ETHICS IN THE TENDER PROCESS: IMPLIED DUTY OF GOOD FAITH AND REMEDIES FOR BREACH

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Fundamentem autem est iustitiae fides,
id est dictorum, conventorumque constantia et veritas
'The foundation of justice, moreover, is good faith –
That is, truth and fidelity to promises and agreements.'
(Cicero, De officiis, 1, VII–23)

INTRODUCTION

The principle of good faith in contract law, by which one refers to a spectrum of obligations ranging from *bona fide* pre-contractual negotiations to honesty and reasonableness in exercising contractual discretions, is nothing less than an emotive subject across civilian and common law jurisdictions alike. Whilst the rest of the common law world has gradually warmed up to the idea of good faith as the "*general organising principle of the common law of contract*",[1] English law has held fast to the deeply entrenched scepticism towards a general doctrine of good faith,[2] giving precedence generally to the quasi-dogmatic principle of freedom of contract – "*the general principle of English law that parties are free to contract as they may think fit*", especially in the commercial context.[3] Back in 1991, Lord Steyn already observed (extra-judicially) that England is "*a somewhat infertile soil for the development of a generalised duty of good faith in the performance of contracts*".[4] The question for us English lawyers is: is this continuing hostility to a general unifying

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[1] *Bhasin v Hrynew* [2014] 3 SCR 494 (Supreme Court of Canada) paragraph 33 (Cromwell J). See also: in Australia, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 and *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 55 (NSW Court of Appeal) and *Alstom Ltd v Yokogawa Australia Pty Ltd* [2012] SASC 49 (South Australia Supreme Court); in the US, section 205 of Restatement (Second) of Contracts (1985) and section 1-304 of the Uniform Commercial Code (2011).

[2] With the notable exception of Leggatt J's decisions in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB); [2013] BLR 147; [2013] 1 Lloyd's Rep 526; [2013] 1 All ER (Comm) 1321; 146 Con LR 39 and *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm); [2015] 1 Lloyd's Rep 359.

[3] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (HL) [1967] 1 AC 361; [1966] 1 Lloyd's Rep 529; [1966] 2 All ER 61 at paragraph 399 (Lord Reid); see also e.g., *Photo Production Ltd v Securicor Transport Ltd* (HL) [1980] UKHL 2; [1980] AC 827; [1980] 1 Lloyd's Rep 545; [1980] 2 WLR 283; [1980] 1 All ER 556 at paragraph 848 (Lord Diplock); *Homburg Houtimport BV v Agrosin Private Ltd ("The Starsin")* (HL) [2003] UKHL 12; [2004] 1 AC 715; [2003] 1 Lloyd's Rep 571; [2003] 1 WLR 2853; [2003] 2 All ER 785 at paragraph 57 (Lord Bingham).

[4] Lord Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?" (1991) *Denning Law Journal* 131, 132.

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theory of good faith in contract law justified or desirable, particularly in the construction context where trust and cooperation are essential?

The perennial debate about introducing a general duty of good faith into all contracts governed by English law is a vast and multifaceted subject. As the Honourable Chief Justice Warren AC (Supreme Court of Victoria) remarked recently, "*whole forests have been felled to produce judicial and academic writing on the meaning of good faith in contract law*",[5] and this article does not seek to embark on a general discussion about the wisdom of introducing an organising principle of good faith into all aspects of contract law. Rather, this article explores one specific manifestation of the duty of good faith in the context of construction law – the merits of introducing an implied duty to evaluate tenders in good faith under English law, and the proper remedy for a breach.

The inspiration for this discussion is the recent Canadian case of *Elan Construction Ltd v South Fish Creek Recreation Association*.[6] The trial judge in the Court of Queen's Bench of Alberta found in *Elan* that the contract awarding body departed from the agreed tender evaluation matrix, with an express reference to *Bhasin v Hrynew*,[7] but only awarded nominal damages. The Court of Appeal of Alberta[8] upheld the decision on breach, but substituted a substantial award of damages for loss of profit on the basis that there was only superficial evidence suggesting that Elan would have suffered a loss in the project like the actual contractor.

The line of cases leading up to *Elan* provide much food for thought when it comes to the basis for regulating the evaluation of tenders and remedies for a breach in that process. In this context, the discussion in this article is divided into four parts:

I. Comparative overview of principles of good faith as applied to pre-contractual negotiations in other jurisdictions.
II. Tensions between freedom of contract and a duty to negotiate in good faith under English contract law.
III. Basis for regulating the tender process under English law – should the *Elan* approach be followed by English courts?
IV. Quantification of damages.

I. COMPARATIVE OVERVIEW OF PRINCIPLES OF GOOD FAITH IN THE TENDER PROCESS

The "English way" of rejecting a general duty of good faith in contract law stands in stark contrast to the approach taken in numerous other jurisdictions.

[5] Hon Marilyn Warren AC, "Good faith: Where are we at?" (2010) 34 *Melbourne University Law Review* 344, 345.

[6] 2015 ABQB 330 (Court of Queen's Bench of Alberta).

[7] *Bhasin*, fn 1.

[8] 2016 ABCA 215 (Court of Appeal of Alberta).

Civilian and common law jurisdictions outside the UK have, to varying extents, acknowledged a general legal principle of good faith. Indeed, the principle of good faith has a long-standing pedigree going back to Roman law, where "*bona fides provided a basis on which to build up those packages of [implied] obligations which fill out the unspoken aspects of common transactions*", including *obligatio verbis* (contracts by word of mouth) and *obligatio consensu* (contracts by consent).[9] Since then, the principle has made its way into almost all civilian jurisdictions and even into international law[10] as "*one of the basic principles governing the creation and performance of legal obligations*".[11] One commentator has therefore described good faith as belonging to "*the very few legal principles which do find resemblance in more or less all legal systems and legal cultures*".[12]

When it comes to disputes involving good faith in the pre-contractual stage, there is again a range of different responses. As the late Professor Farnsworth wrote shortly before passing away, the "*resolution of disputes arising out of the failure of negotiations has assumed increasing importance. Common-law and civil-law systems have arrived at different solutions*".[13] It is, therefore, instructive to consider pre-contractual duties of good faith in various jurisdictions – particularly Canada, Australia, New Zealand, Germany, France, and the Netherlands.

(i) Canada

In Canada, damages for a departure from tender evaluation criteria are not novel. Before *Elan*, Canadian jurisprudence has developed the concept of "*Contract A*" – an implied contract during the tender process before the coming into being of a formal contract for the construction works i.e. "*Contract B*". In the seminal decision of *R (Ont) v Ron Engineering*, Estey J held that: "*Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender*".[14]

The existence of a "*Contract A*" is not automatic, however, and depends on the parties' intentions and the factual matrix. As Cromwell J held in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, the "*Contract A/Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings*".[15]

[9] Peter Birks, *The Roman Law of Obligations* (OUP 2014), pp 57 and 65.

[10] See e.g., Hugo Grotius, *De Jure Belli ac Pacis* (1625), Book III, Chapter 26: if "*good faith has been taken away, 'all intercourse among men ceases to exist'*".

[11] *Nuclear Tests Case (Australia v France)* [1969] ICJ Rep 3, paragraph 46.

[12] Markus Kotzur, "Good Faith (Bona fide)" in *Max Planck Encyclopaedia of Public International Law* (updated January 2009), paragraph 5.

[13] E Allan Farnsworth, "Comparative Contract Law" in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), p 917.

[14] [1981] 1 SCR 111 (Supreme Court of Canada), paragraphs 121 to 123.

[15] [2010] 1 SCR 69 (Supreme Court of Canada), paragraph 17.

Where a "*Contract A*" exists, there is an implied obligation not to accept a non-compliant bid. The rationale was concisely captured in *MJB Enterprises Ltd v Defence Construction (1951) Ltd* by Iacobucci J, who observed that the process entails significant risks for the tenderer who must "*expend effort and incur expense in preparing its tender*", such that "*exposing oneself to such risks makes little sense if the [contract awarding body] is allowed, in effect, to circumscribe this process and accept a non-compliant bid*".[16] In *Bradscot (MCL) Ltd v Hamilton-Wentworth Catholic District School Board*, Laskin JA further characterised the above implied obligation as a broader duty of fairness to all compliant bidders, based on a "*unilateral contract*" which is "*intended to protect and promote the integrity of the tender system*" and "*ensure a level playing field*".[17]

In *Bhasin v Hrynew*, the Canadian Supreme Court effected a sea change by expressly recognising good faith as a "*general organising principle of the common law of contract*",[18] and in so doing, the court also expressly "*recognised that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context*".[19] Similarly, the Superior Court of Quebec held recently that a contract awarding body owes an "*obligation to act equitably and with good faith*".[20]

In the most recent case of *Elan*, Tilleman J in the Court of Queen's Bench of Alberta applied the "*Contract A*" analysis to the tender process for a private project, which is a rare occurrence given that all of the cases referred to above involved public sector tenders. The parties were in agreement that a "*Contract A*" existed. Tilleman J thus proceeded to observe that the recent decision of *Bhasin* "*confirmed the existence of a good faith requirement in the tendering context*",[21] and "*[w]here a bid evaluation has been conducted in an arbitrary manner or on the basis of undisclosed criteria, that is sufficient to constitute breach*".[22] On this basis, a failure to adhere to the evaluation matrix was held to be a breach of the duty of good faith.

