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GOOD FAITH IN CONSTRUCTION CONTRACTS - THE HIDDEN AGENDA

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Abstract: Absence of explicit obligation of good faith in English law, courts' attempts to remedy this by use of implied terms or remedies which accord with general principle of good faith, and extent of application in construction contracts.

***288** Introduction

THE concept of "good faith" and the extent to which such an obligation or duty exists in construction contracts is dependent on the precise meaning of "good faith". [FN1] Whilst lack of trust and general fair dealing has been highlighted by Latham as a weakness of the industry, English law does recognise good faith principles. [FN2] However, the concept is limited to a duty not to engage in fraudulent conduct. The key issue is whether a more onerous and explicit duty of good faith is recognised. Vinelott J. was firmly of the view that it is not and that the requirement of good faith in other jurisdictions has not been imported into English law. [FN3] Instead, English law has developed alternative solutions to address issues of unfairness. [FN4]

It is these alternative solutions in the context of construction contracts which form the subject of this analysis. In particular, attention will be given to the way in which principles of good faith are recognised implicitly by the courts. In this respect, it is the scope and depth of these obligations which is of interest. The existence of such principles beyond a fraudulent conduct norm would suggest that adherence to good faith principles is more extensive than first thought. In consequence, the imposition of implicit good faith principles might represent a hidden agenda, providing a basis for explicit recognition of good faith obligations.

***289** General principles

The doctrine of "good faith" in English law is a difficult concept to define. Indeed, even in jurisdictions where an attempt has been made to define such a standard, it is apparent that there is no single definition upon which there is consensus. [FN5] Here, like Friedmann, "No attempt will be made to define good faith. The term itself has more than one meaning". [FN6] At least, no attempt will be made to provide a single definition of good faith. Instead, a review will be made of a range of relevant attempts to define the concept to establish the general principles to which a doctrine of good faith might subscribe.

In the field of insurance law, the concept of "good faith" or "uberrima fides" is well-established in English law. Often described as imposing a requirement of "utmost good faith" in the disclosure of information, the principle seeks to protect parties from non-disclosure of relevant facts. Indeed this specific duty is also applied in other discrete areas where there is considered to be a special relationship, such as family arrangements, and partnerships. [FN7] However, in other areas of English commercial law, the absence of such a doctrine is evident despite apparent early support by Lord Mansfield in *Carter v. Boehm* for the governing principle (of honesty or non-fraudulent dealing) being applicable to all contracts and dealings. [FN8]

In the United States however (and in many other codified jurisdictions) the concept and duty of good faith is well-established. [FN9] In the United States, the obligation is one of honesty in fact [FN10] and the observance of reasonable commercial standards of fair dealing. [FN11] Consequently, the obligation is both subjective (honesty of conduct) [FN12] and objective (related to commercial standards of fair dealing). There has been much debate over the meaning and interpretation of the scope of the obligation. [FN13] Summers' perspective considered the requirement of good faith as "an excluder". [FN14] In other words, the only way to define good faith is to identify what it would not constitute, that is bad faith, [FN15] (the approach followed in the Restatement 2d Contracts). [FN16]

***290** In simple terms therefore, good faith can be seen as "simply a rechristening of fundamental principles of contract law". [FN17] For some, this excluder approach offers a workable solution. [FN18] However, for Burton, good faith involves placing limits on the exercise of discretionary powers conferred on one party by the contract which may result in attempts to recapture opportunities foregone upon contracting if discretion is abused. [FN19] Evidence of support of this basic principle exists both in civil law systems [FN20] and also in English law, where discretion must be exercised honestly and in good faith but must not be exercised arbitrarily, capriciously or unreasonably. [FN21] Whilst the abuse of discretionary power is an aspect of any good faith principle, it is not an exclusive interpretation.

Consequently, the meaning of good faith may turn on many different functions depending on the circumstances at issue. [FN22] It is clear however that it is possible to test and understand the general principles of good faith through these competing and overlapping analyses. How English law has embraced implicitly the concept of **good faith in construction contracts** will be considered next.

