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Contracting● in Good Faith—Giving the Parties what they Want

By Jim Mason*

Abstract: Examines the duty of good faith as an express obligation contained in the newer standard forms of construction 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.

LT [keywords to follow]

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.”¹

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¹ R.Goode, “The concept of good faith in English law”, Saggi, Conferenze e Seminari, 1992, available at <http://www.cnr.it/CRDCS/goode.htm>.

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.²

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.³ 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.”*⁴

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

² R. Honey and J. Mort, “Partnering contracts for UK building projects: practical considerations” (2004) 20 (7) Const. L.J. 361, pp.361–379.

³ RICS Contracts in Use Survey 2004, available at <http://www.rics.org/BuiltEnvironment/Buildingcontractforms/Contracts+in+use+report.htm>.

⁴ A. Heal, “Construction Partnering: good faith in theory and practice” (1999) 15 (3) Const. L.J. 167, pp.167–198.

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.⁵

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.⁶ 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.⁷ 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.⁸

⁵ M. Miner, “Time to contract in good faith?” (2004) 15(2) *Construction Law* 20, pp.20–22.

⁶ D. Sim (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html>.

⁷ C. Jansen and R. Harrison, “Good faith in construction law” (1999) 15 (3) *Const. L.J.* 346, pp.346–373.

⁸ *Carter v Boehm* [1766] 3 Burr. 1905.

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.⁹ 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 as¹⁰:

- 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.¹¹

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”.¹²

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

⁹ K. Groves, “The doctrine of good faith in four legal systems” (1999) 15 (3) Const. L.J. 265, pp.265–287.

¹⁰ See fn.6 above.

¹¹ “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.

¹² See fn.5 above.

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.”¹³

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.¹⁴ 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.¹⁵

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

¹³ P.D. Finn, “The fiduciary principle”, in T.G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto, Calgary, Vancouver, 1989) 1, at p.4.

¹⁴ 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.

¹⁵ D. Owen, J. Birds and N. Leigh-Jones, *Macgillivray on Insurance Law* (Sweet & Maxwell, London, 2004).

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”.¹⁶

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 given¹⁷ 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*¹⁸ 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*¹⁹ 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.²⁰ A trilogy of cases²¹ 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*²² said that

¹⁶ R. Goode, “The concept of good faith in English law”, Saggi, Conferenze e Seminari 1992, available at <http://www.cnr.it/CRDCS/goode.htm>.

¹⁷ B. Colledge, “Good faith in construction contracts—the hidden agenda” (1999) 15(3) Const. L.J. 288, pp.288–299.

¹⁸ [1989] 1 Q.B. 433.

¹⁹ [1992] 1 All E.R. 453.

²⁰ N. Jefford, “Soft obligations in construction law: duties of good faith and co-operation”, Keating Chambers in-house seminar, May 12, 2005.

²¹ *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.

²² LTL, August 7, 2000 (TCC).

“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 . . .”²³

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*²⁴ 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.²⁵ 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.

²³ *Hadley Design Associates v Lord Mayor and Citizens of the City of Westminster* [2003] EWHC 1617 (TCC).

²⁴ [1999] B.L.R. 194.

²⁵ See fn.7 above.

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.²⁶ 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.

²⁶ See fn.14 above.

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Good Faith in Construction – Will it Make a Difference and is it Worth the Trouble?

By Shy Jackson*

 [Keywords to follow]

Introduction

“Good faith” is a term used by both lawyers and lay men in a variety of circumstances, often with little thought as to what it means. In the construction industry, however, good faith has been considered in more detail and it has been argued that recognising a good faith duty will help to prevent or limit many of the problems in the construction industry.¹

While it is difficult to argue against good faith as a matter of principle, it is legitimate to question whether good faith obligations will, in fact, result in a material change to the way the construction industry operates and whether the benefits of imposing such a duty outweigh the change in culture, and the resulting uncertainty, which such a duty may bring. This article will, therefore, look at the potential practical impact of a good faith duty. The article will also consider the way good faith has developed under Australian and Israeli law, both common law jurisdictions whose experience is, therefore, more relevant than civil law systems.

This article does not presume to provide a definite answer as to whether imposing a good faith duty will be a positive development. The law of good faith is extensive and cannot be properly addressed in this forum. However, it will be

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¹ See Reziya Harrison, “King's College Construction Law Lecture” (1999) 15 Const. L.J. 346. See also David Jones and Marina Miner, “Time to Contract in Good Faith”, (2004) 15 (2) C.L. XXX and A.F. Mason, “Contracts, Good Faith and Equitable Standards in Fair Dealings” (2000) 116 L.Q.R. 66. Kelda Groves has also argued that such a duty would give the courts a more flexible tool to resolve construction disputes, “The Doctrine of Good Faith in Four Legal Systems” (1999) 15 Const. L.J. 265.

demonstrated that English law already provides adequate remedies in many cases and that the case for good faith is not as clear as some commentators suggest. Indeed, it will be shown that the current position in Australia demonstrates a retreat from good faith, having taken it further than English law.

The current position under English law

English law has traditionally resisted recognising a general duty of good faith.² However, a series of judgments by Bingham L.J., starting with *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*³ is often referred to as an attempt to promote the concept of good faith. In *Interphoto*, Bingham L.J. referred to the civil law system's acceptance of an overriding good faith principle, describing it as an obligation to "play fair", "coming clean" or "putting one's cards face upwards on the table". However, he also made it clear that English law has developed piecemeal solutions to deal with such problems. Similar statements were made by him in subsequent cases.⁴

Another example is *Beatty Civil Engineering Ltd v Docklands Light Railway Ltd*,⁵ in which the employer's representative took the place of the engineer under the contract. Bingham M.R. noted that Mr Ramsey Q.C. (as he then was), counsel for the employer, accepted without reservation that the employer was not only bound to act honestly but also bound to act fairly and reasonably, even if there was no such express obligation in the contract. He observed that, even on a more expansive approach to good faith, it may be that no more is required in the performance of a contract.

