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Good faith: How have English courts responded to notions of 'good faith' in the interpretation of modern standard forms of construction contract?

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Abstract

Modern standard forms of construction contract, characterised by the language of good faith, are now commonplace. Expectations of trust and co-operation underpin the modern forms, embracing the ideals of collaboration and partnering. A general duty to act in good faith, however, is not recognised by English law. This dissertation focusses on the response by English courts to notions of good faith in the performance of modern construction contracts. The study includes a detailed examination of good faith type obligations within modern construction contracts most commonly used in the UK, including the NEC and JCT forms. The research adopts a doctrinal methodology using case law and statute as the primary source of information. The doctrine of good faith, originating from Roman law, is recognised in civil law legal systems and some common law legal systems. A duty to act in good faith exists in English law but its application is limited to contracts for insurance, employment and fiduciary relationships. Alternative doctrine such as estoppel, restitution and misrepresentation has been developed by English law to remedy inequitable outcomes. Where express terms giving effect to a duty of good faith have been used, English courts have been reluctant to allow this to override other express terms. This research argues that a general duty of good faith in English contract law is necessary for the effective use and development of modern standard forms. To assist the English courts, new legislation and more clearly defined terms for good faith in contracts are recommended.

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1.0 Introduction

1.1 Background

Following Latham,¹ and Egan,² the UK construction industry has increasingly shown its willingness to use contracts which include obligations synonymous with the doctrine of good faith. Terms such as 'trust and co-operation', 'fairness', 'collaborative' and 'trust and respect' have become features of the modern standard form of construction contract. Even the term 'good faith' is used. Described as 'relational' contracts,³ the modern forms are central to this new approach and are becoming increasingly popular for procuring works and services in the UK.⁴

Most common of the modern forms are NEC contracts; endorsed by the UK government they have been used to deliver significant investment in the UK. Notable projects include the London 2012 Olympics, Heathrow's Terminal 5, NHS Hospital framework (P21plus) and Crossrail. High Speed Two (HS2) with an estimated cost of £19.4bn,⁵ is also being delivered under the NEC. The ACA forms have been used extensively for housing projects including a £1.2bn refurbishment and new build programme in Glasgow.⁶

Partly in response to Latham, the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (the 'Construction Act') sought to enforce more equitable construction contracts. The implementation of European legislation has also brought about the introduction of more general standards of good faith into English law. More recently the reporting of performance payment practice has become the subject of new legislation.⁷

For many countries operating under a civil law legal system, a duty of good faith is enshrined in civil codes. In the United States, which operates under a common law system, the duty of good faith is required in the performance of all contracts. In Canada, also a common law system, the Supreme Court sought to make the common law of contract '...more coherent and more just.' The court identified two steps; first to acknowledge good faith as '...a general organizing principle' and second to recognise there should be an implied duty to '...act honestly in the performance of contractual obligations.'⁸

English courts, however, have traditionally been opposed to implying a duty of good faith, or accept that an express duty of good faith should affect the rights of the parties in a freely negotiated contract. In response to unconscionable bargains and unfairness the courts have relied on alternative equitable remedies.⁹ This refusal to recognise a general obligation of good faith in English law has been described as '...swimming against the tide.'¹⁰ Morgan wrote that the approach by English courts is 'wrong-headed' and one which undermines relational contracting.¹¹

¹ Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO London 1994).

² John Egan, *Rethinking Construction: The Report of the Construction Task Force to the Deputy Prime Minister, John Prescott, on the scope for Improving the Quality and Efficiency of UK Construction* (HMSO 1998).

³ Arthur McInnes, 'The New Engineering Contract: Relational Contracting, Good Faith and Co-operation' (2003) ICLR 128,130.

⁴ RIBA Enterprises Ltd, *NBS National Construction Contracts and Law Survey 2015*, 16-17.

⁵ Estimate of expense for London to West Midlands (phase 1) route made by the UK government on 15 November 2013 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/372539/HS2-_Estimate_of_expense.pdf> accessed 02 August 2017.

⁶ Association of Consultant Architects, *Ten Years of Partnering Contracts: PPC2000/TPC2005* </ppc2000.wiserhosting.com/wp-content/uploads/2016/12/10-Year-Anniversary-PPC-and-5-Year-TPC.pdf> accessed 03 August 2017.

⁷ The Reporting on Payment Practices and Performance Regulations 2017.

⁸ *Bhasin v Hrynew* 2014 [2014] 3 SCR 494 [33].

⁹ Examples include the doctrines of estoppel; unjust enrichment and restitution; misrepresentation.

¹⁰ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [124].

¹¹ Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP 2013) 77.

The decision in *Yam Seng v International Trade Corporation* breathed new life into the good faith doctrine. Leggat J recognised the existence of a duty of good faith in employment and fiduciary contracts. He acknowledged that English law was not ready to imply a duty of good faith by default into all commercial contracts. However, he believed that there was;

....no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty [of good faith] in any ordinary commercial contract based on the presumed intention of the parties.¹²

Yam Seng was followed quickly in the same year by regression,¹³ but then found support in 2014.¹⁴ A year later the courts were again less willing, rejecting an implied duty of good faith.¹⁵

In *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*, Leggat J furthered the cause by stating, 'There is increasing recognition in the common law world of the need for good faith in contractual dealings.'¹⁶ However the court of appeal was keen to dispel the notion that good faith should be recognised; Moore-Bick J stating:

The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case.¹⁷

1.2 Rationale for research

In 2010 Furst said:

I foresee increasing reliance on 'good faith' obligations in litigation; certainly, to criticise the exercise of powers and discretions by the other contracting party and Project Manager/Engineer/Architect. At the very least such obligations reinforce the usual implied terms of co-operation and non-hindrance and, in appropriate cases, may well go further.¹⁸

Furst was not wrong and if the last few years are anything to go by it is unlikely that the courts have seen the last of alleged breaches of good faith.

¹² *Yam Seng* (n 10) [131].

¹³ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 *TSG Building Services plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC); *Fujitsu Services Limited v IBM United Kingdom Limited* [2014] EWHC 752 (TCC).

¹⁴ *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm); *Bristol Groundschool Ltd v Intelligent Capture and others* [2014] EWHC 2145 (Ch).

¹⁵ *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Company* [2015] EWHC 1322 (Ch); *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); *Mears Limited v Shoreline Housing Partnership Limited* [2015] EWHC 1396 (TCC).

¹⁶ *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) [97].

¹⁷ *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 [45].

¹⁸ Stephen Furst, 'Good Faith Trust and Co-operation', Keating Chambers Seminar 08 September 2010, 15 <www.citysolicitors.org.uk> accessed 11 June 2017.

Modern forms of construction contract are characterised by obligations of trust and co-operation signifying notions of good faith. The NEC form of contract operates in a global market.¹⁹ Steyn observed that 'English law serves the international market place and cannot remain impervious to ideas of good faith, or fair dealing.'²⁰

Good faith has been described as possessing a 'remarkably open-textured nature' consequently giving rise to 'a very considerable degree of legal uncertainty.'²¹ Disputes involving obligations of good faith, whether they are alleged to be implied into contracts or exist as express terms are ultimately about interpretation of contracts: an area of law of great importance to the construction sector. The method by which English courts interpret contracts continues to oscillate between applying 'commercial common sense' and 'literalism'.²²

The Civil Procedure Rules, made under the Civil Procedure Act 1997, give an overriding objective with the purpose of 'enabling the court to deal with cases justly and at proportionate cost.'²³ An obligation is placed on the parties in dispute to assist the court in achieving this objective.²⁴ As Furst noted, 'Thus the courts now expect the parties to engage in mediation in good faith and in the field of construction the availability of adjudication is evidently intended to limit expenditure on disputes.'²⁵

The use of collaborative type contracts in response to the government's desire for improved efficiency show no signs of decline. The Farmer report represents the latest criticism of the construction sector, one of the solutions to which remains procurement using partnering and aligned objectives.²⁶

Despite the move towards using contracts that include notions of good faith, there is uncertainty over how good faith presently operates in English law and how it will operate in the future. Where an area of the law is both uncertain and sensitive to facts, practitioners and academics alike need a greater depth of understanding. This research responds to this need and is the justification for addressing the discord that still exists in modern English construction law.

1.3 Overall aim

The overall aim of this research is to examine how English courts have responded to notions of good faith in the interpretation of modern standard forms of construction contract.

The objectives of this research are to:

- i) Identify where the doctrine of good faith originates from, what it is, and how it is applied by the law.
- ii) Identify and critically examine the development of equitable remedies as applied by English courts as alternatives to the good faith doctrine.

¹⁹ The publisher's own website provides case studies citing countries where the NEC form has been used, including; Abu-Dhabi, Australia, Guernsey, Hong Kong, India, Ireland, Netherlands, New Zealand, North Africa, Philippines, South Africa <www.neccontract.com/Case-Studies> accessed 31 July 2017.

²⁰ Johan Steyn, Contract Law: 'Fulfilling the Reasonable Expectations of Honest Men', 113 LQ Review 1997 433, 438.

²¹ Hugh Beale (ed), *Chitty on Contracts: Volume 1* (32nd edn, Sweet & Maxwell 2015) para1-042.

²² Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' Harris Society Annual Lecture Keble College Oxford 8 May 2017 <www.supremecourt.uk/docs/speech-170508.pdf> accessed 04 August 2017.

²³ Civil Procedure Rules (Amendment) 2017, Rule 1.1 <www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed 03 August 2017.

²⁴ Ibid Rule 1.3.

²⁵ Furst (n 18) 5.

²⁶ Mark Farmer, 'The Farmer Review of the UK Construction Labour Model: Modernise or Die' (Construction Leadership Council, 2016)

- iii) Identify the modern standard forms of construction contracts used in the UK, explore any obligations of good faith in their performance and examine the response of English courts to claims of bad faith.
- iv) Examine relevant decisions made by English courts to identify if there has been a change in the approach towards obligations of good faith in contract law.

Objective 1

Although the doctrine of good faith exists, it is not one that is generally recognised in English contract law. Establishing the legal principles which underpin good faith and where the doctrine is applied is therefore considered the necessary starting point for this research. Chapter 3 will consider the historical development of good faith, examine what good faith means, and identify where and how it is applied today.

Objective 2

To meet the overall aim of this project it will be essential to identify the alternative legal doctrines which English law has developed to remedy acts of unfairness and inequitable outcomes. Chapter 4 will address this aspect of the research. Further examination of these doctrines and how they have been applied will be made in Chapter 5.

Objective 3

Collaborative working with trust and confidence are central to the behaviour promoted by modern forms of construction contract. An examination of these forms and the response by the English courts to any express or implied obligations for the parties to act in good faith is a fundamental part of fulfilling the aim of this project. This part of the research will be covered primarily in Chapter 5.

Objective 4

The information needed to meet this objective will flow from the findings of the research carried out in pursuit of objective 3. Identifying any change in the approach by English courts will feature in the summary and conclusions of Chapter 5.

A summary and conclusion for each of the four objectives will be provided at the end of the relevant chapters. Chapter 6 will provide an overall conclusion, recommendations and suggestions for areas of future research.

2.0 Research methods

2.1 Doctrinal methodology

The overall aim and objectives of this research pose the question: 'what is the law?', reflecting the normative character of doctrinal research.²⁷ Doctrinal methodology as a legal research style has been described by Arthurs as 'research in law'.²⁸ The approach involves the development of legal 'doctrines' derived from the evaluation of legal rubrics²⁹ and is said to follow a deductive form of legal reasoning.³⁰ This style of legal scholarship is often referred to as a 'black-letter' approach, referring to the Gothic type set traditionally used in statements of legal principles.³¹

'Doctrine' is a Latin derivative meaning instruction, knowledge and learning. In law, the doctrine is one of legal principles derived from two primary sources of law: cases and statute.³² As explained by Chynoweth, doctrinal research is not without its critics³³, however it is still considered to represent the central method of legal research.³⁴

Good faith is a principle which penetrates all legal jurisdictions in one form or another, naturally pointing the legal scholar towards comparative law study. Reitz wrote that the comparative method 'consists in focussing careful attention on the similarities and differences among the legal systems being compared'.³⁵ The focus of this research is English law but to ignore other jurisdictions would leave a project which deals with good faith bereft of a key ingredient. It is not intended for this project to be a comparative law study but it will involve researching other legal jurisdictions. The justification for this approach is three-fold:

- i) Good faith is a well-established doctrine outside English law;
- ii) English case law dealing with good faith in construction contracts is limited;
- iii) English courts are not opposed to using judgments made in foreign jurisdictions as a point of reference.

2.2 Socio-economic influence

The concept of good faith is characterised by the way organisations and people behave and could be said to be influenced by standards of 'commercial morality',³⁶ as much as by the law. Building on the research of MacNeil,³⁷ McInnes states that 'In essence, society is the context in which contracts operate and thus establishes the boundaries for contractual relationships'.³⁸

²⁷ Paul Chynoweth, 'Legal research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell Publishing Ltd 2008) 30.

²⁸ Harry W Arthurs, 'Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law' (1983), Information Division, Social Sciences and Humanities Research Council of Canada, Ottawa.

²⁹ Chynoweth (n 27) 29.

³⁰ Michael Salter and Julie Mason, *Writing Law Dissertations: An introduction and Guide to the Conduct of Legal Research* (Pearson Longman Ltd 2007) 45.

³¹ *ibid* 44.

³² Terry Hutchinson & Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012), (17)1 *Deakin Law Review* 83-119 p84.

³³ Chynoweth (n 27) 28.

³⁴ Hutchinson (n 32) 85.

³⁵ John C Reitz, 'How to do Comparative Law' (1998) 46 *The American Journal of Comparative Law* 617-636, 620.

³⁶ *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 [17].

³⁷ Ian R Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (Yale University Press 1981).

³⁸ Arthur McInnes, 'The New Engineering Contract: Relational Contracting, Good Faith and Co-operation' (2003) *ICLR* 128,130.

A study of good faith and how it operates within the law could therefore require a socio-legal research style or a 'law in context' approach as defined by Arthurs.³⁹ Socio-legal research includes a broader range of themes than doctrinal methodology, encompassing both qualitative and quantitative methods of empirical research.⁴⁰ This approach is more commonly found in the study of the arts and humanities.⁴¹ Nonetheless socio-legal research has, over the last thirty years, gained increased recognition as a viable epistemological approach to legal scholarship.⁴²

Socio-legal research is associated with an interdisciplinary style; research about law. The approach considers law as a social entity with external influence as opposed to one that is focussed on internal enquiry.⁴³ Schwartz classifies socio-legal research as an 'external method' which is both 'cognitive and theoretical, the purpose of which is to provide 'a comprehensive philosophical and scientific rationality.'⁴⁴

Given the role that the law plays in regulating society, it is inevitable that legal research will involve some consideration of external social influences. Priestly JA expressed the view that good faith and fair dealing was '...the expected standard and anything less is contrary to prevailing community expectations'.⁴⁵ However, it is the social-economic background which gives rise to the research topic and its justification not the research method itself.

