The legal content of partnering arrangements in the construction industry

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Abstract

Successive reports into the construction industry have increasingly emphasised the importance of developing relationships based on trust between the contracting parties. This has led to the development of the co-operative arrangement called 'partnering' in construction contracts.

There is, however, minimal industry guidance on what expectations the parties can have of the judicial interpretation of partnering arrangements containing references to relational concepts such as trust, co-operation, openness, etc where the relationship breaks down and parties have relied on it, perhaps to their detriment. This interpretation is relevant to the allocation of commercial liabilities between the parties and therefore represents a commercial risk to them.

This paper examines the likely current attitude of the courts in England and Scotland to the various forms of the relationship covered by the term 'partnering' in construction contracts.

Introduction

In terms of the nature of the relationship between the parties contracts can range from those, such as simple exchange, which create no significant relationship between the parties, to those which create ongoing, highly intensive relationships relying on mutual trust, such as legal partnership. Between these extremes contracts may be 'relational' to varying degrees.

Over the past twenty years there has been a development towards contract arrangements in construction which are more relational in nature. Revised and new standard forms of contract have introduced specific duties of a relational nature by the use of terms such as trust, co-operation and good faith and have attempted to design the contract administration processes to promote these concepts[1]. In particular 'partnering' arrangements have evolved. In his report *"Constructing the Team"* Sir Michael Latham described partnering as a formal agreement where *"the parties agree to work together, in a relationship of trust, to achieve specific primary objectives"*[2].

By considering rules of law and judicial decisions and comment, this paper examines the likely current attitude of the courts in England and Scotland to the various forms of the relationship covered by the term 'partnering' in construction contracts and the effect that this may have on the judicial interpretation of the contract between the

[1] Eg the NEC Engineering and Construction Contract (London: Thomas Telford Services Ltd, 1995); GC/Works/1 with Quantities (1998) General Conditions (London: The Stationery Office, 1998); The ACA Standard Form of Contract for Project Partnering (PPC2000), drafted by Trowers & Hamlins in association with The Association of Consultant Architects Ltd (2000).
[2] Final report of the government/industry review of procurement and contractual arrangements in the U.K. construction industry by Sir Michael Latham, *Constructing the Team* (London: HMSO, 1994), p.62, para.6.43.

parties.

Partnering arrangements

Current partnering arrangements in the construction industry generally involve one of the following:

- a traditional standard form construction contract[3] supported by a separate non-binding partnering charter: in this arrangement the partnering charter expresses the parties' commitments to relational concepts such as trust, co-operation openness, common goals, etc, whilst the standard form contract expresses the formal legal obligations

- a binding partnering contract: in this arrangement the binding contract includes the relational aspects as formal obligations; a standard form of contract of this type has recently been published[4].

Eisenberg attempts to define 'relational' contracts. He suggests that the best definition is simply that a relational contract is one which *"involves not merely an exchange, but also a relationship, between the contracting parties"*[5] and he specifically refers to construction contracts in this context[6].

[3] Eg the JCT Standard Form of Building Contract, the ICE Conditions of Contract, etc.
[4] The ACA Standard Form of Contract for Project Partnering (PPC2000), drafted by Trowers & Hamlins in association with The Association of Consultant Architects Ltd (2000)
[5] Eisenberg, M, 'Relational Contracts' in Beatson, Jack and Friedmann, Daniel (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 2001), p.296.
[6] Ibid. p.304.

The relational aspects of partnering arrangements in construction contracts clearly exceed the basic requirement for a 'relational contract' as defined by Eisenberg.

In *"Rethinking Construction Sir John* Egan suggested yet more intensive relationships when he advised that *"(t)he industry must replace competitive tendering with long term relationships"*[7]

Industry guidance

Egan and Latham have indicated that government and the industry want construction arrangements to be more intensively relational in nature.

However industry guidance is vague on the legal effect of relational concepts when expressed in commercial contracts. This vagueness is demonstrated by the Construction Industry Council (CIC)[8] when they refer to the possibility of including a specific relational duty of 'good faith' in partnering contracts but advise that:

> *"(i)ssues in relation to good faith as an operative contractual provision include uncertainty, as it may be construed as being too vague to have any legal effect or as requiring the parties to act in good faith in all matters. Good faith is an uncertain concept in English law, which may or may not allow a party not to be in strict application of contractual provisions (eg as to*

[7] The Report of the construction industry task force chaired by Sir John Egan, R*ethinking Construction*, (London DETR, 1998), Executive Summary, p.8.
[8] The CIC is the representative forum for the construction industry's professional bodies, research organisations and specialist trade organisations.

extensions of time).”[9].

The commentary which goes with the GC/Works/1[10] standard form of construction contract is also circumspect in its advice concerning how the relational good faith provision in that form of contract might be interpreted as follows:

> *A general duty is imposed on the parties to ‘deal fairly, in good faith and in mutual co-operation, with one another’. All parts of the Contract must be read against the background of this condition. It will not be sufficient for a party to apply the letter of the Contract if this would amount to sharp practice or obstructionism. It would be reasonable to expect any such action to count against the responsible party if reviewed by adjudicators and arbitrators in the context of disputes dealt with under Conditions 59 (Adjudication) and 60 (Arbitration and choice of law).”*[11].

However, where the relationship breaks down, judicial interpretation of the agreement between the parties may be required. Consequently the attitude of the law to the relational content of the agreement will be relevant to the resulting allocation of commercial liabilities between the parties.

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[9] The Construction Industry Council, *A Guide to Project Team Partnering* (London: CIC 2000), p.16, explanatory note 9.
[10] The Property Advisers to the Civil Estate, (London: the Stationery Office, 1998).
[11] The Property Advisers to the Civil Estate, *GC/Works/1 Model Forms and Commentary (1998)*, (London: the Stationery Office, 1998), p.70, Condition 1A.

