Judgments

TSG Building Services plc v South Anglia Housing Ltd

Building contract – Adjudication – Award – Jurisdiction to make award – Defendant referring matter to adjudication – Adjudicator making award – Claimant commencing proceedings seeking declaration adjudicator having no jurisdiction to adjudicate on number of disputes – Defendant seeking enforcement of adjudicator's decision – Whether adjudicator having jurisdiction to make award – CPR Pt 8

[2013] EWHC 1151 (TCC), HT-13-85, HT-13-87, (Transcript)

QBD, TECHNOLOGY AND CONSTRUCTION COURT

AKENHEAD J

17 APRIL, 8 MAY 2013

8 MAY 2013

A Fenn for the Claimant in HT-13-85

M Lixenberg for the Defendant in HT-13-85

Hogan Lovells; Trowers & Hamlins

AKENHEAD J:

INTRODUCTION

[1] These two sets of proceedings, the first (HT-13-85) for the enforcement of an adjudicator's decision and the second (HT-13-85) a Pt 8 Claim for declarations relating to the meaning of the underlying contract between the parties raise, respectively, jurisdictional issues in adjudication relating to whether more than one dispute was referred to the adjudicator and the scope and applicability of good faith and reasonableness in a termination for convenience clause in the contract between the parties.

BACKGROUND

[2] **South Anglia Housing Ltd** ("**South Anglia**") is a **Housing** Association company which at the time was responsible for some 5,500 individual properties. **TSG Building Services plc** ("**TSG**"), as the name suggests, was a contracting company which provided **building** and maintenance **services**, particularly in relation to **Housing** Associations and the like.

[3] **TSG** and **South Anglia** entered into a contract ("the Contract") for the provision by **TSG** of a gas **servicing** and associated works programme relating to **South Anglia**'s **housing** stock. This contract was based on the ACA Standard Form of Contract for Term Partnering (TPC 2005 amended 2008) and it commenced and came into effect on 1 July 2009. By a bespoke addition to Cl 13.1, it was agreed that the term of the contract was to be "an initial period of four . . . years extendable at the Client's sole option to a further period of one . . . year . . . ."

[4] Whilst I will return to the Contract later in this judgment, there are two terms of key importance to the matters in issue between the parties:

> "1.1 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. [There was added as a bespoke term that the 'roles, expertise and responsibilities of the Client and the **Service** Provider are further described in the Term Brief and the Term Proposals and the **Service** Provider shall be paid in accordance with the Partnering Terms and the Price Framework].
>
> 13.3 If stated in the Term Partnering Agreement that this clause 13.3 applies, 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. [A bespoke term confirmed that Clause 13.3 was to apply and identified that any 'Partnering Team member may serve notice on the others, provided that at least three . . . months' notice is given.']"

[5] There has been no real suggestion in the evidence that over the next 13 months **TSG** performed their work badly or incompetently. However it is clear that **TSG** became disappointed or disillusioned in relation to the amount of payment. It wrote to **South Anglia** on 20 July 2010 that remedial and maintenance works carried out by its predecessor had been poorly undertaken, that **South Anglia** was awarding additional installation works to other contractors, that there was interference, that there were unrealistic requests being made of **TSG** and that certificates and payments were not being issued or made promptly. It proposed that as from the second year of the Contract pricing should go onto an "Open-book" basis or a realistic rate per property. This letter was not replied to and, consequently, on 5 August 2010 **TSG** wrote again to **South Anglia** giving notice of the existence of a dispute reflecting the issues previously raised.

[6] **South Anglia** eventually responded on 23 August 2010 broadly suggesting that **TSG** took the risk when it tendered and denying that there was any breach of contract on the part of **South Anglia**. However it did accept that it was prepared to move to the Open-book approach which should apply for the second year. By a separate letter on the same date, it wrote as follows:

> ". . . Pursuant to clause 13.3 of the Agreement, **South Anglia** hereby gives **TSG** three months notice of its intention to terminate **TSG**'s Appointment under the Agreement. In accordance with Clause 1.10 of the Agreement, the three month notice period is effective from the date of delivery of this letter to you. This letter is delivered to you by fax, as provided by clause 1.10, on 23 August 2010 and as such **TSG**'s Appointment will terminate on 24 November 2010."

[7] Notwithstanding a number of requests and even a gentle hint from the court, **South Anglia** has never explained openly why it terminated, although an internal email of 25 August 2010 suggests that Mr Richardson (Assistant Director of Property **Services**) made the decision "based on current issues, communication, compliancy and risk for **South Anglia** going forward", this email being attached without any relevant comment to **South Anglia**'s Counsel's written submissions. I cannot make any factual assumptions as to why the termination occurred, although **TSG** believed that the termination was financially motivated as it suggested at a meeting on 7 September 2010.

[8] On 12 October 2010, **TSG** expressed disappointment about the termination and sought payment in consequence of the termination under four heads: under recovery of overheads and profit as a result of the termination, under-recovery of contract set-up and termination costs, additional costs of maintenance to properties incurred in Year 1 and under-recovery of overheads and profit on additional repair work instructed by **South Anglia** to others. Interest was also claimed, the claim at this stage totalling £900,682.94.

[9] By letter dated 18 October 2010 **South Anglia** responded denying that **TSG** had any entitlement to compensation consequential upon the termination. **TSG** provided greater detail about their four heads of claim which in its latest iteration totalled £1,013,125.20. **South Anglia** responded on 15 November 2010 explaining that they did not accept that **TSG** was entitled to any additional sums. Correspondence continued sporadically thereafter with little appearing to happen although it is clear that there were meetings called to attempt to resolve the issues between the parties. Although not all the correspondence has been provided, it does appear that a fully detailed cost submission was attached to a letter dated 21 March 2011 from **TSG** to **South Anglia**.

