

**IN THE CARIBBEAN COURT OF JUSTICE  
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF  
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Appeal No GYCV2025/004  
GY Civil Appeal No 51 of 2012**

**BETWEEN**

**CARA INVESTMENTS LIMITED**

**A company duly organized under the laws of Guyana**

**APPELLANT**

**AND**

**CHRISTOPHER RAM**

**Personally and in his capacity as Receiver-  
Manager of Hotel Tower Ltd**

**BANK OF NOVA SCOTIA**

**A financial institution duly organized under  
the Laws of Guyana**

**RESPONDENTS**

**Before:**

**Mr Justice Anderson, President  
Mme Justice Rajnauth-Lee  
Mr Justice Jamadar  
Mme Justice Ononaiwu  
Mr Justice Eboe-Osuji**

**Date of Judgment: 25 March 2026**

**Appearances**

Mr Sanjeev J Datadin, Ms Jamela Ali, SC, Mr Samuel Glasgow and Ms Mohanie Anganoo for the Appellant

Mr Neil Aubrey Boston, SC and Mr Reon Miller for the First Respondent

Mr Kamal Ramkarran and Mr Jensen Samaroo for the Second Respondent

*Contract — Tendering — Request for proposals — Good faith — Cancellation clause — Whether submission of bid gives rise to process contract (Contract A) — Whether doctrine of Contract A recognised in Guyana — Applicability to private commercial tendering — Whether tender documents constituted offer or invitation to treat — Whether compliant bid submitted — Companies Act, Cap 89:01.*

## **SUMMARY**

The Bank of Nova Scotia ('BNS') appointed Mr Christopher Ram as Receiver-Manager ('the Receiver') of Hotel Tower Ltd ('HTL') pursuant to debentures securing the HTL's indebtedness. In November 1999, the Receiver advertised a Request for Proposals ('RFP') inviting bids for the purchase of HTL's assets. The Appellant, Cara Investments Ltd ('Cara'), paid the required registration fee, accessed the information room, and submitted a proposal in December 1999 describing its submission as an 'expression of interest' and making it conditional upon the completion of due diligence and the provision of additional information. Cara also sought and obtained an extension of time to submit a final proposal. Before the process was concluded, however, Cara commenced proceedings in the High Court alleging that contractual or collateral contractual obligations arose from the RFP and that the Receiver had acted unfairly and in breach of those obligations by failing to consider Cara's proposal and by terminating the tender process. Cara sought declaratory relief, injunctions restraining the disposition of HTL's assets, and damages for breach of contract, misrepresentation and loss of opportunity.

In the High Court, Chang CJ (Ag) dismissed the claim holding that the RFP constituted no more than an invitation to treat and that Cara's proposal, which was expressly conditional and dependent upon due diligence and further steps, did not amount to a definite or unconditional offer capable of acceptance. In the absence of offer and acceptance, no contractual or collateral contractual relationship arose between Cara and either the Receiver or the Bank. Chang CJ (Ag) also held that the Receiver, acting as agent of the Bank, owed no contractual duty of fairness to Cara in the context of a private commercial receivership and that the tender process could lawfully be terminated.

Cara appealed to the Court of Appeal of Guyana which dismissed the appeal affirming the decision of Chang CJ (Ag). The Court of Appeal agreed that the RFP was an invitation to treat, and that Cara's conditional proposal did not constitute an offer capable of acceptance. It further held that while considerations of fairness were relevant throughout the tender process, any such obligations in a private commercial tender arose from the contractual framework or the tender documents rather than from public law principles governing statutory or governmental procurement.

Cara obtained leave to appeal to the Caribbean Court of Justice. The principal issues before this Court were: (i) whether Guyanese law recognises the doctrine of a process contract or Contract A (ii) whether such a contract could arise in the context of private commercial tendering (iii) whether, on the facts of this case, Cara's proposal gave rise to such a contract and (iv) whether a receiver owed a separate duty of fairness or good faith toward participants in a tender process.

The Court unanimously agreed that the appeal should be dismissed.

Delivering the lead judgment of the Court, Rajnauth-Lee J held that the doctrine of a process contract should be recognised in Guyana and may arise in both public and private tendering contexts where the intention of the parties, objectively derived from the tender documents and surrounding circumstances, supports such a conclusion. The recognition of a process contract promotes the integrity of competitive bidding by imposing obligations of fairness, good faith, transparency and accountability in the conduct of the tender process.

Rajnauth-Lee J underscored that a process contract does not arise automatically upon the submission of a bid. Whether a process contract or Contract A arises, and if it does arise, its terms depend, as with any other type of contract, on the intention of the parties gleaned from the express and implied terms arising from the request for proposals and the tender bid. Formal, detailed, and structured tender processes, and extensive tender documents requiring significant expenditure on the part of the tenderer are often seen as evidence of

the intention of the parties to create a process contract or Contract A, and often lead a court to the conclusion that the parties intended to create a process contract or Contract A.

Applying those principles, Rajnauth-Lee J concluded that Cara's proposal did not constitute a bid capable of giving rise to a process contract or Contract A. The proposal was expressly framed as an 'expression of interest', was conditional upon the matters raised in Chapter 6 'Conditions of Offer', was more in the nature of a counterproposal introducing a new time frame for due diligence, and by virtue of cl (4) of its 'Conditions of Offer' was open to the interpretation that Cara did not wish its proposal to be considered until the conclusion of its due diligence. Indeed, Cara had insisted that it was not prepared to be considered the 'designated investor' until it had undertaken the due diligence described in the 'Conditions of Offer'. In addition, Rajnauth-Lee J observed that Cara's commencement of legal proceedings before the submission of a final bid was not only premature but may have disrupted the tendering process and the possible formation of Contract A. In those circumstances, Cara had not accepted any offer embodied in the RFP and no Contract A arose.

Rajnauth-Lee J further held that although receivers in Guyana are subject to a statutory duty to act honestly and in good faith, Cara had not pleaded or established any breach of such a duty in the conduct of the RFP process.

Jamadar J agreed that the appeal should be dismissed and delivered a separate opinion in which he examined the doctrinal significance of good faith in the law of contract and its relevance to tender processes. Tracing the historical foundations of the principle and anchoring it constitutionally, he emphasised that honesty, fairness and good faith are fundamental legal norms underpinning all commercial dealings and integral to the performance of contractual obligations. Jamadar J explained in detail how these values are not merely private law concepts but are connected to deeper constitutional principles. Drawing on this Court's jurisprudence on the rule of law and the principle of legality, he observed that in Caribbean constitutional democracies the rule of law forms part of the 'basic deep structure' of the legal system and that the values of fairness, reasonableness

and good faith permeate, shape, and reshape the entire legal order. These constitutional values therefore inform and guide the incremental development of the common law, including the law governing commercial tender processes.

Eboe-Osuji J also concurred in dismissing the appeal but wrote separately to elaborate on the doctrinal requirements for the formation of a process contract in the context of tendering, as well as the principle of good faith that should attend it. He agreed with the adoption of the Canadian ‘Contract A/Contract B’ framework. He also agreed with the adoption of the principle of good faith. He emphasised that while Contract A does not arise merely by tendering a bid, it does arise automatically upon the tendering of a compliant bid in accordance with the terms of the tender invitation.

On the facts of the present appeal, Eboe-Osuji J found that Cara had not submitted a compliant bid giving rise to a Contract A. This is because Cara’s proposal was expressly made subject to several conditions, including the completion of its due diligence process under an arrangement that was different from the arrangement indicated in the RFP, and before its bid could be considered for selection as the designated investor, as well as subject to the approval of its financial backers. Additionally, Cara’s bid proposed an alteration to aspects of the timetable contemplated by the RFP. Cara’s purpose in making its bid submission subject to these conditions was specifically to obviate its tender from being considered a binding contract upon its submission, until it had waived the conditions. Cara never waived the conditions. Therefore, Cara’s bid did not at any time create a Contract A between it and the Receiver. In those circumstances, Cara’s bid did not, in the ordinary principles of contract law, amount to an acceptance of an offer to contract embodied in the RFP and therefore no process contract arose between the parties. Without the existence of Contract A, there was no contractual foundation upon which Cara could sustain its claim for breach of contract or let alone its claim for damages.

This Court therefore dismissed the appeal and affirmed the order of the Court of Appeal, awarding costs to the Respondents.

## Cases referred to:

*Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC); *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Aleyn v Belchier* (1758) 1 Eden 132, 28 ER 634; *Arjoon v New Building Society Ltd* [2024] CCJ 7 (AJ) GY; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109; *Bennet v Bennet* (1880-1881) 43 LT 246; *Bhasin v Hrynew* [2014] 3 SCR 494; *Bisnauth v Shewprashad* [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25; *Braganza v BP Shipping Ltd* [2015] 4 All ER 639; *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (CH); *Build-Rite Construction & GM Associates v NIF Resort Management* [2015] JMSC Civ 21, JM 2015 SC 21 (CARILAW); *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Cara Investments Ltd v Ram* (GY CA, 7 June 2024); *Cara Investments Ltd v Ram* (GY HC, 7 June 2012); *Caribbean Cement Co Ltd v Freight Management Ltd* [2016] JMCA Civ 2, JM 2016 CA 2 (CARILAW); *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; *Chillingworth v Esche* [1924] 1 Ch 97; *Clifford v LCW Investments, LLC* [2025] CCJ 17 (AJ) BZ; *Clinitech Co Ltd v South-West Regional Health Authority* TT 2019 HC 239 (CARILAW), (31 July 2019); *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; *Constantine v Imperial Hotels Ltd* [1944] 1 KB 693; *Controller of Supplies v Gas Tomza Ltd* [2025] CCJ 16 (AJ) BZ; *Coope v Ridout* [1921] 1 Ch 291; *Crossley v Maycock* (1874) L R 18 Eq 180; *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656; *Cuffy v Skerrit* [2022] CCJ 12 (AJ) DM, (2022) 104 WIR 162; *Derby & Co Ltd v ITC Pension Trust Ltd* [1977] 2 All ER 890; *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211; *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116; *Earl of Aylesford v Morris* (1873) L R 8 Ch App 484; *Eccles v Bryant* [1948] 1 Ch 93; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310; *Freight Management Ltd v Caribbean Cement Co Ltd* [2013] JMCC Comm 2, JM 2013 SC 11 (CARILAW); *Galloway v Minister of Communications Works and Labour* (MS HC, 6 November 2015); *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284; *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 (AJ) GY, [2022] 2 LRC 491; *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 ConLR 1; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Jones v Daniel* [1894] 2 Ch 332; *Insurance Corporation of Belize Ltd v Kahtal Resorts International Ltd* [2024] CCJ 5 (AJ) BZ, BZ 2024 CCJ 3 (CARILAW); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100; *Lutchmeesingh's Transport Contractors Ltd v NIDCO Ltd* TT 2016 HC 260 (CARILAW), (7 July 2016); *Manchester and Milford Rly Co, Re, ex p Cambrian Rly Co* (1880) 14 Ch D 645; *Martel Building Ltd v Canada* [2000] 2 SCR 860; *Massy Stores (Barbados) Ltd v Forde* [2025] CCJ 15 (AJ) BB; *Mellish v Motteux* (1792) Peake 156, 170 ER 113; *Michael Richards Properties Ltd v Corp of Wardens of St Saviour's Parish,*

