

# Understanding the joint ventures law commercial essay

Law



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## **Introduction:**

When Architect's are required to group together in a joint venture for the provision of specialist architectural services that could not be adequately provided by an individual or firm due to the nature of such requirements, it would be important for those firms entering the joint venture to have a good understanding of 'up to date' competition law to avoid infringing on the law. It is also be important to have knowledge of case law within competition law for a greater understanding in conjunction with the legislation. To evaluate this statement, this document will analysis the relevant sections of competition law in the event architects are required to form a 'joint venture' and also analysis relevant cases that have previously fallen under those sections.

## **Competition Law:**

Competition law in Ireland is based on the competition rules set out in the 'Competition Acts 2002 and 2006' legislation and also in the 'EC Treaty and the Competition Acts', primarily contained in articles 81 to 89 of the EC Treaty. Sections 4 and 5 within Ireland's Competition Law Act cover the conduct affecting trade within Ireland exclusively. Sections 4 and 5 are exactly replicated from articles 81 and 82 of the EC Treaty on "anti-competitive agreements between undertakings and abuse of a dominant position, respectively"[1]. Since 1991, Competition Law in Ireland is enforced by a statutory body called the 'Competition Authority'. It enforces articles 81 and 82 of the EC Treaty and Sections 4 and 5 of the Irish Act. Section 4 of the Competition Act officially forbids agreements between parties that have an

objective to or effect the "restriction, prevention or distortion of competition law in Ireland"[2]. If agreements fail to adhere to the rules set out in Section 4 of the Act, the agreements become unlawful and void. Section 5 of the Act essentially forbids any party from abusing their position of dominance in any market or part of. Both sections are absolutely important to understand if architecture firms were to come together to form a joint venture to provide specialised architectural services which they cannot adequately provide on their own. Failure to adhere to the rules of Competition Law can result in heavy penalties and imprisonment.

### **Understanding Joint Ventures:**

Joint Venture's are described by D. G. Goyder in E. C. Competition Law as "virtually any commercial arrangement involving two or more firms"[3]. Joint Ventures fall under competition law and are when two or more parties make an arrangement to group together to achieve a commercial objective by combining a part of their business/actions and putting them under a joint control. It is important to note that a joint venture is not a full scale merger, the participants of the venture remain economically independent. Within a joint venture there is also a concern that competition will be reduced between the participants and also that it may have an effect on the marketplace in regards fair competition. This would depend on the details of the joint venture as they can be very complex arrangements.

### **Analysing Section 4:**

Section 4. 1 of the act prohibits agreements between undertakings[4]and decisions by collaborating parties which have unlawfully affected competition

in Ireland under the headings mentioned above as outlined in the Competition Law Act. Section 4 specifically outlines the following anti-competitive actions that would cause an agreement between parties to become prohibited or void by law. They are as follows; Controlling or limiting technical progress, investment, or production Sharing supply sources or markets to create an unfair trading advantage against other trading competitors Fixing trading prices both buying or selling or any other trading conditions Purposefully creating a competitive disadvantage for rival competition by applying different conditions to similar transactions with other parties. Create contracts that contain supplementary obligations that have no connection with the subject of the contract that are to be accepted by the other parties involved.[5] If a joint venture is necessary for an architectural commission, section 4. 2 of the act specifies that agreements or similar practises are allowed if they comply with certain conditions outlined in section 4. 5 or fall under a category stated in section 4. 3[6]. Firstly, section 4. 5 sets out an exemption for arrangements, decisions or collaborative practices if they provide improvement of " production or distribution of goods or the provision of services or to promote technical or economic progress"[7]. This exemption is possible to receive from the Competition Authority as long as the improvement's provide consumers with a fair portion of the resultant benefit without outlining terms in the agreements that are not necessary to the succeed in given objectives or the possibility of removing competition from the market. Secondly, Section 4. 3 of the Competitions Act allows the Competition Authority to make assertions either by belief or knowledge that in its opinion the agreement