[10] On 18 November 2011, **TSG** referred a first dispute to adjudication, relating to whether **TSG** was entitled to payment on the open book basis in relation to the period from 1 July 2010 and the termination date; the claim was for some £238,000 and the adjudicator in that matter, Mr Nigel Davies, issued his decision on 5 January 2012 deciding that **TSG** was entitled to some £61,000 plus interest. This was paid and was not otherwise challenged.

[11] On 15 October 2012 **TSG** wrote to **South Anglia** sending a "Position Statement" and urging a settlement, failing which the matter would be referred either to mediation or adjudication. The Position Statement is a 30 page document which seeks to support the previous four heads of claim, albeit that by this stage with slight accounting adjustments the total claim excluding interest had gone up to £1,190,971.56. The sum was broken down as follows: additional costs of maintenance to properties incurred in Year 1 (£548,086.73), under-recovery of overheads and profit on additional repair work instructed by **South Anglia** to others (£63,462.30), under-recovery of overheads and profit as a result of the termination (£552,948.73) and under-recovery of contract set-up and termination costs (£36,473.80).

[12] No satisfactory response having been received, **TSG** served on **South Anglia** a Notice of Adjudication dated 23 January **2013**. This Notice referred to the following "issues":

> "– the additional costs which **TSG** has incurred during Year 1 as a result of poor maintenance, **servicing** or installation works undertaken by other parties (£548,086.73)
>
> – the revenue **TSG** has lost as a result of [**South Anglia**] awarding contract works to other contractors (£67,235.47)
>
> – the costs which have resulted from [**South Anglia**'s] termination of the Agreement (£586,502.68)"

The latter figure was an amalgam of under recovery of overheads and profit, contract set-up and termination costs. The "redress" sought included decisions that **TSG** was entitled to payment of each of the sums claimed plus adjudicator's fees.

[13] This was followed, after the appointment of the adjudicator, by a detailed Referral Notice on 30 January **2013**. **South Anglia**'s solicitors wrote to the adjudicator on 5 February **2013** taking three jurisdictional points of which only one is pursued, namely that the Referral Notice was referring "three distinct disputes" when the relevant Scheme only permitted a single dispute to be referred to adjudication at any one time. The three disputes were in effect the three "issues" referred to in the Notice of Adjudication, albeit expanded upon in the Referral Notice. The adjudicator nonetheless considered that he did have jurisdiction and proceeded with the adjudication. Whilst **South Anglia** reserved its position on jurisdiction, it responded to the detailed claims, taking numerous points but an overriding one was that the Contract did not permit any of the claimed heads of compensation. Following the exchange of Response, Reply and Rejoinder, the adjudicator issued his decision on 27 February **2013** deciding that **TSG** was entitled to payment of sums associated with the termination of the appointment, namely £383,778.91 plus interest and with **South Anglia** to pay his fees.

THESE PROCEEDINGS

[14] There was something of a race as to which party could get its proceedings started first with **TSG** issuing proceedings on 18 March **2013** in respect of the enforcement of the adjudicator's decision, closely followed by **South Anglia** on 20 March **2013** with its Pt 8 proceedings. It availed them little because the court issued its procedural directions on both sets of proceedings on 21 March **2013**. Whilst there were some reservations about whether the timetable could be achieved, both parties co-operated with each other and the court to ensure that the appointed date could be maintained.

[15] So far as the adjudication enforcement proceedings are concerned, there is one relatively simple issue namely whether the adjudicator exceeded his jurisdiction by adjudicating on more than one dispute.

[16] The Pt 8 proceedings raise issues of contractual construction and implication of terms broadly as to whether or not the termination under Cl 13.3 of the Contract needs to have been effected in good faith or at least reasonably. It is accepted by both parties that, if the court decides that on its proper construction or by implication **South Anglia** was obliged to act in good faith or to act reasonably, the court is not in a position to address the factual issues as to whether **South Anglia** so acted. These Pt 8 proceedings also pre-emptively sought declarations that the adjudicator had no jurisdiction because more than one dispute or difference was referred to him. The declaration sought in relation to the Contract is:

> "**South Anglia** having exercised its right to serve notice to terminate the Agreement under Clause 13.3 thereof, **TSG** has no entitlement, whether as damages for breach of contract, or as a sum due under the contract, to receive monies and/or compensation in respect of the overheads and profit it would have recovered over [the] balance of the Term (Post termination), had the agreement not been terminated."

It seeks a consequential declaration that the adjudicator was wrong in ordering **South Anglia** to pay £383,778.91 to **TSG** by way of compensation for termination and also in ordering payment of interest.

[17] I will address the jurisdiction issue first followed by the contractual issues.

JURISDICTION OF THE ADJUDICATOR

[18] There has been an extensive debate before the court as to whether or not (a) more than one dispute was referred to the adjudicator and (b) even if more than one dispute was referred, the adjudicator nonetheless had jurisdiction.