However, a few years earlier, the leading House of Lords' decision in *Walford v Miles*⁶ rejected any suggestions that good faith duties should be implied. Lord Ackner held that that an agreement to negotiate was unenforceable because it lacked the necessary certainty⁷ and that

"the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations . . . A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party".

This was recently confirmed by the Court of Appeal in *Ultraframe (UK) Ltd v Tailored Roofing Systems*,⁸ in which Waller L.J. noted the difficulties of defining good faith. The Court of Appeal's approach reflects the reluctance to try to define the meaning of good faith, especially in a commercial situation where it was

² See, for example, Vinelott J. in *Merton LBC v Stanley Hugh Leach Ltd* (1985) 32 B.L.R. 68, 80.

³ [1989] 1 Q.B. 433, 439.

⁴ *Timeload Ltd v British Communications Plc* [1995] E.M.L.R. 459, 468 and *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 472.

⁵ (1996) 78 B.L.R. 42, 46 and 47.

⁶ [1992] 2 A.C. 128, 138.

⁷ See also *P&O Property Holdings Ltd v Norwich Union Life Insurance Society* [1994] 68 P. & C.R. 261, where the House of Lords held an obligation to agree reasonable terms to be unworkable.

⁸ [2004] EWCA 585, [17].

open to the parties to agree, any terms they considered necessary. Jackson J. also affirmed *Walford v Miles* in his judgment in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*,⁹ finding an obligation to use reasonable endeavours to agree re-programming and payment to be unenforceable, being too uncertain and merely a statement of aspirations.

However, while *Walford v Miles* remains good authority that good faith will not be brought in as an implied term, the position may now be different in relation to express terms. The more recent Court of Appeal decision in *Petromec Inc v Petroleo Brasileiro SA Petrobras*¹⁰ concerned an express obligation to negotiate in good faith in relation to extra costs arising out of change orders. Although obiter, Longmore L.J. considered whether the express obligation to negotiate in good faith was enforceable. He did not regard the obligation as an agreement to agree, since it was part of an agreement which was itself legally binding and, therefore, a court could ascertain the reasonable costs and any losses arising out of a failure to negotiate in good faith. In addition, he did not think that it would be difficult to ascertain what would have been agreed if good faith negotiations had been carried out, since the court would simply look at the reasonable costs.

In his view, the greatest difficulty was the concept of bringing negotiations to an end in bad faith, which he described as somewhat elusive. However, he did not think that the difficulty of the problem should be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation.

He then went on to point out that in *Walford v Miles* there was no concluded agreement and no express agreement to negotiate in good faith. He observed that it would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered and expressed the view that to decide that the clause had no legal content would be for the law to defeat deliberately the reasonable expectations of the parties. He then expressed the hope that *Walford v Miles* would be reconsidered, as he did not consider that it was binding authority that an express obligation to negotiate is completely without legal substance.

Although obiter, this decision provides support to the suggestion that a court will enforce an express obligation to negotiate in good faith where the obligation is sufficiently certain and does not represent any enforcement difficulties.¹¹ This is particularly relevant to partnership agreements and the modern forms of contract, which seek to impose duties akin to good faith.

Finally, it is worth bearing in mind the decision by the House of Lords in *The Director General of Fair Trading v First National Bank*,¹² setting out the nature of the good faith duty under Reg.4 of the Unfair Terms in Consumer Contracts Regulations 1994¹³ (derived from EU law), which states that an unfair term

⁹ [2006] EWHC 1341 (TCC), [634]–[638].

¹⁰ [2005] EWCA Civ 891, [115]–[121].

¹¹ In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] UKPC 50, [47]–[57], the Privy Council expressly reserved its opinion on the desirability of good faith, having considered the authorities in detail and the views expressed by the New South Wales Court of Appeal suggesting good faith was undesirable.

¹² [2001] UKHL 52, [17], [36] and [54].

¹³ S.I. 1994/3159.

means any term which is contrary to the requirement of good faith, causing a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Schedule 2 to the Regulations lists the criteria for what constitutes good faith. The decision considers good faith in some detail and Bingham L.J.'s views in this case were followed by H.H. Judge Thornton Q.C. in *Westminster Building Co Ltd v Andrew Beckingham*,¹⁴ in which an adjudication clause in a residential contract was found not to contravene good faith.

Partnerships

The law of partnerships is becoming more relevant to construction law, albeit the term "partnership" is used in a loose and non-binding manner. It has been said that the most fundamental obligation which the law imposes on a partner is the duty to display complete good faith towards his co-partners in all partnership dealings and transactions,¹⁵ which is strikingly similar to descriptions of what partnering in construction is meant to achieve.

Indeed, this can be seen as the background to H.H. Judge Lloyd Q.C.'s judgment in *Birse Construction Ltd v St David Ltd*,¹⁶ in which he suggested that a non-binding partnership charter was intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured.¹⁷ He suggested that even though the terms of the partnership charter would not alter or affect the terms of the contract, an arbitrator would undoubtedly take such adherence to the charter into account in exercising the discretion to open up, review and revise.¹⁸

However, there is a reluctance in the construction industry to accept such additional duties as binding obligations by entering into genuine partnerships, in the legal sense of the word. The practical difficulties of this approach have been noted and it has been suggested that binding good faith duties would leave scope for disagreement on interpretation.¹⁹ In addition, as it has been pointed out that while the courts may recognise a good faith duty arising out of a partnering contract, it is difficult to see such duty extending beyond the obligation to do what is reasonably necessary to allow the contract to be performed.²⁰

¹⁴ [2004] EWHC 138 (TCC), [31].