Analysis of implicit good faith solutions in construction contracts

Despite English law being concerned with upholding general standards of fairness in commercial dealings, the precise obligation of good faith generally has not been recognised. [FN23] What is apparent instead is the development of alternative mechanisms for maintaining equilibrium between the parties in what is, in essence, an environment of freedom to contract. [FN24] The position is therefore one of an a priori assumption of freedom in the bargaining process with the opposite (an a priori limitation of freedom of action) being fundamental to good faith. [FN25] Thus, English law has resorted to the implication of terms to promote good faith and fair dealing [FN26] and seeks to permit freedom of contract and to uphold the intentions of the parties, unless this would be unconscionable. The extent to which these solutions have embraced implicitly the general principles of good faith in a construction context needs further analysis. This will establish the current state of law in relation to these obligations and inform an assessment ***291** of the potential shift necessary for the establishment of a positive duty of good faith. [FN27]

The way in which the courts have sought to deal with implicit issues of good faith will be examined using the good faith definitional principles identified. Farnsworth [FN28] summarised the competing definitions of good faith by reference to three examples:

- (1) exercise of discretionary power [FN29];
- (2) basic standards of decency [FN30]; and
- (3) implied terms. [FN31]

It is proposed to use these categories of definition to examine aspects of judicial decision in construction. To provide further refinement, examples of bad faith as defined in the Restatement of Contracts (2nd ed.) [FN32] are incorporated into this framework. Thus, examples of judicial decisions will be considered using the following framework which will serve to illustrate the way in which English law subscribes in principle to implicit good faith obligations in a construction context:

Principles of good faith Circumstantial examples

evidence

 Exercise of
 discretionary power

Abuse of power to specify terms

change

Abuse of power in relation to accommodating

 Basic standards of
 gain
 decency

Evasion of spirit of bar-

Wilful rendering of imperfect performance

 Implied terms to fill
 ance
 gaps

Interference with the other parties' perform-

 Failure to co-operate in the other parties'
 performance

Exercise of discretionary power

The use of discretionary powers in contracts is, according to Burton, [FN33] subject to a general requirement of good faith. In the application of discretionary power, the court seek to place limits on unconstrained use which would result in an outcome which is clearly unreasonable or unfair. The overarching criteria appears to be *292 whether the power has been abused. [FN34] Consequently, such powers must not be exercised arbitrarily, capriciously or unreasonably but operated honestly and in good faith. [FN35] Where the discretionary power is held by a third party or agent under the contract, the requirement to use this power fairly in the interests of both parties is an additional obligation. [FN36] In standard forms of construction contracts it is commonplace to find a range of discretionary powers expressly included. In particular, these often apply to a third party such as the architect or engineer on behalf of the employer [FN37] and can include power to specify terms. Two examples of such powers will be considered next.

Abuse of power to specify terms

Under this broad heading, the power of specification by nomination [FN38] will be considered. In relation to the nomination of suppliers and sub-contractors by the architect under JCT Standard Form contracts, [FN39] the power to specify has been subject to a limitation on the exercise of this power, where the outcome would be considered unreasonable or unfair. For example, where no express right of reasonable objection was available to the contractor to the nomination of a supplier which had excluded liability for certain defects, the employer was not able to recover compensation for defective materials from the contractor. [FN40] It would seem that the power to specify in this case

would be deemed to have been abused if the employer sought to recover compensation for the defects from the contractor.

With regard to nomination of sub-contractors, the question of reasonable use of the power has been considered in relation to timely re-nomination. In *North-West Metropolitan Regional Hospital Board v. T. A. Bickerton and Son Limited*, [FN41] the court held that there was a duty on the employer to re-nominate a second sub-contractor, where the first had defaulted, and also that the main contractor was under no right or duty to undertake the nominated sub-contractor's work, despite the express contract provisions significantly lacking in clarity. Similar issues were considered in *Percy Bilton Limited v. Greater London Council* [FN42] where the court distinguished between delay arising from the re-nomination process and delay by the sub-contractor. In making a re-nomination, it was held that this should be undertaken timeously. Failure to do so would entitle the contractor to an extension of time. Thus in these cases, the courts adopted an interpretation which balanced the use of the power to re-nominate with the interests of the contractors it would affect. The abuse of this power, either failure to re-nominate or delayed re-nomination, would result in an impact on the contractor which would not be reasonable or fair in the context of the contractual bargain made.

***293** The way in which the courts seek to arrive at an equitable solution in the light of express contract terms is illustrated by *Fairclough Building Limited v. Rhuddlan Borough Council*. [FN43] Here, the court held that the architect was under a duty to re-nominate in a reasonable time and in doing so, may take account of the employer's interests. [FN44] However, the contractor was entitled to reject the re-nomination where the main contract and re-nomination sub-contract contract periods were incompatible and because the second did not cover the remedial work necessary. The delay to re-nominate in itself was not an abuse of power, providing there were valid reasons for this, in this case to obtain a lump sum tender in the interests of the employer. However, holding the contractor responsible for delays to the contract period (due to the nominated sub-contractor then being unable to complete within the contract period) and for the cost of the remedial works, was an abuse of this power.