[19] I refer to some observations made by the court in *Witney Town Council v Beam Construction (Cheltenham) **Ltd*** [2011] EWHC 2322 (TCC) on the determination of what might be covered within one dispute:

> "33 It is important to bear in mind that construction contracts are commercial contracts and parties, at least almost invariably, can be taken to have agreed that a sensible interpretation will be given to what the meaning of a dispute is. It is conceivable that there may be a dispute on a construction contract which is simply: what is due to one or other of the parties? That could be a very broad dispute covering a large number of issues. For instance, there may be a dispute between the parties about an interim valuation with the contractor saying that it is entitled to payment for 50 variations but overall it is claiming £100,000; the Architect certifies £80,000 and disagrees with the contractor on each of the 50 variations (a) the amount of work done and (b) the rate or price. One could say that there were 100 disputes, namely two per variation. Alternatively and obviously sensibly, one could and should say that there was one dispute with 100 sub-issues. The parties can not sensibly have intended in these circumstances that each sub-issue for the purposes of adjudication and even arbitration gives rise to a separate dispute which must be referred to a separate adjudication or arbitration. The dispute in this example will be as to what sum the contractor was entitled to on the interim valuation. A particular dispute, somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on; the typical example in a construction contract is the ever increasing dispute about what is due to the contractor as each monthly valuation and certificate is issued; a later certificate may accept amounts in issue previously not certified but then reject some more items of work. One may in the alternative have a dispute, like the proverbial rolling stone gathering no moss, which remains the same and unaffected by later events; an example might be disputed responsibility over an accident on site . . . .
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> 38 Drawing all these threads together, I draw the following conclusions:
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> (i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.
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> (ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.
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> (iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.

> (iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties can not broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.
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> (v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.
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> (vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.
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> (vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

[20] I have no doubt that there was only one dispute referred to adjudication, albeit that it comprised three primary strands or issues. Historically and from the autumn of 2010, **TSG** had put forward detailed written arguments and claims that it was entitled to payment for compensation flowing from the termination. The particular heads of claim pursued eventually in the **2013** adjudication were in principle and substance the same as those raised in late 2010. By October 2012, the three financial heads of claim (albeit then encompassed within four nominal heads of claim) were being put forward very clearly in **TSG**'s Position Statement which appears to have been (at the very least) ignored or (possibly) openly rejected. Either is sufficient in the historical context to give rise to a dispute about **TSG**'s claim for compensation, justified in fact, in law or not as the case may be, consequential upon the termination of the Contract. Both historically and on its face, this compensation claim was one claim comprising three primary alleged financial entitlements which had been effectively challenged or at least not admitted over the three months prior to the initiation of the adjudication. It would have been theoretically possible for a party such as **TSG** to pursue the three separate parts of its claim as separate claims, giving rise potentially to 3 disputes referable to adjudication; however, this was not what **TSG** did. It is suggested that the "rule of thumb" quoted above in para 38(vii) of the *Witney* case comes into play. However, the two largest sub-claims at least were predicated as flowing from the termination and in any event the "rule of thumb" is not invariable.

[21] That disposes of **South Anglia**'s jurisdictional challenge and the adjudicator on any account had jurisdiction to resolve all the issues put before him.

[22] It was argued in the alternative by **TSG** that multiple disputes could be referred to a single adjudication. Reliance is placed on the recent decision of Ramsey J in *illmott Dixon **Ltd** v Newlon **Housing** Trust* [**2013**] EWHC 798 (TCC) which was directly concerned with whether two disputes could be referred to two adjudications with the same adjudicator, the learned judge deciding that there was nothing wrong or objectionable with that. However at para 75 he considered the impact of the Model Adjudication Procedure published by the Construction Industry Council ("CIC Rules") (also incorporated into the Contract here) on the issue as to whether more than one dispute could be referred in one adjudication. He said:

> "75 I have proceeded on the basis that Mr Hickey was correct and that s 108 precludes a party from referring more than a single dispute at the same time, as has been stated in a number of previous decisions. He however accepted that a party could refer multiple disputes to adjudication if the parties consent to that. Mr Lee was careful in his submissions to point out that under

> the Scheme, without the consent of the parties, it is not possible to refer more than one dispute to adjudication: see *Bothma* and *Witney Town Council* both of which involved adjudications under the Scheme. He did not accept that it went further. It is to be noted that the reasoning in *Bothma* at 4 was that as paragraph 8(1) of Part I of the Scheme provided that the adjudicator could, with the consent of the parties, adjudicate more than one dispute, that meant that absent such consent he could not. The decision was not based on a principle derived from the wording of s 108(1), which refers to a party having a right to refer 'a dispute' to adjudication.
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> 76 On analysis such an argument as to the meaning of 'a dispute' in s 108(1) has difficulties. If s 108(1) **limits** a party to being able to refer a single dispute to adjudication by the reference to the phrase 'a dispute' rather than the use of the word 'disputes', then that causes problems for parties consenting to refer multiple disputes to a single adjudication. If a party agreed to a provision for multiple disputes to be referred to adjudication then that provision would not comply with s 108(1). The effect of a provision of the construction contract not complying with s 108(1) would be that s 108(5) would cause the adjudication provisions of the Scheme to apply. The effect would be that paragraph 8(1) of the Scheme would apply which allows multiple disputes to be referred if the parties consent and that would be what the parties had done and were free to do under the Scheme. On that basis the Scheme would not comply with s 108(1). This suggest that an argument based on the reference in s 108(1) to 'a dispute' being 'one dispute' may not be correct and that the reference to 'a dispute' is more likely to be a generic reference to 'a dispute', without seeking to **limit** it to a singular dispute.
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> 77 In this case I have not needed to decide whether the references in rule 8 to 'a dispute' or 'the dispute' **limited** the parties in this case to referring one dispute. However, given the wording of rule 36 which refers to the Adjudicator being appointed 'to determine the dispute or disputes between the Parties', I would have held that the reference to 'a dispute' or 'the dispute' in rule 8 was a generic reference which was not intended to **limit** the number of disputes which could be referred to adjudication by a Notice. Contrary to Mr Hickey's submission I do not consider that the reference to 'disputes' in rule 36 cannot properly be construed as being **limited** to cases of joinder of third parties under rule 22. If it had been necessary, I would have based my decision on this."

