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COMPOUND PHOTONICS GROUP LIMITED: A DISCUSSION IN " GOOD FAITH"

This paper aims to explore some of the broader issues raised by the Court of Appeal (Newey, Carr and Snowden LJJ) in Compound Photonics Group Limited [2022] EWCA Civ 1371, an appeal against a successful s. 994 petition, associated with "good faith" clauses.

Good faith as concept in (commercial) contracts

English law (outside of certain specific types of contract or relationship – e.g. insurance or agency) does not recognise a general concept of good faith in contracts generally or commercial contracts in particular.

The requirement of good faith therefore arise on a case-specific basis and in the general commercial context does so because

- the parties have expressly agreed a good faith obligation. A variety of linguistic formulations have been held to bring such an obligation interplay – "act with the utmost good faith"; "in absolute faith"; even "resolve disputes by friendly discussion".
- one of the parties has been given a discretion under the contract; or
- it is implied because of the parties' relationship.

Before turning to Compound Photonics (a case falling within the first category – express obligation) the following general points in relation to the above categories are worth stating.

First, "good faith" is not a variable concept. Adjectives such as "utmost" and "absolute" add nothing to the standard.

Secondly, where one party has been given a contractual discretion – giving rise to what is often termed the "Braganza duty" – the law implies that that discretion will be exercised in good faith and not arbitrarily or capriciously. It imposes upon the party with the role of decision-maker and for whom a potential conflict of interest arises, an obligation to ensure the contract works consistently with the parties' presumed intention in reasonable expectations. It does not apply to

absolute contractual rights (i.e. decisions in which there was no discretion – terminating a contract, for example, or demanding repayment of a loan) and it seems likely that is implied by default whenever a contractual discretion arises. The duty, where it arises, imposes upon the decision-maker an obligation to ask the right question, only take into account relevant matters and avoid a result that is not so outrageous that no reasonable decision-maker could have made it.

Thirdly, a "relational contract" is one which contains some, at least, of certain identified non-exhaustive characteristics (see Bates v Post Office [2019] EWHC 606 at [725]) comprising

- No specific express term preventing a duty of good faith being implied
- a long-term contract, with a mutual intention of a long-term relationship;
- an intention for the parties' roles to be performed with integrity and fidelity to their bargain;
- a commitment for the parties to collaborate in performing the contract;
- the spirits and objectives of the venture being incapable of exhaustive expression in a written contract;
- the parties reposing trust and confidence in one another, but of a different kind to that involved in fiduciary relationships;
- a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;
- a degree of significant investment by one or both parties; (i) exclusivity of the relationship.

In such contracts, the parties are to avoid conduct that reasonable honest people regard as "commercially unacceptable" and not act so as to undermine the bargain entered into or the substance of the contractual benefits under the parties' bargain. This is not a particularly stringent threshold. The Court's discussion of 'good faith' in Compound Photonics may also cast some light on the evaluation of the test in a relational contract.

The relevant facts

Compound Photonics Group Limited ('the Company') and its UK subsidiary, Compound Photonics UK Ltd, were vehicles for the intended development and commercialisation of certain academic research by a Dr Sachs. As perhaps befitted the academic research behind the underlying product, Dr Sachs was the CEO with day-to-day control of both companies. As one of the investors put it, he was "*the jockey they were backing*." Mr Faulkner was an independent financial adviser who had introduced three investors who, together, held 93% of the shares. Along with Dr Sachs, he too was a "Founder Director" and chairman.

The story underlying the increase of the investors' shareholding is broadly familiar. In 2010, one of them (Vollin) made an investment and obtained two seats on a five-person board, with a shareholders' agreement and appropriate articles. As the demand for capital increased, the "private shareholders" were unable to keep up and Vollin's shareholding increased, with revised shareholders' agreements and articles in 2013. Later investors provided significant capital and executed deeds of adherence to the 2013 shareholders' agreement, gaining seats on the board.

In 2016, there was a substantial disagreement over the amount required to enable the company to break even and Dr Sachs formed the view that the investors were not being given a fair account of his different point of view in relation to the need for much lower sums of money. Discussions between the directors (excluding Dr Sachs) resulted in the conclusion that he should be asked to resign as a director and CEO and that the Company should focus on a short-term strategy seeking to retain what existing value it had. At a meeting, Dr Sachs was left under no illusions that he either had to resign or he would be removed under the procedure prescribed in the Companies Act 2006; the Judge concluded that he was presented with a *fait accompli* and that he had little option but to go. Discussions ensued and he left as a "good leaver" under the 2013 shareholders' agreement. The settlement agreement was approved by the written resolution of the directors and signed by them all, including Dr Sachs and Mr Faulkner.