complies with the criteria of Section 4. 5 stated above. This decision would be based on the Competition Authorities opinion and they also can provide a notice of guidance in regards to the specific categories within the agreement/declaration in question. They can also decide to revoke this at a point in time when it sees fit that the category does not comply with the criteria set out[8]. Section 7 of The Competition Act 1991 outlines that every agreement that falls under section 4 must be notified to the Authority. It also states that any agreement between undertakings that looks for an exemption must apply for a certificate from the Authority within 1 year of the commencement of that joint venture[9]. Although since ' Part2' of the Competition Act and the ' Modernisation Regulation 1/2003' under the EC Council Regulation, it is not possible for undertakings to pre-notify the Competition Authority for permission to enter a joint venture falling under section 4 of the Act even if it fits the requirements for a exemption in section 4. 5. It is the responsibility of the involved parties and legal teams to self-assess their agreement complies with the up to date Competition Law[10]. The Competition Act also makes reference to the prohibition of Cartel activities in section 6. 1 and 6. 2 in regards to section 4. 1 of the act between competing parties. This relates to agreements between competing parties that either knowingly or indirectly " fix prices, limit output or sales or share markets or customers"[11]. If found to do so, undertakings will be guilty of an offence. In the case ' Group 91 Architects Ltd/Shareholders Agreement [1995]' Architectural firms, Shay Cleary Architects; Grafton Architects; Paul Keogh Architects; McCullough Mulvin Architects; McGarry Ni Eanaigh Architects; O'Donnell and Tuomey Architects; Shane O'Toole Architect and

Derek Tynan Architect formed a joint venture in Feb 1992, known as Group 91 Architects Ltd. On the 26th of August 1992, Group 91 applied to the Competition Authority to request for a certificate under section 4 of the Act. If the certificate was refused they also requested a licence under section 4. 2 of the act a 'shareholders agreement' for the joint venture[12]. The venture was undertaken in order to provide specialist architectural services for the purpose of facilitating a competition entry in the ' Temple Bar Framework Plan Competition'. The undertakings made arrangements between themselves as they believed it was necessary to achieve the required expertise for the commission and did not affect competition in regards to the services they were intending to provide. By collaborating their resources and skills the group justified the joint venture by stating that could work more rationally undertaken and also with increased competitiveness and productivity. The group also justified the formation of a single company to avoid an issue were an individual party in the joint venture provided architectural guidance to the client which in turn caused a financial disadvantage to any of the other members of the Group[13]. The group drew up a ' Shareholders Agreement' and a ' Deed of Covenant' (a legally binding agreement between two people where one party pays the second party an agreed sum over an agreed period of time without receiving any returned advantage or profit[14]) in order to regulate the control and care of the joint venture between the firms. The agreement drawn up by the Group defined the joint venture as a " consultancy and or framework studies" to take on the commission. It also covered any other work of similar nature or size which would be decided by a Weighted Majority of the Directors[15]. The '

Shareholders Agreement' set out a series of clauses and conditions that would help settle matters in regards to a weighted majority decisions. They dealt with issues regarding company shares both sale and use. It also dealt with the taking, engagement and decision making with work, commissions and professional services deemed appropriate to be provided by the company and also elections of officers of the board such as chairperson, secretary and director. The shareholders agreement also outlined that the board would divide out particular work to the appropriate practise, but, a clause was also included to allow the board to reallocate the work when it deemed it fit to do so. Importantly, the agreement also made provision for allowing each firm to practise on separate projects or commissions that were outside of the work of the joint venture. The Authority deemed this particular provision to not break Section 4 of the Act[16]. The ' Deed of Covenant' outlined a clause to prohibit a covenantor from affecting competitiveness of the group by making public any confidential information within in company to a third party, soliciting employees or creating alternative/separate partnerships with members of the company both past and present. The clause also prohibited any member of the company from providing architectural services or being connected with such advice that would reduce the competitiveness of the group. The deed also outlined the legal responsibility of the convenator in regards the working of the company, rules of conduct and insurance etc. Importantly, another clause dealt with the duration of those responsibilities in regards to the end date of the joint venture, resignation of members of the board and the event of liquidation of the company. The deed binded all members of the group to the obligations

of the agreement for 18 months after a shareholder had ended his contract with the company to ensure 'goodwill' between shareholders[17]. The Competition Authority deemed the agreement (both shareholders agreement and deed of covenant) between undertakings acceptable as it outlined conditions that would ensure compliance with Section 4 of the Competition Act of 1991 and not affect competition both within and outside the joint venture[18].

