

The Enforceability of Termination for Convenience Clauses

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Abstract

Traditionally the right to terminate a contract has been based on the classification or importance of the term. Specifically, is the term a condition or is it so important that a party would not have entered into the contract unless assured of performance of the term. However termination for convenience clauses (TFC) are being increasingly used in a wide range of construction contracts where the principal may wish to terminate a contract in situations which would not give rise to lawful termination at common law. This paper discusses the origin of TFC clauses, the legal issues arising from their use, common law principles relating to termination and suggestions for appropriate wording for TFC clauses based upon a consideration of the relevant principles developed from Australian case law.

Keywords: termination, AS 2124, rights, convenience, good faith

1. Introduction

The right to terminate a contract has been traditionally based on the classification of the term; specifically is the term a condition or a warranty, or is the term so important that a party would not have entered into the contract unless assured of performance of the term. Additionally a contract may provide express details of what may be determined “substantial” breaches which will give rise to the election to terminate as in the Australian Standard General Conditions of Contract, AS 2124-1992. However, we are now frequently seeing an increase in the use of express termination or termination for convenience clauses (TFC) or termination “at will” clauses, which give the Principal or Owner the right to unilaterally terminate a contract. These clauses were originally used in large infrastructure or defence contracts to ensure that government is able to act freely in order to vitiate contractual obligations where it is in the public interest, or where policy may change, even though this may interfere with the normal common law contractual rights of the other party. They are now being used in a range of construction agreements.¹

Current case law appears to be undecided on the legal issues arising from a clause which provides unfettered right to terminate. This paper will discuss the basic legal principles applicable to termination for convenience clauses. The issues to be discussed include the implication of a term of good faith, the effect of capricious or arbitrary behaviour by a party and whether the right to terminate is unfettered. The paper will also discuss issues of

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compensation and the appropriate wording of enforceable termination for convenience clauses with particular reference to construction contracts.

2. The Origin of Termination for Convenience Clauses

Whilst at first sight the use of “without cause” or “termination for convenience clauses” (TFC) appears to be relatively recent, they appear to have their origins at the end of the American Civil War where these clauses were inserted into federal government contracts in order to allow the government to wind down military procurement and pay contractors for work already completed under the contract.²

In *Torncello v United States*³ it was stated in relation to a TFC clause;

“It originated in the reasonable recognition that continuing with wartime contracts after the war was over was clearly against the public interest. Where the circumstances of the contract had changed so dramatically, the government had to have the power to halt the contractors performance and settle.”

Since the end of the Second World War, TFC clauses have also been widely used in American private construction contracts and since 1997 the American Institute of Architects (AIA) standard form contracts have featured a TFC clause.⁴ Locally these clauses are used in government contracts to allow for termination of projects where there have been policy changes or significant cost overruns but they are increasingly be applied in private sector contracts.

The clauses are also useful by providing a speedy resolution where the relationship between the parties has broken down or there are allegations of poor performance which at the same time may be difficult to prove to the level required for resolution or termination at common law. However there a number of legal issues which may arise with respect to the use of a TFC clause. Before these are considered the right to terminate generally at common law will be discussed.

3. Fundamental principles of construction contract law.

A construction contract is essentially no different to any other commercial contract with the exception of a clause permitting the principal to appoint a “superintendent” to administer the contract and generally the inclusion of a dispute resolution clause. In any dispute arising out of the performance of the contract or the interpretation of its terms, the issues for the court, adjudicator or arbitrator are; to determine the essential elements of formation (offer, acceptance, capacity, intention, legality and consideration) together with the terms of the contract (express and implied), then decide if the obligations of both parties been performed or breached and finally what remedy is available to the innocent party.

The application of this approach can be seen in *Pindan Pty Ltd v Uniseal Pty Ltd*⁵, where McKechnie J set aside an interim award of the arbitrator and remitted the matter back to the

same arbitrator for determination in accordance with his Honour's directions. Specifically the directions were that the arbitrator should determine the terms and conditions which were incorporated into the contract, establish on the evidence of there was a breach and finally consider if the breach caused a loss to the other party.