What these cases illustrate is that any discretionary power is to be used fairly and reasonably but that, in doing so, all matters must be considered, including the views of both parties, where the power is exercised by a third party. Certainly, these examples illustrate the leaning of the courts towards an implicit good faith obligation. In the cases reviewed, the obligation appears to be one of negative (not to delay nomination nor rely on a nomination which would be unreasonable) and positive (the duty to re-nominate and within a reasonable time) influence.

Abuse of power in relation to accommodating change

The ability to accommodate changes to the works is an essential element of almost all construction contracts. Normally, within standard forms of construction contract there are detailed express provisions regarding the power to issue variations together with mechanisms for the valuation of this work. [FN45] However, despite the scope of many of these provisions being cast quite broadly, the ability to make such changes is limited by the courts. Changes which are wholly outside the scope of the original contract and of a kind totally different from that originally contemplated will not be upheld [FN46] and may result in a new contract being formed. [FN47]

Therefore, the courts will not permit an abuse of the power to issue variations by making a change which clearly would not have been contemplated according to the contract. A further example is the interpretation by the court of an express power for work to be carried out under the direction and to the satisfaction of an engineer. The exercise of this power was required to be undertaken honestly. The employer does not have to warrant the engineer's competency or skill, nor that the decision will be reasonable. [FN48]

What this results in is a limitation on the power to vary the works contemplated by the contract. The contractor is protected from the employer's potential opportunistic behaviour in seeking to make changes to the contract works which would not reasonably be within the scope of the original contract.

***294** Similarly, restrictions apply to the power to be able to omit work from the contract. The courts will not permit the omission of work to cancel the contract, [FN49] nor to be given to another contractor. [FN50] It would appear that the courts are seeking to regulate opportunistic behaviour or attempts to recapture the opportunities lost on contracting. [FN51] The omission of work for reasons which are dishonest, or deliberate attempts to maximise self-interests are not permitted.

These examples illustrate the way in which the courts implicitly adopt good faith principles to prevent abuse of discretionary power. They are examples too of a negative influence, in that they are concerned with prevention rather than the imposition of a positive requirement. The courts have, however, also addressed the utilisation of the power to vary in a positive way and are prepared to impose a duty to issue a variation or instruction in certain circumstances. We have seen the duty to re-nominate earlier which is an example of this positive obligation. The positive influence is more extensive though and can result in a failure to issue a variation being held to be a breach of contract. [FN52]

Consequently, in relation to the use of discretionary power, there is evidence that in both a negative and positive way, the courts adopt implicit good faith principles. There is further evidence that in relation to non-discretionary or mandatory powers, such as an architect's or engineer's powers of certification, the courts will, in certain instances, adopt a similar position. [FN53]

Basic standards of decency

The requirement of basic standards of decency were suggested by Summers as being essential components of good faith. [FN54] In English law these basic standards of honesty are implicit in judicial decisions. Bick [FN55] argues that "good faith concepts already play a significant role within construction contract formation processes" and it is clear that a duty of fairness is upheld frequently to limit opportunistic behaviour. [FN56] Two principles of decency derived from the Restatement of Contracts (2nd ed.) will be considered to examine examples in relation to performance of contracts.

***295** Evasion of spirit of bargain

Examples of attempts of evasion of the spirit of the bargain are evident from cases relating to variations to a contract. It is clear for example that the courts will uphold the basis of lump sum contracts and not permit parties to circumvent the nature of the bargain through seeking variations or additional payment for work which is indispensably necessary or included in the original price. [FN57] Thus, in relation to claims for payment for alleged varied work, the courts will seek to uphold the spirit of the bargain. In these examples, this resulted in the enforcement of the lump sum contract and not additional payments to the contractors.