¹⁵ *Lindley & Banks on Partnership* (18th edn, 2002), at 16-01. See also Lord Lindley's description of the duty in *Bissett v Daniel* [1853] 10 Hare 493 and Vice Chancellor Bacon's description in *Helmore v Smith* [1886] 35 Ch.D. 436, pp.436 and 444.

¹⁶ [1999] B.L.R. 194, 202.

¹⁷ He then considered the behaviour of other parties against the background of the duties described as "mutual co-operation and trust" and a relationship which was intended to "promote an environment of trust, integrity, honesty and openness" and "to promote clear and effective communication". He observed that these days one would not expect, where the parties had made mutual commitments such as those in the charter, to be concerned about compliance with contractual procedures if otherwise there had been true compliance with the letter or the spirit of the charter.

¹⁸ Chan and Suen have relied on this case to suggest that the concept of good faith in England is changing to reflect global practice, "Legal Issues of Dispute Management in International Construction Projects Contracting" (2005) 21 Const. L.J. 291.

¹⁹ Richard Honey and Justin Mort, "Partnering Contracts for UK Building Projects: Practical Consideration" (2004) 20 Const. L.J. 361.

²⁰ Barbara Colledge, "Obligations in good faith of partnering in UK construction contracts" [2000] 17(1) I.C.L.R. 175.

The recent case of *Button v Phelps*²¹ shows the courts' reluctance to impose fiduciary duties in a commercial joint venture agreement and the preference to use the straightforward remedy of damages for breach of contract.²² However, in certain circumstances, a partnership may arise in a commercial situation. Tugendhat J. found in *Beddow v Cayzer*²³ a "partnership at will" to exist on the basis of an opportunity to acquire shares although there was no written agreement and the parties did not regard their relationship as a partnership. This allowed a finding that certain conduct was a breach of a good faith obligation.

Modern standard forms

Modern forms of contract have also sought to create a legal relationship where co-operation, reasonableness and good faith play an important role. The *Petromec* decision has increased the likelihood that such express obligations will be enforced.

The Engineering and Construction Contract (ECC) represents an attempt to override the traditional objection to good faith and uses notions of co-operation, drawing from principles derived from good faith and fairness. This was an issue before Jackson J. in *Costain Ltd v Bechtel Ltd*,²⁴ when he looked, in the context of an application for an injunction, at the project manager's duty to act in the spirit of mutual trust and co-operation in a contract based on the ECC.

Jackson J. confirmed that the project manager's discretion had to be exercised as set out in *Sutcliff v Thackrah*²⁵ and resisted the suggestion that the detailed provisions of the contract meant that the project manager only had to consider the employer's interests. Significantly, he noted that the argument was presented by reference to a duty of good faith, which he observed was used as a synonym for "impartiality" or "honesty". However, he saw no point in considering the precise meaning of good faith, making it clear he only considered the issue of impartiality. This case, therefore, serves as an example of the court's use of existing law to deal with what can be described, and had been described during submissions in that case, as a good faith duty.

Another modern form of contract, PPC 2000, refers in the recitals to an agreement to work in mutual co-operation, and cl.1.3 requires the parties to "work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Project. . .".

However, the precise nature of these duties is more difficult to ascertain. By way of example, a client representative may instruct inspection, opening up and rectification works, at no cost to the client, of any designs, works or services which are not in accordance with the contract. This is similar to the power

²¹ [2006] EWHC 53 (Ch), [59] and [60].

²² It was alleged in this case that a party agreed to support and participate in a bid but, whilst still under contract, proceeded to join a rival bid which was not successful during the life of the agreement but ultimately succeeded. The court held at [57] that this was a breach of contract but not of a fiduciary obligation and it was held that a court should be wary of importing equitable obligations into a commercial relationship.

²³ [2006] EWHC 557 (QB); [2006] All E.R. (D) 283 (Mar), [254].

²⁴ [2005] EWHC 1018, [69].

²⁵ [1974] A.C. 727, i.e. in a fair and unbiased manner, holding the balance between the employer and the contractor.

under the Joint Contracts Tribunal (JCT) form of contract but, significantly, this power must be exercised “*without prejudicing the collaborative spirit of the partnering relationships*”. However, any instructions regarding defective works and additional works at no cost may well result in some dispute and some prejudice to the partnering relationship and it is difficult to see what was envisaged in this clause since it is unlikely that the client will simply give up this right, accepting defective works or paying for them²⁶ for the sake of the partnering relationship.

This demonstrates that the scope of the good faith duties in modern contracts remains far from clear. Certainly, until there is some guidance from the courts, parties will struggle to understand what the precise nature of their obligations is under such contracts.

Good faith in common law jurisdictions

The application of good faith in continental legal systems²⁷ has been covered extensively but a more interesting exercise is to look at common law jurisdictions where good faith obligations apply, e.g. the good faith duty in the United States Uniform Commercial Code,²⁸ since these jurisdictions have started from the same position as English law and have a similar approach as English law.

Australian law, like English law, does not recognise a general implied duty of good faith but there has been a move in that direction since the early 1990s.²⁹ However, recent cases show a reversal of this trend with the courts preferring to apply the express contractual terms. In contrast, Israel is a common law jurisdiction where good faith has been part of a codified law of contract since the early 1970s and the Israeli courts have expanded the use of good faith beyond contract, using it as a general overriding principle.