On appeal, the Court of Appeal of Alberta acknowledged the Supreme Court's observation in *Bhasin*[23] and approved Tilleman J's finding on this point, even though no express reference was made to "*good faith*". The Court of Appeal held that a privilege clause providing for "*sole and unfettered discretion*" simply "*does not confer on the owner the right to ignore, alter or delete bid criteria as they please*".[24]

Overall, although the existence of "*Contract A*" has to be established on the facts, the Canadian courts have readily implied a "*Contract A*" in public and even

[16] [1999] 1 SCR 619 (Supreme Court of Canada), paragraph 41.

[17] (1999) 42 OR (3d) 723 (Court of Appeal of Ontario), paragraph 6; see also *MG Logging & Sons Ltd v British Columbia*, 2015 BCCA 526 (Court of Appeal of British Columbia), paragraph 18 (Fenlon J).

[18] *Bhasin*, fn 1, paragraph 33.

[19] *Ibid*, paragraph 56.

[20] *Inter-Cité Construction ltée v Québec*, 2015 QCCS 4365, paragraph 94 (Brossard JCS): "*obligation d'agir équitablement et avec bonne foi*".

[21] *Elan*, fn 6, paragraph 86.

[22] *Ibid*, paragraph 98.

[23] *Elan*, fn 8, paragraph 6.

[24] *Ibid*, paragraph 18.

private sector tenders. Where there is an implied "*Contract A*", it is clear that there is a duty of good faith owed to bidders in a tender process. In reality, a breach of this duty is almost always cast in terms of a departure from the advertised tender procedure or evaluation criteria, and the epithet of "*good faith*" does not necessarily add any value to clarifying the test for a finding of breach.

(ii) Australia

A number of appellate courts in Australia have similarly recognised an implied duty of good faith, although in a less sweeping fashion than the Canadian approach. As early as 1992, it was observed by Priestley JA that "*[t]here is nothing in the slightest novel in the implication of terms requiring reasonableness by parties to a contract in implementing terms of the contract*", given that "*this is in these days the expected standard, and anything less is contrary to prevailing community expectations*".[25]

In *Burger King Corporation v Hungry Jack's Pty Ltd*, which concerned the limits of Burger King's discretion to terminate a franchise agreement, the court surveyed the case law and observed that there was "*such an extraordinary range of detailed considerations […] that unless there was an implied requirement of reasonableness and good faith, BKC could, for the slightest of breaches, bring to an end the very valuable rights*", especially given the absence of any objective criteria in the agreement.[26]

More recently, the Supreme Court of South Australia also considered the implication of a duty of good faith in *Alstom Ltd v Yokogawa Australia Pty Ltd.* In the course of determining whether there were breaches of an implied obligation of good faith in a sub-contract for the refurbishment of a power station, Bleby J referred with approval to the increasing recognition of a general implied duty of good faith in all commercial contracts, noting the "*universal implication*" of such a duty in the US, Canada, Europe and even Asia.[27] His Honour noted that "*[w]hile the question of an implied obligation to act reasonably and in good faith has not been the subject of consideration by the High Court, neither has it been condemned*",[28] and went on to adopt Sir Anthony Mason's extra-judicial formulation[29] of the duty of good faith.[30]

[25] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (New South Wales Court of Appeal), paragraph 268.

[26] *Burger King*, fn 1, paragraph 183.

[27] *Alstom*, fn 1, paragraphs 592 to 596.

[28] *Ibid*, paragraph 594. See also *Royal Botanic Gardens & Domain Trust v South Sydney City Council* [2002] HCA 5, paragraph 40 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); Anthony Mason, Foreword to Elisabeth Peden, *Good Faith in the Performance of Contracts* (Lexisnexis Butterworths 2003).

[29] Anthony Mason, "Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith" (The Cambridge Lectures, 8 July 1993): (1) cooperation in achieving the contractual objects; (2) compliance with honest standards of conduct; and (3) compliance with standards of contract which are reasonable having regard to the interest of the parties.

[30] *Alstom*, fn 1, paragraph 593.

These developments have advanced hand in hand with the recognition of implied obligations of good faith and fair dealing in the tender process. In *Hughes Aircraft Systems International v Airservices Australia*, Finn J considered that the agreed tender assessment criteria gave rise to a contract upon the submission of a tender with an implied obligation of fair dealing. His Honour went on to observe *obiter* that there is an implied obligation of good faith and fair dealing in all public project tenders, which is "*a proper presupposition of a competitive tender process contract*".[31]

This was followed in *Cubic Transportations Systems Inc v State of New South Wales*,[32] where Adams J analysed the parties' dealings and considered, not without some misgivings, that there was a contract governing the tender process for the development of an integrated public transport ticketing system, with an implied obligation of good faith. This was despite the fact that the contract awarding body was representing private sector transport operators, and that the call for tenders stated that it was not intended to be contractual, as the court was troubled by "*the broad powers the Call reserves to [the contract awarding body] to vary the Call and the processes under it*".[33]

The direction of travel that emerges from Australia is therefore towards a general implied obligation of good faith in commercial relationships, and where the tender process is governed by a contractual arrangement, there would be an implied term of good faith and fair dealing. However, whether a tender process is subject to a preliminary contract would ultimately depend on the facts. The authorities suggest that there will almost always be a contract governing public sector tenders, and it is also a real possibility in the private sector.

(iii) New Zealand

The New Zealand courts are the least judicially active when it comes to regulating the tender process and introducing a general principle of good faith.[34] Except for a number of dicta from Thomas J (who is effectively New Zealand's version of Lord Denning/Kirby J),[35] the New Zealand courts have refused to imply a general duty of good faith into all contracts[36] – an approach which is characteristically English. Therefore, a universal principle of good faith is still a "*developing area of law*" in New Zealand.[37]

[31] [1997] FCA 558 (Federal Court of Australia).

[32] [2002] NSWSC 656 (New South Wales Supreme Court).

[33] *Ibid*, paragraph 44.

[34] See Edward Thomas J, "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 *New Zealand Business Law Quarterly* 391, 392.

[35] E.g., *Livingstone v Roskilly* [1992] 3 NZLR 230, 237; *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506, paragraphs 33 to 48; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277, paragraph 149.

[36] See *Archibald Barr Motor Company Ltd v ATECO Automotive New Zealand Ltd* [2007] NZHC 1142 (High Court of New Zealand), paragraph 79 (Allan J).

[37] *Culverden Retirement Village v Hill* [2008] NZHC 1843 (High Court of New Zealand), paragraph 21 (Lang J).

Nevertheless, the New Zealand Court of Appeal has recently considered the implication of an obligation of good faith under a "*process contract*" governing a tender process – akin to the Canadian notion of "*Contract A*". In *Transit New Zealand v Pratt Contractors Ltd*, McGrath J described the test for establishing a process contract as "*a question of whether all the elements of contractual formation are made out at that point*", and the starting point is an "*analysis of the terms of the invitation to tender*", particularly any "*rigorous and comprehensive expression of requirements to be complied with by tenderers*".[38]

This decision was applied by William Young P in a subsequent case where there was no process contract. The court stressed that cases where process contracts were established "*often involved very formal tender procedures with one or more of the following characteristics: registration of interest by tenderers; detailed specifications which tenders must comply with; a prescribed methodology (often detailed) for the evaluation of tenders; and an express or implied commitment to choose the successful tenderer based on such evaluation*".[39] It follows that the more informal the tender procedure, the less likely the court would imply a process contract.

Where there is a process contract, the New Zealand courts have accepted that there may be an implied obligation of good faith and fair dealing. This was first recognised by the High Court and Court of Appeal in *Pratt*, and was accepted by the parties when the case came before the Privy Council. In the recent decision of *Roading & Asphalt Ltd v South Waikato District Council*, Keane J observed that an implied duty to treat tenderers fairly and equally "*turns primarily on the terms of tender, and any related conditions of the substantive contract*",[40] and found that there was a breach of such an obligation on the facts. Citing the relevant Canadian cases, Keane J observed that those decisions were consistent with New Zealand law, and that the implied duty recognised in *Pratt* has been applied and endorsed at the highest level.