In *Sir Lindsay Parkinson and Company Limited v. Commissioners of Works*, [FN58] the matter at issue was slightly different, that is whether the contract restricted the contractor's profit to a maximum of £300,000 and whether the Commissioners were entitled to require the contractor to undertake variations without any extra payment. The court construed the contract and deed in a restrictive light to prevent a situation which would have been unduly harsh on the contractor. It was held that only the most compelling language would induce a court to construe the contract as placing one party so completely at the mercy of the other. [FN59]

Equally, where there is fraud or collusion, the courts will seek to protect the injured party. In *John Mowlem v. Eagle Star Insurance*, [FN60] the issue under consideration was whether there had been actionable interference with the contract by the architect. The contractor claimed that the architect had wrongfully interfered with the performance of the contract and wrongfully conspired with the employer to injure their interests by unlawful means, by incorrect certification of payments and withholding extensions of time. The court upheld the claim. Thus, there was an apparent attempt to evade the spirit of the bargain through wrongful interference.

Wilful rendering of imperfect performance

Where wilful rendering of imperfect performance leads to defective construction work as a result of fraud, or deliberate concealment, this is covered by a statutory duty. [FN61] However, wilful rendering of imperfect performance may fall short of defective work as in *Strongman (1945) Limited v. Sinock*. [FN62] Here, the builders sought recovery of additional costs associated with works undertaken in excess of licence amounts. The employer architect had agreed to obtain all licences for the work but had failed to do so and refused to pay the builder. Denning L.J. considered the employer's attitude to be inappropriate for a professional man and restrained this attempt to capitalise on his deception. In *Ibmac Limited v. Marshall (Homes) Limited*, [FN63] it was the builders who failed to perform satisfactorily and abandoned the works because it turned out to be more difficult than *296 envisaged. In considering whether the builders were entitled to payment for the work carried out, Denning L.J. held that the builders had failed to keep their side of the contract by abandoning it without just cause in the middle of the contract. Being an entire contract they could recover nothing.

The courts therefore are prepared to restrict improper gain because of wilful imperfect performance where the result is unconscionable or unfair to the innocent party in the light of the contract made.

Implied terms to fill gap

The courts have sought to use implied terms as a mechanism for upholding general fairness in commercial contracts. In construction contracts, these are extensive, perhaps reflecting the nature of the relationship between the parties which is generally far removed from a discrete transaction and often necessitating a high degree of co-operation between the architect/engineer and the contractor. [FN64] This results in two general implied terms, that neither party shall do anything to hinder the other from performing the contract and an obligation to do anything which may be necessary to enable the other to perform his obligations. [FN65] That is, there is a distinction to make between a positive duty not to obstruct and a duty to co-operate actively. [FN66] These two elements of good faith, interference and co-operation, will be considered separately.

Interference

As with discretionary powers, mandatory powers such as certification will be subject to implied terms requiring an architect or engineer to act fairly and independently. This is closely related to a limitation on interference by the employer which the courts will prohibit. Thus, an employer's improper influence of an architect's certifying role [FN67] is not permitted and will enable the contractor to recover payment without a certificate. [FN68] *Perini Corporation v. Commonwealth* [FN69] provides further clarification on the nature of the certifier's role. The court held that the director could use discretion, rely on other people to provide information, give decisions in a reasonable time and take departmental policy into account. However, he must not be unduly influenced or controlled by the policy or others. Implied terms were that the employer should not interfere with the director's duties and that there was a positive obligation on the employer to ensure that the director did his duty.

Therefore, the courts are prepared to imply terms which uphold the certifier's role as one of independence and will uphold both a negative (duty not to interfere) and a positive (obligation to ensure that the certifier's duty is executed properly) implicit good faith requirement. The obligation is to retain independence of judgment, reaching decisions in a fair and unbiased manner. [FN70] Whilst this *297 responsibility is one of independence, this does not necessarily mean that the outcome will be reasonable. The discretionary powers must be exercised with due regard to the interests of the contractor and building owner, fairly and without improper reference by the employer. [FN71]

The courts will protect the parties through implied terms in relation to the certifier's independence, which equate very closely to good faith principles. The courts have extended this protection to include rights of recovery against the architect if there is interference, although this will depend on the construction of the contract and the express terms included. Thus, a certifier could be liable in tort to the contractor for negligent under-certification if the owner

is insolvent, where the architect unfairly promotes the building employer's interests by low certification or merely fails properly to exercise reasonable care and skill in his certification. [FN72]

To summarise, there is considerable evidence that the courts are willing to uphold implicitly general good faith principles of fairness through an implication of terms which prevent or limit interference in other parties' performance. This is a negative principle but can be applied positively, for example to require the employer to take steps to ensure that the architect performs [FN73] or a duty not to prevent or hinder the contract performance. [FN74]

