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Article
CONTRACTING IN GOOD FAITH - GIVING THE PARTIES WHAT THEY WANT
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Abstract: Examines the duty of good faith as an express obligation contained in the newer standard forms of construction contract, including partnering contracts. Describes good faith provisions in other jurisdictions and the seeming hostility of the English judiciary. Discusses the benefits that might arise from "concretising" the duty of good faith in English law and encourages developments in this area.

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Introduction

Partnering promotes a co-operative approach to contract management with a view to improving performance and reducing disputes. The relationship between a contractor and a client in a partnering contract contains firm elements of trust and reliance. In so far as partnering is delivered through the medium of contracts, those contracts more often than not contain an obligation that the parties act in good faith to facilitate delivery of those aims.

Partnering contracts pose a problem for contract advisors containing as they do "hard" and "soft" obligations. Whilst all conditions of contract are equal, some, to misquote George Orwell, are more equal than others. Clients can be advised and terms drafted stipulating hard obligations such as payment and quality standards. But what of the soft obligations--and in particular the duty of good faith--what are we to make of them? As one leading commentator put it:

"We in England find it difficult to adopt a general concept of good faith...we do not know quite what it means." [FN1]

***437** The resulting situation is that "soft" obligations are often overlooked and not given any particular importance. This sentiment was picked up by a report expressing the consensus of construction lawyers as being that duties of good faith are not likely to be newly recognised in law by reason of their introduction into partnering contracts. [FN2]

This consensus of opinion invites the question whether this is what the users of construction contracts want. Parties having taken the trouble of entering into a partnering contract may feel disappointed to learn that their voluntarily assumed mutual obligations are not enforceable. This article seeks to open a discussion around this point and recommends the "concretising" of the duty of good faith by judiciary and/or parliament to deliver what the parties have chosen for themselves.

The newer contract forms

By far and away the most popular forms of contract are those which make no mention of partnering obligations. [FN3] The dominance of the Joint Contracts Tribunal (JCT) lump sum and design and build forms remains intact. However, the growing trend is to use contracts which move away from formal legal "black letter" contracts to contracts fulfilling a different role which includes seeing the contract as a management tool and a stimulus for collaboration. The challenge for these newer contract forms is to capture this new role whilst providing sufficient contractual certainty in the event that disputes arise.

The link between contracts, partnering and good faith was initially made by organisations such as Associated General Contractors of America making statements such as:

"Partnering is recognition that every contract includes an implied covenant of good faith." [FN4]

These connections are relatively straightforward in the United States, a legal system that recognises the duty of good faith in contracting. The principles of partnering are congruent with the doctrine: trust, open communication, shared objectives and keeping disputes to a minimum. Making the connections in the English context is more challenging, given the absence of the general duty of good faith. In its absence it is the partnering contracts themselves which fill the gap.

In the 13 years since the Latham Report, partnering contracts have become significantly more sophisticated in terms of the wording of partnering obligations and the conduct expected. The duty to act in good faith is a common thread.

There are variations on the exact imposition of the duty to act in good faith in partnering contracts. A distinction can be drawn between those which are intended to regulate the parties' behaviour through the contractual terms *438 and conditions (binding) and those which place a non-contractual partnering framework over the top of another contract (non-binding). The latter have been described as seeking to influence rather than mandate certain behaviour. [FN5]

The parties to the JCT Non-Binding Partnering Charter agree to "act in good faith; in an open and trusting manner, in a co-operative way in a way to avoid disputes by adopting a no blame culture". The binding multi-party PPC 2000 requires that the parties "agree to work together and individually in the spirit of trust, fairness and mutual co-operation". The NEC x12 Partnering Option calls the parties "partners", and requires that partnering team members shall "work together to achieve each other's objectives".

The latest contract to enter the fray is the JCT Be Collaborative Constructing Excellence Form. The contract goes further than the other partnering contracts in introducing an over-riding principle which includes a duty of good faith and stipulates that this principle takes precedence over all other terms.

This contract completes the transition of good faith-type provisions from being somewhere on the under-card of contractual terms to being the main event. A significant proportion of the standard forms of contracts now available to the construction industry expressly impose an increasingly onerous duty on the parties to act in good faith. This paper will briefly review the history of the duty of good faith before examining the reasons why the consensus of rejection of the legal significance of this development exists.