In this respect, the scope of the implied obligation under New Zealand law is similar to that under Canadian and Australian law, despite the absence of a universal principle of good faith. This implied obligation depends heavily on the finding of an implied process contract in the first place, which in turn depends on the factual matrix, and the New Zealand courts are visibly less liberal than their Canadian and Australian counterparts in finding such an implied contract.

(iv) Civilian jurisdictions

The principle of good faith is common to most European civil codes, and in particular, most of the European legal systems recognise a general duty of good

[38] [2002] 2 NZLR 313 (New Zealand Court of Appeal), paragraph 77; affirmed by the Privy Council in [2005] 2 NZLR 433 (PC).

[39] *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2006] NZCA 295 (New Zealand Court of Appeal), paragraphs 15 to 16.

[40] [2012] NZHC 1284, paragraph 26.

faith in pre-contractual negotiations.[41] It has been specifically enshrined, for instance, in Article 1337 of the Italian Civil Code, Article 197 of the Greek Civil Code, Article 227 of the Portuguese Civil Code, section 311(2) of the German Civil Code ("BGB"), and also Article 2:301 of the Principles of European Contract Law which forms the basis of a proposed European Civil Code.

In Germany, section 311(2) of the BGB is a codification of the German case law on *culpa in contrahendo* (fault in concluding a contract). For instance, in the early *Oolitic Stones* case,[42] the German Supreme Court decided that the defendant awarded a contract to other bidders in breach of the agreed tendering procedure, and as a result the defendant was ordered to compensate the aggrieved bidder for its positive interest i.e. loss of profit. Subsequent decisions, however, have held that the positive interest would only be awarded in exceptional cases,[43] and in any event, liability for breach of good faith mostly arises in cases where a negotiating party breaks off negotiations "*without fair cause*" when a contract is imminent.[44]

Other jurisdictions have traditionally addressed the pre-contractual obligation of good faith in judicial decisions. In France, for instance, the principles were, until the recent civil code reforms, based on the law of delict. In the *Gerteis* case,[45] the *Cour de cassation* found that *Société établissements Vilber-Lourmat* broke off negotiations with *Société Gerteis* to purchase a Hydrolite machine "*brutally, unilaterally and without a legitimate reason*", when *Société Gerteis* had made large expenditures and the negotiations were in an advanced stage. This was said to be contrary to the "*rules of good faith in commercial relations*". This can be contrasted with the decision of *Muroiterie Fraisse,*[46] in which the *Cour d'appel* rejected the claim and concluded that "*the negotiation phase is designed to permit the eventual contracting parties to study and understand the risks and advantages of the future contract*", such that "*any fault in contrahendo must be patent beyond discussion*".[47]

In the well-known *Manoukian* case,[48] the *Cour de cassation* held that a party who led the other party to enter into negotiations without any intention to conclude a contract was in breach of good faith, but the compensation was confined to costs incurred for the negotiations. This approach was similarly adopted in the recent *Boyé* case,[49] which confirmed that termination of

[41] See Martijn Hesselink, "The Concept of Good Faith" in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Chantal Mak and Edgar du Perron (eds), *Towards a European civil code* (4th Edition, Kluwer 2010), p 628; see also Martijn Hesselink, "Precontractual Good Faith" in Hugh Beale, Hein Kötz, Arthur Hartkamp and Dennis Tallon (eds), *Cases, Materials and Text on Contract Law* (1st Edition, Hart Publishing 2002), pp 237 to 293.

[42] BGH, 25 November 1992.

[43] 114 BGHZ 94; 108 BGHZ 200.

[44] 71 BGHZ 395.

[45] Cour de Cassation, ch comm, 20 March 1972, Bull civ 1972, IV, No 93.

[46] Cour d'appel, Pau, 14 January 1969, DS 1969 J 716.

[47] See James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (CUP 2009), p 442.

[48] Cour de cassation, ch comm, 26 November 2003, Bull civ 2003, IV, No 186.

[49] Cour de cassation, ch comm, 18 September 2012, appeal no 11-19629.

negotiations would not give rise to damages for loss of a chance. The civil code reform which entered into force on 1 October 2016 now codifies these principles in the new Article 1104.[50]

In the Netherlands, the Dutch courts have similarly grappled with the issue of good faith in tender processes. The Dutch Supreme Court held in the pioneering decision of *Baris v Riezenkamp*[51] that pre-contractual negotiations are "*a special relationship governed by good faith*". In the case of *Plas v Valburg*,[52] a contractor tendered for the construction of a public swimming pool. After spending on experts to price the works, the city council awarded the contract to another contractor. Although the claim was rejected, the Dutch Supreme Court divided the negotiations into three stages, and acknowledged that negotiations could reach a stage when parties could not break off negotiations in good faith.

Subsequent Dutch cases have remained cautious and confirmed that parties are usually free to break off negotiations, unless a party has a legitimate reliance on the conclusion of a contract, or there are circumstances which would make the termination unreasonable.[53] This largely depends on whether the essential and material terms have been agreed. In the *Shell Nederland* case,[54] the Dutch Supreme Court decided that the parties could break off negotiations because the contract price was not agreed, and "*there is no room for compensation of the lost revenue*".

The said Dutch decisions indicate that the Dutch Supreme Court is unlikely to award damages for breaking off negotiations. In any event, parties could avoid being bound by negotiations by expressly stating that the negotiations are "*subject to board approval*",[55] although one District Court decision in 2008 summarily ordered a company to specifically perform a contract which the board refused to approve the agreement without giving any reasons, stressing that "*the parties should be able to rely on the constructive conduct of the other party*".[56]

The overall trend in civilian jurisdictions is that, despite the express recognition of good faith in pre-contractual negotiations, the courts are often cautious and only award compensation (especially loss of profit) in the event of patent breaches, in contrast to the Canadian jurisprudence culminating in *Elan*. Notably, each decision is a function of fact and degree, and it is difficult to gauge the precise benchmark.

[50] Order N° 2016-131, 10 February 2016; see Peter Rosher, "French Contract Law Reform" (2016) 1 *Business Law International* 17.

[51] Hoge Raad, 15 November 1957, NJ 1958/67; see also Hoge Raad, 21 January 1966, NJ 1966/183.

[52] Hoge Raad, 18 June 1982, NJ 1983/723.

[53] See e.g., *De Ruiteij v MBO*, Hoge Raad, 14 June 1996, NJ 1997/481.

[54] Hoge Raad, 29 February 2008, NJ 2008/686.

[55] See e.g., *Homburg*, Hoge Raad, 29 June 2007, NJ 2007/576; *Meyer v Pontmeyer*, Hoge Raad, 19 January 2007, JOL 2007/38.

[56] *Rijkers v Essent*, District Court of Den Bosch, 14 April 2008, LJN:BD0037.

II. TENSIONS BETWEEN FREEDOM OF CONTRACT AND A DUTY TO NEGOTIATE IN GOOD FAITH

Despite the ebbs and flows over the years,[57] the principle of freedom of contract which enshrines "*party autonomy*"[58] retains considerable support and is "*still fundamental to [English] commercial law*".[59] At the heart of the principle are two key propositions:[60]

1. Term freedom and sanctity of contract – the parties are free to agree on whatever terms they wish in a contract (subject to limited restrictions due to public policy), and the function of the court is simply "*to enforce and give effect to the intention of the parties as expressed in the clauses*".[61] It is not within the gift of a judge to temper the fairness of contracts by imposing extrinsic moral or ethical duties. As Lord Neuberger and Lord Sumption recently stressed, "*the courts do not review the fairness of men's bargains either at law or in equity*".[62]
2. Party freedom – in the words of Professor Wendell Holmes, the "*freedom of contract carried with it a freedom not to contract*",[63] which presupposes a party's liberty to choose whom to (or not to) contract with, by *inter alia* declining to accept a particular offer notwithstanding a universal invitation to treat. This rationale is epitomised by Lord Ackner's well-known observation that "*while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason*".[64]

With this classical theory of contract law deeply ingrained in the English legal psyche, coupled with the commercial setting in which English contract law has developed, it is hardly surprising that "*the idea that contracting parties are under duties to assist one another (duties of good faith) […] has never been*

[57] See generally, PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979).

[58] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (CA) [2016] EWCA Civ 553; [2016] 2 Lloyd's Rep 391; [2016] 3 WLR 1519, paragraph 34 (Kitchin LJ), following *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* (CA) [2016] EWCA Civ 396; 168 Con LR 59, paragraphs 64 and 100 (Beatson LJ); see also Hugh Beale (ed), *Chitty on Contracts* (32nd Edition, Sweet and Maxwell 2016), [1-026] to [1-027], and the authorities cited therein.