By way of example, s.6 of the Sales Law 5728-1968 reads “*Any obligation or right that arises from a sale contract shall be fulfilled or exercised in the customary manner and in good faith*” and ss.12 and 39 of the Contracts General Law 5733-1973 state:

“12

(a) *In negotiating a contract, a person shall behave in a customary manner and in good faith.*

²⁶ One possible explanation is that it is intended to prevent the client from insisting on exercising this power where the suspected defect is of a *de minimis* nature and such works would have a disproportionate effect on the rest of the works. However, it could be argued that this is already the case under existing law, see *Ruxley Electronics and Construction Ltd v Forsyth* [1955] 3 All E.R. 268 and *Farley v Skinner* [2001] UKHL 49.

²⁷ It is also worth noting the proposals for a common European law of contract, to include a good faith obligation. See Ole Lando and Hugh Beale, *Principles of European Contract Law*, Parts I and II Combined and Revised (Kluwer Law International, 2000).

²⁸ Section 1-203 of the Uniform Commercial Code provides that: “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” In addition, the American Restatement (2nd) of Contract states that “Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement”.

²⁹ *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 N.S.W.L.R. 234.

(b) *A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequences of the negotiations or the making of the contract, and the provisions of Sections 10, 13 and 14 of The Contracts (Remedies for Breach of Contract) Law 5731-1970 shall apply mutatis mutandis.*

...
 39 *An obligation or right arising out of a contract shall be fulfilled or exercised in a customary manner and in good faith.*"

The way in which the Australian and Israeli courts have dealt with good faith is described below, as part of the general analysis of good faith in practice.

Good faith—what does it mean in practice?

Good faith is an attractive concept in principle, but does it work in practice and is it needed when there are already various remedies under existing law? It is, therefore, worth looking at the various stages of a construction project in an attempt to evaluate the practical effect of good faith.

Pre-contractual negotiations—disclosure and tenders

The difficulty at this stage is that there is no contract imposing obligations on the parties and none may subsequently come into existence, which is addressed in Israeli law by applying a good faith obligation to pre-contractual negotiations.³⁰ Negotiating parties have opposing interests and the contract, which may one day represent a common aim, is yet to come into existence. Nonetheless, pre-contractual disclosure and tenders are two areas often considered as suitable for good faith obligations.

In so far as disclosure is concerned, a good faith duty could mean a duty to disclose all information which is relevant to the contract and it has been suggested that if contractors act as quasi-insurers in taking on risks, a good faith duty should apply to the supply of information as it applies in the law of insurance.³¹ However, English law does not impose a general duty of disclosure; the general principle is "*buyer beware*"³² and mere non-disclosure does not constitute misrepresentation. The law of misrepresentation and deceit will provide an adequate remedy in other cases.

Imposing a disclosure obligation is likely to result in additional costs being incurred by a party who is obliged to provide information, especially if providing such information requires a costly exercise, e.g. carrying out ground conditions investigation or verifying the accuracy of earlier reports or calculations by other consultants.

³⁰ Section 12 of the Contracts General Law 5733-1973.

³¹ John Barber, "Risks in the Method of Construction", John Uff and Philip Capper (eds), *Construction Contract Policy* (Centre of Construction Law and Management, King's College London, 1989), p.64.

³² *Bell v Lever Brothers Ltd* [1932] A.C. 161. It has also been held that passive acquiescence in self deception does not void a contract: *Smith v Hughes* (1871) L.R. 6 Q.B. 597.

In the context of partnerships, the recent case of *Conlon v Simms*³³ established that a duty of good faith and, specifically, disclosure exists in a partnership context at the negotiations stage, before a partnership is formed. This could be relevant to the negotiation of partnership arrangements, especially if the nature of any quasi-partnership duties remain unclear, but shows the risk of proceedings on this basis.

In any event, a duty of good faith is only likely to make a difference where one party is in possession of relevant information which the other party is unlikely to raise questions about and which cannot be regarded as part of the risk included in the contract price. In reality, it is difficult to see why a party would not in ordinary circumstances disclose such information or point to it as being relevant. Where an employer is reluctant to provide information, this is usually due to genuine concerns regarding the risk that such information proves inaccurate or out of date and is relied upon by the contractor.

A duty to disclose is, therefore, likely to result in additional costs by the employer ensuring that the information is accurate or factoring this risk into the overall price, but it will have limited effect in reality. Further, how far should it extend? It could be argued that the same duty will require the contractor to disclose any relevant information it may have, which could include any assessments carried out by the contractor when preparing its offer or information gained from other projects, e.g. on building methods and design issues. The resulting uncertainty of such a duty may well result in a flood of information accompanied by wide legal disclaimers. It is difficult to see the practical benefit of a good faith duty in such circumstances.

Disclosure is much more of an issue in tenders, as vividly demonstrated in *State of Israel v Fever*.³⁴ In this case, decided in 1987, the government of Israel published and awarded a tender concerning the demolition of two properties in the Sinai Peninsula, failing to disclose that it was in negotiations to sell one of the properties. Having awarded the tender, it then used a contractual power to omit the demolition works relating to the sold property. The Israeli Supreme Court found this to be breach of the statutory pre-contractual duty of good faith, since the government should have disclosed that it was negotiating to sell one of the properties and could not simply rely on its contractual right to avoid the contract applying to that property.