Commercial contracts and self interest

Partnering agreements are clearly intended to intensify the relational nature of construction contracts. As previously indicated, these agreements frequently contain express references to general relational concepts such as trust, collaboration, goodwill, co-operation, good faith etc. In some cases more detailed obligations in relation to 'open book accounting' and disclosure of information are included.[12] It is reasonable to suggest, therefore, that parties will have some positive expectations of the relational aspects of partnering arrangements. It is submitted that such expectations would include moderation of the extent to which each party is entitled to pursue their own self interest at the expense of other parties.

However, in a competitive commercial context, relational concepts give rise to a fundamental tension between individual self interest and consideration of the interests of other contracting parties.

The classical attitude of the courts in both England and Scotland towards self interest in commercial contracts was that the parties were the masters of their own contractual fate. This resulted in rules which encouraged minimum judicial intervention in the contract terms and maximum judicial certainty of enforcement of those terms. Provided that there was contractual consent, the fairness of the contract terms was a matter for the parties themselves. This 'freedom of contract' approach was generally

[12] Eg the ACA Standard Form of Contract for Project Partnering (PPC2000) drafted by Trowers & Hamlins in association with, and published by, The Association of Consultant Architects Ltd (2000), clauses 3.1, 10.3 & 23.2.

seen as beneficial to a mercantilist society.[13]

Eisenberg points out that one of the central paradigms of classical contract law was *"a contract for a homogeneous commodity concluded between two strangers transacting on a perfect spot market"*[14] which he describes as a 'discrete' contract as opposed to a 'relational' contract. Consequently the classical approach was often suitable only for 'discrete' contracts.

In the second half of the Twentieth Century modern contract law was characterised by some moderation of this position with the recognition of new categories of impaired contractual consent and some legislative intervention resulting in terms relating to fairness being implied into certain types of contracts (eg consumer contracts).

These safeguards are not, however, for the purpose of establishing minimum standards of fairness in commercial contracts between businessmen. Indeed there is some opinion that recently there has been a post-modern return to classical principles characterised by a return towards the values of certainty.[15] Chitty refers to this reinforcement of the classical position saying that *"recently……the cases have shown a determination to adhere firmly to principles of freedom of contract,*

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[13] See, for example, Beatson, Jack and Friedmann, Daniel, 'Introduction: From 'Classical' to Modern Contract Law' in Beatson, Jack and Friedmann, Daniel (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 2001); Thomson, J, 'Judicial Control of Unfair Contract Terms' in Reid, Kenneth and Zimmermann, Reinhard (eds), *A History of Private Law in Scotland*, Vol. 2 (Oxford: University Press, 2000).

[14] Eisenberg, M, 'Relational Contracts' in Beatson, Jack and Friedmann, Daniel (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 2001), p.296.

[15] See, for example, Beatson, Jack and Friedmann, Daniel, 'Introduction: From 'Classical' to Modern Contract Law' in Beatson, Jack and Friedmann, Daniel (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 2001).

particularly in commercial contracts between businessmen"[16].

The general approaches of English and Scots law to the rules concerning freedom of contract and certainty of enforcement are similar. In relation to Scots law McBryde suggests that *"(i)f anything, the modern tendency in (Scottish) contract law has been to accept English authority if it is relevant. Thus in any argument about, for example, offer and acceptance incorporation of terms in a contract, implied terms or repudiation or recission of a contract, English cases will be freely cited."*[17].

However Eisenberg is of the opinion that in reality 'relational' contracts are more common than 'discrete' contracts[18] and that *"the general rules of contract law should fit relational contracts, because contracts that involve a relationship between the contracting parties, beyond the mere relationship of stranger exchange, comprise the bread and butter of contracting"*[19].

The analysis of judicial decisions and comment will involve a consideration of the general rules of law regarding self interest in commercial contracts and their application to the express relational content of partnering agreements.

Reported cases

[16] *Chitty on Contracts*, vol.1, 28th ed., (London: Sweet & Maxwell, 1999), p.450, para.7-075.
[17] McBryde, William, *The Law of Contract in Scotland,* 2nd ed. (Edinburgh: W Green, 2001), p.10, para.1.26.
[18] Eisenberg, op. cit. n.14, p.297.
[19] Ibid. p.298.

Judicial consideration of partnering agreements in the UK construction industry is currently limited to one reported case in England and no reported cases in Scotland. Consequently the precedents in these jurisdictions for how such arrangements will be viewed by the courts is very limited. The Australian construction industry has a longer history of co-operative relationships such as partnering and some cases have been reported there. Australian law is historically based on English law and therefore some relevant conclusions might be drawn from Australian cases, although there are differences in attitude to relational concepts in the two jurisdictions.

In particular Furmston has recognised a movement in Australian law in the direction of recognising a relational duty of 'good faith' in contracts[20] and, more recently, has suggested that *"(i)t is not inconceivable that on appropriate facts and with skilful argument, English law may make tentative steps in the same direction."*[21]. Chitty does not recognise this advising that *"the modern view is that, in keeping with the doctrines of freedom of contract and the binding force of contracts, in English contract law good faith is in principle irrelevant"*[22].

However McKendrick advises that *"(m)any, if not most rules of English contract law, conform with the requirements of good faith and cases which are dealt with in other systems under the rubric of good faith and fair dealing are analysed and resolved in a different way by the English courts, but the outcome is very often the same"*[23].

