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# Fiduciary Content in Joint Ventures and Partnering Contracts in the Construction Industry

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'Partnering' is a co-operative arrangement in the construction industry which is commonly based on general expressions of trust, co-operation and good faith. However it seems that partnering parties can have negligible expectations that such general expressions will have any fiduciary content requiring them to moderate self-interest or act in the interests of other parties.

Where parties intend that either a general fiduciary relationship or specific fiduciary obligations should be created, it has been suggested that they should consider joint venture agreements and very careful drafting of contract obligations in order to achieve these intentions.

This paper firstly examines the potential for fiduciary relationships to arise in joint ventures generally and from the drafting of the ACA Standard Form of Contract for Project Partnering (PPC2000) in particular. It then examines the possibility of distinct fiduciary obligations arising as a result of individual provisions of the PPC2000 contract form.

It is concluded that joint ventures are not readily construed as fiduciary relationships and that whilst the PPC2000 partnering form is also unlikely to imply such a relationship, some individual provisions in it may have fiduciary content.

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The need for relationships based on trust, openness, good faith, etc between the contracting parties in the construction industry has been specifically encouraged by successive reports into the industry<sup>1</sup> and this has resulted in the development of 'partnering' arrange-

<sup>1</sup> For example, Report of the Central Council for Works and Buildings chaired by Sir Ernest Simon, *The Placing and Management of Building Contracts* (London: HMSO, 1944); Report of the Committee chaired by Sir Harold Banwell, *The Placing and Management of Contracts for Building and Civil Engineering Work* (London: HMSO, 1964); Final report of the government/industry review of procurement and contractual arrangements in the UK construction industry by Sir Michael Latham, *Constructing the Team* (London: HMSO, 1994); The report of the construction task force chaired by Sir John Egan, *Rethinking Construction* (London: DETR, 1998).

ments. In his report, *Constructing the Team*, Sir Michael Latham described partnering as a formal agreement where 'the parties agree to work together, in a relationship of trust, to achieve specific primary objectives'.<sup>2</sup> Partnering agreements normally include general statements which express the parties' commitments to trust, openness, common goals, etc. These statements may be contained in a 'partnering charter' which can be agreed either before or after execution of the formal contract. Alternatively, they can be contained within the contract itself. In a recent paper, the writer submitted that it is reasonable to suggest that parties to such arrangements will have some positive expectations of commitments to trust, etc, which he described as 'relational aspects' and he suggested that these would include an expectation that the extent to which each party is entitled to pursue their own self-interest would be moderated.<sup>3</sup> However, he concluded that, in a general sense, 'parties to construction contracts can have negligible expectations that any judicial consideration will be given to the relationship covered by the term "partnering" in any of its forms'.<sup>4</sup>

More specifically, the writer also concludes that, in relation to express commitments to relational concepts such as trust, etc, in partnering arrangements, 'the law, as it is currently applied, does not fit any positive expectations that the parties may have of moderation of self-interest as a result of the relational aspects of partnering arrangements. Consequently parties would be advised to depend on very careful drafting of obligations if they expect these to contain any enforceable requirements in this regard'.<sup>5</sup>

In *Rethinking Construction*, Sir John Egan proposed that those involved in the delivery of construction move beyond partnering and form long-term alliances to identify and fulfil client's needs.<sup>6</sup> Mak has suggested that, since standard contract forms are unlikely to meet the needs of co-operative arrangements such as partnering, an even more intensive relationship is required. He suggests that one approach is for a project owner to enter into a 'legally binding joint venture' with a managing contractor who is a single delivery entity consisting of the constructor and consultants.<sup>7</sup>

The Association of Consultant Architects has taken a different approach. They have published a standard form of project partnering contract known as PPC2000<sup>8</sup> which they consider is consistent with the guidance on co-operative relationships in construction contained in the Egan Report. Currently PPC2000 is the only standard form of contract available for multi-party partnering arrangements in the construction industry. The form contains a range of obligations drafted in a manner designed to encourage the parties to work together in a relationship of trust and openness.

2 Final report of the government/industry review of procurement and contractual arrangements in the UK construction industry by Sir Michael Latham, *Constructing the Team* (London: HMSO, 1994), p 62, para 6.43.

3 Begg, 'The Legal Content of Partnering Arrangements in the Construction Industry' (2003) 8(3) SLPQ 179 at 181.

4 At 196.

5 At 196.

6 The report of the construction task force chaired by Sir John Egan, *Rethinking Construction* (London: DETR, 1998) at 32, para 68.

7 Mak, 'Partnering and Alliancing' (2001) 17(3) Const LJ 218 at 227.

8 The ACA Standard Form of Contract for Project Partnering (PPC2000), drafted by Trowers & Hamlin in association with The Association of Consultant Architects Ltd (2000).

There is a question, therefore, concerning the extent to which these approaches may either create *relationships* which legally require general moderation of self-interest in the interests of other parties, or may create specific and enforceable obligations in this regard. This article, therefore, examines the following in relation to the law of England and Wales and the law of Scotland:

- the extent to which joint ventures may result in relationships legally requiring the parties to act generally in the interests of other joint venture parties;
- the extent to which the relationship created by the PPC2000 partnering contract may result in a general enforceable obligation to moderate self-interest in the interests of other parties;
- the extent to which particular provisions in the PPC2000 partnering contract may create specific enforceable obligations to moderate self-interest in the interests of other parties.