His logic was that references in s 108 and the Scheme to the reference to adjudication of "a dispute" were generic and were not statutorily intended to restrict reference in one adjudication of more than one dispute and that it is open to the parties to agree in their contract that more than one dispute can be referred in a single adjudication; he found that the CIC Rules permitted more than one dispute so to be referred. I do not intend to add, *obiter*, to a debate on this topic which was only addressed by Ramsey J himself on an *obiter* basis. I would say only that, absent specific agreement either in the original contract or on an ad hoc basis, authorities are sufficiently well established now to suggest that only one dispute can be referred to adjudication, albeit that the courts adopt a sensible and commercial approach in determining the relative width of any given dispute.

THE CONTRACT AND THE PT 8 PROCEEDINGS

[23] The first area of this issue concerns the extent to which, if at all, the Cl 13.3 right of termination was constrained by Cl 1.1. One first needs to consider the nature of the Contract. At a simple level, **TSG** was to provide gas **servicing** and other associated works at **South Anglia**'s many properties for reward. The preamble confirms that the parties "agree working in mutual cooperation to fulfil their agreed roles and responsibilities and apply their agreed expertise in relation to the Term Programme, in accordance with and subject to the Partnering Documents . . . ." The Partnering Documents were defined as "the documents governing implementation of the Term Programme and each Task and the partnering relationships between the Partnering Team members, as described in the Term Partnering Agreement". The Term Programme was defined as

the “works and/or **services** governed by the Partnering Contract, as described in the Partnering Documents”. The Term Brief was the “brief provided by the Client in relation to the Term Programme”. “Task” was described as “the works and/or **services** to be undertaken pursuant to an order issued in accordance with the Partnering Documents” and “order” defined as “an order based on the form set out in App 6 instructing the **Service** Provider to undertake any one or more Tasks”.

[24] The Term Brief incorporated in the Contract runs to over 200 pages. This provides model specifications for different types of gas **servicing** works. Several of the attached documents encourage liaison and cooperation between **TSG** and **South Anglia**. It provided for various prices for various types of work. It highlighted substantial elements of co-operation between **South Anglia**'s Client Representative and **TSG**. It addressed the need for emergency work and work to be done out of hours. “Key Performance Indicators” were provided for.

[25] The standard terms used by the parties, albeit somewhat specifically adapted, in addition to Cl 1.1, provide for what might loosely be called “partnering”, which is to be distinguished from legal partnership. It would be wrong to say that the partnering envisaged an equal sharing of the profits or losses suffered by the parties. Indeed, Cl 12.1 expressly stated that no partnership would be construed or created. The objects or objectives of the partnering are set out in Cl 2.1:

> “The Partnering Team members shall establish, develop and implement their partnering relationships, within their agreed roles, expertise and responsibilities and in accordance with the Partnering Documents, with the objectives of achieving for the benefit of the Term Programme and for the mutual benefit of Partnering Team members:
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> (i) trust, fairness, mutual cooperation, dedication to agreed common goals and an understanding of each other's expectations and values;
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> (ii) satisfaction of the agreed pre-conditions to implementation of the Term Programme referred to in clause 6.1;
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> (iii) implementation of Tasks within the agreed time and price and to the agreed quality pursuant to orders issued in accordance with clause 6;
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> (iv) innovation, improved efficiency, cost-effectiveness, lean production, improved Sustainability and other measurable continuous improvements by means of the Processes referred to in clause 2.2 and by reference to the agreed KPIs and Targets referred to in clause 2.5;
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> (v) commitments to people including staff and Users;
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> (vi) any additional objectives stated in the Term Partnering Agreement.”

[26] Clause 1.6 provided for the establishment of a “Core Group to review and stimulate the implementation of the Term Programme”, which was to investigate the potential for cost savings and added value (under Cl 2.4) amongst other functions.

[27] Clause 7 provided for payment. “Task Prices” were to be calculated in accordance with the “Price Framework” (Cl 7.1). Clauses 7.3 to 7.6 provided for payment following applications and valuations on a monthly basis. 7.13 provided:

> "Within . . . 40 Working Days following the end of the Term, the Client Representative shall prepare and issue to the Client and the **Service** Provider a Final Account, which when agreed by them shall be conclusive evidence as to the balance due between them and, upon such agreement, the Client Representative shall issue a Final Account valuation. The Client shall pay in accordance with clause 7.6 the amount stated in the Final Account valuation . . . . If agreement is not reached within . . . 40 Working Days from the date of issue of the Final Account, either the Client or the **Service** Provider may implement the procedures described in clause 14 if appropriate."

[28] Clause 7.14 entitled **TSG** to suspend performance after notice if **South Anglia** failed to make payment in accordance with Cl 7.

[29] Clause 8 provided for the undertaking by the parties of "Risk management" in order to "analyse and manage such risks in the most effective ways". It was open to any party to propose a "Change" and procedures were laid down for the implementation of such Change.

[30] Clause 13 provided for termination. Clause 13.3 is set out above but Cl 13.5 provided for automatic and immediate termination on the bankruptcy, liquidation or the like of one or other party. Clause 13.6 provided as follows:

> "In the event that any Partnering Team member shall breach the Partnering Contract so as to have a demonstrable adverse effect on the implementation of the Term Programme or any Task and shall not remedy such breach within ten . . . Working Days from the date of notice from another Partnering Team member specifying the breach then, after notifying the Core Group and allowing a period of ten . . . Working Days from the date of such notification to receive and consider their recommendations, the notifying Partnering Team member (if it is not the Client) may terminate its own appointment under the Partnering Contract or, (if it is the Client) may terminate the appointment of the Partnering Team member in breach, in each case by notice with immediate effect."

Clause 13.8 provided:

> "In the event of termination in accordance with clauses 13.2, 13.3 or 13.4 or by reason of Client bankruptcy or insolvency under clause 13.5 or by any Partnering Team member of its own appointment in accordance with clause 13.6, the relevant Partnering Team member(s) shall be entitled to payment in accordance with clause 7 of the total amount(s) properly due up to the date of termination."

