

SPEAKING OF CHANGE: GOOD FAITH AND FAIR DEALING IN THE FINAL ACCOUNT

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39 Essex Chambers

The Scenario: The Contract

Contract says this:

- The parties are to act in a spirit of mutual trust and cooperation
- Disputes to be notified to the other party and thereafter, a dispute must be referred to an adjudicator within 4 weeks.

The Scenario: The Dispute

- A dispute has been notified.
- You are acting for the “defendant”.
- You know there is a time bar on adjudication in the Contract
- Negotiations are taking place.
- No one mentions the time bar.
- Do you check that the other side knows and understands that there is such a time bar?

The Scenario: What If?

- What do you do if the other side tell you that there is no time bar on adjudication in the Contract?
- What do you do if the other side ask you if there is a time bar on adjudication in the Contract?

WHERE ARE WE?

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Illustrative Case List

- Express terms
- Implied terms
- Relational contracts
- The exercise of a contractual discretion
- The obligation to negotiate

Express Terms

- *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland UK (t/a Medirest)* [2013] EWCA Civ 200
- *Berkeley Community Villages Ltd v. Pullen* [2007] EWHC 1330 (Ch)
- *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm)
- *Costain Ltd v. Tarmac Holdings Ltd* [2017] EWHC 31 (TCC)

Berkeley Community Villages Ltd v. Pullen

[2007] EWHC 1330 (Ch)

*“imposing on the defendants a contractual obligation to observe **reasonable commercial standards** of fair dealing in accordance with their actions which related to the Agreement and also requiring **faithfulness to the agreed common purpose and consistency with the justified expectations of the first claimant**”.*

Implied Terms

- *Hamsard 3147 Ltd v Boots UK Ltd.* [2013] EWHC 3251 (Pat)
- *MSC Mediterranean Shipping Co v Cottonex* [2016] EWCA Civ 789
- *Monde Petroleum SA v Westernzagros Limited* [2016] EWHC 1472 (Comm).
- *Globe Motors Inc & Ors v TRW Lucasvarity Electric Steering Ltd* [2016] EWCA Civ 396
- *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307

Implied Terms (continued)

- *Ilkerler Otomoviv Sanayai Ve Ticaret Anonim Sirketi v. Perkins Engines Company Ltd* [2017] EWCA Civ 183
- *General Nutrition Investment Co v Holland and Barrett International Ltd (Formerly NBTY Europe Ltd)* [2017] EWHC 746 (Ch)
- *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch)

Hamsard 3147 Ltd v Boots UK Ltd. [2013] EWHC 3251

*“I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I **do not accept** that there is to be routinely implied some positive obligation upon a contracting party to **subordinate its own commercial interests to those of the other contracting party**”.*

Costain Ltd v. Tarmac Holdings Ltd

[2017] EWHC 31 (TCC)

- Defendant could not do or say anything that lulled Claimant into falsely believing time bar non-operative or would not be relied on.
- Defendant obliged to correct a false assumption obviously being made that time bar was not going to be operated or relied on.
- No further obligation as that would have required Defendant to put aside its own self-interest.

WHERE SHOULD WE BE?

A SOLUTION?

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