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[20] Furmston, Michael P, 'Performance in Good Faith' (1998) 9(4) Construction Law 109.
[21] Furmston, Michael P, *Cheshire, Fifoot and Furmston's Law of Contract,* 14th ed., (London: Butterworths, 2001), p.28, para.J.
[22] *Chitty on Contracts*, 28th ed., Vol. 1 (London: Sweet & Maxwell, 1999), p.13, para.1-019.
[23] McKendrick, Ewan, 'Good Faith: A Matter of Principle' in Forte, A D M (ed.), *Good Faith in Contract and Property* (Oxford - Portland Oregon, 1999), p.41.

The position is similar in Scots law where MacQueen advises that *"good faith does play a substantial role in the Scottish law of contract, but that on the whole this has been expressed by way of particular rules rather than through broad general statements of the principle."*[24].

It is submitted, therefore, that although the relevance of Australian decisions and comment on partnering agreements requires to be critically analysed in each case, especially where specific references to good faith or similar relational concepts may have a bearing on the outcome, they will be helpful in analysing potential attitudes in English and Scots law.

Relational concepts expressed in non-binding partnering charters

As previously stated, parties may decide to express a partnering arrangement by means of a traditional standard form construction contract which states the formal contractual obligations, supported by a non-binding partnering charter containing the commitments to the relational aspects. This partnering charter is frequently a signed document and may be agreed either before or after the execution of the formal contract. In these situations the partnering charter may constitute either a pre-contractual exchange or an element of conduct subsequent to contract formation.

This section examines the possible effects that such partnering charters may have on

[24] MacQueen, Hector, 'Good faith in the Scots Law of Contract' in Forte, A D M (ed.), *Good Faith in Contract and Property* (Oxford: Portland Oregon, 1999), p.33.

the parties' formal contractual obligations.

In English law written contracts were traditionally subject to the 'parol evidence rule' which bound the parties to what was written in the contract and excluded the presentation of extrinsic evidence of terms which had been agreed, but which had been, by accident or design, omitted from the written agreement.[25]

The rigid application of such a rule could defeat the intentions of the parties where, for example, pre-contractual correspondence contains a specific agreement to include additional terms in the formal contract documents. In 1986 the English Law Commission decided that, due to extensive exceptions to the rule, it no longer had any content and advised that *"no parol evidence rule today requires a court to exclude or ignore evidence which should be admitted or acted upon if the true contractual intention of the parties is to be ascertained and effect given to it"*.[26]

However where it is admitted or proved that the parties intended that the written contract should express all the terms of their agreement, then extrinsic evidence is inadmissible *"for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract"*.[27]

Nevertheless pre-contractual exchanges may be relevant to the *interpretation* of contracts in English law as summarised by Lord Steyn:

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[25] English Law Commission, *The Parole Evidence Rule,* (Working Paper No 70, 1976) at p.4.
[26] English Law Commission, *The Parole Evidence Rule,* (Law Com No 154, 1976) at para. 1.7.
[27] Scottish Law Commission, *Report on Three Bad Rules in Contract Law,* (Scot Law Com No 152) at para.2.11.

> *"There is a rule that the court is not permitted to use evidence of the pre-contractual negotiations or their subsequent conduct in aid of the construction of written contracts even if the material throws light on the subjective intentions of the parties…… But, if these rules were absolute and unqualified the primary rule would sometimes defeat the reasonable expectations of commercial men. Pragmatically, it has been decided that if pre-contractual exchanges show that the parties attached an agreed meaning to ambiguous expressions that may be admitted in aid of interpretation"*[28].

In 1996 the Scottish Law Commission considered the content of the general rule in Scotland that extrinsic evidence was not admissible to prove the existence of additional terms beyond those expressed in a written contract document.[29] It concluded that it was not devoid of content in the way that the equivalent parol evidence rule was in England.[30] The subsequent Contract (Scotland Act) 1997 changed the law such that whilst a document *appearing* to express all the terms of a contract is to be presumed to be the whole contract, it is admissible to present extrinsic oral or documentary evidence to prove that there are other agreed terms. This is the case provided that the contract document itself does not state that it represents the whole agreement between the parties.[31]

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[28] Steyn, J, 'Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 at p.440.
[29] Scottish Law Commission, *Report on Three Bad Rules in Contract Law"*, (Scot Law Com No 152, 1996).
[30] Ibid. at para.2.12.
[31] s.1.

McBryde's analysis of the relevance of pre-contractual exchanges to the *interpretation* of ambiguities in contracts in Scotland suggests that the position is similar to that in England.[32]

In both England and Scotland, therefore, whilst evidence of pre-contractual exchanges is not excluded in the consideration of written contracts, it is unlikely that such exchanges will affect express and unambiguous written terms unless this is clearly the intention of the parties. Since the relational concepts in partnering charters are generally expressed in vague and aspirational terms, it is submitted that it is unlikely that any true intention to change the express terms of a subsequent written contract would be inferred from such a charter agreed during pre-contractual exchanges.

In relation to the conduct of the parties subsequent to contract formation in English law, Furmston advises that *"(w)hat has been created by agreement may be extinguished by agreement".*[33] However he points to confusion between the concepts of agreed variation and waiver and a consequent recourse to equity[34]. He quotes the equitable doctrine as stated by Bowen LJ as follows:

> *"(i)f persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed*

[32] McBryde, op. cit. n.17, pp.178-179, paras.8-07 - 8-08.
[33] Furmston, Michael P, *Cheshire, Fifoot and Furmston's Law of Contract,* 14th ed., (London: Butterworths, 2001), p.619.
[34] Ibid. p.625.

by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were in before."[35].

