SOCIETY OF CONSTRUCTION LAW

"Some Aspects of Good Faith and Fairness in the Formation of Construction and Engineering Contracts"

by

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I. Introduction

Fewer aspects of contract law have attracted more attention recently than 'good faith'.[1] The interest extends beyond the formation of contracts to their operation and termination.[2] It is not proposed to speculate upon the causes of this outbreak of interest, but a greater awareness of the civilian legal systems of Europe (where concepts of good faith[3] play a broad role in contract law[4]), and the effect of EC directives,[5] have played a large part in the process.[6]

It is largely the theoretical aspects of good faith that have been the subject of this scrutiny; as is so often the case, the practical working out of these aspects against an empirical background of construction industry[7] operations has been largely overlooked. This is a matter of considerable regret since the relatively high transaction costs of construction contract formation provide a fertile ground for the application of good faith concepts. Here, as elsewhere, there is scope for construction contract law to show the way in developing contract law generally.[8]

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[1] See particularly Beatson and Friedmann (eds) Good Faith and Fault in Contract Law (Clarendon, 1995), esp pp 25 -122; Hondius (ed) Precontractual Liability (Kluwer, 1991).

[2] E.g. Renard Constructions (ME) Pty Ltd v Minister of Public Works (1992) 26 NSWLR 234 (NSW Ct of Appeal)

[3] In the Netherlands, for example, the phrase employed in this connection is 'reasonableness and equity': see Goudsmit 'A. Construction Contracts' in Formation of Contracts and Precontractual Liability (ICC, 1994)

[4] Cf. generally Marsh, Comparative Contract Law: England, France, Germany (Gower, 1994); e.g. Art. 242 of the BGB.

[5] E.g. Unfair Terms in Consumer Contracts Regulations 1994 (implementing EC Directive 93/13/EEC) and the Commercial Agents (Council Directive) Regulations 1993 (implementing EC Directive 86/653).

[6] See e.g. Lando and Beale, The Principles of European Law I (Nijhoff, 1994)

[7] In this paper, the term 'construction 'industry' should be taken to subsume all related industries whose contracts may be defined as being for 'works' as opposed to contracts for sale or hire.

[8] E.g. Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85; Ruxley Electronics and Construction Ltd v Forsyth [1996] 1 AC 344.

The bias of this paper therefore is both practical and empirical: it aims first to define, in a manner relevant to the industry and this discussion, what may compendiously be described as duties of 'good faith' ; it next seeks to determine the implications of the requirement to act in (or to observe) good faith or to demonstrate fairness in pre-contractual negotiations and other activities. It will be seen later, that these two duties, though related conceptually, involve separate obligations: the duties, though congruent, are by no means co-extensive. Finally, the paper considers whether the range of duties discussed here may properly be classified as aspects of a general duty of good faith. By extrapolating from this general discussion it may be possible to identify further applications of the duty.

The two principal conclusions to emerge from this study are first that the common law is more committed to 'good faith' in contract formation than is usually thought to be the case (certainly more than the courts themselves suggest),[9] and secondly, that the very breadth of existing duties suggests that it may be less difficult than previously considered to extend, where appropriate, the range of duties of good faith and fairness. Many existing practices, often reluctantly accepted as part of the way the industry conducts business, actually offend against principles of good faith and may be legally actionable on that account.

II Central Concepts

1. Fairness

Fairness may be defined as the obligation to treat all parties (usually tenderers) equally, i.e. not to prefer one over others unless it is clear at the outset that this may occur: the 'playing field be even.' It is suggested, for example, that all tenderers must be made explicitly aware (it is doubted whether a 'necessary implication' satisfies) of the criteria by which tenders

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[9] Recently the Court of Appeal, particularly Bingham MR and Steyn LJ (as they then were) have done much to promote the concept.

are to be assessed and the contract awarded. Even where preference is permitted, the occasions for its exercise must also be made clear.

2. Good Faith

The term 'good faith' is, as others have remarked,[10] a much more difficult term to define positively.[11] It is something which one can identify as not having been observed in a particular case, although one we cannot easily say what has taken place when good faith has been observed.