2.3 Research techniques and approach to data collection

The doctrinal approach to this project does not call for empirical research strategies such as data collection through surveys, interviews or case studies. Research will primarily involve obtaining and analysing relevant legal literature. A 'black letter' approach to legal research demands that the primary source of information is limited to case law and statute.⁴⁶ This research will not be wholly confined to a doctrinal methodology so it is deemed appropriate to draw upon support from authoritative text from secondary sources such as law books and journals.

2.4 Approach to data analysis

The analytical approach adopted is governed by the aim of this project, which is to address the question; 'what is the law?'.⁴⁷ The primary method employed will be one of deductive reasoning. This process is founded on case law and statute forming the basic axioms which are then applied to a specific situation.⁴⁸

The application of pure deductive logic in legal reasoning is limited to the extent that in any given situation the factual matrix will often differ. In these situations, the decision maker is forced to shift from deductive reasoning to analogical reasoning. This requires specific cases to be analysed to identify facts which are '...sufficiently similar to the facts of the subject case...' before the courts can apply the same approach.⁴⁹

³⁹ Arthurs (n 28).

⁴⁰ Michael Salter and Julie Mason, *Writing Law Dissertations: An introduction and Guide to the Conduct of Legal Research* (Pearson Longman Ltd 2007) 118.

⁴¹ Chynoweth (n 27) 37.

⁴² Salter (n 40) 119.

⁴³ Chynoweth (n 27) 30.

⁴⁴ Richard Schwartz, 'Internal and External Method in the Study of Law', (1992), 11(3) *Law and Philosophy* 179-199, 179.

⁴⁵ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 268E.

⁴⁶ Salter (n 40) 90.

⁴⁷ Chynoweth (n 27) 32.

⁴⁸ Salter (n 40) 91.

⁴⁹ Chynoweth (n 27) 33.

The initial focal literature research conducted for this project has highlighted the imperspicuous nature of good faith and absence of definitive legal rules in English law. The research has also revealed a dearth of cases dealing directly with good faith in construction contracts. Such situations will call for a different technique known as inductive reasoning. Chynoweth describes this as 'reasoning from a specific case to a general rule'.⁵⁰

2.5 Conclusion

This project requires 'research in law'. Research will therefore focus on doctrinal methods using case law and statute as the primary sources of information. Secondary sources will be relied upon particularly for establishing the historical development of good faith as set by objective 1 and the examination of modern standard forms of contract under objective 3.

Limited case law dealing specifically with matters of good faith in construction contracts will require the research to extend beyond the construction sector. Given the varied approach to good faith by different legal jurisdictions, an element of comparative law type study is considered informative.

⁵⁰ Chynoweth (n 27) 33.

3.0 Good Faith: its origins, principles and application

3.1 Introduction

This project involves the study of English law which is yet to fully recognise good faith in construction contracts. As part of this research it is therefore appropriate to identify where the doctrine of good faith originates from, its principles, and where it is applied by the law.

3.2 Origins of good faith in Roman law

The thirteen hundred years between the foundation of Rome in BC753 and the fall of the Roman western empire in 476AD represents the first period of Roman law. These civil laws were summarised in the law books of the Byzantine Emperor Justinian I in the sixth century AD.⁵¹

Two types of contracts existed; unilateral and bilateral. The former established rights in one party and duties in the other, the latter created rights and obligations for both parties. The doctrine of *stricti iuris*, a narrow and strict interpretation of the contract, applied to unilateral contracts. The obligation of *bonae fide* (good faith) was confined to bilateral contracts up until around the first century BC. Following this period an action founded on *exceptio doli* (bad faith) under unilateral contracts began to emerge.⁵²

Marcus Tullius Cicero, a Roman politician and lawyer in the first century BC, stated that, 'The foundation of justice is good faith, in other words truthfully abiding by our words and agreements.' Cicero advocated a stoical approach believing that we should 'accept that good faith (*fides*) is so called because what is promised becomes fact (*fiat*).'⁵³ Akenhead argues that good faith is derived from equity, a concept which can be found in the writings of Aristotle some three hundred years earlier.⁵⁴ Indeed it is well known that the Romans took much from the Greeks in their own intellectual development.⁵⁵

3.3 Good faith: the principles

Black's Law Dictionary defines good faith as the, 'Observance of reasonable commercial standards of fair dealing in a given trade or business'.⁵⁶ This definition is notable for its reliance in *Berkeley Community Villages Ltd & Anor v Pullen*⁵⁷ and *Bropho v Human Rights & Equal Opportunity Commission*.⁵⁸

Leggat J stated:

What good faith requires is sensitive to context. That includes the core value of honesty. In any situation, it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue.

⁵¹ Barry Nicholas, *An Introduction to Roman Law* (OUP 1975) 2.

⁵² *ibid* 162-164.

⁵³ Patrick Walsh (trs), *Cicero on Obligations De Officiis: Book 1* (OUP 2008) 10 para 23.

⁵⁴ Robert Akenhead, 'Through the Ages: Construction Law and all that' (March 2014) 186 *Society of Construction Law*, 5-6.

⁵⁵ Nicholas (n 51) 1.

⁵⁶ Bryan A Garner (ed), *Black's Law Dictionary* (7th edn, West Publishing Co 1999).

⁵⁷ [2007] EWHC 1330 (Ch).

⁵⁸ [2004] FCAFC 16.

He added that the requirement of honesty goes further than not telling lies and extends to correcting information later known to be false and not deliberately being evasive in response to requests for information.⁵⁹

Bingham LJ addressed the meaning of good faith in *Interfoto v Stiletto*, stating:

This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing.⁶⁰

In *Gold Group Properties Ltd v BDW Trading Ltd* an express term that the parties, 'will at all times act in good faith' was interpreted by the court to mean that:

...whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, [good faith] does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.⁶¹

In *Astor Management v Atalya Mining*, Leggat J considered the duty to act in good faith as a 'modest requirement'. Adding:

It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.⁶²

The Uniform Commercial Code (UCC) of the USA provides a definition of good faith describing it as, '... honesty in fact and the observance of reasonable commercial standards of fair dealing.'⁶³ The Restatement (Second) of Contracts states, 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'⁶⁴ Although the Restatement is non-binding it has provided persuasive authority implying good faith into commercial contracts.⁶⁵

In *Nova Contracting v City of Olympia*,⁶⁶ the Court of Appeals of Washington considered whether the local authority had breached a duty of 'good faith and fair dealing' in their obligations to review and approve submissions made by the Contractor. The Court took guidance from the notes accompanying the Restatement (Second) of Contracts, which characterises bad faith as conduct which would, 'violate community standards of decency, fairness or reasonableness.'⁶⁷

⁵⁹ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [141].

⁶⁰ [1989] 1 QB 433 (CA) 439D.

⁶¹ [2010] EWHC 1632 (TCC).

⁶² *Astor Management AG & Anor v Atalya Mining Plc & Others* [2017] EHCW (Comm) [98].

⁶³ The Uniform Commercial Code: Article 1 General Provisions (2001) Part 3 Territorial Applicability and General Rules <www.law.cornell.edu/ucc/1/1-201> accessed 07 July 2017.

⁶⁴ The Restatement (Second) of Contracts (2nd edition 1979) Section 205.

⁶⁵ Kelda Groves, 'The doctrine of good faith in four legal systems' (1999) CLJ 265, 270.

⁶⁶ No. 48644-0-II (Wash Ct. App. Apr. 18, 2017).

⁶⁷ Comment a to Section 205 of the Uniform Commercial Code.

The notes also state:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, wilful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.⁶⁸

The court held that the conduct of the local authority was in bad faith as they did not have an unconditional right to reject the Contractor's submissions and had abused their power in doing so.

In Australia, a clear link between the 'obligation to act in good faith and the obligation to act fairly and reasonably' has been made. Further, a party acting 'capriciously or in an oppressive, unfair or intimidatory manner' is indicative of conduct which is contrary to good faith.⁶⁹

3.4 Good faith in application

3.4.1 Civil law systems

Over five hundred years after the fall of the Roman empire, the Code of Justinian became the focus of attention in the universities and courts of Northern Italy. Except for England, this code of civil law spread across Europe and a common set of legal rules was established.⁷⁰ These civil law systems were operated by European continental countries.

The development of the civil law systems based on Roman law contrasts with English law and other jurisdictions which operate under a common law system. Civil law systems are characterised by codified legal principles which provides a framework within which judicial decisions are made. A common law system is based on judge-made law derived from decisions made in the courts.⁷¹ Whilst legislation exists, the common law still provides the primary rules by which the law of contract in English law is governed.

Many European countries now operate a civil law legal system which embraces good faith.⁷² German civil law is principally governed by a Civil Law Book; the Bürgerliches Gesetzbuch. Section 157 requires a general duty of good faith in performance of a contract, stating that, 'Contracts are to be interpreted as required by good faith, taking customary practice into consideration.' Section 242 states, 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.' However good faith is not a defined legal term.

Performance in good faith in French law imposes a duty of loyalty, co-operation and coherence. The French courts extended the Civil Code obligations of good faith or *bonne foi*, to the pre-contract relationship of the parties during negotiations. In 2016 the Code was subject to its first reform since 1904 (Ordinance No. 2016-131 of 10 February 2016.) The changes sought to provide a uniformed body of rules aligning the Code with the development of contract law in the French courts and other French codes.

⁶⁸ Comment d to Section 205 of the Uniform Commercial Code

⁶⁹ *Automasters Australia PTY Limited v Bruness PTY Limited* [2002] WASC 286 [388].

⁷⁰ Nicholas (n 51).

⁷¹ Gary Slapper and David Kelly, *The English Legal System* (16 edn, Routledge 2015) 4.

⁷² For example, Austria, Belgium, France, Germany, Italy, Netherlands, Portugal, Spain, Switzerland.

Article 1104 now states, 'Contracts must be negotiated, trained and executed in good faith.'⁷³ It is beyond the scope of this project to undertake any in-depth research of civil law legal systems. However, it is noted that the jurisdictions of Germany and France are the most representative and influential with their neighbours.⁷⁴ It is also worthy to record that good faith, a principle in Sharia law, applies to the six middle eastern countries of the Gulf Co-operation Council.⁷⁵ In the United Arab Emirates good faith is implied into all contracts subject to the Civil Transactions Law.⁷⁶

3.4.2 Two common law systems outside English law

3.4.2.1 United States of America

Apart from Louisiana, all fifty American states operate a common law legal system. Following the Declaration of Independence in 1776, the USA inherited the traditional English common law legal system.⁷⁷ The United States of America accepted the principle of good faith in contract law when the Uniform Commercial Code (UCC) was first published in 1952. The UCC was influenced by the German Civil Code and is adopted by all but a few American states.⁷⁸ Over the next two decades other countries including Canada, Australia and New Zealand followed.⁷⁹ Article §1-304 states: 'Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.'⁸⁰ The UCC goes one step further to reinforce compliance by prohibiting the exclusion of good faith obligations. However, it does permit the parties to agree the standard by which the obligation is to be measured.

The US courts have given a qualified acceptance of a duty of good faith.⁸¹ In *Kham*, the court held that where the contract was silent the principle of good faith was there to 'fill the gap' but should not be used to 'block use of terms that actually appear in the contract.'⁸² In *Mid-America* it was held that it would be harmful to the 'institution of contract' if the covenant of good faith were allowed to create '...new substantive terms that do not otherwise exist in the contract.'⁸³ The approach reflects the principle of 'freedom of contract found in English law.'⁸⁴

⁷³ French Civil Code as of 01st July 2013 <www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> accessed 06 July 2017.

⁷⁴ For example, Lithuanian Civil Code Lietuvos Respublikos civilinis kodeksas, 'LR CK'; Jan M Smits (ed) *Elgar Encyclopaedia of Comparative Law* (2006 Edward Elgar Publishing) 439.

⁷⁵ Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman.

⁷⁶ UAE Civil Transactions Law (Civil Code) Article 246(1) provides that 'a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith'.

⁷⁷ Laurence Friedman, *The History of American Law* (3rd edn, Touchstone 2005) 67.

⁷⁸ Kelda Groves, 'The doctrine of good faith in four legal systems' (1999) CLJ 265, 269.

⁷⁹ Jan van Dunné, 'On a Clear Day, You Can See the Continent: The Shrouded Acceptance of Good Faith as a General Rule of Contract law on the British Isles' (2015) CLJ 3,4.

⁸⁰ The Uniform Commercial Code: Article 1 General Provisions (2001) Part 3 Territorial Applicability and General Rules <www.law.cornell.edu/ucc/1/1-304> accessed 07 July 2017.

⁸¹ *Kham & Nate's Shoes No 2 Inc v First Bank of Whitting* [1990] USCA7 908 F 2d 1351 (7th Cir 1990); *Market Street Associates Limited Partnership v Dale Frey* 941 F 2d 588 (7th Cir. 1991).

⁸² *Kham & Nate's Shoes No 2 Inc v First Bank of Whitting* [1990] USCA7 908 F 2d 1351 (7th Cir 1990).

⁸³ *Mid-America Real Estate Co v Iowa Realty Co Inc* [2005] USCA8 267.

⁸⁴ *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 392E, 406D410D, 425.

3.4.2.2 Australia

Following independence in 1901, Australia's legal system was developed from the incumbent English common law approach inherited from the time of the European settlement in the eighteenth century.⁸⁵ Australian law therefore gives a worthy source of reference for this research.

The Australian courts have been willing to accept that obligations of good faith are enforceable.⁸⁶ In *Automasters Australia v Bruness*, the courts considered an express term obligating the franchisor to 'deal with the franchisee in absolute good faith.'⁸⁷ *Bruness* experienced difficulties in operating software provided by *Automasters* for processing invoices, which ultimately led to *Automasters* purported termination of the agreement. Finding in favour of *Bruness* the court decided that *Auto Masters* had acted:

...capriciously and unreasonably but also failed to recognise and have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract.⁸⁸

The courts have also been convinced that a duty of good faith can be implied into commercial contracts to limit a party's right to terminate for breach of contract.⁸⁹ Such an approach, however, has not been universally applied.⁹⁰ In *Pacific Brands Sport & Leisure v Underworks*, Finkelstein J stated that a duty of good faith is an incident (not an *ad hoc* implied term) of every commercial contract. However, he qualified this by saying that 'The duty cannot override any express term or unambiguous term which is to a different effect.'⁹¹

The Uniform Civil Procedure Rules of New South Wales allow judgments to be set aside if they have been shown to have been given contrary to good faith.⁹² However the Rules do not provide a definition or any guidance as to the meaning of good faith.