Chitty refers to this as waiver by estoppel[36] and expresses similar views.[37] He emphasises that the waiver must be clear and unequivocal.[38]

In Scots law McBryde also advises that the conduct of the parties subsequent to a contract can be relied on for various purposes, one of which is variation of the effect of the original contract.[39] In this respect he describes personal bar and waiver and the difficulties of definition when they are to be inferred from the conduct of the parties. He concludes that repeated acceptance of performance different from that envisaged in the original contract is one form of conduct which may bar a party from insisting on that original performance.[40] However it is clear that bar can only apply to an existing obligation and not to obligations which have yet to be agreed.[41] He includes a passage by Bell's editors which describes personal bar as closely corresponding with English estoppel.[42]

McBryde considers that waiver is a unilateral abandonment of a right for all time which again can only apply to a pre-existing contract, obligation or right.[43] Since the

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[35] Birmingham and District Land Co v London and North Western Rly Co (1888)40 ChD 268 at 286.
[36] *Chitty on Contracts*, vol.1, 28th ed., (London: Sweet & Maxwell, 1999), p.1158, para.23-039.
[37] Ibid. p.1159, para.23-041.
[38] Ibid. p.1160, para.23-043.
[39] McBryde, op. cit. n.17, p.645, para.25-01.
[40] Ibid. p.646, para.25-07.
[41] Ibid. p.647, para.25-06.
[42] Ibid. p.645, para.25-03.
[43] Ibid. p.649, para. 25.12.

policy of the law is to encourage the performance of contracts he advises that waiver should not be easily inferred.[44]

In both England and Scotland, therefore, subsequent conduct may alter the effect of a contract in similar ways, but clear evidence of intention is again required.

The relevance of a pre-contract partnering charter was considered in the Australian case of P Ward v Civil and Civic[45]. Civil and Civic had been awarded a BOOT[46] contract for the construction of a water filtration plant and were negotiating a sub-contract for earthworks with Ward which included a design development aspect. During these negotiations the parties had attended a partnering meeting which had resulted in the signing of a partnering charter. In this charter the parties expressly agreed that their relationship would be *"to work together to achieve our mutually developed goals via the collective utilisation of our joint skills in an environment of open and honest communication"*[47]. This charter was signed before the conclusion of the formal sub-contract but its legal status does not appear to have been specifically defined by the parties.

When the formal sub-contract was eventually prepared it did not contain any references to the partnering charter, but it did include a definition of design

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[44] Ibid. p.649, para.25-16.
[45] [1999] NSWSC 727 (file no.55062/97, 3 August 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/1999/727.html?query=title....>(10 October 2001).
[46] BOOT stands for Build, Own, Operate and Transfer which is a type of construction procurement system where the contractor finances the project, operates it for a period to recover the cost and then transfers it to the client.
[47] P Ward v Civil and Civic [1999] NSWSC 727 (file no.55062/97, 3 August 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/1999/727.html?query=title....>(10 October 2001), para.169.

development which Ward subsequently claimed was different from that discussed during the negotiations. Ward had apparently failed to notice this change before the sub-contract was signed and they claimed that this placed an additional financial liability on them.

A dispute arose over payment for the costs of design carried out by Ward during the course of the sub-contract. Ward claimed that Civil and Civic had represented to them that the partnering relationship between them *"would be in the nature of a partnership and that they would co-operate to ensure that the project was a financial success for both the Plaintiff and the Defendant"*[48] and that in this context Civil and Civic's failure to draw Ward's attention to the changed liabilities amounted to misrepresentation.

However the Judge advised that *"(t)he most obvious of the difficulties is the fact that Wards seeks to disavow a formal written contract signed by both parties following close dealings between them over a period of almost a year, which dealings were, on my findings, clearly understood by both parties as intended to culminate in the execution of the Subcontract"*[49].

The Judge dismissed the partnering aspect saying in his conclusion that *"Wards' abrogation of the usual common sense commercial obligation to look at contractual materials prior to executing a contract, cannot in the circumstances here proven, even accepting the 'partnering' parameter, sustain this cause of action"*[50].

[48] Ibid. para.25(a).
[49] Ibid. para.386.
[50] Ibid. para.658(6).

In regard to taking surrounding circumstances into account in Australian law, the Judge confirmed the traditional position on pre-contractual exchanges quoting[51] Mason J in Codelfa Construction Pty Ltd v State Railway Authority of New South Wales[52] as follows:

> *"The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."*[53].

A more extreme situation arose in the only English case involving partnering, Birse Construction Ltd v St David Ltd,[54] where an initial project was intended to lead to a long term relationship. The case involved building construction by contractor Birse for developer St David and was concerned with establishing whether a formal JCT form of building contract existed between them for the initial work done over a fifteen month period. During this period various negotiations had taken place in relation to contract matters and a pre-contract partnering agreement in the form of a charter had been signed. This charter consisted of general relational statements, eg that the parties would enhance their reputations through *'mutual co-operation and trust'*, would *'promote an environment of trust, integrity, honesty and openness'* and *would 'build long term profitable relationships with all parties'*[55].

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[51] Ibid. para.650.
[52] (1981) 149 CLR 337.
[53] Ibid. at p.352.
[54] (1999) BLR 194, [2000] WL 477292
[55] (1999) BLR 194, at pp.197-198.

However, although negotiations to finalise a JCT standard form of contract had been proceeding, failure to agree some outstanding matters resulted in a failure to formalise the contract. Disagreements during the initial project meant that the long term aspect did not materialise. Consequently Birse claimed that there was no contract and issued a writ for payment on a quantum meruit basis for work done on the initial project. St David sought a stay of proceedings as they claimed that a JCT form of contract existed and therefore any dispute over payment must therefore be heard by an arbitrator as required by that form of contract. The arguments were therefore about whether the course of dealing had resulted in the formation of a contract of the JCT form.