The duty of good faith

The attraction for contract draftsmen to use the phrase "the parties owe each other a duty of good faith" is understandable. The phrase resonates with the reader who has an instinctive grasp of what it is the contract is trying to do. This resonance is due, in part, to the long history and high esteem in which the duty is

steeped.

The concept of good faith has great normative appeal. It is the aspiration of every mature legal system to be able to do justice and do it according to law. [FN6] The duty of good faith is a means of delivery.

Good faith has an ancient philosophical lineage and is referred to in the writings of Aristotle and Aquinas. [FN7] They were concerned with the problems of buying/selling and faced the dilemma of how to achieve fairness while not stifling enterprise in commerce. This dilemma is still an issue today and its successful resolution is a major challenge for those seeking to (re-) establish a duty of good faith.

The ancient concept of good faith in a revived form went around Europe, England and United States like wildfire at the end of the eighteenth century. Lord Mansfield described the principle of good faith in 1766 as the governing principle applicable to all contracts and dealings. [FN8]

***439** The duty of good faith subsequently fell into disuse in England in favour of encroaching statute law and the emphasis on the promotion of trade. Emphasis shifted onto contractual certainty in contracting instead. [FN9] Contractual certainty has remained the cornerstone of standard form construction contracts since their inception at the start of the twentieth century. Procurement and contracting in the twenty-first century however is different. The role of the contract is changing and the re-emergence of the duty of good faith is an important element in this development. The advantages of recognising the legal enforceability of the duty have been presented as [FN10]:

- Safeguarding the expectations of contracting parties by respecting and promoting the spirit of their agreement instead of insisting upon the observance of the literal wording of the contract.
- Regulating self-interested dealings.
- Reducing costs and promoting economic efficiency.

- Filling unforeseen contractual gaps.
- Providing a sound theoretical basis to unite what would otherwise appear to be merely a series of disparate rights and obligations.

The support for introducing the duty of good faith amongst industry commentators has not to date been overwhelming. Academic studies in this area tend towards mild encouragement for the judiciary or parliament to take action and introduce a general duty. [FN11]

Making the case for the imposition of a general duty of good faith is as challenging as attempting a definition. Despite its beguiling simplicity it has proved to be an elusive term. The attempts to define good faith at best replace it with equally vague and nebulous terms. The danger, as one commentator put it, is that any definition would "either spiral into the charybdis of vacuous generality or collide with the scylla of restrictive specificity". [FN12]

The difficulty of defining "good faith" is not necessarily a problem for partnering contracts which tend to evoke the spirit rather than the letter of the law. However, progress has been made in defining the term, particularly by the Australian judiciary. The parallels here are striking--a common law jurisdiction grappling with the issue of how best to "concretise" the duty of good faith.

The Australian Judge Paul Finn made the following useful contribution towards definition in the common law tradition:

"good faith occupies the middle ground between the principle of unconscionability and fiduciary obligations. Good faith, while permitting a party ***440** to act self-interestedly nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other." [FN13]

Thus far the English courts have denied themselves the opportunity to engage in this shaping of the meaning of good faith in the modern construction context despite its historical relevance, its resonance with the public and even in light of other recent stimuli to its introduction.

Other stimuli towards the introduction of a duty of good faith

As mentioned above, English law made a choice to promote trade through contractual certainty rather than through widely drawn concepts. In Europe the duty of good faith has flourished to the extent that its existence of otherwise in contract law is one of the major divisions between the civilian and common law systems. [FN14] The great continental civil codes all contain some explicit provision to the effect that contracts must be performed and interpreted in accordance with the requirements of good faith. For example, art.1134 of the French Code Civil and s.242 of the German Code. In Germany, the experience has been that the articulation of a general principle has enabled the identification and solution of problems which the existing rules do not or seem unable to reach. Through the duty of good faith the German court has developed its doctrines without incurring the reproach of pure judicial decision law making.

It is unsurprising, given the establishment of the good faith doctrine into continental legal systems, to discover the duty is enshrined within European law. For example, the Unfair Terms in Consumer Contracts Directive 1993 may strike down consumer contracts if they are contrary to the requirements of good faith. The Commercial Agents Directive 1986 also makes reference to good faith.