[59] *Transocean Drilling UK Ltd v Providence Resources plc* (CA) [2016] EWCA Civ 372; [2016] BLR 360; [2016] 2 Lloyd's Rep 51; 165 Con LR 1, paragraph 28 (Moore-Bick LJ).

[60] See Roger Brownsword, *Contract Law: Themes for the 21st Century* (2nd Edition, OUP 2006), pp 49 to 57.

[61] Ewan McKendrick, "The Regulation of Long-Term Contracts in English Law" in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (OUP 1995), p 305.

[62] *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* (SC) [2015] UKSC 67; [2016] BLR 1; [2016] 1 Lloyd's Rep 55; [2016] AC 1172; [2015] 3 WLR 1373; 162 Con LR 1, paragraph 13; for a discussion of the impact of that case on construction law, see my Society of Construction Law Hudson Prize 2015 paper, "Shylock's Construction Law: The Brave New Life of Liquidated Damages?" (SCL Paper No 199, May 2016), also published in (2017) 33 Const LJ 173.

[63] Wendell H Holmes, "The Freedom Not to Contract" (1986) 60 *Tulane LR* 751, 752.

[64] *Walford v Miles* (HL) [1992] 2 AC 128, 138; [1992] 2 WLR 174; [1992] 1 All ER 453 followed recently in *Barbudev v Eurocom Cable Management Bulgaria EOOD* (CA) [2012] EWCA Civ 548; [2012] 2 All ER (Comm) 963, paragraphs 44 to 46 (Aikens LJ).

favourably received".[65] To this day, England stands as the "*last bastion*"[66] resisting a general duty of good faith both pre-contract and post-contract.[67] As such, it is often difficult for a party to seek redress for an unconsummated negotiation process – but does this close the door on the judicial regulation of private tender processes?

III. BASIS FOR REGULATING THE TENDER PROCESS UNDER ENGLISH LAW

Whereas most civilian jurisdictions have specific pre-contractual obligations imposed by the respective civil codes or laws of delict, common law jurisdictions have to overcome two legal hurdles by establishing: (1) a preliminary "*process contract*" or "*Contract A*" governing the tender process; and (2) the existence and scope of any express and/or implied obligations owed to all bidders. Under current English law, neither of those questions is necessarily straightforward.

The *locus classicus* in English law is the case of *Blackpool Aero Club v Blackpool Borough Council*,[68] in which the public authority invited tenders by a specified date for the renewal of a concession to operate pleasure flights from the airport, but omitted to consider the claimant's tender because the letterbox was not cleared in time. The Court of Appeal held that there was a limited implied contract to consider all compliant tenders.

Bingham LJ (as he then was) noted that the tendering procedure was "*heavily weighted in favour of the invitor*" and "*prescribes a clear, orderly and familiar procedure*", such that a compliant bidder was "*entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders*".[69] Stocker LJ also reached the same conclusion, but went slightly further, stating that such an implied contract "*would not preclude or inhibit the council from deciding not to accept any tender or to award the concession,* provided the decision was bona fide and honest*, to any tenderer* [emphasis added]".[70]

Blackpool was soon followed by *Fairclough Building Ltd v Port Talbot Borough Council*,[71] which was itself delayed to take into account the judgment

[65] Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (6th Edition, OUP 2005), p 22.

[66] Mark Williams, "An Introduction to General Principles and Formation of Contracts in the New Chinese Contract Law" (2001) 17 JCL 13, 17.

[67] See *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (CA) [1989] 1 QB 433; [1988] 2 WLR 615, 439 (Bingham LJ); *Chitty*, fn 58, [1-039]: "*the modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract law there is no legal principle of good faith of general application, although some authors have argued that there should be*".

[68] (CA) [1990] 1 WLR 1195; [1990] 3 All ER 25.

[69] *Ibid*, 1201 to 1202.

[70] *Ibid*, 1204.

[71] (CA) (1992) 62 BLR 82; 33 Con LR 24.

in *Blackpool*. In *Fairclough*, the contractor was included in the selective tendering list, but the local authority decided to remove the contractor from the list during the tender process due to a potential conflict of interest. The Court of Appeal agreed that there was an implied contract but no breach, and in so doing, Parker LJ agreed with the trial judge's findings that there was an implied duty "*to act in good faith – not to issue a sham invitation"* and *"honestly to consider the tenders of those whom they had placed on the shortlist*".[72]

Given the limited nature of the implied obligation in *Blackpool* and *Fairclough*, one might argue that those decisions are not direct authority for implying a "*process contract*" in all cases, and it is well established that "*contracts are not to be lightly implied*".[73] Moreover, the said decisions left unsettled the exact test for an implied contract during the tender process, nor did they address the existence and extent of any implied obligation of good faith.

The dearth of cases addressing these issues may be attributable to the EU public procurement regime, as the tender-related claims which have come before the court by and large involve public sector projects. Interestingly, however, the issue of implied contract was taken up once again in the case of *Harmon*,[74] which involved a tender process subject to the public procurement regime as implemented in the Public Works Contracts Regulations 1991 (SI 1991 No 2680).[75] After considering *Blackpool*, *Fairclough* and the commonwealth jurisprudence discussed above, HHJ Humphrey Lloyd QC observed that "*it is clear from Blackpool and from the other authorities that there must be something more than a request for a tender which is to be submitted competitively along with others*", and in order not to encroach on the ordinary commercial freedom to accept or reject any tender, there must be "*some good reason why obligations of the kind suggested by Harmon can arise*".[76]

HHJ Humphrey Lloyd QC then considered the comprehensive framework laid down by public procurement law, with its detailed tender procedure and requirements, and concluded that there was an implied contract, for "*it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly*", citing *Blackpool* and *Fairclough*.

Where does this leave us? It is fair to say that *Blackpool*, *Fairclough* and *Harmon* have sowed the seeds for the English courts to imply a contract for a private sector tender process, and to that end, the courts also seem to accept that there should be an implied duty to act in good faith and consider all tenders fairly and honestly. However, as demonstrated by the

[72] *Ibid*, paragraphs 90 to 92; also paragraphs 93 to 94 (Nolan LJ).

[73] *Ilyssia Compania Naviera SA v Ahmed Abdul-Qawi Bamaodah ("The Elli 2")* (CA) [1985] 1 Lloyd's Rep 107, 115 (May LJ); *Heis v MF Global UK Services Ltd* (CA) [2016] EWCA Civ 569; [2016] WLR(D) 318, paragraph 13 (Vos LJ).

[74] *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (QBD (TCC)) (1999) 67 Con LR 1.

[75] Now superseded by the Public Contracts Regulations 2015 (SI 2015 No 102).

[76] *Ibid*, paragraph 214.

Canadian, Australian and New Zealand experiences, there are clear and valid reasons why an English court would more readily find an implied process contract in a public sector project than in a private sector one. Unlike in public procurement, "*principles of freedom of contract permit a private employer whose intention is to contract partly on the basis of subjective experience and existing relationships […] to invite tenders in terms which do not require any 'Contract A'*, and in the absence of any express intention, it would often be *'more difficult to imply a 'Contract A' where the employer is a private individual or corporation with no duties under procurement legislation*".[77] This is a persistent dilemma faced by the English courts – a clash between the demands of fairness and the exigencies of a laissez-faire free-market economy.

On the other hand, there are also robust reasons why the court should not rule out intervening in an appropriate case, given that serious ethical issues such as corruption, bid-rigging and sharp/unconscionable practices in tendering have long beset the construction industry. It was for this reason that back in 2003, the Society of Construction Law considered the need for a code of conduct which governs, inter alia, the process of tendering. Professor John Uff noted in a paper that in a large proportion of tender processes, "*the rule appears to be that anything goes*", and for large projects, there are calculated strategies "*crudely aimed at giving one tenderer a superior negotiating position when the final bargaining process arrives*".[78]

There are strong policy reasons for encouraging a culture of fairness and integrity in private tender processes. HHJ Anthony Thornton QC stressed in a related paper that the consequence of the general lack of an ethical culture leads to "*dishonest or wasteful tendering practices […] and a business culture which is not conducive to efficient construction at affordable prices*",[79] and Professor Uff similarly noted that "*[u]nethical conduct leads to waste, inefficiency and depression of the market*".[80]

One could no doubt argue that this is a job for soft law, but the complexities inherent in enforcing these standards in such a diverse industry meant that there have been impediments in establishing an effective code over the past 14 years. This suggests that the law could serve a useful function of fostering a minimum ethical culture in tender processes, by granting remedies in certain instances of breach. As Professor Uff himself noted, the "*maintenance of ethical standards must be dependent also on the existence of a workable sanction*".[81] In my view, whilst the framework and context of public sector tenders are particularly susceptible to an implied contract, the English courts could

[77] Robert Clay and Nicholas Dennys QC (eds), *Hudson's Building and Engineering Contracts* (13th Edition, Sweet & Maxwell 2016), paragraph 3-035.