Subsequent to the partnering agreement, Judge Humphrey Lloyd was satisfied that a JCT contract had been formed as a result of the course of dealing, together with the fact that the parties had never specifically excluded the formation of a contract unless and until formal documents were prepared and executed. In further support of this finding the Judge commented that he had *"little doubt that the parties considered that the "partnering" arrangements that they had made, as exemplified by the Charter, made it unnecessary. People who have agreed to proceed on the basis of mutual co-operation and trust, are hardly likely at the same time to adopt a rigid attitude as to the formation of a contract"*[56].

Whilst the Judge rejected any legal status for the partnering charter itself he described its significance as follows:

[56] Ibid. at p.203.

"*The terms of that document, though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured"*[57].

This was important in relation to the interpretation of the contract since the Judge was of the view that problems would be addressed *"within the "partnering" ethos which it was expected would have naturally led to a sympathetic approach to the questions of extensions of time and of deduction of damages for delay if the plaintiff had not been able to maintain the programme because of the occurrence of a relevant event (as defined in the JCT Conditions) and also for other reasons beyond its immediate control, such as being let down by a supplier or sub-contractor."*[58].

Under the JCT form of contract relevant events are occurrences which entitle the contractor to extensions of the time for completion of the work and, in some instances, financial recompense for loss and expense incurred as a result. Being let down by a supplier or sub-contractor chosen by the contractor is not a relevant event under the JCT form of contract and is, therefore, the contractor's liability. Consequently it appears that the Judge considered that the non-legally binding, pre-contract charter would create a reasonable expectation that the contractor's liability would be reduced in respect of damages for delays for which he should be contractually liable. This represents a transfer of commercial liability from the

[57] Ibid. at p.202.
[58] Ibid.

contractor to the client. This would seem to be inconsistent with the concept that a partnering charter is merely a surrounding circumstance which is not admissible to contradict the language of the contract where this has a plain meaning. In this case it seems that the charter could lead to the plainly expressed risk allocation in the contract being waived *in advance* of the execution of the formal contract.

There are many other circumstances, such as adverse weather, which are also beyond a contractor's *'immediate control',* but are also not relevant events and are, therefore, contractor's risks under the JCT and many other standard forms of construction contract. Reallocation of the risks of these events to the client would mean that the contractor would be entitled to an extension of the time for completion of the work if they occurred. There is no contractual mechanism in the JCT form of contract for fixing an extension of time and therefore a revised completion date as a result of these circumstances if they are the responsibility of the client. This in turn means that there would be no date from which the client's entitlement to liquidated damages would commence and consequently the right to such damages for *any* reason would be lost. The whole financial liability of not meeting the original completion date would thereby be transferred to the client on the first occurrence of adverse weather.

The Judge also considered that the parties should not be concerned about prejudicing their contractual rights in relation to relevant events as a result of non-compliance with contractual procedures if there had been true compliance with the spirit of the charter. His reason for this was that *"these days one would not expect, where the parties had made mutual commitments such as those in the charter, either to be concerned about compliance with contractual procedures if otherwise there had been*

true compliance with the letter or spirit of the charter. Even though the terms of the Charter would not alter or affect the terms of the contract (where they are not incorporated or referred to in the contract or are not binding in law in their own right) an arbitrator (or court) would undoubtedly take such adherence to the Charter into account in exercising the wide discretion to open up, review and revise, etc which is given under the JCT Conditions"[59].

In this case the Judge considered that other documents excluding the partnering charter constituted 'the contract'. Since the partnering charter was not incorporated into or referred to in the contract, it was not legally binding and would not affect the terms of the contract. However the reference to *"these days"* suggests that the judge was of the view that current attitudes to relationships, in construction at least, had developed such that a non-binding agreement such as a partnering charter warranted greater significance than merely being a surrounding circumstance. The parties were apparently no longer bound to observe the contractual procedures and the charter would *'undoubtedly'* be taken into account by an arbitrator or a court when using their power to review and revise matters concerning extensions of time, etc. One purpose of contract procedures in relation to relevant events to is to allow the client to monitor the events and to have adequate access to site records to permit fair valuation of them. The relaxation of the contractor's obligation to comply with such procedures places a greater risk on the client by removing this aspect of control.

In addition this relaxation seems to be a form of advance estoppel or bar against implementing subsequently agreed formal contract terms. It is submitted that this is

[59] Ibid. at p.203

inconsistent with the general position that an obligation must already exist before it can be waived or reliance on it estopped or barred.

It is also relevant that the judge did not restrict the consideration of the charter to decisions by an arbitrator whose decision is private and not open to appeal, but suggested that a court would also consider it.

Since the Judge found that there was sufficient evidence that a contract on the basis of JCT80 terms had been formed, this meant that all disputed matters were required to be heard by an arbitrator as required by that form of contract. A stay of court proceedings was therefore granted.

Whilst perhaps not essential to his reasoning in reaching his conclusion that a JCT contract had been formed, the Judge's specific remarks in relation to the relevance of the non-binding partnering charter are interesting as judicial observations on the possible effect of such an agreement. However his position does seem inconsistent in that whilst on the one hand he affirms that the charter would not alter or affect the contract terms, on the other hand he appears to describe how it could do just that.

Birse appealed[60] and the appeal Judge came to a different conclusion in relation to the existence of a contract. He reviewed the correspondence and, taking witness testimony into account, decided that the course of dealing had not resulted in the formation of a contract.

[60] Birse Construction Ltd v St David Ltd [2000] WL 1421182 (QBD(T&CC), 78 Con LR 121.