The best that one can do in general terms is to say that an absence of good faith will have occurred when the standard of commercial behaviour displayed by one party towards others falls below that which is accepted as honest within the market place. In Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd Bingham LJ (as he then was) said of good faith that it:

> does not simply mean that [the parties] should not deceive each other...; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', coming clean' or 'putting one's cards on the table'. It is in essence a principle of fair and open dealing.[12]

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[10] See e.g. Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations' (1987) 87 Colum L Rev 217.

[11] Interestingly, no single attempt is made to provide a working definition in Beatson & Friedmann (eds) op. cit.

[12] [1989] 1 QB 433, 439.

III Good Faith in Practice[13]

1 Calling Tenders

Within the construction industry it is by no means uncommon for employers to call for tenders not as a means of selecting a contractor but rather to gauge the accuracy of internal costings; indeed, in some cases, tenders are called to determine the broad costings for an anticipated project. In a recent Canadian case[14] tenders were at one point called by a government agency 'to test the market for price of concrete versus asphalt'.[15] The court did not comment upon the merits of proceeding in this way,[16] but it is perhaps surprising that this behaviour was apparently treated as acceptable.

That the use of the tender process for this purpose is unacceptable is established in English law in 1873 by Richardson v Silvester.[17] Although not a construction case, the principles which it establishes are of general application and particular relevance to the industry. Here, S placed an advertisement in a newspaper falsely indicating an intention to sell real property. R expended money by travelling to the property and inspecting it. When the property was not put up for auction R claimed his expenses from S. It was held as a matter of law that these expenses could be recovered via an action in deceit. The principle also applies to tenders. Indeed, it is suggested that it should extend to pointless negotiations which do not involve tendering. Both in principle and upon the authority of Landless v Wilson[18] the employer

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13 Particular issues omitted from consideration include 'unilateral' mistake, problems arising in connection with the aceptance of subcontracts (detrimental reliance) and most importantly issues of damages, the latter (as Commonwealth v Amman Aviation Pty Ltd (1991) 174 CLR 64 demonstrates) requiring urgent review. Some aspects of these issues are already covered in the literature.

14 Tri-Gil Paving and Construction Ltd v Nova Scotia (A-G) (1995) 138 NSR (2d) & 394 APR 313.

15 (1995) 138 NSR (2d) & 394 APR 313, 314.

16 Indeed, it was not required to make any such finding.

17 (1873) LR 9 QB 34. See also Milton v Hudson Sales Corp 152 Cal App 2d 418 (1957); Swinerton & Wallberg Co v Inglewood 40 Cal App 3d 98 (1974).

18 (1880) 8 R 289, 292 per Lord Shand.

in such a case is exposed to claims from all tenderers, not merely that tenderer likely to have been the successful bidder. The price of testing the market may thus be very high.[19] An ulterior (and predominating) purpose is almost per se evidence of bad faith.[20]

2. Valid Tenders

(a) 'referential' bids

The same principles of good faith apply to contractors and other tenderers. It has been decided beyond doubt that 'referential bidding' i.e. bidding by reference mainly to the price supplied by other tenderers is 'unacceptable'.[21] There are several reasons for this. In the first place, an advertisement calling for tenders, without more, will generally be construed to mean tenders which are entirely self-contained, i.e. complete upon their face and which need no reference to other tenders to determine the price or (for that matter) any other aspect of the bid.

There are other arguments stemming from public policy concerns: these have tended to weigh more heavily in the United States where the courts regularly held that referential tenders are unlawful and unenforceable. In the United States cases mentioned previously the courts often refer to such bids as 'sharp bidding' which is treated as a fraudulent practice on other bidding parties. In appropriate cases, this would mean that any resulting contract could be set aside at the instance of the other parties. Quantification issues appear not generally to have arisen.[22]

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[19] This leaves open the case of the client who invites tenders when not ready to proceed because, e.g., funding or planning permissions are not in place.

[20] It will not have escaped notice that ulterior purpose may, within the realms of administrative law, also constitute evidence of bad faith.

[21] Harvela Investments Ltd v Royal Trust Co of Canada Ltd [1986] AC 207.

[22] See e.g. Holliday v Higbee 172 F2d 316 (USCA, 10th Cir, 1949); Short v Sun Newspapers Inc 300 NW 2d 781 (S Ct, Minn, 1980), where a very full discssion is provided. In the main these are not construction cases.