[78] John Uff QC, "Duties at the Legal Fringe: Ethics in Construction Law" (SCL Paper No 155, July 2003), p 9.

[79] HHJ Anthony Thornton QC, "Ethics and Construction Law: Where to Start?" (SCL Paper No 117, April 2004), p 2.

[80] John Uff QC, "Ethics in Construction Law – Two Years On" (SCL Paper No D55, April 2005), p 9.

[81] Uff, fn 78, p 15.

and should, if given the right set of facts, legitimately imply a contract over a private sector tender process. As the learned editors of *Hudson* pointed out, "*in the context of many larger construction contracts — at least where there are competitive tenders which are to remain open for a period — a court is likely to find that there is no difficulty in implying a contract of the sort under consideration*".[82]

This should be done on a case-by-case basis and predicated on a detailed analysis of the parties' dealings, rather than a blanket rule of law. One could easily envisage circumstances where parties arguably do not intend to bind themselves contractually to the procedure, as in the Dutch cases of tenders specifically marked "*subject to approval*" at the contract awarding body's sole discretion, or if the tender process is very informal and open-ended. In such cases, the freedom of contract should remain as the starting point and also the endpoint. It is noteworthy that the commonwealth jurisdictions similarly emphasise the analysis of each tender process and the relevant documentation, and this approach is instructive for an incremental development of English law.[83]

In cases where an English court implies a process contract over a private sector tender, how should the court formulate the implied obligations imposed on the contract awarding body? Should an English court adopt the Canadian approach in *Bhasin* and *Elan*, and imply a general obligation of good faith into all process contracts? Although the judgments of Stock LJ in *Blackpool* and Parker LJ in *Fairclough* give credence to such an implied obligation, this does not sit comfortably (at least at first sight) with the position in *Walford v Miles* that a duty to negotiate in good faith is unworkable and unenforceable "*as it is inherently inconsistent with the position of a negotiating party*".[84]

One could arguably distinguish *Walford v Miles* on the basis that there was no enforceable contract governing the open-ended negotiations in that case, and that decision should not preclude an obligation of good faith under an implied process contract which is sufficiently precise and procedurally-defined for the court to enforce. The more important question, however, is whether an obligation of good faith, as adopted in Canadian cases like *Elan*, would actually add anything to a legally certain and principled basis on which the English courts could police private tender procedures.

In *Pratt Contractors Ltd v Palmerston North City Council*,[85] Gallen J observed that fairness is a "rather indefinable term", and this similarly applies to the concept of good faith, which is "*a phrase which has been used in many different senses*".[86] This was recognised by Bingham LJ in a well-known passage, observing that good faith "*is perhaps most aptly conveyed by such metaphorical*

[82] Clay and Dennys, fn 77, paragraph 3-032.
[83] *Ibid*, paragraph 3-034.
[84] *Walford*, fn 64, 138.
[85] [1995] 1 NZLR 469 (High Court of New Zealand).
[86] Clay and Dennys, fn 77, paragraph 3-036.

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".[87]

In the slightly different context of the law of restitution, Moore-Bick J (as he then was) also considered it undesirable to define the limits of good faith, noting that "*it is a broad concept, the definition of which, in so far as it is capable of definition at all, will have to be worked out through the cases […] it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself*".[88]

Thus, on one end of the spectrum, a failure to act in good faith could include the similarly vague concept of "*sharp practice*", for which Lord Nicholls once observed that "*the law would be defective if it did not provide a remedy*".[89] However, Sedley LJ rightly stated that "*sharp practice has no defined boundary*",[90] and Toulson LJ (as he then was) similarly opined that sharp practice "*may be easier to judge than to define*".[91] This open-textured nature of various notions/aspects of good faith is perhaps the key driver behind the traditional reluctance of English judges to countenance a general unifying principle of good faith. As Gummow J memorably remarked, "*it requires a leap of faith to translate […] well established doctrines and remedies [in equity] into a new term as to the quality of contractual performance, implied by law*".[92]

Admittedly, there have been recent judicial developments in favour of recognising implied obligations of good faith in English law. The most oft-cited example is Leggatt J's judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd*, which recognised that good faith simply requires the observance of "*standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document*".[93]

This was followed by *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*, in which Leggatt J referred to the Canadian decision of *Bhasin* with approval and observed that whenever a party is given an option or discretion (including as to termination), the principle of good faith is relevant "*in each case to imply some constraint on the decision-maker's freedom to act purely in its own self-interest*".[94] Most recently, in *Astor Management AG v Atalaya Mining plc*,

[87] *Interfoto*, fn 67, 439.

[88] *Niru Battery Manufacturing Co v Milestone Trading Ltd* (QBD (Comm Ct)) [2002] EWHC 1425 (Comm); [2002] 2 All ER (Comm) 705, paragraph 135; cited with approval by Clarke LJ in the Court of Appeal in (CA) [2003] EWCA Civ 1446; [2004] 1 Lloyd's Rep 344; [2004] QB 985; [2004] 2 WLR 1415, paragraph 164.

[89] *Bank of Credit and Commerce International SA v Ali* (HL) [2001] UKHL 8; [2002] 1 AC 251; [2001] 2 WLR 735; [2001] 1 All ER 961, paragraph 32.

[90] *George Wimpey UK Ltd v VI Construction Ltd* (CA) [2005] EWCA Civ 77; [2005] BLR 135; 103 Con LR 67, paragraph 65.

[91] *Daventry District Council v Daventry and District Housing Ltd* (CA) [2011] EWCA Civ 1153; [2012] 1 WLR 1333, paragraph 184.

[92] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* [1993] FCA 445 (Federal Court of Australia), paragraph 50.

[93] *Yam Seng*, fn 2, paragraph 139.

[94] [2015] EWHC 283 (Comm); [2015] 1 Lloyd's Rep 359, paragraph 97.

Leggatt J commented that the duty of good faith "*does no more than reflect the expectation that a contracting party will act honestly towards the other party*".[95] All this could be construed as judicial support for implying a general duty of good faith into tender processes.

However, it would appear that Leggatt J's openness to a general principle of good faith is not shared by the rest of the judiciary. In fact, even Leggatt J himself doubted in *Yam Seng* "*that English law has reached the stage […] where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts*".[96] Shortly after *Yam Seng*, Jackson LJ stressed that *"there is no general doctrine of 'good faith' in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract. If the parties wish to impose such a duty they must do so expressly*".[97] Similar sentiments have been expressed by Norris J[98] and Andrews J[99].

The English courts have, moreover, consistently refused to imply an obligation of good faith in the context of termination of contracts, most notably in the TCC.[100] Leggatt J's observations in *MSC Mediterranean* were also expressly disapproved in the Court of Appeal, where Moore-Bick LJ took the view that there is "*a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement*", drawing an analogy with the similar danger of "*too liberal an approach to construction, against which the Supreme Court warned in Arnold v Britton [2015] UKSC 36*".[101]

Indeed, ever since the decision of *Arnold*, there has been an undercurrent of conservatism weaving through recent judgments (although this trend may reverse in light of the latest decision of *Wood v Capita Insurance Services Ltd*[102]). With the clear weight of authorities against implied obligations of good faith, it would be an uphill struggle to persuade an English court that a tender process should be governed by an implied duty of good faith, especially since a judge who has to define the boundaries of good faith would be in no better position than someone being asked to define "*time*" – "*if no one asks me, I know what it is. If I wish to explain it to him who asks, I do*

[95] [2017] EWHC 425 (Comm), paragraph 99.

[96] *Yam Seng*, fn 2, paragraph 131.

[97] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* (CA) [2013] EWCA Civ 200; [2013] BLR 265, paragraph 105.

[98] *Hamsard 3147 Ltd v Boots UK Ltd* (QBD (Pat)) [2013] EWHC 3251 (Pat), paragraph 86.

[99] *Greenclose Ltd v National Westminster Bank plc* (Ch D) [2014] EWHC 1156 (Ch); [2014] 2 Lloyd's Rep 169, paragraph 150.

[100] *TSG Building Services plc v South Anglia Housing Ltd* (QBD (TCC)) [2013] EWHC 1151 (TCC); [2013] BLR 484, paragraph 42 (Akenhead J); *Portsmouth City Council v Ensign Highways Ltd* (QBD (TCC)) [2015] EWHC 1969 (TCC); [2015] BLR 675, paragraph 95 (Edwards-Stuart J).