3.4.3 English insurance law

Contracts for insurance originate from the maritime industry in mediaeval times and the need for surety against the risk of losing ships and their cargo. This approach to risk management developed amongst London shipping merchants during the 16th century, however it was not regulated by common law until the 18th century, under the Lord Chief Justice, Lord Mansfield.⁹³

A duty of utmost good faith (*uberrimae fidei*) in insurance contracts was established in the landmark case, *Carter v Boehm* (1766). George Carter, the governor of Fort Marlborough in Sumatra, as it was known then, insured the fort with Boehm against loss from attack by a foreign enemy. Whilst the fort had been built to resist native attack, Carter failed to disclose that it had not been designed to resist European enemies. An attack by the French navy in 1760 was successful and Boehm consequently claimed the policy was voided.⁹⁴

⁸⁵ Anthony M Gleeson, *The Rule of Law and the Constitution: Boyer Lecture* (ABC Books 2000) 6.

⁸⁶ *Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234.

⁸⁷ *Automasters Australia Pty Limited v Bruness Pty Limited* [2002] WASC 286 [14].

⁸⁸ *ibid* [393].

⁸⁹ *Burger King Corporation v Hungary Jack's Pty Ltd* [2001] NSWCA 187.

⁹⁰ *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASC 16.

⁹¹ [2005] FCA 288 [64].

⁹² Uniform Civil Procedure Rules 2005 (NSW) Reg 36.15(1).

⁹³ John Birds, *Bird's Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 1.

⁹⁴ *Carter v Boehm* (1766) 3 Burr 1905, (1766) 97 ER 1162 (1766).

Lord Mansfield reasoned that the purpose of the rule to disclose information 'changing the risqué understood to be run', was to 'prevent fraud, and to encourage good faith.' Mansfield held in favour of Boehm declaring that, 'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary'.⁹⁵

Mansfield also sought to extend the principle of a duty of good faith beyond insurance to all contracts by stating, 'The governing principle is applicable to all contracts and dealings.' However, Mansfield's attempts were largely unsuccessful. Over the next two hundred years the approach by Parliament and the English courts was to abstain from interfering with private agreements made by parties in a free market.⁹⁶ The right to 'freedom of contract' as expatiated by Lord Denning, prevailed.⁹⁷

The activities of the marine insurance underwriters in London during the late seventeenth century centred around a coffee shop owned by Edward Lloyd. It was from this that the Lloyd's of London corporation was born. Lloyd's standard policy for marine insurance later formed the basis of the Marine Insurance Act 1906,⁹⁸ section 17 stating that insurance is *uberrimae fidei*:

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Up until recently the law for non-marine insurance contracts has been governed mainly by common law, and based on the doctrine of utmost good faith. The Insurance Act 2015, which came into effect in August 2016, was described by Paten as a 'watershed moment' in commercial insurance.⁹⁹

In the context of this research the most significant reforms are;

- i) The duty of utmost good faith in relation to disclosure has been moderated to a requirement for the insured to make '...a fair presentation of the risk' to the insurer.¹⁰⁰
- ii) Representation of information by the insured is to be made in good faith.¹⁰¹
- iii) Abolition of the law permitting avoidance of a contract of insurance due to a breach of a duty of utmost good faith.¹⁰²

The recent legislative changes to insurance contracts are a dilution of good faith obligations providing added protection to consumers. Whether intended or not, the changes may also represent a further barrier for English courts to recognise a general duty of good faith in contracts.

Similar changes regarding misrepresentation in consumer contracts have also been effected.¹⁰³ This regression also appears to align insurance contracts to existing statute; the Misrepresentation Act 1967. That said, its affect may be tempered by the option for insurers to contract out, providing the requirements for transparency are met.¹⁰⁴

⁹⁵ *ibid* [1909] – [1910].

⁹⁶ Mary Arden, 'Common Law and Modern Society: Keeping Pace with Change' (1st edn, OUP 2015) 50.

⁹⁷ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 296 - 298.

⁹⁸ *Birds* (n 93) 1.

⁹⁹ Ben Patten and Sian Mirchandani, 'The Insurance Act 2015: How Will it Impact Upon the Insurance of Construction Professionals' (March 2017) 203 *Society of Construction Law*, 1.

¹⁰⁰ Insurance Act 2015, s 3(1).

¹⁰¹ Insurance Act 2015, s 3(3).

¹⁰² Insurance Act 2015, s 14(1).

¹⁰³ Consumer Insurance (Disclosure and Representations) Act 2012, s 2(5)(a).

¹⁰⁴ Insurance Act 2015, s 17.

3.4.4 Fiduciary contacts

One class of contract specifically obligates one party to act in the interests of the other party: these contracts involve what is known as fiduciary relationships. The obligation arises from law and the terms of the contract.

Where a person acts as an agent for another they must do so honestly and in a manner which does not result in conflict with the interests of their principal.¹⁰⁵ A key feature of a fiduciary relationship is one of loyalty, from which a duty to act in good faith has been recognised in English law.¹⁰⁶

Fiduciary duties also arise when financial or property interests are held by one party for the benefit of the others, an area of the law which overlaps with the law of trusts and the Trustees Act 1925. In a construction context this arrangement is seen at work with the increasingly popular Project Bank Accounts,¹⁰⁷ where funds from the client are held in trust by the contractor and used as payment to their suppliers.

3.4.5 Employment contracts

Implied terms of good faith in employment contracts have existed for over a hundred years. In *Robb v Green*, the court of appeal considered the actions of an employee who had secretly taken copies of his employer's order book and subsequently used them for marketing when setting up his own business. Lord Esher agreed with the judge of first instance in that the employee's conduct was a 'breach of the trust reposed in the defendant as the servant of the plaintiff in his business.'¹⁰⁸ Lord Esher concluded that for a 'contract of service', where a servant (employee) was placed into a confidential position, an obligation of good faith 'must have necessarily been in view of both parties when they entered the contract'. Here the courts quite clearly saw a direct relationship between a duty of trust owed by the employee and good faith.

In *MPT v Peel*,¹⁰⁹ two ex-employees admitted copying and taking away company data which they later used to start a rival business. Citing *Robb v Green*, the court affirmed that their conduct was a 'flagrant breach of the two men's contractual duties of fidelity.'¹¹⁰ However, the judge was unwilling to accept that failure to disclose their future intentions was in breach of a duty of good faith.¹¹¹

Lloyd Steyn described mutual trust and confidence to be 'an overarching obligation implied by law as an incident of the contract of employment' adding that it would require 'express words or a necessary implication to displace it or to cut down its scope'.¹¹²

In *Mahmud v BCCI*, the House of Lords held that an obligation of mutual trust and confidence was implied into a contract for employment. BCCI had gone into liquidation following serious financial irregularities. Lord Nicholls stated that not to observe an implied 'portmanteau obligation' of trust and confidence would be a repudiatory breach of contract.¹¹³ Lord Nicholls described an employment contract as a 'close personal relationship where there is often disparity of power between the parties'.¹¹⁴

¹⁰⁵ Hugh Beale (ed), *Chitty on Contracts: Volume 1* (32nd edn, Sweet & Maxwell 2015) para 1-045.

¹⁰⁶ *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18B.

¹⁰⁷ Since 2011 the UK Government report that over £10 billion of contracts awarded used Project Bank Accounts: Government Construction Strategy 2016-20 (March 2016).

¹⁰⁸ [1895] 2 QB 315, 317.

¹⁰⁹ [2017] EWHC 1222 (Ch).

¹¹⁰ *Robb* (n 108) [41].

¹¹¹ *MPT* (n 109) [86].

¹¹² *Johnson (AP) v Unisys Ltd* [2001] UKHL 13 [24].

¹¹³ [1998] AC 20 34H - 35A.

¹¹⁴ *ibid* 45H - 46A.

However, the court recognised that the balance of power had been moderated in recent times by legislation and the judiciary. Lord Nicholls concluded that the evolution of employment contract law to recognise an implied term of trust and confidence had made the traditional master-servant relationship obsolete.

3.4.6 UK Statute

As a member of the European Union, the UK has been required to respond to the European Commission who have incorporated obligations of good faith into their Directives.¹¹⁵ Only time will tell if the UK's decision to leave the European Union will impact on this legislation. The Consumer Rights Act 2015 (CRA) amends and consolidates the law in relation to the rights and protection of consumers.¹¹⁶ Section 62(4) of the CRA states;

A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

The CRA applies only to contracts between a trader and a consumer.¹¹⁷ Whilst consumer regulations have been the subject of disputes in domestic construction contracts,¹¹⁸ and an injunction sought against a bank,¹¹⁹ its application in the wider construction sector is probably limited.

Legislation regarding unfair contract terms, applicable to business-to-business contracts, is contained in the Unfair Contract Terms Act 1977 (UCTA).¹²⁰ Some contract terms are automatically non-binding,¹²¹ others need to pass the test of reasonableness.¹²² In *Saint Gobain v Hillmead Joinery*, the court considered an exemption clause which sought to exclude liability for consequential losses. It was held that the exemption did not satisfy the statutory test of reasonableness because, amongst other things, the parties were of not equal bargaining power.¹²³ Acting in a fair and reasonable manner must be components of good faith. In fact it has been argued that reasonableness provides a higher standard than good faith.¹²⁴

Part II of the Construction Act, makes mandatory provisions in respect of adjudication and payment. Where there is non-compliance, specific Regulations apply.¹²⁵ The Construction Act requires the payer to give notice before the final date for payment if they intend to pay less than either the amount certified or a valid application for payment: the 'notified sum'. In the absence of a valid pay less notice the notified sum becomes the amount due.¹²⁶ The Construction Act responded to Latham's recommendation for, 'A general duty to trade fairly, with specific requirements relating to payment and related issues'.¹²⁷

¹¹⁵ For example, The Unfair Terms in Consumer Contracts Directive 93/13/EEC and Common European Sales Law 2011.

¹¹⁶ Consumer Rights Act 2015, Explanatory note 5, 23 & 24.

¹¹⁷ Consumer Rights Act 2015, s 61(1).

¹¹⁸ *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973; *Steve Domsalla (t/a Domsalla Building Services) v Kenneth Dyason* [2007] EWHC 1174 (TCC).

¹¹⁹ *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52.

¹²⁰ As amended by the Consumer Rights Act 2015.

¹²¹ Unfair Contract Terms Act 1977, s 2(1).

¹²² Unfair Contract Terms Act 1977, s 2(2).

¹²³ [2015] EWHC B7 (TCC) [53] – [54].

¹²⁴ Jane Stapleton, 'Good Faith in Private Law' (1999) 52 CLP 1, 8; Richard Hooley, 'Controlling Contractual Discretion' (2013) CLJ 65, 74-75.

¹²⁵ The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) (Amendment) (England) Regulations 2011.

¹²⁶ Construction Act Part II Section 110A, 110B & 111.

¹²⁷ Latham (n 1) para 5.17, 4a, 36.

It is submitted that if there are no obstacles to accepting that acting fairly and reasonably are characteristics of good faith, then it might not be a huge step to accept that the Construction Act could imply notions of good faith. However, several cases suggest that the Construction Act may not necessarily encourage parties to a contract to act reasonably and fairly. One unintended consequence has been what the industry has called 'smash and grab' adjudications.

In *ISG Construction Ltd v Seevic College*, the court held that the Employer, who failed to serve the appropriate notices was deemed to have agreed the value of the work in the Contractor's interim application for payment and was liable to pay the amount applied for whether it was right or wrong.¹²⁸ This interpretation by the court has been approved in a few other cases.¹²⁹ These rulings appear to be unfair for employers. It would be difficult to argue that knowingly making an exaggerated payment application was honest. Further, to then take advantage of the Employer's failure to administer a contract would surely be acting in bad faith.

3.5 Summary

The origin of the doctrine of good faith in contract law can be traced back over two thousand years to the *bona fide* obligations of Roman law enshrined in the writings of Cicero and Justinian law books. It was from the principles of Roman law that codified civil law legal systems developed across continental Europe from the 11th century. Many European countries still operate under a civil law system with their civil codes obligating a duty of good faith in the performance of contracts. Despite this advocacy, good faith has not universally attracted a defined legal term, leaving enforcement down to interpretation by the courts.

English law has followed a different course, deriving a system of judge-made law, known as a common law legal system, where freedom of contract prevails over the civil law doctrine of good faith. However, obligations of upmost good faith (*uberrimae fidei*) were held to apply for marine insurance and codified in the Marine Insurance Act 1906. A hundred years later statute was updated to cover all contracts for insurance. The UK construction sector is now also regulated by statute that imposes requirements for fairer payment terms and the right of adjudication.

English courts have been willing to imply an obligation of mutual trust and confidence into employment contracts, owing to the close personal relationship between the parties, but have not expressed this in terms of a general duty to act in good faith.

USA and Australia, both of which operate a common law legal system, have had a different approach to English law. In the USA, attempts to unify the law through a commercial code and restatement of contracts has included a duty of good faith in contract performance: a definition has also been provided. In Australia, the courts have been willing to imply a duty of good faith but have not gone so far as to enforce it as a general obligation that would override other express terms.

3.6 Conclusion

Objective 1 of this research was to:

Identify where the doctrine of good faith originates from, what it is, and where it is applied by the law.

¹²⁸ [2014] EWHC 4007 (TCC) [25].

¹²⁹ *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC) [22]; *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855 (TCC); *Henia Investments Inc v Beck Interiors Limited* [2015] EWHC 2433 (TCC) [25] - [28].

A general overriding obligation for parties to act in good faith in the performance of a contract is well established in civil law legal systems. Terms such as honesty, fair dealing, disclosure, reasonableness, trust and co-operation all feature in the language of good faith. However, identifying a comprehensive definition that has received common acceptance and application in any legal jurisdiction is somewhat elusive. As a result, explaining what it means to act in good faith is best illustrated by setting principles of behaviour.

The main reason for this is that good faith in contract law is subject to context and underpinned by principles which are more readily measured by the terms of the contract and the expectation of the parties.

Good faith exists in the English common law legal system, but is normally limited to contracts for insurance, employment and fiduciaries. English statute also provides for obligations in good faith pertaining to consumer contracts.

The Construction Act, provides no express duties for the parties to a contract to act in good faith. This has given rise to some unequitable decisions as the courts have strictly applied the letter of the Construction Act in fear of otherwise undermining its primary purpose to regulate cash flow. The dichotomy is acknowledged, but these decisions continue to support the argument made by Goode that in English law that the legal outcome of a case is more important than absolute justice.¹³⁰

English law has established that a duty to act in good faith, where it exists in contract law, does not mean that the parties must abandon their own legitimate financial interests. However, the duty does moderate their conduct so allowing both parties to reap the benefits of the contract. Whilst the different approaches to the doctrine of good faith may have traditionally been what separates civil and common law systems, the boundary between them is no longer a definitive one.

