Stopping the "avalanche" of implied duties of good faith? A case note on Candey v Bosheh & Anr [2022] EWCA Civ 1103

From time to time fashions emerge, become ubiquitous, and then fade from view as quickly as they emerged. Perms, flared trousers and fully matching nylon tracksuits all enjoyed their days in the sun only to become a source of regret when seen in family photo albums. One legal development that has been all the rage recently has been the implied duty of good faith in "relational" commercial contracts akin to joint venture agreements. This implied duty enjoyed its zenith in 2018 and 2019 when it was recognised in *Al Nehayan v Kent* [2018] EWHC 333 ("*Al Nehayan*"), a judgment of Leggatt LJ (as he then was, although sitting as a first instance judge) and *Bates v Post Office* [2019] EWHC 606 ("*Bates*"), a judgment of Fraser J in the civil case that brought the scandalous treatment of the Post Office's Sub-Postmasters to public attention.

The judgments in *Al Nehayan* and *Bates* are faces that launched a thousand pleadings – following those two judgments it has become *de rigeur* for parties in commercial disputes to intimate a claim for breach of an implied duty of good faith. The fashion may now wane. In *Candey Ltd v Bosheh* [2022] EWCA Civ 1103 ("*Candey v Bosheh*"), the first judgment of the Court of Appeal since *Bates* to address in any detail the implied duty of good faith, the claimant's attempt to establish the implied duty met with no judicial enthusiasm. The judgment in *Candey v Bosheh* indicates how difficult it will be for a claimant to clear the first hurdle in establishing a breach of an implied duty of good faith, which is to show that the contract in question is "relational".

The claim in *Candey v Bosheh*

The claim was brought by a law firm, Candey, against a former client, Mr Bosheh. The dispute focused on the settlement of previous litigation between Mr Bosheh and Sheikh Mohammed Bin Issa Al-Jaber, a prominent Saudi investor in the hotel and leisure sectors. In that previous litigation, Sheikh Mohammed alleged fraud and dishonesty against Mr Bosheh, while Mr Bosheh made a substantial counterclaim. Ultimately, the litigation between Sheikh Mohammed and Mr Bosheh was settled on a drop hands basis – neither side recovering money from the other, and each side being responsible for its own costs. This was bad news for Candey, who had been representing Mr Bosheh under a conditional fee agreement ("CFA"). The drop hands settlement meant that under the express terms of the retainer Candey received nothing by way of fees even though the value of its legal work ran to over a million pounds.

Mr Bosheh's settlement with Sheikh Mohammed prompted Candey to commence proceedings against Mr Bosheh. In those proceedings, Candey alleged that its retainer with Mr Bosheh was a relational contract which imposed an implied duty of good faith on both parties. Candey claimed that Mr Bosheh had failed to comply with that duty because (i) he had failed to give Candey a full and accurate account of the case relating to Sheikh Mohammed, and (ii) he had deliberately misled Candey as to the merits of that case. Candey's claim was for over £3m, representing the full value of its fees plus a 100% success uplift.

The case came to the Court of Appeal at an interim stage; the judgment relates to Candey's application to amend its Particulars of Claim to plead breach of the implied duty of good faith. However, the Court of Appeal dismissed Candey's application on the basis that Candey had no real prospect of establishing that its retainer contained an implied duty of good faith. The Court of Appeal considered that it was both novel and odd for Candey to categorise its retainer as a

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relational contract:

- It was novel because solicitors' retainers generally, and CFAs more specifically, had never before been regarded as relational contracts and were not commonly understood to place the client under an obligation of good faith. As the first instance judge, Ms Clare Ambrose KC, noted at paragraph 84 of her judgment, the solicitor's relationship with his client is a fiduciary one under which the *solicitor* is under an obligation of "loyal subordination" of his own interests to those of his client. As a result, if any obligation of good faith were owed under the retainer, one would expect it to be owed by the solicitor to the client, not the other way around. Coulson LJ regarded the proposition that a client owed his solicitor a duty of good faith as "*startling*": see paragraph 37.

- Candey's argument was also odd as it was inconsistent with the very purpose of CFAs: see paragraphs 39-40 of the judgment. The point of a CFA is that the solicitor is only remunerated if their client is successful in litigation. However, on Candey's case it would be entitled to its fees whether or not Mr Bosheh's defence to the claim in fraud was founded in fact: if Mr Bosheh was telling the truth then his defence would be successful and Candey would become entitled to its fees under the terms of the CFA. However, on Candey's case it would also be entitled to its fees if Mr Bosheh was not telling the truth (and his defence was therefore unsuccessful) as Candey would then be entitled to its fees as damages for breach of an implied duty of good faith. The Court of Appeal's view was, therefore, that the implication of a duty of good faith into the retainer would mean that a CFA would cease to be a truly conditional fee agreement. In other words, the proposed implied duty would be inconsistent with the CFA's express terms.