There are, of course, further and more compelling reasons why bids of this type may be unacceptable to the employer. Do employers really want to proceed with a tenderer who can only frame a bid in terms that promise to 'shave' off a given amount from an, as yet, unspecified sum. But the legal point is important in view of the claims of tenderers that, in the particular circumstances of the case, they are the party to whom the contract ought to have been awarded: for example, say a client calls for tenders and commits itself to the lowest tenderer. Is it obliged to contract with that tenderer which submits a bid to carry out the work for '£x less than the otherwise lowest price'?

(b) collusive bidding[23]

Collusive bidding or bid-rigging is unlawful in most jurisdictions and under relevant legislation attracts heavy penalties. However, it was early held that agreements not to bid were not bad: Jones v North[24]. In these situations, bidders may be exposed to a claim in respect of costs and may have difficulty recovering their bid deposits.

A very good illustration of the latter difficulty is Haden Engineering Co Ltd v Sligo and Leitrim County Council,[25] where, tenderers submitted what almost certainly were collusive bids. The evidence was that there were seven bids for certain work. Of these five were for the same price and the plaintiff's was for about £1500 less. A 'rogue' bidder was substantially less again. Of 79 individually priced items in Haden's tender 50 were quoted at exactly the same price as in the other five tenders. The employer claimed to be entitled not to return deposits on account of the expense to which it had been put in assessing tenders which, in its view, were not 'bona fide' (In the result, it was decided that lack of bona fides had not been proved.) As a matter of evidence

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[23] It is not proposed to consider the related issues of bribes and secret commissions.

[24] (1875) LR 19 Eq 426.

[25] (1941) 75 ILT 174.

the District Court Judge was not prepared to assume that the only explanation was that there had been collusion in the bidding. If there had been he would not have ordered the return of Haden's deposit against their 'bona fide' tender.

A related good faith issue occurs in connection to agreements, clearly unlawful in most places, that all bidders should include sums to cover the expenses of unsuccessful tenderers. Recent extra-judicial inquiries in Australia[26] have confirmed that the sum thus incorporated within the successful tenderer's bid is recoverable at the client's instigation as money had and received.

(c) cover pricing

The question of cover pricing appears not to have been the subject of by any specific decision, although it is difficult to see that the propositions about bona fide tenders would also not apply in this case. Cover pricing operates first, to provide an apparently competitive tender, and is often used because the contractor wishes not to bid on the project but equally desires not to fall out of favour with the client. Secondly, cover pricing applies in consequence of an agreement among tenderers that one of a ring should submit the lowest bid, the others (e.g. as in Haden's case) submitting bids to make the agreed 'low bidder' the most appealing bid.[27] There are two legal consequences: cover pricers may be unable to recover their deposits on the same basis as was suggested in Haden's case; further, tenderers may be liable to the client

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[26] The fascinating stories are recounted in the Report of the Royal Commission into Productivity in the Building Industry in New South Wales, Volume 2: Collusive Tendering, (1992) and Economic Development Committee of the Victorian Parliament, Inquiry into the Victorian Building and Construction Industry: First Report to Parliament: 'The Corruption of the Tender Process (1993); see also Fourth Report to Parliament: 'Code of Tendering' (1994).

[27] The author is aware, from personal knowledge of such a 'ring' which operated in relation to tendering for supply and instalation of agricultural pipes in Australia. The ring was effectively broken by the relevant departmental contracts officer who, suspecting the existence of the ring, managed to award contracts to the same firm on each occasion, regardless of the tender price!

for the additional costs and time spent in assessing bids that are not bona fide.

(d) unbalanced bidding

At least in relation to public contracts in the United States 'unbalanced bidding' is regarded generally as unacceptable.[28] This usually arises as a result of specific legislation, but there are objections to unbalanced bidding based upon considerations of good faith and fairness. These are generally treated as matters of the assessment of the tender and are considered below, under that heading.