¹³⁰ Roy Goode, 'The Concept of Good Faith in English Law', (Saggi, Conferenze e Seminari 2 Rome March 1992) <www.cisg.law.pace.edu/cisg/biblio/goode1.html> accessed 03 September 2017.

4.0 Bad faith: alternative remedies in English law

4.1 Introduction

In the absence of a general duty of good faith or disclosure, English law has developed alternative remedies. These remedies represent attempts by the judiciary and Government to uphold the expectations of parties to a contract and avoid the unfairness that would otherwise exist.¹³¹ Estoppel, restitution and unjust enrichment, and misrepresentation are the most common alternative doctrinal remedies.

The alternative remedies are terms that English courts have implied into contracts. In 1997 Lord Steyn considered that, in the absence of an implied duty of good faith in English contract law, 'the implication of terms fulfils an important function in promoting the reasonable expectations of parties.'¹³²

Kendrick argues that English law's justification for resisting a general duty of good faith has three motives:

- i) Parties are expected to look after their own interests during negotiations with the freedom to obtain terms that are most favourable to themselves;
- ii) A preference for incremental development of the law based on precedents rather than general principles;
- iii) A general principle obligating a duty of good faith is too uncertain.¹³³

Lord Bingham described the preference for incremental development of the law of equity as the response to unfairness and unconscionable bargains: the 'piecemeal solutions'.¹³⁴ In *Yam Seng*, Leggat J began his long dicta promoting implied duties of good faith by responding to the position set out by Lord Bingham and Kendrick.¹³⁵ In response to the problem of uncertainty, Leggat J believed the position was unjustified stating, 'There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.'¹³⁶

4.2 Estoppel

Estoppel is an equitable doctrine which serves as a defence preventing a party from reverting to what may otherwise have been their legal right to assert. It is synonymous with the phrase; 'You can't just turn round and say that now'.¹³⁷ Denning LJ described the development of the law of estoppel as a 'natural result of the fusion of law and equity'.¹³⁸

Although a relatively new development in French law,¹³⁹ the term estoppel is derived from the French word, *estoupail*, meaning a bung or a cork used to prevent something from coming out. It is ironic, but not surprising, that common law estoppel is inherited from the Roman law of detrimental reliance.¹⁴⁰

¹³¹ Ewan McKendrick, *Contract Law* (11th edn, Palgrave 2015) 219.

¹³² Johan Steyn, *Contract Law: 'Fulfilling the Reasonable Expectations of Honest Men'*, 113 LQR 1997 433, 441.

¹³³ McKendrick (n 131).

¹³⁴ *Interfoto v Stiletto* [1989] 1 QB 433 (CA) 439F.

¹³⁵ [2013] EWHC 111 (QB) [119] – [154].

¹³⁶ *ibid* [152].

¹³⁷ Vivian Ramsey and Stephen Furst (eds), *Keating on Construction Contracts* (9th edn, Sweet & Maxwell 2012) 12-001.

¹³⁸ *Central London Property Trust Ltd v High Trees House Ltd* [1947] K B 130, 134.

¹³⁹ *Golshani v Government of the Islamic Republic of Iran*, Civ 1ère, 6 July 2005, No.01-15912.

¹⁴⁰ Peter Birks, *The Roman Law of Obligations* (1st edn, OUP 2014) 32.

The level of respect given to detrimental reliance by the Roman judiciary gave rise to the Latin phrase, '*venire contra proprium factum*' translated as 'no one can contradict his own act.'¹⁴¹ Estoppel, in English law, is an action that can be used only as a shield and not a sword,¹⁴² although it may serve to provide a vehicle for counter-claims.

Good faith is not alone in having to pass the test of certainty. For estoppel to apply, the alleged actions, conduct or representations relied upon need to have been made with 'precise and unambiguous' language.¹⁴³ Estoppel has several sub-doctrines attracting varying taxonomy.¹⁴⁴ In *Mears* the judge considered that estoppel by representation and convention were 'almost interchangeable on the facts'.¹⁴⁵ It is therefore not uncommon for a court to deliberate over which 'species of estoppel' is applicable.¹⁴⁶ For the purposes of this research three types of estoppel will be considered; estoppel by representation, estoppel by convention and promissory estoppel.

4.2.1 Estoppel by representation

Estoppel by representation serves to prevent a party relying on information to support a claim if previously they have made different representations to the other party.¹⁴⁷ A party may make certain statements to another party to persuade another party to change their position. However, when the other party is disadvantaged, having relied on that representation, estoppel serves as a remedy to prevent the representor from subsequently relying on information different to that initially represented.¹⁴⁸

A good example of estoppel by representation influencing the drafting of a modern construction contract can be found in the NEC3 Engineering and Construction Contract. Where the impact of a compensation cannot be reasonably determined, the Project Manager may state assumptions for the Contractor to rely on when preparing their quotation. If these assumptions are later shown to be incorrect, then the matter is notified as a further compensation event.¹⁴⁹

Representation takes different forms, including oral communication, written statements and conduct. Deliberately remaining silent with the intent of leaving the other party disadvantaged due to ignorance of material facts has also given rise to estoppel by representation.¹⁵⁰ English courts have, however, stopped short of implying a general duty to advise or correct a mistake made by the other party.

Smith J, adopting the views of Rix LJ in *ING Bank NV v Ros Roca SA*,¹⁵¹ stated:

The general proposition is that in the common law (as opposed to the civil law) there is not generally a notion of good faith and as he says silence is golden for where there is no obligation to speak silence gives no hostage to fortune.¹⁵²

¹⁴¹ Shael Herman, 'Detrimental Reliance in Louisiana Law - Past, Present and Future? The Code Drafter's Perspective' (1984) 58 *Tulane Law Review* 707, 714.

¹⁴² *Combe v Combe* [1951] 2 KB 215.

¹⁴³ *Low v Bouverie* [1891] 3 Ch 82, 106 as cited in *Woodhouse AC Israel Cocoa Ltd SA & Anor v Nigerian Produce Marketing Co Ltd* [1972] AC 741, 756D.

¹⁴⁴ Halsbury's Laws of England: Estoppel (Vol 47 (2014)) s 1 Nature, Classification and Principles of Estoppel <lexis library> accessed 16 July 2017.

¹⁴⁵ *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 139 (TCC) [69].

¹⁴⁶ *Seria Ltd & Ors v Ronald Hutchison* [2006] EWCA Civ 1551 [87].

¹⁴⁷ Hugh Beale (ed), *Chitty on Contracts: Volume 1* (32nd edn, Sweet & Maxwell 2015) 1-008.

¹⁴⁸ Ramsey R and Furst S (eds), *Keating on Construction Contracts* (9th edn, Sweet & Maxwell 2012) 12-002.

¹⁴⁹ NEC3 ECC cl 61.6 and cl 60.1(17).

¹⁵⁰ *Greenwood v Martins Bank* [1933] AC 51, 58-59.

¹⁵¹ [2012] 1 WLR 472.

¹⁵² *PCE Investors Ltd v Cancer Research UK* [2012] EWHC 884 (Ch) [104].

In *Costain v Tarmac* it was alleged that an arbitration agreement had become 'inoperative' due to 'abandonment, repudiation and estoppel.'¹⁵³ Costain argued that Tarmac, who were seeking to rely on a time bar clause for adjudication, should not have stayed silent but spoken out bringing it to their attention. i.e. estoppel by representation. Coulson J concluded that Tarmac's silence did not represent false knowledge, nor did it deliberately encourage Costain to believe the time bar would not apply.¹⁵⁴

4.2.2 Estoppel by convention

Estoppel by convention is derived from the doctrine of estoppel by deed; where the act of sealing and delivery were necessary to create rights and obligations and considered more important than the agreement itself.¹⁵⁵ Until the law of equity intervened, estoppel by deed prevailed in English law thus preventing a contract executed under seal from being varied by parole agreements.¹⁵⁶

The modern form of estoppel by convention requires three key elements:

- i) the parties, by virtue of their contract or a shared understanding of its legal meaning, have established a basis of convention;
- ii) the parties have conducted themselves in line with their shared understanding; and
- iii) one party would be disadvantaged if the other party could abandon the convention.¹⁵⁷

Estoppel by convention may flow from representation. In *Whittal Builders v Chester Le-Street DC*,¹⁵⁸ the Council had presented a contract for execution under seal but inadvertently failed to seal their copy. The builder had sealed their copy. More than six years after completion the builder made a claim for breach of contract alleging the Council had been late giving site possession. The Council argued the contract was not under seal and therefore the builder's claim was statute barred.

The court held that representation by the Council gave rise to an estoppel by convention and were therefore prevented from denying the contract had been executed under seal.¹⁵⁹ Referring to Spencer Bower,¹⁶⁰ Andrews-Fox J noted a party should be able to rely on assumptions of truth they make based on convention of the parties prior to entering into a contract.¹⁶¹

The attempt made by the Council to deny the existence of a sealed contract to avoid their liability seems wholly contrary to even the narrowest definition of good faith. No doubt if the Council had been seeking to make a claim against the builder outside the six-year limitation period for a simple contract, then they would have argued differently.

In *Mears v Shoreline Housing*, the parties had consented to depart from the contract terms governing valuation and payment but later Shoreline sought to rely on the contract to justify deduction of a significant sum. The court held that estoppel by convention applied. Akenhead J said, 'I can and do accept that the concepts of fairness and unconscionability are important facets of estoppel, both by convention and by representation.'¹⁶²

¹⁵³ [2017] EWHC 319 (TCC) [5].

¹⁵⁴ *ibid* [99] – [110].

¹⁵⁵ *Ryan v Moore* [2005] SCC 38 [53].

¹⁵⁶ *Berry v Berry* [1929] 2 KB 316, 318-321.

¹⁵⁷ Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (3rd edn, OUP 2012) 199ff.

¹⁵⁸ (1987) 40 BLR 82.

¹⁵⁹ *ibid* 90.

¹⁶⁰ George Spencer Bower, *The Law Relating to Estoppel by Representation* (3rd edn, Butterworths 1977) 157.

¹⁶¹ (1987) 40 BLR 82, 89.

¹⁶² *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) [76].

He added Shoreline's actions were not 'conscionable or just by reason of the convention between the parties'.¹⁶³ However, Akenhead J stopped short of saying Shoreline's action were dishonest, stating, 'It would be almost dishonest for Shoreline to seek to renege from what they agreed to and both parties acted upon.'¹⁶⁴ Perhaps he knew he was sailing close to the principles of good faith and was steering a careful course to avoid it.

Mears v Shoreline Housing is a good example of English courts appearing to be more comfortable in applying other legal doctrines in response to good faith type claims, but ultimately arriving at the same judicial decision. In absence of the estoppel doctrine, it is not clear whether the court would have arrived at the same decision. It is submitted that by encouraging the other party's deviation from the contract and then subsequently relying on its provisions to exercise a right, would have otherwise not been a breach of contract. With a contract obligating behaviours consistent with trust and co-operation, such an approach would surely strain the boundaries of what was fair and within the reasonable expectation of the parties.

4.2.3 Promissory estoppel

A party, who has unequivocally promised or represented to another party that they do not intend to enforce their rights arising under a contract, may be estopped from subsequently asserting those rights where it would be inequitable to allow that party to do so.¹⁶⁵ Lord Cairns described it as 'the first principle upon which all Courts of Equity proceed.'¹⁶⁶

The promisor may however change his mind providing reasonable notice is given which allows the promisee to resume an equitable position.¹⁶⁷ A party seeking to invoke the estoppel must demonstrate that the promise has been relied on and influenced their conduct to the extent that resilement from the promise would be unjust.¹⁶⁸

Prior to the decision in *Central London Property Trust Ltd v High Trees House Ltd*, a promise made without consideration did not entitle the claimant to damages for breach of the promise, although the courts would enforce the promise.¹⁶⁹ In *China-Pacific S A v The Food Corporation of India*, Megaw LJ referring to Bower,¹⁷⁰ affirmed that a promise made contrary to the contract requires less assurance than the contract itself; consideration not being required to accompany the promise for promissory estoppel to apply.¹⁷¹

Mason argues that, in Australia, unconscionability is the 'driving force' behind the acceptance of promissory estoppel as an equitable remedy.¹⁷² Guoqing concurs, describing Australian law as adopting an 'unconscionability-based' approach and one that is more inclusive than English law.¹⁷³ Definitions of what is unconscionable vary and include 'not right or reasonable',¹⁷⁴ and 'unscrupulous or unprincipled'.¹⁷⁵

¹⁶³ *ibid* [67].

¹⁶⁴ *ibid* [65].

¹⁶⁵ Vivian Ramsey and Stephen Furst (eds), *Keating on Construction Contracts* (9th edn, Sweet & Maxwell 2012) 12-004

¹⁶⁶ *Hughes v Metropolitan Railway* (1877) 2 App. Cas. 439, 448.

¹⁶⁷ *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761; *Emanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326,1330.

¹⁶⁸ *Crossco No. 4 Unlimited & Ors v Jolan Limited & Ors* [2011] EWHC 803 (Ch) [360].

¹⁶⁹ [1947] K B 130, 134.

¹⁷⁰ George Spencer Bower, *The Law Relating to Estoppel by Representation* (3rd edn, Butterworths 1977) 376.

¹⁷¹ [1981] WL 149523 QB 403, 429.

¹⁷² Anthony F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) LQR 66,90.

¹⁷³ Liu Guoqing, 'A Comparative Study of the Doctrine of Estoppel' (2010) Canberra Law Review 1, 10-11.

¹⁷⁴ Oxford English Dictionary (7th edn 2012 OUP).

¹⁷⁵ Collins English Dictionary (Standard edn, 1993 Harper Collins).

4.3 Unjust enrichment and the law of restitution

Unjust enrichment, as a feature of Civil law systems,¹⁷⁶ owes its existence to Roman law but was largely spurned by English law up until the mid-20th century.¹⁷⁷ The doctrines of restitution and unjust enrichment are synonymous with good faith. The English law of unjust enrichment matured from the 1960's to become recognised as the law of restitution. This development followed the approach taken by United States in 1937 when naming the Restatement of the Law of Restitution.¹⁷⁸

The English courts have responded to incidences of unjust enrichment: restitution being one possible cure where the enrichment is returned to the party who has incurred the expense.¹⁷⁹ Restitution has its foundation in quasi-contracts: enforcing payment of a reasonable sum for work done in circumstances where a contract does not exist.¹⁸⁰

In the landmark case of *Costello v MacDonald*, the plaintiffs had set up a Special Purpose Vehicle (SPV), for advantageous tax purposes, to procure works for a small housing development. *Costello* were sole shareholders of the SPV, Oakwood. The defendant carried out building works under an oral contract with Oakwood but, following a dispute over non-payment, ceased work and left the site. *MacDonald* advanced a claim against *Costello* for unjust enrichment. The court of appeal held that restitution for unjust enrichment was not lawful because the building contract was with a third party.¹⁸¹

The decision in *Costello* seems harsh and contrary to the principles of trust and fair dealing. The court, however, rejected the claim that enrichment had been achieved by unconscionable conduct concluding that they had not acted in bad faith.¹⁸² Etherton LJ agreed that 'in one sense', *Costello* had been enriched at the expense of the builder. However, *Costello* had been enriched only because contractual arrangements had allowed Oakwood to confer the benefit on them.¹⁸³ It is submitted that the English law principles of privity and freedom of contract prevailed over a duty to act in good faith.