The "new regime" without Dr Sachs did not prosper; by August 2016, the investors took a decision to also remove Mr Faulkner from office and a meeting was requisitioned under section 168 of the Companies Act 2006 removing him as a director. Mr Faulkner was removed as a director by an overwhelming majority of 97.5% for 2.5% against (the latter being the vote of the minority shareholders). In subsequent correspondence he was also classified as a "good leaver". Subsequent events saw the realisation of certain assets before group insolvency in December 2018.

The minority shareholders petitioned under section 994, claiming to have been unfairly prejudiced by the investors when Dr Sachs and Mr Faulkner respectively were forced to resign from office and thereby excluded from any continuing role in the management of the Company.

The terms of the 2013 shareholders' agreement and articles

Clause 4.2 of the shareholders' agreement contained a provision that each shareholder undertook to the other and the Company that "[they] *will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to matters contained in this agreement*". A number of other clauses required the exercise of rights and powers to ensure that the Business was conducted in accordance with good business practice and on sound commercial and profit-making principles. Clause 7 made provision in relation to the Board including for a quorum to *"include (insofar as they each remain a director) [Dr Sachs], [Mr Faulkner] and, if more than one has been appointed, an Investor Director."* Importantly, further provisions governed what could and could not be decided in the absence of agreement by Dr Sachs and Mr Faulkner. A "good leaver" comprised an individual whose cessation of directorship was (*inter alia*) without cause…". Clause 21 provided obligations for the shareholders to exercise their powers and their voting rights in a manner consistent with the shareholders' agreement. Clause 23 provided that nothing in that agreement created a partnership (and it was common ground for the purposes of the 994 petition that the Company was not a quasi-partnership) and clause 25 contained an entire agreement clause.

It is unnecessary to set out the terms of the articles in any great detail; they reflected the shareholders' agreement and article 15 provided for the vacation of the office of a director upon a board resolution to remove the same.

The above (necessarily) limited review of the constitutional documentation perhaps does not do justice to that which was in support of the minority shareholders' arguments. Their case focused on the meaning of clause 4.2 (the good faith provision), arguing that it required adherence to a "bargain" inherent in the 2013 shareholders' agreement and articles, namely that Dr Sachs and Mr Faulkner would be "entrenched" as directors would hold the balance of power on the board of the Company; they also argued that the 2013 shareholders' agreement formed part of the constitution of the Company for the purposes of the directors' duties under section 171(a) of the Companies Act 2006, with the consequence that the directors that voted to remove Dr Sachs and Mr Faulkner were in breach of their duties to act in accordance with the Company's constitution.

The trial judge agreed with the minority shareholders' arguments and in doing so agreed with and adopted the statements of principle set out in Unwin v Bond [2020] EWHC 1768 (Comm) at [229] – [232]. Those paragraphs read as follows: –

> "229. First, the context in which the good faith obligation was entered into is everything, or at least a great deal. That is hardly surprising, because the extent of the obligation, that is, what prospective acts of a defendant may be subject to a duty of good faith, is a matter of the construction of the contract which contains the obligation.
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> 230. Secondly, once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:

i) they must act honestly;
ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;
iii) they must not use their powers for an ulterior purpose;
iv) when acting they must deal fairly and openly with the claimant;
v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.

These minimum standards are not entirely distinct from one another. Rather, they tend to overlap.

231. Fair and open dealing is a broad concept and what it means in practice in any case will again depend on context. It is likely that, in many cases, the claimant is entitled to have fair warning of what the defendant proposes. In those cases where the defendant is contemplating taking a decision which will affect the claimant, fair and open dealing is likely to require that the claimant is given an opportunity to put their case before the defendant makes the decision and the defendant is likely to be required to consider the claimant's case with an open mind.

232. Thirdly, and very much linked to the second point, the fact that a defendant could have achieved the same result in a procedurally compliant way does not amount to a defence where the approach they adopt does not meet the minimum standards I have set out."

