

Chapter 11 Delivering improvements in ethical behaviour in the construction industry through the implementation of contractual good faith provisions

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The interaction between ethical principles and legal rights and duties was noted in a paper given by Uff 2003¹ as: “extending the definition of acceptable professional conduct”. The paper makes the argument that an ethical approach may hold the key to a number of the problems which have beset the construction industry for many years and may lead to a fairer and ultimately more prosperous future.

At the time, Uff was involved in the formulation and dissemination of an ethical code for construction professionals produced by the Society of Construction Law². This chapter seeks to establish another method of promoting ethical behaviour through recent innovations in contractual practice.

The direction and implementation of each stage of the construction process is overseen and managed by professionals. Depending on the nature of the work, they will be engineers, architects, surveyors, lawyers, construction and project managers. Each of these professionals operates under an existing ethical code and the same professionals bring this ethical code with them when they operate in the field of construction law.

Notwithstanding this, a widely adopted uniform code does not currently exist and the sheer variety of personnel involved on a typical construction project and the diverse nature of their tasks make such a code difficult to contemplate.

The Construction Context

That there is a place for such a code appears to be beyond question. In his paper, Uff³ identifies a number of individual issues including: whether it can be ethically justifiable to allow contracts to be let on inadequate ground investigation data or in circumstances where a major variation to the works will be inevitable or where grossly under priced contracts should be let at all. He notes that in the area of tendering the rule appears to be that anything goes. Unconscionable dealings of tendering contractors can be well matched by the practices of employers. An ethical code would seek to prevent cheating in the same way that duties are owed under the criminal law to avoid or prevent bribery or corruption.

It is often the case that when placing risk through the terms of the contracts and subcontracts the relevant risks are simply transferred to the level of subcontractors and sub-consultants. Projects then run into difficulty as a result of the parties having taken on contractual obligations which are more onerous than anticipated in terms of time and money. The solution here is to suggest that there is an ethical burden to ensure that the contract draftsmen are properly informed as to the feasibility of the tasks that are being created for others and lawyers owe a reciprocal duty to avoid the creation of risk which cannot be practically and economically borne.

At the construction stage ethical considerations apply in giving warning of avoidable disaster. There are a number of cases where the duty to warn has been considered. However the point is that the rulings of the court on the existence of legal duties cannot be taken as defining the extent of an ethical duty in such circumstances.

Much of the construction process is still operated and controlled by professionals who are often appointed to carry out an “independent” certifying role where, despite being engaged by the client, the certifier’s function involves “holding the balance between the client and his contractor” as was identified in the case of *Sutcliffe v Thackrah*⁴. A common complaint of contractors is that the certifier failed to act in an ethical manner being reluctant to “concede” extensions of time or to sanction variation orders.

In the third project stage, construction industry professionals will be involved at all levels in the settling of the final account including the formulation and resolution of claims and counterclaims. This also covers adjudication and arbitration should either of the parties so elect. This gives rise to a series of ethical issues concerning the way in which facts are analysed and expertise utilised to support claims.

The Wider Context

Many people do not realise that actions which they regard as “part of the game” are actually criminal activities. Corruption not only includes bribery, but also fraudulent practice such as tender collusion, claims fraud and deliberate supply of sub-standard products or incorrect quantities. Corruption on UK Projects leads to waste, defective products, inefficiency and un-necessary litigation. I have cut out a paragraph here on the international situation for corruption to avoid repetition to be covered elsewhere

According to TI’s Project Director Neill Stansbury⁵ the construction process forms the UK’s core commercial activity. Construction in the UK is, however, economically wasteful and excessively costly. This unnecessarily enhanced cost is further increased as a result of the large number of claims and disputes that construction generates. Particular complaints are: inefficient working practices, poor planning, inadequate identification of the scope of required work, unsatisfactory design, detailing and specification and low standards of workmanship. Complaints are compounded by a lack of trust, co-operation and information sharing between participants at every level of the design, planning and construction chain. This is then exacerbated by the unsatisfactory way that many specialists are hired with inter-locking contractual and commercial relationships.

Partnering and Good Faith

In the last ten years the introduction of partnering to the UK construction industry has sought to simplify contractual and commercial relationships. 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. The very existence of the principle of partnering implies that the participants will act ethically in seeking to achieve the stated objectives. The premise of this chapter is that by encouraging the concretising of the duty of good faith in construction contracts an improvement will be discernible in terms of improved ethical standards within the industry. The abuses of contractual positions referred to above can be alleviated by the adoption of good faith as the cornerstone of contractual relations.

Under the existing law provisions of good faith in construction contracts are a long way from being able to deliver improvements in ethical behaviour. The perception is that these type of terms of contract are not taken particularly seriously at the present time.

The background to this is that 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 is to be made 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.”*⁶

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.⁷

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. For the benefits of good faith provisions to be felt, there must be a “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.⁸ The dominance of the 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.”*⁹

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 doctrines of 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 fourteen 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 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 behaviour¹⁰.

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 and 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 overriding 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.¹¹ 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 Aquinas¹². 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 18th century. Lord Mansfield described the principle of good faith in 1766 as the governing principle applicable to all contracts and dealings¹³.

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 instead¹⁴. Contractual certainty has remained the cornerstone of standard form construction contracts since their inception at the start of the 20th century. Procurement and contracting in the 21st 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 safeguarding the expectations of contracting parties¹⁵ 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

To this list must be added the benefit of improving on some of the unethical behaviour highlighted at the start of this chapter.