However, the Court of Appeal in *Blackpool & Fylde Aero Club Ltd v Blackpool BC*³⁵ made it clear that a party inviting tenders had a duty "to act in good faith—not to issue a sham invitation . . .". This was described as a contractual right and in *Harmon CFEM v House of Commons*³⁶ H.H. Judge Humphrey Lloyd Q.C. also held that the requests for the submission of tenders and the

³³ [2006] EWHC 401 (Ch). However, it appears that the same remedies would have been available in an action for deceit and it is less clear whether the breach of the good faith obligation had a material effect on the remedy awarded.

³⁴ Civil Appeal 144/87 P.D. 44 Vol. 3 1990.

³⁵ [1990] 1 W.L.R. 1195, 1202, per Bingham L.J.

³⁶ [1999] 67 Con. L.R. 1, [216]. The bodies responsible for carrying out works wished for as much work as possible to be allocated to UK firms and, after a tendering process, the contract was ultimately awarded to a British competitor. The claim included a claim for damages for the breach of the implied contract said to arise from the requests for the submission of tenders and the response thereto.

response created an implied contract, including an implied obligation to treat tenderers who responded equally and fairly.³⁷

These cases, although concerning public authorities, demonstrate the obligations of fairness, akin to good faith, that apply where a tender is concerned. The clear reference to contractual rights within an implied contract means these duties can apply more widely.³⁸

However, imposing an express duty to disclose all relevant information is likely to be difficult in practice, since a line will need to be drawn between information which needs to be disclosed despite the fact that it is likely to be commercially sensitive and information which can be withheld.³⁹ Therefore, disclosure can only be justified in relation to information which is directly relevant to construction risks, rather than commercial risks (e.g. insolvency). However, these construction risks are already factored into the contract price or provided for in other ways so imposing a good faith duty of disclosure will make little difference in practice.

The construction stage

In contrast, during the construction stage the parties act on the basis of the negotiated and express obligations set out in the contract. While a good faith duty may be acceptable during the pre-contractual stage when there is no agreement in place, imposing such a duty once the parties have expressed their obligations in writing is more difficult to justify.

Exercising discretion

It could be argued that the exercise of discretion should be made subject to good faith. However, it has been held recently that in commercial contracts discretion must be exercised “. . . *honestly and in good faith* . . . *it must not be exercised arbitrarily, capriciously or unreasonably*”.⁴⁰ This is even clearer in the case of the architect/engineer, where it is well established that they must act in a fair and unbiased manner,⁴¹ holding the balance between the client

³⁷ Judge Lloyd Q.C. also considered Canadian and Australian cases (at [210]–[213]), before finding that under English law a contract may come into existence in the public sector whereby an employer is impliedly obliged to consider all tenders fairly.

³⁸ Similar issues were considered by Privy Council in *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, which upheld a New Zealand Court of Appeal decision. This concerned competitive tendering and the Privy Council agreed there was a good faith duty (at [45]), but that it did not mean there was a need to act judicially or in a way which would render it amenable to judicial review.

³⁹ By way of example, the employer's financial position and business plans will be of great interest to a tenderer, but it would be wrong to suggest that such information should be disclosed as a matter of course.

⁴⁰ *Gan Insurance v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, at [62]. The position was also recently summarised by Potter L.J. in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287; [2005] I.C.R. 402, [26]–[46], where a duty to consider a bonus was described as a duty to “exercise discretion reasonably and in good faith”. However, Potter L.J. made it clear at [30] that this did not amount to implying good faith, which he said did not exist in English contract law.

⁴¹ *Sutcliffe v Thackrah* [1974] A.C. 727.

and the contractor, as recently confirmed by the Court of Appeal in *Amec Civil Engineering Ltd v Secretary of State for Transport*.⁴²

Therefore, there is already a duty to exercise discretion reasonably and fairly and there is little need in this area for an additional good faith duty.

Technical arguments and strict interpretation

Can good faith be relied upon to stop parties from what has been described in *Automasters Australia v Bruness*⁴³ as cynical resort to black letter law or the literal meaning of a contractual provision? In that case, it was successfully argued that a notice of default and the subsequent termination, based on contractual rights, were in breach of an express term to deal in good faith. The Supreme Court of Western Australia held that the good faith obligation meant a party could not exercise rights capriciously or unreasonably and was obliged to consider the legitimate interests of all parties to the contract.

Similarly, in *SBM v Rokach*⁴⁴ the Israeli Supreme Court held that good faith prevents reliance on minor breaches, such as a delay in making a small payment, and that a contractual right to suspend the works had to be exercised in good faith. Therefore, raising technical arguments could be the type of unmeritorious conduct which good faith could be relied upon to prevent.

In relation to notices, the leading case of *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*⁴⁵ made it clear that a technically defective notice will be valid if its intention was clear to a reasonable recipient. However, when the contractual requirements are clear, the courts will not prevent a party from insisting on its strict rights. This happened in *Lafarge (Aggregates) Ltd v Newham LBC*⁴⁶ in which a contractual deeming provision was effective in invalidating a notice which was actually received within the required time period.⁴⁷

Similarly, in *Roichman Shomron Brothers*,⁴⁸ the Israeli court did not allow a party to avoid the strict requirements of the contract (requiring only the use of concrete of an approved standard) by arguing that insisting on them would be a breach of good faith. In *Meir Ken-Tor v Shlomo Alon*,⁴⁹ the court applied the same principles as English law, to find that an employer could insist on

⁴² [2005] EWCA Civ 291, where the validity of an engineer's decision under clause 66 of the ICE conditions was questioned on the basis of the engineer's failure to abide by the rules of natural justice. May L.J. stated (at [47]) that "Under clause 66 the engineer is required to act independently and honestly. The use by the New Zealand Court of Appeal of the word 'impartially' does not, in my view, overlay independence and honesty so as to encompass natural justice, as Mr Ramsey appeared to contend. I would not be coy about saying that the engineer has to act 'fairly', so long as what is regarded as fair is flexible and tempered to the particular facts and occasion".