The issues on appeal

Snowden LJ (with whom the other members of the Court agreed) considered that the trial judge was correct, in principle, to approach matters on the basis that, in the absence of any suggestion that the Company was a quasi-partnership or that there were other grounds for the imposition of equitable constraints upon the actions of the members, the question of whether that amounted to unfairly prejudicial conduct within the meaning of section 994 turned upon whether such conduct breached the terms upon which the members had agreed that the affairs of the Company should be conducted, i.e. the 2013 Articles on the 2013 shareholders' agreement: see paragraph [142].

To that end, the majority of his findings of unfair prejudice depended upon his interpretation of the content of the obligation of good faith in clause 4.2 of the 2013 shareholders' agreement. The Judge concluded that the expression "good faith" necessarily imported all of the "minimum standards" of good faith identified in Unwin v Bond [2020] EWHC 1768 (Comm). These standards included, in addition to a requirement that the investors should act honestly, a requirement of "fidelity to the bargain", a requirement of "fair and open dealing" and a requirement "to have regard to the interests" of the minority shareholders: [143].

A particularly important point for the purposes of our discussion today, is the identity of the "bargain" to which the parties were required to have fidelity. The trial judge's conclusion was that it was embodied in the 2013 constitution of the Company, namely the articles of association and the shareholders' agreement, and that, come what may, it provided that the management of the Company was to be conducted by a board in which Dr Sachs and Dr Faulkner were entrenched, held the balance of power and were able to make certain decisions with which the investors could not interfere.

The investors' appeal was principally on the basis that the trial judge interpreted the "good faith" clause in the shareholders' agreement far too widely; it did not mean that they had given up the right to remove Dr Sachs and Mr Faulkner or take control of a company in which they were very substantial investors and majority

shareholders and it did not impose on them duties of procedural fairness which required them to take into account the interests of the minority shareholders when deciding how to exercise their rights to vote as the majority. In particular, they relied on the finding by the trial judge (not challenged on appeal) that they had genuinely and reasonably formed the view that it was necessary for Dr Sachs to cease to be involved in the management of the Company for its own good. Accordingly, they did not act in breach of an obligation of good faith. On appeal, they also denied liability in relation to the removal of Mr Faulkner.

Thus, whilst the context of the discussion of the meaning of a good faith clause arose in relatively unusual circumstances, the Court's discussion of the manner in which it should approach the determination of its meaning and effect is of more general application. With the meaning and effect of the good faith clause firmly in the parties' cross-hairs, the Court of Appeal embarked upon a thorough and wide-ranging review of the law.

The Court of Appeal's analysis

The general approach to interpreting express clauses of good faith

Unsurprisingly, the starting point is to construe the contract, just like any other – "*an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used*": [147].

Secondly (and this may explain where the trial judge initially fell into error) cases from other areas of law or commerce, which turned upon their own particular facts, may be of limited value and must be treated with considerable caution. As Auld LJ observed in Street v Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964 at [41], "*Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration….. Terms to be found in many statutory and common-law contexts and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another*."

Against this analysis, aside from the irreducible obligation to act honestly, the Court declined to deduce any number of further "minimum standards" of conduct that a defendant must be taken to have agreed to comply with simply because there was a "good faith" clause in a contract.

By way of illustration of this point, the Court considered how the Judge had reached the conclusion that the investors were required to deal "fairly and openly" with Dr Sachs and Mr Faulkner, including when seeking their respective resignation or removal from office. The Judge relied on a range of authorities which were concerned with partnerships and quasi-partnerships. Given that "context is king", the Court of Appeal made the point that it was hardly surprising that these cases gave rise to an aspect of good faith which included an obligation to deal "fairly and openly". (In passing, it is worth noting that one of the Court of Appeal's objections to the Judge's reliance on partnership cases was because of the contractual provision that the relationship was not one of partnership: [155].) All of this led the Judge into error by failing to consider *"how (if at all) the parties to the 2013 [shareholders' agreement] might be taken to envisage that the duty of fair and open dealing was intended to fit alongside or to add to those statutory procedures"* available under the Companies Act 2006.

Fidelity to the bargain and the consideration of interests

Similarly, the failure to address context tainted the Judge's decision that the investors were required to act with "fidelity to the bargain" and have regard to the interests of the minority shareholders as well as their own.

The Court of Appeal reviewed the origins of these concepts, recognising they were imports from the USA and Australia where *"they have been applied in other areas of law and commerce not involving changes to the constitutional structure of the company"*.