### **Analysing Section 5:**

Section 5 of the Competition Act outlaws a party or parties from abusing a position of dominance in the market. A dominant position is a situation when a party is capable of action without the need to consider the reaction of its competitors or customers. The Irish Act does not contain a definition of dominance but has assimilated a definition formulated in the case *United Brands V. Commission* [1979] in the European Court of Justice; "[a] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[19] It is important to point out that the act does not forbid dominant positions but rather when a party abuses that position. Unlike section 4, it is not possible to receive an exemption from Section 5 of the Act and will be considered a criminal offence. Section 5. 1 outlines a list of abusive actions which may be considered as an abuse of dominance. They are as follows; Imposing prejudice prices or trading conditions either directly or indirectly. Unfairly limiting the market or production of goods or technical progress which



causes unfair conditions for consumers. Creating a competitive disadvantage to one or more parties by mismatched conditions to similar situations or transactions. Create contracts that contain supplementary obligations that have no connection with the subject of the contract that are to be accepted by the other parties involved.[20] In the High Court Application 'Goode Concrete v Cement Roadstone Holdings PLC & Ors [2011]' the Plaintiff 'Goode Concrete' attempted to have an interlocutory injunction put in place against three defendants[21]. The first defendant was Cement Roadstone Holdings, Ireland's largest producer of concrete and cement and the second defendant was its smaller subsidiary company 'Irish Cement Ltd'. Both defendants collectively made up 'CRH Plc'. The third is 'Kilsaran' who were also a direct competitor to the complainant. The injunction was requested to prevent the defendants from selling particular products in their trading sector, most notably ready mixed concrete for construction, below the average market price. Goode Concrete complained that the defendants had unlawfully breached sections 4 and 5 of the Competition Act 2002. The plaintiff alleged that either CRH secretly owned Kilsaran or the defendants have deceitfully collaborated during the bidding for contract tenders which would have breached section 4. The plaintiff also alleged that the three companies had used their combined market strength to abuse their position of dominance by selling significantly below average cost which would breach section 5. The plaintiff stated that CRH Plc solely held at a minimum 70% and a possible 90% of the market share for cement which gave it a position of dominance in the market[22]. The plaintiff argued that the breaches in question unfairly affected its competitiveness in the marketplace. The

plaintiff backed up their allegation by providing evidence that outlined below average pricing for tenders won by the defendants during 2007 to 2010, most notably 2010 in which the plaintiff has been unable to secure a single tender. The plaintiff also provided evidence a of telephone conversation between the plaintiff and the third defendant in which the director of Kilsaran threatened to reduce prices even further. The injunction was therefore important to the plaintiff in order to stop the three defendants from continuing trading below average cost. The plaintiff argued if the alleged breaches continued, Goode Concrete would become insolvent, unable to continue trading and also seriously affect future competition in the geographical area of Dublin[23]. The defendants denied outright the claims made by the plaintiff arguing that no breaches had taken place. They supported their position by arguing that the plaintiff's figures were inaccurate and hence incorrect and that no secret ownership existed. CRH argued the difference in figures was because they owned their own quarries to produce raw materials for both cement and aggregate for concrete as well as subcontracting haulier companies to transport their product when the needed arose. This allowed them to sell their produce at a lower average market price. The defendant argued that the plaintiff owned its own transport infrastructure which in turn increased their overall costs during slow periods of trade. In the Judges view, the business methods used by CRH Plc were such, that they could bring their product to market at a lower price than the plaintiffs. The Judge felt that even if he issued an injunction to prevent CRH selling below their average costs, the gap in their market price as against goods would remain as such to make the complainant

uncompetitive. In short, the plaintiff was simply not equipped to compete with the defendants and that an abuse of dominance was not apparent due to the lack of evidence brought forward by the plaintiff, therefore the injunction was refused[24].