It is not uncommon for a party to undertake work in the hope that a contract will be awarded. In *Regalian v LDDC*, it was held that the plaintiff was not entitled to recover costs of £2.9m incurred when the intended contract failed to materialise.¹⁸⁴ Rafter J dismissed the claim for restitution since the parties had not abandoned negotiations arbitrarily but were unable to agree a price. The judge was also unwilling to apply the ruling in *Sabemo v North Sydney Municipal Council*, as it was not established by English law.

In *Sabemo*, Shepard J, applying a duty of good faith, decided that a party who has negotiated in good faith but withdrawn for legitimate commercial self-interest was entitled to restitution under quasi-contract.¹⁸⁵ Mason, in support of the decision in *Sabemo* suggests that imposing a limited duty of good faith on the parties in negotiation would be a 'step forward'. He argues that where the abortive work provides no benefit, a duty of good faith could provide a remedy similar to restitution for unjust enrichment.¹⁸⁶

¹⁷⁶ For example, German Civil Code (BGB) 'Ungerechtfertigte Bereicherung' Articles 812-822.

¹⁷⁷ Nicholas B, *An Introduction to Roman Law* (OUP 1975) 231.

¹⁷⁸ Robert Goff and Gareth Jones, *The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 1-01.

¹⁷⁹ *ibid* para 1-02.

¹⁸⁰ *William Lacey (Hounslow) Ltd v Davis* (1957) WLR 932, 936.

¹⁸¹ [2011] EWCA Civ 930 [4].

¹⁸² *ibid* [36].

¹⁸³ *ibid* [20].

¹⁸⁴ [1995] 1 WLR 212, 230D.

¹⁸⁵ [1977] 2 NSWLR 880, 902.

¹⁸⁶ Anthony F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) LQR 66, 82.

4.4 Misrepresentation

A statement made by a party while negotiating a contract, which ultimately does not form part of the contract, is known as representation. When the statement is false it is classed as misrepresentation. Misrepresentation may arise from statements made fraudulently or innocently and may nullify the contract when it has brought about a mistake by the party alleging injury.¹⁸⁷ The English law on misrepresentation was codified by the Misrepresentation Act 1967.

Lord Ackner, whilst strongly rejecting a duty of good faith, was keen to limit the extent to which a party's interests may be protected stating: 'Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.'¹⁸⁸

Claims of misrepresentation and bad faith may co-exist. In *Yam Seng*, known better for its decision to imply a duty of good faith, an alternative claim for damages from misrepresentation was made. The court accepted that the representation had been relied upon and was false but damages were not recoverable for misrepresentation because the claimant had not suffered loss.¹⁸⁹

In construction contracts, Contractors may rely on information, pertaining to ground conditions, provided by the Employer at tender stage. If that information is shown to be inaccurate or misleading it may not, however, necessarily constitute misrepresentation. Furthermore, a site investigation report indicating different conditions to that encountered would not necessarily be information given in bad faith. The question of who is liable is often a matter of risk allocation under the contract.¹⁹⁰ For example, the Employer may expressly exclude any warranty for the information, with a disclaimer as to its completeness or accuracy.¹⁹¹ The NEC3 ECC approaches the issue by establishing a bench mark based on Site Information provided by the Employer and a probability based approach applying the test of what an 'experienced contractor' should have reasonably allowed for.¹⁹²

Staying silent when new information becomes available which shows that the initial representation is inaccurate can also be classed as misrepresentation. In *First Tower Trustees v CDS (Superstores International)*, the court held that a tenant was entitled to damages when the landlord failed to pass on new information, recording the presence of asbestos, before the parties had concluded a lease agreement. Brindle DJ accepted that a landlord does not generally provide a warranty on the property's condition and prospective tenants were bound to undertake their own surveys. However, regarding disclosure, he stated;

...when the landlord represents, as here, that he knows nothing of any environmental problem when he is in possession of information clearly pointing to a serious problem that is when the law will come to the aid of the tenant.¹⁹³

The court also dismissed a non-reliance clause as it was deemed to fail the test of reasonableness.¹⁹⁴ It is arguable that the landlord's actions were less than honest and intended to deceive; certainly, behaviour synonymous with bad faith.

¹⁸⁷ John Uff, *Construction Law* (11th edn, Sweet & Maxwell 2013) 194-195.

¹⁸⁸ *Walford v Miles* [1992] 2 AC 128, 138E.

¹⁸⁹ *Yam Seng Pte Limited v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [193] - [208].

¹⁹⁰ Julian Bailey, 'What lies beneath?' (2007) 4 ICLR 394,404-405.

¹⁹¹ *Enertrag (UK) Ltd v Sea & Land Power and Energy Ltd* [2003] EWHC 2916;100 Con LR 146, 192-194.

¹⁹² NEC3 Engineering and Construction Contract, cl 60.1(12) and 60.2.

¹⁹³ [2017] EWHC 891 (Ch) [23].

¹⁹⁴ Misrepresentation Act 1967, s 3.

The law of misrepresentation and its link to obligations of good faith are found in insurance law and the disclosure of information.¹⁹⁵ In common law, information provided in good faith without knowledge that it was wrong or misleading would not give rise to a valid claim. In *Walker v Milner*, Cockburn J affirmed 'A mere representation is not a ground of action unless it is wilfully false and fraudulent.'¹⁹⁶ Following the Misrepresentation Act 1967, damages could also be recovered if the representor made an innocent misrepresentation i.e. even if they believed the information provided was true. In a construction context, this is particularly important for professionals who provide advice to clients.¹⁹⁷

In Scots law, misrepresentation by silence has been deemed to be acting in bad faith. In *Smith v Bank of Scotland*, a wife had granted security for her husband's loan over their jointly-owned home. Smith was therefore acting as a cautioner for the debts of her husband. Subsequently the wife claimed to reduce the security executed in favour of the bank. The House of Lords found that the creditor had a duty to warn and recommend that the cautioner take legal advice before entering into the cautionary contract. Lord Clyde explained that where it was reasonable to suspect that there could be circumstances that would undermine the validity of the contract, a duty to advise existed. He concluded, 'This is simply a duty arising out of the good faith of the contract to give advice.'¹⁹⁸

4.5 Summary

English courts have traditionally avoided implying a general duty of good faith into contracts. The main reasons behind the approach has been to preserve the principles of freedom of contract, the incremental law of precedent and concerns over certainty.

The development of remedies as an alternative to good faith has given rise to a variety of legal doctrines responding to different circumstances with the aim of regulating the rights and duties of parties to a contract. The main examples are estoppel, unjust enrichment and the law of restitution. Representation and the obligation to disclose information that is truthful features strongly and is supported by statute. It could not be said that these doctrines have been intentionally developed as alternatives to good faith: the position owes more to the English common law approach of incremental development based on precedents rather than general principles.

This development of English law has provided the courts with the tools to fix a range of misdemeanours. Examples include dishonesty, improper or unconscionable conduct and deceit: all antonymic with the principles of good faith. Some of the so-called common law doctrines are based on the Roman civil law traditions: the same place from which good faith is derived.

4.6 Conclusion

Objective 2 of this research was to:

Identify and critically examine the development of equitable remedies as applied by English courts as alternatives to the good faith doctrine.

Whilst English courts have not sought to imply duties of good faith, the law has advanced alternative doctrines. The law governing estoppel, unjust enrichment and misrepresentation are effective in dealing with dishonesty, broken promises and false representation.

¹⁹⁵ Insurance Act 2015, s 3(1) and s 3(3).

¹⁹⁶ (1866) 176 ER 773, 780.

¹⁹⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹⁹⁸ *Smith v Bank of Scotland*, 1997 SC (HL) 111 [121].

However, their strict application combined with the right to freedom of contract can produce some harsh results. A primary objective of these doctrines is to enforce standards of fairness and reasonableness: Steyn LJ described it as ‘the moulding force of our law of contract’¹⁹⁹ and there can be little doubt the objective is influenced by notions of good faith.

The doctrines of estoppel, unjust enrichment and misrepresentation are implied terms. To be applied, they require an in-depth knowledge and understanding of actual events to be considered in context with the interpretation of a contract. This can be complex and successful implication is often highly sensitive to the factual matrix. Distinctions between alternative doctrinal remedies, which often overlap, are not always clear and therefore certainty from their application cannot be assured.

The absence of a general duty to act in good faith in English contract law has not stopped ‘good faith’ type claims. Case law suggests that claimants either consider their claims under alternative remedies are less than robust and or, that the common law doctrines alone are insufficient to deal with the alleged injustice. English courts have acknowledged that a duty of good faith goes further than simply being honest and may be necessary to deal with inequitable outcomes where other common law remedies fail to do so. The dicta of judges in several cases,²⁰⁰ demonstrates the inadequacy of English law in not having the doctrine of good faith in its armoury. The position is also not helped by English common law which precludes a court from deviating from binding precedent.²⁰¹

In the absence of a duty of good faith the obligation to disclose information is limited to not providing false information or correcting information found later to be incorrect. What is missing in English contract law is a general duty of disclosure of all known information. Not accepting that a duty of good faith applies, gives rise to the possibility that a party can stay silent on a matter that had the other party known otherwise they would have acted differently. The problem is not a new one: two thousand years ago, Cicero described it as the conflict between benefit and honourableness.²⁰²

¹⁹⁹ *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep.194, 196.

²⁰⁰ For example, *Astor Management, Gold Group, Interfoto and Yam Seng*, as discussed in Chapter 3.

²⁰¹ *First Energy* [n 199].

²⁰² Miriam T Griffin and E M Atkins (eds), *Cicero on Duties: Book II* (Cambridge University Press, 2016) 118.

5.0 Modern standard forms of contract and good faith

5.1 What is a modern standard form?

Before examining any obligations of good faith purported to exist in the modern form, we first need to answer the question; 'what is a modern standard form of construction contract?'

Since the 19th century, the use of standardised contracts in a printed form for construction projects has featured strongly in the UK, with over forty different forms now available from nine different publishers.²⁰³ The proliferation of standard forms is unique to common law jurisdictions, such as the UK. This is due mainly to the detailed legislation found in Civil Law countries governing construction work.²⁰⁴ This difference between the legal systems seems to be reflected in the contrasting approach taken towards a duty of good faith in contract law.

When and who first used the term 'modern' in the context of construction contracts is not certain. Latham claimed that to be effective in modern conditions, a form of contract should include thirteen provisions: 'A Modern Contract'. At the top of the list was:

A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual co-operation.²⁰⁵

Although trust and collaboration was a strong theme, none of Latham's recommendations specifically referred to obligations of good faith. Latham's interim report was entitled 'Trust and Money' and he believed, 'If there is more money, there may be more trust.'²⁰⁶ Latham concluded that the New Engineering Contract, as it was called then, met 'virtually all' of his thirteen recommendations.²⁰⁷ Latham was not so complimentary of the JCT forms and ICE Conditions of Contract, strongly recommending that if clients did intend to keep using them, they should be amended to align with the principles of a Modern Contract.²⁰⁸

For the purposes of this research and in the context of its overall aim, this study has identified and classified four standard forms as Modern Contracts which will be considered in more detail below:

NEC3 Engineering and Construction Contract (ECC) April 2013,
JCT Constructing Excellence (JCT/CE) 2016
ACA Standard Form of Contract for Project Partnering PPC2000 (amended 2008 and 2011)
CIOB Complex Projects Contract (CPC) 2013

In June 2017, both the NEC and ACA published new forms of contract.²⁰⁹ As their release coincided with the advanced progress of this research, these new forms have not been considered here.

²⁰³ Hugh Clamp, Stanley Cox, Sarah Lupton and Koko Udom, *Which Contract: Choosing the Appropriate building contract* (5th edn, RIBA Publishing 2012) 11.

²⁰⁴ John Uff, *Construction Law* (11th edn, Sweet & Maxwell 2013) 341.

²⁰⁵ Latham (n 1) para 5.18, 37.

²⁰⁶ Latham (n 1) para 2.7, 9.

²⁰⁷ Latham (n 1) para 5.19, 39.

²⁰⁸ Latham (n 1) para 5.21, 40

²⁰⁹ A revised fourth edition (NEC4) suite of contracts including a new Alliance Contract (ALC) were launched on 22 June 2017 at the NEC User Group Conference held at County Hall, London; A new Term Alliance Contract (TAC-1) was launched by the ACA at Somerset House, London on 05 June 2017.

5.2 NEC3 Engineering and Construction Contract 2013 (ECC)

Following publication of a consultative version in 1991, the first edition of the New Engineering Contract (NEC) was launched in 1993. Barnes, recognised as its originator, referred to the NEC as a 'new style contract'.²¹⁰ In 1995 it was renamed the Engineering and Construction Contract (ECC) and over the next twenty years a suite of contracts under the NEC brand were developed. In 2011 the Institution of Civil Engineers officially withdrew the ICE Conditions of Contract, a decision which finally confirmed its commitment to the NEC forms. Uff describes the key difference between the forms; 'The ICE Conditions of Contract proceed on the basis that each side looks to its own interest. The NEC seeks to focus the interest of both parties on the project.'²¹¹

Endorsed for use by the public sector by the UK Government Construction Strategy and Construction Clients' Board,²¹² the NEC forms have developed from a 'revolutionary contract' to one of mainstream use.²¹³ According to the National Construction Contracts and Law Survey 2015, the NEC3 suite is 'becoming more often used' with an increase of fourteen percentage points since 2011.²¹⁴

Except for the Adjudicators Contract (AC), all NEC3 forms include clause 10.1. The ECC states, 'The *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* shall act as stated in this contract and in a spirit of mutual trust and co-operation.' The obligation of 'mutual trust and co-operation' extends to all subcontracts made under the main contract.²¹⁵

The NEC drafting panel, focussing their attention on achieving the three objectives of flexibility, clarity and a stimulus to good management,²¹⁶ did not include any express terms pertaining to a duty of good faith. As a contract that is intended for use in the UK and abroad,²¹⁷ perhaps this was a conscious decision to avoid using a term which has attracted different judicial interpretations.