Before considering further the Court of Appeal's evaluation of these concepts, it is worth noting some of the (largely *obiter*) *dicta* in which these concepts have been expressed in order to provide some background to the discussion. For present purposes they can probably be taken from the decision of Vos J in CPC

Group Ltd v Qatari Diar Real Estate Investment Co. [2010] EWHC 1535 (Ch) (the emphasis being that of the Court of Appeal in the instant decision): –

> "65. If adherence to such standards of conduct is the predominant component of a separate obligation of good faith in performance of a contract, it becomes necessary to enquire about the extent to which selflessness is required. It must be accepted that the party subject to the obligation is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become), in words used by McHugh and Gummow JJ in Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410, "nugatory, worthless or, perhaps, seriously undermined". This seems to me to be the principle emerging from paras 172 to 177 of the joint judgment in [Burger King v. Hungry Jack's Pty [2001] NSWCA 187] where the various authorities are collected and discussed.
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> ……
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> 66. Viewed in this way, the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character. A party is precluded from cynical resort to the black letter. But no party is fixed with the duty to subordinate self-interest entirely which is the lot of the fiduciary: Burger King at para 187. The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the

> parties in the enjoyment of the fruits of the contract as delineated by its terms.
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> 67. In many ways, the implied obligation of good faith is best regarded as an obligation to eschew bad faith. This is borne out by the … succinct statement by Lord Scott of Foscote in Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd …"
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> …
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> "246. Thus, it seems to me that the content of the obligation of utmost good faith in the SPA was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties. I do not need, it seems to me, to decide whether this obligation could only be broken if [the parties] acted in bad faith, but it might be hard to understand, as Lord Scott said in Manifest Shipping how, without bad faith, there can be a breach of a duty of good faith, utmost or otherwise"."

With that introduction and returning to the concept's parentage, the Court of Appeal considered, in detail, two first instance decisions of the English High Court: Berkeley Community Villages v Pullen [2007] EWHC 1330 (Ch) (Morgan J) and CPC Group: [164] – [179]. Consistent with the requirement to consider context, the Court also analysed the underlying circumstances of the American and Australian authorities cited in them in order to put the nature and scope of the duty under consideration into its proper context. The following points emerge: –

first, the passages of the judgements in the cases themselves were (and in the case of Vos J's judgment, were expressly) *obiter;*

secondly, the reliance on the American authority – principally paragraph 205 of the United States Second Restatement of Contracts – was not only partially misquoted, but failed to recognise that under the Second Restatement, "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcements"; the Australian cases (from New South Wales) were – at least – very heavily influenced by the pre-existing contractual jurisprudence in that jurisdiction which implied an obligation of good faith. In effect, the "takeaway point" is that partial importation of foreign authority carries with it significant risk in the absence of a thorough understanding of the legal universe which it inhabits.

Distilling these *obiter* comments down and following the analysis of the American and Commonwealth authorities – including some extra-judicial writing – the Court of Appeal identified a number of emerging points relating to the concepts of fidelity to the bargain and the requirement to have regard to the interests of the other contracting party.

First, these concepts originated in a commentary on US contract law and were adopted and developed in New South Wales, Australia in the context of imposing terms requiring good faith and the performance of contracts as a *matter of general law* and not in the context of the interpretation of individually negotiated contracts. As such, the desire to give a requirement of good faith a single, clearly understood meaning was entirely understandable but there was no such basis for automatically adopting such a formulaic meaning in English law where the parties to it individually negotiated a provision to act in good faith; there was no presumption that the parties should automatically be presumed to have intended to incorporate obligations of fidelity to the bargain and the consideration of the other parties' interests.

Secondly, the concept of having regard to the interests of the other contracting parties has largely been developed and applied in cases concerning business decisions which are capable of adversely affecting or even depriving the other parties of the commercial benefit expected to be enjoyed under the contract.

Thirdly, although judges have on occasions used the expression "the spirit of the contract" in the context of a good faith clause, it is not an open invitation to interpret such a clause as imposing additional substantive obligations or any restrictions on action outside the other terms of the contract: [205]. "*That must especially be so where… the contract in question is professionally and comprehensively drafted and contains an entire agreement clause*": [205].