3. Disclosure of Site & Similar Information

To what extent does the common law require, at the negotiation stage, one party to a contract to reveal to the other/s facts material to their position? This issue has been the subject of interminable debate since Cicero wrote: 'aliud est celare, aliud tacere'.[29] Indeed, this is one of the very features which is said to distinguish the common law and the civil law. In fact, as is known, there are some examples in English law in which a duty to make disclosure does exist, the prime example being of insurance contracts. There are other situations in which the law imposes a duty to disclose: see, for example, Hartog v Colin & Shields.[30]

So far, however, as the question of revealing site, sub-surface or other physical characteristics is concerned the common law has, consistently with

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[28] Gordon 'Unbalanced Bids' (1994) 24 PCLJ 1.

[29] De Officiis, iii, 50; and see the valuable discussion in Stein, Fault in the Formation of Contract in Roman and Scots Law (Oliver & Boyd, 1958), esp ch 1.

[30] [1939] 3 All ER 566

its approach of not imposing duties, firmly set itself against requiring clients to make such disclosure. This blanket refusal has given rise to its own queer body of jurisprudence and practice: terms like clause 12 of the ICE contract are common in the standard contracts in many places (at least in civil engineering contracts in the UK); there is much litigation about the extent to which failure to disclose constitutes negligent misrepresentation (see the high water mark in Dillingham Construction Pty Ltd v Downs[31]), and the question of the proper interpretation to be placed upon these essentially exculpatory clauses.

In this arena there lies the greatest potential for a shift in the English law based upon notions of good faith. In some jurisdictions (especially Australia and New Zealand) some of these difficulties have been overcome by legislation which renders it unlawful to engage in misleading or deceptive conduct.[32] It is clear that in some limited respects at least English law (and its derivative systems) is significantly out of step with developments overseas. In Hardemann-Monier-Hutcherson v United States[33] and elsewhere it has been held that the client (if it is the government) may under certain circumstances be obliged to disclose information about site conditions to a bidder. In Morrison-Knudsen Company Inc v Alaska the test was stated thus:

> Where resort to the state is the only reasonable avenue for acquiring the information, the state must disclose it, and may not claim as a defense (sic!) either the contractor's failure to make an independent request or exculpatory language in the contract documents.[34]

Of more persuasive authority are three Canadian decisions, which firmly support the notion of an independent duty, based on considerations of good

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[31] [1972] 2 NSWLR 49; (1972) 13 BLR 97

[32] E.g. Trade Practices Act 1974, s.52 (Cwth)

[33] 458 F 2d 1364 (Ct Cl, 1972)

[34] 519 P 2d 834, 837 (S Ct Alaska, 1974)

faith, in certain situations to disclose site and other information to bidders. The most important of these (but the least persuasive for English law) is the decision of the Supreme Court of Canada in Québec (Commission hydroélectrique) v Banque de Montréal,[35] a decision on appeal from Quebec and decided under the Code civil.[36]

The Court found that Q had acted fraudulently in withholding critical geotechnical information from contractors at both the tender stage and construction phase of the contract.[37] The court outlined a general theory to inform in the context of contracts, as a secondary obligation arising from a primary obligation of good faith between contracting parties. The basic elements of this obligation to inform were established by Gonthier J as:

> (1) knowledge of the information (whether actual or presumed) by the party which owes the obligation to inform;
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> (2) the fact that the information is of decisive importance; and
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> (3) the fact that it is impossible for the party to whom the duty is owed to inform itself.[38]

Gonthier J also said:

> The advent of the obligation to inform is related to a certain shift that has been taking place within the civil law. While previously it was acceptable to leave it to the individual to obtain information before acting, the civil law is now more attentive to inequalities in terms of information, and imposes a positive obligation to provide

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[35] (1992) 93 DLR (4th) 490; (1992) 3 CLR (2d) 1.

[36] This was another case (see importantly Canadian National Railway v Norsk Pacific Steamship Co (1992) 91 DLR (4th) 289 , esp per Stevenson J at) in which the SCC was at pains to point out how much each system - common law and civil - had to learn from the other.

[37] Much of the hostility of the Supreme Court to the decision of the Quebec Appeal Court per Beauregard JA may stem from the fact (pointed out to the SSC at the commenement of the appeal to that Court) that Beauregard JA was the brother-in-law of the person within the defendeant principally responsible fror the fraud which was claimed to have been perpetrated!

[38] (1992) 93 DLR (4th) 490, 513-515 ; (1992) 3 CLR (2d) 1, 72-74 (¶ 57-60).