Moves towards the harmonisation of European contract law by the European Contract Commission stopped short of outright commitment to the duty of good faith but did state that regard is to be had to the observance of good faith in international trade.

Neither is good faith a concept unknown to English Law. The obvious example is in insurance contracts which are subject to a duty of utmost good faith owed by the assured to disclose material facts and refrain from making untrue statements while negotiating the contract. [FN15]

The duty of good faith is also apparent in areas of law where there is a special relationship such as family arrangements and partnerships.

A pattern is discernible towards the re-emergence of the duty of good faith in English law. Despite this encroachment (or possibly because of it) suspicion *441 and hostility abound, in the words of one commentator "(the duty of good faith) is a vague concept of fairness which makes judicial decisions unpredictable". [FN16]

Another argument against the imposition of a general duty of good faith is the preference given to ad hoc solutions in response to demonstrated problems of unfairness. In other words, good faith outcomes are already being achieved through other means. Examples of these outcomes have been given [FN17] as the contractor's duty to progress the works regularly and diligently and the employer's duty not to obstruct and to co-operate. However, ad hoc solutions can lead to unsatisfactory results. Contract draftsmen have given the judiciary a unique opportunity to create new law based around the key concept of good faith. This article now examines judicial attitudes in this area.

Judicial hostility?

The grounds for the seeming hostility (with one notable of exception) of the judiciary to the concept of good faith has already been stated--suspicion of broad concepts. The approach is, to paraphrase Lord Bingham in *Interfoto Picture Library v Stilleto Visual Programme Ltd* [FN18] to avoid any commitment to over-riding principle in favour of piecemeal solutions in response to demonstrated problems of unfairness.

The judgment of Lord Ackner in the case of *Walford v Miles* [FN19] sums up the prevailing sentiment: "the duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved.... how is the court to police such an "agreement?"

From time to time the courts have, at least, entertained submissions about the more general application for the duty of good faith. [FN20] A trilogy of cases [FN21] in the Court of Appeal suggested a move towards a more general principle. Lord Bingham was at the time dropping heavy hints such as: "we would, were it material, imply a term that [x] should act in good faith in the performance of this contract. But it is not material." In the second case "the court would then have wished to consider whether it was not subject to a duty of good faith substantially more demanding than that customarily recognised in English Contract Law". In the third "I am for my part by no means sure that the classical approach to the implication of terms is appropriate here".

The impact of these judgments on the Technology and Construction Court appears to have been minimal. The initiative towards the introduction of a general duty of good faith has not found support here. H.H. Judge Lloyd Q.C. in the case of *Francois Abballe (t/a GFA) v Alstom UK Ltd* [FN22] said that

*442 "the proposition that 'good faith' may be used as a fall back device tellingly shows why it is wrong but tempting to consider with the advantage of hindsight whether a term should be implied. I do not consider I should be a hero and permit the Claimant to advance this term".

The door seemed to be more firmly closed on the introduction of a general duty of good faith by H.H. Judge Seymour Q.C. "the development of the law in the direction anticipated by Sir Thomas Bingham would, it seems to me, be fraught with difficulty ... I should not be prepared to venture into these treacherous waters ...". [FN23]

There has only been one case where a specific duty to act collaboratively has been considered by the judiciary. The case of *Birse Construction Ltd v St David Ltd* [FN24] has been poured over in great detail in other articles. For the purposes of this paper the relevant considerations of the case are that: (a) it features a non-binding partnering charter; and (b) the judge specifically highlighted that the parties had entered into a partnering arrangement.

Judge Lloyd Q.C. recognised that the terms of the partnering charter were important in providing the standards of conduct of the parties. Although such terms may not have been otherwise legally binding, the charter was taken seriously as a declaration of assurance. In short, the parties were not allowed to interpret their relationship in a manner which would have been inconsistent with their stated intention to deal with each other collaboratively.

It is possible to discern support from this judgment for the parties' expressed desire to operate in good faith in their dealings with one another. This support fulfils the role of meeting the expectations of the contract users. Increasing numbers of contract draftsmen have been bold enough to include good faith provisions in their contracts. The contracts have been welcomed by their users. If they find themselves getting into difficulties then the users have a reasonable expectation to be bound by their promises to one another. The challenge for the judiciary is to decide on the appropriate level of support to be given to the more prescriptive and onerous terms of contract now employed in the latest construction contracts.

