, some major tenants such as Woolworths, Myer etc. require opening within a particular band of dates so that the tenant can fit-out and have the shop operating at full capacity at peak times such as Christmas and Easter. If construction is not completed by that date, the tenant may not have to pay rent until the next window. The liquidated damages would have to take into account this loss.

There may also be a need to prevent early completion or early progress claims if there are timeframes for drawdowns under the finance facility. These would also need to be negotiated and clearly identified in the contract. Normally all parties would prefer early completion because then the profit is realised by the joint venturers at an earlier date.

3.2.2 Variations

Similar to the negotiations regarding time, the joint venturers need to discuss the possibility of variations. It is likely that the issue of variations would need to be determined under the Joint Venture Agreement as well as under the Construction Contract. Often the Joint Venture

Agreement will provide for delegation of consent for a variation up to a certain percentage of the construction sum or to a dollar amount to the project manager.

The relationship between the contractor and the joint venture remains the same as the relationship between the contractor and the principal. Irrespective of the structure of the joint venture, the contractor/participant will still be seeking to maximise profit from the building contract potentially at the expense of the other participants. Where the joint venture engages an independent project manager to negotiate issues such as variations to time and cost, the joint venture may be able to provide that the decision of the Project Manager is final.

Where the detailed construction drawings are not available and the contractor is building on a design and construct basis, there may be no provision for a variation unless there is a change of scope directed by the joint venture. It is less common to use a design and construct vehicle in either a partnering contract or a joint venture because both of these models rely on a high degree of knowledge between the parties before entering into the Construction Contract and the joint venture.

Where there are variations, the Agreement may deal with minor variations and the contract sum may include a margin for minor changes. The contract should deal with whether the contractor is entitled to a percentage for profits off-site overheads etc. and where there is such a percentage, the parties need to consider whether there has been full disclosure to the joint venture. This is discussed more fully in the section dealing with the obligation of good faith.

Under a partnering arrangement, the parties would discuss the potential variation and consider in a collaborative way mechanisms to reduce the cost and time implications of the variation. This would include matters such as considering alternate materials or methods of construction, particularly where the variation has arisen because of an increase in the cost of components to the project.

The Partnering Agreement should also deal with reductions in price where the cost of components have reduced. This may arise in the current market where the cost of sub-contractors, steel and concrete may be reducing. On the other hand, where components are to be imported, the price may vary because of fluctuations in the exchange rate of the Australian dollar, particularly compared to the US dollar.

3.2.3 Scope of Work

Where the development proceeds by way of joint venture, partnering agreement, design and construct contract or a traditional construction contract, the parties need to clearly identify the scope of work to be undertaken by each of the participants.

Often obligations will be placed on the designer or the contractor that the finished work will be "fit for the purpose". While in a general way the "purpose" may be self evident – it is commercial building, retail complex, apartment building etc. but for this phrase to have meaning, the purpose must be defined with some degree of certainty.

The purpose should include:-

- a minimum life of the building. Is it intended to be a long term investment or is it the sort of building which would be demolished after 20 years and rebuilt. This would impact on the nature of the finishes, the durability of the components particularly lifts and air-conditioning etc;
- the maintainability of surfaces. Where one of the participants is likely to keep all or part of the project as a long term investment, maintainability, that is the ease of cleaning and maintaining the building will be important. Under the Workplace Health & Safety legislation, the designer and principal contractor have obligations for workers safety both during construction and for ongoing maintenance of the building. The parties need to consider how glass will be cleaned, light bulbs changed and the ease of access to machinery.

The parties may also have to consider whether particular finishes will bear the traffic which is intended to use the area. For example, the use of a wooden floor in a high traffic area would cause a maintenance problem. The use of a hard surface in an area where is a lot of traffic may also cause a problem with noise.

- Marketability. Sometimes the joint venture agreement and the scope of services will refer to an intended sale price for the product. The range of sale price is often more useful to identify the costs which can be incurred in the design rather than a subjective such as a high class residential facility.

Particularly in a joint venture or partnering arrangement, the parties need to negotiate upfront about exactly what is intended to be built, the budget, and the long term investment strategy of the participants and for the development.

4. Due Diligence

Prior to entering into a Joint Venture it is important that each participant undertakes complete due diligence on the other to understand the business culture of the other participants to check if they have a business culture which is conducive to the venture, whether the people who will be

engaged on the project day to day have the personality to participate in the joint venture and whether there is a genuine commitment by all participants to the joint venture.

The use of a joint venture does not diminish the need to carry out extensive engineering/technical due diligence.