Co-operation

The basic principle is that parties to a contract are under an obligation to co-operate with each other, and to do all that is reasonably necessary to enable the contract to be performed. [FN75] In construction contracts where there is partnering, co-operation between the parties is seen as an essential requirement and one which partnering itself aims to foster. [FN76] The difficulty with this proposition is the extent to which co-operation will be applied by the courts in a positive sense, or where the contract is silent. English law does not generally adopt a good faith requirement which would impose a more extensive positive co-operation requirement. However, it will uphold an obligation which is necessary to make the contract workable. [FN77]

Thus, each party has an obligation not to hinder or prevent the other from carrying out its obligations in accordance with the contract. [FN78] Further, the obligation extends to the employer taking all steps reasonably necessary to enable the contractor to discharge its obligations and execute the works in a regular and orderly manner, to the architect in providing correct information *298 regarding the works and for the architect to administer the contract in an efficient and proper manner. However, the employer's duty to co-operate does not extend to requiring the employer to assist the contractor to achieve an earlier completion date or to accelerate to make up lost time. The contractor is entitled to complete early but the employer is not obliged to assist the contractor to achieve this. [FN79] Similarly, there is no requirement for a contractor to make sufficient work available to a sub-contractor to enable them to maintain reasonable progress and to execute their work in an efficient and economic manner. [FN80] More recently, in *Scottish Power plc v. Kvaerner*, [FN81] a duty was implied for the contractor to take "all steps within their power which were ... reasonably necessary" to enable a sub-contractor to execute the works in a regular and orderly manner, but subject to the express provisions in the contract for the contractor to direct the works. [FN82]

Consequently, it is clear that the courts will uphold both a negative (duty not to hinder) and a positive obligation of co-operation. However, the courts seek to place limits on the extent of a positive duty and will not impose an obligation which goes beyond that contemplated by the construction of the contract or the intentions of the parties. Thus, the obligation to provide information to the contractor is limited to provision within a reasonable time, which is to be determined from the express terms of the contract and all the circumstances, including the views of the architect/engineer and employer. In other words there is a positive duty to provide information at a time which is reasonable, so as not to hinder or prevent the contractor from completing the works in accordance with the contract. [FN83]

In some respects, the employer's obligation to co-operate is uncontroversial and might be considered to be reasonable, whether as an explicit or implicit good faith requirement. However, more controversial is the extent to which there is a duty on the contractor to co-operate with the employer. An example would be a contractor's duty to warn of defects in the design of the works which the employer's architect is designing. In a classical contracting model, one might expect that no such obligation would be implied with the express responsibilities being clearly directed towards the architect and employer. However, in a framework of good faith or co-operation, it would not seem unreasonable if the contractor were under an obligation to warn of design defects if these are reasonably apparent. Interestingly, the implied obligation (in fact not law) placed on contractors by the courts is one of a duty to warn of defects in design that they believe to exist. [FN84] Thus, the courts have embraced a positive implication of a duty which would appear to reflect a leaning towards a good faith principle even though not recognised explicitly as such.

Thus, in relation to implied terms, there is significant evidence that the courts seek to fill gaps which in other jurisdictions would be filled by a good faith *299 requirement. These are in effect, implicit good faith obligations which have both a negative and positive effect.

Conclusions

The concept of good faith in English law and its application in the context of construction contracts fails to extend as far as an explicit obligation (unlike other jurisdictions). However, it is clear that, instead, the courts have sought to fill this gap in English law with an alternative emphasis on implied terms or remedies which substantially accord with general principles and definitions of good faith. To this extent, it can be argued that it is an implicit obligation of good faith which is recognised by the courts and there is significant evidence to suggest that these concepts are applied extensively in the context of construction contracts in both a negative and positive way. Recently, the courts have been more liberal in their views and have been prepared to contemplate the implication of a good faith requirement in certain commercial situations. [FN85] In Australia, further support in a construction context has been given to the recognition of explicit good faith obligations rather than implicit solutions. [FN86] This leads to the premise that in principle, a move towards explicit recognition of good faith obligations in English law is within reasonable contemplation.

In construction contracts, the current implicit approaches to good faith accord strongly with the explicitly recognised duty in other jurisdictions. As a consequence, the necessity for a more transparent recognition is limited. However, the increased interest in partnering, together with express good faith contract provisions, such as clause 10.1 of the Engineering Construction Contract or clause 1(A)(1) of GC/Works/1 (1998), challenge our notions of good faith. Therefore, future explicit recognition of the concept is not inconceivable and would appear to demand only a re-definition rather than a sea-change in judicial analysis.