### Methodology

The analysis is based on consideration of rules of law, recent judicial decisions and academic comment. Because trust-based relationships in construction of the form envisaged by Latham and Egan are a relatively recent development in the UK, relevant cases and comment are limited. In fact there is currently only one reported case involving a partnering relationship in the construction industry in the UK.<sup>9</sup> Consequently, cases and comment in other related jurisdictions are considered. In particular, Begg has noted a more extensive history of co-operative relationships in the Australian construction industry and the historical relationship between Australian and English law. However, he also points out that Australian law has moved in the direction of recognising a general duty of good faith in contracts whereas English and Scots law have not. Consequently, he concludes that although the relevance of Australian decisions and comment requires to be critically analysed in each case, they can be helpful in analysing potential attitudes in English and Scots law.<sup>10</sup>

Similarly, comment on US law can provide some useful indications in relation to English and Scots law.

It is submitted that the analysis will be applicable to both English and Scots law because whilst these jurisdictions have evolved from distinct origins, their general approaches to the rules concerning freedom of contract and certainty of enforcement are similar. In this respect, McBryde suggests that '(i)f anything, the modern tendency in (Scottish) contract law has been to accept English authority if it is relevant. Thus in any argument about, for example, offer and acceptance incorporation of terms in a contract, implied terms or repudiation or rescission of a contract, English cases will be freely cited'.<sup>11</sup>

<sup>9</sup> *Birse Construction Ltd v St David Ltd* [2000] WL 1421182 (QBD(T&CC), 78 Con LR 121; *Birse Construction Ltd v St David Ltd* [2000] WL 1421182 (QBD(T&CC) (No 1998 TCC No 419).

<sup>10</sup> Begg, 'The Legal Content of Partnering Arrangements in the Construction Industry' (2003) 8(3) SLPQ 179 at 183.

<sup>11</sup> McBryde, *The Law of Contract in Scotland* (2nd edn 2001), p 10, para 1.26.

### Moderation of self-interest

Finn provides the following definitions in respect of the legitimate pursuit of self-interest:

“Unconscionability” accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other’s interests, it then proscribes excessively self-interested or exploitative conduct. “Good faith”, while permitting a party to act self-interestedly, none the less qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The “fiduciary” standard for its part enjoins one party to act in the interests of the other – to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour.”<sup>12</sup>

This article is not concerned with unconscionable conduct. However, it is relevant to examine the progression from the good faith standard to the fiduciary standard of behaviour, since the term good faith is frequently used in cases where there is a dispute over whether conduct by the parties is consistent with the legitimate pursuit of self-interest.

‘Good faith’ is described by Lucke as having ‘not one but many meanings, as well as the unusual capacity to acquire expanded and altogether new meanings’.<sup>13</sup> Legislators, judges and legal commentators in various jurisdictions have offered a variety of approaches to defining good faith in commercial transactions. Many of these definitions are in two parts consisting of a basic threshold standard accompanied by a further content which depends on context. The threshold standard is frequently expressed in terms of the exclusion of certain basic types of ‘bad faith’ conduct such as dishonesty, deliberate misrepresentation and deliberate exploitation.<sup>14</sup> This basic standard is reflected in the American Uniform Commercial Code (1977) which provides a statutory definition of good faith in commercial contracts as being merely ‘honesty in fact in the conduct of the transaction concerned’.<sup>15</sup>

Although English and Scots law do not subscribe to general principles of good faith in commercial transactions, dishonesty, deliberate misrepresentation, etc, are also proscribed in these jurisdictions. McKendrick summarises the position by advising that ‘(m)any, if not most rules of English contract law, conform with the requirements of good faith and cases which are dealt with in other systems under the rubric of good faith and fair dealing are analysed and resolved in a different way by the English courts, but the outcome is very often the same’.<sup>16</sup>

12 Finn, *The Fiduciary Principle* in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), p 4.

13 Lucke, ‘Good Faith and Contractual Performance’ in Finn (ed) *Essays on Contract* (1987), p 160.

14 See Nehf, ‘Bad Faith Breach of Contract in Consumer Transactions’ in Brownsword, Hird and Howells (eds), *Good Faith in Contract: Concept and Context* (1999), pp 124–125; Stapleton, ‘Good Faith in Private Law’ (1999) 52 *Current Legal Problems* 1 at 8; Kovach, ‘Good Faith in Mediation – Requested, Recommended or Required? A New Ethic’ (1997) 38 *South Texas Law Review* 623, para (k); Steyn, ‘Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 *LQR* 433 at 438; Wightman, ‘Good Faith and Pluralism in the Law of Contract’ in Brownsword, Hird and Howells (eds), *Good Faith in Contract: Concept and Context* (1999), pp 42–46.

15 UCC (1977), s 1–201(19).

16 McKendrick, ‘Good Faith: A Matter of Principle’ in Forte (ed), *Good Faith in Contract and Property* (1999), p 41.

The contextual element can lead to some divergence between jurisdictions where there is a tendency towards recognising a general principle of good faith in commercial transactions and those which do not.

In Australia, for example, where some movement in the direction of recognising a duty of good faith in commercial contracts is evident, the contextual element was explained by Einstein J in the Australian case of *Aiton Pty Ltd v Transfield Pty Ltd*<sup>17</sup> as follows: '(t)he good faith concept acquires substance from the particular events that take place and to which it is applied. As such, the standard must be fact-intensive and is best determined on a case by case basis using the broad discretion of the trial court'.<sup>18</sup> In this case the context was a contractually specified negotiation and mediation process and the contextual content of the good faith requirement when applied to this was very limited and amounted only to the display of an appropriate level of pro-active participation in the negotiation and mediation process.