- Candey's argument also had potentially far reaching consequences for CFAs generally. If a duty of good faith were to be implied into Candey's retainer with Mr Bosheh, it would be difficult to see why it would not also be implied into the very many CFAs governed by English law entered into between solicitors and clients. It plainly weighed heavily on the Court of Appeal that CFAs were very unlikely to have been them on the basis that the client was under a duty of good faith: see paragraph 42 of the judgment.

More fundamentally, the Court of Appeal found that the implied term contended for by Candey was neither so obvious as to go without saying nor necessary for the retainer to work: see paragraph 35 of the judgment. As a result, there was no basis for the term to be implied in fact. While the judgment does not expressly deal with the issue, any duty of good faith would have needed to be implied as a matter of law on the basis that the CFA was a relational contract. However, for the reasons set out above, the Court of Appeal concluded that the retainer was not relational.

The upshot was that the Court of Appeal found at an interim stage of proceedings that Candey could not plead a claim for a breach of an implied duty of good faith. As a result, the factual question of whether Mr Bosheh's conduct complied with such a duty was not considered and will not be considered during the proceedings at all. To some, the Court of Appeal's decision that the retainer was not a relational contract might seem like a bold conclusion prior to hearing evidence at a trial. However, *Candey v Bosheh* is not the only case where a judge has found at an interim stage that the implied duty of good faith could not be relied upon because the contract was not relational. In another case from this summer, *Perucci v Orlean Investment Holding Ltd* [2022] EWHC 2038, HHJ Keyser KC also decided before trial that the contract in question was not relational.

<u>The Court of Appeal's views towards implied duties of good faith</u>

The tone of the judgment in *Candey v Bosheh* does not suggest that the Court of Appeal is enthusiastic about defining "relational contracts" so broadly that a duty of good faith would be implied into a broad class of contracts:

- Coulson LJ noted at paragraph 31 of the judgment that "*there has been something of an avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith. Only a relatively few have succeeded*." The pejorative overtone

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T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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in this paragraph is difficult to ignore.

- At paragraph 32 of the judgment Coulson LJ stated that *"it might be said that the elusive concept of good faith should not be used to avoid orthodox and clear principles of English contract law*." The description of the concept of good faith as *"elusive"* is, again, not an indicator of enthusiasm towards the implication of a duty of good faith into a wide class of contracts. The language of Coulson LJ is also consistent with previous judgments that have observed that an obligation to act in good faith, without more, may be too imprecise to workable: see, for example, paragraph 109 of *Carewatch Care Services v Focus Caring Services Ltd* [2014] EWHC 2313 at paragraph 109.

Those that have followed the progeny of cases following *Al Nehayan* and *Bates* may be aware that there is some debate as to the legal basis on which the duty of good faith should be implied. In *Al Nehayan* Leggatt LJ suggested that the duty could be implied into a relational contract in fact (in accordance with the test set out in *Marks & Spencer PLC v BNP Paribas* [2015] 3 WLR 1843) but also in law. Coulson LJ did not address this issue directly, but did note at paragraph 32 of his judgment that *"it is important not to veer from the test as to implied terms"* set out in *Marks & Spencer v BNP Paribas*. This suggests that the primary mechanism for the implication of a duty of good faith is in fact. This was also the approach of Falk J in *Russell v Cartwright* [2020] EWHC 41 (Ch) at paragraph 87, who decided that *"rather than trying to identify first whether a contract is a "relational contract" and for that reason includes an obligation of good faith, the better starting point for* […] *is the application of the conventional tests for the implication of contractual terms, as authoritatively restated by Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd"*.

The judgment in *Candey v Bosheh* ultimately may not contribute a great deal to the discussion in first instance authorities as to when a duty of good faith may be implied into a contract as a matter of law even if it cannot be implied as a matter of fact. At present, the prevailing view is that a duty of good faith will be implied as a matter of law where the contract requires the parties to collaborate in future in ways that respect the spirit and objectives of their joint venture but which they have not specified or have been unable to specify in detail: see *UTB v Sheffield United* [2019] EWHC 2322 at paragraph 200 *per* Henderson J and *Cathay Pacific v Lufthansa* [2020] EWHC 1789 (Ch)at paragraph 201 *per* John Kimbell KC (sitting as a Deputy High Court Judge). This means that if the parties have considered and negotiated how they ought to demonstrate good faith towards each other, a term will not be implied: see, for instance, paragraph 150 of *Greenclose v Royal Bank of Scotland* [2014] EWHC 1156 *per* Andrews J (as she then was). In practice, this further reduces the number of contracts into which a duty of good faith may be implied.