*Southwark* [1975] 3 All ER 416; *MJB Enterprises Ltd v Defence Construction (1951) Ltd* [1999] 1 SCR 619; *Montpellier Farm Ltd v Antigua Commercial Bank* (AB CA, 26 October 2015); *Munton v Greater London Council* [1976] 2 All ER 815; *National Contractors Ltd v National Development Corp* LC 2000 HC 10 (CARILAW) (9 April 2000); *Naylor Group Inc v Ellis-Don Construction Ltd* [2001] 2 SCR 943; *Nicolene Ltd v Simmonds* [1953] 1 QB 543; *NT Power Generation Pty Ltd v Power & Water Authority* (2001) 184 ALR 481; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2005) Aust Contract R 90-213; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469; *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433 (PC); *Pratt Contractors Ltd v Transit New Zealand* [2002] 2 NZLR 313 (CA); *Prenn v Simmonds* (1971) 1 WLR 1381; *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462; *R (Ontario) v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 SCR 111; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *River Wear Commissioners v Adamson* (1877) 2 App Cas 743; *Rossdale v Denny* [1921] 1 Ch 57; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45; *Sandy Lane Hotel Co Ltd v Cato* [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW); *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206; *Slade's Case* (1602) 4 Co Rep 92 b, 76 ER 1074; *Spencer v Harding* (1870) 5 LR CP 561; *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726; *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69; *Timothy v Simpson* (1834) 6 C & P 499, 172 ER 1337; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284; *Winn v Bull* [1877] 7 Ch D 29; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All ER (Comm) 1321; *Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506.

#### **Legislation referred to:**

**Dominica** – Constitution of the Commonwealth of Dominica 1978; **Guyana** – Companies Act, Cap 89:01, Constitution of the Co-operative Republic of Guyana Act, Cap 1:01.

#### **Other Sources referred to:**

‘§ 1-304. Obligation of Good Faith’ (Cornell Law School Legal Information Institute, 23 February 2015) < [www.law.cornell.edu/ucc/1/1-304](http://www.law.cornell.edu/ucc/1/1-304) > accessed 10 March 2026; Anson W, *Principles of the English Law of Contract* (Clarendon Press 1879); Atiyah P S, *The Rise and Fall of Freedom of Contract* (OUP 1979); Beale H G, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018); Beatson J, *Anson's Law of Contract* (28th edn, OUP 2002); Beatson J, Burrows A, Cartwright A J, *Anson's Law of Contract* (30th edn, OUP 2016); Burgess A D, *Commonwealth Caribbean Company Law* (Routledge 2013); Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024; Furmston M P, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn, OUP 2012); Halson R (ed), *Contract: The Law of Contract* (7th edn, LexisNexis Butterworths 2022); Hume D, *A Treatise of Human Nature* (1966); Kessler F, ‘Contracts of Adhesion—Some Thoughts about Freedom of Contract’

(1943) 43 Colum L Rev 629; McCamus J D, ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ (2022) 45 Man LJ 7; McDougall R, ‘The Implied Duty of Good Faith in Australian Contract Law’ (2006) 108 Au Constr Law Newsletter 36; Miachika D, Kristjanson L and Pratt J, ‘Resolving Disputes Arising from the Bidding and Tendering Process’ (Borden Ladner Gervais LLP (BLG), 15 April 2016) < [https://www.blg.com/-/media/Legacy-News-And-Publications/Documents/Publication\\_4476.pdf](https://www.blg.com/-/media/Legacy-News-And-Publications/Documents/Publication_4476.pdf) > accessed 10 March 2026; *Oxford English Dictionary* (2026) < <https://www.oed.com/search/dictionary/?q=bargain> > accessed 10 March 2026; Peden E, 'Incorporating Terms of Good Faith in Contract Law in Australia' (2001) 23 Sydney L Rev 222; *Shorter Oxford English Dictionary on Historical Principles* (6th edn, OUP 2007); Simpson A W B, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press 1975); Soyinka W, ‘Telephone Conversation’ (All Poetry, 13 September 2012) <<https://allpoetry.com/poem/10379451-Telephone-Conversation-by-Wole-Soyinka>> accessed 10 March 2026; Stoljar S J, *A History of Contract at Common Law* (Australian National University Press 1975); Swan J, ‘Whither Contracts: A Retrospective and Prospective Overview,’ in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984); Tiplady D, ‘The Judicial Control of Contractual Unfairness’ (1983) 46 Mod L Rev 601; ‘Uniform Commercial Code’ (Uniform Law Commission, 13 December 2018) <[www.uniformlaws.org/acts/ucc](http://www.uniformlaws.org/acts/ucc)> accessed 10 March 2026; Wilson N S, ‘Freedom of Contract and Adhesion Contracts’ (1965) 14 Int’l & Comp LQ 172.

## JUDGMENT

### Reasons for Judgment:

Rajnauth-Lee J (Anderson P and Jamadar, Ononaiwu and Eboe-Osuji JJ concurring) [1] – [85]

Jamadar J [86] – [167]

Eboe-Osuji J [168] – [305]

**Disposition** [85]

**RAJNAUTH-LEE J:**

**Introduction**

[1] Before the Caribbean Court of Justice ('the Court') is the appeal of the Appellant, Cara Investments Ltd, ('the Appellant' or 'Cara') against the judgment of the Court of Appeal of Guyana. The Court of Appeal dismissed Cara's appeal and affirmed the judgment of the High Court of Guyana. Cara had commenced proceedings before the High Court on 25 January 2000, alleging that the First Respondent, Mr Christopher Ram, the Receiver-Manager, ('Mr Ram' or 'the Receiver') and the Second Respondent, the Bank of Nova Scotia ('the Bank' or 'BNS') had been guilty of breach of contract and misrepresentation, resulting in loss of opportunity to Cara. The High Court dismissed Cara's claim on the basis that the Request for Proposals for the sale of the assets of Hotel Tower Ltd constituted no more than an invitation to treat, and that Cara's proposal, being expressly conditional and dependent upon due diligence and further steps, did not amount to a definite or unconditional offer capable of acceptance. Accordingly, the High Court found that no contractual or collateral contractual obligations arose between Cara and either the Receiver or the Bank.

[2] This appeal presents an opportunity for the Court to examine some important issues as they relate to contract law and procurement law in Guyana. The central issue concerns whether a process contract, also called Contract A, can arise in Guyana in relation to both public sector procurement and private sector tendering. If the Court agrees that Contract A can arise in Guyana, the question to be determined in the circumstances of this case can be framed as follows: whether on the documents and facts, a process contract or Contract A arose? Of course, if there was such a contract, the Court will consider whether it was breached, and, if so what, if any, damages flow from that breach. The second main issue relates to whether there exists in Guyana a separate duty on the part of a receiver to act fairly and in good faith; if that duty exists, whether there was a breach of that duty; and, if there was a breach,

what damages, if any, flow from that breach. For the reasons that follow this Court has unanimously agreed that the appeal should be dismissed.

### **Background Facts**

- [3] This appeal arises from a long and complex procedural history concerning the attempted sale of the assets of Hotel Tower Ltd ('HTL') and the conduct of Mr Ram, appointed the Receiver/Manager by the secured creditor, BNS.
- [4] The appellant is a company duly registered in Guyana which in late 1999, expressed interest in acquiring the assets of HTL, a company then in receivership under debentures held by BNS.
- [5] On 9 April 1999, the Bank appointed Mr Ram as Receiver/Manager of HTL under three debentures executed by HTL in favour of BNS, an appointment which was subsequently confirmed by the High Court on 12 April 1999. At the time of the appointment, the indebtedness of HTL to the Bank exceeded USD2.5 million.
- [6] On 12 and 17 November 1999, in his capacity as Receiver/Manager, Mr Ram advertised in the Stabroek News, a daily newspaper of general circulation, a Request for Proposal ('RFP') for the purchase of the assets of HTL. It is important to note that in those advertisements, Mr Ram expressly reserved, among other things, the right to terminate the process at any time before any definite agreements were executed.
- [7] In response to those advertisements, on 23 December 1999, Cara submitted a proposal to Mr Ram, describing its submission as an expression of interest and expressly conditioning any purchase on the completion of due diligence, the provision of further information, and their subsequent designation by Mr Ram as the successful investor.

[8] Cara paid a registration fee and incurred costs associated with accessing documents relating to the operations of HTL. Cara requested and was granted an extension to submit their tender or proposal up to 12 January 2000. No new date was thereafter fixed by Mr Ram for the opening of tenders. In fact, no formal tender opening ever occurred.