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FN1. R. Powell, "Good Faith in Contracts" (1956) 9 C.L.P., 16; R. S. Summers, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980/81) 94i Harv.L.R. 369; R. S. Summers, "The General Duty of Good Faith--its Recognition and Conceptualization" [1982] Cornell Law Review 810; R. Brownsword "Good Faith in Contracts Re-visited" (1996) 49 C.L.P. 111; *Interfoto Picture Library Limited v. Stiletto Visual Programmes Limited* [1989] 1 Q.B. 433.

FN2. M. Furmston, T Norisada & J. Poole *Contract Formation and Letters of Intent* (John Wiley and Sons, Chichester, 1998) p. 269.

FN3. *London Borough of Merton v. Stanley Hugh Leach Ltd* 32 Build.L.R. 55, per Vinelott J. at p. 80.

FN4. *Interfoto Picture Library Limited v. Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433, per Bingham L.J. at p. 439.

FN5. E. A. Farnsworth, "Good Faith in Contract Performance" in *Good Faith and Fault in Contract Law* (Beatson and Friedmann ed., Clarendon Press, Oxford, 1995) p. 159.

FN6. D. Friedmann, "Good Faith and Remedies for Breach of Contract" in *Good Faith and Fault in Contract Law* (Beatson and Friedmann ed., Clarendon Press, Oxford, 1995) p. 400.

FN7. For further details see for example M. P. Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed., Butterworths, London, 1996) p. 309.

FN8. *Carter v. Boehm* (1766) 97 E.R. 1162, per Lord Mansfield at 1164.

FN9. United States--the Uniform Commercial Code (UCC) ss1-203, ss1-201(19) and ss2-103(1)(b); The American Law Institute's Restatement (2d) of Contracts s.205; United Nations Convention on Contracts for the International Sale of Goods Act 7(1); France--Code Civil Art. 1134(3); Germany BGB ss242.

FN10. The UCC ss1-201(19).

FN11. The UCC ss3-103(a)(4).

FN12. Which parallels the Carter v. Boehm principle.

FN13. op. cit. n. 5.

FN14. R. S. Summers (1968) op. cit. n. 1; R. S. Summers (1982) op. cit. n. 1.

FN15. For more detailed discussion of what is "bad faith" and the good faith "excluder" theory, see R. S. Summers (1968) op. cit. n. 1.

FN16. Restatement (second) of contracts s.205 (1979): s.205 comment section d:

"A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to co-operate in the other party's performance."

FN17. Tymshare Incorporated v. Covell 727 F 2d 1145, per Scalia J. at 1152 (D.C. Cir. 1884).

FN18. Renard Constructions (ME) Proprietary Limited v. Minister for Public Works (1992) 26 N.S.W.L.R. 234, per Priestly J.A. at 266G. See S. J. Burton "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980-81) 94i Harv. L.R. 369 at 369.

FN19. Burton, op. cit. pp. 372-373.

FN20. Where the issue is dealt with in accordance with good faith rules.

FN21. See J. Beatson, "Public Law Influences in Contract Law" in Good Faith and Fault in Contract Law (Beatson and Friedmann ed., Clarendon Press, Oxford, 1995) p. 268; Abu Dhabi National Tanker Company v. Product Star Shipping Limited (The Product Star) (No 2) [1993] 1 Lloyd's Rep. 397; Panmena Europea Navigacion (Compania Limitada) v. Frederick Leyland and Company Limited [1947] A.C. 428; Sutcliffe v. Thackran [1974] A.C. 727.

FN22. Be it Burton's limitation on the exercise of discretion. Summers's basic standards of decency or merely an implied term to fill a gap as under Farnsworth's perspective. See E. A. Farnsworth (1995) op. cit. n. 5, p. 163; E. A. Farnsworth (1962-63) "Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code" 30 Univ. Chicago Law Rev. 666.

FN23. See R. Powell (1956) op. cit. n. 1, p. 25.

FN24. Interfoto Picture Library Limited v. Stiletto Visual Programmes Limited [1989] 1 Q.B. 433, per Bingham L.J., p. 439.

FN25. N. Cohen "Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate", in Good Faith and Fault in Contract Law, (Beatson and Friedmann ed., Clarendon Press, Oxford, 1995) pp. 30-31.

FN26. J. Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?",

(1991) The Denning Law Journal 131.

