Termination for convenience: Good faith and other possible restrictions

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Termination for convenience clauses allow a contracting party to terminate at will and without cause. They are quite common in construction contracts. Clauses that empower the principal (or its representative) to remove part of the work from the contractor's scope of works are also quite common. Is the principal at large in exercising such rights, alternatively is the exercise of such rights tempered by either an implied obligation to act in good faith, the equitable doctrine of penalties; or the equitable doctrine of relief against forfeiture? Can contract drafting assist and, if so, how? As some segments of the building and mining industries in Australia face straightened economic times, it is likely that the courts will be called on to resolve such issues.

INTRODUCTION

If you believe the newspapers, the mining boom in Western Australia has come to an end. With this downturn, billions of dollars of mining and construction projects have been wiped, deferred or reduced.[1] Furthermore, the Australian construction industry is patchy at best. Hence, the capacity of a party to terminate a contract for convenience (TFC), or to reduce the scope of works, is assuming increased importance. Two major issues arise:

- Is the principal at large – or the exercise of an apparently unqualified right to TFC – tempered in any way? If so, what way?
- By way of subsidiary question, can contract drafting assist?

This article shall consider three particular ways in which an express power to TFC may potentially be qualified (other than by other contract terms):

- by implication of a duty of good faith;
- via the doctrine against penalties; or
- through the doctrine of relief against forfeiture.

The focus of this article will be on the potential for an implied duty of good faith to qualify an express power to TFC. It will not discuss the possible application of the equitable doctrine of unconscionability or statutory unconscionability.[2]

BACKGROUND

A TFC clause confers upon a party an unconditional power to terminate the unperformed parts of a contract (without cause). An example is as follows:

> 15.5 Termination for Employer's Convenience
>
> The Employer shall be entitled to terminate the Contract, at any time and for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security.

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[1] The iron ore price almost halved between January 2014 and January 2015 – from over US$120 per ton to less than US$70 per ton: Peter Ker, "Jobs Lost as Miners Stumble", *The Sydney Morning Herald* (24-25 January 2015) p 1.

[2] For a discussion of the equitable principles relating to relief against unconscionable dealing, see *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [117]--[125]. The statutory unconscionability provisions are set out in the *Competition and Consumer Act 2010* (Cth), Sch 2, Pt 2-2.

> The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.
>
> After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release].[3]

Further, some contracts authorise a principal to decrease the scope of work under the contract. For example:

> The Superintendent may direct the Contractor to –
> a. increase, decrease or omit any part of the work under the Contract …
>
> The Contractor is bound only to execute a variation that is within the general scope of the Contract.[4]

The right to TFC has its origins in government contracts. The power is rooted in the doctrine of executive necessity.[5] TFC clauses come in many different shapes and sizes.[6] The specified consequences flowing from TFC may vary considerably from case to case. In particular, in terms of:

- what, if any, compensation is the contractor entitled to; and
- whether the principal is entitled to perform the unperformed work as at the date of termination.

As far as compensation is concerned, there are many possibilities; for example, whether the contractor is entitled to compensation for:

- unpaid work as of the date of termination, including work not yet invoiced;
- demobilisation;
- contribution to site overheads and profit margin;
- compensation for lost profit on unperformed work; and/or
- compensation for forward commitments or downstream liability to subcontractors/suppliers.

The proper meaning of a TFC clause is to be ascertained from the clause read in the context of the rest of the contract, with particular reference to other termination clauses, as well as the factual matrix. Such clauses tend to be construed narrowly.[7] Two particular contractual principles (or rules of construction) have emerged in the case law. First, absent clear language, an express power to TFC cannot be exercised for the purpose of the principal engaging another (usually cheaper) contractor to perform the unperformed work, or for the principal to perform the work itself.[8] Secondly, in the context of removal from scope of works, absent clear language, such power does not extend to deletion of a substantial portion of the work if this would fundamentally alter the nature of the contract.[9]

Few Australian cases have considered attempts to constrain the right of a party to TFC in the construction industry context. One such example is *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd*[10] (discussed below). However, a number of Australian cases have considered attempts to restrain the exercise of the power contained in TFC clauses in other contexts, including in defence procurement contracts.[11]

The starting point of the analysis is the contract itself. One must ask whether the power to TFC is qualified by other express terms of the contract. For example, cl 90.2 of NEC3 provides that the

[3] FIDIC, Red, Yellow and Silver Books (MDB ed, 1999), cl 15.

[4] Australian Standards, General Conditions of Contract (AS 2124-1992), cl 40.1.

[5] See *NSW Rifle Association Inc v Commonwealth* (2012) 266 FLR 13 at [57] (White J). See also Nicholas Seddon, *Government Contracts: Federal, State and Local* (5th ed, Federation Press, 2013) p 256.

[6] For example, see AS 4000-1997, cl 39.10A; FIDIC Gold Book (2007), cl 15; Department of Defence, Design Services Contract (DSC-1 2003), cl 11.7-11.8.

[7] See Richard Wilmot-Smith, *Construction Contracts: Law and Practice* (2nd ed, OUP, 2010) at [13.08].

[8] *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327. See also *Abbey Development Ltd v PP Brickwork Ltd* [2003] EWHC 1987.

[9] *Trustees of the Stratfield Saye Estate v AHL Construction Ltd* (2004) EWHC 3286 (TCC).

[10] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130.

[11] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200; *GEC Marconi Systems Pty Ltd v HBP Information Technology* (2003) 128 FCR 1.

employer may terminate "for any reason". However, cl 10.1 provides that the parties shall act in the spirit of mutual trust and co-operation. Arguably, cl 10.1 operates as a constraint on the power contained in cl 90.2.[12]

Implied duty of good faith

The first question for discussion is whether an implied duty of good faith may qualify an express contractual right to TFC.

There is wide support by Australian courts for the implication of a duty of good faith in commercial contracts.[13] The greatest support is to be found in NSW. But it is not yet recognised by the High Court of Australia, which has left the question open.[14] In contrast, it is accepted that there is an implied duty to co-operate in the doing of acts which are necessary to the performance by the parties of their obligations under the contract. However, the scope of this duty is narrower than the implied duty of good faith.[15]

Aside from the question of the existence of an implied duty of good faith in Australian jurisprudence, there are uncertainties as to the content of such duty. A number of questions arise that are not yet settled.

First, does the duty to act in good faith require the principal to act reasonably (as well as honestly)?

Secondly, does the duty of good faith require the principal to consider the other party's interests in the exercise of powers under the contract, as opposed to having regard only to the principal's legitimate interests in exercising the power?

Moreover, there remains some uncertainty as to the basis on which a duty of good faith is to be implied. There are two possible bases for implication:

- implication in fact (ad hoc); and
- implication by law.

Implication by law of a duty of good faith is not generally accepted as a matter of course for all commercial contracts (or even a significant class of them).[16] For a term to be implied in law, it must satisfy the criterion of "necessity" such that, absent the implication of the term, "the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or … seriously undermined".[17]

The recent High Court case of *Commonwealth Bank of Australia v Barker* illustrates the difficulties of establishing a term implied by law.[18] The question on appeal was whether it was appropriate to imply a term of mutual trust and confidence into employment contracts generally. The

[12] That said, a similar argument did not succeed in *Thiess*.

[13] See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266-267; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Alcatel Australia Ltd v Scarcarella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703; [1999] FCA 903; *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200; *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd* (2012) 305 ALR 569; [2012] VSCA 175.

[14] See *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [40], [88]-[89], [156]; John Carter and Andrew Stewart, "Interpretation, Good Faith and the 'True Meaning' of Contracts: The Royal Botanic Decision" (2002) 18 *Journal of Contract Law* 182 at 191.

[15] See *Secured Income Real Estate (Australia) v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607-608 (Mason J).

[16] See *Central Exchange v Anaconda Nickel* [2002] WASCA 94.