### **High Court Proceedings**

[9] On 25 January 2000, Cara commenced proceedings in the High Court (High Court Action No 62-W of 2000), naming Mr Ram as defendant, and later joining the Bank as an added defendant. In its Amended Statement of Claim dated 2 March 2001, Cara alleged that following the publication of the RFP by the Receiver, contractual and/or collateral contractual relations arose between itself and the defendants upon the submission of its proposal, the payment of the prescribed registration fee, and its participation in the tender process.

[10] Cara further contended that the Receiver acted unfairly, uncommercially, and in breach of the RFP by repeatedly extending deadlines, failing to open tenders publicly, failing to consider Cara's bid, and aborting the tender process without lawful justification. It further alleged misrepresentation, conflict of interest, and breach of legal and contractual duties owed to it, including a duty to act fairly and impartially and to give due consideration to compliant bids. Cara claimed that these acts deprived it of a valuable opportunity to acquire and manage HTL, and it sought declaratory relief, injunctive relief restraining the disposition of the hotel assets, and damages exceeding USD1 million for breach of contract, misrepresentation, and loss of opportunity.

[11] Mr Ram and BNS filed separate defences. Both denied that any contract or collateral contract arose from the RFP or Cara's proposal. It was pleaded that the RFP constituted no more than an invitation to treat, and that Cara's proposal was expressly conditional, subject to due diligence and further steps, and therefore incapable of acceptance. They denied that any duty to consider bids, to act fairly,

or to complete the tender process existed in the context of a private commercial receivership.

- [12] BNS further pleaded that Mr Ram acted at all material times as agent of the Bank, that no misrepresentation was made, and that Cara had not submitted any unconditional or definitive offer capable of forming the basis of contractual relations. The defendants also contended that the tender process could lawfully be terminated and that Cara had suffered no legally compensable loss. On these bases, they asserted that the Amended Statement of Claim disclosed no sustainable cause of action and that all relief sought should be refused.
- [13] Following the commencement of the High Court proceedings, Cara sought interim relief to restrain the disposition of the assets of HTL pending the determination of its claim. On that application, by order dated 16 May 2001, Singh J granted an interlocutory injunction restraining the Receiver from awarding or allocating the purchase of the hotel assets until the Receiver complied with the conditions of the RFP and until the hearing and determination of the claim. In addition, the Receiver gave an undertaking to the court not to proceed further with the tender process pending the determination of the action. In the High Court judgment of Chang CJ (Ag) ('the Chief Justice') on the substantive claim, he noted that the Receiver's undertaking was still in operation up to the time his receivership came to an end in 2003 following the sale of the shares in the HTL by its shareholders to an investor (under an agreement with the Bank).
- [14] Following the grant of interim relief restraining the disposition of the hotel assets, the defendants applied by originating notice of motion to strike out Cara's claim on the ground that it disclosed no reasonable cause of action and was frivolous, vexatious, and an abuse of process.
- [15] That application was heard and determined by Moore J who delivered a ruling on 25 April 2002 refusing the strike-out. Moore J held, first, that the defendants had

employed the wrong procedural route in bringing the application, a defect which was sufficient of itself to dispose of the motion. Notwithstanding that conclusion, he proceeded to consider the substantive issues before him. Moore J held that, applying settled principles governing strike-out applications, the court was required to assume the pleaded facts to be true and to strike out only in plain and obvious cases. On that footing, Moore J interpreted the pleaded facts as alleging the existence of a contract or contractual obligations arising from the tender process, under which the Receiver was obliged to act fairly, transparently, and reasonably in the business sense, conferring on Cara not a right to an award but to a fair opportunity to have its proposal properly considered.

[16] Moore J further indicated that, even if conditions of fairness and reasonableness were not expressly pleaded, the court would not hesitate to imply such conditions once a contractual relationship was shown to exist. He expressly declined, however, to determine whether any such contract was collateral to the debenture arrangements or whether the Bank retained a discretion as to which bid to accept. In the result, Moore J ruled that the Amended Statement of Claim disclosed a reasonable cause of action and dismissed the strike-out application, with costs in the cause.

[17] The substantive claim was ultimately heard by the Chief Justice. In a judgment delivered on 7 June 2012, he dismissed Cara's claim in its entirety. He held that the RFP constituted no more than an invitation to treat and that Cara's proposal, being expressly conditional and dependent upon due diligence and further steps, did not amount to a definite or unconditional offer capable of acceptance. In the absence of offer and acceptance, no contractual or collateral contractual obligations arose between Cara and either the Receiver or the Bank.

[18] The Chief Justice further held that the Receiver, acting as agent of the Bank, owed no contractual duty to Cara, that the tender process could lawfully be terminated, and that no duty of fairness or obligation to consider tenders arose in the

circumstances of a private commercial receivership. The claims for misrepresentation, breach of contract, and damages for loss of opportunity were accordingly unsuccessful.

[19] While the proceedings in the High Court were pending and the tender process had not been brought to completion, the receivership was ultimately resolved through a restructuring and share-sale transaction rather than by sale of the hotel assets pursuant to the RFP. On 19 May 2003, a Memorandum of Agreement was executed among the Bank of Nova Scotia, Hotel Tower Ltd, the Receiver, and a group of investors represented by RL Singh and Associates, with the participation of the majority shareholders. The Memorandum recorded that the Receiver had prepared a restructuring plan following an evaluation of offers received, and that the directors and shareholders of HTL had approved a proposal for the sale of shares in the company at a general meeting held on 21 February 2003.

[20] Under the arrangement, the investors agreed to acquire a controlling interest in the company through the issue and sale of shares, with the proceeds applied towards reducing the company's indebtedness to the Bank. The Bank agreed to apply the purchase monies to the outstanding debt and to restructure the remaining balance, while the Receiver undertook to do what was necessary to terminate the receivership and to hand control of the company back to its directors upon completion of the transaction. The Memorandum of Agreement thus brought the receivership to an end through a shareholder-approved share sale and corporate restructuring, effectively supplanting the earlier tender process for the sale of the hotel assets, which was never completed.

### **Proceedings in the Court of Appeal**

[21] Cara appealed the decision of the High Court to the Court of Appeal of Guyana (Civil Appeal No 51 of 2012). In an oral judgment delivered on 7 June 2024, the Court of Appeal (Cummings-Edwards C (Ag), Gregory JA, and Rishi Persaud JA)

dismissed the appeal and affirmed the reasoning and conclusions of the Chief Justice.<sup>1</sup>

[22] The Court of Appeal held that the Chief Justice did not err in assuming jurisdiction to determine whether contractual relations arose between the parties, notwithstanding the earlier interlocutory ruling of Moore J, which had merely allowed the claim to proceed to trial without finally determining the issue. The Court of Appeal concluded that the ruling of Moore J was procedural and preliminary in nature and did not bind the trial judge on the substantive question as to whether a contract existed in the circumstances of the case. Moreover, in the written judgment of Cummings-Edwards C (Ag), she made the point that what was before Moore J was an interlocutory application which did not require any ruling on the substantive matter.

[23] Turning to the merits, the Court of Appeal upheld the Chief Justice's finding that the RFP issued by the Receiver constituted an invitation to treat and that Cara's proposal, being expressly conditional and dependent upon due diligence and further steps, did not amount to a definite offer capable of acceptance. In the absence of offer and acceptance, no contract or collateral contract arose between Cara and the Respondents, nor did the payment of a registration fee or access to documents alter that conclusion.

[24] The Court of Appeal further held that while considerations of fairness were relevant throughout the tender process, any such obligations in a private commercial receivership arose, if at all, from contract or the tender documents themselves, and not from public law principles governing statutory or governmental tenders.

[25] The Court of Appeal accordingly rejected Cara's claims founded on breach of contract, breach of duty, misrepresentation, and loss of opportunity, declined to

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<sup>1</sup> See Record of Appeal, *Cara Investments Ltd v Ram* (GY CA, 7 June 2024) 1530 (Cummings-Edwards C (Ag)).

interfere with the findings of fact and law, and dismissed the appeal with costs to the Respondents.

[26] By Notice of Motion filed on 10 July 2024, Cara applied to the Court of Appeal for leave to appeal to this Court. By order entered on 15 April 2025, the Court of Appeal granted leave.

### **Appeal to the Caribbean Court of Justice**

[27] Cara filed a Notice of Appeal in this Court on 30 July 2025. The appeal challenges the entirety of the decision of the Court of Appeal and argues that the courts below erred in their treatment of the legal principles governing tender processes, invitations for expressions of interest, and the formation of contractual and collateral contractual obligations.

[28] Cara challenges the correctness of the conclusions of the Court of Appeal on both jurisdictional and substantive grounds. It contends, first, that the Court of Appeal erred in law in holding that it, and the Chief Justice before it, had jurisdiction to determine whether contractual relations arose between the parties, when that issue had already been determined by Moore J in his ruling which was never appealed. It is further argued on behalf of Cara that the Court of Appeal misdirected itself in its treatment of the legal principles governing invitations for expressions of interest and proposals, and in concluding that no contractual or legally enforceable obligations arose from the tender process.

[29] Cara also asserts that the Court of Appeal erred in law in holding that the Receiver did not act in breach of contract when he failed to respond to Cara's proposal, failed to consider it, and failed to inform Cara of the outcome of the tender process, particularly in circumstances where, it was alleged, there was no evidence of any other compliant bid.