So, is it reasonable to translate a duty of 'mutual trust and co-operation' into one of good faith? Lloyd, a self-confessed supporter of the NEC, asserts the obligation to be '...tantamount to one of "performance in good faith" ...' Lloyd adds that the duty requires honesty and reasonableness and suggests that it may bring an obligation to go beyond what the contract demands if true co-operation is to be achieved.²¹⁸

In addition to clause 10.1, the ECC includes express terms where co-operation is required:

- i) Management of risks notified as early warnings;²¹⁹
- ii) Obtaining and providing information from and to third parties;²²⁰
- iii) On-site activities where the Working Areas are shared.²²¹

²¹⁰ Martin Barnes, 'The Role of Contracts in Management' in John Uff and Phillip Caper (eds), *Construction Contract Policy: Improved Procedures and Practice* (Construction Law Press 1989) 119.

²¹¹ John Uff, 'Figaro on ICE: The ICE 6th Edition and the New Engineering Contract' (1991) CILL 653,654 cited in Robert Gerrard, 'Relational Contracts: NEC in Perspective' (2005) 2 *Lean Construction Journal* 80.

²¹² Anon, 'Governments' (NEC) <www.neccontract.com/About-NEC/Governments> accessed 03 June 2017

²¹³ ICE, *NEC3 Procurement and Contract Strategies* (Thomas Telford Ltd 2013), 1.

²¹⁴ RIBA Enterprises Ltd. *NBS National Construction Contracts and Law Survey 2015*, 17.

²¹⁵ NEC3 Engineering and Construction Contract, cl 26.3.

²¹⁶ ICE, *The New Engineering and Construction Contract Guidance Notes* (1st edn, Thomas Telford Ltd 1993), 1.

²¹⁷ ICE, *NEC3 Engineering and Construction Contract Guidance Notes* (Thomas Telford Ltd 2013), 1.

²¹⁸ Humphrey Lloyd, 'Some Thoughts on NEC3' (2008) ICLR 468, 474.

²¹⁹ NEC3 Engineering and Construction Contract, cl 16.3.

²²⁰ NEC3 Engineering and Construction Contract, cl 25.1.

²²¹ *ibid.*

An implied general duty to co-operate to allow performance of a construction contract under common law was established by Lord Blackburn who stated:

....as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.²²²

Lord Blackburn's dicta remains good law.²²³ Dismissing the limitation placed on co-operation by Devlin J,²²⁴ Vinelott J thought it was clear that a JCT Standard Building Contract implied a requirement of 'close co-operation between the contractor and the architect.'²²⁵

Much has been written about clause 10.1 but had it not been for Latham, it is probable it would not have attracted so much attention. The first edition of the NEC stated only that, 'The *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* shall act as stated in this contract.' The obligation for the parties to act in a '...spirit of mutual trust and co-operation' then appeared in the second edition,²²⁶ following recommendation by Latham.²²⁷ The second obligation is linked to the first by the word 'and' suggesting the obligations are either mutually inclusive or are intended to serve to act as 'gap-filler' where the contract is silent.²²⁸

Keating considers five areas within the ECC where parties acting in a manner consistent with 'trust and co-operation' might be conditioned to behave in a certain way when exercising their otherwise strict rights and obligations under the contract:

- i) Clause 24.2; the Project Manager's right to instruct removal of an employee being subject to reasonableness on the part of the Project Manager.
- ii) Clause 31.3; the Project Manager's right to not accept a programme modified in circumstances where non-essential information is absented from the Contractor's submission.
- iii) Clause 36 and 62; Quotations for acceleration and compensation events provided by the Contractor to comprise genuine commercial offers.
- iv) Clause 61.3; the Project Manager's obligation to notify compensation events of matters that he is aware of and could be time-barred if the Contractor fails to notify.
- v) Clause 64.1; the Project Manager's right to reject a compensation quotation subject to a test of reasonableness precluding the Project Manager from requiring an inappropriate level of information.²²⁹

Clause 10.1 is drafted in the future tense with all other conditions of contract written in present tense. The Guidance Notes explain the reason for this is simplicity, obliging the parties 'to do everything which the contract states they do'.²³⁰

²²² *Mackay v Dick* (1881) 8 R (HL) 37, 263.

²²³ *Allridge (Builders) Ltd v Grandactual Ltd* (1996) 55 Con LR, 107.

²²⁴ *Mona Oil Equipment Co v Rhodesia Railways* [1949] 2 All ER 1014, 1018.

²²⁵ *London Borough of Merton v Hugh Stanley Leach* (1986) 32 BLR 51,81.

²²⁶ ICE, NEC2 Engineering and Construction Contract 1995 (Thomas Telford 1995).

²²⁷ Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the UK Construction Industry* (HMSO London 1994) ch 5 para 5.20.4.

²²⁸ David Thomas (ed), *Keating on NEC3* (1st edn, Sweet & Maxwell 2012) para 2-004.

²²⁹ *ibid* para 2-006.

²³⁰ ICE, NEC3 Engineering and Construction Contract Guidance Notes (Thomas Telford Ltd 2013), 31.

Case law involving matters of interpretations of NEC contracts is limited. During this research twenty-two cases, where interpretation of the NEC conditions of contract were material to the dispute, have been identified. These cases are cited in Appendix A and presented in chronological order to illustrate the development of NEC case law. From the twenty-two cases identified, five included consideration by the courts as to the effects of clause 10.1 and these will now be examined.

In *CORBER v Bechtel Ltd*, considered by many to be the first NEC case, clause 10.1 had been amended to:

The *Employer*, the *Contractor* and the *Project Manager* act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.²³¹

The case involved an application for an interim injunction to compel the Project Manager's employer to refrain from influencing their employees, when certifying payment, in any manner other than 'impartially and in good faith'. Jackson J declared 'good faith' was ambiguous and would 'serve no useful purpose' in the context of certification electing only to consider if a duty of impartiality existed and if this had been breached.²³² Taking guidance from *Sutcliffe v Thackrah*,²³³ Jackson J accepted it was arguable that the Project Manager had a duty to act impartially,²³⁴ but was unwilling to give a definitive answer because the Employer was not party to the proceedings. The court refused the application for injunction. Unfortunately, the decision regarding impartiality is at best only a persuasive one in the context of any duty of good faith owed by another party acting on behalf of the Employer.

In *ABB Ltd v BAM Nuttall Ltd* clause 10.1 was amended to read:

The Contractor and the Subcontractor shall act as stated in the subcontract and in the spirit of mutual trust and cooperation but without prejudice to the respective rights and obligations of the parties.²³⁵

It is submitted that the words '...without prejudice to the respective rights and obligations of the parties' sought to moderate the duty to 'act in a spirit of mutual trust and co-operation' so as not to fetter other express terms of the contract.

In *Mears v Shoreline*, a dispute arose as a consequence of the Employer who sought to rely on the express terms of the NEC3 Term Service Contract following agreement by both parties to depart from the rules for payment. It was pleaded that the 'trust and partnering language' of the NEC contract implied a duty that;

...any party would not take advantage against the other of the departure by the other from the strict requirements of the contract where the first mentioned party was or ought to have been aware of the departure without warning the other party and affording an opportunity and reasonable time to the other party to change.²³⁶

Akenhead J was not convinced, rejecting the argument of an implied term he declared;

...the obligation to act in a spirit of mutual trust and cooperation or even in a 'partnering way' would not prevent either party from relying on any express terms of the contract freely entered into by each party.²³⁷

²³¹ [2005] EWHC 1018 (TCC) [8].

²³² *ibid* [22].

²³³ *Sutcliffe v Thackrah* [1974] AC 727, 737D.

²³⁴ *CORBER* (n 290) [53].

²³⁵ [2013] EWHC 1983 (TCC).

²³⁶ *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 139 (TCC) [70].

²³⁷ *ibid*.

The court did however hold in favour of Mear's parallel argument of estoppel by convention.²³⁸

In *Costain v Tarmac*, the Parties had engaged under an NEC3 Framework Contract and Supply Short Contract. It was claimed that clause 10.1 meant the defendant had a duty to draw attention to a dispute resolution clause which included a time bar on adjudication. Coulson J dismissed the claim, calling it a 'startling submission.' He stated that 'at its highest', mutual trust and co-operation meant Tarmac 'could not do or say anything which lulled the claimant into falsely believing that the time bar was either non-operative or would not be relied on'. He added that the obligation went further and included a duty 'to correct a false assumption obviously being made by the claimant'.²³⁹

Showing strong support for Keating,²⁴⁰ and relying on a few Australian cases,²⁴¹ Coulson concluded that a duty of 'good faith' does not oblige the parties to 'put aside self-interests.' In doing so, however, their behaviours should be 'honest, fair and reasonable, and not attempts to improperly exploit the other party'.²⁴²

In *Northern Ireland Housing Executive v Healthy Building (Ireland)*,²⁴³ a dispute arose under the NEC3 Professional Services Contract 2005. The contract required the Employer to notify a compensation event and instruct submission of a quotation when giving an instruction to vary the scope of works. The Employer failed to do both. Four months later, the Consultant notified a compensation event to the Employer followed by an instruction to submit quotations in another five months. The quotations were rejected and the Employer assessed the compensation event at nil. Following adjudication, which was decided in favour of the Consultant, the matter went before the court.

The defendant asserted that the forecast of the compensation event given in their quotation should apply even though the work had been completed and held records of the actual hours expended. The judge was clearly annoyed by the consultant asking: 'why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?'²⁴⁴ Deeny J ordered the consultant to disclose all the information held pertaining to the actual costs incurred. Referring to clause 10.1 he stated:

It seems to me that a refusal by the consultant to hand over his actual time sheets and records for work he did during the contract is entirely antipathetic to a spirit of mutual trust and co-operation.²⁴⁵

The Consultant had been relying on a literal interpretation of the contract and appeared to be taking advantage of the Employer's failings to administer the contract. The reason given for the court's decision not to rely on the Consultant's literal interpretation of the contract was that it preferred an approach that was 'consistent with business common sense'.²⁴⁶

²³⁸ *ibid* [64] - [67], [79].

²³⁹ *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 318 (TCC) [124].

²⁴⁰ David Thomas (ed), *Keating on NEC3* (1st edn, Sweet & Maxwell 2012) para 2-004, 2-005.

²⁴¹ *Automasters Australia Pty Limited v Bruness Pty Limited* [2002] WASC 286; *Overlook v Foxtel* (2002) Aust. Contract 90-143; *Macquarie International Health Clinic Pty Limited v South West Area Health Service* [2010] NSWCA 268.

²⁴² *Costain* (n 299) [121].

²⁴³ [2017] NIQB 43.

²⁴⁴ *ibid* [54].

²⁴⁵ *ibid* [43].

²⁴⁶ *ibid* [50]

The contract required the Consultant to keep account and records of Time Charge and to allow the Employer to check them.²⁴⁷ However Deeny J made no mention of this obligation, presumably because he considered clause 10.1 to be more persuasive in justifying his decision. It is submitted that the decision represents a shift from the view in *Mears* that obligations of ‘trust and co-operation’ cannot be influential in precluding a party from relying on express terms.

5.3 JCT Constructing Excellence (JCT/CE)

JCT launched their Constructing Excellence Contract (JCT/CE) in 2007 describing it as being ‘...for use where the participants wish to engender collaborative and integrative working.’²⁴⁸ The contract represents JCT’s response to Latham’s call for more collaborative working, albeit thirteen years after his seminal report. Latham gave the key note speech at its launch, describing it as one which was ‘based on trust and fairness’.²⁴⁹

Under the heading ‘Working Together’ the JCT/CE sets out an ‘Overriding Principle’:

The Overriding Principle guiding the Purchaser and the Supplier in the operation of this Contract is that of collaboration. It is their intention to work together with each other and with all other Project Participants in a co-operative and collaborative manner in good faith and in the spirit of trust and respect.²⁵⁰

The obligation to be both ‘co-operative’ and collaborative affirms the intent of the partnering ideology. Unlike the NEC forms, the term ‘good faith’ is included, however it is not defined term so devoid of a contractual meaning. Standard forms of contract have sought to assist the courts in the interpretation of common phrases that may be construed differently. For example, Force Majeure is a defined term in the FIDIC forms,²⁵¹ albeit with a warning that ‘the Employer should verify that the wording of this Clause is compatible with the law governing the Contract.’²⁵²

Presumably the contract drafters either considered a definition unnecessary or vulnerable to different interpretations, preferring to identify the behaviours by which the obligation of the Overriding Principle is to be met:

- i) providing and receiving feedback on performance
- ii) drawing attention to any difficulties
- iii) sharing information openly
- iv) supporting collaborative behaviour and addressing behaviour that does not comply with the Overriding Principles.²⁵³

One effect of the Overriding Principle is presented in clause 2.9;

In the event of any dispute between the Parties and/or members of the Project Team, it is the intention that any court or adjudicator or other forum to which the dispute is referred shall take account of the Overriding Principle and of the Parties adherence to it when making any award.²⁵⁴

²⁴⁷ NEC3 PSC (2005) Option G cl 52.2.

²⁴⁸ JCT 2011 Practice Note: *Deciding on the appropriate JCT contract 2011* (Sweet and Maxwell 2011) para 73, 11.

²⁴⁹ Martin Howe, ‘An Introduction to the JCT Constructing Excellence Contract 2007’ (2008) D88 Society of Construction Law, 1.

²⁵⁰ JCT Constructing Excellence 2016 cl 2.1.

²⁵¹ FIDIC Conditions of Contract for Plant and Design-Build 1999, cl 19.1.

²⁵² *Ibid*, Notes on the Preparation of Tender Documents page 20.

²⁵³ JCT Constructing Excellence 2016, cl 2.1.

²⁵⁴ JCT Constructing Excellence 2016, cl 2.9.

According to Furst the effect of the Overriding Principle is to go beyond that required by the NEC forms.²⁵⁵ The JCT/CE includes an optional multi-party Project Team Agreement, 'which enables members of the Project Team to reinforce their collective approach to guiding the successful delivery of a project'.²⁵⁶ The Agreement is supplemental to the various bi-party agreements and provides optional arrangements for sharing risk and reward between members of the Project Team.²⁵⁷ The JCT suite also provides for a non-binding Partnering Charter for incorporation into the main stream JCT contracts. This research has not identified any case law on the JCT/CE: perhaps this is not surprising given its apparently very limited use to date.²⁵⁸

In *Birse Construction Ltd v St David Ltd*, Lloyd HHJ was faced with a Partnership Charter with the intention:

To produce an exceptional quality development within the agreed time frame, at least cost, enhancing our reputations through mutual co-operation and trust.²⁵⁹

The intended contract wasn't signed, the project became delayed and the client sought to apply liquidated damages. In response, the Contractor left the site with the work incomplete, claiming that there was no contract between the parties and the Charter's objectives could no longer be achieved. Lloyd HHJ said that whilst the Charter wasn't legally binding, it did set standards against which the parties conduct and attitudes were to be measured. Consequently, it would be a strong point of reference for an arbitrator acting within the scope set out in the JCT conditions of contract.²⁶⁰ Precisely how an arbitrator would take account of an agreement that was not binding in arriving at an enforceable decision is unclear and it is notable that the court gave no direction on this.