However, in a similar situation, English law would reject even this limited contextual content as a result of *Walford v Miles*,<sup>19</sup> where it was held that a duty to negotiate in good faith was unworkable in practice.<sup>20</sup>

The position in English law is perhaps accurately described by *Chitty on Contracts* when it states that 'the modern view is that, in keeping with the doctrines of freedom of contract and the binding force of contracts, in English contract law good faith is in principle irrelevant'.<sup>21</sup> It is submitted, therefore, that in the context of commercial transactions, a good faith duty requires little more than basic honesty in any of the jurisdictions considered and does not require moderation of self-interest.

However, where the context of the relationship goes beyond that of a commercial transaction, there can be a substantial leap in the contextual content of good faith. In relation to legal partnership which Lindley and Banks describes as 'a relationship resulting from a contract'<sup>22</sup> it states that '(p)erhaps the most fundamental obligation which the law imposes on a partner is the duty to display complete good faith towards his co-partners in all partnership dealings and transactions'.<sup>23</sup> In this context Lord Lindley summarised the good faith duty as follows:

'The utmost good faith is due from every member of a partnership towards every other member; and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour.'<sup>24</sup>

Lindley and Banks further advises that the duty of good faith is of general application and arises out of the fiduciary relationship which exists between the partners.<sup>25</sup> It also takes the view that this duty is largely reflected in the provisions of s 28 of the Partnership Act

17 *Aiton Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, [2000] ADRLJ 269.

18 At p 366.

19 [1992] 2 AC 128 (HL).

20 At 129.

21 *Chitty on Contracts* (28th edn, 1999), p 13, para 1-019.

22 Banks, *Lindley & Banks on Partnership* (17th edn 1995), p 12, para 2-07.

23 *Lindley & Banks on Partnership* p 483, para 16-01.

24 At p 483, para 16-01.

25 At p 484, para 16-03.



1890 where the partners are 'bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representative'.<sup>26</sup>

From a Scottish perspective, Miller accepts that whilst there is considerable authority to the effect that partnership is a contract *uberrimae fidei* (ie of the utmost good faith), he also quotes judicial dicta which refer to 'a fiduciary relationship' or to 'an especial degree of good faith'.<sup>27</sup> He considers the doctrine of *uberrima fides* to be an importation into Scots law from the English law relating to disclosure of material facts in insurance contracts and to have limited relevance to the rights and duties of partners during the course of the partnership. As in English partnership law, he sees these rights and duties as founded in the fiduciary nature of the relationship. The *Stair Memorial Encyclopaedia* concludes that 'partnership is a relationship of good faith, even if not requiring *uberrima fides*, and it is clear that partners are regarded as being in the position of fiduciaries towards the firm and each other'.<sup>28</sup> It seems, therefore, that it is the *fiduciary* nature of the partnership relationship which is the defining feature and this leads to the extensive content of good faith in this context.

Legal partnership is a particularly intense fiduciary relationship and in this regard Lindley and Banks quotes Vice-Chancellor Bacon in *Helmores v Smith*<sup>29</sup> as saying: 'If the fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business goes on.'<sup>30</sup> It is submitted, therefore, that there is perhaps not such a clear progression from the good faith standard to the fiduciary standards as that suggested by Finn. Good faith in the context of fiduciary relationships appears to be a radically different concept from good faith in the context of commercial transactions, with little evidence of grades in between. It also seems that in examining whether moderation of self-interest is a legitimate expectation it is necessary to examine the agreement between the parties in relation to its fiduciary content rather than to attempt to assess conduct in relation to good faith.

### The context of joint ventures

Mak has suggested that because standard construction contract forms cannot meet the expectations of parties to co-operative arrangements such as partnering, a project owner should enter into a 'legally binding joint venture' with a managing contractor who is a 'single delivery entity' consisting of the constructor and consultants.<sup>31</sup>

As previously explained, legal partnership is a fiduciary relationship. A partnership may also exist for a 'single adventure or undertaking' after which it is dissolved.<sup>32</sup> Lindley and Banks advises that in these cases 'the rights and liabilities of the partners are governed by the same principles that apply to general partnerships'.<sup>33</sup>

26 Section 28.

27 Miller, *The Law of Partnership in Scotland* (2nd edn, 1994) at p 156.

28 *Stair Memorial Encyclopaedia - The Laws of Scotland* (Edinburgh, 1995), vol 16, p 38, para 1057.

29 (1886) 35 Ch D 436.

30 (1886) 35 Ch D 436 at p 444.

31 Mak, 'Partnering and Alliances' (2001) 17(3) Const L J 218 at 227.

32 Partnership Act 1890, s 32.

33 Lindley & Banks on *Partnership* p 107, para 5.73.

Miller devotes a chapter to the analysis of 'Joint Adventure' in terms of Scots law. He defines it as being 'clearly a species of partnership, though the restricted purposes for which it is set up may distinguish it in practical terms from the partnership or firm which is established to carry on a continuing business. These restricted purposes may give rise to legal consequences which are peculiar to the joint adventure. These legal consequences, however, do not entail any divergence in legal theory from that which governs the partnership proper'.<sup>34</sup> Arrangements termed 'joint ventures' may or may not constitute partnerships depending on the extent of the agreement. Clearly, if the joint venture relationship amounts to a partnership then the appropriate fiduciary obligations will be relevant. Even if it does not it may still have some fiduciary content.

