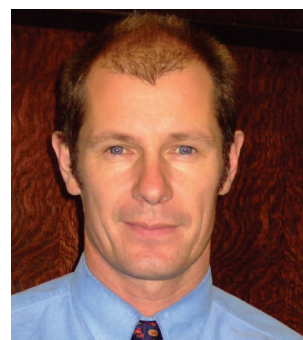


Business Focus

The joint venture: A marriage made in heaven or hell?

David Parker discusses matters for consideration before venturing into business with a partner



Although the current financial climate may suggest otherwise, from time to time in business there seem to be just too many opportunities and not enough time or money to exploit them all.

Lack of time and/or money are the most commonly cited reasons for people to venture into business jointly. Sometimes, one party has all the money and precious little time while the other has little money, but time and energy in abundance.

It is often this mismatch of resources, in the face of an apparently un-missable opportunity, that will convince two previously sane individuals that they should immediately be joined in commercial matrimony without as much as a precautionary glance towards the future.

However, although some problems may be better shared, there remain a great number where acting without human impediment is far preferable. Unfortunately, the euphoria of impending success and riches will often prevent a bit of rational forethought. Indeed, the mere suggestion by either party of potential problems in the future may be taken as a sign of weakness, infidelity or lack of belief in the union.

Basic questions

However, it borders on stupidity to embark on a joint venture without at least teasing out and discussing some of the “what-ifs” of the middle- to longer-term.

Some basic questions need to be asked, including:

- How will capital funding work, both at the start and on an ongoing basis?
- How will this be secured (who will lose their home)?
- How will the profits (or losses) be split up and how will you decide to what extent you re-invest or withdraw these?
- How will shares (assuming a corporate structure) and voting rights be split?
- Who will do what in the business and how will they be remunerated for this?
- What if one of you becomes unwell or, worse still, dies?
- What if one party wants to withdraw from the business, or sell their share?
- What if your good friend turns out to be something of an impediment?

These are but a few of the dozens of “what-ifs” that could, be discussed before taking the leap.

How formal you choose to make these discussions and their outputs will, to a large extent, depend on what you are risking and how much you trust your partner. A good number of these should also be picked up within the legal framework in which you choose to operate your business. Therefore, some good legal advice on this framework is essential at an early stage.

I have asked specialist pharmacy lawyer Nick Austen of Vertex Law, who has extensive experience in such agreements, to give a brief oversight in this respect. The rest of the article is contributed by him.

Legal view

There is no English law relating specifically to joint ventures. Instead, the relationships between the parties involved will be governed by general principles of company (and partnership, if relevant) law, contract and tax law.

Most lawyers would agree that it is essential to plan and document any pharmacy joint venture to reflect the underlying commercial objectives of the parties and to provide a rulebook governing how it will be carried on. This documentation would be the equivalent of the prenuptial agreement in David’s metaphor.

The structure of the joint venture will depend on the nature, size and funding of the enterprise, the identity and location of the parties and the commercial or financial objectives of them. It could be a company, a partnership, a limited liability partnership or, simply, a contractual co-operation agreement. Having said that, most joint ventures are set up through a new company (“Newco Ltd”) under the joint ownership of the parties, eg, a joint venture between a property developer and a pharmaceutical company to build and operate a new health centre pharmacy and to share the trading profits. The Newco Ltd structure has the benefit of separating the venture away from the parties’ own business to allow the joint ownership of the project, to isolate any potential risks and to prevent brand dilution.

Agreement

In legal terms, the “rulebook” is the joint venture agreement, which is a private contract between the parties, reinforced by the articles of association — the public constitution of Newco Ltd. The ownership of Newco Ltd is through its share capital.

The key purpose of the joint venture agreement is to describe how the venture will

be managed and trade on a day-to-day basis and which decisions should require formal consent of the parties. This sets the boundaries of each party’s decision-making powers and effective rights of veto. For instance, in the new pharmacy development example given above, the signing of any premises lease, a change of a wholesale supplier, perhaps an application for a new NHS dispensing contract or minor relocation are likely to be issues for both parties, but employee management, stock control, and the expansion of enhanced services may not be.

Lawyers are by nature a gloomy bunch and a properly drawn joint venture agreement should anticipate the odd sticky patch occurring. Disagreements over the funding or management of the venture do sometimes arise. As a means of introducing some objectivity, some clients have agreed that, in the event of a dispute over a particular matter, they will seek guidance from a pre-agreed pharmacy expert, or perhaps a more formal arbitration process.

Exit

If a shareholder wishes to exit the venture, the agreement will normally set out a pre-emption procedure under which an agreed process is followed to deal with the valuation and transfer of the shareholding. It may be most tax efficient to have the shares repurchased by Newco Ltd if it has sufficient distributable profits to do so. If the joint venture business is to continue, possibly with the arrival of a new participant, there are likely to be restrictions placed on the exiting party to prevent him or her from competing against the venture or taking its trade secrets, employees or contracts.

Whatever the advantages for the individual participant, a joint venture inevitably involves a compromise of the control and flexibility which would exist if the business opportunity or project had been undertaken independently. The parties should have a clear rulebook from the outset to set the ground rules for the good (and not so good) times ahead.

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