This approach at first sight appears straight forward, however as Kirby P observed in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*⁶ courts and lawyers may expect the agreements of business people to be clear and complete but unfortunately, in the market place, agreements (especially when prepared by lay persons) often fall short of what a lawyer might desire. In particular when determining which actions constitute a breach which may give rise to the election by the innocent party to terminate, in order to avoid the consequences of unlawful breach⁷ it is important to understand the common law right to terminate.

4. Termination at common law

At common law it is well established that the "innocent" party can only elect to terminate a contract where there has been a breach of a condition or what is described in the Australian General Conditions of Contract as a substantial term⁸ or generally as a breach of a condition or a term which goes right to the heart of the contract rather than a minor term or warranty.⁹ Unfortunately the classification of all terms as either conditions or warranties is a simplistic view of the various terms. The importance may not always be obvious and in some cases it may well be that some terms are capable of both substantial and minor breach. These terms which are generally described as intermediate or innominate, may create issues where a party seeks to terminate a contract for breach of a term which could in fact be minor and which consequently result in wrongful repudiation.¹⁰

Consequently, some terms may be viewed as critical to the operation of the contract such that without assurance of strict performance the parties would probably not have entered into the contract in the first place. For example in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*¹¹ where Chief Justice Jordan stated;

"The question whether a term in a contract is a condition or a warranty i.e. an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of strict and substantial performance of the promise, as the case may be and this ought to have been apparent to the promisor."

At the same time, expressly providing that all terms in the contract are conditions, the breach of which will give rise to termination, will not be enforced. In the Court of Appeal decision in *L Schuler AG*, Edmund Davies LJ specifically referred to the non lawyer's practice of referring to all terms as conditions.¹² In a later decision, Lord Diplock stated that whilst

“condition” is used in a variety of senses it does not mean that a breach, however minor, by one party entitles the other party to elect to bring the contract to an end.¹³

5. Termination under AS Standard or industry based construction General Conditions of Contract

Standard general conditions of contract (GCOC) typically provide provisions relating to the lawful grounds for the termination of the contract. These are invariably described as “substantial” breaches which whilst not exclusive, provide a right to terminate which may still fall short of a breach which goes to the heart of the contract but would still provide the innocent party with a right to terminate.

In AS 2124-1992, Clause 44.2 refers to default by the Contractor and notes that substantial breaches include;

- Suspension of work in breach of clause 33.1
- Failing to proceed with due expedition (clause 33.1)
- Failing to lodge security (clause 5)
- Failing to use materials or standard workmanship required by the contract Clause 30.1
- Failing to comply with directions of the Superintendent (clauses 30.3, 23)
- Failing to provide evidence of insurance (clause 23.1)
- Providing n untruthful statutory declaration or documentary evidence in respect of clause 43

Similarly clause 44.7 of AS 2124-1992 lists the substantial breaches under which the Principal may be in default of its obligations. Clause 39 of AS 4000-1997 also stipulates the events which may constitute a substantial breach of the contract. Clause 39.2 refers to substantial breaches by the Contractor while clause 39.7 refers to substantial breaches by the Principal. These provisions essentially mirror those found in As 2124-1992.

PC-1 (1998)¹⁴ lists the breaches which permit the other party to issue notice to the party in default.¹⁵ ABIC MW-1¹⁶ provides that the failure of a party to meet its substantial obligations permits the other party to commence the termination procedures as set out in Section Q.

6. Case law decisions on the express right to terminate

Current case law appears to be undecided on the legal issues arising from a clause which provides an unfettered right to terminate as illustrated by the following cases.

