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Insights

JCT 2024 CONTRACTS – GOOD FAITH IN PRACTICE

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SUMMARY

In this Insight, Shy Jackson considers the scope and implications of the parties' obligation to work together in good faith under the Joint Contracts Tribunal (JCT) 2024 contracts.

Not everyone will be familiar with the 1994 Latham Report that advocated the use of good faith, but the government's Construction Playbook and the equivalent private sector Trust and Productivity report are more recent examples of the drive for collaborative contracting as a way to improve delivery. This, in practice, will mean including good faith obligations in construction contracts, which is one of the reasons why the JCT 2024 suite of contracts includes the new Article 3.

Article 3 requires the parties to work with each other and other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. In addition, it requires the parties to support collaborative behaviour and to address behaviour which is not collaborative.

As noted by JCT, there does appear to be more openness by the courts to the concept of good faith in recent years. But this is not always consistent and each case very much depends on its own facts. An early House of Lords decision (Walford v Miles [1992] 2 AC 128) observed that good faith is 'inherently repugnant to the adversarial position of the parties when involved in negotiations' but a more recent and relevant decision (Essex County Council v UBB Waste (Essex) Limited [2020] EWHC 1581 (TCC)) found that '[a] 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith'. In a recent Scottish decision concerning the NEC subcontract (Van Oord UK Ltd v Dragados UK Ltd [2021] CSIH 50) it was commented that 'Clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract.'

As can be seen, there is a substantial body of case law and commentary on the operation of good faith and this is very much a developing area. Recognising that each case depends on its facts, one way to test the potential impact of Article 3 is to look at cases that address the operation of good

faith obligations set out in earlier versions of the NEC contracts and consider whether the addition of Article 3 would have affected the court's decisions.

This article therefore looks at two recent decisions that deal with the common issues of conditions precedent and termination in order to identify what difference, if any, a good faith obligation might have made. As noted in the highly publicised dispute concerning the Post Office sub-masters (Bates v Post Office Ltd (No.3) [2019] EWHC 606 (QB)), good faith imposes an obligation to '…refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people' and this is the standard against which conduct can be assessed.

CONDITIONS PRECEDENT

FES Ltd v HFD Construction Group Ltd [2024] CSIH 37 is a recent decision that looked at the notice requirements in the Scottish College of the Joint Contracts Committee (SBCC) Standard Building Contract for use in Scotland, 2016 Edition, which are identical to the equivalent provisions in the corresponding JCT building contracts 2016/2024 editions. It was held that the wording of clause 4.20.1 was 'unambiguous' in creating a condition precedent and that this was useful as the 'need to be duly notified and advised of the potential liability within a limited (but not certain) time span is a reasonable condition'.

The potential impact of such a condition was considered by the TCC recently in the context of a bespoke amendments in My Contracts Ltd v 74 Hamilton Terrace Freehold Ltd [2024] EWHC 2896 (TCC) where an employer's notice was one day late but the employer argued that because the final day was a Sunday, service on Monday should be seen as valid. This argument was rejected by the judge who held that the clause could not be interpreted to refer to working days or exclude public holidays, and that notice by email on a Sunday would have been effective.

Where one party is one day late in serving a notice that is expressed to be a condition precedent, would Article 3 make a difference, and would a party seeking to deny entitlement based on a minor delay be accused of behaving in a way that which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people?

In the context of the NEC3 suite of contracts, in Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd [2014] NICA 27, the judge rejected an employer's argument that a claim failed due to late notice. It was held that under the contract the time bar did not apply where an instruction is issued and it did not matter that in this case it was an informal instruction recorded in minutes of a meeting. When reaching that conclusion, however, the court made it clear that the primary contractual provision was interpreted in the light of the good faith provision in clause 10.1.

This suggests that the good faith principle may be relevant when applying other contractual provisions, but courts may be reluctant to use it when it is seen as cutting across agreed contractual terms. This is consistent with other decisions on good faith where it was held in Costain v Tarmac

[2017] EWHC 319 (TCC) that the obligation does not require a party to '…put aside its own self-interest.' In another case, Gold Group Properties v BDW Trading [2010] EWHC 1632 (TCC), it was observed that good faith '…does not require either party to give up freely negotiated financial advantage clearly embedded in the contract'. To date, there do not appear to be any English law decisions that relieve a party of the consequences of non-compliance with a condition precedent on the basis that a good faith obligation but as the use of the JCT 2024 suite becomes more prevalent, it is likely that such arguments will be raised.