Loke advises that, in general, 'the collaborative nature of a joint venture may suggest that parties rely not only on their co-venturers abiding by the contractual stipulations, but also on their good faith in respecting the spirit and intent of the collaborative venture. These expectations may be unwritten and unspoken – but yet deserving of relief in the context of the relationship'.<sup>35</sup> Loke also suggests that the use of terms such as trust and confidence may be relevant but that the difficulty is that their meaning can be of various kinds, depending on the nature of the relationship. Trust and confidence can mean merely an expectation that the counter-party will carry out a task competently or, more onerously, trusting the other party to perform obligations in good faith or, finally, expecting that the counter-party will suppress pursuit of his own self-interest. Consequently trust and confidence are inadequate to indicate a fiduciary relationship without other factors being present.<sup>36</sup>

As a general rule he suggests that in establishing whether a fiduciary duty exists 'the touchstone of the enquiry should be: does the complainant have a legitimate expectation that the "obligor" subordinate the pursuit of his self-interest to that of the complainant'<sup>37</sup> and that this depends on a matrix of relevant factors which should be judged holistically in the context of the relationship.<sup>38</sup>

The attitude of the courts is unsettled in relation to finding whether fiduciary duties exist in collaborative joint ventures. In the Australian case of *Hospital Products v United States Surgical Corporation* ('USSC')<sup>39</sup> Hospital Products was awarded an exclusive distributorship to market USSC's products, but instead used this distributorship to develop and promote its own products at the expense of USSC's products. USSC attempted to establish that the distributor owed it obligations which were of a fiduciary nature. This was so held by the court of first instance but was subsequently rejected by the High Court of Australia who were not satisfied that the nature of the relationship required the distributor to subordinate the pursuit of his self-interest to that of the manufacture.

Also in Australia, Sharp examined the situation in *Pacific Coal Pty Ltd v Idemitsu Queensland Pty Ltd*<sup>40</sup> where a joint venture consisting of seven parties became divided

<sup>34</sup> Miller, *The Law of Partnership in Scotland* (2nd edn, 1994) p 630.

<sup>35</sup> Loke, 'Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures' [1999] *Journal of Business Law* 538 at p 544.

<sup>36</sup> At 553–554.

<sup>37</sup> At 556.

<sup>38</sup> At 558.

<sup>39</sup> (1984) 156 CLR 41.

<sup>40</sup> Unreported, Supreme Court of Queensland, 21st February 1992.

on pursuing a mining project which required a government concession.<sup>41</sup> The parties had entered into an 'Investigation Agreement' to:

- (a) investigate the feasibility of developing and exploiting deposits of coal in the Ensham area of the Bowen Basin in Central Queensland; and
- (b) develop and exploit the area if the parties decided that this was viable.

One party separately persuaded the government to grant the concession to a different joint venture group consisting of themselves and just one of the other parties. They were then sued by the other parties for breach of an alleged fiduciary relationship on the basis that each party had duties:

- (a) not to place themselves in a position where their interests conflicted with their duties to the other parties to the joint venture;
- (b) to account to other joint venture parties for any property, benefit or gain obtained as a result of the party's position as a joint venturer;
- (c) not to use their position to gain an advantage for themselves.

The defence argued that the parties expressly agreed that they were not partners and that the agreement was negotiated at arms' length. Consequently, fiduciary obligations should not be imposed. However, the judge found that it was not necessary for the relationship to be construed as a partnership for fiduciary obligations to exist.<sup>42</sup> He found that a fiduciary relationship existed as a result of the Investigation Agreement which meant that 'the participants undertook to act so as to further their joint interest in the venture and not to act so as to prejudice that joint interest. They placed a mutual confidence in one another and each was vulnerable to abuses of power by the others'.<sup>43</sup>

According to Sharp, the conclusion to be drawn from this decision is that joint venturers who are not partners may owe fiduciary duties to one another and 'the existence of a contract entered into at arms' length by parties with equal bargaining power does not preclude the existence of a fiduciary relationship'.<sup>44</sup> However, he also stressed that establishing the existence of fiduciary obligations is based on: 'the form of the joint venture agreement; the content of the obligations undertaken by the parties; and the extent of the participants' placement of mutual trust and confidence in one another'.<sup>45</sup>

The English case of *Francois Abballe (trading as G F A) v Alstom UK Ltd*<sup>46</sup> displayed some similar aspects to the Pacific Coal case as it also involved a situation where joint venture partners entered into an initial agreement to evaluate a project with a view to pursuing it further but became divided. Here, Abballe and Alstom were pursuing the construction of a power station in Mexico as a joint venture in which they would be designer and constructor respectively. The initial agreement consisted of two stages.

41 Sharp, M W, 'Fiduciary Duties Owed by Co-venturers in a Joint Venture' (1992) 3(9) *International Company and Commercial Law Review* 321.

42 At 323.

43 At 323.

44 At 323.

45 At 323.

46 (No 1) 2000 WL 331020 (QBD (T&CC)) (No 1999 TCC No 48, 24th March 2000) (online) <<http://uk.westlaw.com/result/text.wl...>> (4th October 2001).

Stage 1 required the parties to evaluate the viability of the project and to produce a definitive 'Consortium Agreement' for full-scale development of the project. Under Stage 2 the parties were to develop the project subject both to being satisfied with the financial aspects and also entering into the Consortium Agreement produced in Stage 1. Either party could withdraw if the project was not financially viable and Alstom decided to withdraw after the first stage, citing this as the reason. Abballe raised an action, part of which was for damages for termination of the project as a result of Alstom's withdrawal. He claimed that lack of financial viability was not the reason for Alstom's termination and that the real reason for withdrawal was that Alstom had decided to pursue an alternative project of a similar nature with a different joint venture partner. Abballe claimed that the details of the Consortium Agreement were substantially settled and that Alstom was under an obligation to negotiate to settle the outstanding details and to proceed to develop the project.