In *Champtaloup v Thomas*¹⁷

The purchaser of a property had an express right, in accordance with the terms of the contract, to rescind a contract in the event of the occurrence of proscribed events. In evidence at trial, the purchaser stated that these events had nothing to do with his decision to rescind the contract. The NSW Court of Appeal held that where a party has a contractual right to terminate, even when that right is exercised capriciously, arbitrarily, unreasonably and not bona fide, the right is not restricted or lost. The Court held that the right was validly exercised and refused to limit the rights given by the contract.¹⁸

*Renard Constructions (ME) Pty Ltd v Minister for Public Works*¹⁹

In *Renard Constructions*, the decision of the NSW Court of Appeal was inconsistent with the decision in *Chantaloup*. In *Renard Constructions*, under clause 44.1 of the general conditions of contract (NPWC3) if the contractor breached the contract, the principal could call upon it to show cause as to why the contract should not be terminated. The principal was unhappy with the contractor's performance and required the superintendent to issue a show cause notice. The contractor accordingly responded to the show cause provision. Nevertheless principal proceeded to terminate the contract.

The majority of the court held that the powers conferred on the principal under the clause must be exercised reasonably and consequently by analogy, in good faith. While *Renard Constructions* is authoritative in the context of express termination clauses, the issues arose from a consideration of the show cause notice, which nevertheless is a feature of all construction contracts.

*Gary Rogers Motors (Australia) Pty Ltd v Subaru (Australia) Pty Ltd*²⁰

This decision held that the use of a TFC can be challenged on the basis that it is inconsistent with an implied condition that the parties are to act in good faith. In *Gary Rogers Motors (Australia) Pty Ltd v Subaru (Australia) Pty Ltd* the agreement between the parties allowed that either party could terminate the agreement by giving the other party notice in writing. Subaru were discontented with the performance of Gary Rogers and issued a notice of termination. The court held that in this case there was an implied term requiring good faith and fair dealing in the relationship. This means that the exercise of a TFC (depending on the exact wording of the clause) could be subject to a challenge on good faith grounds if the election to terminate was exercised either capriciously, arbitrarily or for an improper purpose (thus reflecting the comments in *Abu Dhabi National Tanker Co v Product Star Shipping Line (NO 2)*)²¹

*Kellogg Brown Root Pty Ltd v Australian Aerospace Limited*²²

The issue of good faith in the exercise of a power under a termination for convenience clause was considered in the case of *Kellogg Brown Root Pty Ltd v Australian Aerospace Ltd*. Australian Aerospace were engaged by the Commonwealth to supply 12 helicopters

and Kellogg Brown Root (KBR) was engaged as a subcontractor to provide training services for the project. The agreement contained a dispute resolution process and also a TFC. When a dispute occurred, KBR gave notice commencing the dispute resolution process but Australian Aerospace responded by giving notice to terminate for convenience. KBR then sought an injunction restraining Australian Aerospace from terminating the agreement. KBR alleged that Australian Aerospace's right to terminate was subject to an implied term of good faith and fair dealing. They submitted that Australian Aerospace had breached this implied term by terminating the contract. KBR further submitted that the behaviour of Australian Aerospace was indicative of an opportunistic attempt to avoid any adverse determination arising for the dispute resolution process. The court noted that in Australian Aerospace giving the notice of termination before the dispute resolution process had been carried out they had acted to pre-empt the process.

Whilst the focus was on the issue of whether the terms of the subcontract permitted the implication of a good faith term under the *BP Refinery*²³ principles, and whether the implication of the term was as serious question to be tried under the *American Cyanamide*²⁴ principles, Hansen J noted that the case for an implied term and its breach was arguable.

*Thiess Contractors v Placer (Granny Smith) Pty Ltd*²⁵

This case is definitive with respect to the application of good faith in applying a TFC and whether the right to terminate is unfettered. In 1989 Thiess entered into a schedule of rates mining contract with Placer to undertake open cut mining at Placer's gold mine at Laverton, Western Australia. In 1991 a number of unforeseen problems arose and as a consequence of variations under the contracts Placer's costs per cubic meter of mined material significantly increased. Placer subsequently negotiated with Thiess for a new contract which was based on a risk sharing basis rather than schedule of rates basis. A term of the new agreement was that the parties "work in good faith on all matters relating to the contract." The new contract provided for a fixed profit to be earned by Thiess based on a agreed percentage on costs. A new contract on this basis was entered into on 13 July 1992.