TERMINATION

Another way to test the potential application of Article 3 is to look at the JCT termination provisions. These were considered recently in Providence v Hexagon [2024] EWCA Civ 962, where it was held by the Court of Appeal (reversing the High Court judge's decision) that a contractor validly terminated the contract due to late payment by the employer. The decision surprised some commentators as it concerned two late payments and the first default was remedied before the notified period for correcting the default had expired. It was felt that the contractor was taking advantage of a technical interpretation which may be correct based on the wording used but did not reflect the intention of the clause or the merits of this case.

Would the court have reached a different conclusion if the contract included Article 3 and did the contractor behave in a way that would be regarded as commercially unacceptable by reasonable and honest people?

The right to terminate is different from other obligations, as it does not relate to the performance of a contractual obligation and it brings the contract and the parties' relationship to an end, save for the post termination process. As it is an extreme step, there have been a number of attempts to argue before the courts that termination must be exercised in good faith.

An earlier case, TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151, concerned the ACA standard form of contract for term partnering (TPC 2005, amended 2008) and considered whether the right to terminate under clause 13.3 of the contract had to be effected in good faith, or at least reasonably. It was held that, properly construed, clause 1.1, which required the partnering team to '…work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme…', did not require the employer to act reasonably in terminating and clause 13.3 allowed termination for any reason.

The same approach was taken in Optimares SpA v Qatar Airways Group QCSC [2022] EWHC 2461 (Comm). Here the contract included an express good faith obligation but it was held that it applied only the parties' performance of their 'responsibilities and obligations' under the contract but not to the right to terminate. The position appears to be the same when parties rely on an implied duty of good faith. In TAQA Bratani v RockRose UKSC8 LCC [2020] EWHC 58 (Comm), the judge was willing to treat the agreement as being at least arguably relational contract but went on to find that this did

not necessarily lead to a finding of good faith and that in that case there was no basis for implying a good faith duty which qualified the absolute right to terminate.

Looking again at the decision in Providence v Hexagon, it seems likely that a court would still place the same emphasis on the meaning of the wording agreed by the parties, rather than look at the conduct of the contractor when exercising the right to terminate. In that context, the court may also be influenced by the fact that had the employer made payments on the dates required under the contract, the right to terminate would not have arisen in the first place. Overall, the cases suggest that a clear contractual right to terminate is unlikely to be seen as subject to a good faith obligation. That does however depend on the drafting of the termination clause and the facts in each case and there may be circumstances where some judges will be more open to arguments that an express good faith obligation, which is drafted so it applies in wide terms, affects the right to terminate.

CONCLUSIONS

The cases above highlight the tension between preserving the parties' commercial bargain based on the contractual terms they have agreed, and what is often seen as an overarching good faith obligation, bearing in mind that is also a contractual term the parties have agreed to.

It is not always easy to resolve this tension, which is why each case must be examined on its own facts but also on the specific drafting of the agreement. In some of the decisions considered above, the good faith obligation was drafted on a narrow basis so that it applied to only some of the contractual obligations. That is quite different from the wording of Article 3, which applies to both parties equally and refers to the obligations under the contract in wider terms, similar to the NEC contracts wording. It may well be that in the two examples considered above, Article 3 would not have affected the outcome, but that will not always be the case. As people start to use the 2024 suite and assuming Article 3 remains largely unamended, it is likely that it will feature in arguments raised by parties, probably in support of claims based on other specific contractual obligations but also in certain cases as a stand-alone obligation.

It is therefore necessary to go back and consider why Article 3 has been introduced. The aim is to encourage and embed collaborative contracting as part of the JCT contract, with the aim of parties taking a less adversarial approach on the basis that it is in everyone's interest for a project to be successful. That is a worthwhile goal but, as the courts have pointed out, it is also necessary to acknowledge the parties' commercial interests as set out in the contractual terms. Simply adding Article 3 to the JCT contracts will not resolve that tension, but adopting a different mindset may well result in better behaviours and more efficient delivery. This is the challenge for the industry and any further guidance from the courts should help identify how that will operate in practice, especially as Article 3 becomes accepted as part of the standard JCT suite of contracts.

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