5. Obligation of Good Faith

The joint venture relationship creates a new set of relationships and legal obligations between the participants. In a traditional Construction Contract, the parties have an obligation not to commit fraud or misrepresentation, but there is no positive obligation of good faith. There is no restriction on one party taking advantage of its bargaining position (subject to the Trade Practices Act) or superior market knowledge when dealing with the other. There is generally no obligation of general disclosure of information known about the project.

In a joint venture the relationship is much closer. The participants may have fiduciary obligations in some aspects of the venture. For example, if a participant discovered information about the venture, such as that the coal seam extended further than the current mining lease, the participant may have a fiduciary obligation to advise the other joint venturers and if the participant took out a mining lease over the extended area in its own name, it is likely that it would be holding that mining lease on trust for the joint venture. The information relating to the extension of the mining lease is so intimately related to the mine that that information should be made known to the joint venturer as a whole.

Other aspects of the relationship do not carry fiduciary duty. For example joint venturers would not be required to act in good faith considering the impact on the other venturers in exercising a contractual right such as an assignment or consent to assignment of the contract.

The leading case dealing with this obligation of good faith is *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*⁵. The facts of that case were that Placer was the operator for a joint venture of a number of mines in Western Australia. It had engaged Thiess to carry out the mining operations. Initially the contract was on the basis of a schedule of rates contract but because of the expense which had been incurred, Placer had proposed a partner in contract under which Thiess would be paid its costs plus an agreed percentage profit. The contract had a provision which allowed Placer to terminate the contract for its convenience without penalty other than payment of the demobilisation of costs. Following various discussions with Thiess, Placer decided to terminate the existing contract and to put the work to tender. Thiess tendered at a significantly lower rate.

⁵ [2000] WA SCA 102
(2003) 77 ALJR 776 (on Appeal)

Thiess brought an action against Placer claiming damages for loss of profits it would have earned had the contracts not been terminated. It was a claim for breach of fiduciary duty and misleading and deceptive conduct. Placer defended on the basis that it had an unqualified right to terminate the contracts and, during discovery, Placer became aware of material facts and claimed that Thiess had made material and fraudulent misrepresentations which induced Placer to enter into the contracts. Placer argued that Thiess had acted in bad faith.

The judge in the first instance, Mr Justice Templeton, reviewed the evidence in detail (the decision is almost 250 pages).

He held that Placer had an unfettered right to terminate. This was one of the aspects of the partnering agreement which did not attract any fiduciary obligations.

Most of the decision however was considering the surrounding circumstances to the parties entering into the partnering agreement. This is relevant in determining the percentage profit which was paid to Thiess. The analysis of the relationships which arose from this negotiation is directly relevant to the payments under an Alliance Contract where the contractor and designer are usually entitled to be paid their "cost" but the profit is risk.

During negotiations between Thiess and Placer, it was proposed that the rates would be derived from an open book system from Haul Profiles, Cycle Times, ownership costs and operating costs plus a profit margin. The base rates were the rates in dollars per bank cubic metre ("BCM"). The rates were to be used by places to determine whether it was better to use Thiess to operate the mine or for Placer to operate the mine itself which it had done previously.

In addition to profit, Thiess would be entitled to claim overheads which would include head office charges. It was agreed that no profit would apply to those charges.

During the negotiations, there was discussion about repairs and accidental damage. Thiess advised Placer that Thiess had an internal plant department which obtained, services and repaired plant and equipment and then hired it to various operating departments. The objective was for the plant department to break even. The evidence given by a representative for Placer was that he had been told by Thiess that Placer would be charged the plant department rates, that is the internal hire rate by Thiess without profit. During disclosure, Placer discovered that Thiess had charged more than its internal plant rates. Thiess provides Placer with various costs for its internal plant rates. The impression given to Placer was that a 5% profit was being charged. In fact the profit was 10.87%. Placer was not told that the plant rates in the submission were not the internal plant rates which they appeared to be and which had been indicated to them.

The trial judge held that:-

"I accept entirely that Messrs Jukes, Trio and Parsons (senior staff at Thiess) derived no personal gain from the misrepresentations. I think that their conduct was motivated by loyalty to Thiess and the desire to ensure that it retained an important contract.

"They were in an invidious position. The 1989 contract had been very profitable for Thiess and it was anxious to retain Placer as a client. But Placer would accept only a 5% profit margin which was far below the level required by Thiess's business plan.