[17] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450 (McHugh and Gummow JJ). See also *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [28]--[29] (French CJ, Bell and Keane JJ), [60] (Kiefel J), [114] (Gageler J).

[18] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814.

Court found that it was not appropriate to imply such a term by law.[19] The plurality noted that this conclusion "should not be taken as reflecting upon the question whether there is a general obligation to act in good faith in the performance of a contract".[20] Kiefel J similarly observed that the question whether a standard of good faith should be applied generally to contracts has not been resolved in Australia.[21]

In contrast, ad hoc implication of such a duty in accordance with the *BP Refinery*[22] criteria (in particular, where the implied term is necessary in order to give business efficacy to the contract, and is not in conflict with the express terms of the contract) has general acceptance in Australia.[23]

Australian case law establishes that a duty of good faith may be implied to qualify an express power to terminate for breach/cause (as opposed to for convenience). For example, in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, in the context of a construction contract, Priestley JA construed a contractual power to cancel or vary as containing ad hoc implied terms that the principal would give reasonable consideration to both the question of failure to show cause against the exercise of the power and whether one or more of the powers should be exercised.[24] Handley JA construed the clause as requiring the principal to act both reasonably and honestly in forming the opinion that the contractor had failed to show cause to his satisfaction, and thereafter deciding whether or not to exercise the powers conferred.[25]

In contrast, the preponderance of Australian authority is to the effect that a duty of good faith will not be implied into a contract to qualify an unfettered express power to TFC. This can be demonstrated by an analysis of six leading cases.

But first it is opportune to survey the English and US position.[26] As Kiefel J observed in *Barker*, "[f]airness in dealings as between contracting parties may be understood as an aspect of a duty of good faith, *which has been accepted in other legal systems*".[27] Her Honour drew particular attention to the contrasting approaches in English and US contract law:

> Acceptance of a standard of good faith in all contractual relationships is not confined to civilian legal systems. In the United States, § 205 of the *Restatement of the Law Second, Contracts* contains an obligation of good faith and fair dealing. Amongst the meanings of good faith identified by the *Restatement* is that of the Uniform Commercial Code as applied to merchant contracts ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"), although it is recognised that its meaning varies somewhat with the context. In any event, it is the view of some that good faith reflects a standard of conduct rather than operating as a fixed rule.
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> In 1766, Lord Mansfield considered that good faith was a governing principle applicable to all contracts and dealings. Aspects of it may be evident in the duty of co-operation referred to in *Mackay v Dick*. However, in more recent times, English law has for the most part turned its face against the imposition of a general duty of good faith, preferring the predictability of a legal outcome in a case to "absolute

[19] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [43] (French CJ, Bell and Keane JJ), [109] (Kiefel J), [115] (Gageler J).

[20] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [42] (French CJ, Bell and Keane JJ).

[21] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [107].

[22] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. An exception is insurance contracts.

[23] *Starlink International v Coles Supermarkets* [2011] NSWSC 1154 at [18] (Bergin CJ).

[24] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 257-263; see also discussion of good faith at 263-268.

[25] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 279–280.

[26] It is noteworthy that the Supreme Court of Canada in *Bhasin v Hrynew* (2014) SCC 7 recently held that Canadian law recognises an organising principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. It said that a manifestation of the organising principle was that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

[27] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [104].

justice".[28]

The article will now examine the approach to good faith in these jurisdictions.

English position

In English contract law, the accepted position is that there is no implied duty of good faith.[29] That said, English courts have held that discretionary contractual powers must not be exercised in a manner that is unreasonable.[30] Moreover, in recent times, there has been evidence of a weakening of that accepted position, with an implied duty of good faith found in a commercial context in the recent case of *Yam Seng Pte Ltd v International Trade Corp Ltd*.[31] In that case, after surveying jurisprudence from other jurisdictions and earlier English court decisions, Legatt J concluded that a refusal to recognise a duty of good faith is out of step with the approach in other jurisdictions and the recognition of the concept in several lines of English authority.[32] Having considered the reasons in earlier English law for refusing to recognise a duty of good faith, his Honour concluded that such an attitude, "to the extent that it still persists", was "misplaced".[33]

For present purposes, it is important to note that the case turned on whether the implied duty was breached in the performance of the contract, rather than in the exercise of a right to terminate the contract. Nonetheless, it is helpful for its discussion of why courts should, where appropriate, recognise an implied duty of good faith, since Legatt J articulated reasons for rejecting the "traditional English hostility" towards the good faith doctrine.[34]

First, his Honour observed that since the content of the duty depends on the context of the particular contract, recognition of the duty is consistent with the case by case approach to the implication of contractual terms favoured by the common law.[35] Importantly in this respect, the implied duty allows for "fashioning particular solutions in response to particular problems": it does not impose a "broad overarching principle" that applies rigidly to a class of contracts.[36] Secondly, since the content of the duty is based on the presumed intention of the contracting parties, it is not an undue restriction on the parties' freedom to pursue their own interests, since they may modify the scope of the duty by express words.[37] Thirdly, the fear that recognising an implied duty of good faith would generate uncertainty is unjustified because its application involves no more uncertainty than is inherent in the process of contractual interpretation.[38]

It is also worthy to note that in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*, Teare J found that a contractual clause requiring the parties to engage in "friendly discussion" before commencing arbitration proceedings was valid. According to Teare J, an obligation to negotiate

[28] *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [105]--[106] (citations omitted).

[29] *Chitty on Contracts*, Vol 1 at [1-309], cited in *Yam Sent Pte v International Trade Corp* [2013] EWHC 111 at [121]. For a critical analysis of the general hostility of English law to good faith as a general overarching principle, see Lady Arden, "Coming to Terms with Good Faith" (2013) 30 *Journal of Contract Law* 199.

[30] Jeannie Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009) 35 *Monash University Law Review* 45 at 59-61, cited in *Commonwealth Bank of Australia v Barker* (2014) 88 ALJR 814 at [42] (Kiefel J).

[31] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111.

[32] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [145].

[33] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [153]. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [105], [150], the English Court of Appeal considered the *Yam Seng* decision and confirmed that good faith was not a general principle of English law, but could be an implied term in certain categories of cases.

[34] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [146]--[153].

[35] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [146].

[36] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [123]. Legatt J sets out this precise point as a reason for rejecting an implied duty of good faith.

[37] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [148]-[149].

[38] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [149].

in good faith is certain enough to be enforceable, since it connotes an identifiable standard of an "honest and genuine approach to settling a dispute".[39]

US position

US law recognises an implied duty of good faith in all contracts.[40] The American courts have not interpreted the duty as a freestanding obligation that can be independently breached.[41] Rather, the implied duty is concerned with good faith performance or enforcement of some specific duty or obligation existing under the contract.[42] For example, in *Tymshare Inc v Covell*,[43] Scalia J concluded that the doctrine of good faith was a means of *finding an implied obligation not to engage in a particular form of conduct*. As Posner J observed:

> The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule. "'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties". The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or … the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases.[44]

Therefore, American courts have applied good faith as an interpretative tool that limits the behaviour of a contracting party.[45] Apart from prohibiting bad faith behaviour, the content of the duty remains unsettled. In particular, it is unclear if the duty only requires a party to act honestly or if it also requires a party to act reasonably.[46]

The US cases contain some limited discussion of the application of an implied duty of good faith to TFC, albeit in the context of government contracts. In *Torncello*, the plurality of the Court of Claims held, in the context of a federal contract, that the government may not employ a TFC clause "to dishonour, with impunity, its contractual obligations".[47] Rather than a good faith limitation on the power to TFC, the plurality found that the power could only be used "when the expectations of the parties had been subjected to a substantial change".[48]

It rejected the government's contention that the exercise of its discretion to terminate the contract was sufficiently limited by a good faith requirement, since this would require the contractor to demonstrate "well-nigh irrefragable proof" of bad faith.[49] The gist of the plurality's reasoning was to prefer an (objective) test to qualify the exercise of the power to TFC.