- [30] Cara maintains that the Receiver was under an obligation, whether arising from contract, implied terms, law, or established tender practice, to consider all bids and to act fairly, and that the failure to do so deprived Cara of a genuine opportunity to own and manage HTL. Further, Cara challenges the Court of Appeal's acceptance of the distinction drawn by the Chief Justice between tenders conducted by public bodies and those conducted by private commercial entities, contending that duties of fairness, transparency, and proper consideration apply equally to private tender processes of this nature.
- [31] Finally, Cara contends that the Court of Appeal failed to recognise that, on the evidence, Cara was the only compliant bidder and that the conduct of the Receiver resulted in the loss of a valuable commercial opportunity for which damages ought to have been assessed and awarded. Cara seeks orders reversing and setting aside the judgment of the Court of Appeal, granting the relief originally sought in the High Court proceedings, including declaratory and injunctive relief, and directing the assessment of damages for loss of opportunity within a time frame fixed by this Court. Cara also seeks its costs before this Court and in both courts below.
- [32] In its Notice of Appeal, Cara expressly reserved the right to amend or supplement its grounds of appeal upon receipt of the written judgment of the Court of Appeal. At the time that this appeal was filed, Cara indicated to this Court that no transcript or Court of Appeal judgment was yet available and so only the order of the Court of Appeal dismissing the appeal was filed. The judgment of the Court of Appeal was only made available to this Court on 28 November 2025.
- [33] It is against this procedural and factual background, spanning more than two decades of litigation in the courts of Guyana, that this appeal now comes before this Court for determination.

### **Preliminary Issue of Jurisdiction to Determine Contractual Relations**

[34] Before embarking on the main issues which arise for determination by this Court, it is convenient at this stage to look briefly at Cara's second ground of appeal. Cara argues that the Chief Justice as trial judge had no jurisdiction to determine whether there were contractual relations between the parties since this issue had been determined by Moore J on 25 April 2002. Cara therefore argued that the issue of whether there was a binding contract between Cara and Mr Ram was determined before the actual trial of the matter. Cara further argues that there was early consideration of this issue when on 2 November 2000, Mr Ram moved the High Court on an application to strike out Cara's claim on the grounds that the Statement of Claim disclosed no reasonable cause of action, was frivolous, vexatious, and an abuse of the process of the court. As noted earlier, the application to strike was dismissed by Moore J, who held that the Statement of Claim disclosed a cause of action, that is to say, the contract between Cara and Mr Ram. Cara therefore contends that the matter of a concluded contract is *res judicata* between Cara and Mr Ram.

[35] The Respondents take issue with Cara's arguments. In particular, the Bank contends that a ruling on an interlocutory strike-out application does not bind the trial judge on questions of fact or mixed fact and law, which must ultimately be determined after oral evidence and cross-examination. The Bank further contends that orders made on strike-out applications are interlocutory and do not generally give rise to an estoppel *per rem judicatam*.

[36] It has been firmly recognised that in order to successfully argue estoppel *per rem judicatam*, the party asserting the estoppel must establish: (i) that there has already been a judicial decision by a competent court or tribunal, (ii) of a final character, (iii) of the same question as that sought to be put in issue by the plea in respect of

which the estoppel is claimed, (iv) between the same parties, or their privies, as the parties between whom the question is sought to be put in issue.<sup>2</sup>

[37] In addition, in the case of *Cuffy v Skerrit*,<sup>3</sup> the central issue before the Court was whether the decisions of the trial judge were ‘final’ in the sense in which that word was used in s 40(6) of the Constitution of the Commonwealth of Dominica or ‘interlocutory’. In a judgment delivered by Saunders P, the Court observed that an application to strike out pleadings was a draconian measure which should be sparingly adopted. Imposing timelines for the production of suitable particulars, coupled perhaps with an ‘unless’ provision, was often a more just alternative. Saunders P added that at this interlocutory stage, the judge was not expected to conduct a mini-trial on contested facts. Indeed, the judge was in no position to decide at this stage the merits of a contested case.

[38] We do not accept Cara’s submissions on this ground. It is clear that the function of Moore J on the application to strike was strictly circumscribed. His task in determining the application was to ascertain whether, assuming the pleaded facts to be true, the claim disclosed a cause of action. In his written reasons, Moore J stated:<sup>4</sup>

I interpret the facts alleged in these pleadings to amount in law to a firm contract between the Plaintiffs and the Defendant. Even though I am not at liberty to frame the Plaintiff’s case, it appears to me to amount to this. When the Defendant advertised for tenders to the public at large the Plaintiffs came forward and fulfilled the conditions i.e. they paid a fee, uplifted the tender documents and submitted their proposal. They entered into a contract with the Defendant. What was this contract? In consideration of all the Plaintiffs had done, they expected and were entitled to a fair representation of their proposal, together with others, to who eve[r] was to make a final decision, which, if any proposal to accept.

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<sup>2</sup> See *Zeiss Stiftung v Rayner & Keeler Ltd* (No 3) [1970] Ch 506 at 538.

<sup>3</sup> [2022] CCJ 12 (AJ) DM, (2022) 104 WIR 162 at [27].

<sup>4</sup> See Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 25 April 2002) 202.

[39] We agree with the Bank that a ruling on a strike-out application does not bind the trial judge on factual determinations or mixed questions of fact and law. A strike-out application tests whether the pleadings disclose an arguable cause of action, assuming the pleaded facts to be true. It does not determine whether the pleaded facts are true, nor does it conclusively decide the legal effect of facts that have not yet been proven. Orders on strike-out are interlocutory and do not ordinarily give rise to *res judicata* or issue estoppel.

[40] To reiterate, to treat the ruling of Moore J as a substantive finding that a contract in fact existed would misconceive the nature of a strike-out inquiry. Moore J was not evaluating evidence. He was stating that the pleaded facts, if true, could sustain a claim in contract. His reasoning shows that he accepted the pleaded assertion of a contract for the limited purpose of deciding whether the claim should proceed. His observation that the pleadings alleged a contract did not purport to resolve the ultimate issue, that is, whether contractual relations arose on the evidence. That question required a full evaluation of the evidence and the law at the trial.

[41] We are therefore of the view that the Chief Justice, as trial judge, was not deprived of jurisdiction to determine the question of the existence of contractual relations between Cara and Mr Ram. Accordingly, this second ground must fail. We therefore move on to consider the central issues in this appeal.

**Issue 1 - Whether a Process Contract also called Contract A can Arise in Relation to both Public Sector Procurement and Private Sector Tendering in Guyana?**

[42] The Chief Justice as trial judge had interrogated whether in the circumstances of the case, there was a contract precedent to contract. He further examined whether Mr Ram and the Bank were under a collateral contractual obligation to consider Cara's tender or proposal once it had been submitted. Having looked at the cases

of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*,<sup>5</sup> *Hughes Aircraft Systems International v Airservices Australia*<sup>6</sup> and *Harmon CFEM Façades (UK) Ltd v Corporate Officer of the House of Commons*<sup>7</sup> the Chief Justice discussed the significance of these cases all dealing with invitations to tender made by public authorities in respect of which it was not unreasonable to imply a promise, not only to consider all conforming tenders, but also to consider them fairly. The Chief Justice observed that the instant case was not at all concerned with an invitation to tender by a public authority but by the receiver of a private commercial bank whose duty was to act not in the public interest but rather in the interest of the private bank as the debenture holder.

[43] In her written judgment, Cummings-Edwards C (Ag) recognised that the issue of Contract A and Contract B, and the cases cited before the Court of Appeal which examined the judicial consideration of that issue, were not placed before the Chief Justice. She added that it was not necessary for the Chief Justice to have considered the Canadian jurisprudence in order to have arrived at his decision. She observed however that as a court of review, the Court of Appeal had given consideration to the issue.<sup>8</sup> After due consideration of the cases cited, the Court of Appeal was not persuaded that a process contract could arise in the case of private sector tendering.

[44] It is to be noted that before the Court of Appeal, Mr Datadin, counsel for Cara, argued for the application of Contract A in Guyana. Mr Boston, senior counsel for Mr Ram, accepted the jurisprudential principle that the submission of a compliant bid in response to a tender may give rise to Contract A between the bidder and the person who advertised the request for proposals. Indeed, in his oral submissions before this Court, Mr Boston resiled from his original position set out in the written submissions to the effect that process contracts could only arise in public tendering noting in particular that commercial considerations and objectives of a private body

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<sup>5</sup> [1990] 3 All ER 25.

<sup>6</sup> (1997) 146 ALR 1.

<sup>7</sup> (1999) 67 ConLR 1.

<sup>8</sup> See Record of Appeal, *Cara Investments Ltd v Ram* (n 1) at [54].

were different from a public body. Mr Boston, having resiled from his original position, invited this Court to set out legal principles that would guide Guyanese courts on the issue of process contracts or Contract A in private commercial tenders. On the other hand, Mr Ramkarran, counsel for the Bank, relied on the classic authority of *Spencer v Harding*<sup>9</sup> that a circular inviting tenders was merely an invitation to treat – an invitation for others to submit offers. In that case, the Court of Common Pleas had emphasised that where a request for tenders does not expressly promise to accept the highest bid or any bid at all, it is simply a preliminary step in negotiations. Mr Ramkarran therefore contended that the Chief Justice had correctly applied this principle to the RFP.

### *The Jurisprudence of some Commonwealth Jurisdictions*

[45] The concept of a process contract also referred to as Contract A represents a contractual relationship formed upon the submission of a compliant bid in response to an invitation to tender, imposing legal obligations on the party inviting the bids. Whilst the Court has not made an exhaustive study of the approach of common law jurisdictions on process contracts, the Court has looked at the jurisprudence of some Commonwealth jurisdictions. Some jurisdictions have formally recognised a process contract or Contract A, such as Canada and Australia. Other common law jurisdictions such as the United Kingdom, New Zealand, and some Caribbean jurisdictions, have approached the issue differently. Some jurisdictions have recognised a preliminary procedural or collateral contract whilst others have relied on implied duties of fairness.

[46] In his paper entitled ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ John D McCamus<sup>10</sup> examined the developments in the Canadian common law of contracts in the jurisprudence of the Supreme Court of Canada during the last decades of the twentieth century and the

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<sup>9</sup> (1870) 5 LR CP 561.

<sup>10</sup> John D McCamus, ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ (2022) 45 Man LJ 7.

first decades of the twenty-first.<sup>11</sup> At page 14, the writer considered ‘The Development of Unique Canadian Contract Law Doctrine: A Brief Sketch’, and observed that following the appointment of Laskin J<sup>12</sup> to the Supreme Court of Canada in 1970, the Supreme Court appeared to develop a stronger sense of its independence from English authority. He underscored that a number of doctrines of contract law which had no equivalent in contemporary English law were developed by the court.