[31] Clause 14 provided for dispute resolution with provision for Core Group review, conciliation, mediation and/or adjudication.

DISCUSSION

[32] The first question to consider is whether Cl 1 as a matter of construction provides for any constraint, condition or qualification on the apparently unfettered right of either party to terminate in effect for convenience (or without any already given reason) under Cl 13.3. In that context, one needs to have regard to the usual precedents relating to the construction of commercial contracts, such as *Investors Compensation Scheme **Ltd** v West Bromwich **Building** Society* [1998] 1 All ER 98, [1998] 1 WLR 896, [1998] 1 BCLC 493 and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900. In broad terms, one needs to determine objectively what a reasonable person with all the background knowledge

reasonably available to the parties at the time of the contract would have understood the parties to have meant and one is looking to adopt the more rather than less commercial construction.

[33] It is probably helpful if one breaks Cl 1.1 down into its arguably different parts (with paragraph numbers added):

> "[1] 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
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> [2] all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and
>
> [3] in all matters governed by the Partnering Contract they shall act reasonably and without delay."

(1) The first part of this clause is clearly and primarily calling upon the parties to "work together" and in that context jointly and separately to do so "in the spirit of trust, fairness and mutual co-operation", the object being towards "the benefit of the Term Programme"; the Term Programme has as its object the efficient and good quality performance of the gas related works in some 5500 dwellings. This is all to be "within the scope" of the "roles, expertise and responsibilities" called for in the Partnering Documents. This on its face and as a matter of commercial common sense does not obviously or at all impinge upon either party's right to terminate at will under Cl 13.3. Termination at will is not a "responsibility"; it does not give rise to a "role" or is not dependent upon any "expertise".

(2) The second part is in effect a corollary of the first part. The reference to the "respective obligations" does not obviously or at all relate to a negotiated right on either party to terminate at will. The second part in any event is simply calling for obligations on each or all of the parties to be construed in effect in the context of the specified roles expertise and responsibilities.

(3) It is in the third part of the clause on which **TSG**'s Counsel has properly placed most emphasis. He argued that termination was a matter governed by the Contract and therefore that this last part of the clause requires each party to act reasonably, amongst other things, in effectively deciding whether to terminate under Cl 13.3. He points to other contracts referred to in other cases in which termination or other contractual requirements were subject to an express term that the party should not behave unreasonably or vexatiously, an example being *John Jarvis v Rochdale **Housing** Association* (1986) 36 BLR 10. In some of these cases of course, the termination provision is itself expressly qualified by a requirement that the terminating party shall not terminate unreasonably or vexatiously. I will return to this, which was **TSG**'s strongest point on contract construction.

[34] The recent Court of Appeal case of *Mid Essex NHS Trust v Compass Group UK and Ireland **Ltd*** [2013] EWCA Civ 200 provides some illustrative assistance, albeit that the contract was a different one to that in this case. The contract was for the provision of catering and cleaning **services** over a seven year term. Clause 3.5 provided:

> "The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract. At all times in the performance of the **Services**, the Contractor will co-operate fully with any other contractors appointed by the Trust or any Beneficiary in connection with other **services** at the Location."

Clause 5.8 provided for deductions to be made from payments in certain circumstances:

> "The Trust or any Beneficiary shall ascertain whether the Contractor's provision of the **Services** meets the performance criteria as specified in the **Service** Level Specification or, if the criteria are not so specified, meets the standards of a professional provider of the **Services**. Where such performance criteria or standards have not been met by the Contractor in the performance of the **Services** then the Trust shall be entitled to levy payment deductions against the monthly amount of the Contract Price payable to the Contractor in accordance with the terms of the Payment Mechanism. In addition, the Trust may by notice to the Contractor award **Service** Failure Points depending on the performance of the **Services** as measured in accordance with the **Service** Level Specification. **Service** Failure Points which are agreed or determined to have been awarded in circumstances where such award was not justified shall be deemed to have been cancelled."

[35] An issue had arisen as to whether the good faith obligation constrained the operation of Cl 5.8. Relevant parts of the judgments are:

> "83 An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so. Certainly clause 1.1.5 of the conditions in the present case is not effective to exclude such a term, if it is otherwise to be implied . . . .
>
> 91 The discretion which is entrusted to the Trust in relation to **service** failure points and deductions in the present case is very different from the discretion which existed in the authorities discussed above. The Trust is a public authority delivering a vital **service** to vulnerable members of the public. It rightly demands high standards from all those with whom it contracts. There may, of course, be circumstances in which the Trust decides to award less than the full amount of **service** failure points or to deduct less than it is entitled to deduct from a monthly payment. Nevertheless the Trust could not be criticised if it awards the full number of **service** failure points or if it makes the full amount of any deduction which it is entitled to make. The discretion conferred by clause 5.8 simply permits the Trust to decide whether or not to exercise an absolute contractual right.
>
> 92 There is no justification for implying into clause 5.8 a term that the Trust will not act in an arbitrary, irrational or capricious manner. If the Trust awards more than the correct number of **service** failure points or deducts more than the correct amount from any monthly payment, then that is a breach of the express provisions of clause 5.8. There is no need for any implied term to regulate the operation of clause 5.8.
>
> 106 The obligation to co-operate in good faith is not a general one which qualifies or reinforces all of the obligations on the parties in all situations where they interact. The obligation to co-operate in good faith is specifically focused upon the two purposes stated in the second half of that sentence.