> information in cases where one party is in a vulnerable position as regards information from which damages may result.[39]

The importance of this decision lies in the lead it provided to common law decisions in Canada, being followed and applied in Opron Construction Co Ltd v Alberta,[40] and also in Begro Construction Ltd v St Mary River District.[41] In adopting the approach of the Supreme Court Feehan J of the Alberta Court of Queen's Bench in Opron stressed that the common law focuses upon three important factors to determine whether there is a duty to disclose. They are:

> (1) the degree of technicality of the data provided by the owner to the contractor;
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> (2) the lack of opportunity or time for tenderers to acquire that information for themselves; and
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> (3) whether the information was indispensable for tenderers to form a judgment.[42]

These factors (which are remarkably similar to the considerations set out in Hardemann-Monier-Hutcherson) are of the first importance. In the first place, they operate as a significant limitation upon claims by all tenderers in every case that there is a duty to disclose. It is, thus, a heavily qualified duty, flexible and sensitive to the commercial realities of individual cases. Secondly, in many cases there will be no such duty. Tenderers must search for themselves where this realistic.Nevertheless this approach provides a rational basis upon which a duty may be imposed which recognises economic reality in tendering and balances the rights of the respective parties accordingly.

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39 (1992) 93 DLR (4th) 490, 510-511; (1992) 3 CLR (2d) 1, 69 (para 48).

40 (1994) 14 CLR (2d) 97.

41 (1994) 15 CLR (2d) 150.

42 (1994) 14 CLR (2d) 97, at 221- 224

IV Fairness

1 General Considerations

It has already been mentioned that fairness may be treated either as a separate requirement of the law of pre-contractual relations or as one aspect of a general obligation of good faith. Putting aside for the moment the issue of the precise juristic basis for such a duty, it becomes necessary to determine exactly what the duty involves.

In English jurisprudence the starting point is the case of Blackpool and Fylde Aero Club Ltd v Blackpool BC,[43] the facts of which are generally sufficiently well known not to bear restating.[44] It will be recalled that Bingham LJ (as he then was) was prepared to accept that, at least in cases of selective or restricted tendering, a tenderer

> ...is...protected at least to this extent: if he submits a conforming tender before the deadline he is entitled...as a matter of...contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.[45]

Like so much in this case, the passage is pregnant with possbilities. Notwithstanding the decision in Fairclough Building Ltd v Port Talbot BC[46] we still do not know what really constitutes proper and equal 'consideration' of a tender. Nor is it clear, as a matter of English law, whether the principle extends to enterprises of a wholly private nature. As a matter of principle, however, duties of equal of treatment, while historically easier to impose upon

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[43] [1990] 1 WLR 1195.

[44] They, and the decision, should be compared with the remarkably similar US case of Morgan Business Associates v United States 619 F 2d 892 (Ct Cl, 1980).

[45] [1990] 1 WLR 1195, 1202.

[46] (1992) 62 BLR 86.

public bodies, ought as a matter of private law to be imposed also, and not necessarily only where the bidding procedure is selective.

But what is also important is the idea that the rights enunciated in Blackpool are available only to selective bidders. The reason for this resriction may be regarded as an attempt to balance the interests of bidders with those of the employer. We know, for example, that nearly all invitees will bid if they know that selective bidding procedures are in place: the chance of winning the contract justifies the very costs of tendering. The costs are no lower in open bidding but the prospects are! It is the very fact of the tendering procedure which itself acts as an inducement to tender. That inducement is not to be lightly disregarded. Thus we have a fairly explicit statement based upon the practicalities of a commercial situation and tenderers' expectations when bidding.

Other questions, which are undecided in England (and perhaps surprisingly in the United States, though not necessarily elsewhere) is whether the Blackpool principle extends to private clients, as opposed to those in the private sector. But the principle of equal treatment or fairness is not limited to the scrutiny which tenders receive from the contracting authority. In particular, three matters call for comment. These are (a) the assessment of the bid, (b) the extent to which all bidders are subject to the same criteria, and (c) the acceptability of parallel negotiations.