[101] (CA) [2016] EWCA Civ 789, paragraph 45.

[102] (SC) [2017] UKSC 24; [2017] 2 WLR 1095, paragraphs 8 to 15: Lord Hodge stressed that *Arnold v Britton* did not "*row back*" on the previous approach to interpretation, but also said that "*the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity*", which hints at the avoidance of radical change e.g. implying a general duty of good faith.

not know".[103] This obstacle was recognised early on by Professor Goode, who cautioned that good faith is "*a vague concept of fairness which makes judicial decisions unpredictable*".[104]

There are, of course, some notable decisions which have attempted to give some flesh to the bones of good faith in a tender process. In *Pratt*, Lord Hoffmann held that "*the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally*".[105] One may also draw inspiration from the line of decisions holding that a contractual discretion is necessarily limited by "*concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality*".[106]

However, in a tender process where parties are in the midst of pre-contractual negotiations, it is dubious that an implied duty of good faith, even if developed along the lines of the above precedents, would be sufficiently certain and entirely consistent with the freedom of contract. Whilst the Canadian courts in *Elan* etc. have embraced concepts of "*good faith*" and "*fair dealing*", those phrases have become terms of art which serve to obscure the standard breached and the underlying reasoning, and do not assist a fair-minded commercial observer in ordering his future affairs. It is also no easy task for a lawyer to advise a bidder on the merits of a proposed claim against a contract awarding body.

Ultimately, it is difficult to untangle principles of "*good faith*" and "*fairness*" from value judgments. The temptation for the court is to invoke "*good faith*" as a touchstone or buzzword, without defining the precise legal standard or checking for consistency with previous authorities, much like the concept of "*unconscionability*" which Lord Hoffmann described as "*an undefined discretion to refuse to enforce the contract […] sufficient to create uncertainty*".[107]

This is a real risk rather than mere scepticism. In *Elan*, the Court of Queen's Bench referred to good faith whereas the Court of Appeal did not, and it is unclear whether good faith and fair dealing mean the same thing or are distinct and cumulative requirements. In Australia, the courts have vacillated in their application of good faith in different contexts, and Professor John Carter recently commented that "*the law is incoherent*" because "*there has been nothing approaching consistency in application*", and the implied terms often "*go beyond what is necessary to deal with the matter*" without being fully reasoned.[108]

[103] St Augustine of Hippo, *Confessions* (circa 397 AD), Book XI.

[104] Roy Goode, "The concept of good faith in English law" (Saggi, Conferenze e Seminari, March 1992).

[105] *Pratt*, fn 38, paragraph 47.

[106] See e.g., *Socimer International Bank Ltd v Standard Bank London Ltd* (CA) [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558, paragraph 66 (Rix LJ).

[107] *Union Eagle Ltd v Golden Achievement Ltd* (PC) [1997] AC 514, 519; [1997] 2 WLR 341; [1997] 2 All ER 215.

[108] John W Carter, "Good Faith in Contract: Why Australian Law is Incoherent" (Legal Studies Research Paper No 14/38, April 2014), pp 48 to 50.

If an obligation of good faith is implied generally into tender processes but proves too uncertain, the English courts may simply be reluctant to imply a process contract or find a breach, and one can envisage this by looking at civilian jurisdictions like the Netherlands, where the Dutch courts rarely find that the negotiations have reached a sufficiently advanced stage for a finding of breach of good faith. Therefore, a principled way of regulating the tender process may well be to limit the implied obligation to the consistent and equal application of the advertised tender procedure and criteria to all bidders, which respects the terms of the tender process set by the parties and does not involve judges rewriting the process.

Indeed, the fundamental breach found in *Elan* was a departure from the agreed evaluation matrix, and it was unnecessary to refer to concepts of good faith to achieve that result. As Finn J noted in *Hughes*, "*[i]t may well be that, on analysis, [good faith] would be found to advance little the standard that presently may be exacted from contracting parties by other means*".[109] If so, the incremental development of English law would simply require the regulation of the tender process by reference to the contract awarding body's tender evaluation criteria and procedure, without following the *Elan* approach or relying on good faith/fairness. As the learned editors of *Hudson* trenchantly admonished, "*considerable care must be taken in the development of these tests*", and where there are no express procedures laid down by the tender instructions, "*the implication of a general contractual obligation to act fairly is capable of giving rise to considerable uncertainty*".[110]

IV. QUANTIFICATION OF DAMAGES FOR BREACH

Although the issues discussed above in respect of the basis of liability during a tender process are daunting enough to discourage even the mythical Judge Hercules,[111] assuming that the English courts manage to settle on a principled basis for regulating the tender process, the next hurdle is equally challenging – when and how should an English court quantify damages? The most straightforward measure is reliance loss i.e. expenses incurred in preparing and submitting a tender, which accords with the aim of the law to protect bidders who would otherwise "*either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process*".[112]

However, most parties would wish to claim the expectation measure of damages i.e. loss of profit. Many would argue that this measure of

[109] See fn 31 above.

[110] Clay and Dennys, fn 77, paragraph 3-036.

[111] As famously introduced by Ronald Dworkin in *Law's Empire* (Hart Publishing 1986), Chapter 7 (Integrity in Law).

[112] *Martel Building Ltd v Canada* [2000] 2 SCR 860 (Supreme Court of Canada), paragraph 88 (Iacobucci and Major JJ).

compensation is too difficult to quantify, and in any event too onerous on private employers. In the US, for instance, the response is to award reliance damages only.[113] However, seeing as the English court in *Chaplin v Hicks* awarded damages for loss of a chance in a competition for actresses based on an implied contract, an aggrieved bidder should in principle be able to recover its loss of profit. This would also help deter unethical tendering practices. As Vaughan Williams LJ noted, "*the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract*".[114] But the question remains – how does one quantify such damages? It is again instructive to consider the approach adopted in other jurisdictions.

(i) Quantification under Canadian law

The Canadian courts have considered this question in *Elan* and a number of earlier cases. In *MJB*, the Canadian Supreme Court considered that there was a clear intention to award "*Contract B*" based on the fact that the contract has been awarded – it was as such not merely a loss of a chance.[115] The Supreme Court then concluded that, on the balance of probabilities, had the non-compliant bid been properly disqualified, MJB would have been awarded the contract as the next lowest bidder, as the evidence showed that the contract awarding body "*never came to the conclusion that there was anything wrong with the MJB tender*".[116] The loss of profit was therefore not too remote.[117] This approach was followed subsequently in *Naylor Group Inc v Ellis-Don Construction Ltd*, where the court held that the "*normal measure of damages*" for wrongful rejection of a tender is loss of profit.[118]

The issue was again taken up by Dillon J in the instructive case of *Tercon*,[119] where the Ministry argued that Tercon should only be entitled to nominal damages, alternatively reliance damages. Referring to *MJB, Naylor*, and a 1994 decision also entitled *Tercon*,[120] Dillon J observed that "*the difference between the revenue that the plaintiff would have received had it been awarded the contract and the costs that it would have incurred in performing the work is a good prototype for assessment*", taking into account the estimated chances of "*job site conditions and related performance problems*".[121]

Dillon J then considered any discounts to reflect the chances of Tercon successfully negotiating the contract, the probable contract price, and

[113] Farnsworth, fn 13, p 918.
[114] (CA) [1911] 2 KB 786, 792.
[115] *MJB*, fn 16, paragraph 55 (Iacobucci J).
[116] *Ibid*, paragraph 56 (Iacobucci J).
[117] *Ibid*, paragraphs 59 to 60 (Iacobucci J).
[118] [2001] 2 SCR 943 (Supreme Court of Canada), paragraph 73 (Binnie J).
[119] (2006) 53 BCLR 138 (Supreme Court of British Columbia); reversed by the Supreme Court of Canada in *Tercon*, fn 15, due to the interpretation of an exclusion clause.
[120] *Tercon Contractors Ltd v British Columbia* [1994] BCJ No 1636 (Supreme Court of British Columbia).
[121] *Tercon*, fn 15, paragraph 156.

the probable cost of the project, taking into account, *inter alia*, the fact that a contract was awarded to another bidder, the fact that Tercon was the next lowest bidder, Tercon's track record, a comparison of the different bids, potential savings and value engineering, and actual hours and costs of the successful bidder.[122] In awarding nearly Can$3.3 million in loss of profit, Dillon J refused to assess the quantum based on the successful bidder's actual profit margin because no relevant evidence had been adduced, and to "*embark upon that assessment is speculative and not legally based*".[123]

It is, therefore, tolerably clear that loss of profit is the usual measure of damages in Canada for the wrongful rejection of a tender. Interestingly, in the most recent case of *Elan*, Tilleman J in the Court of Queen's Bench of Alberta awarded nominal damages, largely on the basis of discounting the profit margin for unanticipated site conditions.[124] Referring to *Naylor* where the Supreme Court reduced the award by 50%, Tilleman J proceeded to rely on witness evidence even though there was no expert evidence or detailed construction records, stating that "*[t]here is sufficient evidence before me to establish that Chandos […] experienced numerous negative conditions that ultimately delayed the Project's completion*".[125] His Honour concluded that "*[t]here is no evidence upon which I can find that Elan would have been better placed to anticipate or deal with the site conditions that Chandos ultimately faced*", effectively reversing the burden of proof.