So, for example in Re Coroin [2013] EWCA Civ 781, [2014] BCC 14, the parties agreed that each should act in good faith towards the others and use reasonable endeavours to ensure the observance of the terms of the relevant shareholders' agreement and (in clause 8.5.4) each of them will do all things necessary or desirable to give effect to the spirit and intention of their agreement. In the Court's analysis of Arden LJ's decision (she held that the way to give meaning to the relevant clause was to ascertain the intention of the parties in entering into the agreement as a matter of conventional interpretation of the agreement or implication terms), it observed:-

> 212. "Understood in this way, even where thought to be inherent in an obligation of good faith, the concept of fidelity to the bargain or adherence to the spirit of the agreement could only operate to support the common purpose and aims of the parties as objectively ascertained from the express or implied terms of the contract. ……. On any footing, however, the shared aims of the parties must be identified by interpretation of the other terms of the agreement, or by implication of terms according to the usual test outlined in Marks & Spencer plc v BNP Paribas Securities [2016] AC 742."

Accordingly (and in summary), in the case under consideration, the structure of a limited company and the relationship and interests of its members were held to

provide a very different backdrop to that of an ordinary commercial contract; in general meeting, there is no requirement to consult with the other shareholders nor is there any general requirement that they should take into account the interests of others when deciding how to vote – votes attached to shares of proprietary rights, which may be exercised as the holders see fit: [199]. In doing so, they do not ordinarily deprive the other shareholders of the benefit of the statutory contract, i.e. their shares. If these well-known principles of company law are intended to be changed, they must be done so expressly, clearly and directly with further consequences (e.g. as to consultation between the parties) being spelt out – especially in a professionally drafted agreement: [201]

Is dishonesty or bad faith required for any breach of a good faith clause?

The Judge thought that the duty of good faith could be breached if any of the minimum standards of good faith derived from Unwin v Bond were not met; there was no express consideration of the point identified by Vos J in CPC Group that unless the defendant had acted in bad faith, he could not be in breach of a duty of good faith, utmost or otherwise.

The Appellant submitted that the Judge should not have found a breach of the good faith clause without a finding of dishonesty or something akin to it; the test being objective but based the Appellant's actual knowledge (in the sense explained in Royal Brunei Airlines v Tan [1995] 2 AC 378 and more recently endorsed by the Supreme Court in Ivey v Genting Casinos (UK) [2018] AC 391).

The Court of Appeal rejected that argument. The authorities upon which it was based did not give rise to a principle of general application and were concerned solely with the agreements in question in their respective context. The Court cited Yam Seng Pte Ltd v International Trade Corp Ltd [2013] 1 All ER (Comm) 1321 and the *dicta* of Leggatt J at [138] of that decision where he observed:-

> "not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable"."

The Court of Appeal concluded that the duty of good faith could be breached by "bad faith conduct" which could include conduct which would not necessarily be described as dishonest [232]:

> [241] ….the authorities do not support the proposition that a contractual duty of good faith can only be breached by conduct that is dishonest according to the explanation of that concept in Royal Brunei and Ivey. Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest. I therefore reject the Investors' argument that a finding of dishonesty was a pre-requisite for a finding of breach of [the good faith clause in the shareholders' agreement].
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> ….
> [243] ….I accept the argument that apart from the "core" duty of honesty and (depending on the context) a duty not to engage in conduct that could be characterised as bad faith, any further requirements of an express duty of good faith must be capable of being derived as a matter of interpretation or implication from the other terms of the contract in issue in the particular case."

The parties' bargain

This discussion arose in the context of considering that to which the parties were required to have fidelity, which in this instance meant preserving the "special position" occupied by Dr Sacks and Mr Faulkner, albeit was recognised that the investors had the statutory right to do so and therefore Dr Sachs and Mr Faulkner were vulnerable to being removed; that was not the same thing as saying that their removal might not be a breach of contract.

The Court of Appeal considered that represented a fundamental conceptual error – namely that by envisaging a contractual obligation which did not prevent the removal of the director whilst at the same time giving rise to a breach of contract if the director was removed.

For the purposes of the specific appeal, the court of Appeal focused upon the statutory right of the company under section 168 of the Companies Act 2006 to remove a director in general meeting, which right cannot be alienated by contract in contrast to the ability of a shareholder contractually to preclude the casting of their shares' votes in a specific way: such an agreement would be enforceable by injunction absent any discretionary bar. A careful analysis of the constitutional documents of the Company led to a conclusion that there was no such prohibition.