How best to deliver what the parties want?

It is beyond the aims of this article to provide a blueprint for how a general duty of good faith might operate. One commentator has pointed out that if good faith is to be of any practical utility it needs to provide a few clearly understandable action-guiding principles of conduct. [FN25] The small print solution of listing every possible potential misconduct on the part of any party is not suitable, given the complexity of con-

struction contracts and the move away from voluminous forms. One approach would be to allow the judge/arbitrator/adjudicator a wide discretion so that they might "concretise" the duty in line with the principles of conduct as they see fit or in line with experiences in other jurisdictions.

***443** Good faith in negotiations could mean an inquiry into the reasons for breaking off negotiations. Examples of bad faith might include negotiating without serious intention to contract, non-disclosure of known defects, abusing superior bargaining position, arbitrarily disputing facts and adopting weaselling interpretations of contracts and willingly failing to mitigate your own and other parties' losses and abusing a privilege to terminate contractual arrangements.

The effect of the court recognising the duty of good faith as a hard obligation has been likened to recognising the general duty of care in negligence or the principle of undue enrichment. [FN26] As a result, the principle may remain relatively latent or continue to be stated in extremely general terms without doing too much damage to the important virtues of certainty and predictability in the law. The principle could also provide a basis on which existing rules can be criticised and reformed.

The alternative way of introducing a duty of good faith is to set down guidelines in a statute. A statutory obligation to act in good faith was recommended by the Latham Report as a measure which would lead to the improvement of the performance of the construction industry. The government of the time chose not to move in this direction. The time may have come to revisit this decision.

Conclusion

Good faith has been described as "repugnant to the adversarial position of the parties". The duty is surely not so repugnant to an industry currently characterised and actively pursuing an agenda not of adversarial relations but of collaboration.

The industry would benefit from some clear messages from the judiciary as to the enforceability of their collaborative arrangements. The positive stance taken in the *Birse v St David* case is encouraging in terms of direction but further concretising of the exact meaning of such obligations on the particular facts of any case would be helpful. Re-ordering the structure of construction contracts by introducing the sound theoretical basis presented by the duty of good faith is an achievable and laudable aim. The expression of this underlying principle with its uncluttered simplicity may serve to bring clarity to the dense contractual conditions for which the industry is renowned.

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FN3. RICS Contracts in Use Survey 2004, available at <http://www.rics.org/Builtenvironment/Buildingcontractforms/Contracts+in+use+report.htm>.

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FN7. C. Jansen and R. Harrison, "Good faith in construction law" (1999) 15 (3) Const. L.J. 346, pp.346-373.

FN8. Carter v Boehm [1766] 3 Burr. 1905.

FN9. K. Groves, "The doctrine of good faith in four legal systems" (1999) 15 (3) Const. L.J. 265, pp.265-287.

FN10. See fn.6 above.

FN11. "awaiting developments through the common law is likely to be slow; the time for appropriate legislation may now have come": M. Miner, (2004) 15(2) Construction Law 20, pp.20-22; "future explicit recognition of the concept (of good faith) is not inconceivable and would appear to demand only a re-definition rather than a sea change in judicial analysis.": B. Colledge, (1999) 15(3) Const. L.J. 288, pp.288-299.

FN12. See fn.5 above.

FN13. P.D. Finn, "The fiduciary principle", in T.G. Youdan (ed.), Equity, Fiduciaries and Trusts (Toronto, Calgary, Vancouver, 1989) 1, at p.4.

FN14. H. Macqueen, "Good faith in the Scots law of contract: an undisclosed principle?", in A.D.M. Forte (ed.), Good faith in contract and property law (Hart Publishing, Oxford, 1999), 5-37.

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FN19. [1992] 1 All E.R. 453.

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FN21. Philips Electronic Grand Public SA v BSB [1995] E.M.L.R. 472; Balfour Beatty v DLR [1996] 78 B.L.R. 42; Timeload Ltd v British Telecom [1995] E.M.L.R. 459.

FN22. LTL, August 7, 2000 (TCC).

FN23. Hadley Design Associates v Lord Mayor and Citizens of the City of Westminster [2003] EWHC 1617 (TCC).

FN24. [1999] B.L.R. 194.

FN25. See fn.7 above.

FN26. See fn.14 above.

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