In March 1995 Placer terminated the contract in reliance on a TFC which entitled it at any time and for any reason it might deem advisable to cancel and terminate the contract. Clause A 6.5.1 stated;

*"[Placer] may at its option, at any time and for any reason it may deem advisable, cancel and terminate the Contract, in which event [Thiess] shall be entitled to receive compensation as follows,"*²⁶

Upon termination Thiess would receive compensation for unit price items and demobilization as well as certain other compensation.

Thiess commenced proceeding against Placer alleging that the termination had been unlawful and claiming substantial damages. Placer counterclaimed alleging that in breach of the express obligation of good faith, Thiess had falsely represented the costs of certain plant

costs it would incur in work under the contract. Thiess submitted that prior to entering the new contract Placer represented that it would only rely on the termination clause in the contract if the mine were closed or if the mine was uneconomical to work. On the evidence, the court rejected the submission and noted that Placer had insisted on the termination clause being inserted into the contract even though Thiess wished it to be removed. Further Thiess was well aware of the risks agreeing to the contract with the termination clause and accepted those risks. The trial judge noted that “This clause appears to be clear and unambiguous in providing Placer with an absolute and uncontrolled right to termination.”²⁷

With respect to the issue of good faith relative to the termination clause, Templeman J made the interesting comment that the good faith provisions were typical of many contained in sections dealing with good faith, but which at the same time, do not define the rights and obligations with any precision.²⁸ Templeman J further noted that their implementation clearly requires goodwill and cooperation on the part of both parties and that good faith must include these matters and additionally that the obligation of good faith requires the parties to deal honestly with each other.²⁹

Templeman J considered that the good faith obligation applies to general matters relating to carrying out the works, derivation of rates and interpretation wherever they arise in the contract. In summary the obligation of good faith requires the parties to act honestly with each other and to take reasonable steps to cooperate in relation to matters where the contract does not define rights and obligations or provide any mechanism for the resolution of disputes.

However in relation to the interpretation of the contract, Templeman J noted the obligation of good faith was far more difficult to define. Templeman J held that the application of the good faith provision in clause B1.1.5 had not application to the TFC (6.5.1). Thiess had submitted that the obligation of good faith requires the termination clause on to be invoked when Placer had a reasonable reason for determining the contract. Templeman J however noted that the construction of the TFC was clear and unambiguous. It was an express provision which entitled Placer to terminate the contract “...at its option, at any time and for any reason it may deem advisable...” Thiess had relied on the English decision of *Abu Dhabi National Tanker Co v Product Star Shipping Line*³⁰ which noted that;

“Where A and B contract with each other to confer a discretion on A, that does not render B subject to A’s uninhibited whim. In my judgment the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.”

Templeman J noted that whilst “ Placer had a discretion whether or not it would terminate the contract, the termination clause provided it with an absolute and uncontrolled discretion which it was entitled to exercise for any reason it might deem advisable. That is a contractual right which relieved Placer from any obligation to have regard to Thiess’ interest.”

³¹ In his “Summary of Conclusions”, Templeman J noted (in part)³²; that the termination

clauses gave Placer an unfettered right of termination and in any event, Placer exercised its rights of termination honestly and in good faith.

Subsequently Thiess appealed against the dismissal of its claim and the upholding of the counterclaim.³³ The court dismissed Thiess' appeal relating to Placers right to apply the TFC. The court noted that Placer had insisted on the termination clause being inserted into the contract even though Thiess wished it to be removed and Thiess was well aware of the risks of agreeing to the contract with the termination clause and accepted those risks.³⁴

7. Express and implied conditions of good faith

It can be seen that the issue of an express right to terminate is inextricably linked to the issue of good faith. However the issue of good faith in the operation of commercial contracts and the interpretation of terms is far from settled. The term is controversial because we do not have a legal definition of what constitutes good faith in commercial agreements.³⁵ For example in *South Sydney District Rugby League Football Club Ltd v News Limited* (2000) 177 ALR 611 @ 695, Finlay J. said that Australian law has not yet committed itself unqualified to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement.