⁴³ [2002] W.A.S.C. 286, [357], referring to the judgment of Barrett J. in *Overlook v Foxtel* (2002) Aust. Contract R. 90-143.

⁴⁴ Civil Appeal 765/90 P.D. 46 Vol. 1 2001.

⁴⁵ [1997] A.C. 749.

⁴⁶ [2005] EWHC 1337 (Comm).

⁴⁷ The High Court upheld an arbitrator's decision that a notice was too late due to a deeming provision (under which the notice was deemed to arrive two days after posted) although in reality it arrived within the specified time limit.

⁴⁸ Civil Appeal 2054/98 P.D. 56 Vol. 2 2002.

⁴⁹ Civil Appeal 524/83 P.D. 40 Vol. 2 1984.

his contractual right and refuse to take possession due to defects which went beyond minor aesthetic defects.

In a construction context, the same need for certainty has been used to justify clauses requiring the contractor's notification of a delay event within a fixed period as a pre-condition to recovery, even when timely notification is not possible. The question is, therefore, whether good faith should be used to prevent an employer from relying on a minor delay in notification to avoid liability, if the minor delay in notifying had no effect in practice and was not due to any default by the contractor. This is one of the criticisms levelled at the third edition of the ECC⁵⁰ as cl.61 contains strict notification provisions setting absolute time bars so that a failure to comply will prevent recovery.⁵¹

This demonstrates the inherent difficulty with good faith duties, bearing in mind the ECC is designed specifically to include such duties. It could be argued that the general co-operation duties in cl.10.1 should prevent an employer raising such a defence, thereby defeating the intended early warning incentive which is the rationale behind this provision. Indeed, allowing an employer to rely on such a clause to deny an extension of time would result arguably in an unjustified windfall which would not be possible under the traditional forms of contract. McInnis, in his commentary on the second edition,⁵² acknowledged that the clause may be seen to operate harshly but stated that "a choice has been made and a balance has been struck", explaining that the advantages of settling issues outweigh the potential hardship caused by this provision.

This is a good example of the difficulty of applying good faith principles in practice and this could be seen as the basis for the New South Wales Court of Appeal decision in *Vodafone v MIL*,⁵³ finding there was nothing wrong in Vodafone using a contractual power to fix a target of nil, although it effectively negated the contract and brought it to an end.

However, the House of Lords made it clear recently in *Sirius International Insurance Co v FAI General Insurance Ltd*⁵⁴ that the courts will not interpret a contract on the basis of its literal meaning if it makes no commercial sense. Accordingly, rules of interpretation allow courts to avoid the effect of a pure technical argument when it makes no sense. This is sufficient to deal with genuinely unmeritorious arguments and there is little which can be added by a good faith obligation.

⁵⁰ John Redmond, "Shot by both sides", (2006) *Building*, January 20, 57, John Redmond, "That'll do nicely", (2005) *Building*, June 27, 55.

⁵¹ Clause 61 is also more severe on the employer. If the project manager does not notify his decision within one week of the contractor's notification and fails to respond to the contractor's further notification then, after a further two weeks, he is deemed to have accepted the event as a compensation event.

⁵² *The New Engineering Contract: A Legal Commentary* (Thomas Telford Publishing, 2001), pp.455-457. At p.84, McInnis suggests that the express duty of co-operation might suffice to import good faith notions.

⁵³ [2004] N.S.W.C.A. 15.

⁵⁴ [2004] UKHL 54, [19]. See also Lord Diplock's opinion in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191, stating that, if a detailed semantic and syntactical analysis will lead to a conclusion that flouts business common sense, it must yield to business common sense (at 201).

Duties to co-operate and to warn

The duty to co-operate is often seen as a good faith obligation and it is commonly referred to in partnership agreements. However, this duty already exists under English law originating from Lord Blackburn's dictum in *Mackay v Dick*.⁵⁵ In *Merton LBC v Stanley Hugh Leach Ltd*,⁵⁶ Vinelott J. made it clear that although the courts will imply a duty to do whatever was necessary to carry out the contract, this did not amount to good faith which was not part of English law.

There is, therefore, a balance between what must be done to allow the contract to be performed and what may be done to assist one party in the performance of its obligations, similar to the balance between good faith obligations and a party's ability to act in its own interest. This was the thinking behind the decision in the Australian case of *WMC Resources Ltd v Leighton Contractors Proprietary Ltd*,⁵⁷ which despite describing this duty as good faith, accepted that a party could look to its own interest even when under an implied obligation to agree the value of variations. Therefore, to the extent that co-operation is required, the existing duty is sufficient.

Another example of a good faith duty is the duty to warn. While it is unusual to find such an express contractual provision, this duty has been recognised by the English courts in *Edward Lindenberg v Joe Canning*⁵⁸ and more recently by the Court of Appeal in *Plant Construction Plc v Clive Adams Associates*,⁵⁹ finding an obligation on the sub-contractor to warn of a risk arising from another consultant's design.⁶⁰ It is difficult to see the basis for extending this duty further, as it will have significant implications, requiring parties to take steps well beyond their contractual duties to avoid a potential liability.