Initially the judge was considering whether the claim as pleaded had any prospect of succeeding before allowing it to proceed to a full hearing. He decided, however, that whilst the agreement between Abballe and Alstom had been sufficient for the immediate purposes of Stage 1, the definitive Consortium Agreement to develop the project had not been agreed. The alleged obligation to negotiate the Consortium Agreement was unenforceable because it lacked the necessary certainty in the same sense as an agreement to agree.<sup>47</sup> The judge explained the uncertainty in relation to self-interest in the following terms: '(t)he ratio of *Walford v Miles* appears to me to be that an agreement to negotiate requires a party to consider its own best interests and if it were enforceable it would necessarily require a party to forego those best interests'.<sup>48</sup> The judge therefore refused permission to proceed but did not, however, prevent Abballe from submitting revised pleadings.

Abballe then submitted revised pleadings which claimed that the written terms of the initial agreement did not represent the common intentions of the parties and that the agreement had implied terms.<sup>49</sup> Abballe claimed that one of these terms was that the project *would* be developed in accordance with a 'detailed programme of activities' which would be drawn up later. This was subject to:

- (a) the previously described right of withdrawal which was expressed in the contract but which Abballe also claimed could *only* be invoked if either of the parties concluded that the project was not economically viable after the financial analysis in stage 1;
- (b) each party, *if so required by the other party in good faith*, entering into the Consortium Agreement embodying the outcome from Stage 1 of the agreement.

However, the judge rejected this argument on the basis that the agreement of the detailed programme of activities was essential to the implementation of the project and again had to be treated as an agreement to agree. Consequently, the agreement was again unenforceable on the basis of *Walford v Miles*.<sup>50</sup>

47 At pp 7-8 of 18, paras 19-21.

48 At p 7 of 18 para 18.

49 *Francois Abballe (trading as GFA) v Alstom UK Ltd (No 2)* [2000] WL 989503 (QBD (T&CC)) (No 1999 TCC No 48, 24th May 2000) (online) <<http://uk.westlaw.com/result/text.wl...>> (4th October 2001).

50 At p 2 of 10, para 4.

In both cases the judge rejected the claim that implied good faith introduced certainty into the alleged duties to negotiate.<sup>51</sup> In this respect he referred specifically to Lord Ackner's view in *Walford v Miles* that an agreement to negotiate is uncertain because a court cannot be expected to decide whether, subjectively, a proper reason exists for the termination of negotiations, since parties are entitled to withdraw from these negotiations at any time and for any reason. The concept that this could be decided on the basis of good faith was 'inherently repugnant to the adversarial position of the parties when involved in negotiations'.<sup>52</sup>

Abballe's Statement of Claim contained extensive references to the course of dealing between the parties including statements alleging Alstom's intention to 'participate jointly with the plaintiff (Abballe) as a promoter and equity shareholder in any special purpose company established in respect of the project'.<sup>53</sup> On this basis, Abballe further argued in his revised pleadings that a clause in the initial agreement requiring the parties to co-operate in the evaluation of viability was subject to an implied good faith requirement and that the co-operation had to be genuine. In relation to the implied duty of good faith to co-operate the judge accepted that although '(a) joint venture of this kind presupposes mutual confidence and trust if its factual matrix is that pleaded by the claimant (Abballe) ... (i)f that factual matrix is not established then the parties may be found to be at arm's length so such a term could not be implied as it would not "go without saying" for the reasons given in *Walford v Miles*'.<sup>54</sup> However, he could not say that the arguments in this respect had no realistic prospect of success and therefore allowed them to proceed.

The alleged duty for co-operation to be *genuine* was, however, rejected because it would add nothing to the duty to co-operate as defined by the factual matrix of the agreement. It also indirectly suggested a negative aspect which could be developed by a claimant as an allegation of turpitude or bad faith and such allegations needed to plainly made.<sup>55</sup>

The conclusions from the consideration of the complex pleadings in this case seem to be that claims based on breach of an implied duty of good faith to progress a joint venture are likely to be rejected on the basis that they are unenforceable agreements to agree. The claimant must establish that the factual matrix of the agreement is such that it has fiduciary obligations which have been breached, rather than arguing subjectively that conduct has breached an implied duty of good faith. This objective approach is justified by Steyn in the following terms: '(i)t is a defensible position for a legal system to give predominance to the subjective intentions of the parties. Such a policy can claim to be committed to the ideal of perfect individualised justice. But that is not the English way. Our law is generally based on an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of the English approach is that it promotes certainty and predictability in the resolution of contractual disputes'.<sup>56</sup> The emphasis on the factual matrix of the agreement

51 (No 1) 2000 WL 331020 at p 5 of 18, para 14; (No 2) [2000] WL 989503 Judgment (No 2) at p 2 of 10, para 4.

52 [1992] 2 AC 128 (HL) at 138.

53 (No 1) 2000 WL 331020 p 14 of 18, extracts from the Statement of Claim, para 11.

54 (No 2) 2000 WL 989503, Judgment (No 2) at p 5 of 10, para 10.

55 Judgment (No 3) at p 7 of 10, para 2.

56 Steyn, 'Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 at 433.

in *Abballo v Alstom* is consistent with Sharp's conclusion in *Pacific Coal v Idemitsu* that in examining whether moderation of self-interest is a legitimate expectation it is necessary to examine the agreement between the parties in relation to its fiduciary content.

These cases tend to support the assertion by Mason that '(t)he imposition of a fiduciary relationship in a commercial situation has been sternly resisted in the United Kingdom and, to a lesser extent, in Australia on the ground that it is undesirable to allow equitable interests to penetrate commercial transactions'.<sup>57</sup> He also suggests that 'we appear to have witnessed the high water mark of the fiduciary tide in commercial relationships'.<sup>58</sup> Consequently, recognition of the right to pursue self-interest as the legitimate expectation in such relationships is likely to be the judicial preference, especially in the UK.