[47] At page 14, the writer examined the issue of ‘Offer and Acceptance in the Conduct of Tendering’. He observed that a uniquely Canadian perspective on the application of the rules of offer and acceptance in the conduct of the tendering process was adopted by the Supreme Court in the case of *R (Ontario) v Ron Engineering & Construction (Eastern) Ltd*<sup>13</sup> in 1981. Under traditional English doctrine, an invitation to submit bids or tenders would be considered an invitation to treat. Submission of the bids would constitute an offer which might or might not then be accepted by the issuer of the invitation. In *Ron Engineering*, the Supreme Court adopted a new model of analysis for tendering processes. The invitation itself was considered to be an offer which, when accepted by the submission of a bid, constituted what was referred to by the Supreme Court as ‘Contract A’. Submission of the bid also constituted an offer of a second contract, ‘Contract B’, which might or might not be accepted by the issuer of the invitation. The principal effect of this analysis was to create a binding contract, Contract A, governing conduct of the tendering process. The rules set out in the invitation to tender became a binding contractual commitment. As these rules were quite detailed, possibilities for litigation flourished, arising out of a failure of the issuer to follow the rules set out in the invitation.

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<sup>11</sup> *ibid* 7.

<sup>12</sup> *ibid* 14.

<sup>13</sup> [1981] 1 SCR 111.

[48] In addition, the writer looked at the case of *MJB Enterprises Ltd v Defence Construction (1951) Ltd*<sup>14</sup> noting that:

This obligation of strict compliance has been reinforced by the Court's holding that Contract A includes an implied obligation not to accept a "non-compliant" bid. Where issuers do so, they become targets for lawsuits by disappointed bidders who believe they would have been awarded Contract B but for such a breach of Contract A by the issuer. Importantly, the Supreme Court subsequently confirmed that a term was to be implied in invitations to the effect that all bidders would be treated "fairly and equally".<sup>15</sup> This, in turn, has spawned a rich body of jurisprudence. Unsurprisingly, disappointed bidders are often of the view that they have not been so treated and claims for damages for loss of an opportunity to make a profit on Contract B have become a frequent feature of Canadian litigation on this subject. Although it would be possible to stipulate in the invitation to bid that no such contractual relationship had been established, some issuers of invitations, especially public agencies, appear to be reluctant to do so and this stream of litigation shows no sign of drying up at the present time.<sup>16</sup>

[49] The recognition of 'Contract A' was therefore firmly established in *R v Ron Engineering & Construction (Eastern) Ltd* which sought to preserve the integrity of the bidding process where under the law of contracts, it was possible to do so. Estey J, writing for the court, stated that the tender submitted by the Respondent brought Contract A into life. He further observed that the principal term of Contract A was the irrevocability of the bid and the corollary term was the obligation in both parties to enter into a construction contract, Contract B, upon the acceptance of the tender.

[50] Subsequent cases from the Supreme Court of Canada, including *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, refined the doctrine. In *MJB*, the Supreme Court confirmed that the submission of a tender in response to an invitation to

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<sup>14</sup> [1999] 1 SCR 619.

<sup>15</sup> *Martel Building Ltd v Canada* [2000] 2 SCR 860.

<sup>16</sup> McCamus, 'The Supreme Court of Canada and the Development of a Canadian Common Law of Contract' (n 10) 14-15 (footnotes omitted).

tender may give rise to contractual relations, a separate process contract or Contract A, quite apart from the obligations associated with the construction contract which may be entered into upon the acceptance of a tender, if the parties intended this outcome. Iacobucci J writing for the court took the opportunity to clarify that it was always possible that Contract A did not arise upon the submission of a tender, or that Contract A arose, but the irrevocability of the tender was not one of its terms. In other words, Contract A did not automatically spring into existence upon the submission of a tender. The court had to determine the intention of the parties. In addition, the terms of Contract A had to be ascertained as with any other contract. Iacobucci J noted that at a minimum, the Respondent, in inviting tenders through a formal tendering process involving complex documentation and terms, offered to consider the bids for Contract B. The court therefore found that Contract A arose in this case, and that the appellant's submission constituted acceptance and consideration. The court also found there was an implied term in Contract A that the Respondent was to accept only compliant bids. The Respondent, however, had conceded that the accepted bid was non-compliant. The court found that by awarding Contract B to a non-compliant bidder, the Respondent had breached Contract A.

[51] In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*,<sup>17</sup> the Supreme Court of Canada considered whether the British Columbia Ministry of Transportation had breached the obligations arising under a process contract (Contract A) when it accepted a bid from a party that was ineligible under the terms of the request for proposals. The court reaffirmed that a properly structured tendering process can create an enforceable Contract A between the owner and each compliant bidder. Under this framework, the owner's discretion is not unlimited; it must adhere to the express terms of the tender call and cannot undermine the integrity of the competitive bidding process by considering non-compliant bids unless the tender documents clearly reserve that right. The Supreme Court held that the Ministry had indeed breached Contract A by awarding the contract to an entity

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<sup>17</sup> [2010] 1 SCR 69.

that did not qualify as a bidder under the RFP. While the tender documents contained an exclusion-of-liability clause, the majority found that the clause did not apply to the type of breach at issue and thus did not shield the Ministry from liability. Despite agreement on the appropriate framework of analysis, the court was divided on the applicability of the exclusion clause to the facts of the case. We will return to the legal principles that should apply to the construction of exclusion clauses later in this judgment.

[52] *Tercon* therefore stands as a leading authority on the doctrine of process contracts in Canadian tendering law.<sup>18</sup> It underscores that Contract A imposes binding procedural duties on owners, particularly the duty to evaluate only eligible and compliant bids unless the tender explicitly provides otherwise. It also establishes a principled approach to the enforceability of exclusion clauses in tendering contexts, balancing contractual freedom with the need to maintain fairness, transparency, and integrity in tendering processes.

[53] Returning to *MJB*, and the judgment of the Supreme Court, Iacobucci J observed that:

...the jurisprudence in other common law jurisdictions supports the approach that, depending upon the intentions of the parties, an invitation to tender can give rise to contractual obligations upon the submission of a bid: see *Blackpool and Fylde Aero Club Ltd. v. Blackpool Borough Council* [1990] 3 All E.R. 25 (C.A.); *Hughes Aircraft Systems International v. Airservices Australia* (1997) 146 A.L.R. 1 (F.C.); and *Pratt Contractors Ltd. v. Palmerston North City Council* [1995] 1 N.Z.L.R. 469 (H.C.).<sup>19</sup>

[54] In *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*<sup>20</sup> it was recognised that even if the invitation for tenders does not contain an undertaking to accept any particular tender, it may nevertheless impose an obligation on the person

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<sup>18</sup> See also *Naylor Group Inc v Ellis-Don Construction Ltd* [2001] 2 SCR 943.

<sup>19</sup> *MJB Enterprises Ltd* (n 14) at [20].

<sup>20</sup> *Blackpool and Fylde Aero Club Ltd* (n 5). See 'Offers and Invitations to Treat' in Roger Halson (ed), *Contract: The Law of Contract* (7th edn, LexisNexis Butterworths 2022) para 2.214.

issuing it at least to consider the tenders. To recount briefly the facts, in *Blackpool*, the council invited tenders from a limited group to operate pleasure flights from an airport owned by the council, with a strict deadline and detailed procedural requirements. Due to its own administrative error, the council failed to clear the letterbox on time and did not consider the plaintiff's timely, compliant tender. The plaintiff claimed damages from the council for breach of contract, arguing that the terms of the invitation to tender implied an undertaking to consider all bids which conformed to its terms and were received by the deadline.

[55] The Court of Appeal upheld that claim and gave judgment for the plaintiff with damages to be assessed. The court was of the view that an invitation to tender was normally no more than an offer to receive bids, but circumstances could exist whereby it gave rise to binding contractual obligations. The court underscored that although contracts were not to be lightly implied, an examination of what parties said and did led the court to the conclusion that the parties intended to create contractual relations. It was therefore established that there existed a clear intention on the part of the council to consider the plaintiff's tender. In summary, the Court of Appeal inferred an intention to create legal relations from (i) the formality and structure of the process (ii) the restricted and identified group of invitees (iii) the use of sealed envelopes and strict deadlines and (iv) the commercial seriousness of the concession. It is to be noted that UK courts have generally applied the principles laid down in *Blackpool*.<sup>21</sup>

[56] Australia has embraced the concept of process contracts. For example, in *Hughes Aircraft Systems International v Airservices Australia*,<sup>22</sup> to avoid problems with the tender process, the Civil Aviation Authority ('CAA') required the final two tenderers to sign a letter setting out the assessment criteria. However, the CAA awarded the contract to one of the final tenderers using different assessment criteria. Hughes argued that the signed letter and the offer made under the request for tender

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<sup>21</sup> See *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207. See also *Harmon CFEM Façades (UK) Ltd* (n 7).

<sup>22</sup> *Hughes Aircraft Systems International* (n 6).

created a contractual relationship with the CAA, which included an obligation to use the agreed assessment criteria. The Federal Court of Australia found that a tender process contract came into force when the tender was lodged, and that there was an implied obligation in that contract for the CAA to conduct the tender assessment fairly and in accordance with the agreed criteria. The court found that the CAA had breached the tender process contract.<sup>23</sup>

[57] In *Pratt Contractors Ltd v Palmerston North City Council*<sup>24</sup> Gallen J (in the High Court of Palmerston North, New Zealand) found that Pratt had established that a contract had arisen between the council and itself when it submitted the tender which had been in conformity with the council's requirements. The court underscored that this was not a situation where there had been a mere calling for tenders and nothing more but a requirement to register an interest. The extensive, detailed and substantial tender documents were evidence that contractual relations were intended, and that a preliminary procedural contract arose. In *Pratt Contractors*, the council had called for tenders for the construction of a flyover. The tenderers had to pre-register and to pay a non-refundable \$100 deposit on registration. When the detailed tender was lodged, each tenderer had to pass an evaluation. The tender to be accepted would be the lowest price tenderer. Pratt was the lowest price tenderer and expected to be awarded the contract but was not successful. Pratt therefore issued proceedings against the council.<sup>25</sup>

[58] Some Caribbean cases have recognised the doctrine of process contracts or Contract A. For example, in the Jamaican case of *Freight Management Ltd v Caribbean Cement Co Ltd*,<sup>26</sup> the claimant alleged that the defendant had accepted its tender and that a binding contract existed following discussions and performance

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<sup>23</sup> See also *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656.