Finally, in *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd*⁶¹ it was suggested by the trial judge that applying commercial pressure could amount to bad faith if it went against the agreement, but the Federal Court of Australia found this difficult to accept. Under English law, the doctrine of economic duress will provide a remedy when the conduct of a party is serious enough and, although rare, this principle has been recognised recently in a construction context.⁶² This serves as a further example of the law providing a remedy in a situation which may otherwise require reliance on good faith principles.

⁵⁵ [1881] 6 App. Cas. 251, 263.

⁵⁶ See fn.2 above. In a dispute concerning delays and loss and expense claims, the contractor argued that the delay was due to lack of co-operation on the part of the architect. It was held that there was an implied term that a party would not hinder or prevent a contractor.

⁵⁷ [1999] Const. L.J. 488, where a clause required parties to attempt to reach agreement as the first step in determining the value of variations.

⁵⁸ (1992) 62 B.L.R. 147, 161.

⁵⁹ [2000] B.L.R. 137, pp.147 and 148.

⁶⁰ The duty to warn was also considered in *Aurum Investments Ltd v Avon Force Ltd* [2001] Const. L.J. 145 where it was held that there are circumstances where a contractor would be under a duty to warn, but not on the specific facts of that case.

⁶¹ [2005] F.C.A. 288.

⁶² *Carillion Construction Ltd v Felix (UK) Ltd* [2001] B.L.R. 1 and *Capital Structures Plc v Time & Tide Construction Ltd* [2006] B.L.R. 226.

Dispute resolution

During the contract, or after it, disputes result in the parties' interests being at their most opposed and the common goal of completing the works is often superseded by the desire to increase monetary recovery. Arguably, therefore, it is at this stage that good faith could make the most significant difference.

In reality, however, the popularity of mediation and other alternative dispute resolution (ADR) methods has resulted in less disputes proceeding all the way to trial. The promotion of ADR by the courts has encouraged this trend, imposing costs penalties.⁶³ Many express dispute resolution clauses require a good faith discussion prior to mediation and any subsequent formal dispute resolution methods and the use of such clauses was considered and found to be effective in England in *IBM v Cable & Wireless*.⁶⁴ In *Aiton v Transfield*⁶⁵ the New South Wales Supreme Court emphasised the need for good faith in dispute resolution and did not think it was too uncertain. This is clearly correct, but this cannot justify imposing a general good faith duty when undertaking ADR. The benefits of ADR arise from the parties' willingness to participate in what is meant to be a voluntary process. Imposing such a duty will simply give grounds for further disputes as to what conduct during ADR is in breach of good faith, detracting from the effectiveness of the process.

In addition, the Woolf reforms have changed the nature of litigation and in *Three Rivers*⁶⁶ Lord Scott suggested that litigation following the Woolf reforms is no longer an adversarial process. While this may not reflect conventional thinking, anecdotal evidence suggests that there are now fewer cases which reach the courts. The practical effect of these changes can be argued to be similar to a good faith obligation applying to parties' conduct. This is likely to be reinforced by the new TCC Guide, which sets out the various ways in which proceedings can be dealt with more quickly and efficiently.⁶⁷

Finally, the requirements of the Pre-Action Protocol (introduced as part of the Woolf reforms) also result in more openness and an exchange of information at an early stage with general duties on parties to co-operate in the exchange of information, in order to achieve a cost-effective resolution of the dispute. The sanction for non compliance is through an award of costs.⁶⁸

⁶³ *Halsey v Milton Keynes General NHS Trust* [2004] EWHC Civ 576, *Burchell v Ballard* [2005] EWHC (Civ) 358 but note the more recent decision in *The Wethered Estate Ltd v Davis (Michael)* (July 15, 2005), representing a move away from the *Dunnett v Railtrack Plc* [2002] EWCA Civ 303 approach.

⁶⁴ [2002] All E.R. (D) 227, but note that the Hong Kong Administrative Region Court of Appeal reached the opposite conclusion in *Hyundai Engineering and Construction Co Limited v Vigour Ltd* [2005] B.L.R. 416 (CA (HK)).

⁶⁵ See n.48 above.

⁶⁶ *Three Rivers District Council v Governor and the Company of the Bank of England (No 5)* [2004] UKHL 48, [29].

⁶⁷ See H.H. Judge Coulson Q.C., "The New TCC Guide: Putting the Users First" (2006) Const. L.J. 373.

⁶⁸ In *Phoenix Finance v Federation International* [2002] EWHC 1242, a claimant was ordered to pay the costs of two defendants on an indemnity basis when it joined them to a claim without providing them with a letter before action. This was despite the fact that no Pre-Action Protocol directly applied to the case and that the Practice Direction did not, at that time, set out a procedure for all parties to follow prior to the issue of proceedings. See also *Daejan Investments Ltd v Buxton Associates* [2004] B.L.R. 223.

However, the Pre-Action Protocol also results in a front-loading of costs before litigation commences formally and which a party cannot recover even if it is able to show that its position was justified.⁶⁹ Similarly, the Protocol can be relied upon by parties who seek to delay matters by requiring detailed information to be provided, supported by the threat of costs sanctions for failure to comply with the Protocol.

Having said that, the prevalent use of adjudication under the Housing Grants, Construction and Regeneration Act 1996 is one area where the advances in court procedure do not play a role. The lack of procedure and the tight timetable mean that the parties can use various tactics which would not be possible in court or arbitration proceedings. Nonetheless, it is difficult to see good faith being applied in the context of the speedy process which is adjudication⁷⁰ and it is not difficult to imagine the mischief which might be caused by requiring adjudications to be carried out in good faith. For the same reason, there is little point in applying a Pre-Action Protocol to adjudication as has been suggested recently.⁷¹ Indeed, imposing further obligations in the adjudication process will go against the aim of a flexible quick and cost effective process. There has been a trend for adjudication to become more similar to litigation and a pre-action protocol would make that even more so, depriving the process of its main benefit which is its flexible structure allowing a very quick process.