The issue was considered by the High Court in *Royal Botanic Gardens & Domain Trust v South Sydney City Council* (2002) 186 ALR 289 @ 301. Kirby J indicated his view that the notion of reasonableness, fairness and good faith appeared to be in conflict with the doctrine of Caveat Emptor inherent in common law conceptions of economic freedom.³⁶ However there have been a number of cases where courts have determined that there are situations where an obligation of good faith (or fair dealing) will be imported into contractual relationships. These include *Amann Aviation v The Commonwealth* (1990) 192 ALR 601, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSW LR 234 *Hughes Bros. Pty Ltd v Trustees of the Roman Catholic Church and Archdiocese of Sydney* (1993) 31 NSW LR 91 *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSW LR 349 and as mentioned above *Garry Rodgers Motors (Australia) Pty Ltd v Subaru (Australia) Pty Ltd* (1999) FCA 903. However, there are a number of other decisions where the courts have declined to imply conditions of good faith in the operation of commercial agreements. These include *G S A Group Pty Ltd v Sieve Plc* (1993) 30 NSW LR 573, *Service Station Association Limited v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393, *Esso Australia Resources Pty Limited v South Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed)* [2005] VSCA 228) and *Kendells v Sweeney* [2005] QSC 64.

More recent decisions have also not assisted us with the issue. In *Vodafone Pacific Limited v Mobile Innovations Limited*³⁷ Justice Giles J declined to hold that commercial contracts generally, and specifically dealing with the right to termination, could not imply a term of good faith. Further, in *Solution 1 Pty Limited v Optus Networks Pty Limited*³⁸ whilst the court was willing to imply a term of good faith into a contract, in this case it was excluded because the term which permitted Optus to terminate on 120 days notice at its absolute

discretion was absolute and further there was an entire contract clause which expressly excluded any implied terms.

8. Good faith requirements under AS GCOC

The Australian Standard General Conditions of Contract (GCOC) expressly refer to the application of fair dealing or good faith on the part of the Superintendent. The duality of the role in acting as both agent for the Principal and independent certifier has been considered in a number of cases and will not be considered here suffice to say that there is no legal impediment to the Superintendent acting in both roles.³⁹

AS 2124-1992 Clause 23 states;

“The Principal shall ensure that... in the exercise of the functions of the Superintendent under the contract, the Superintendent-

- (a) Acts honestly and fairly*
- (b) Acts within the time prescribed under the contract or where no time is prescribed within a reasonable time; and*
- (c) Arrives at a reasonable measure or value of work, quantities or time”*

AS 4000-1997 Clause 20 states;

“The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all the aspects of the role and functions reasonably and in good faith.”

The issue of good faith has been considered above and as noted is far from settled. However judicial decisions have made it clear that in the context of certification and approval the contract administrator must make an assessment free for interference and only taking into account whether the work has been done in accordance with the requirements of the contract.

Similarly in the context of what is reasonable behaviour for the purpose of both AS 2124-1992 and AS 4000-1997 what is “reasonable” is a question of fact depending on the particular circumstances.⁴⁰

Whilst not in the context of construction contracts, the decisions in *Burger King Corp v Hungry Jacks*⁴¹ and *Alcatel Australia Ltd v Scarcella*⁴² provide some assistance in determining the possible elements of good faith. These include an obligation on the parties to cooperate in achieving the contractual objectives; compliance with honest standards of conduct; and compliance with standards of conduct that are reasonable having regard to the interests of the parties.

9. Drafting an express right to terminate clause

In the absence of a High Court decision on the matter and in view of the divergent state court decisions, the law is still unsettled. However the early decision in *Renard Construction* and the more recent decision in *Thiess* provide some assistance with respect to construction and infrastructure contracts but it is acknowledged that the case law generally indicates that courts will be reluctant to imply a term of good faith in all commercial contracts. In drafting an operative TFC the following factors will be relevant.