<u>What does the judgment in *Candey v Bosheh* mean for the future of breach of implied duty of good faith claims?</u>

Experience now shows that a claim for breach of an implied duty of good faith is difficult to establish. *Candey v Bosheh* is just the latest example of a party unsuccessfully relying on *Bates* and *Al Nehayan* to establish a claim for breach of an implied duty of good faith: see *New Balance Athletics v Liverpool Football Club* [2019] EWHC 2837, *Russell v Cartwright* [2020] EWHC 41, *Taqa Brahtani v Rockrose UKCS8 LLC* [2020] EWHC 58, *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581, *UTB v Sheffield United Ltd*, *Cathay Pacific v Lufthansa* and *Perucci v Orlean Invest Holding Ltd*, to give just seven examples. There is now a sufficient sample of cases to give some meaningful guidance on how the law is developing in relation to implied duties of good faith in relational contracts.

First, the threshold task of showing that a contract is "relational" is difficult. In only two of the seven cases listed immediately above, *UBB v Essex* and *New Balance Athletics v Liverpool FC*, was it accepted that the contract in question was a relational contract into which a duty of good faith should be implied. There is a much longer list of cases where parties have argued unsuccessfully that the contract in question was relational. Further, as *Candey v Bosheh* and *Perucci v Orlean Invest Holding Ltd* show, the allegation that a contract is relational is susceptible to being struck out before trial. In the view of this author, the current robust approach of the courts is consistent with longstanding principles. As Lord Hodge held in *Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant)* [2021] UKSC 40

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at paragraph 27, "*English law has never recognised a general principle of good faith in contracting*". It would drive a coach and horses through this longstanding axiom of English contract law if judges were to recognise a wide class of contracts as being relational and therefore containing an implied duty of good faith.

Second, once a claimant has met the stiff task of establishing that a contract is relational, current experience would suggest that fairly extreme facts are required to establish that the duty of good faith has actually been breached. In the (very) recent Court of Appeal judgment of *In re Compound Photonics Group* [2022] EWCA Civ 1371 Snowden LJ held at paragraph 241 that a claimant seeking to establish a breach of a duty of good faith does not necessarily need to establish that the defendant has acted dishonestly. However, in the decided cases to date, a breach of the implied duty has only been established on fairly remarkable facts. In *Al-Nehayan* the claimant's agent threatened the defendant that money would be extracted from him "*by blood*": see *Al Nehayan* at paragraphs 58-62. *Bates* concerned conduct by the Post Office, including the criminal prosecution of Sub-Postmasters on a false basis, that Coulson LJ described as *"not unfamiliar to a mid-Victorian factory owner"*: see paragraph 10 of the judgment on permission to appeal dated 22 November 2019. *British Groundschool Ltd v Intelligent Data Capture* [2014] EWHC 2145 concerned one party secretly accessing the other's database ahead of the end of a joint venture and then using that information to further its own sales efforts – conduct that might commonly be thought of as "stealing". *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) concerned a party that contracted to dispose of cars that had been seized by the police, but instead used one of them in its own fleet after changing the numberplates and the chassis with another vehicle to disguise its true identity. As these cases show, the claim for breach of an implied duty of good faith has only succeeded in instances of obviously reprehensible behaviour where, most likely, the party relying on the implied duty could have obtained relief by a different route.

Thirdly, "chucking in" an allegation of a breach of an implied duty of good faith as a backstop, alternative allegation is a dangerous and expensive strategy. In the important (but little known) costs judgment of Pepperall J in *Essex County Council v UBB Waste (Essex) Ltd (No.3)* [2020] EWHC 2387, the judge found that because the defendant had made *"widespread allegations of a lack of good faith…without any proper foundation"*, that "*of itself*" meant it was appropriate to make an order for indemnity costs against the defendant. The judge noted that an allegation of breach of a duty of good faith necessarily involved an attack on the integrity of the individuals alleged to have engaged in commercially unacceptable behaviour, and that by making such allegations without proper foundation the defendant had engaged in conduct that was "*out of the norm*": see paragraphs 60-63 of the judgment of Pepperall J. The lack of success of these claims, coupled with the potentially serious costs consequences of the claim being unsuccessful, is likely to mean that the "*avalanche*" of these sorts of claims referred to by Coulson LJ will diminish to a thin dusting. That should be welcomed both by proponents of the implied duty of good faith and those that oppose it on principle. Lord Leggatt, the main judicial proponent of the implication of a duty of good faith into relational contracts, only ever intended that a remedy would be available for breach of such a duty where a party engages in conduct that *"would be regarded as commercially unacceptable by reasonable and honest people"* during the course of performing a contract akin to a joint venture agreement: see *Al Nehayan* at paragraph 175. That is not a wide class of cases, as the judgment of Coulson LJ in *Candey v Bosheh* ought to make clear. The fashionable claim for breach of implied duty of good faith, like nylon tracksuits and flared trousers, perhaps now will be seen more regularly in the legal equivalent of a charity shop than in court.

Author: Sanjay Patel

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
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