He found that Birse had acted *"consistently with there being no concluded contract in place and with their not wishing to take up a contractual (but potentially confrontational stance) in advance of knowing that St David was bound to propose contract terms"*[61]. The appeal Judge did not find it necessary to consider the relevance of the partnering aspect in reaching his conclusion which relied on other documentary evidence and witness testimony. Also, since there was no contract, there was no context in which to comment on the effect of a non-binding partnering charter on a contract. His only comment on the partnering aspect related to Birse's non-confrontational stance where he accepted that *"it may also be right to say……that Birse acted as it did because that was the appropriate way in which to behave……within the partnering arrangement"*.[62].

The Judge therefore reversed the previous decision and the application to stay proceedings was dismissed, thereby allowing Birse to pursue a potential claim for quantum meruit through the courts at a future date.

The above cases concerned express relational agreements in the form of pre-contract partnering charters where the relational aspects were stated in general aspirational terms. Whilst the cases are very limited in number, the indications in respect of the legal content of partnering charters seem to be as follows:

- both the English and Australian cases suggest that a pre-contract partnering agreement is likely to be non-binding unless stated otherwise

[61] Birse Construction Ltd v St David Ltd [2000] WL 1421182 (QBD(T&CC) (No. 1998 TCC No.419) (online) <http://uk.westlaw.com/find/default.wl?.....> (29 April 2002) at p.8 (of 20).
[62] Ibid.

- in Australia, whilst a non-binding pre-contract partnering agreement may be used as a surrounding circumstance to assist in interpretation of ambiguous terms, it will not be admissible to contradict the terms of a formal contract where these have a plain meaning; this is consistent with the general current view on pre-contractual exchanges in English law and Scots law

- the Australian case suggests that where negotiations are intended to culminate in a formal contract, the partnering agreement is not indicative of any deeper relationship which might imply a duty to moderate self interest or to protect the other party's interests eg in this case to point out the inclusion of an additional obligation; this is also consistent with the general current view on pre-contractual exchanges in English law and Scots law

- in the English case the comments by the first instance judge seem inconsistent in themselves in that they confirm that a non-binding, pre-contract partnering charter would not alter or affect subsequent formal contract terms and then indicate ways in which it would; also his major finding that a JCT contract had been formed was reversed by the appeal court which apparently attributed negligible significance to the partnering agreement; it is submitted, therefore, that whilst pre-contract partnering charters are currently accorded the traditional limited status appropriate to pre-contractual exchanges, any development towards greater recognition could release the potential for considerable uncertainty in the allocation of liabilities in construction contracts.

- bearing in mind the traditional approach to the interpretation of pre-contractual partnering charters and the need for clear evidence of intention to infer waiver, estoppel or bar, it is submitted that vague and aspirational relational statements in post-contract partnering charters are also unlikely to affect express contractual requirements.

Relational concepts expressed in binding partnering contracts

The previous cases considered non-binding partnering charters. In '*A Guide to Project Team Partnering"*[63] the CIC emphasise that they recommend legally binding partnering contracts[64] stating that *"(f)or the avoidance of doubt what we are talking about is a legally binding contract and not a non-legally binding charter or any equivalent"*[65] In the foreword to the guide Egan endorsed the CIC approach saying that its advice was squarely behind the recommendations in his report "Rethinking Construction".[66]

Partnering contracts generally contain express references to relational concepts such as co-operation, trust, fairness, mutual disclosure of information, good faith, etc as part of the formal obligations. This section examines the legal interpretation of express requirements of this nature in binding partnering contracts.

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[63] The Construction Industry Council, A Guide to Project Team Partnering (London: CIC, 2000)
[64] The CIC define Project Team Partnering in their glossary of terms as *"A structured management approach based on a non-adversarial team with a client (and/or users), consultants, constructor, key specialists working as a team, operating as a 'virtual company', acting co-operatively and making corporate decisions, in a blame-free environment of trust and openness"*, A Guide to Project Team Partnering (London: CIC, 2000), p.25.
[65]The Construction Industry Council, A Guide to Project Team Partnering (London: CIC, 2000), p.12.
[66] The Report of the construction industry task force chaired by Sir John Egan, R*ethinking Construction*, (London DETR, 1998).

Interpretation of requirements for 'good faith' and disclosure of information in the context of a binding partnering contract in Australia were addressed in Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd[67].

Placer employed Thiess as earthmoving contractors in an opencast mining operation under a partnering contract. This arrangement included an 'open book' system for costing the mining operations with payments to Thiess being based on these costs plus an agreed profit margin. This system *"involved the disclosure by Thiess of confidential information concerning the way in which it derived its rates for carrying out various mining operations"*[68]. The contract stated that *"the successful operation of this Contract requires that (Thiess) and (Placer) agree to act in good faith in all matters relating both to the carrying out (of) the works, derivation of rates and interpretation of this document"*[69]. This clause, therefore, placed a specific good faith requirement on the derivation of plant rates and general good faith requirements on the works and interpretation of the contract as a whole.

A dispute arose over the plant rates whereby Placer alleged that they had not been calculated on the agreed costing basis and had been inflated both during the negotiations leading up to the execution of the partnering contract and during the period of the contract. Placer subsequently invoked a general termination clause in the contract. Thiess sued claiming that Placer had breached a fiduciary duty by terminating the contract. Placer counterclaimed for damages for the inflated plant

[67] [1999] WASC 1046 (lib. no. 990187, 16 April 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title…> (10 October 2001).
[68] Ibid. at p.6 (of 247)
[69] Ibid. at p.98 (of 247).

rates and claimed that Thiess had owed it fiduciary obligations in respect of both the pre-contract negotiations on plant rates leading up to the partnering contract and on the subsequent assessment of those rates after execution of the contract.