- The obligation of good faith requires the parties to act honestly with each other and to take reasonable steps to cooperate in relation to matters where the contract does not define rights and obligations or provide any mechanism for the resolution of disputes.
- Where the principal has discretion, whether or not to terminate the contract, if the termination clause provides it with an absolute and uncontrolled discretion which it is entitled to exercise for any reason it might deem advisable, that right will be unfettered. Particularly if it has been brought to the contractor's attention, or was subject to discussion at the time of entering into the contract.
- When drafting a termination clause in a commercial contract, consider including a clause which expressly excludes the application of good faith with respect to the provisions of the TFC.
- In the absence of an express term excluding the application of good faith, where a duty of good faith is implied it will not prevent a party from taking steps which are designed to protect its legitimate interests.⁴³
- When a party is acting in a manner that is consistent with its contractual rights to promote its legitimate interests, there should be no breach of any implied duty to act in good faith.⁴⁴
- In the TFC make provision to ensure that the Contractor is to be compensated for its losses including loss of profit and an overheads contribution on the balance of the work. If this is absent then there is the possibility that that clause may be considered as penal or in some circumstances as unconscionable

10. Termination for Convenience clause example

The following clause is representative of a TFC clause which is considered to provide an unfettered right to terminate at will.

TERMINATION BY THE PRINCIPAL FOR CONVENIENCE

Without prejudice to any of the Principal's other rights and powers under this contract, the Principal may at any time for any reason within its sole discretion upon 10 Business Days

Notice to the Contractor terminate the Contract. Upon receipt of such notice the Contractor shall remove its Constructional Plant from the Site, shall otherwise cease the performance of its obligations under the Contract and shall endeavor to mitigate any expense or losses that it or the Subcontractor may incur or has incurred in relation to its obligations under the Contract.

If the Principal terminates the Contract under this clause then the Principal shall be liable to pay the Contractor the total of:

- (a) For work executed prior to the date of termination, the amount which would have been payable if the Contract had not been terminated and the Contractor had made a progress claim on the date of termination;*
- (b) Subject to the obligation of the Contractor to mitigate its costs and expenses, the cost of materials reasonably ordered by the Contractor for the Work under the Contract, which the Contractor is liable to accept, but only if the materials become the property of the Principal upon payment;*
- (c) All retention monies and security; and*
- (d) The reasonable cost of demolition*

up to a maximum amount of the balance of the contract sum (as it is adjusted pursuant to the Contract) unpaid at the date of termination and other amounts payable pursuant to the Contract at the date of termination. The amounts to which the Contractor is entitled under this clause shall be in full satisfaction and compensation of the Contractor in relation to the termination and the Contractor shall have no other entitlement as a consequence of the termination under this Clause or in relation to carrying out the work under the Contract to the date of termination.

There appears to be little in the literature or authorities, relating to the form and content of the compensatory provisions; however it was noted in the English case of *Abbey Developments Limited v PP Brickwork Ltd*⁴⁵

“Termination for convenience clauses frequently provide that the Contractor is to be compensated for its losses including loss of profit and overheads contribution on the balance of the work. If they do not then they risk being treated as leonine and unenforceable as unconscionable.”

11. Conclusion

Traditionally the right to terminate at common law has been dependent on the classification of the term. That is, is it a condition or a warranty? Where a contract is terminated for breach of a minor term or mere warranty then the termination will be unlawful and provide the right of the innocent party to the damages which flow from the breach. A term containing

an express right to terminate for convenience is inextricably linked to the requirement of the parties to undertake obligations in good faith but without clear High Court authority on the issue of good faith, the law remains unsettled. However guidance can be obtained from a number of decisions which have held that where the principal has the discretion, whether or not to terminate the contract, if the termination clause provides it with an absolute and uncontrolled discretion which it is entitled to exercise for any reason it might deem advisable, that right will be unfettered. In the absence of an express term excluding the application of good faith, where a duty of good faith is implied it will not prevent a party from taking steps which are designed to protect its legitimate interests. When a party is acting in a manner that is consistent with its contractual rights to promote its legitimate interests, there should be no breach of any implied duty to act in good faith. Finally the TFC should provide that the Contractor is to be compensated for its losses including loss of profit and an overheads contribution on the balance of the work. If this is absent then there is the possibility that that clause may be considered as penal or in some circumstances as unconscionable