In relation to partnering arrangements the writer concluded that parties would be advised to rely on careful drafting of obligations if they expect these to have any enforceable requirement for the parties to moderate their self-interest.<sup>59</sup> This conclusion seems to be equally applicable to joint ventures.

### The PPC2000 context

PPC2000<sup>60</sup> is currently the only published standard form of multi-party partnering contract in the UK and it contains a range of detailed requirements for openness and co-operation. By a comparative analysis of these requirements with those of partnership in accordance with the Partnership Act 1890, this section assesses the possibility of a fiduciary relationship arising as a result of the PPC2000 contract.

It might seem that the PPC2000 form excludes the formation of a partnership by stating that '(n)othing in the Partnering Documents shall create, or be construed as creating, a partnership between any of the Partnering Team members. No Partnering Team member shall conduct himself in such a way as to create an impression that such a partnership exists'.<sup>61</sup>

However, a partnership may exist even though the parties purport to exclude it.<sup>62</sup> In this respect Lindley and Banks quotes Cozens-Hardy MR in *Weiner v Harris*<sup>63</sup> as follows: 'Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The court pays no regard to that. The court looks at the transaction and says: "Is this, in point of law, really a partnership?" It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is.'<sup>64</sup>

As explained by Miller, the definition of a partnership in s 1(1) of the Partnership Act 1890 has three elements: (1) a business; (2) two or more persons engaged in carrying

57 Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116(Jan) LQR 66 at 85.

58 At 85.

59 Begg, 'The Legal Content of Partnering Arrangements in the Construction Industry' (2003) 8(3) SLPQ 179 at 196.

60 The ACA Standard Form of Contract for Project Partnering (PPC2000), drafted by Trowers & Hamlin in association with The Association of Consultant Architects Ltd (2000).

61 Clause 25.1.

62 *Lindley & Banks on Partnership* (17th edn 1995) pp 73-74, paras 5-04 - 5-06.

63 (1910) 1 KB 285.

64 At 290.

on that business; and (3) a motivation on the part of those persons in seeking a profit.<sup>65</sup> The concept of a business can include almost any commercial or professional activity.<sup>66</sup> Clause 23.3 of the PPC2000 partnering contract requires the Partnering Team members to 'work together ... for the benefit of the Project' which suggests a joint interest by two or more persons in a single definable business entity called 'The Project'. The designer, constructor, specialists, etc, clearly have a profit motive. Whilst the link to profit is more tenuous with the client where the Project is construction of a facility for him, he would be motivated by an expectation that the partnering relationship would result in savings in the cost of the Project which would effectively represent a profit.

In addition, s 2(3) of the Partnership Act 1890 states that '(t)he receipt by a person of a share in the profits of a business is prima facie evidence that he is a partner in the business'. Consequently, the provisions in the PPC2000 form of contract where '(t)he Partnering Team members shall implement any shared savings arrangements and added value incentives described in the Project Partnering Agreement'<sup>67</sup> might reasonably be expected to result in a form of profit-sharing arrangement.

Consequently, the features of the contract do not immediately appear to exclude the existence of a fiduciary relationship similar to partnership.

As previously indicated, the good faith basis of a partnership is, to a large extent, reflected in the disclosure requirements in s 28 of the Partnership Act 1890 where '(p)artners are bound to render true accounts and full information of all things affecting the partnership to any partner'. The PPC2000 partnering contract also contains disclosure requirements including the following:

- Partnering Team members are to 'work together ... to achieve transparent and co-operative exchange of information'.<sup>68</sup>
- Constructors are to submit Business Cases for certain construction packages on an 'Open-book basis'<sup>69</sup> (where open book is defined as 'involving the declaration of all price components including Profit, Central Office Overheads, Site Overheads and the costs of materials, goods, equipment, work and services, with all and any relevant books of account, correspondence, agreements, orders, invoices, receipts and other relevant documents available for inspection').<sup>70</sup>
- Progress against Key Performance Indicators is to be demonstrated by Partnering Team Members on an 'Open-book basis'.<sup>71</sup>
- Early warnings are to be given by each Partnering Team member 'as soon as it is aware of any matter adversely affecting or threatening the Project or that Partnering Team member's performance under the Partnering Contract'.<sup>72</sup>

At first sight, despite the differences in wording, there does not seem to be a world of difference between the sum of these obligations of disclosure in PPC2000 in relation

65 Miller, *The Law of Partnership in Scotland* (2nd edn, 1994) at p 2.

66 At p 3.

67 Clause 13.2.

68 Clause 3.1.

69 Clause 10.3.

70 Appendix 1, Definitions, p 40.

71 Clause 23.2.

72 Clause 3.7.

to the Project and the duty to render true accounts and full information of all things affecting a partnership.

Furthermore, in a partnership 'every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership'.<sup>73</sup> PPC2000 has a similar disclosure requirement that '(e)ach Partnering Team member shall notify the client of any payment or benefit offered or received by it in relation to the Project other than pursuant to the Partnering Documents or a Specialist Contract'.<sup>74</sup>

However, the commercial aspects of the transaction are indicated by the payment terms. These include 'Consultant Payment Terms' for the payment of Designers, etc, and an agreed 'Price Framework' for paying the Constructor.<sup>75</sup> The prices paid under this framework are developed in accordance with a variety of rules as the project progresses and consultation between the parties is emphasised at every stage.