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[39] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 at [64]. For a discussion of this issue in the Australian context, see Andrew Murray, "The Limits of Uncertainty – What is the Appropriate Focus for the Review of Dispute Resolution Clauses by Standards Australia?" (2014) 26(2) *Australian Construction Law Bulletin* 36.

[40] American Law Institute, *Restatement (Second) of Contracts* (1981), § 205: "[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

[41] James Allsop, "Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle" (2011) 85 ALJ 341 at 361.

[42] See Commentary to s 1-304 of the US *Uniform Commercial Code*: "This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this sections means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power."

[43] *Tymshare Inc v Covell* 727 F 2d 1145 (1984).

[44] *Market Street Associated Ltd Partnership v Frey* 941 F 2d 588 (7th Cir, 1991) at 595 (citations omitted).

[45] See *Duquesne Light Co v Westinghouse Elec Co* 66 F 3d 604 (3rd Cir, 1995) at 617; *Riggs National Bank of Washington v Linch* 36 F 3d 370 (4th Cir, 1994) at 373.

[46] See also *Doubleday & Co v Curtis* 763 F 2d 495 (2d Cir, 1985) (test of honest dissatisfaction is "especially appropriate in construing publisher's agreements" to avoid placing "authors at the unbridled mercy of their editors"); E Allan Farnsworth, *Farnsworth on Contracts* (1999) at [7.17a] p 330; cf *Random House Inc v Gold* 464 F Supp 1306 (SDNY, 1979) (a "publisher's financial circumstances and the likelihood of a book's commercial success" need not be excluded from consideration).

[47] *Torncello v United States* 681 F 2d 756 (Ct Cl, 1982) at 772.

[48] *Torncello v United States* 681 F 2d 756 (Ct Cl, 1982) at 766.

[49] *Torncello v United States* 681 F 2d 756 (Ct Cl, 1982) at 770-771.

Leading Australian cases

Having surveyed the English and US position, let us return to the leading Australian cases concerning the intersection of the duty of good faith and the express power to TFC.

Thiess

Thiess[50] was contracted to provide services to Placer for a fixed period in relation to open-cut mining at Placer's mine sites in Western Australia. The contract contained a TFC clause, cl 6.5.1, which provided that Placer:

> may, at its option, at any time and *for any reason it may deem advisable*, cancel and terminate the Contract, in which event the Contractor shall be entitled to receive compensation.

(emphasis added)

Compensation was set out in the contract under the various headings of "lump sum items", "unit price items", "demobilisation" and "additional compensation". As for "additional compensation", the provision read:

> [Thiess] shall be paid an additional amount to compensate the Contractor for any inconvenience, loss or damage incurred by it due to the termination of the Contract by [Placer]. Such compensation shall amount to not more than five (5%) percent of the estimated value of work which the Contractor would have executed in a period of sixty (60) days from the date of notice of termination.

A further clause provided that the amount calculated in accordance with the above formula should represent the contractor's whole entitlement for the consequences of termination. Further, the contract contained cl 1.1.5, which provided:

> the successful operation of this Contract requires that [Thiess] and [Placer] agree to act in good faith in all matters relating both the carrying out [of] the works, derivation of rates and interpretation of this document.

Placer was dissatisfied with the estimates of costs that Thiess was quoting (which were found at trial to be wrongfully inflated) and the windfall that Thiess was receiving. Accordingly, Placer gave notice of termination to Thiess relying on the express power to TFC under cl 6.5.1.

Thiess subsequently commenced an action seeking damages for breach of contract, arguing, inter alia, that the termination was in breach of the duty of good faith arising under cl 1.1.5. Thiess argued that Placer needed a reasonable basis to exercise the power to terminate, which it did not have.

Templeman J rejected the notion that a duty of good faith operated as a fetter on Placer's express power to TFC (that is, without cause). He did so on two grounds. First, on the proper construction of the contract in question, the express duty of good faith contained in cl 1.1.5 applied only in relation to the operation of the contract, and not its termination. Secondly, the express power to TFC contained in cl 6.5.1 provided Placer "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' interests".[51]

In *Thiess*, the contract contained an express good faith clause. Having found that on the proper interpretation of the contract, the express duty of good faith did not apply to qualify the power to TFC, the court did not go on to consider whether an implied duty of good faith applied to qualify that power. His Honour noted that Thiess rightly refrained from arguing for an implied term of good faith, as this "would be contrary to the express provision which entitles Placer to terminate at its option, at any time, and for any reason".[52]

Commenting on the nature of the duty of good faith, Templeman J stated:

[50] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130.

[51] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at [101].

[52] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at [100].

> I construe the obligation of good faith as requiring the parties to act honestly with each other and to take reasonable steps to co-operate in relation to matters where the contract does not define rights and obligations.[53]

Placer appealed to Full Court of the Supreme Court of Western Australia, and in turn to the High Court, on the assessment of damages. Neither of the appeal decisions[54] touched on the question whether the duty to act in good faith may act as a restraint on the power to TFC.

Apple

Thiess may be contrasted with *Apple*.[55] Optus and Apple entered into a distribution agreement under which Apple was authorised to distribute certain Optus phone products. Clause 17.3 of the contract provided that Optus was empowered to TFC: Optus could terminate the agreement per any reason by providing 30 days' written notice to the distributor.

Apple set about selling Optus pre-paid mobile products with considerable success, at least from Apple's point of view. Optus was interested to obtain connections to its network. As far as it was concerned, sales that did not result in connections were not truly successful. Optus was most concerned about unbundling, which involved separating the handset from the package and re-selling it separately.[56] The price of the handset in the package was subsidised as a competitive marketing tool to induce customers to connect to the Optus network. Optus sought to increase its network subscribers by minimising unbundled sales, a course which involved focusing on a few key distributors. Optus did not communicate its concerns over unbundling to Apple, and it was not provided with the opportunity to demonstrate that it should be an ongoing distributor. Optus then sought to terminate the agreement with Apple under cl 17.3.[57]

Apple submitted that it was an implied term of the contract that cl 17.3 may only be exercised in good faith.[58] Apple contended that the power to TFC was not exercised in good faith. It relied on the fact that, prior to entering into the distribution agreement, Optus was contemplating a restructure of its distribution arrangements, which would result in the termination of all current distributors; and furthermore that Optus failed to disclose this to Apple during pre-contractual negotiations.

The question before the court was whether an implied duty of good faith fettered Optus's express power to TFC, such that its exercise could not be capricious or arbitrary, or for an extraneous purpose.[59]

Windeyer J held that there was no a priori reason not to imply a term of good faith in a commercial contract.[60] However, he refused to imply such a term in the case at hand because the contract in question was perfectly effective without it, and thus the proposed implication did not satisfy the *BP Refinery* requirement that the implied term be "necessary for business efficacy".[61] His

[53] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at [99].

[54] *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2000] WASCA 102; *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768; 19 BCL 431.

[55] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635.

[56] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [7].

[57] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [5].

[58] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [13].

[59] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [19].

[60] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [17], following Sheller JA in *Alcatel Australian Ltd v Scarcella* (1998) 44 NSWLR 349. Sheller JA (Powell and Beazley JJA agreeing), in obiter, recognised (at [369]) that "a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract. There is no reason why such a duty should not be implied as part of this lease". However, this finding was of no consequence, since his Honour found that Alcatel failed to demonstrate any unreasonableness in the Council's conduct. In the absence of unreasonableness, Scarcella was not in breach of any implied duty of good faith in terminating the lease.

[61] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [20]: "This term is not made out. The contract is perfectly clear without it and is effective without it. It does not go without saying."