Paul Finn has defined the 'good faith' and 'fiduciary' standards of conduct in relation to self interest as follows: *'Good faith', while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The 'fiduciary' standard for its part enjoins one party to act in the interests of the other – to act selflessly and with undivided loyalty."*[70].

Templeton J found that during the pre-contract negotiations the parties were at 'arms length'[71] and was not persuaded that the relationship between Thiess and Placer up to the point at which they entered into the contract, was a fiduciary one. He considered that at this point if the costing figures were wrong *"then there has been a misrepresentation: not a breach of fiduciary duty"*[72].

However after execution of the partnering contract the Judge gave extensive consideration to good faith and fiduciary duties. He pointed to contract requirements stated in general terms *"that are typical of many……which do not define rights and obligations with any precision. Their implementation clearly requires goodwill and*

[70] MacQueen, Hector, 'Good Faith in the Scots Law of Contract' in Forte, A D M (ed.),*Good Faith in Contract and Property* (Oxford: Portland Oregon, 1999) p.12 quoting Finn, P D, *The Fiduciary Principle* in Youdan, T G (ed.), *Equity, Fiduciaries and Trusts* (Toronto, Calgary, Vancouver: Carswell Co. Ltd, 1989), p.4.
[71] [1999] WASC 1046 (lib. no. 990187, 16 April 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title…> (10 October 2001) at p.111 (of 247).
[72] Ibid. at p.110 (of 247).

co-operation on the part of both parties. ''Good faith'' must include those matters."[73]. Using this basis he went on to interpret the wording and application of the good faith clause in detail.

He limited the expression *"all matters relating to the works"* to meaning all matters related to the *"carrying out"* of the works and he interpreted the good faith obligation as *"requiring the parties to act honestly with each other and to take reasonable steps to co-operate in relation to matters where the contract does not define rights and obligations or provide any mechanism for the resolution of disputes"*[74].

It is submitted that 'reasonable steps' in this context would at least imply a duty to negotiate in relation to these undefined rights and obligations. It is also submitted that such a duty must also involve the implication of a duty of good faith in relation to the negotiation process because, as observed by Einstein J in relation to negotiation and mediation processes in the Australian case of Aiton Pty Ltd v Transfield Ltd[75], *"without it there is no chance of reaching a mutually satisfactory conclusion"*[76]. In that case a duty to negotiate and mediate in good faith was expressly stated in the contract and was generally considered to be certain and enforceable by the Judge. His definition of the content of the express duty of good faith in this situation amounted to the display of an appropriate level of pro-active participation in the specified negotiation and mediation processes.[77]

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[73] Ibid. p.98 (of 247).
[74] Ibid. p.99 (of 247).
[75] [2000] ADRLJ 269.
[76] Ibid. at p.365.
[77] Ibid at p.370.

However such an approach is precluded in England as a result of Walford v Miles[78] where it was held that *"a duty to negotiate in good faith was unworkable in practice and inherently inconsistent with the position of a negotiating party, since while the parties were in negotiations either of them was entitled to break off the negotiations at any time and for any reason"*[79]. Indeed the good faith duty necessary to regulate participation in a negotiating process was described by Lord Ackner as *"inherently repugnant to the adversarial position of the parties when involved in negotiations"*[80].

This was reinforced in 1994 by the Court of Appeal in Little v Courage Ltd[81] where Millett L J stated that *"(u)nlike some systems of law, English law refuses to recognise a pre-contractual duty to negotiate in good faith, and will neither enforce such a duty when it is expressly agreed nor imply it when it is not....."*[82].

Walford v Miles was also followed in 2000 in Franois Abballe (t/a GFA) v Alstom UK Ltd[83] where Judge Humphrey Lloyd QC stated that*"(t)here is so far as I am aware nothing to displace Walford v Miles in which it was held that "a duty to negotiate in good faith was unworkable in practice""*[84].

The judge in Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd[85] continued his construction of good faith as it applied to the interpretation of the 'contract

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[78] [1992] 2 AC 128 (HL).
[79] Ibid. at p.129.
[80] Ibid. at p.138.
[81] (1995) 70 P&CR 469.
[82] Ibid. at p.475.
[83] (No1) 2000 WL 331020 (QBD (T&CC)) (No.1999 TCC No.48, 24 March 2000) (online) <http://uk.westlaw.com/result/text.wl....>(4 October 2001).
[84] Ibid. at para.23.
[85] [1999] WASC 1046 (lib. no. 990187, 16 April 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title…> (10 October 2001).

document' in that case. He concluded that it required the parties to *"construe or give effect to general provisions in such a way as to promote the contractual objectives, which are to be gleaned either from the contract as a whole or from the provisions in particular"*[86].

However the Judge did not consider that the 'good faith' obligation applied to the termination provision in the contract. He cited two apparently independent reasons for this. The first was that the good faith provisions related to the *'operation'* of the contract and 'termination' was not concerned with 'operation'.[87] The second was that the termination clause was clear and unambiguous and allowed Placer to terminate the contract *"at its option, at any time and for any reason it may deem advisable"*[88].

In relation to the plant rates issue the Judge went a step further and concluded that the contract *"imposed on Thiess the obligation of formulating, in good faith, equipment operating costs based on historical data. This was in the nature of a fiduciary obligation."*[89]. However it was not the good faith requirement which gave rise to the fiduciary duty, but the precise nature of the obligation in relation to the formulation of plant rates. This required Thiess to formulate plant rates from "*historical data in its possession"* which *"put it in a position in which it was required to act in Placer's interest as well as its own"*[90]. The Judge therefore considered that Thiess fell within the definition of a fiduciary as set out in Hospital Products Ltd v United States

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[86] Ibid. at pp.99-100 (of 247).
[87] Ibid. at p.100 (of 247).
[88] Ibid.
[89] Ibid. at p.246 (of 247), conclusion No.4.
[90] Ibid. at p111 (of 247).