A similar type of arrangement was considered in the Australian case of *Thiess v Placer*<sup>76</sup> where a negotiated partnering contract contained a specific mechanism for assessing rates to be paid to a contractor for providing mining services. The contract contained obligations for the 'open book' disclosure by the contractor of historical cost data which would be used as the basis for calculating these rates. In a subsequent dispute over these rates the judge was not persuaded that the relationship up to the point at which the parties entered into the contract was a fiduciary one and decided that the agreement was a normal commercial transaction negotiated at arms' length. However, after execution of the contract he decided that the specific obligations to disclose historical cost data were fiduciary in nature and required the contractor to act in the client's interest as well as its own.<sup>77</sup>

The implication of a relationship with the fiduciary obligations of partnership would also imply a very different situation regarding the liability of the parties in contract and tort/delict. In respect of contractual liability s 9 of the Partnership Act 1890 makes the partners jointly liable in England and jointly and severally liable in Scotland. Section 12 makes the partners jointly and severally liable in both jurisdictions in tort/delict. It has previously been submitted that in joint venture relationships the preference of the courts is likely to be to recognise the rights of parties to pursue their own self-interest. It is therefore now submitted that the possibility of a relationship with the consequence of joint and several liability being implied into a commercial construction contract, even where there is a major partnering dimension, is extremely remote.

Consequently, considering

- the extent of the elements suggesting a commercial transaction negotiated at arms' length;
- the attitude of the Australian court in *Thiess v Placer*;

<sup>73</sup> Partnership Act 1890, s 29.

<sup>74</sup> Clause 13.6.

<sup>75</sup> PPC2000, Project Partnering Agreement p i.

<sup>76</sup> *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [1999] WASC 1046 (lib no 990187, 16th April 1999) (online) <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title...>> (10th October 2001).

<sup>77</sup> At pp 110–111 (of 247).



- the resistance against implying even basic good faith duties into joint venture relationships in the UK;
- the stern resistance, particularly in the UK, against imposing fiduciary relationships in commercial situations; and
- the step change in liability which would be involved in implying a partnership relationship in a commercial transaction

it is submitted that the *relationship* formed by the PPC2000 contract form is most unlikely to be construed as fiduciary in nature. This does not, however, preclude individual obligations in PPC2000 from having a fiduciary content as found in *Thiess v Placer*.

### Possible fiduciary content of obligations in PPC2000

Loke suggests that in assessing whether a fiduciary *obligation* exists the definitional debate of what constitutes a fiduciary *relationship* should be avoided.<sup>78</sup> The approach should be to focus on the interest intended to be protected by the relevant obligation and in what circumstances the other party is bound to regard that interest.<sup>79</sup>

The PPC2000 form includes a number of clauses which refer to openness and which apparently require disclosure of information in a commercial context. The extent to which some of these may have a fiduciary content requiring parties to act in the interests of other parties is considered below.

The PPC2000 partnering contract requires the Partnering Team members to 'work together . . . to achieve transparent and co-operative exchange of information'.<sup>80</sup> Where the expectations of the parties are not fulfilled in this respect the construction of the terms 'transparent' and 'co-operative' in this context and the extent of the information expected to be disclosed may be matters for disagreement and dispute. The contract provides that such disputes shall be referred to the 'problem-solving hierarchy'<sup>81</sup> which is defined as 'arrangements for any difference or dispute to be referred within strict time limits to increasingly senior individuals'<sup>82</sup> and which is to be specified in the contract. In the Australian case of *Aiton Pty Ltd v Transfield Ltd*<sup>83</sup> whilst the judge found that participation in a specified negotiation process would be enforceable provided that the process itself was sufficiently certain,<sup>84</sup> he specifically pointed to the need for good faith in that participation because 'without it there is no chance of reaching a mutually satisfactory conclusion'.<sup>85</sup> However, such a good faith requirement would be unenforceable in English law as a result of *Walford v Miles*<sup>86</sup> and therefore the problem solving process itself would be unworkable and unenforceable. Recourse to determinative dispute resolution processes such as statutory adjudication, arbitration (if provided for in the contract) and

78 Loke, 'Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures' [1999] *Journal of Business Law* 538 at 538.

79 At p 541.

80 Clause 3.1.

81 Clause 27.2.

82 Appendix 1, Definitions, p 41.

83 [2000] ADRLJ 269.

84 At 355.

85 At 365.

86 [1992] 2 AC 128 (HL).

litigation are other options. However, 'working together ... to achieve' indicates that the nature and extent of the information exchange process would have to be negotiated to achieve an outcome which would have the consent of both parties. This situation seems, therefore, to be no more than an agreement to negotiate an agreement which, as stated by Lord Denning, 'is not a contract known to the law'.<sup>87</sup>

The uncertainty of the PPC2000 provision particularly in relation to the extent of the exchange of information required is in sharp contrast to the requirements of the Partnership Act 1890 which clearly specifies the extent of disclosure as being 'full information of all things affecting the partnership'.<sup>88</sup> The conclusion is, therefore, that no enforceable obligation is likely to arise as a result of the exchange of information clause in PPC2000.

The term 'Open Book' is used in PPC2000 in a number of provisions relating to cost including:

- clause 10.3 concerning presentation of 'Business Cases' for the constructor to carry out work either himself or by his preferred 'Specialist';
- clause 18.6 concerning extra cost due to delay;
- clause 23.2 in relation to the substantiation of progress by the parties against Key Performance Indicators.