2 Assessment of Tenders

Under this rubric falls the question of whether to entertain unbalanced bids and how one deals with bids which contain 'mistakes'. Examples of the manipulation of unfavourable bids so that they become the most attractive are legend. The difficulty with the 'unbalanced bid' (whether front-loaded or otherwise) is that even in the US (apart from certain public contracts) the jury

is still out whether this is an example of bad faith tendering or merely an extreme example of risk allocation. In some cases, it is clearly the former

On the other hand, absent a clear showing of collusion or improper practice, it may not be objectionable. This appears to be the view taken in the United Kingdom: Convent Hospital Ltd v Eberlin & Partners.[47] Issues of unfairness arise, however, when (the issue having been raised) the tenderer receives the opportunity to revise its bid. In many cases this will occur when the 'unbalanced' bidder knows the prices of other bidders, and thus is able to adjust its bid upwards but never by so much as will render it no longer the lowest bidder. This was an objection to the options allowed under the NJCC Tendering Codes. There is a case for saying that in these circumstances the prices of other tenderers remain confidential that unbalanced bids ought to be accepted according to their tenor or rejected under the 'privilege' clause by which the employer reserves the right to reject any or all bids.

3 Common Criteria for Assessment

The 'privilege' clause has figured prominently in cases concerning the employer's right to award contracts on the basis of criteria unknown to tenderers. The courts have uniformly rejected the idea that this clause can be employed to perpetrate unfairness. The principle of fairness has a number of very important roles to play in ensuring that all clients/contracting authorities provide the same tendering information to all tenderers. There seems to be no question that a tenderer who has been provided with defective or incomplete specifications will have an action against the client in tort, and there are several cases in point. Although the issue has not arisen for decision in England, it is firmly established in Canada that all tenderers must be informed of all criteria according to which the contract will be awarded. In

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47 (1989) 23 Con LR 112.

many cases, the issue has arisen in the context of provincial preference schemes under which provincial governments may award contracts to tenderers who have not submitted the lowest bid. This will often be the case where a local bidder has submitted a tender which is within a pre-determined percentage of the lowest bid. Foreign bidders are justifiably angry to find that they were not informed of this criterion when the inquiry documents were sent out. In many cases the likelihood of being able to match or beat a local tenderer is so low that it is not worth the trouble and expense to bid.

In a non-construction context within the United Kingdom a hopeless mess was made in terms of the bidding procedures which came to light in R v Lord Chancellor's Department, Ex parte Hibbitt & Saunders.[48] The principle to be deduced from the Canadian cases (the issue did not have to be resolved in Ex parte Hibbitt & Saunders) is that tenderers are entitled to know all the grounds upon which their bid is to be assessed, and this applies whether they are in the public or private sectors (to the extent that there is any longer a distinction).

The rationale for imposing a duty in such cases is precisely the same as that which was set out in Blackpool namely, that the tenderer is called upon to make often significant expenditures. It is unfair to expect them to do so while material facts are withheld from them, or some of them.

4 Parallel Negotiations

Two recent overseas cases have confirmed that, in certain circumstances, carrying on parallel negotiations when the contractor believes that it is the only party engaged in those negotiations is a breach of a duty of fairness (alternatively good faith), and will give rise to a claim for damages. This is a most important development for it suggests a means by which bid-shopping may be reduced, if not eliminated.

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48 [1993] COD 326.

Protec Installations Ltd v Aberdeen Construction Ltd[49] is also significant for the quite separate reason that it is one of the very few cases where duties of good faith were imposed as between two private sector enterprises. The facts were that P was the lowest bidder for a subcontract with FC; it was the lowest bidder by a margin of about 10% over L (the next lowest bidder). The owner's representative told P that it was the lowest bidder and that it would be recommended to the owner as subcontractor. After bidding closed, an agent of the owner began discussions with L, which later agreed to do the job for a further 5% reduction over P's price. P was not given any opportunity to participate in further bidding . Rowan J. said:

> I also find that there was no valid commercial reason...to exclude Protec from further negotiations or not to award the contract to Protec. ...[t]he defendants did not conduct the bidding process in good faith.[50]

This is a controversial decision. not least because the reasoning supporting it is weak. There was evidence that P's bid was made known to L, so that the decision can be justified as a breach of confidence.[51] Interestingly, the case also parallels the French doctrine of 'La rupture des pourparlers'[52]

A similar case of duplicitous dealing arose in Gregory v Rangitikei District Council,[53] although this involved a sale of council land. In this case, after an apparently abortive tender procedure the defendant led G to believe that it was not proceeding with the sale, when in fact it had been negotiating with G's rival. The negotiations were kept secret at all times. It was not necessary to consider the matter under the common law since the NZ Fair Trading Act 1982 made the failure to disclose this fact an actionable conduct, but there

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[49] (1993) 6 CLR (2d) 143

[50] (1993) 6 CLR (2d) 143, 146.