Honour was influenced by the fact that both parties were large commercial trading companies in a competitive industry, and well able to protect their own interests.[62]

Apple tends to suggest that a duty to act in good faith is less likely to be implied to qualify an express power to TFC in a contract where there is no inequality in bargaining power, and significantly, where the parties have the opportunity to protect their own interests.[63]

GEC

Two years later, Finn J of the Federal Court voiced support for an implied duty of good faith in Australian contract law in *GEC*.[64] The facts of that case are quite complex.

BHP-IT entered into a contract with the Department of Foreign Affairs and Trade (DFAT) for the development of communication network software. BHP-IT at the same time entered into a "back-to-back" contract with EASAMS (Aust) Ltd (subsequently acquired by GEC), termed the "standing offer" (SO). Under the SO, EASAMS assumed responsibility for the performance of the bulk of BHP-IT's contractual obligations to DFAT. The contract entitled BHP-IT to terminate for GEC's poor performance, giving notice under cl 27.1, and separately conferred a right on BHP-IT to TFC under cl 27.5, titled "Termination for Convenience", which relevantly provided:

> In addition to any other rights it has under this SO, BHP-IT may terminate this SO in whole or in part, by notifying the BTM in writing that this SO or a part of this SO is terminated from the date specified in the notice (which date shall not be a date earlier than the date on which the notice is received by the BTM), and in that event, BHP-IT may give to the BTM such directions as it thinks fit in relation to subsequent performance of this SO.

GEC, on the other hand, was empowered under cll 40.8 and 40.9 to terminate where BHP-IT was in breach (such as by failing to pay for services) and failed to remedy its breach.

There was a specific goal in the contract termed "Milestone 4000", which GEC was to complete by a certain date. GEC experienced difficulties in achieving the milestone, but kept the subcontract on foot. Further, GEC, while being aware that it would not meet its deadline, misled BHP-IT as to its progress, expecting that BHP-IT would withhold payment, and intending to use this breach by BHP-IT as a reason to terminate.[65] Meanwhile, BHP-IT failed to provide GEC with certain software required under the subcontract, and did not pay GEC for its late completion of Milestone 4000.

Subsequently, GEC, relying on this failure to pay, sought to terminate the contract under cll 40.8 and 40.9. BHP-IT contended that GEC was under an implied contractual duty to act honestly, fairly and reasonably in giving any notice of termination, which duty it alleged GEC breached. Finn J considered BHP-IT to be referring to what is now known as the implied duty of "good faith and fair dealing".[66]

In turn, BHP-IT unsuccessfully sought to terminate the contract for GEC's poor performance under cl 27.1. Relevantly, cl 4.4 required BHP-IT to be satisfied that GEC had performed poorly over a minimum period of 12 months in order to exercise cl 27.1. Finn J held that this purported termination was ineffective because he was "not satisfied (and there [was] no evidence suggesting otherwise) that a joint review (formal or informal) was undertaken [by BHP-IT] that led to the view that [GEC] had 'performed poorly … over a … period of twelve … months' as required under cl 4.4 of the contract".[67] BHP-IT later sought to argue that it could rely on the express power to TFC under

[62] *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 at [19]. See also Ben Curtin, "Recent Developments in Termination for Convenience Clauses: The Role of Good Faith" (2010) *Commercial Law Quarterly* 23 at 25.

[63] This principle may well extend to the relationship between the principal and the builder (or the builder and the subcontractor) in many building contracts.

[64] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1.

[65] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [833].

[66] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [915].

[67] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [759].

cl 27.5 in the alternative. BHP-IT also advanced a subsidiary contention that GEC repudiated the contract by its conduct in contriving circumstances that amounted to BHP-IT's supposed breach under cll 40.8 and 40.9.

Finn J accepted BHP-IT's subsidiary contention,[68] holding that BHP-IT's notice of termination constituted a (constructive) acceptance of the repudiation on the part of GEC.[69] Finn J refrained from expressing an opinion whether BHP-IT was entitled to rely upon the power to TFC under cl 27.5.

By way of obiter, his Honour considered that there is no reason in principle that precludes a party from relying on a TFC clause where it had previously sought to rely on a different basis for terminating. Accordingly, BHP-IT would have been entitled to rely on the right to TFC under cl 27.5. His Honour acknowledged the orthodox principle that "while a termination must be justified by reference to a legal right to terminate, the party terminating may rely on any ground available … at the time of termination, whether or not it was then aware of it".[70]

Finn J accepted, by way of obiter, that the exercise of a power to TFC is subject to an implied duty of good faith and fair dealing: His Honour stated:

> the issue is, not whether a duty of good faith should be implied, but rather whether it should be excluded in circumstances where it would otherwise be implied but for some alleged inconsistency with, or preclusion by, the terms of the contract.[71]

Finn J found that the implied term of good faith "is … to be implied both by law and ad hoc".[72] Further, he considered that "the duty of good faith and fair dealing should apply to *all* contracts", while noting that other judges "are prepared for the moment to see it as a legal incident of *particular classes* of contract".[73]

Although there was no express entire agreement clause in the contract, BHP-IT contended (in order to rebut the implication of an implied duty of good faith) that an entire agreement should be construed from the comprehensively outlined obligations in the contract. Finn J rejected this argument,[74] observing in any event that the inclusion of an "entire agreement" clause in a contract does not defeat the implication of a duty of good faith:

> I consider the law in this country to be that an "entire agreement" clause does not preclude implications ad hoc and "I find arresting the suggestion that an entire agreement clause is of itself sufficient to constitute an 'express exclusion' of an implied duty of good faith and fair dealing where that implication would otherwise have been made by law".[75]

Kellogg

Australian Aerospace (AA) entered into a contract with the Commonwealth Government for the supply of helicopters to the Department of Defence (DD). AA subcontracted with Kellogg for it to perform training and support services in relation to the helicopters and associated flight control support systems. Clause 12.3.1 of the subcontract provided AA with the power to reduce Kellogg's'

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[68] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [892]: "GEC Marconi kept the Sub-Contract on foot with the objects in mind of securing either a favourable renegotiation or a termination for convenience. When these proved unachievable it staged its own termination. Its conduct was not that of one adhering genuinely to a mistaken interpretation of the contract. Rather it manipulated and knowingly misinterpreted contractual obligations and engaged in disingenuous conduct to avoid having to complete the then Sub-Contract which, from at least July 1996, it had no intention of doing."

[69] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [753].

[70] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [753].

[71] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [920].

[72] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [920]. In this regard Finn J referred to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 and *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 as to the difference between the two bases of implication.

[73] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [920] (emphasis added).

[74] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [710], [717], [720].

[75] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [922].

scope of works, or TFC. The exact terms of the provision were "[i]n addition to any other rights it has under the Contract, AA may terminate the Contract or reduce the scope of the Contract by notifying the Contractor in writing".

AA became dissatisfied with Kellogg's performance, and the parties entered into negotiations to resolve the conflict and keep the contract on foot. AA communicated to Kellogg that it was useless continuing, and terminated the contract "for convenience with immediate effect".[76] Kellogg alleged that the termination was wrongful, contending that it was not in good faith and deprived Kellogg of the substantial benefit of the contract.

Kellogg sought an interlocutory injunction to prevent AA relying on the notice to TFC, which Hansen J (as he then was) granted. His Honour considered that there was "a serious question to be tried, both as to the existence of an implied term of good faith and its breach".[77] Indeed, he opined that the case for an implied duty was "well arguable". His Honour continued:

> The gravamen of Kellogg's case is that AA has used the power to terminate for convenience for the purpose of damaging its contracting party and itself taking advantage of the consequent situation for its material benefit, both under the subject contract and generally in the event of future contracts. For several reasons however it is neither necessary nor appropriate that I develop further the case for the implied term or the breach. For one thing the relevant evidence is not all in as it would be at trial. For another, that is the province of the trial.[78]

Hansen J reflected on the origin of termination for convenience clauses, considering:

> More particularly, the provision for termination for convenience is to be understood in the defence material procurement area, in which the Commonwealth is the head contracting party, as reflecting the principle of executive necessity.[79]

On the content of the duty of good faith, Hansen J considered it comprised:

(a) not depriving the other contracting party of the substantial benefit of the contract;

(b) acting fairly and reasonably, using the power to TFC for just cause or upon proper and reasonable grounds; and

(c) not acting capriciously, for an improper or extraneous purpose.[80]

Kellogg Brown thus provides limited authority for the proposition that under Australian law it is at least arguable that a power to TFC must be exercised in good faith.