5.4 ACA Contract for Project Partnering (PPC2000) and Term Partnering Contract (TPC2005)

An entirely new standard of contract emerged with the launch of the PPC2000.²⁶¹ Recognised as the first standard form for multi-party contracting, it has been described as a 'brave attempt to bring together partnering arrangements, consultant appointment terms and a building contract into one document'.²⁶² Reflecting many of the hallmarks of a Modern Contract, Latham declared it as 'the full monty of partnering and modern best practice'.²⁶³

Clause 1.1 Term Partnering Contract (TPC2005) sets out the roles and responsibilities:

The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and in all matters governed by the Partnering Contract they shall act reasonably and without delay.

²⁵⁵ Stephen Furst, 'Seminar: Good Faith, Trust and Co-operation' (City of London Law Society, 08 September 2010) 15 <www.citysolicitors.org.uk/attachments/category/117> accessed 11 June 2017.

²⁵⁶ JCT Constructing Excellence Contract Guide 2016 (Sweet and Maxwell 2016) Introduction note 4.

²⁵⁷ JCT Constructing Excellence Contract Project Team Agreement 2016 (Sweet and Maxwell 2016) Section 3.

²⁵⁸ RIBA Enterprises Ltd, *NBS National Construction Contracts and Law Survey 2015*, 16-17.

²⁵⁹ [1999] BLR 194 (TCC) 194, 197.

²⁶⁰ *Birse Construction Ltd v St David Ltd* [1999] BLR 194 (TCC) 194, 202-203.

²⁶¹ David Mosey and Andrew Vickery, *ACA Standard Form of Contract for Project Partnering: PPC2000* (Association of Consultant Architects 2000).

²⁶² Hugh Clamp, Stanley Cox, Sarah Lupton and Koko Udom, *Which Contract: Choosing the Appropriate Building Contract* (5th edn, RIBA Publishing 2012) 339.

²⁶³ David Mosey (ed), *10 Years of ACA Project Partnering Agreements* (Association of Consultant Architects 2010).

As in the NEC forms, the term 'good faith' is conspicuous by its absence. The term 'fairness' is included and on the face of it, the clause overall does represent an attempt to go further than a duty to 'act in a spirit of mutual trust and co-operation'.²⁶⁴ The Term Programme is defined as 'the works and/or services governed by the Partnering Contract, as described in the Partnering Documents.'

Clause 1.1 obligates a standard of behaviour by the parties to deliver a general benefit to the collective activities performed under the contract. There are no specific or measurable benefits identified and reliance is placed on the parties in developing and recording their agreement to these in the Partnering Documents.²⁶⁵ The core terms of the TPC2005 are set out in only 14 pages of text making any interpretation of the contract heavily reliant on what has been agreed in the Partnering Documents. It is submitted that this alone requires the parties to commit to a level of trust and co-operation during negotiation of the contract.

The obligations of Clause 1.1 are limited to, 'the scope of such roles, expertise and responsibilities' of the Partnering Contract. The Guide to the contract states that, 'This qualification establishes that no Partnering Team member is accepting obligations beyond its agreed competence and experience.'²⁶⁶ Presumably this qualification also limits the duties so that the parties own legitimate interests are protected. It is notable that neither the Contract or Guide gives any indication as to how 'competence and experience' is measured or agreed.

It is submitted that the obligations of clause 1.1 alone would be difficult to measure and therefore not easy to establish a breach. Clause 2.1 does however include the more measurable objective of, 'implementation of Tasks within the agreed time and price and to the agreed quality.'

In *TSG Building Services v South Anglia Housing*,²⁶⁷ the parties had engaged under the ACA TPC2005, amended 2008, contract for the provision of gas services. South Anglia terminated the contract thirteen months into the four-year term. No suggestion of poor performance had been alleged and no reason was given for the termination. TSG sought damages for breach of a duty to 'act reasonably' as required by clause 1.1 in all matters including exercising the right of termination.

Clause 13.3 deals with termination and states:

...the Client may terminate the appointment of all other Partnering Team members, and any other Partnering Team member stated in the Term Partnering Agreement may terminate its own appointment, at any time during the Term or as otherwise stated by the period(s) of notice to all other Partnering Team members stated in the Term Partnering Agreement.

The court interpreted clause 13.3 to mean that either party could terminate the contract 'for any reason or no reason.' Akenhead J, overturning the adjudicator's decision, held that whilst the duty to 'act reasonably' did apply to a substantial amount of matters, it could not extend to the right of termination as this had been expressed as an unqualified right of either party.²⁶⁸

The court also considered whether a duty to act in good faith was implied by clause 1.1. Akenhead J began his judgment by referring to *Yam Seng* but considered the case would not apply as South Anglia had not been dishonest in exercising their right of termination.

²⁶⁴ ECC clause 10.1.

²⁶⁵ For example, Agreed KPI's, Targets and Incentives (Appendix 3); Agreed Risk Register (Appendix 5).

²⁶⁶ Chris Paul and Rebecca Rees, *Guide to the ACA Term Partnering Contracts TPC2005 and STPC2005*, (Association of Consultant Architects, 2010).

²⁶⁷ [2013] EWHC 1151 (TCC).

²⁶⁸ *ibid* [42].

Akenhead J went on to say that the Contract did not include an implied term of good faith say because, 'The parties had gone as far as they wanted in expressing terms in Clause 1.1 about how they were to work together in a spirit of "trust fairness and mutual cooperation" and to act reasonably.'

Mosey argues that if *TSG v South Anglia* had been the subject of the JCT/CE contract, then the Overriding Principle would have given effect to moderating all rights and obligations, including the right to terminate at will and as consequence the decision by the court would have been different.²⁶⁹

The TPC2005 also featured in *Lovell Partnerships Ltd v Merton Priory Homes*. In his decision, Edwards-Stuart J assumed the Client's Representative 'had acted in good faith' when carrying out valuations.²⁷⁰ Whilst the case did not involve any aspects of good faith, implied or otherwise, it is notable that the judge felt it necessary to rely on the assumption that 'good faith' had been observed in the performance of the contract.

5.5 CIOB Time and Cost Management Contract (TCM 2015)

The TCM 2015 is principally a name change, with revisions, to the CIOB Complex Project Contract (CPC): it has a strong focus on time management and Building Information Modelling (BIM). The CPC was published in 2013 following research commissioned by the Chartered Institute of Building led by Keith Pickavance. The research concluded that, to be successful, management of construction projects could not rely solely on intuition.²⁷¹ The User Notes state that, 'The Contract requires a collaborative approach to the management of design, quality, time and cost.'²⁷²

The obligations of the parties comprise twelve sub-clauses within section 4. Clause 4.1 states:

The parties shall work together in the manner required by the Contract and shall co-operate in a spirit of mutual trust and fairness and in good faith.

Clause 4.1 obligates the parties to collaborate in ways that are defined by the Contract. The duty to behave 'in a spirit of mutual trust and fairness and in good faith' appears to be limited to that of co-operation. No case law has been identified in this research involving the CIOB CPC or TCM contracts: this is perhaps due to the infancy and limited use of these contracts to date.

5.6 Modern forms and the relational contract model theory

It has been said that the philosophy behind modern forms of construction contract, such as the NEC, 'does not fit easily within traditional contractual models' and 'operate at cross purposes' with traditional contract law. In response to the dichotomy, McInnis proposes adopting the 'relational contract model' promoted by the works of Macneil.²⁷³ McInnes explains that relational contracts can be compared to discrete contracts which are characterised by short duration, limited interaction between the parties and 'minimal future co-operation'.

²⁶⁹ David Mosey, 'Good Faith in Construction Law: What does it Mean and Does It Matter?' (2015) ICLR 393, 399.

²⁷⁰ [2014] EWHC 1615 [21].

²⁷¹ Keith Pickavance, 'Managing the Risk of Delayed Completion in the 21st Century: The CIOB Research' (2009) D106 Society of Construction Law.

²⁷² CIOB Contract for Use with Complex Projects: Section 4 User Notes (1st edn 2013 CIOB) 9.

²⁷³ Ian R Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (Yale University Press 1981); 'Reflections on Relational Contracts' (1985) 141 Journal of Institutional and Theoretical Economics 541.

He concludes that 'futurity' is a key aspect of the model and 'The success of the contractual relationship depends less upon what has been agreed than upon how the parties will agree to handle events in the future.'²⁷⁴

Good faith in 'relational contracts' was considered in *Yam Seng v International Trade Corp*. Leggat J stated that relational contracts:

...may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements.²⁷⁵

Leggat J stopped short of providing an explicit definition of a relational contract, but did provide some examples including, 'joint venture agreements, franchise agreements and long term distributorship agreements'.²⁷⁶ Leggat J argued that good faith should be implied into the contract owing to a generally accepted standard of commercial dealing which did not need to be explicitly stated.²⁷⁷ In support he drew on the words of Lord Bingham: 'Parties entering into a commercial contract ... will assume the honesty and good faith of the other; absent such an assumption they would not deal.'²⁷⁸ Support for *Yam Seng* was given in *Bristol Groundschool Ltd & Ors v Intelligent Data Capture*, where the contract was considered to be the 'relational' kind: consequently, an implied duty of good faith was held to exist.²⁷⁹

In *Compass v Mid Essex Hospital Services*, Jackson J referring specifically to *Yam Seng* and *Horkulak*, acknowledged that good faith was implied by law but only for relational contracts: beyond this there was no general duty in the English law of contract and where the parties wanted to impose a duty of good faith, an express term must be included.²⁸⁰ Further, a relational type contract will not necessarily imply a duty of good faith and will be subject to the particular terms of the contract.²⁸¹

If we accept the relational contract model theory is correct, is it conceivable that modern forms of construction contract could be classed as relational contracts? The futurity that exists in the obligations to operate 'intensive management machinery to deal with issues during the process of a project',²⁸² would suggest that NEC contracts are 'relational' in concept. Similar mechanisms exist in the JCT/CE 16, TPC2005 and TCM2015 contracts, particularly regarding mutual obligations to notify and manage risks.²⁸³

Discretion allowing choice in the administration of a contract is an important factor in 'good faith' type obligations. Where discretion is required the courts have suggested an implied term exists, compelling a party not to 'exercise its discretion in an arbitrary, capricious or irrational manner'.²⁸⁴

²⁷⁴ Arthur McInnis, 'The New Engineering Contract: Relational Contracting, Good Faith and Co-operation' (2003) ICLR 128, 128-131.

²⁷⁵ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 [142].

²⁷⁶ *ibid*.

²⁷⁷ *ibid* [137] – [138].

²⁷⁸ *HIH Casualty v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61 [15].

²⁷⁹ [2014] EWHC 2145 (Ch) [196].

²⁸⁰ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [105].

²⁸¹ *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [67].

²⁸² *WSP Cel Ltd v Dalkia Utilities Plc* [2012] EWHC 2428 (TCC) [86].

²⁸³ For example, JCTCE 16 section 5; TPC2005 cl 8; TCM2015 cl 32.

²⁸⁴ *Mid Essex* (n 280) [83].

The parties to the ECC are obligated to act in 'a spirit of mutual trust and co-operation' but the drafting style does not afford the parties much discretion as they must also 'act as stated in the contract'.²⁸⁵ Nor could it be said that the ECC is a true partnering contract.²⁸⁶

Clause 4.2 of the TCM2015 states:

Where the Contract Administrator, Time Manager, Cost Manager and/or any Listed Person is required to exercise discretion as between the interests of the Employer and Contractor, it shall do so independently and fairly.

Where the parties' interests are at stake, clause 4.2 appears to give the Employer's representatives freedom and authority to make decisions as they see fit; with the qualification that they do so 'independently and fairly'. It is thought that this is reflective of a 'holding the balance' type obligation.²⁸⁷ Notably there are 22 conditions of contract where a decision or action to be taken is subject to what is 'reasonable' including valuation of work following the Employer's right to termination at will. The TPC2005 has a similar approach requiring the Client Representative to, 'fulfil its functions as described in these Partnering Terms, exercising any discretion fairly and constructively'.²⁸⁸

In the tragic case of *Braganza v BP Shipping*,²⁸⁹ the Supreme Court considered the standard by which the decision maker may lawfully exercise its discretionary powers. Relying on several cases,²⁹⁰ Hale L affirmed that decisions should be made '...rationally (as well as in good faith) ...'.²⁹¹ In *Bluewater Energy v Mercon Steel*, Ramsey J stated exercising discretion was, 'limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality'.²⁹²

Despite the prospect of a relational contract including an implied term of good faith, this may not extend to the right of a client to terminate. In *Ilkerler Otomotiv v Perkins Engines*, the parties had entered into a three-year distribution agreement for diesel and gas engines. The agreement gave Perkins the right to terminate if, in their 'absolute discretion',²⁹³ they were dissatisfied with the distributors performance. Ilkerler, relying on *Yam Seng*, claimed that Perkins had breached an implied duty of good faith when terminating the agreement.

The agreement seemed to share many of the characteristics of a relational contract. However, the court did not go as far as to say that a duty of good faith existed, and decided that even if it did, it would not have been breached by Perkins exercising their right to terminate. Longmore J was also clear to point out that in *Yam Seng*, the implied duty of good faith was limited to the performance of the contract stating that 'Requirements for communication and co-operation in relation to termination would take one into a different realm altogether'.²⁹⁴

²⁸⁵ NEC3 ECC cl 10.1.

²⁸⁶ Secondary Option X12 Partnering may be used but the NEC3 ECC would remain a bi-party contract. However, the NEC4 suite of contracts, published in June 2017, has included a new multi-partnering contract entitled the Alliance Contract (ALC).

²⁸⁷ *Sutcliffe v Thackrah* [1974] AC 727, 737D.

²⁸⁸ cl 3.1(i).

²⁸⁹ [2015] UKSC 17.

²⁹⁰ *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2)* [1993] 1 Lloyd's Rep 397, 404; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 [66]; *Hayes v Willoughby* [2013] UKSC 17 [14]; *British Telecommunications Plc v Telefonica O2 UK Ltd* [2014] UKSC 42 [37].

²⁹¹ *Braganza v BP Shipping* [2015] UKSC 17 [30].

²⁹² *Bluewater Energy Services BV v Mercon Steel Structures BV & Ors* [2014] EWHC 2132 (TCC) [1009].

²⁹³ *Ilkerler Otomotiv Sanayai ve Ticaret v Perkins Engines Co Ltd* [2017] EWCA Civ 183 [4].

²⁹⁴ *ibid* [23].

Except for the JCT/CE16, all the other modern standard forms of construction identified in this research particularly permit termination by the client at will.²⁹⁵ The JCT/CE16 provides three reasons why the Purchaser may serve notice for termination but none of these include the right to terminate for any reason.