<sup>24</sup> [1995] 1 NZLR 469.

<sup>25</sup> See also the unrelated case of *Pratt Contractors Ltd v Transit New Zealand* [2002] 2 NZLR 313 (CA) and the judgment of Lord Hoffmann in the Privy Council: [2005] 2 NZLR 433 (PC) (Transit New Zealand). At [2] Lord Hoffmann observed that the defendant had accepted, in the light of modern authority, that the request for tenders was not a mere invitation to treat and did give rise to a preliminary contract requiring the defendant to comply with certain procedural obligations. It also accepted that the contract included an implied duty to act fairly and in good faith. The parties however differed over exactly what these procedural obligations were and over what counted as acting fairly and in good faith.

<sup>26</sup> [2013] JMCC Comm 2, JM 2013 SC 11 (CARILAW).

preparations. Sinclair-Haynes J, the trial judge, considered the cases of *Ron Engineering, Blackpool, and Pratt Contractors*, and embraced the views espoused in those cases. She noted that considerable time, effort and expense were required to submit the tender in a timely manner. The tender was submitted the afternoon before the deadline. The trial judge unhesitatingly found that a Contract A existed. The trial judge further observed that the plaintiff had submitted a conforming tender which was approved. She added that the defendant could not have expected to have put the claimant to the trouble and expense of preparing its tender and then have changed its mind about the venture without compensating the preferred, accepted, conforming tenderer. The trial judge went on to consider whether the tender had been accepted, and whether the parties had moved to a Contract B position.

[59] The defendant appealed to the Court of Appeal of Jamaica: see *Caribbean Cement Co Ltd v Freight Management Ltd*.<sup>27</sup> The Court of Appeal affirmed the judgment of the trial judge on liability, but it is to be noted that they did not embark on any analysis of the Contract A doctrine.

[60] In the Trinidad and Tobago case of *Lutchmeesingh's Transport Contractors Ltd v NIDCO Ltd*,<sup>28</sup> Kokaram J, the trial judge, addressed the substantive issue of whether a tenderer had a contractual right to reasons for rejection. Both parties accepted that the invitation to tender ('ITT') could give rise to binding obligations in two scenarios (i) upon submission of the tender (Contract A) and (ii) upon the actual contract being entered into for the execution of the project (Contract B). The court permitted brief oral amplification on two issues: (a) the meaning and content of the duty to act 'in good faith' as implied in the term of Contract A and (b) whether the duty to act in good faith or the limited contractual rights implied under Contract A included the right to provide the tenderer with reasons if the defendant elected to withdraw from negotiations before the formation of Contract B. Kokaram J examined several Commonwealth cases on the doctrine of Contract A and Contract

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<sup>27</sup> [2016] JMCA Civ. 2, JM 2016 CA 2 (CARILAW).

<sup>28</sup> TT 2016 HC 260 (CARILAW), (7 July 2016).

B. He observed that the issuance of an invitation to tender was obviously not an offer by the invitee, and a tender was merely an offer to the invitor which it may accept or reject. He however recognised that in one type of contract ‘the Tendering process itself is to be viewed as being guided by the terms and conditions agreed to by the parties which are gleaned from the express and implied terms arising from the invitation to Tender’. This, the judge noted, has been referred to as Contract A. At [20], Kokaram J stated:

The body of case law in the Commonwealth amply demonstrates that by the language used in the ITT, both parties, the invitor and tender evaluation process governed by rules and procedures which are more than a matter of mere expectation but can themselves have contractual force. To that extent the parties do intend to create contractual relations to the limited extent provided by their arrangement. ... This conclusion can be made by adopting the Contract A/B approach of the Canada Jurisdiction (*M.J.B Enterprises Ltd v Defence Construction* [1999] 1 R.C.S. 619, *Ellis Don Construction Ltd Naylor Group* [2001] 2 RCS 943) or examining whether the language gave rise to a preliminary procedural contract (*Pratt Contractors Limited v Transit New Zealand* [2003] UKPC 83) in determining whether by the mandatory language used it is consistent with the imposition of binding obligations on the parties. (*Hughes Aircraft Systems International v Air Services Australia*).

[61] Kokaram J dismissed the claim, however, holding that no duty to provide reasons was expressed or implied in the contractual obligations between the parties. He was not satisfied that such a duty or term could be implied in the context of the parties’ dealings in the circumstances of the case.<sup>29</sup>

[62] Having considered the jurisprudence of various Commonwealth jurisdictions, this Court is of the view that the Canadian approach to a formally recognised process contract or Contract A should be adopted in Guyana in the specific context of requests for proposals and tenders. It promotes the integrity of the competitive bidding process while remaining consistent with fundamental principles of contract law— such as invitation to treat, offer, and acceptance—and without introducing

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<sup>29</sup> See also *Clintech Co Ltd v South-West Regional Health Authority* TT 2019 HC 239 (CARILAW), (31 July 2019).

uncertainty into the legal framework. The integrity of the bidding process is maintained by recognising the implied obligation on the part of the issuer to treat all bidders fairly and equally. The doctrine of a process contract imposes clear duties of fairness, good faith, transparency and accountability, basic requirements that promote integrity in the bidding process.

[63] It is important to underscore that a process contract or Contract A does not automatically arise simply because a tender has been submitted. Whether a process contract or Contract A arises, and if it does arise, its terms depend, as with any other type of contract, on the intention of the parties which are gleaned from the express and implied terms arising from the request for proposals and the tender bid. Formal, detailed, and structured tender processes, and extensive tender documents requiring significant expenditure on the part of the tenderer are often seen as evidence of the intention of the parties to create a process contract or Contract A, and often lead a court to the conclusion that the parties intended to create a process contract or Contract A.

[64] Moreover, the Court accepts that this doctrine should apply equally to public procurement and private commercial tenders. There is no principled basis for distinguishing between them, particularly given the nature of private commercial tenders. They often require formal and detailed processes, extensive tender documents and significant expenditure by tenderers. The applicability of a process contract should not turn on the identity of the parties, whether public authorities or private entities, but on their intention as implied from the express terms of the request for proposals and the surrounding circumstances. The critical question is whether the procedures prescribed in the request for proposals objectively demonstrate an intention on the part of the parties to create a binding process contract or Contract A governing the submission and evaluation of bids.

**Issue 2: Whether on the Documents and Facts of the Present Case, a Process Contract or Contract A arose?**

[65] We turn to consider whether on the documents and facts of the present case, a process contract or Contract A arose. The factual background to the RFP and Cara's tender has already been explored. On 12 and 17 November 1999, Mr Ram in his capacity as Receiver/Manager advertised in a daily newspaper in Guyana a RFP dated November 1999 for the purchase of the assets of HTL. The following paragraphs of the RFP are to be noted:

Para 1.3 Purpose of the RFP – This RFP is issued to invite sound, formal proposals from investors to bid for the assets of Hotel Tower Limited, pursuant to the three debentures for which security is pledged at the Bank of Nova Scotia.

Investors are required to submit their proposal as far as possible in the format laid out in this RFP.

The Receiver/manager is interested in securing the most favourable proposal.

Para 2.1 Timing – The process to arrive at the selected investor who will acquire the assets of Hotel Tower Limited.

Para 2.3 Availability of Documents – A document room will be opened at Hotel Tower Limited after the issue of the RFP. Access to the documents will be limited to those investors who have signed a letter of confidentiality undertaking and have paid a registration fee of US\$100.00 or G\$18,000.00.

[66] In particular, para 2.6 of the RFP contained a Cancellation clause as follows:

The Receiver-manager is not bound to accept any of the Proposals submitted and reserves the right to reject Proposals in whole or in part, and to discuss different or additional aspects with any investor, to terminate the process described in this RFP and in the Preliminary Information Package at any time before definite agreements are executed.

[67] In response to those advertisements, Cara paid USD100 (GYD18,000) and incurred costs associated with accessing documents relating to the operations of HTL. At page 2 of the Chief Justice’s judgment, he noted that on 23 December 1999, Cara submitted a proposal which was stated to ‘represent our expression of interest’. Indeed, the proposal was accompanied by a covering letter dated 23 December 1999 that stated: ‘This covering letter, attached to our proposal documents represent our expression of interest on behalf of Cara Investments Limited’. Further, at page 3 of the Chief Justice’s judgment, he observed that Cara applied for and was granted an extension up to 12 January 2000 to submit its proposal.<sup>30</sup> No new date was thereafter fixed by Mr Ram for the opening of tenders, and no formal tender opening ever occurred. Cara filed action No 62/W on 25 January 2000. The several applications made to the courts by the parties, and the judgments of the courts have already been discussed.

[68] In addition, Cara’s proposal at Chapter 6 entitled ‘Conditions of Offer’ specified that the ‘Bid for Hotel Tower’ as described in the attached Bid Document was conditional on the following:

- (1) Due diligence by Cara Investments Ltd is carried out in a timely manner (see Chapter (VI) Required Time Frame)
- (2) After completion of due diligence and its verification process, then if Cara is selected as the “designated investor” after notification by the Receiver/Manager, terms of payment would apply.
- (3) The additional information as requested (see attached) has been made available to us before completion of due diligence process

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<sup>30</sup> The Court has considered whether on the evidence Cara submitted a different or further proposal or bid on 12 January 2000. By letter dated 30 December 1999, the Receiver wrote that following a request by a prospective investor he had granted an extension of time to 12 January 2000. In addition, at page 470 of 744 of the Record of Appeal, there is exhibited a document dated 12 January 2000 that records ‘Received one envelope Bids for Hotel Tower Limited’ and signed by the Receiver. There is, however, no evidential basis for treating that envelope as containing a different proposal or bid from that mentioned in the judgment of the Chief Justice at page 2. (see [67]). The only proposal from Cara to the Receiver that is exhibited and was the subject of much discussion before this Court is the proposal bearing the date ‘December 1999’. There is no evidence that any other proposal or bid was submitted by Cara to the Receiver on 12 January 2000. It is important however to emphasise that whether Cara’s bid was submitted on 23 December 1999 or 12 January 2000 makes no difference to this Court’s decision.