Surgical Corporation[91] where Mason J stated that *"(t)he critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of the other party who is accordingly vulnerable to abuse by the fiduciary of his position."*[92].

Whilst the Judge in Thiess v Placer defined the extent of the application and interpretation of the term 'good faith' in various contexts, he advised against generalisation saying that *"(i)n the end, the term must be construed in the context of the agreement in which it appears"*[93].

The Judge found for the defendants (Placer) and awarded substantial damages in their favour.

Thiess appealed[94] and the appeal court supported the original judgement in relation to the good faith and fiduciary elements, but rejected the basis of the assessment of damages. The lack of a meaningful method of calculating the damages resulted in their reduction to a nominal sum.

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[91] (1984) 156 CLR 41.
[92] Ibid. at pp.96-97.
[93] Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd [1999] WASC 1046 (lib. no. 990187, 16 April 1999) (online) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title…> (10 October 2001) at p.101 (of 247).
[94] Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd [2000] WASCA 102 (14 April 2000) (online) <http://www.austlii.edu.au/cgibin/disp.pl/au/cases/wa/WASC/1999/1046.html?query=title…> (10 October 2001).

The context of the Thiess case was a partnering contract in which express requirements of 'good faith' were placed on general conduct and on specific obligations, and where certain obligations, by their nature, required, disclosure of information. The conclusions from this case seem to be that:

- the existence of a partnering arrangement is not apparently seen as relevant to the interpretation of relational obligations and it is the specific wording of the obligations which is important

- in Australian law a general good faith obligation would, as a minimum, require the parties to deal honestly with each other; however there is no suggestion that the general requirement for honesty in this context involves any duty of disclosure and it is submitted, therefore, that it would be satisfied by the parties not being deliberately dishonest; it is submitted that the attitude of English and Scots law to dishonesty would not be significantly different, even in the absence of any content of a requirement for good faith in commercial contracts

- in Australian law general statements of good faith may require the parties to take reasonable steps to co-operate in relation to matters where the contract does not define rights and obligations or provide any mechanism for the resolution of disputes; this suggests the implication of a duty to negotiate in good faith; such a duty would be rejected in English law as a result of Walford v Miles[95] and it is submitted that this would also be the case in Scotland

[95] [1992] 2 AC 128 (HL).

- in Australian law unambiguous rights would not be modified by a general 'good faith' obligation and it is submitted that this would also be the case in English and Scots law

- in Australian law 'good faith', expressed either as a general requirement or related to a specific obligation is unlikely to give rise to a fiduciary duty; in order to be fiduciary, an obligation in a commercial contract must specifically require one party to act in the interests of the other, such as in the duty of honest disclosure in this case; the Thiess case suggests that currently even an express duty of good faith is irrelevant to a duty of disclosure in commercial situations in Australia; it is submitted that this would also be the case in English and Scots law

- the traditional view on pre-contractual exchanges was reinforced; fiduciary duties are unlikely to occur during these exchanges because the parties are at 'arms length'; the expectation that the contract will be a co-operative arrangement such as partnering seems to be irrelevant to this; it is submitted that this would also be the case in English and Scots law

- in the final analysis the interpretation of the term 'good faith' in Australian law depends on the context of the agreement in which it appears

Conclusions

There has been some limited judicial consideration in England and Australia of the

effect of pre-contract partnering charters containing relational aspects, in the form of statements of mutual co-operative intentions, on formal contractual obligations. The judicial comment suggests that in both jurisdictions these arrangements will not alter or affect clear obligations expressed in the formal contract. No duty to protect the other party's interest appears to arise even where the parties appear to have intended that their relationship would be in the nature of a partnership.

The first instance judge in the English case did suggest the potential for a much wider interpretation of a pre-contract partnering charter. This included a significant alteration in the balance of risk, especially in relation to extensions of time for completion and therefore to the clients entitlement to liquidated damaged for non-completion. However, in the light of the appeal court decision, it seems unlikely that his views will be followed in the immediate future and consequently it seems likely that interpretation will follow the current rules on pre-contractual exchanges and conduct subsequent to contract formation.

The general conclusion is, therefore, that no special relational status arises from the partnering charter. Consequently it is merely an element of the pre-contractual process and is subject to the current, essentially classical, self interested limits to the reference which may be made to it subsequent to contract formation. With this in mind there is no reason to suggest that the relationship where a partnering charter is agreed after contract formation would be subject to other than the current narrow rules of variation, estoppel, personal bar, waiver, etc in relation to conduct subsequent to contract formation.

Where a binding partnering contract exists, the partnering relationship again seems to be irrelevant to interpretation of the contract. A significant difference is apparent between the Australian and English positions on the relevance of the specific relational concept of 'good faith'. This might result in enforcement of agreed mediation and negotiation processes in Australia but this would not be the case in England or Scotland. However beyond this the interpretation of partnering contracts in Australia follows the traditional rules for the construction of contracts. This again results in a traditional construction of pre-contractual exchanges and a reluctance to interpret obligations in a manner which suggests any requirement to protect the interests of other parties, except where the drafting of the obligation clearly requires this. The situation is likely to be similar in England and Scotland.

Consequently the situation seems to be that currently parties to construction contracts can have negligible expectations that any judicial consideration will be given to the relationship covered by the term 'partnering' in any of its current forms. The law, as it is currently applied, does not fit any positive expectations that the parties may have of moderation of self interest as a result of the relational aspects of partnering arrangements. Consequently parties would be advised to depend on very careful drafting of obligations if they expect these to contain any *enforceable* requirements in this regard.