114 The substantial deductions which the Trust made in July and August 2009 fall into a different category. They were not agreed by Medirest and they exceeded the true amount which the Trust was entitled to deduct. In making these deductions the Trust was acting in breach of clauses 5.8, 6.3 and 6.5 of the conditions. The Trust was also acting contrary to the various provisions of the Payment Mechanism concerning deductions which I have set out in Part 2 above. On the other hand these unilateral deductions were not breaches of clause 3.5 of the conditions. I say this for two reasons:

i) There is no finding by the judge that the Trust was acting dishonestly, as opposed to mistakenly applying the provisions of a complicated contract.

ii) These deductions were irrelevant to the two stated purposes. They had nothing to do with the transmission of information or instructions between the parties. Nor were they relevant to the Trust or any beneficiary deriving the full benefit of the contract . . . .

116 . . . On the facts as found by the judge the Trust persisted in awarding an excessive number of **service** failure points throughout the period August 2008 to September 2009. This was a breach of the express provisions of clause 5.8 of the conditions. It was not, however, a breach of clause 3.5 of the conditions. I say this for two reasons:

i) There is no finding by the judge that the Trust was acting dishonestly, as opposed to mistakenly applying the provisions of a complicated contract.

ii) These deductions were irrelevant to the two stated purposes. In particular, an award of **service** failure points under clause 5.8 of the conditions was not 'the transmission of information and instructions' within clause 3.5. The two clauses are directed towards different matters. There is no need for clause 3.5 and 5.8 to cover the same ground twice over and, as I read those two clauses, they do not do so . . . [per Jackson LJ]

141 . . . In effect the judge has implied a term that makes it a breach of contract to misinterpret the contract. In my judgment it is not generally a breach of contract merely to assert rights which the contract does not confer . . . .

146 It seems to me to be clear that whatever the scope of the duty it can be no more than a duty to *co-operate* in good faith. My difficulty is to see in what sense the unilateral decision by the Trust to award SFPs or to assert a right to levy Deductions (or even the actual levying of Deductions) is something that requires co-operation at all.

147 Mr Howe also argued that properly interpreted the second limb of clause 3.5 imposed on the Trust a duty not to act unreasonably in the exercise or purported exercise of its rights under the contract; and in particular imposed on the Trust an obligation not to make unreasonable claims. In my judgment, however, that is simply not what the clause says. First, it is concerned with taking action, not making claims. Second, the action concerned is action for **limited** purposes. Third, I do not consider that a positive obligation to take all reasonable action necessarily entails a negative obligation not to make unreasonable claims. [per Lewison LJ]

151 The scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context. As to the first of these factors, I respectfully agree with Jackson LJ (at paragraphs 106 – 108) that the content of the obligations to co-operate in good faith is to be determined by reference to the two purposes specified in the clause. Those purposes are the efficient transmis-

> sion of information and instructions and enabling the Trust or any beneficiary to derive the full benefit of the contract . . . .
>
> 154 The contract in the present case is a detailed one which makes specific provision for a number of particular eventualities. The specific provisions include clauses 5.8, 6.3 and 6.5. In a situation where a contract makes such specific provision, in my judgment care must be taken not to construe a general and potentially open-ended obligation such as an obligation to 'co-operate' or 'to act in good faith' as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them." [Per Beatson LJ]

[36] This type of case encourages a textual but also a contextual interpretation of commercial contracts. So it is that one needs to consider not just what the words in Cl 1.1 mean verbally but also what from looking at the contract overall they are intended to apply to. It is legitimate to consider whether they are intended to apply to the termination provisions at all.

[37] With that in mind, one needs to consider the scope of Cl 1.1 in the context of the preamble confirming that the parties agree to work "in mutual cooperation to fulfil their agreed roles and responsibilities and apply their agreed expertise in relation to the Term Programme, in accordance with and subject to the Partnering Documents" and the bespoke part of Cl 1.1 which spells out that the "roles, expertise and responsibilities" of the parties are further described in the Term Brief and Term Proposals. Turning to the remainder of Cl 1.1, it concentrates on what is in effect co-operation in the spirit of trust and fairness. The term "roles, expertise and responsibilities" is repeated twice. The clause is primarily directed to them and the way in which the parties shall work together (and individually). The use of the words "in all matters governed by the Partnering Contract" is readily comprehensible in relation to the assumption, deployment and performance of roles, expertise and responsibilities; it is at least odd that the word "matters" is used in this context if what is intended is that each and every obligation, power or right must be exercised reasonably.

[38] One only needs to consider by way of example the payment provisions and the rights of **South Anglia** to call for the rectification of defects. So far as payment is concerned, **TSG** is entitled to be paid for Tasks at "Task Prices" to be "calculated in accordance with the Price Framework". These prices may be high or low and may produce a net loss or net profit for **TSG**; **South Anglia** may have secured contractually very low prices. It might be "reasonable" if (short of any actionable misrepresentation) work proved to be much more expensive than any reasonable tendering contractor could have envisaged or discovered for **South Anglia** to pay more. The application of a duty to act reasonably in relation to payment provisions seems to be immaterial because it is, broadly, reasonable for **South Anglia** to pay at the level of the agreed rates and prices. Similarly, Cl 6.8 requires **TSG** to remedy defects attributable to "materials, goods, equipment or workmanship not in accordance with the Partnering Documents"; either there are or there are not demonstrably culpable defects and there is no obvious room for **South Anglia** to act "reasonably" in notifying **TSG** of culpable defects which it requires to have remedied. The fact that in some rather vague way there were such defects but it was bad luck or hard on **TSG** to have to put them right would seem to be completely irrelevant. To these two examples can be added the right of each party to refer disputes to adjudication: it is very difficult to see that a party which wishes to refer a dispute to adjudication has an added hurdle of having to act reasonably in proceeding to adjudication.