Sundararajah

The recent Federal Court decision of *Sundararajah*[81] involved a contract between the medical health fund, Teachers Federation Health (TFH), and a Dr Sundararajah, a dentist whose patients were members of TFH. The contract, entitled a "HICAPS Provider Agreement", allowed Dr Sundararajah to lodge electronic insurance claims for his patients directly with TFH. Following concerns over apparent anomalies in billing practices, TFH exercised its unilateral power to terminate the contract without cause under cl 7.3 which permitted TFH to "end this agreement to the extent that it related to a Fund on the giving of 90 days' notice". Dr Sundararajah commenced proceedings alleging the purported termination was a breach of contract, arguing that the TFC clause under the contract was qualified by an implied term that TFH exercise its powers in good faith.

[76] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [30].

[77] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [61]; see also Marilyn Warren, "Good Faith: Where Are We at?" (2010) 34 *Melbourne University Law Review* 344 at 357; Curtin, n 62 at 23.

[78] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [61].

[79] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [11].

[80] *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 at [34].

[81] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720.

Foster J held that a duty of good faith should not be implied on the grounds that this was not reasonable nor necessary, and that to do so would be inconsistent with the express terms of cl 7.3, which conferred a broad discretion upon TFH to terminate the contract without cause.[82] His Honour held:

> where a power is given to one party to be exercised in its sole discretion so as to bind the other, the terms of the contract are inconsistent with a constraint on the exercise of that power by considerations of reasonableness or good faith.[83]

Foster J found it highly influential that "there are no criteria at all specified in the … agreement against which a requirement of reasonableness or good faith could be measured. If the respondent chooses to terminate the … agreement pursuant to cl 7.3, it is not required to give any reason for its decision to terminate".[84]

On the content of the duty of good faith, Foster J considered that "generally speaking, if a contract contains a requirement that the parties act in good faith, they must act honestly, not capriciously, and reasonably".[85] However, his Honour appeared less than convinced that a duty to act in good faith involved an obligation to act reasonably, suggesting that "the essence of the good faith requirement is honesty".[86]

His Honour continued: "However, good faith does not require a party to act in the interests of the other contracting parties, nor to subordinate their own legitimate interests to those of the other parties".[87]

Starlink

Bergin CJ of the NSW Supreme Court took a similar approach in *Starlink*.[88] Coles Supermarkets entered into a 36-month trolley collection contract with Starlink, which was due to expire in March 2012. Special Condition 1 (SC 1) of the contract provided that "Coles may terminate this Agreement at any time without a reason by giving [Starlink] 45 days written notice". Various undisclosed third parties made allegations against Starlink, claiming improper behaviour, including intimidation and violence. Coles terminated the trolley collection contract pursuant to SC 1 by notice dated 13 July 2011.

Starlink commenced proceedings contending that Coles breached an implied term of good faith in exercising its power under SC1. Bergin CJ dismissed Starlink's claim, finding that "a duty to act in good faith in exercising the right under SC 1 would be to impose a condition on the defendants inconsistently with the express term of the contract".[89] Her Honour continued:

> The very notion of there being no necessity for a cause or a reason prior to the defendants being entitled to exercise the power under SC 1 is inconsistent with the view that the defendants were not entitled to act according to their own idiosyncrasies.[90]

Her Honour held that "commercial contracts are not a class of contract that, as a legal incident, have an implied obligation of good faith. It will depend upon the individual contract".[91]

[82] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [64], [66], [68]-[69]; see also Scott Alden and Alex Ottaway, "Good Faith and Termination of Contracts" (2012) *Australian Construction Law Bulletin* 61 at 62.

[83] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [64].

[84] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [69].

[85] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [68].

[86] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [68].

[87] *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [68].

[88] *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154.

[89] *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154 at [30], [33]; see also Alden and Ottaway, n 82 at 62.

[90] *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154 at [30].

[91] *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154 at [18].

Similar to *GEC*,[92] *Starlink* suggests that a TFC clause may be relied upon instead of a power to terminate for breach, even where a breach of contract may be evident.[93] Thus, contractual rights to TFC and for breach are not mutually exclusive, but may exist as concurrent exercises of alternate powers of termination.

Summary

It is clear from *Thiess*, and the most recent authorities, *Sundararajah* and *Starlink*, that a duty of good faith will not be implied into commercial contracts where there are express terms to the contrary. An implied duty of good faith, by definition, is arguably inconsistent with a power to TFC, which is usually unconstrained and unconditioned. On the other hand, Finn J in *GEC Marconi* demonstrated a willingness to imply a duty of good faith into all commercial contracts,[94] including where a TFC clause operated. However, this view has not found general approval in later cases.[95]

Given the residual uncertainty as to whether an implied duty of good faith operates to qualify an unfettered, express power to TFC, some commentators argue that it is best for a principal to conduct itself on the basis that such a duty is likely to be implied.[96] In that regard, the question arises whether the principal should state the reason for exercising the power to terminate, even if it is not required to. The better view is that this is a perilous course, unless the principal has an undisputed legitimate reason for terminating.[97]

Returning to the three questions posed in the introduction to this section, the cases discussed suggest some tentative conclusions.

First, it remains unclear whether the implied duty of good faith requires a party to act only honestly, or both honestly and reasonably. While there is some support that the implied duty requires a party to act “reasonably”, this support is not widespread.[98]

Secondly, whatever the correct answer to the first question, as Foster J observed in *Sundarajah*, the duty of good faith does not require the principal to act in the interests of the contractor so as to subordinate its own legitimate interests to those of the other party.[99]

[92] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [66].

[93] In *Starlink*, conduct likely to constitute a breach was apparent on the facts, yet the principal, Coles, sought to rely instead on the TFC clause: *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154 at [30].

[94] See also *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703 (Finkelstein J).

[95] See *Esso Australian Resources Pty Ltd v Southern Pacific Petroleum NL* [2004] VSC 477, in which Hollingworth J considered the High Court had not yet endorsed the implication of a duty of good faith into commercial contracts. On appeal, the Victorian Court of Appeal ([2005] VSCA 228 at [25]) confirmed the possibility of implication ad hoc, meeting the tests laid down in *BP Refinery*, of a duty of good faith, but expressed reluctance toward implication of such a term as “a legal incident of contracts of a certain type”. Buchanan JA (at [25]) considered that it may be appropriate to import such an obligation ad hoc to protect a vulnerable party from exploitive conduct which subverts the original purpose for which the contract was made. See also Robert McDougall, “The Implied Duty of Good Faith in Australian Contract Law” (2006) 108 *The Australian Construction Law Newsletter* 28 at 29 where his Honour, speaking extra-judicially, considered that in light of *Hughes Aircraft* and *Esso*, the approach of Finn J in *GEC* overstated the Australian position.

[96] Emanuel Confos, Colleen Platford and Paul McDonald, *Good Faith and Termination for Convenience Clauses*, Gilbert + Tobin White Paper (10 July 2013) p 5.

[97] For example, if the principal has terminated a contract with a subcontractor, in consequence of termination of its head contract.