FN27. From Summers for example, good faith obligations were being upheld by the judiciary in the United States prior to the introduction to Statutory Uniform Commercial Code obligation; see Summers (1968), op. cit. Note 1. So too in Australia more recently, in Renard Constructions v. Minister for Public Works (1992) 26 N.S.W.L.R. 234, per Priestly J.

FN28. E. A. Farnsworth (1995), op. cit. n. 5.

FN29. S. J. Burton (1980-81), op. cit. n. 19; J. Beatson (1995) op. cit. n. 21.

FN30. R. S. Summers (1968) and (1982) op. cit., n. 1.

FN31. E. A. Farnsworth (1962-63) op. cit., n. 22.

FN32. Restatement of Contracts (2nd ed.), op. cit., n. 16.

FN33. S. J. Burton (1980-81) op. cit., n. 19.

FN34. J. Beatson (1995) op. cit., n. 21.

FN35. Abu Dhabi National Tanker Company v. Product Star Shipping Limited (The Product Star) (No 2) [1993] 1 Lloyd's Rep. 397, per Leggatt L.J. at 404.

FN36. Tillmanns and Company v. SS Knutsford Limited [1908] 2 K.B. 385, per Farwell L.J. at 406.

FN37. See for example JCT Standard Form of Building Contract 1980, cll 13, 17, 25, 26, 30 and 35; and ICE Conditions of Contract 6th Edition, cll 44, 48, 51, 52, 60 and 61.

FN38. That is, specification of which supplier or sub-contractor is to be used.

FN39. Joint Contracts Tribunal Standard Form of Building Contract 1980.

FN40. Gloucestershire County Council v. Richardson (1969) 1 A.C. 480.

FN41. North-West Metropolitan Regional Hospital Board v. T. A. Bickerton and Son Limited [1970] 1 All E.R. 1039.

FN42. Percy Bilton Limited v. Greater London Council (1982) 20 Build.L.R. 1.

FN43. Fairclough Building Limited v. Rhuddlan Borough Council [1985] 3 Con. L.R. 38.

FN44. For example, to obtain a lump sum tender for the works.

FN45. See for example cll 13.1 and 13.2-13.7 of JCT Standard Form of Building Contract 1980; cll 51 and 52 of the ICE Conditions of Contract 6th Edition.

FN46. Halsbury's Law of England 4th Edition, Vol. 4, para. 1178.

FN47. Blue Circle Industries plc v. Holland Dredging Company (U.K.) Limited [1987] 37 Build.L.R. 40.

FN48. Neodox Limited v. Borough of Swinton and Pendlebury (1958) 5 Build.L.R. 34.

FN49. Chadmax Plastics Proprietary Limited v. Hansen and Yuncken (SA) Proprietary Limited (1984) 1

B.C.L.

FN50. Carr v. J. A. Berriman Proprietary Limited [1953] 89 C.L.R. 327; Commissioner for Main Roads v. Reed and Stuart Proprietary Limited (1974) 12 Build. L.R. 55.

FN51. S. J. Burton (1980-81) op. cit., n. 19.

FN52. See Holland Hannen and Cubitt v. Welsh Health Technical Services Organisation (1981) 18 Build. L.R. 89.

FN53. For example, the courts have held that an architect or engineer should act independently, fairly and must not be controlled or unduly influenced by either party, when certifying payments; See Hickman v. Roberts (1913) A.C. 229; Panamena v. Frederick Leyland (1947) A.C. 429; Perini Corporation v. Commonwealth (1969) 12 Build.L.R. 82; Michael Sallis and Company Limited v. Calil (unreported July 3, 1987).

FN54. R. S. Summers (1968) op. cit., n. 1.

FN55. P. Bick (1996) "Some Aspects of Good Faith and Fairness in the Formation of Construction and Engineering Contracts" (Society of Construction Law) p. 19.

FN56. Richardson v. Silvester (1873) L.R. 9 Q.B. 34; Harvela Investments Limited v. Royal Trust Company of Canada Limited [1986] A.C. 207; Quebec (Commission Hydroelectrique) v. Banque de Montreal (1992) 93 D.L.R. (4th) 490, (1992) 3 C.L.R. (2d) 1 (a Canadian case decided under the Code Civil) and subsequent Canadian decisions Opron Construction Company Limited v. Alberta [1994] 14 C.L.R. (2d) 97; Begro Construction Limited v. St Mary River District [1994] 15 C.L.R. (2d) 150; Blackpool and Fylde Aero Club Limited v. Blackpool Borough Council [1990] 1 W.L.R. 1195; Convent Hospital Ltd v. Eberlin and Partners [1989] 23 Con. L.R. 112; Protec Installations Limited v. Aberdeen Construction Limited [1993] 6 C.L.R. (2d) 143.