References

¹ See Gray, Anthony (2012) *Termination for convenience clauses and good faith*. Journal of International Commercial Law and Technology, 7 (3). pp. 260-275.

² See New York Law Journal, Volume 345-No 30, 15 February 2011

³ 681 F.2d 756, 764 (Ct.C1.1982)

⁴ See AIA A201-1997 General Conditions of Contract for Construction, Clauses 14.4

⁵ [2003] WASC 168

⁶ (1991) 24 NSW LR1 at 21

⁷ See *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64

⁸ See AS 2124-1992 (Clause 44) and AS 4000-1997 (Clause 39)

⁹ See *Bettini v Gye* (1876) 1 QBD 183 and *Poussard v Spiers and Pond* (1876) 1 QBD 410

¹⁰ See *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235.

¹¹ (1938) 38 SR (NSW) 632 @ 641-642

¹² See *Schuler AG v Wickman Machine Tool Sales Ltd* [1972] 1 WLR 840 (The Court of Appeal decision)

¹³ See *ANZ Banking Group Ltd v Beneficial Finance Corp* (1982) 44 ALR 241.

¹⁴ Property Council of Australia Project Contract (PC-1 1998). PC-1 is produced by the Property Council of Australia and has been designed to represent the interests of the commercial property industry. It does not represent to balance the interests of the owner and the contractor but is premised on the view that those who pay for projects are entitled to allocate the risks.

¹⁵ See clause 14.2 (Owner) and clause 14.3 (Contractor)

¹⁶ Australian Building Industry Contract, ABIC MW-1 2003, Major Works Contract. The ABIC contracts are jointly published by the Master Builders Association and the Australian Institute of Architects. They are intended for use in architect administered building contracts.

¹⁷ [1976] 2 NSWLR 264

¹⁸ However in *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972) 128 CLR 529 the High Court held that similar rights could not be exercised “unconscionably or unreasonably”.

¹⁹ (1992) 26 NSWLR 234

²⁰ (1999) FCA 903

²¹ (1993) Lloyds Rep 397

²² [2007]VSC 200

²³ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266

²⁴ *American Cyanamide v Ethicon* [1975] AC 396

²⁵ (2000) CIV 1970 of 1995 16 April 1999 Templeman J; Lib No; 990187

²⁶ Lib N0; 990187 at page 95

²⁷ Lib N0; 990187 at page 95

²⁸ A helpful discussion on the issues of good faith is the decision of Gummow J in *Service Station Association v Berg Bennetts & Associates* (1993) 45 FCR 84.

²⁹ Lib N0; 990187 at page 98

³⁰ [1993] 1 Lloyd's LR 397 at 404

³¹ Lib N0; 990187 at page 101

³² Lib N0; 990187 at page 246

³³ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102

³⁴ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102 at paragraphs 18,19

³⁵ For detailed information on the issue of good faith generally, see “Good Faith in the Performance of Contracts” Peden, E. (2003) LexisNexis

³⁶ See also *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1; *Australis Media Holdings v Telstra Corporation* (1998) 43 NSWLR 104.

³⁷ [2004] NSWCA 15.

³⁸ [2010] NSWSC 1060.

³⁹ See *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322.

⁴⁰ See Note 33

⁴¹ (2001) NSWCA 187

⁴² (1988) 44 NSWLR 349

⁴³ *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611).

⁴⁴ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102

⁴⁵ (2003) EWHC 1987