[39] If the duty in s 1.1 on the part of **South Anglia** to act reasonably in "all matters" means that it must act reasonably in respect of each and every one of its powers and rights, that itself undermines a not insignificant number of other clauses in the Contract which the parties have mutually agreed that **South Anglia** may exercise, either unconditionally or subject to conditions as the case may be. One can ask rhetorically: is it not reasonable that a party may exercise a right or power freely negotiated and agreed with the other party?

[40] There is a very substantial amount of "matters" to which Cl 1.1 can apply. An example is that Annex 6 envisages that there will be an annual maintenance exercise in respect of each of 5526 dwellings:

> "Undertake during normal working hours the annual **service**, test and . . . gas safety certification, and maintain and repair in response to all breakdown callouts to any type of gas fired, oil or solid fuel appliance and the entire dwelling wet central heating radiator system, including provision and renewal of all unserviceable parts connected to the heating system and provision of **service**, maintenance and repair history records or as specified."

[41] One can see that there has to be substantial co-operation between the parties to arrange for this work. **South Anglia** might, in acting reasonably, have to seek to facilitate as many of these operations in a specific area or street at about the same time; it would be reasonable, arguably, and fair to seek to do this not only on the grounds of efficiency but because it might well be cheaper for **TSG**, compared with 5,526 separately arranged visits at different times. Similarly, **TSG** could be expected, in acting reasonably, when doing annual **services** to put right defects which it actually noticed did not need putting right exactly at that time but which foreseeably would go wrong or fail before the next annual **service**.

[42] I have formed the view that properly construed Cl 1.1 does not require **Anglia** to act reasonably as such in terminating under Cl 13.3. Clause 13.3 entitles either party to terminate for any or even no reason. Clause 13.1 makes it clear that the four year term is subject to Cl 13. Clause 13 provides for automatic termination for bankruptcy, insolvency or the like (Cl 13.5), termination for breach (Cl 13.6) and an unqualified and unconditional right to terminate (Cl 13.3). There can be no doubt that if either party had applied their mind to this prior to the contract being signed it was clear that there was such an unqualified right available to either party; it was obvious to each that the other could terminate at any time. Clause 1.1 is primarily concerned with the assumption, deployment and performance of roles, expertise and responsibilities set out in the Partnering Documents and the parties in so doing must "work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Term Programme" and act reasonably and without delay in so doing.

IMPLIED TERM OF GOOD FAITH

[43] It is not unfair to say that the primary focus of **TSG**'s argument was directed towards the implication of a term that each party should act in good faith in connection with the Contract, in particular in relation to whether Cl 13.3 was subject to any such obligation. In English Law, there have over many years been different formulations as to how and when terms may be implied. Two decisions from the Privy Council are germane. The relevant dictum from the well known earlier case of *BP Refinery (Westernport) Pty **Ltd** v Shire of Hastings* (1977) 180 CLR 266 is set out in the *Belize* case below.

[44] In *Attorney General of Belize v Belize Telecom **Ltd*** [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 1 WLR 1988, Lord Hoffman dovetailed the above into the context of contractual interpretation:

> "16 Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors *Compensation Scheme **Ltd** v West Bromwich **Building** Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

17 The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

18 In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

19 The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls **Ltd** v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

'[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'

20 More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'

21 It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

22 There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is 'necessary to give business efficacy' to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word 'business', is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant back-

ground, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable *Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word 'necessary', is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

23 The danger lies, however, in detaching the phrase 'necessary to give business efficacy' from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p 459) when he said that in that case an implication was necessary 'to give effect to the reasonable expectations of the parties'.

24 The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68 'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men.'

25 Likewise, the requirement that the implied term must 'go without saying' is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926)* ***Ltd*** [1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase 'necessary to give business efficacy', it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander 'Could you please explain that again?' does not matter.

26 In *BP Refinery (Westernport) Pty* ***Ltd*** *v Shire of Hastings* (1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was 'not . . . necessary to review exhaustively the authorities on the implication of a term in a contract' but that the following conditions ('which may overlap') must be satisfied:

'(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that 'it goes without saying'

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract.'

27 The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of 'necessary to give business efficacy' and 'goes without saying'. As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

[45] With this in mind, one must then move on to considering where English Law stands with regard to the implication of a duty of good faith as such. This has recently been considered and reviewed in some detail by Leggatt J in *Yam Seng v International Trade Corporation* [**2013**] EWHC 111 (QB), [**2013**] BLR 147. He prefaced his review as follows:

"120 The subject of whether English law does or should recognise a general duty to perform contracts in good faith is one on which a large body of academic literature exists. However, I not am aware of any decision of an English court, and none was cited to me, in which the question has been considered in any depth.

121 The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see Chitty on Contract Law (31st ed), Vol 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in *Interfoto Picture Library **Ltd** v Stiletto Visual Programmes **Ltd*** [1989] 1 QB 433 at 439 are often quoted:

'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. 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 open dealing . . . English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

122 Another case sometimes cited for the proposition that English contract law does not recognise a duty of good faith is *Walford v Miles* [1992] 2 AC 128, where the **House** of Lords considered that a duty to negotiate in good faith is 'inherently repugnant to the adversarial position of the parties when involved in negotiations' and 'unworkable in practice' (per Lord Ackner at p 138). That case was concerned, however, with the position of negotiating parties and not with the duties of parties who have entered into a contract and thereby undertaken obligations to each other.

> 123 Three main reasons have been given for what Professor McKendrick has called the 'traditional English hostility' towards a doctrine of good faith: see McKendrick, Contract Law (9th ed) pp 221-2. The first is the one referred to by Bingham LJ in the passage quoted above: that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.
>
> 124 In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide . . . .”