[98] See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 266-267; *Alcatel Australia Ltd v Scarcarella* (1998) 44 NSWLR 349 at 367 (Shelley JA); *Theiss Contractors v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at [99]; *Burger King Corp v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558 at [172]; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [3]; *Kellogg Brown & Root Pty Ltd v Australian Aerospace Ltd* [2007] VSC 200 [34]; *Sundararajah v Teachers Federation Health Ltd* (2011) 283 ALR 720 at [68]-[69]. *Beerens v Bluescope Distribution Pty Ltd* (2012) 39 VR 1 at [165], [167]; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at [188]-[198].

[99] For other cases on this point, see *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at [172] (Giles J). See also Meagher JA (dissenting) in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at [275]; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR 41-703 at [37] (Finkelstein J); *Burger King Corp v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558 at [185].

Finally, the trend in the cases suggests that the correct basis for implication of a good faith term is that it is a term implied in fact, not a term implied in law. As discussed above, the only case to suggest otherwise is *GEC*. Furthermore, as Legatt J observed in the English context, it may be that this is the doctrinally preferable approach, since it allows a case-by-case approach to the duty of good faith.

PENALTY DOCTRINE

The next question for discussion is whether the doctrine against penalties may apply to qualify the exercise of an express power to TFC.

Prior to the recent High Court decision in *Andrews v ANZ Banking Group*,[100] the penalty doctrine only applied to stipulations providing for the imposition of a different or additional liability upon a breach of contract (or termination of a contract premised on a breach of contract), in accordance with the decision in *Export Credits Guarantee Department v Universal Oil Products*.[101] This continues to be the position in the UK,[102] as well as in New Zealand and Canada.[103]

Lord Dunedin had set out the principles for distinguishing between liquidated damages and penalties in the seminal case of *Dunlop Pneumatic Tyre Co v New Garage and Motor Co*.[104] First, the labels the parties use are not determinative; the court must determine whether, regardless of the labels used, the stipulation was or was not a penalty. Secondly, the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, whereas the essence of liquidated damages is a genuine pre-estimate of damages. Thirdly, the question is one of construction and is to be judged at the time of the making of the contract. Fourthly, if the sum stipulated for is "extravagant and unconscionable" in comparison with the greatest loss that could be proved to have flowed from the breach, it will be a penalty. Fifthly, if the breach consists of the non-payment of money, the amount will be a penalty if it is greater than what should have been paid. Sixthly, there is a presumption that the amount is a penalty if a single amount is payable when consequences of the events that might occur differ widely. Finally, if the consequences of a breach are such as to make precise pre-estimation almost impossible, a stipulated amount is likely to be considered as a genuine pre-estimate of the damages.

In *Andrews*, the High Court reframed the penalty test by reference to primary and collateral stipulations. A collateral stipulation is one imposed as security for, and *in terrorem* of, the satisfaction of a primary stipulation. Thus, a collateral stipulation will prima facie impose a penalty if, as a matter of substance, the following five requirements are met:

(a) B has the benefit of a primary stipulation that amounts to a promise (or something equivalent to a promise) from A;

(b) by way of a collateral stipulation, A agrees to assume a detriment to the benefit of B if the primary stipulation fails (for example, to pay money or give property to B);

(c) the primary stipulation fails;

(d) the compensation for the prejudice suffered by B from the failure of the primary stipulation is capable of assessment; and

(e) A's detriment under the collateral stipulation exceeds the compensation for B's prejudice.

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[100] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

[101] *Export Credits Guarantee Department v Universal Oil Products* [1983] 1 WLR 399.

[102] *Jervis v Harris* [1996] Ch 195.

[103] See, for example, LexisNexis, *Halsbury's Laws of England*, Vol 12, "4 Consensual Adjustment of Damages" at [1065]-[1066].

[104] *Dunlop Pneumatic Tyre Co v New Garage and Motor Co* [1915] AC 79 at 86-88.

In these circumstances, B is permitted to enforce the collateral stipulation only to the extent of the loss occasioned by the failure of the primary stipulation, with the remainder being unenforceable as a penalty.[105]

By way of classic illustration, assume a typical building contract between a principal (B) and a contractor (A) containing a liquidated damages (LD) clause. On the one hand, the relevant primary stipulation is the promise of the contractor to complete the works by the date for practical completion. On the other hand, the relevant collateral stipulation is the obligation of the contractor to pay LD in the event of late completion. The LD clause will be struck down as a penalty (more precisely, rendered unenforceable) if the amount of compensation imposed by the clause is not a genuine pre-estimate[106] [I would delete these words, as the last sentence of the paragraph – which I have highlighted – deals with the point] of the loss that the principal (B) will suffer as a consequence of late completion of the works by the contractor (A). The test is applied at the time the contract is entered into, not when it is breached.

The High Court drew a distinction between a "collateral stipulation" and an "alternative stipulation", where the latter is a clause that may impose a fee for an additional service and does not infringe the penalty doctrine. The High Court provided several examples of an "alternative stipulation", including *French v Macale*[107] and *Metro-Goldwyn*.[108] In *French*, a lease of farmland provided for the tenant to pay two guineas an acre to lease farmland and an extra two guineas per acre for him to plough the land and plant a crop. The High Court confirmed that such an arrangement would not infringe the doctrine of penalties.[109] Unfortunately, there is uncertainty as to whether a particular stipulation is properly characterised as a collateral stipulation as opposed to an alternative stipulation.

The High Court's judgment contains a learned historical analysis of the penalty doctrine. It noted that equity's review jurisdiction, unlike the common law's review jurisdiction, was not premised on establishment of a breach of contract.[110] The High Court said that equity's review jurisdiction continued after the passing of the *Judicature Act 1873* (UK), and did not "wither on the vine"[111] (the view taken by the NSW Court of Appeal in *Interstar*).[112]

As a result of *Andrews*, the operation of the penalty doctrine has been enlarged, but with consequent uncertainty. One commentator has observed:

[105] Kanaga Dharmananda and Leon Firios, "Penalties Arising Without Breach: The Australian Apogee of Orthodoxy" [2013] *Lloyd's Maritime and Commercial Law Quarterly* 145.

[106] There is debate as to whether the proper substantive test is one of "genuine pre-estimate" or "extravagant and unconscionable". In *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [41], Gordon J appeared to suggest that the correct focus of the enquiry is whether the relevant sum is "extravagant and unconscionable", *not* whether the sum is a "genuine pre-estimate". The point was directly in issue in *Zachariadis v Allforks Australia Pty Ltd* (2009) 26 VR 47, where the Victorian Court of Appeal held that the proper test is that of extravagance. Further, *Ringrow* (below) supports this view.

[107] *French v Macale* (1842) 2 Drury and Warren 269.

[108] *Metro-Goldwyn-Mayer Pty Ltd v Greenham* [1966] 2 NSWR 717.

[109] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at [80] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). See also Richard Manly, "Breach No Longer Necessary: The High Court's Reconsideration of the Penalty Doctrine" (2013) 41 ABLR 314.

[110] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at [45]-[46].

[111] See *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at [63], [68]. The expression comes from *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 191 (Mason and Wilson JJ).

[112] In *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* [2008] NSWCA 310 at [99], the NSW Court of Appeal referred to Mason and Wilson JJ's judgment in the earlier High Court decision in *AMEV-UDC* as authority for the proposition that: "The modern rule against penalties is a rule of law, not equity". In *Andrews*, the High Court disapproved of the Court of Appeal's judgment in *Interstar* in this respect, preferring the single instance decision of Brereton J in *Interstar* which had been reversed on appeal by the Court of Appeal.