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 duty¹⁶:

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, or 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”¹⁷.

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 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”¹⁸.

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 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 or otherwise in contract law is one of the major divisions between the Civilian and Common Law systems²⁰. 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, article 1134 of the French Code Civil and Section 242 of the German Code.

In France, the rather vague concept of good faith or “bonne foi” has been given clarity and definition by judicial decisions, which cumulatively have produced a number of “rules” relating to the performance of contractual obligations and, possibly more importantly, to the obligations of parties before a formal contractual relationship is entered into. For example, good faith is the legal basis for the rules relating to the French doctrine of abuse of rights (l’abus de droit). This is where the court adds a further qualification to the specific express contractual obligations to prevent the purpose of the contract being thwarted by a manifestly unfair attempt to rely on a contractual right.

The development of the doctrine in France has also been determined by the nature of the contract being considered. The courts have developed different types of duties based on the general obligation of good faith that are specific to certain categories of contract. In the context of engineering and construction contracts, there is authority that the developer must provide all relevant data that are necessary to the proper completion of the project by the engineer.

German law has adopted an even more positive approach to the doctrine of good faith than the French. Good faith creates positive extra-contractual obligations and is used as a justification to facilitate performance of the contract. The doctrine is contained in sections 157 and 242 of the German civil code, the Burgerliches Gesetzbuch, which provides that:

S157 – Contracts shall be interpreted according to the requirements of good faith

S242 – The debtor is bound to perform according to the requirements of good faith

The wider statutory basis extending the application of the doctrine from performance to the definition of contractual obligations which explains the different approach of the

German Courts, which has been used to create a positive duty of co-operation from one party to the other. For example, in one case where German long-term contracts were adversely affected by inflation after the First World War, it was held that the principle of good faith allowed the judge to re-allocate contractually agreed risk pursuant to section 157.

In summary of this point, the experience in France and Germany has been that through the duty of good faith the German and Court have had the freedom to develop its doctrines without incurring the reproach of pure judicial decision law making. This has enabled the identification and solution of problems which the existing rules do not or seem unable to reach. Whether or not either of these models could be successfully adopted in England and Wales is not a question that can be easily answered. A “bolting on” by domestic law makers of a French or German type duty is extremely unlikely step in any event. The move contemplated in this chapter is much more modest in scope: where the parties have expressly contracted in good faith there ought to be a detectable legal meaning to give some weight to their undertaking.

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 contract 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.²¹

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 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.”²²

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 given²³ 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 chapter now examines judicial attitudes in this area.

Judicial Hostility? Jim could we make this section a bit simpler and cut a bit out?

The grounds for the seeming hostility (with one notable 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*²⁴ 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*²⁵ 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?”

The door seemed to be more firmly closed on the introduction of a general duty of good faith by His Honour Judge Seymour “the development of the law in this direction would, it seems to me, be fraught with difficulty..... I should not be prepared to venture into these treacherous waters...”²⁹

There has been one case from which encouragement towards concretising the duty of good faith can be ascertained. The case of *Birse Construction Limited v St David Limited*³⁰ featured a non-binding partnering charter and the judgement specifically highlighted that the parties had entered into a partnering arrangement.

His Honour Judge Humphrey Lloyd 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 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 chapter to provide a blue-print 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.³¹ The small print solution of listing every possible potential misconduct on the part of any party is not suitable given the complexity of construction 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.

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 enrichment³². 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 Latham 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 is also making moves towards the ethical agenda. It would appear to make clear sense to further promote collaboration and ethical behaviour through the medium of good faith provisions. In this regard the benefits that could be felt across the industry would be considerable and potentially lead to completely new framework in which construction activity would be characterised by increased professionalism, integrity and fair dealings.

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.

The benefits of concretising the duty of good faith would be felt right across the board, not least in the improvement of the standard of acceptable ethical behaviour amongst the disparate set of people working in today’s construction industry.

Chapter References

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- ³ see note 1 ibid
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- ⁵ N. Stansbury “Unethical Behaviour and Criminal Acts” (2005) Society of Construction Law paper available at scl.org.uk
- ⁶ R.Goode, “The concept of good faith in English law”, Saggi, Conferenze e Seminari [http://www.cnr.it/CRDCS/goode.htm] 1992
- ⁷ R. Honey and J Mort, “Partnering contracts for UK building projects: practical considerations” (2004) 20 (7) Const L.J. 361-379
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- ¹³ Carter v Boehm [1766] 3 Burr 1905
- ¹⁴ K.Groves, “The doctrine of good faith in four legal systems” (1999) 15 (3) Const L.J. 265-287
- ¹⁵ See n.6, supra
- ¹⁶ “awaiting developments through the common law is likely to be slow; the time for appropriate legislation may now have come” M. Miner, (2004) Construction Law 15(2), 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. 288-299
- ¹⁷ See n.5, supra
- ¹⁸ P D Finn, “The fiduciary principle”, in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Calgary, Vancouver, 1989) 1, at p.4
- ²⁰ 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
- ²¹ Macgillivray on Insurance Law D. Owen, J. Birds, N. Leigh-Jones (2004)- London: Sweet & Maxwell
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- ²⁴ [1989] 1 QB 433
- ²⁵ [1992] 1 All E.R. 453
- ²⁹ Hadley Design Associates v Lord Mayor and Citizens of the City of Westminster [2003] EWHC 1617 [TCC]
- ³⁰ [1999] BLR 194
- ³¹ See n.7, supra
- ³² See n.14, supra