[51] See Faccenda Chickens v Fowler [1987] Ch 117.

[52] Cf. Ghestin, Traite de droit civil: la formation du contrat (3 rd ed, 1993), pp 295-298 (¶330), where (of course) liability is tortious not contractual).

[53] [1995] 2 NZLR 208.

are suggestions that the issue would have been actionable at common law under good faith principles[54]

V Confidentiality of the Tender Process

This final issue is a constant problem for tenderers. We have already considered an aspect of this issue under the related head of 'parallel' negotiations, but it requires especial treatment. These breaches are serious not only in themselves but because many firms depend for contract awards upon their ingenuity in suggesting modifications to the tender specifications producing savings either in the cost of the works or in the running costs over the life of the structure. Often unable to compete on price alone firms rely heavily upon a reputation for innovation.

In addition to the case mentioned above there are several cases in which the results obtained by the tenderer are not entirely consistent. In Faccenda Chickens Ltd v Fowler[55] the question of tender prices arose incidentally. In this case (which was as remote from the construction industry as one can image) the Court of Appeal said:

> ...in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent.[56]

This is obviously so in almost all cases of competitive tendering. The price is not merely a figure plucked from the air but a matter of some precision into which skill, commercial judgment and other related ingredients have been blended.

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[54] [1995] 2 NZLR 208, 234-235.

[55] [1987] 1 Ch 117.

[56] [1987] 1 Ch 117, 140

But in many cases the tenderer is as much concerned about other matters, e.g. work method or the end product. In Site Preparations Ltd v Secretary of State for Scotland[57]the pursuers[58] sought recompense for the preparation of plans to develop Peterhead Harbour in Ayr. The plans had been produced speculatively but the contract to develop the harbour had not materialised. It was alleged that the Secretary of State had used the plans to proceed with the concept on the Crown's account. Site Preparations' claim failed since technically it fell short of the requirements for recompense in Scots law. However, an obvious alternative claim, based upon copyright, appears never to have been raised or pursued.

However, in Home Orderly Services v Manitoba[59] the plaintiff established a business and then tendered for the contract when the provincial government decided itself to offer the services. The government decided not to let the contract but then proceeded to conduct the service itself. HOS claimed that the government had used its tender as a blueprint for setting up the service.

With all respect to the Master who decided the case the basis of the decision is somewhat difficult to follow. He decided against the defendant's application to strike out the statement of claim on the grounds that 'misuse of tender' constituted a good cause of action. A more satisfactory basis might have been the breach of confidence in using the plaintiff's tender material. The Master appears to have preferred to place the claim upon a broader 'good faith' basis but did not articulate that with any success.

In some cases, as has been seen, it will not be necessary to rely upon the vagaries of notions of confidence, for much more direct rights from copyright law will be of assistance. It is suggested that it is at least likely that in the

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57 1975 SLT (Notes) 41.

58 I.e. the plaintiffs.

59 (1984) 28 Bus LR 197

cases of Site Preparations and Home Orderly Services copyright could have done what the law of confidential information was, according to the courts in those cases, unable to do.

VI Conclusions

This material illustrates that good faith concepts already play a significant role within construction contract formation processes. This development is Although the material considered is multi-jurisdictional industry practices are by and large so remarkably similar as to justify a close examination of overseas decisions.The postulate upon which this development rests is that of giving effect to standards of honest dealing which commercial people might reasonably expect. In practice, the courts are seeking to guard against wasteful expenditure which honest dealing would have curtailed.

Industry contract formation practices render this a compelling argument. Contracting is no straightforward process, as we well know. The concept of good faith is both flexible and commercially-sensitive, and has the particular merit of being applied by approaching matters from a generally accepted ethical stance without imposing a further set of specific 'rules upon the parties.

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