> The judgment of the High Court may be welcomed [because it avoids evasion of the penalty doctrine by skilled contract drafting] but it leaves only partially answered the very important question: if not breach of a contractual obligation … what, if anything, is the limit of the scope of the rule against penalties?[113]

Uncertainty as to the operation of the expanded penalty doctrine can be seen in the recent debate in Australia as to whether the expanded penalty doctrine applies to time-bar clauses in construction contracts.[114]

In its earlier decision in *Ringrow Pty Ltd v BP Australia Pty Ltd*, the High Court left for another day the question of whether *Dunlop Pneumatic* should be reconsidered:

> [T]he formulation [by Lord Dunedin in *Dunlop Pneumatic*] has endured for 90 years. It has been applied countless times in this and other courts. In these circumstances the present appeal afforded no occasion for a general reconsideration of Lord Dunedin's tests to determine whether *any particular feature of Australian conditions, any change in the nature of penalties or any element in the contemporary market-place* suggests the need for a new formulation. It is therefore proper to proceed on the basis that Dunlop … continues to express the law applicable in this country, leaving any substantial reconsideration … to a future case.[115]

Regrettably, in *Andrews*, the High Court did not explain what particular factor(s) justified a re-formulation of the well-established penalty test. The High Court's judgment has been the subject of scathing criticism by some leading Australian commentators who question the utility of re-positioning the doctrine of penalties to a position which prevailed 150 years ago.[116] In that regard, Windeyer J said in *Coulls v Bagot's Executor and Trustee Co Ltd*: "The law of today is a living law. I would not suggest that we should arrest its growth … The common law develops but not by looking back to an assumed golden age."[117]

Andrews involved a direct appeal from Gordon J to the High Court (leap-frogging the Full Court of the Federal Court). In her judgment, Gordon J decided on a trial of preliminary questions, that the doctrine of penalties did not apply to the fees in question other than potentially the late payment fees, because the other fees were not payable on a breach of contract.[118] In her Honour's view, a breach of contract was an essential pre-condition to the invocation of the Court's jurisdiction to review whether a contractual provision infringed the doctrine of penalties. On appeal, the High Court overturned Gordon J's decision, holding that the equitable doctrine of penalties may apply, notwithstanding that there is no breach of contract, and that the equitable doctrine has not been subsumed by the common law doctrine of penalties.[119]

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[113] Edwin Peel, "Case Comment: The Rule Against Penalties" (2013) 129 *Law Quarterly Review* 152 at 154.

[114] Sandra Steele and Miranda Brookes, "The Impact of *Andrews v ANZ* on Time Bar Clauses in Construction Contracts" (2014) 26(1) *Australian Construction Law Bulletin* 10; Sandra Steele, Marcel Marquardt and Kayley Rozos, "Revisiting the Impact of the Penalty Doctrine to Construction Contracts after *Andrews v ANZ*" (2014) 26(8) *Australian Construction Law Bulletin* 127; Patrick Easton, "Penalties Percolating through the Construction Industry: Andrews v Australia and New Zealand Banking Group Ltd" (2013) 29 BCL 233; John Bond, "Contrary to What You Might Have Heard, a Properly Drafted Contractual Time Bar Will Not Attract the Penalty Doctrine" (2013) 32(1) *Arbitrator & Mediator* 69; Philip Davenport and Helen Dunham, *Construction Claims* (3rd ed, Federation Press) pp 314-355.

[115] *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656 at [12] (emphasis added).

[116] JW Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and GJ Tolhurst, "Contractual Penalties: Resurrecting the Equitable Jurisdiction" (2013) 30 *Journal of Contract Law* 99, who argue that the resurrection of the equitable doctrine of penalties by the High Court in *Andrews* was based on cases which have long since ceased to be viable precedents. See also Neil J Young QC, *What Ever Happened to Pacta Sunt Servanda?*, Paper presented at the Commercial Law Conference (Supreme Court of Victoria, 9 October 2014) at [58]-[74], who argued that the extension of the penalty doctrine sits uncomfortably with the principle of *pacta sunt servanda* (that is, agreements must be kept), since the expansion of the doctrine makes it more difficult for parties to know whether they will in fact be kept to their bargain.

[117] *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 at 496.

[118] *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53.

[119] *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

Following the High Court's determination in *Andrews* of the preliminary questions set down by the trial judge, Gordon J, the matter was remitted to the trial judge for further determination. On being remitted to Gordon J, Paciocco replaced Andrews as lead plaintiff.

In a judgment handed down on 5 February 2014 in *Paciocco*, Gordon J held that late payment fees charged by the ANZ Bank infringed the doctrine of penalties.[120] The decision was handed down in a class action brought by about 43,500 customers against the ANZ Bank. An attack on other bank fees – "honour, dishonour, non-payment and over limit fees" ("the other fees") – was rejected. Therefore, the judgment represents a mixed result for the protagonists.

Her Honour's latest judgment in *Paciocco* methodically applied the High Court's judgment to the different fees in question. Once the doctrine of penalties (whether in its common law or equitable form) is found to apply, the following interrelated questions fall to be considered:[121]

- Is the sum stipulated a genuine pre-estimate of damage?
- Conversely, is the sum stipulated extravagant and unconscionable in amount, in comparison with the greatest conceivable loss, as judged at the date of entry into the contract? In this regard it is relevant to ask if the same sum is payable on the occurrence of one or more or all of several events of varying seriousness.

The late payment fee of about $35 was payable upon non-occurrence of timely payment. The same fee was payable regardless of the amount that was overdue on the customer's account. The evidence before the court was that, assessed as at the contract date, it would cost the bank about $3 in administrative costs upon the customer being late in payment on a relevant account. The bank conceded that the fee was not calculated by reference to any detailed estimate of the loss that it would suffer.

The court held that the late payment fees were payable upon the customer breaching its contractual obligation to make timely payment and that the fee operated in the nature of security for, and *in terrorem* of, the satisfaction of the primary stipulation (to pay on time).[122] Further, it held that the late payment fee was extravagant and unconscionable in amount and was not a genuine pre-estimate of the bank's damage flowing from the customer being late in payment.[123]

On the other hand, the other fees survived attack because they were considered by Gordon J to be alternative stipulations providing for an additional fee for an additional service.[124] Unlike the late payment fee, they were not payable upon a breach of contract by the customer. For example, an honour fee was payable where a payment instruction was given by the customer to the bank which, if the bank chose to act on the instruction, would overdraw the customer's account. As the bank was not required to honour the customer's request (rather, it had a discretion whether or not to do so), the fee could not properly be considered as security for performance by the customer of its obligations to the bank.

In sum, the court found that the plaintiffs were entitled to recover the difference between the late payment fees and the bank's loss consequent upon the customer's late payment.[125]

Gordon J's judgment was appealed. At the time of writing, the appeal judgment is reserved.

With respect to the question under discussion, does the expanded penalty doctrine apply to qualify the exercise of an express power to TFC? In short, the better view is that penalty doctrine does not apply. In *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd*, Brereton J (whose judgment the High Court approved in *Andrews*) said:

[120] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249.

[121] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [15].

[122] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [116].

[123] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [183].

[124] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [374].

[125] *Paciocco v Australia and New Zealand Banking Group Ltd* (2014) 309 ALR 249 at [376].

Accordingly, I would hold that a penalty is a contractual liability to pay or forfeit or suffer the retention of a sum of money or property which is agreed in advance to be payable (or forfeited or retainable), by one party to the other, upon or in default of the *occurrence of an event which can be seen, as a matter of substance, to have been treated by the parties as lying within the area of obligation of the first party, in the sense that it is his or her responsibility to see that the specified event does or does not occur*, and where the stipulated payment is out of all proportion or unrelated to the damage which might be sustained by the other party by reason of the particular occurrence or default.[126]

To paraphrase Brereton J, the gist of a penalty is that it is a sum payable by one contractual party to the other upon the occurrence (or non-occurrence) of an event, *where it is the responsibility of the first party to ensure that the specified event does (or does not) occur*. A TFC clause falls outside this characterisation, since a principal is entitled to terminate at will *and independently of any event lying within the responsibility of the contractor*. Such a clause is therefore inapt to be characterised as imposing liability upon the occurrence (or non-occurrence) of an event lying within the responsibility of the first party, since the power may be exercised for reasons totally unrelated to the responsibilities of the first party.