The term was used in the Australian case of *Thiess v Placer*<sup>89</sup> where rates for mining work were to be derived by 'open book analyses and negotiations'.<sup>90</sup> Whilst the parties in that case were not disputing the meaning of the term 'Open Book', the judge advised that he considered that it meant what it said, namely 'that Thiess would open its books to Placer and thereby disclose the way in which it derived its rates for the relevant pieces of mining equipment'.<sup>91</sup> The open book provision was necessary because the rates were to be based on historical data possessed by Thiess. In this situation the judge considered that 'good faith ... would require Thiess to formulate plant rates which were honestly based on the relevant historical data'<sup>92</sup> and that 'this was in the nature of a fiduciary duty'.<sup>93</sup> Whilst English and Scots law would also demand honesty, there is a greater tendency to resist the imposition of fiduciary obligations in these jurisdictions than in Australia. However, the PPC2000 clause is precise in that it states that 'all price components' are required to be disclosed under the term 'open book'<sup>94</sup> and the mandatory language of 'shall' is used in relation to the disclosure in each case. Consequently, it is submitted that there would be a reasonable case for finding fiduciary content in the 'open book' requirements of PPC2000.

87 *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297 at 301.

88 Section 28.

89 *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [1999] WASC 1046 (lib. no. 990187, 16th April 1999) (online) <<http://www.austlii.edu.au/cgi-bin/displ/au/cases/wa/WASC/1999/1046.html?query=title...>> (10th October 2001).

90 At 14 of 247.

91 At 15 of 247.

92 At 98-99 of 247.

93 Conclusion No 4 at 246 (of 247).

94 Appendix 1, Definitions, p 40.

PPC2000 requires early warning to be given by each Partnering Team member 'as soon as it is aware of any matter adversely affecting or threatening the Project or that Partnering Team member's performance under the Partnering Contract'.<sup>95</sup> The clause indicates a disclosure requirement in the specific situation where matters adversely affect the Project. It is submitted that whilst it would not be unreasonable to suggest that delay and extra cost, for example, would represent adverse effects on the Project as a whole, they may not necessarily represent adverse effects on an individual participant. For example, extra cost may result in additional profit for a constructor. Consequently, there is an apparent duty on parties to consider the interests of other parties. However, the extent of the information required by the early warning obligation is not specified. If this had been specified as 'full information' as required for a partnership, then this could be assessed objectively and might have a fiduciary content. Consequently, this clause is likely to suffer from similar uncertainty to that found in clause 3.1 concerning the transparent and co-operative exchange of information.

Clause 13.6 of PPC2000 requires partnering team members to disclose payments or benefits received other than pursuant to the Partnering Documents or a Specialist Contract. The clause has significant similarities to clause 29(10) of the Partnership Act 1890 where 'every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership'.<sup>96</sup> Miller sees the Partnership Act as emphasising the prohibition of secret profits by placing this duty of disclosure of material facts on a partner.<sup>97</sup> Clause 30 of the Act then requires profits from any business of the same nature and competing with that of the firm to be paid over to the firm. The PPC2000 clause covers the consent aspect since any benefit which is pursuant to the Partnering Documents or a Specialist Contract would, by its nature, already be contractually approved. PPC2000 requires prior approval by the client of any other payment or benefit received by a party. The disclosure of such payments may well be contrary to a party's interests and therefore the obligation would appear to be fiduciary in nature. Furthermore, where such payments or benefits are legitimate, it might be expected that they would be included under the heading of shared savings arrangements and/or added value incentives between Partnering Members under clause 13.2. In this event the requirement for disclosure would be linked to the distribution of the payment or benefit between the partnering team members resulting in a fiduciary situation similar to partnership.

The above analysis of selected clauses suggests that many of the apparent requirements for co-operation and openness would not result in any enforceable expectation that self-interest would be moderated. This again emphasises the need for very careful drafting of clauses if they are intended to have this effect.

### Conclusion

The gulf between commercial contract relationships negotiated at arms' length, where parties are entitled to pursue their own self-interest, and fiduciary relationships, where

<sup>95</sup> Clause 3.7.

<sup>96</sup> Partnership Act 1890, s 29.

<sup>97</sup> Miller, *The Law of Partnership in Scotland* (2nd edn 1994) at p 161.

they must moderate this in the interests of other parties, is wide and is not easily bridged by joint venture agreements. There is substantial resistance to implying fiduciary relationships in commercial situations and therefore the factual matrix of the agreement must objectively demonstrate that such a relationship exists. Australian case law suggests that the same conclusion is relevant to partnering contracts in general. Analysis of the specific case of the PPC2000 contract form suggests that its factual matrix is very unlikely to imply a fiduciary relationship.

The judge in *Abballe v Alstom* commented that '(m)any commercial agreements contain well-intentioned provisions which, even when given the most favourable interpretation possible, prove on examination to be fatally flawed and unenforceable in law'.<sup>98</sup> Analysis suggests that some of the specific provisions in the PPC2000 form orientated towards openness and co-operation would fall into this category and are unlikely to result in fiduciary obligations are unlikely to be realised. However, certain individual requirements such as 'open book' accounting and the need for parties to disclose certain benefits may have enforceable content requiring one party to act in the interests of another.

Consequently, unless drafting has been very careful, any positive expectations that parties may have that fiduciary relationships or obligations requiring moderation of self-interest will arise in joint ventures or partnering contracts in the construction industry are unlikely to be realised.

<sup>98</sup> *Francois Abballe (trading as GFA) v Alstom UK Ltd (No 1)* 2000 WL 331020 (QBD (T&CC)) (No 1999 TCC No 48, 24th March 2000) (online) <<http://uk.westlaw.com/result/text.wl...>> (4th October 2001) at p 8 para 21.