The flaws in Tilleman J's approach had not been lost on the Court of Appeal of Alberta. Whilst accepting the principles laid down in *Naylor* regarding reductions for negative contingencies,[126] the Court of Appeal unanimously reversed Tilleman J's decision on quantum and awarded damages for loss of profit of Can$572,868, stressing that "*[i]t was an attempt to get the trial judge to compare a visible apple and an invisible orange*", and that "*the trial judge's reasoning was a combination of speculation and improper reversal of the burden of proof*".[127]

This is consistent with Dillon J's methodology in *Tercon* as cited above, and the bottom line is that a contract awarding body would have to meet a high evidential threshold in order to establish, on the balance of probabilities, that loss incurred by another contractor means that the aggrieved bidder would suffer the same loss. In that sense, the balance is in favour of a bidder seeking to establish loss of profit, and this approach may well encourage more claims from bidders in the future.

[122] *Ibid*, paragraphs 160 to 188.
[123] *Ibid*, paragraph 168.
[124] *Elan*, fn 6, paragraphs 117 to 146.
[125] *Ibid*, paragraph 128.
[126] *Elan*, fn 8, paragraph 29.
[127] *Ibid*, paragraphs 35 to 36.

(ii) Quantification in civilian jurisdictions

As already mentioned above, expectation damages in the form of loss of profit (known as the "*positive interest*") are "*rarely successfully claimed*" except in France,[128] and this may be due to the need for the civilian courts to limit the effect of what would otherwise be an onerous duty of good faith with a far-reaching impact on negotiating parties. This factor should no doubt be taken into account by the English courts in determining whether to imply a general obligation of good faith into all tender processes.

Many tender-related cases in European jurisdictions concern damages for breach of EU public procurement law. Notwithstanding the different basis of liability, the approach to quantification of damages is equally relevant for present purposes. It would suffice to consider the approach in Germany, the Netherlands and France.

In Germany, the German Supreme Court has recognised that the positive interest should be protected – provided that the aggrieved bidder would have obtained the contract,[129] and the actual contract awarded to another bidder must be in "*economically identical form*".[130] Together, these requirements create a high threshold for claiming lost profits, and the burden is generally on the bidden to prove its loss. A recent case concerned a tender for the supply of cement screeds, and the bid was wrongfully awarded to a bidder who supplied screeds which were non-compliant with the tender. All the other bidders also submitted tenders based on similarly non-compliant screeds. On that basis, the Provincial Appellate Court in Koblenz awarded lost profits.[131] If there were other bidders who could have obtained the bid, the bidder would only have suffered a loss of a chance and an award of lost profits would be unlikely.[132]

Similarly, in the Netherlands, the burden is on the aggrieved bidder to establish that it would have obtained the contract in order to claim damages representing lost profits, and this is a very high threshold even though it is the normal measure of damages.[133] In a rare but recent case, there were two bidders for the supply of road salt to the municipality, and the award criteria was not adhered to. Lost profits were awarded in interim proceedings, but there was insufficient information to quantify the damages.[134] This can be contrasted with an earlier case,[135] where the Dutch court managed to quantify the lost profits by taking into account the estimated net profit, any

[128] Hanna Schebesta, *Damages in EU Public Procurement Law* (Springer 2016), pp 191 to 192.
[129] BGH, 3 April 2007, X ZR 19/06.
[130] BGH, 3 April 2007, NZBau 2007, 523.
[131] OLG Koblenz, 6 February 2014, 1 U 906/13.
[132] *Schebesta*, fn 128, pp 210 to 211.
[133] E.g., *HLA v Dutch Land Registry*, Gerechtshof Arnhem-Leeuwarden, 8 July 2014; see also JMJ Van Rijn Van Alkemade, "Overheidsaansprakelijkheid voor onrechtmatige verdeling van schaarse publieke rechten" (2011) *Overheid en Aansprakelijkheid* 69, 72.
[134] *Eurosalt v Oldambt*, Rechtbank Noord-Nederland, 7 November 2014.
[135] *Temmink v Gemeente Raalte*, Gerechtshof Arnhem, 6 April 2010.

shortfall losses on indirect costs, relevant expert evidence, average profit margins and the bid budget – similar to the approach in the Canadian cases of *Naylor* and *Tercon*. In another interesting decision, the profits were actually divided by three to reflect the loss of a chance where there were three bidders.[136] Bid costs, however, are generally considered to be at the bidder's own risk and cannot be recovered separately.[137]

In contrast, lost profits are often awarded in France, provided that the bidder establishes that it had "*a serious chance*" of winning the award of the contract[138] as in the recent *Commune de la Rochelle* case[139]. The starting point is that a serious chance is presumed to exist, and the burden is effectively on the contract awarding body to adduce evidence that there was no serious chance.[140] Interestingly, the French courts would not grant a discounted award if the chance is not serious enough, and if there is a serious chance, the lost profit would simply be awarded in full.[141] In the *ETPO Guadeloupe* case,[142] lost profits were awarded to ETPO after the contracting authority reneged on its decision and awarded the contract to another bidder, but as in Dutch law, lost bidding costs could not be awarded in addition to lost profits as they were part of the risk of tendering. The *Conseil d'État* has recently confirmed that loss of profits should be assessed on the basis of net profits which would have been realised if the bidder had succeeded.[143] The French approach is, therefore, the most generous and approximates the Canadian decisions described above, although loss of profit is still awarded on an all or nothing basis like Germany and the Netherlands, which is in stark contrast to the common law approach.

(iii) Quantification under English law

There are not many English cases on the quantification of damages for breach of a tender process, as the issue of quantification is often left to the parties to settle or deferred to a later date.[144] Many of the existing cases relate to breach of public procurement rules, although the applicable principles of quantification should apply equally to a private tender process.

The position on the recoverability of loss of profit for a breach of tender procedures is comparable with that established by the Canadian decisions of *MJB*, *Naylor* and *Tercon*. The seminal case on quantification of damages is *Harmon*, which has already been mentioned above. HHJ Humphrey Lloyd

[136] *Woningstichting Rochdale*, Rechtbank Amsterdam, 29 May 2012.
[137] *Schebesta*, fn 114, p 90.
[138] CE, 28 March 1980, *Centre Hospitalier de Seclin*, 1/4 SSR, 11292.
[139] CE, 8 February 2010, *Commune de la Rochelle*.
[140] E.g., CE, 27 October 2010, N° 318023, *Sté Pradeau et Morin*.
[141] CE, 27 January 2006, *Commune d'Amiens*.
[142] CE, 4 June 2003, N° 249630, *Groupement entreprises solidaires ETPO Guadeloupe, Sté Biwater et Sté Aqua TP*.
[143] CE, 11 February 2011, *Communauté de communes du pays d'Arlanc*.
[144] E.g., *Woods Building Services v Milton Keynes Council* (QBD (TCC)) [2015] EWHC 2172 (TCC); [2015] BLR 591, paragraphs 17 to 18 (Coulson J).