FN57. Williams v. Fitzmaurice (1858) 3 H & N 844; Sharpe v. Sao Paulo Brazilian Railway Company (1873) 8 Ch. App. 597.

FN58. Sir Lindsay Parkinson and Company Limited v. Commissioners of Works [1950] 1 All E.R. 208.

FN59. Sir Lindsay Parkinson and Company Limited v. Commissioners of Works (1950) op. cit., n. 135, per Asquith L.J.

FN60. John Mowlem v. Eagle Star Insurance (1992) 62 Build.L.R.

FN61. Under the Limitation Act 1980 and Latent Damage Act 1986.

FN62. Strongman (1945) Limited v. Sinock [1955] 2 Q.B. 525.

FN63. Ibmac Limited v. Marshall (Homes) Limited (1968) 208 Estates Gazette 852.

FN64. I. N. D. Wallace Hudson's Building and Engineering Contracts, 11th Edition, volume 1. (Sweet and Maxwell, London, 1995) Vol. 1 p. 96.

FN65. I. N. D. Wallace (1995) *ibid* at p 96.

FN66. J. F. Burrows "Contractual Co-operation and the Implied Term" (1968) 31 M.L.R. 390 at 396.

FN67. For example by instructing the architect not to issue a certificate.

FN68. Hickman v. Roberts (1913) A.C. 229.

FN69. Perini Corporation v. Commonwealth [1969] 12 Build.L.R. 82.

FN70. Hounslow Borough Council v. Twickenham Gardens Developments [1970] 7 Build.L.R. 81; Sutcliffe v. Thackrah (1974) A.C. 727.

FN71. London Borough of Merton v. Stanley Hugh Leach [1985] 32 Build.L.R. 55.

FN72. Michael Sallis and Company Limited v. Calil (unreported July 3, 1987), see commentary to Pacific Associates v. Baxter (1988) 44 Build.L.R. 33 at 36; see Pacific Associates v. Baxter (1988) 44 Build. L.R. 33.

FN73. Perini Corporation v. Commonwealth (1969) 2 N.S.W.R. 536; 12 Build.L.R. 82.

FN74. Torquay Hotel Company Limited v. Cousins (1969) 2 Ch. 106, per Lord Denning M.R. at 140.

FN75. Mackay v. Dick (1881) 6 App. Cas. 251 at 263; see also Luxor (Eastbourne) Limited v. Cooper (1941) 1 All E.R. 33.

FN76. Campbell D. and Harris D. (1993) "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation", Journal of Law and Society, No. 2, Summer, 166 at p. 167.

FN77. Mona Oil Equipment Company v. Rhodesia Railways Limited (1949) 2 All E.R. 1014, per Devlin J. at 1018.

FN78. London Borough of Merton v. Stanley Hugh Leach [1985] 32 Build.L.R. 51.

FN79. Glenlion Construction Limited v. Guinness Trust (1987) 39 Build.L.R. 89.

FN80. Martin Grant and Company Limited v. Sir Lindsay Parkinson and Company Limited (1984) 29 Build. L.R. 31.

FN81. Scottish Power plc v. Kvaerner (March 6, 1998, Court of Session, Scotland; unreported).

FN82. L. Patterson "Implied Terms in Construction Revisited", [1998] 9 Const. L.J. 228.

FN83. Neodox v. Swinton and Pendlebury Borough Council [1958] 5 Build.L.R. 38.

FN84. Brunswick Construction Limited v. Nowlan [1974] 21 Build.L.R. 27; EDAC Limited v. William Moss and Others [1984] 1 Const. L.J. 131; Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited [1984] 1 Const. L.J. 162.

FN85. Philips Electronique Grand Public S.A. v. British Sky Broadcasting (1995) E.M.L.R. 472; Timeload Limited v. British Telecommunications plc (1995) E.M.L.R. 459 (CA); Balfour Beatty Civil Engineering Limited v. Docklands Light Railway (1996) 78 Build.L.R. 42.

FN86. Renard Constructions (ME) Proprietary Limited v Minister for Public Works [1992] 26 N.S.W.L.R. 234, per Priestly J.A.

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