"... I am satisfied that Thiess's conduct was deceitful".⁶

In his conclusion the trial judge found that the Granny Smith contract imposed on Thiess the obligation of formulating in good faith equipment operating costs based on historical data. This was in the nature of the fiduciary obligation. Thiess was in breach of the contract because it inflated the equipment operating costs based on historical data for the purpose of deriving additional profit. Placer was entitled to damages for breach of contract in the sum of \$4,253,000.00. While the decision was overturned at the first instance, the High Court reinstated that order.

The Placer (Granny Smith) case is important on a number of issues:-

1. It confirms that the parties to a partnering agreement can have fiduciary obligations in some respects but other contractual rights (such as the right to terminate for convenience) do not have to be exercised having regard to the effect on the other party.
2. There are fiduciary obligations, obligations of good faith, arising from the relationship.

It highlights the importance of full disclosure but also the discussion by the trial judge of the evidence particularly of the senior management from Thiess indicates the pressure on the parties (particularly in the current economic climate) to justify the entry into the contract, the need to produce the required profit.

⁶ Page 83

6. Representations

In the negotiation of a joint venture there are significant negotiations about the method that the project will proceed and the intentions of the parties. Under a traditional design and construct or EPC contract, the contract itself will set out the standard of skill, cost, variation procedures etc. The contract stands alone.

With a joint venture the pre-contractual negotiations will become more important. As was seen in the Placer (Granny Smith) case, the negotiations about the partnering agreement were vital to the interpretation of the final contract. Representations made about the methodology used to calculate cost could be relied upon in interpreting the intention of the final contract even though Placer had not specifically asked for a breakdown of the costs in that final contract.

Cost is only one aspect of a relationship contract. Representations can be made about other aspects which are less tangible which may affect the outcome of the project. These may include the commitment of a party to the joint venture.

Representations may become binding on a party either under Section 52 of the Trade Practices Act – false and misleading conduct or as a collateral contract. A representation made in the course of negotiations may become binding as either a term of the agreement or as a collateral contract.⁷ For a collateral contract to arise, the statement must be promissory rather than merely representational and this will depend on the intention of the parties. The courts will consider whether the parties intended the statements would constitute a term of the contract or whether they were a statement of the opinion of one party which to be relied upon by the other.

Where the statement is made during the negotiations of a joint venture or during a partnering workshop (if the joint venture proceeds under a partnering arrangement) whether they are intended to form part of the contract or create a collateral contract depends on the intentions of the parties. For example, when the final joint venture document sets out all of the commercial terms of the arrangement and states that the joint venture agreement constitutes the "entire agreement" it is less likely that the statements made prior to entering into the contract form a collateral contract. It is likely that a court would consider that if the parties considered the statement to be integral to the agreement then those statements would form part of the joint venture agreement. This will clearly be the case where the statement relates to the participation of the joint venturer. It may be less clear where the statement relates to the partnering relationship.

For example, during negotiations of the joint venture, the parties will acknowledge that the development will be undertaken within a partnering regime and that each party would seek to

⁷ Hospital Products Limited v United States Surgical Corp (1984) 156 CLR 41

avoid conflict and to work in the best interest of the development. Often the parties may then negotiate and sign a standard form Construction Contract which would allow all the usual rights of disputes, claim etc. and also the parties would have rights under the Building and Construction Industry Payments Act. If one party then sought to enforce those rights to the detriment of the other, the other party may claim that the negotiations regarding the partnering arrangement are a collateral contract to the black letter Construction Contract. It is likely that the courts would look at the intention of the parties both at the time of the negotiations regarding the partnering arrangement and at the time of signing the Construction Contract. The partnering arrangement may be considered to be a collateral contract where the parties intended that the partnering arrangement and the obligations to negotiate in the best interest of the development would be enforceable despite the black letter Construction Contract. Usually the partnering agreement is not inconsistent with the Construction Contract and would be considered to be promissory rather than representational.

The position would be different where the negotiations about the partnering relationship are general particularly where there is no partnering agreement or where it is just a general intention to work for the benefit of the development without any formal agreement setting up a process for dealing with the partnering relationship.

7. Summary

The use of the joint venture provides advantages for the construction of projects including significant buildings and infrastructure. These structures ensure that the participants share in the pain and the gain, that the participants have a vested interest in close dialogue, avoiding blame and looking for results and maximising the return on the project.

While these structures do not create partnerships, there are obligations of good faith between the participants. Each participant must ensure that it does not obtain an advantage from the other participants and is open in all dealings with them.

Issues can also arise about representations made during negotiations, meetings prior to the Joint Venture Agreement being signed which may have induced one of the participants to enter into the Agreement.

The great advantage however is that the parties are all working together.