He then refers to cases in the USA, Canada, Australia and Scotland as well as to the law in New Zealand. He picks up the references to the *Belize* case above. He underlines the proposition that virtually all contracts will require honesty in their performance (para 137) and “fidelity to the parties' bargain” (para 139). He then goes on to say:

> “140 The two aspects of good faith which I have identified are consistent with the way in which express contractual duties of good faith have been interpreted in several recent cases: see *Berkeley Community Villages **Ltd** v Pullen* [2007] EWHC 1330 (Ch) at 95 – 97; *CPC Group **Ltd** v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at 246.
>
> 141 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. Frequently, however, the requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information.”

[46] Because cases and contracts are sensitive to context, I would not draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts. I do not see that implied obligations of honesty or fidelity to the contractual bargain impinge in this case at all. There is certainly no suggestion or hint that there has or might have been any dishonesty in the decision to terminate. So far as fidelity to the bargain is concerned, that depends upon what the bargain actually was. In any event, fidelity to the bargain is largely already covered by the expressed terms of Cl 1.1 and, at least to that extent, does not have to be implied as well.

[47] Reliance is placed by **TSG**'s Counsel on the Chancery decision of Morgan J in *Berkeley Community Villages **Ltd** v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 EGLR 101 which related to an agreement between farmers and a property development company relating to a substantial part of the farm. There was an express term that the parties would “act with the utmost good faith towards one another and will act reasonably and prudently at all times” which the judge construed in para 97, having reviewed various authorities, as follows:

> ". . . based on the material that has been put before me, I feel I am able to construe paragraph 33 of the Third Schedule to the Agreement as imposing on the Defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness is to the agreed common purpose and consistency with the justified expectations of the First Claimant."

[48] The agreement in that case involved the Claimant in effect securing a planning consent for **housing** development for the land with the land thereafter being marketed for sale and the Claimant being paid a percentage fee relating to the net sum secured on sale. There was no provision to pay Claimant any other fee. There was however, the judge held, (see for instance para 109) an expectation that the promotion of the land would be taken to a conclusion "involving (if possible) the obtaining of the Consent and the sale on the open market whereupon the First Claimant would be entitled to a fee based on the express contractual terms as the calculations of the fee."

[49] I consider that the *Berkeley* case is very different from the current case because **TSG** was entitled to payment for all the work which it had done pursuant to the agreement at rates which had been agreed and because there was an express, clear and simple agreement that either side could terminate the Contract at any stage albeit that the term of the contract was a four-year one.

[50] Reliance has been placed by **South Anglia**'s Counsel on *Reda v Flag **Ltd*** [2002] UKPC 38, [2002] IRLR 747, an employment case from Bermuda which involved a "termination without cause" term. The Privy Council said:

> "42 Under the terms of the Appellants' contracts, therefore, Flag had an express contractual right, which it exercised, to bring the Appellants' contracts of employment to an end at any time during the contract period without cause. Their Lordships agree with Flag that that is an end of the matter. As the Court of Appeal observed, 'the very nature of such a power is that its exercise does not have to be justified'.
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> 43 The principal ground on which this was disputed by the Appellants at trial was that the decision of Flag's Directors to bring their contracts to an end was vitiated by their 'collateral purpose' in seeking to avoid having to grant the Appellants stock options. But in the present context there is no such thing as a 'collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none. The Directors of Flag were, of course, obliged to exercise their powers as directors in good faith and for the benefit of the company. As the Court of Appeal pointed out, however, this was a duty owed to the company and not to its employees . . . ."

It can of course be said that employment contracts, given the nature of the relationship between employer and employee, fall into a somewhat different category to commercial contracts but these dicta at least provide a pointer which is germane. Their Lordships went on:

> "45 Their Lordships accept that the Appellants' contracts of employment contained an implied term that Flag would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of such a term is now well established on the authorities: see *Imperial Group Pensions Trust **Ltd** v Imperial Tobacco **Ltd*** [1991] 1 WLR 589 at pages 597-9; *Malik v Bank of Credit and Commerce International SA* [1998] AC 20; *Johnson v Unisys* [2001] 2 All ER 801. But in common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in *Johnson v Unisys* it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an ex-

> press and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification: see *Nelson v British Broadcasting Corporation* [1977] IRLR 148 (where it was sought to imply a restriction of location into a contract which contained an unqualified mobility clause). Roskill LJ said at p 151:
>
> '. . . it is a basic principle of contract law that if a contract makes express provision . . . in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction of the kind that the Industrial Tribunal sought to do.'"

[51] I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in Cl 1.1 about how they were to work together in a spirit of "trust fairness and mutual cooperation" and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Cl 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term. Obviously, if **South Anglia** (and there is no suggestion of this) misrepresented prior to the Contract that it intended to proceed to the full term in circumstances when it was always planning to terminate early, that could give rise to a separate cause of action for one type of misrepresentation or another. Again, if (and there is similarly no suggestion of this) there was some material fraud or dishonesty on the part of **South Anglia** in and about the termination that might well give rise to some cause of action. Thus, if there were extreme and unusual facts (none being adumbrated so far), the law may well provide **TSG** with some other remedy.

CONCLUSION

[52] Although this has been an extremely well researched and argued case by both Counsel, I have no doubt that **South Anglia** are entitled to the declaration sought by it that having exercised its right to serve notice to terminate the Contract under C 13.3, **TSG** has no entitlement (whether as damages for breach of contract, or as a sum due under the contract) to receive monies and/or compensation in respect of overheads and profit which it would have recovered over the balance of the Term of the Contract following termination had the Contract not been terminated. It will follow that the adjudicator was wrong to order that **South Anglia** should pay £383,778.91 to **TSG** in relation to such overheads and profit and consequentially interest thereon.

[53] However, the adjudicator had jurisdiction to decide what he did, although I have held that he reached the wrong conclusion. It follows that **South Anglia** must pay the adjudicator's fee of £12,564 plus VAT.

Judgment accordingly.