## **Enforcement and Penalties:**

The Competition Authority has the power to summon witness for evidence, production of records and also surprise inspections of business premises to review relevant documentation, interview staff and seize files relating to the alleged offence. Breaches of Sections 4 & 5 mentioned above, is a criminal offence and can result in a fine or imprisonment. In the 2002 Act, Section 4 offences are split into two categories, hardcore and non-hardcore offences. Hardcore offences relate to 'Hardcore Cartel' activities. Serious anti-competitive behaviour is prosecuted by indictment (judge and jury)[25] in the central criminal court[26]. It can result in a maximum fine of €4million or 10% of yearly turnover. Individuals found to consent to anticompetitive conduct may also be prosecuted by way of fines or imprisonment. Summary Convictions (proceedings carried out by judge only)[27] will result in a maximum fine of €5000 and up to 6 months imprisonment. Non-Hardcore offences and breaches of section 5 will not result in imprisonment but will result in a fine[28]. An amendment was introduced to strengthen enforcement of competition law in 'The Competition Amendment Act 2012' on July 3rd 2012[29]. The main points of the amendment were; An increase of 5 to 10 years maximum prison sentence if convicted on indictment of hardcore offence Increase of fines from €4million to €5million. A party convicted may have to pay for the legal bill including investigations and legal

proceedings. If convicted probation is not available. An individual can be ineligible for being a company director during criminal and civil proceedings[30].

### **Analysis on the effects of Architects Grouping Together:**

When architects group together to form a joint venture it is important to have an indebt knowledge of the conditions and rules set out in the Irish Competition Legislation particularly section 4 and 5, to ensure they do not infringe competition law. It is important that agreements made do not restrict, prevent or distort competition law in Ireland under the headings mentioned above from section 4. 1. It is also important to note that exceptions are possible to be obtained if they are deemed to improve, in regards to the architects in question, the provision of services as set out in section 4. 2. The case involving Group 91 is very relevant to this evaluation. Interestingly, this case not only deals with the justification of a joint venture of architectural firms and its effect on competition with other companies entering the Temple Bar Competition, but also breaches of competition law within the company itself during the period of the venture. The details of the Shareholders Agreement and Deed of Covenant would be an excellent base model for Architects wishing to form a joint venture for the reason in question. Section 5 of the Competition Act is also very important to consider. Upon reflection of the architect firms in Group 91, most architects within the group would be a strong firm, therefore by combining their resources they would theoretically be strengthening their position within the market.

Although they would hold such a position, it is not illegal to be in a position of dominance but in fact to abuse that position. In the Goode Cement v Cement

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Roadstone Case, the defendants in this High Court Application were in a position of dominance, yet they did not abuse that position. The plaintiff in this case was simply unable to compete adequately with its competitors. Therefore the court did not deem the defendants to be in breach of section 5. This is a very important precedent to architects wishing to form a joint venture.

### **Conclusion:**

I have learned from this research and analysis on Competition Law and Competition Case Law that Competition Legislation is very important to understand for architects. From my knowledge of the architectural profession, it will become more frequent in the future for joint ventures to take place with the ever increasing advancements in technology, the existing depth of different kinds of specialist work undertaken during commissions and also the recent behaviour in the construction industry regarding the fight for survival during the economic downturn. It is therefore in my opinion very important to understand this legislation in order to avoid infringing the law especially due to the heavy penalties one does. I feel confident that I have a good understanding of the law and how cases have dealt with issues in regards those rules. I would also feel confident to be able to point out when a breach of those rules has or is taking place.

## **Bibliography:**

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