- (4) Cara Investments Ltd. would only be prepared and in a position to be considered as your “Designated investor” after we have completed our due diligence process.

[69] The due diligence required time frame mentioned at cl (1) was set out in Chapter 5 of Cara’s proposal under the heading ‘Due Diligence Requirements’. Cara noted that their required time frame to carry out the due diligence was 15 working days. Cara further indicated that two teams from Trinidad were expected to arrive in the second week of January 2000 to start their process and to complete their due diligence. Cara therefore proceeded to set out the time frame that it required as opposed to the time frame specified by the Receiver in the RFP. For example, Cara proposed that the period for the completion of due diligence and its verification process would commence on 5 January 2000 and conclude on 27 January 2000, as against the Receiver’s time frame which was 11 – 18 January 2000. Cara further proposed that negotiations would be completed with an agreement by 8 February 2000, with the completion of the transaction by 15 February 2000, whilst the Receiver proposed approval on 27 January 2000 and completion of the transaction on 5 February 2000.

[70] As to the significance of cl (4) of the ‘Conditions of Offer’ contained in Cara’s proposal, we endorse the reasoning expressed by Eboe-Osuji J in his concurring opinion. Cara had indicated at cl (4) that it would only be prepared and be in a position to be considered as the Receiver’s ‘designated investor’ after it had completed its due diligence process. It should be noted that the RFP had contemplated due diligence prior to selection and additional due diligence for the successful bidder thereafter. Accordingly, we agree with Eboe-Osuji J that Cara gave the impression that they envisaged a different due diligence regime, and that impression was reinforced by Cara’s insistence that it was not prepared to be considered the ‘designated investor’ until it had undertaken the due diligence described in the ‘Conditions of Offer’. In that light, Cara’s cl (4) was open to the interpretation that it did not wish its proposal to be considered until it had first concluded the due diligence described in its conditions.

[71] In all the surrounding circumstances, the Court has concluded that a process contract or Contract A never arose in this case. The Court has taken into account that (i) Cara's proposal dated December 1999 was explicitly described as an 'expression of interest' (ii) Cara sought an extension of time to 12 January 2000 (iii) before any further documents were submitted by Cara, whether on 12 January 2000 or otherwise, Cara filed action No 62/W on 25 January 2000, alleging that contractual and/or collateral contractual relations between the parties arose on the submission of its tender, and that the Receiver acted unfairly and uncommercially, and in breach of contract (iv) Cara's proposal was conditional on the matters raised in Chapter 6 'Conditions of Offer' (v) Cara's proposal appeared more in the nature of a counterproposal introducing a new time frame for due diligence, and (vi) Cara's cl (4) of its 'Conditions of Offer' was open to the interpretation that it did not wish its proposal to be considered until the conclusion of due diligence. It also seems to the Court that Cara's commencement of the High Court proceedings on 25 January 2000 was not only premature but may have disrupted the tendering process and the possible formation of Contract A.

[72] The Court is therefore of the view that Cara never submitted a proposal which amounted to an acceptance of an offer, or was capable of giving rise to a process contract or Contract A. By labelling the tender an 'expression of interest' and imposing the 'Conditions of Offer' contained in Chapter 6, Cara made clear that they did not intend to be party to a process contract or Contract A at this preliminary stage.

[73] As noted earlier, the Cancellation clause at para 2.6 of the RFP expressly reserved to the Receiver the right to reject proposals in whole or in part and to terminate the process described in the RFP at any time before definite agreements were executed.

[74] Canadian jurisprudence recognises that an issuer of a request for proposals is entitled, if it so chooses, to include within the tender documentation an 'escape clause' variously described in the case law as an exclusion, exemption, privilege,

or cancellation clause. Such clauses operate in different ways depending on their wording, the context and the structure of the tendering process. For example, a privilege clause may stipulate that the lowest or any tender would not necessarily be accepted. In the case of an exclusion clause, the request for proposals may include a clause preventing any bidder from making a claim for breach of the tendering process. A cancellation clause, by contrast, typically preserves the issuer's discretion to bring the tender process to an end without incurring liability to bidders, provided that no Contract A has been formed. The overarching objective of these clauses is to limit or eliminate potential exposure to claims arising from the conduct of the tendering process. They allow the issuer to be shielded from liability in circumstances where commercial, financial, or operational considerations make it prudent to reserve the right to withdraw, cancel, or refrain from awarding the tender.

[75] The case of *MJB* was examined in some detail earlier in this judgment and provides useful guidance on the construction of escape clauses. The Supreme Court of Canada considered the proper approach to the construction of a privilege clause. In *MJB*, the tender documents had included a privilege clause that the lowest or any tender would not necessarily be accepted. The court underscored that the issue here was whether the inclusion of a privilege clause in the tender documents allowed the Respondent to disregard the lowest bid in favour of any other tender, including a non-compliant one. The court observed that the privilege clause was only one term of Contract A and had to be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties. Accordingly, the privilege clause did not override the obligation to accept only compliant bids, because on the contrary, there was compatibility between the privilege clause and this obligation.

[76] In addition, in *Tercon*, the request for proposals included a broad exclusion of liability clause which essentially provided that no bidder shall have a claim for compensation of any kind whatsoever. The majority expressed the view that the

exclusion clause did not protect the Ministry from *Tercon*'s claim for damages arising from the Ministry's dealing with an ineligible bidder, let alone from its breach of the implied duty of fairness to bidders. The Supreme Court of Canada articulated a three-step test for construing an exclusion clause: (1) determine whether the clause, properly interpreted, covers the breach; (2) if it does, determine whether the clause is unconscionable at the time the contract was formed; and (3) even if consensual and applicable, consider whether the court should refuse to enforce it for overriding public policy reasons. In addition, at [64], Cromwell J, writing for the majority, set out legal principles applicable to the construction of such clauses, that is to say, such clauses should be interpreted not in isolation, but in harmony with the rest of the contract and in light of its purposes and commercial context:

The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

[77] Furthermore, at [71] of *Tercon*, Cromwell J considered what was necessary for an exclusion clause to be effective. He emphasised that clear language was necessary to exclude liability for breach of such a basic requirement of the tendering process, that is to say, the implied obligation to treat all bidders fairly and equally, which was consistent with the goal of protecting and promoting the integrity of the bidding process. It is therefore clear to this Court that escape clauses ought to be strictly construed.

[78] We also agree with Jamadar and Eboe-Osuji JJ that the principle of good faith applies to escape clauses as an overarching principle of contract law. In the circumstances of the present case, however, where there is no compliant bid or Contract A, we do not think it necessary to consider the impact of the Cancellation clause set out at para 2.6 of the RFP.

**Issue 3: Whether there Exists in Guyana a Separate Duty on the Part of a Receiver to Act Fairly and in Good Faith?**

[79] Before this Court, Mr Datadin on behalf of Cara, submitted that, even in the absence of a process contract or Contract A or any other binding contractual obligations, there existed in this case a separate duty on the part of the Receiver to act fairly and in good faith. Mr Datadin contended that pursuant to the Receiver's duty to act fairly and in good faith, the Receiver was under an obligation to notify bidders that the RFP process had been brought to an end and that they had been unsuccessful.

[80] Section 278 of the Companies Act of Guyana<sup>31</sup> provides that:

A receiver or receiver-manager of a company appointed under an instrument must –

- (a) act honestly and in good faith; and
- (b) deal with any property of the company in his possession or control in a commercially reasonable manner.

[81] In Guyana, therefore, the receiver's duty to act in good faith enjoys clear statutory recognition. Burgess J in his text *Commonwealth Caribbean Company Law*<sup>32</sup> makes the point that although under such legislation the receiver is subject to an express, overriding statutory duty (or statutory command) to act honestly and in

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<sup>31</sup> Cap 89:01.

<sup>32</sup> Andrew D Burgess, *Commonwealth Caribbean Company Law* (Routledge 2013) 465.

good faith, there is no express statutory delineation of the nature and content of this duty.

- [82] Good faith has long been understood as a foundational standard governing the conduct of receivers, informing both the manner in which their powers are exercised and the purposes for which those powers are invoked. Acting in good faith involves obligations that go beyond mere honesty. The receiver must act without improper or ulterior motives, must exercise all statutory and contractual powers for their proper and intended purpose, and must conduct themselves in a manner that is fair, impartial, and even-handed. Central to this standard is the requirement that stakeholders be treated consistently, fairly, and without discrimination.
- [83] There is no principled basis for limiting the duty of good faith solely to questions of motive or honesty. In appropriate circumstances, the duty may also require the receiver to take positive steps to ensure procedural fairness. This can include, where fairness so demands, duties to notify or inform affected parties of decisions or proposed courses of action, as well as a duty to give reasons sufficient to enable stakeholders to understand the basis on which the receiver has acted. Recognising these obligations as aspects of the overarching duty of good faith ensures that the receiver's conduct remains transparent, accountable, and aligned with the just administration of the receivership.
- [84] It is evident that Cara never pleaded the existence of any separate duty of good faith requiring the Receiver to notify or communicate that the RFP process had ended and that Cara's proposal had been unsuccessful. In fact, Cara did not raise this specific issue of notification until its oral submissions before this Court. Such a pleading was necessary to afford the Respondents a fair opportunity to address the allegation. In these circumstances, Cara cannot maintain its contention that the Receiver breached any duty of good faith. Cara is therefore not entitled to damages or any other relief in this matter.