Drawing the threads together…

At [275], Snowdon LJ summarised his conclusions; they are worth setting out in full: –

275. "Pulling the threads together, the net result, in my view, is that the duty of good faith ….. imposed a core requirement that the parties should act honestly towards each other and the Company. It might be objected that this would simply be stating the obvious, but I consider that making such a requirement served a purpose in a contract between parties who had not worked together before, and who came from very different business backgrounds.

276. I would also accept that [the specific good faith clause] required the parties not to act in bad faith towards each other. As Leggatt J explained in Yam Seng, this would prohibit conduct that reasonable and honest people would regard as commercially unacceptable, but not necessarily dishonest. However, in the same way as Lord Nicholls suggested in Royal Brunei that it is impossible to be entirely specific about the meaning of "dishonesty", I do not consider that it is

appropriate to try to be prescriptive in describing what conduct might fall into this category, given that to do so would necessarily involve recourse to synonyms or epithets (such as "improper" or "sharp practice").

277. For the reasons I have explained, I have considerable reservations about finding a duty of fidelity to the bargain to be inherent in a good faith clause used in the context of a shareholders' agreement in the absence of any other indication to that effect in the agreement (c.f. the express wording in Coroin). However, whether or not that is so, in the instant case I do not in any event accept that [the good faith clause] required the parties to adhere to the concept of a bargain having the characteristics identified by the Judge of a constitutionally omnipotent board on which Dr. Sachs and Mr. Faulkner held an unalterable balance of power. Nor, in the absence of any supporting wording in the [shareholders' agreement], do I accept that [the good faith clause] imposed on the Investors some procedural duty of fair and open dealing with Dr. Sachs or Mr. Faulkner going beyond the terms of sections 168 and 169 of the 2006 Act. And neither do I consider that [the good faith clause] required the Investors to have regard to the interests of the Minorities in some undefined way over and above any requirements that would be imposed upon shareholders to have regard to the interests of the Company when voting on particular types of resolutions as a matter of general company law.]"

The appeal was allowed.

So what?

The discussion in Compound Photonics allows the following propositions to be stated: –

First, in relation to an express duty of good faith, it can only be understood upon a proper construction based on its context, applying ordinary principles of construction. The exercise is case-specific and authorities based upon different facts – particularly those drawing upon foreign law – must be approached with extreme caution.

Secondly, the only "core" duty is one to act honestly, assessed in a subjective sense in light of what the defendant actually knew albeit applying an objective standard. Everything else is contextual, including a duty not to act in a way that might fall short of dishonesty (e.g. conduct which is commercially unacceptable to reasonable and honest people). In circumstances where there are additional, contextual duties, dishonesty is not a requirement.

Thirdly, the relevance and scope of "fidelity to the parties' bargain" remains opaque and clearly may gain more traction in cases in which there is not such a clear statutory starting point.

Fourthly, the guiding principles stated in relation to the express term in this particular case should (it is submitted) apply equally to those cases where an implied term arises, most notably relational contracts.

Fifthly, a careful health warning needs to be given to clients contemplating inclusion of a "good faith" clause in any agreement: a simple clause (as they often are) is uncertain in its scope, save to the extent of being a fruitful foundation for dispute and litigation. Clearly, in the right commercial context, that may be sufficient in itself.

Sixthly, if a good faith clause is to be included, a "long form" option might be preferable. Significant emphasis was placed (on at least four occasions) on the fact that the shareholders' agreement and the articles were professionally drafted and therefore represented a considered documentation of rights. Although the discussion in the case itself was in the context of shareholders' agreements (and that if it was desired to limit the ability to remove Dr Sachs and Mr Faulkner, the shareholders' agreement would need to contain further

provision – [201]), the clear focus on the fact the contract was "professionally drafted" throws the burden onto the profession at large to ensure that the consequences of a "good faith" clause are thought through and, where appropriate, documented. How realistic this is in terms of delicate commercial negotiations must be open to some doubt but essentially the thrust of the Court of Appeal's narrative was at least to imply a need to identify those rights that remained notwithstanding a good faith clause, such that challenges to the fidelity to the bargain and remaining commercial latitude envisaged by the parties should be identified if not spelt out.

Finally, and perhaps turning full circle, the case may represent a clear warning against including good faith clauses at all, although it must be recognised that striking through a good faith clause in a draft commercial agreement is (in all probability) seldom if ever done.

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