Obligations to resolve differences and avoid disputes are a feature of modern forms of construction contract. The TPC2005 allows disputes to be resolved before resorting to adjudication and litigation via a 'Problem Solving Hierarchy' followed by a 'Core Group review' and options for conciliation or mediation.²⁹⁶ The JCT/CE16 states 'The Purchaser and the Supplier shall endeavour to notify each other of any anticipated dispute so that it can be avoided by negotiation between them.'²⁹⁷ The contract then expects the parties to 'endeavour to resolve any dispute which does arise by direct negotiations in good faith.' Further, 'serious consideration must be given to mediation if negotiation does not resolve the dispute.'²⁹⁸

English law has generally considered agreements to negotiate to be unenforceable.²⁹⁹ It reflects the principle espoused by Denning MR that where a fundamental term remains a matter of negotiation, no contract can exist because it would be too uncertain to enforce.³⁰⁰ Lord Ackner dismissed the obligation stating it would be '...inherently repugnant to the adversarial position of the parties.'³⁰¹

However, an express term requiring the parties to negotiate disputes in good faith in a first-tier dispute resolution process has been upheld. In *Cable & Wireless v IBM*, Colman J said:

...English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question.³⁰²

Obiter, in *Petromec v Petroleo Brasileiro*,³⁰³ the court said the obligation could have been enforceable because the consequences of non-compliance could be ascertained.³⁰⁴

5.7 Summary

There are four main standard forms of construction contract used in the UK which could be regarded as modern forms. The demand for these contracts which are based on collaboration, partnering and alignment of interests is driven by continued calls to improving efficiency. The use of contracts in the UK which include terms sharing the same underlying principles of good faith has grown over the last twenty years. Some of the standard forms expressly include the words 'good faith' in their text. Others prefer to focus on an ethos of trust and co-operation, alluding to notions of good faith in their performance. The most commonly used of the modern forms are the NEC contracts which are now the default procurement option for public sector infrastructure projects.

²⁹⁵ NEC3 ECC cl 90.2; TPC2005 clause 13.3; TCM2015 cl 68.

²⁹⁶ cl 14.

²⁹⁷ cl 11.1.

²⁹⁸ cl 11.2.

²⁹⁹ *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297.

³⁰⁰ *ibid* 301-302.

³⁰¹ *Walford v Miles* [1992] 2 AC 128, 138.

³⁰² *Cable & Wireless v IBM United Kingdom Ltd* [2002] EWHC 2059, [2002] C.L.C. 1319, 1326.

³⁰³ *Petromec v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891.

³⁰⁴ *ibid* [117] - [118].

Case law involving the modern forms of contract are limited. Claims relying on breaches of trust and co-operation and other notions of good faith are infrequent, but not without authority. In their response, the courts have taken their lead from decisions made outside the field of construction contracts. The courts have recognised that trust and co-operation are fundamental obligations and a key element of how the parties should conduct themselves. However, they have not gone so far as to say that these obligations would override other express terms of the contract or fetter the legitimate commercial interests of the individual parties and in particular the right of termination. Attempts to seek implied duties of good faith and a breach of that duty have been largely unsuccessful with the courts preferring to use estoppel as a remedy.

The law has recognised the existence of relational contracts where a duty to act in good faith may arise. However, the courts have not yet shown their willingness to include modern forms of construction contract in this special category.

5.8 Conclusion

Objective 3 of this research was to:

Identify the modern standard forms of construction contracts used in the UK, explore any obligations of good faith in their performance and examine the response of English courts to claims of bad faith.

Whether implied or given in express terms, the language of the modern standard form of construction contract demand a duty of good faith in their performance. In an era of modern procurement methods and alternative dispute resolution it is submitted that, at the very least, notions of good faith exist. This situation has provided reluctant English courts with a quandary and will continue to do so as more cases lean on these principles as a remedy for breach of contract and inequitable outcomes.

The principles which underpin duties of good faith in the modern forms set out clear intentions of the parties. English law fully embraces and promotes the sanctity of contract enforcing the intentions of contracting parties. There seems no legitimate reason why express terms or even notions of good faith should therefore be enforceable. The notion that an express term could override a duty to act in good faith is wholly inconsistent with the principles of co-operation and honesty, but as so often is the case, the intent and outcome of a party's conduct is decisive.

Contract law recognises that it is not always possible to reduce an agreement made between parties into writing that covers all eventualities. This problem is more prevalent in modern forms of construction contract: particularly the NEC forms which are typified by their brevity. Reliance on trust and co-operation to ensure fair dealing is therefore amplified.

Perhaps one unintended consequence of the modern forms is their vulnerability to disputes when parties fail to operate the contract correctly. The evidence in *Costain, Mears and Shoreline* would support this notion. On one hand, this creates a space within which the courts have traditionally preferred to fill with estoppel and similar equitable doctrines but on the other, opportunity for implied terms of good faith.

Difficulties in interpreting good faith type obligations are not helped by the absence of defined terms in the standard forms of construction contract. This makes the task of the court to enforce express duties of good faith problematic. The courts will not readily imply terms into a contract, so in the absence of an express term and no statute to fall back on, it is unlikely the courts will be willing to imply duties of good faith: at least not to the extent that they override express terms of the contract. A robust contractual definition of what it means to act in good faith supported by a statutory obligation would certainly advance the English law of good faith in line with the needs of the modern forms.

Objective 4 of this research was to:

Examine relevant decisions made by English courts to identify if there has been a change in the approach towards obligations of good faith in contract law.

English courts remain uncomfortable with declaring a breach of good faith in justifying their judgments. Further, the courts do not appear to be ready to imply obligations of good faith into modern forms of construction contract. However, evidence in this research indicates that there is a greater willingness by some judges, at the very least, to consider the core principles associated with good faith in their decision-making process.

Doctrine may be too strong a word for English law at present. Simply recognising that principles of good faith exist in contract law is more likely to result in evolutionary development of the law. The immediate question, for the time being at least, facing English courts is not whether a doctrine of good faith exists, but how its principles can be applied in modern construction contracts.

6.0 Overall conclusion

6.1 Introduction

This chapter will revisit the overall aim of the research and provide concluding remarks based on the findings from the research. Recommendations for contracting parties will be made along with suggestions for further research.

6.2 Overall aim revisited

The overall aim of this research was to examine how English law has responded to notions of good faith in the interpretation of modern construction contracts.

6.3 Concluding remarks

Whether English courts do eventually fully embrace the doctrine of good faith in the future will be a source of conjecture for some time to come. Of one thing, however, there is no doubt: successful commercial relationships will always depend on honesty between the parties.

Defining good faith may not be straight forward, however it is easy to recognise when a party has acted in bad faith. So, if the courts continue to refuse acceptance of good faith as an enforceable obligation then we cannot expect that the law will always find a remedy when a party acts in bad faith. Knowledge of material information is key to commercial fair dealing. Staying silent when in possession of information that one party knows the other party would act differently if they were aware of it, is almost indistinguishable from concealing the truth. And yet, without a duty of good faith, this is the position that English contract law uncomfortably sits.

Whilst English law may espouse the doctrine of freedom of contract, contractors are not always free to choose whether to accept overtly high levels of risk when bidding in a competitive market. The popularity of design and build procurement has accentuated that risk. Modern forms of construction contract together with legislation have sought to bring about equilibrium. There is a compelling argument that a duty to 'act in a spirit of mutual trust and co-operation', is analogous to the close relationship required in a contract of employment. To advance from this to an implied duty of good faith might appear a short step but it remains a difficult and significant one for English law.

Modern forms of construction contract and their notions of good faith are still in their infancy and the evidence in this research confirms that the UK construction industry and Government are committed to their use and development. However, if the legal interpretation of these contracts and enforcement of the principles of good faith remain unsettled then the development and wider use of true partnering and alliancing style contracts is likely to remain slow.

This conclusion is advocacy for English law to recognise a duty of good faith in modern construction contracts. To have argued otherwise would have suggested that acting in bad faith was acceptable.

6.4 Recommendations

- i) Parties wishing to be held to obligations of good faith in the performance of a contract should include this as a specific and unambiguous express term. If the obligation is to extend to the resolution of disputes and the right of termination of contract, then this should also be conveyed by the express term.
- ii) The NEC forms of contract should provide an option for the parties to agree to act in good faith. A solution for use with the NEC4 forms of contract providing the parties with this choice by way of a secondary option X clause is offered in Appendix C.
- iii) The JCT/CE16 and TCM2015 contracts should include 'Good Faith' as a defined term with an interpretation of its meaning. Guidance notes should warn those preparing tender documents that any definition will need to be compatible with the law of that country.
- iv) UK government to commission an independent review of the law of good faith as practised by European and international jurisdictions in context with English modern methods of construction procurement and contracts. The review should respond to the question whether there should be a change in UK legislation obligating a duty of good faith to be included in construction and engineering contracts.

6.5 Further research

- i) This project involved 'research in law' using a doctrinal approach. Given the social-economic factors that has influenced the use and development of modern forms of construction contract, a social-legal study to examine English law's approach to good faith is endorsed. Use of case studies and interviews could be undertaken to identify whether or not the absence of a general duty of good faith is a barrier to development of the modern forms.
- ii) A consultative edition of NEC4 Alliance Contract was published in June 2017 and is the first NEC contract which is truly representative of a multi-partnering contract. A study providing a legal interpretation of this contract would be informative. It is suggested that the research should focus on the obligations of the Client, the Client Representative and the parties that make up the Alliance, in the context of the duty to act in a spirit of mutual trust and co-operation.
- iii) The NEC4 Term Service Contract and ACA Term Partnering Contract 2005 are considered to more closely resemble a 'relational' contract than all the other modern forms. Research comparing these two forms and notions of good faith in their negotiation, performance and termination is recommended.

Word count summary:

Abstract	248
Chapter 1	1495
Chapter 2	956
Chapter 3	4296
Chapter 4	3586
Chapter 5	6344
Chapter 6	861
Total	<u>17786</u>

Appendix A - Research Ethics Statement

Ethical research has been described as ‘the application of a moral code of conduct when human participants are the focus of empirical research.’³⁰⁵ This legal research project is a doctrinal study primarily obtaining information that is publicly available. It has not involved any formal data-gathering exercise through case studies, interviews or questionnaires. There has been no interaction with vulnerable persons or discussions involving sensitive subjects.

This research is a Type 1 project as classified by the University of Salford and the issue of informed consent has not arisen during this project. Ethical approval for this research has been granted.

³⁰⁵ John Biggam, *Succeeding with your Master's Dissertation* (3rd edn, Open University Press 2015) 73.

Appendix B – NEC Case Law

(in chronological order)

Costain Ltd & Others v Bechtel Ltd & Anor [2005] EWHC 1018 (TCC)
Balfour Beatty Ltd v Gilcomston Ltd [2006] CSOH 81
Henry Brother v Department of Education Northern Ireland [2007] NIQB 116
Anglian Water v Laing O'Rourke [2010] EWHC 1529 (TCC)
Walter Llewlyn v Excel Brickwork [2010] EWHC 3415 (TCC)
SGL Carbon Fibres v RBG Ltd [2012] CSOH 19
WSP Cel Ltd v Dalkia Utilities Plc [2012] EWHC 2428 (TCC)
Atkins v SoS Transport [2013] EWHC 139 (TCC)
RWE Renewables v JN Bentley [2013] EWHC 978 (TCC)
Liberty Mercian v Cuddy Civil Engineering [2013] EWHC 2688 (TCC)
ABB Ltd v BAM Nuttall Ltd [2013] EWHC 1983 (TCC)
Amec Group Ltd v Secretary of State for Defence [2013] EWHC 110 (TCC)
Liberty Mercian v Cuddy Civil Engineering [2014] EWHC 3584 (TCC)
Northern Ireland Housing Executive v Healthy Building (Ireland) Ltd [2014] NICA 27
RWE Renewables v JN Bentley [2014] EWCA Civ 150
Fermanagh DC v Gibson (Bainbridge) Ltd [2014] NICA 46
Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 (TCC)
SSE Generation v Hochtief Solutions AG [2015] CSOH 92
Transnet SOC Ltd v Group Five Construction & Others 7848/2015
SSE Generation v Hochtief Solutions AG [2016] CSOH 177
Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)
Northern Ireland Housing Executive v Healthy Building (Ireland) Ltd [2017] NIQB 43

Appendix C – Good Faith NEC4 Secondary Option X Clause

Proposed wording for a secondary option X clause in the NEC4 Engineering and Construction Contract obligating a duty of Good Faith.

OPTION X26: GOOD FAITH

- Actions** X23.1 (1) The Parties, the *Project Manager* and the *Supervisor* Act in Good Faith in the performance, resolution of disputes and termination of the *Contractor's* obligation to Provide the Works in the contract.
- (2) The *Project Manager* and the *Supervisor* act impartially.³⁰⁶
- (3) The Parties, the *Project Manager* and the *Supervisor* notify each other as soon as they become aware of:
- a false assumption made by the Parties, the *Project Manager* and the *Supervisor*³⁰⁷ and
 - any matter which may affect the rights and obligations of the Parties in the contract that otherwise could not have been known.³⁰⁸

Identified and defined terms X23.2

To Act in Good Faith is to:

- be honest,³⁰⁹ fair and reasonable,³¹⁰
- recognise and have due regard to the other Parties' legitimate interests,³¹¹
- not knowingly give false information,³¹²
- take reasonable steps to ensure that information given is not false,
- not mislead by silence,³¹³ conduct or communication,
- refrain from exploitation³¹⁴ and
- not act vexatiously or capriciously.³¹⁵

Note:

Case law citations have been used here to justify the terms proposed however, in practice these references would not be included in the contract.

³⁰⁶ *Sutcliffe v Thackrah* [1974] AC 727, 737D; *CORBER v Bechtel Ltd* [2005] EWHC 1018 (TCC) [53]

³⁰⁷ *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 318 (TCC) [124].

³⁰⁸ *Greenwood v Martins Bank* [1933] AC 51, 58-59; *Fung Kai Sun v Chan Fui Hing & Ors* [1951] AC 489.

³⁰⁹ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [135]; *HIH Casualty v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61, 68

³¹⁰ *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 318 (TCC) [299]; *HIH Casualty v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61 [15]; *Bhasin v Hrynew* 2014 [2014] 3 SCR 494 [33]

³¹¹ *Automasters Australia Pty Limited v Bruness Pty Limited* [2002] WASC 286 [393];

³¹² Misrepresentation Act 1967 s 3; *First Tower Trustees v CDS (Superstores International)* [2017] EWHC 891 (Ch) [23].

³¹³ *Smith v Bank of Scotland*, 1997 SC (HL) 111 [121].

³¹⁴ *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 318 (TCC) [299].

³¹⁵ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) [145]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [83]; *Bluewater Energy Services BV v Mercon Steel Structures BV & Ors* [2014] EWHC 2132 (TCC) [1009].

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