Conclusion

Overall, it can be seen that English law already provides for duties akin to good faith in several significant respects. It is acknowledged that such duties can be extended by an express good faith duty and this is what contracts such as the ECC and PPC 2000 seek to achieve. Express good faith obligations may be enforced if there is sufficient certainty, but not otherwise. In any event, it is less clear whether extending duties on this basis will result in any material benefits to parties in a contractual relationship as existing law already provides adequate remedies and there is some uncertainty in relation to the scope of duties described as duties to act for the benefit of the contract. Adding express good faith duties will only add to the uncertainty.

There will always be cases where circumstances fall outside existing principles and where a good faith duty might make a material difference. Nonetheless, it can be validly questioned whether providing remedies for a small number of claims justifies implying good faith obligations generally, where the parties did not choose to include them as part of their agreement. This can be justified for

⁶⁹ This was the case in *McGlenn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC), where the claimant asserted substantial claims against the contractor, architect and engineer. This resulted in extensive pre-action correspondence but the claim against the architect was not pursued. The architect failed to recover his pre-action costs.

⁷⁰ In *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] B.L.R. 764, H.H. Judge Toulmin C.M.G. Q.C. justified the slip rule on the basis of an implied term, as "Parties acting in good faith would be bound to agree at the start of the adjudication that the adjudicator could correct an obvious mistake . . .". However, it can be questioned whether a good faith duty can be relied upon to justify implying such a term when a good faith duty is not recognised and it is difficult to see how any other terms could be implied on this basis.

⁷¹ Richard N.H. Anderson, "For the Greater Good: a Pre-Adjudication Protocol?" (2006) 22 Const. L.J. 437.

consumer contracts, but not in a commercial context. Significantly, it is less clear that imposing such a good faith duty will lead to fewer disputes.

It can also be questioned whether the law can or should be used to resolve what are in reality ethical and moral issues. An assessment of good faith requires an examination of parties' (subjective) motives in the context of general standards of what is considered by society as being fair (described by Bingham L.J. as "*commercial morality*"⁷²). As pointed out by Landsberg and Megens,⁷³ good faith may mean different things to different people, depending on the cultural and political background, making it particularly difficult to apply in an international context.

In addition, the recognised tension between a good faith obligation and the right of a party to act in its own commercial interest means that every decision will depend on its own facts and, as has been held by the courts in Israel,⁷⁴ on what society may consider to be fair at the time. This increases uncertainty, and it is difficult to justify decisions on such a basis in a commercial context, when existing law already provides adequate remedies.

This was described recently by Gibson L.J. as

"... a paradox in the notion of what an honourable and reasonable person would do in the context of an arm's-length commercial negotiation. . . . The phrase 'honest and reasonable' is not a term of art. It is a judicial attempt to sketch a line beyond which conduct may be regarded as unconscionable or inequitable. Its duality, however, is recognition that honesty alone is too pure a standard for business dealings because it omits legitimate self interest; while reasonableness alone is capable of legitimising Machiavellian tactics. . . . Nobody is bound, even in honour, to help his opposite number to negotiate to the best advantage".⁷⁵

The same doubts have been expressed in Australia and recently, in *Esso Australia Resources v Southern Pacific Petroleum NRL*,⁷⁶ Warren C.J. made the following comments, having noted that the development of the law relating to good faith has travelled an almost full circle:

"If a duty of good faith exists, it really means that there is a standard of contractual conduct that should be met. The difficulty is that the standard is nebulous. Therefore, the current reticence attending the application and recognition of a duty of good faith probably lies as much with the vagueness and imprecision inherent in defining commercial morality. The modern law of contract has developed on the premise of achieving certainty in commerce. . . . Ultimately, the interests of certainty in contractual activity should be interfered with only when the relationship between the parties is

⁷² *The Director General of Fair Trading v First National Bank* [2001] UKHL 52, [17], [36] and [54].

⁷³ Ross Landsberg and Peter Megens, "Applications of Good Faith in Contracting" [1996] 13(2) I.C.L.R. 180.

⁷⁴ *Moshe Rucker v Moshe Salomon*, Civil Permission to Appeal 6339/97 P.D. 55 Vol. 1 2001.

⁷⁵ *George Wimpey UK Ltd v V.I. Construction Ltd* [2005] EWCA 77, [58], [60] and [62]. Gibson L.J. observed that, in this case, an honourable person negotiating would have asked the other party if it realised its mistake, but doubted whether a reasonable negotiator would do so.

⁷⁶ [2005] V.S.C.A. 228 (September 15, 2005), [2].

unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context. Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise, leaving aside duties that might arise in a fiduciary relationship. If one party to a contract is more shrewd, more cunning and out-manoeuvres the other contracting company who did not suffer a disadvantage and who was not vulnerable, it is difficult to see why the latter should have greater protection than that provided by the law of contract."

In conclusion, it is suggested that any development of good faith should be limited to express good faith obligations, which can already be found in modern standard forms or partnership arrangements. However, the current reluctance to impose such binding obligations, through binding partnerships, reinforces the argument that the perceived benefits of good faith duties are outweighed by the resulting uncertainty. Disputes in the construction industry are caused by a variety of factors, but not usually by what can be regarded as a failure to act in good faith. Imposing a good faith duty is unlikely to solve these problems and may well create new ones. Overall, it can be questioned whether the benefits of good faith will outweigh the problems created by imposing such a duty indiscriminately.