Therefore the express power to terminate (including its prescribed consequences) cannot be said to be by way of security for a primary stipulation, *in terrorem*, or have the object of incentivising the contractor to perform in a particular manner. This is to be contrasted with the situation where a power to terminate is available upon breach of contract by the contractor, or upon the happening of an event (for example, insolvency of the contractor) which lies within the control of the contractor.[127]

Relief against forfeiture

The final question for discussion is whether the relief against forfeiture doctrine may provide a fetter on the right of a principal to exercise a contractual right to TFC.

Relief against forfeiture refers to the situation where a court protects a person against the loss of an interest in property or a proprietary right in consequence of the failure to perform a covenant or the determination of a contract or for some other reason.[128] The classic example is a tenant's failure to pay rent, conferring upon the landlord the right to re-enter and forfeit the lease. Another classic example is the mortgagee's power of sale upon a mortgagor's default.

Relief against forfeiture is an equitable remedy which, in general, is granted in exceptional cases.[129] The remedy is discretionary. The touchstone of the court's discretion is unconscionability. The modern jurisdiction to relieve against forfeiture is derived from the decision of the House of Lords in *Shiloh Spinners Ltd v Harding*, where Lord Wilberforce said:

we should reaffirm the rights of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where [1] the primary object of the bargain is to secure a stated result [2] which can effectively be attained when the matter comes before the court, and [3] *where the forfeiture provision is added by way of security for the production of that result*. The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.[130]

[126] *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* (2007) 2 BFRA 23 at [74] (emphasis added).

[127] But see Steele et al, n 114 at 128. The authors suggest that TFC payment clauses (that is, clauses dealing with the financial consequences of TFC) may potentially offend the expanded penalty doctrine but, with respect, do not fully explain their conclusion. They conclude that "it is unlikely that courts will readily dispatch with such common provisions".

[128] See Michael Tilbury and Chris Rossiter, "Relief against Forfeiture" in Patrick Parkinson (ed), *Principles of Equity* (2nd ed, Lawbook Company, 2002); Lionel Smith, "Relief against Forfeiture: A Restatement" (2001) 60 *Cambridge Law Journal* 178.

[129] Albeit in the "core cases" of leases and mortgages, courts grant relief as a matter of course. Lionel Smith argues that the doctrine of relief against forfeiture must be understood in a way which prevents it from amounting to a "general jurisdiction to reform contracts": Smith, n 128 at 186.

[130] *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723-724 (emphasis added).

The leading Australian cases are *Legione v Hateley*,[131] *Stern v McArthur*,[132] and *Tanwar Enterprises v Cauchi*.[133] The security requirement[134] underpins both the penalty doctrine and the relief against forfeiture doctrine.

The jurisdiction to relieve against forfeiture can generally be invoked only to protect proprietary or possessory rights, whether real or personal property. It is not available in respect of the forfeiture of contractual rights, at least where the enforcement of such rights does not give rise to an interest in property.[135] Sir Anthony Mason, speaking extra-judicially, has challenged the proprietary restriction:

> Although, as already noted, recent English authority appears to favour the view that relief against forfeiture should be confined to contracts concerning the transfer of proprietary or possessory rights, the distinction between proprietary and possessory rights on the one hand and choses in action on the other hand, albeit rooted in history, is difficult to define and to defend. There are persuasive reasons for saying that the jurisdiction should extend to relief against the forfeiture of a contractual right, at least when that contractual right, if enforced, results in the acquisition of an estate or interest in land.[136]

Suffice it to say, there is presently uncertainty in Australian law whether the relief against forfeiture doctrine extends to cases involving a contractual right which, if enforced, will give rise to a proprietary interest.

Returning to the question under discussion, may the equitable relief against forfeiture apply to qualify the express power of a principal to TFC?[137] The better answer is a resounding "no", for two reasons:

(1) the power to TFC cannot be properly characterised as a power added by way of security for the production of any particular result;[138] and
(2) the relief against forfeiture doctrine does not apply to forfeiture of contractual (as opposed to proprietary or possessory) rights.

Drafting issues

The above discussion emphasises the importance of contract drafting. It brings to mind a comment made by an experienced commercial judge that "a contract is a contract is a contract".[139] Put simply, if it is contemplated that a contract should contain a TFC clause, or a clause entitling the principal to remove scope of work, there needs to be a full and frank discussion between the principal and the contractor at the contract drafting stage as to the circumstances in which the principal may exercise the relevant power and the consequences of the exercise of such power.

The questions to be considered at the contract drafting stage include:

- Is a sole and absolute discretion to terminate (or remove scope of works), alternatively a somewhat fettered discretion,[140] to be conferred on the principal?
- On what date is the contract to come to an end?[141]

[131] *Legione v Hateley* (1983) 152 CLR 406.

[132] *Stern v McArthur* (1988) 165 CLR 489.

[133] *Tanwar Enterprises v Cauchi* (2003) 217 CLR 315. See also *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367 (heard with *Tanwar*).

[134] The third element of Lord Wilberforce's test in *Shiloh*.

[135] *Scandinavian Trading Tanker Co Ltd v Flota Petrolera Ecuatoriana* (1983) 2 AC 694; *Westminster Property Pty Ltd v Comco Construction Pty Ltd* (1991) 5 WAR 191.

[136] Sir Anthony Mason, "Themes and Prospects" in Paul D Finn (ed), *Essays in Equity* (Law Book Company, 1985) p 238.

[137] Whether the power to TFC or the stipulated consequences flowing from TFC.

[138] See *Stern v McArthur* (1988) 165 CLR 489 at 500 (Mason CJ), 516 (Brennan J); *Tanwar Enterpirses Pty Ltd v Cauchi* (2003) 217 CLR 215 at [36] where the majority judgement endorsed Mason CJ's dissenting judgment in *Stern v McArthur*.

[139] *Hartleys Ltd v Martin* [2002] VSC 301 at [81] (Gillard J). The full quote is: "The general rule is, a contract is a contract is a contract, parties are bound by the terms and the terms should be enforced against them."

[140] For example, a discretion to terminate (or remove scope of works) if there are good commercial reasons for doing so.

[141] Usually at the end of the period of notice.

- Protection of the works completed as at the date of termination.
- Removal of the contractor's plant and equipment from site in a safe and orderly manner, alternatively whether the principal should be entitled to use that plant/equipment (and, if so, on what terms)?
- To what extent is the contractor to be compensated? For example, should the contractor be compensated or indemnified for unavoidable losses suffered as a consequence of termination?
- Should the contractor be under an obligation to mitigate its losses consequent upon TFC?
- Should the contractor forfeit its right to compensation if it is in default under the contract at the time of the giving of notice of TFC?[142]
- Should the principal be entitled, at its discretion, to complete the uncompleted parts of the works itself or by engaging another contractor to do so?

CONCLUSION

An express power to TFC, or to remove scope, will be construed according to usual contractual principles, but usually in a narrow fashion. Such power is unlikely to be qualified by an implied duty of good faith, or the equitable doctrines of penalties or relief against forfeiture. Some may think that equity should intervene in such circumstances, particularly where consequent upon the exercise of a TFC clause there is an extinguishment of accrued rights[143] or the transfer of property.[144] But it is to be remembered that it is not the function of equity to intervene to adjust contractual rights contained in contracts entered into between astute commercial parties.[145] Principals and contractors are therefore well advised to address the allocation of contractual risk arising from TFC, or removal from scope, during the contract drafting stage. In particular, contractors should adequately price the risk of entering into contracts which contain such clauses.

[142] Thus, see the TFC clause considered in *Adi & Baines Harding Pty Ltd v SECV* (unreported, VSC, BC9803044, Gillard J, 11 June 1998).

[143] For example, where upon TFC the contractor is not entitled to render invoices for work in progress at the date of termination.

[144] For example, where upon TFC use of the contractor's site sheds is to be transferred to the principal.

[145] *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 626.