QC observed that it is first necessary to establish *"whether Harmon would have been awarded the contract or what chances Harmon would have had of being awarded the contract*".[145] Referring to the Canadian and New Zealand decisions, HHJ Lloyd QC then observed that an award of loss of profit is "*no more than an obvious illustration of well established principles*".[146]

Although HHJ Lloyd QC considered that the contract would have been awarded to Harmon, HHJ Lloyd QC also considered *obiter* the issue of causation and quantification for loss of a chance, based on the principles laid down in *Allied Maples Group Ltd v Simmons & Simmons (A Firm).*[147] In *Allied Maples*, Stuart-Smith LJ held that, in respect of loss depending on a third party's hypothetical action, the claimant must "*prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one*", and if he succeeds on that front, "*the evaluation of the chance is part of the assessment of the quantum of damage*".[148]

On the facts, HHJ Lloyd QC took the view that the chance of Harmon being awarded the contract as the lowest bidder was "*virtually certain*" as a matter of causation,[149] although in practice, a percentage as low as 10 to 15% could be sufficiently real or substantial.[150] In quantifying the loss of profit, however, HHJ Lloyd QC would award Harmon 35% of its estimated loss of profit, which inevitably required a comparison of the different tenders.[151] A further discount of 50% was conceded to account for the probability of "*the risks and hazards inherent in construction work*".[152] In the subsequent application for interim payment, HHJ Lloyd further observed that the experience of the actual contractor is "*not relevant (unless perhaps the events encountered by it were particularly untoward)*" to the base profit claimed[153] i.e. discounts may have to be made for unanticipated contingencies outside the general risks of contracting. Further, losses which would have been avoidable e.g. overheads which could have been met out of other contracts would also be discounted.[154]

[145] *Harmon*, fn 74, paragraph 259; cf. *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* (QBD (TCC)) [2015] EWHC 73 (TCC); [2015] PTSR 1106, paragraph 32 (Edwards-Stuart J): "*It seems to me that it is an inescapable conclusion from these provisions that a party who suffers a loss as a result of a breach of a contracting authority's obligations in relation to public procurement is entitled, at the least, to compensation in the form of damages […] by way of compensation for loss of profit*"; reversed in part by (CA) (2016) 67 Con LR 27.

[146] *Ibid*, paragraph 315.

[147] *Ibid*, paragraph 262.

[148] (CA) [1995] 1 WLR 1602, 1614; [1995] 4 All ER 907; 46 Con LR 134, recently applied in *Wellesley Partners LLP v Withers LLP* (CA) [2015] EWCA Civ 1146; [2016] 2 WLR 1351; 163 Con LR 53 ; [2016] Ch 529, paragraphs 98 to 99 (Floyd LJ).

[149] *Harmon*, fn 74, paragraph 266.

[150] Mr Justice Akenhead, "Causation, Loss and Damage: The Challenge of Chance" (SCL Paper No D118, December 2010), p 10.

[151] *Amaryllis Ltd v HM Treasury (No 2)* (QBD (TCC)) [2009] EWHC 1666 (TCC); [2009] BLR 425, paragraph 10 (Coulson J).

[152] *Ibid*, paragraph 320.

[153] *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (QBD (TCC)) [2000] EWHC Technology 84, paragraph 54.

[154] *Harmon*, fn 74, paragraph 314; see also *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85 (High Court in Northern Ireland), paragraph 105 (Sir Liam McCollum).

The rough and ready approach taken by HHJ Lloyd in discounting the loss of profit can be contrasted with the decision of the Court of Appeal of Alberta in *Elan* where the burden is on the contract awarding body to provide concrete evidence that the bidder would suffer unanticipated losses, and the approach in France where the lost profit is awarded in full insofar as it is presumed that there is a serious chance. Whilst a 50% discount was actually conceded by Harmon, a principled approach in other cases would be to require a contract awarding body to prove by factual/expert evidence the reductions that should be applied, and as a general rule, the English courts should (as stressed in *Elan*) be cautious when taking into account the position of the actual contractor.

The *Harmon* approach in respect of a loss of a chance in a tender process was adopted in subsequent decisions.[155] In *Hargreaves v Barron Industrial Services Ltd*, Parker LJ affirmed the trial judge's award of 40% of the lost profits in light of the "*the difficult task of valuing the chance of being awarded the 1996 Contract*", criticising the lack of factual and expert evidence from the contract awarding body to substantiate the alleged costs/reductions, much like the Canadian Courts did in *MJB* and *Elan*.[156]

A more recent successful claim for loss of profit is the Scottish decision of *Aquatron Marine v Strathclyde Fire Board*,[157] where Aquatron and MB Air Systems both tendered for a three-year contract for the service and repair of breathing apparatus compressors. The contract awarding body departed from the published criteria and awarded the contract to MB. Lord Carloway held that the other considerations alleged by the contract awarding body would not have enabled it to award the contract to a bidder other than Aquatron pursuant to the procedure.[158] More interestingly, his Lordship presumed in the absence of contrary evidence that there would in any event be "*at least an even chance of acceptance*", which would mean an assessment of the loss "*at half of that contract value*".[159]

The said approach places the burden of disproving a bidder's chance of success on the contract awarding body, which is analogous to the approach in French law and in the Canadian cases of *MJB* and *Tercon* discussed above. In fact, the High Court in Northern Ireland has also adopted the same approach, refusing to make any discount where "*there is no evidence that there is any likelihood that any of the other contractors would have been awarded the contract at their original tender figures*".[160]

[155] See e.g., the public procurement cases of *Lettings International Ltd v Newham London Borough Council* (CA) [2007] EWCA Civ 1522, paragraph 20 (Moore-Bick LJ); *McLaughlin and Harvey Ltd v Department of Finance and Personnel (No 3)* [2008] NIQB 122, paragraph 22 (Deeny J); *Mears Ltd v Leeds City Council* (QBD (TCC)) [2011] EWHC 1031 (TCC), paragraphs 205 to 214 (Ramsey J).

[156] (CA) [2003] EWCA Civ 1038, paragraphs 73 to 74.

[157] [2007] CSOH 185 (Outer House).

[158] *Ibid*, paragraph 102.

[159] *Ibid*, paragraph 103.

[160] *J & A*, fn 154, paragraphs 102 to 103 (Sir Liam McCollum).

In *Aquatron*, Lord Carloway ultimately awarded the profits which Aquatron would have gained, by deducting the income from the contract sum and extra works by the costs which were likely to be incurred based on previous contract experience. Aquatron gave an estimated increase in costs of 25% to account for additional contingencies for the works in question, even though no evidence was adduced by the contract awarding body as to the actual or likely extra expenses for the works.[161] As in *Harmon*, the concession in *Aquatron* should not displace the usual burden of the contract awarding body to prove reductions to the lost profit claimed.

Although it is clearly for the bidder to adduce adequate *prima facie* factual/expert evidence and calculations to prove the lost profits on the balance of probabilities,[162] as the bidders have done in cases like *Harmon* and *Aquatron*, it is submitted that the Canadian approach in *Elan* is correct in placing the burden on the contract awarding body to prove what it considers to be appropriate discounts/reductions, in order to reflect the chance of not being awarded the contract and/or unanticipated and extraordinary contingencies in the project.

CONCLUSION

With the incorporation of EU public procurement rules into English law and the developments in civilian and commonwealth jurisdictions, something would be amiss if English law does not take into account the signs of the time and afford some protection to bidders in private sector tenders where appropriate, especially given the desirability of upholding minimum ethical standards in tender processes. To that extent, valuable lessons can be learned from the approach in *Elan* and in other common law and civilian jurisdictions.

English law is equipped with the legal arsenal to recognise implied process contracts where there is a sufficiently detailed tender procedure. However, given that good faith is as yet a vague and imperspicuous concept, it is premature to imply a general duty of good faith into all pre-contractual tender processes – as the court recently stressed, "*an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it*".[163] In most cases, however, it would be sufficient to imply a more clearly delimited obligation to apply the published tender procedure and criteria equally to all bidders.

[161] *Ibid*, paragraphs 104 to 107.

[162] *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* (CA) [1999] 2 Lloyd's Rep 423, paragraph 32 (Stuart-Smith LJ); *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* (QBD (TCC)) [2009] EWHC 1919 (TCC), paragraph 206 (Ramsey J); *Saint Gobain Building Distribution Ltd v Hillmead Joinery (Swindon) Ltd* (QBD (TCC)) [2015] EWHC B7 (TCC); [2015] BLR 555, paragraphs 154 to 161 (HHJ David Grant).

[163] *Globe Motors*, fn 58, paragraph 68 (Beatson LJ).

At the end of the day, the greatest practical challenge may be in the quantification of damages. Canadian decisions such as *Tercon* and *Elan* and comparisons with civilian jurisdictions provide useful points of reference. Most lawyers would agree that "*reliably fixing the value of that percentage loss of chance would take time, face difficulties and be costly*".[164] However, the difficulty of the task is no reason for the court to shy away from doing substantial justice between the parties, as "*a court has to do the best it can in the circumstances, having regard to all of the evidence*".[165] Done properly, the remedy could also act as a proportionate sanction to deter unethical and anti-competitive practices in private tendering, and with less competition from EU-based undertakings in the wake of Brexit, this development of the common law may prove to be ever more important and timely to keep the construction industry dynamic and competitive.

[164] *McLaughlin*, fn 155, paragraph 22 (Deeny J).

[165] *AJ Lucas Drilling Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2009] VSCA 310 (Court of Appeal of Victoria), paragraph 165.