## **Disposition**

[85] This appeal is therefore dismissed, and the order of the Court of Appeal dismissing the Appellant’s appeal with costs is affirmed. The Appellant shall pay to each of the Respondents standard costs in accordance with r 17.15(3)(b) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024.

## **JAMADAR J:**

### **Introduction**

‘No point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void.’<sup>33</sup>

‘[I]n contracts of all kinds, it is of the highest importance that courts of law should compel the observance of *honesty* and *good faith*.’<sup>34</sup>

[86] In 1766, in between the decisions in *Aleyn v Belchier* (1758)<sup>35</sup> and *Mellish v Motteux* (1792),<sup>36</sup> in *Carter v Boehm*,<sup>37</sup> Lord Mansfield unequivocally stated that in English law *good faith* is a principle *applicable to all contracts*. *Carter v Boehm* was an insurance case dealing with concealment and non-disclosure, but Lord Mansfield felt no constraint in stating in relation to the principle of good faith: ‘The governing principle is applicable to all contracts and dealings.’<sup>38</sup> He applied this governing principle of good faith to the circumstances of the case before the court, because in that context doing so ‘is to prevent fraud, and to encourage good faith.’<sup>39</sup> And he gave no indication that the principle of good faith as applied in English contract law ought to be restricted. However, its subsequent incremental application in contract law to particular types of contracts, contractual provisions, and contractual relationships, is an artifact of the common law method.<sup>40</sup>

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<sup>33</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 28 ER 634 at 637 (Lord Keeper).

<sup>34</sup> *Mellish v Motteux* (1792) Peake 156, 170 ER 113 at 313–314 (Lord Kenyon).

<sup>35</sup> *Aleyn* (n 33).

<sup>36</sup> *Mellish* (n 34).

<sup>37</sup> (1766) 3 Burr 1905, 97 ER 1162.

<sup>38</sup> *ibid* at 1164.

<sup>39</sup> *ibid* at 1165.

<sup>40</sup> See, in the Canadian context, *Bhasin v Hrynew* [2014] 3 SCR 494 at [42] – [56].

[87] It would seem to me, as a matter of pragmatic contractual common sense and customary business practice, and certainly in contemporary commercial transactions, that parties expect and presume good faith dealings to be normative – certainty in relation to *the performance* of contracts. It is important, however, to clarify that, *arguendo*, the principle *may* not necessarily or presumptively always apply in relation to *the formation* of all types of contracts, and as this aspect does not arise directly on the factual matrix in this matter, the opinions offered are focused on performance.<sup>41</sup>

[88] Few involved in Caribbean commerce would contest, I believe, that essential to the performance of all contractual relationships is trust, and trust is paradigmatically built upon honesty and fairness (honest and fair dealing) - which are critical aspects of good faith. After all, contracts are essentially relational, made between or among two or more parties, with ascribed and accepted duties, undertakings and responsibilities that shape and dictate agreed performance, expectations and outcomes. It would be antithetical to commercial practice to suggest that unfair or dishonest dealing could somehow be acceptable to how business is conducted between contracting parties. Such an acceptance would be contrary to the constitutional principle and value of legality (a foundational principle of democracy and the rule of law), and therefore, *a fortiori*, contrary to contractual public policy.

[89] The Canadian Supreme Court, in a seven-panel unanimous decision (*Bhasin v Hrynew*), opined as follows (albeit in Canadian contexts): ‘Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm’s length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce.’<sup>42</sup> However, Caribbean courts are seemingly still hesitant and unsure as to whether the principle of good faith is integral to all contractual relationships. In my opinion it is, and clearly so in relation to the performance of contracts. And this case is an

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<sup>41</sup> Note, at the formation stage, parties contracting who are at arm’s length and of equal bargaining power are free to represent their interests and agree terms and are presumed to do so without misrepresentation or fraud.

<sup>42</sup> *Bhasin* (n 40) at [60].

opportunity to demonstrate its applicability in the context of private law commercial tenders, as this Court has already done in relation to the performance of other types of contracts.

[90] The material facts and procedural history are recited in the lead judgment of Rajnauth-Lee J. There is no need to repeat them in detail here. I propose to share my views on one area of law that this appeal raises, that is, whether a submission of a bid can give rise to enforceable contractual relations between the contractor and tenderer/bidder.

[91] In essence and insofar as is relevant for the issue that this opinion explores, the following are noteworthy. On 9 April 1999, the Bank of Nova Scotia ('BNS' or 'the Bank') appointed Christopher Ram as Receiver of Hotel Tower Ltd ('HTL') under three debentures executed by HTL in favour of BNS. This appointment was subsequently confirmed by the High Court. Also in 1999, the Appellant, Cara Investments Ltd ('Cara'), sought to acquire the assets of HTL, which had been advertised by the Receiver through a Request for Proposals ('RFP') for the purchase of the assets of HTL.

[92] Thus, in December 1999 and in response to the RFP, Cara submitted a proposal, describing its submission as an expression of interest made on condition of its completion of a due diligence assessment and the provision of further information. All of which conditionalities were duly provided for in the RFP. Cara also paid the prescribed registration fee and incurred costs associated with accessing documents relating to the hotel's operations and in order to submit an unconditional offer. Up to this point Cara was following the bid process. Indeed, in furtherance of this, Cara applied for and was granted an extension to 12 January 2000 to submit its final proposal.

- [93] However, circumstances overtook the process – Cara commenced proceedings in the High Court on 25 January 2000,<sup>43</sup> naming the Receiver as Defendant and later joining the BNS as an added Defendant. In this action, Cara alleged that following the publication of the RFP by the Receiver, contractual and/or collateral contractual relations arose between itself and the Defendants upon the submission of its proposal, the payment of the prescribed registration fee, and its participation in the tender process. Although, up to this point Cara had not submitted its final bid nor sought any further extensions to do so. Therefore, they were no longer bid-compliant. And were in fact now in default of compliance.
- [94] Cara contended in these proceedings that the Receiver acted unfairly, uncommercially, and in breach of the RFP by among other things, failing to consider Cara’s bid and aborting the tender process without lawful justification. It further alleged a breach of legal and contractual duties owed to it, including a duty to act fairly and impartially and to give due consideration to valid and compliant bids. Cara claimed that these acts deprived it of an opportunity to acquire HTL, and it sought declaratory relief, injunctive relief, and damages for breach of contract, misrepresentation, and loss of opportunity.
- [95] Indeed, on an application for interim relief, and by order entered on 4 June 2001, Cara obtained an interim injunction restraining the Receiver from awarding or allocating the purchase of HTL otherwise than in accordance with the RFP. On that application, the Receiver also gave undertakings to the Court not to proceed further with the tender process pending the outcome of the action.
- [96] Thus, a final bid was never submitted by Cara, nor was there any further action taken on the RFP by the Receiver, and therefore no formal tender opening occurred whether pursuant to the RFP or at all.

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<sup>43</sup> Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 7 June 2012) 284.

## Issues

- [97] The substantive claim was heard by Chang CJ (Ag). On 7 June 2012, he dismissed Cara's claim in its entirety. In so far as it is relevant for this opinion, he held that the RFP constituted no more than an invitation to treat and that Cara's proposal, being expressly conditional and dependent upon due diligence and further steps, did not amount to a definite or unconditional offer capable of acceptance. Further, that in the absence of any offer and acceptance, no contractual or collateral contractual obligations arose between Cara and either the Receiver or the Bank.
- [98] The Chief Justice also held that the Receiver, acting as agent of the Bank, owed no contractual duty to Cara, that the tender process could lawfully be terminated, and that no duty of fairness or obligation to consider tenders arose in the circumstances of a private commercial receivership. The claims for misrepresentation, breach of contract, and damages for loss of opportunity were accordingly unsuccessful.
- [99] Cara appealed the decision of Chang CJ (Ag).<sup>44</sup> On 7 November 2024, the Court of Appeal dismissed the appeal and affirmed the reasoning and conclusions of the Chief Justice. The Court of Appeal upheld the Chief Justice's finding that the RFP issued by the Receiver constituted an invitation to treat and that Cara's proposal, being expressly conditional and dependent upon due diligence and further steps, did not amount to a definite offer capable of acceptance. Therefore, in the absence of an offer and acceptance, no contract or collateral contract arose between Cara and the Respondents, and the payment of a registration fee or the accessing of documents by Cara to process its bid did not alter that conclusion.
- [100] The Court of Appeal further held that the Receiver was entitled to terminate or abort the tender process, that no obligation or duty in law arose to consider or accept Cara's proposal, and that principles of fairness applicable to public law tenders did not govern a private commercial receivership.

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<sup>44</sup> Record of Appeal, *Cara Investments Ltd v Ram* (n 1).

[101] In the context of Caribbean private law commercial tenders with certain characteristics, this opinion interrogates what are the legal principles governing (i) the tender processes, (ii) invitations for expressions of interest, (iii) the submission of bids (conditional or final), and (iv) the formation of contractual and/or collateral contractual obligations arising out of the tendering process.

[102] Further, and in the circumstances of this case, this opinion will draw conclusions on whether the Receiver was under an obligation, whether arising contractually (by way of process or collateral contracts), through implied terms, or by way of commercial tender best practice, to duly consider all valid and compliant bids and to act fairly, reasonably and in good faith in processing them. And whether the Receiver acted unlawfully when he failed to consider or respond to Cara's proposal and failed to inform the Appellant of the outcome of the tender process (on an assumption that Cara had submitted a valid and compliant bid). And finally, did those failures deprive Cara of a genuine opportunity to acquire and manage HTL.

### **Disposition**

[103] I have read the opinions of Rajnauth-Lee and Eboe-Osuji JJ. I agree with Rajnauth-Lee J that: i) the courts were not deprived of jurisdiction (the issue estoppel point; ii) tender process contracts are a part of Caribbean common law, provided certain requirements are satisfied; iii) such process contracts apply equally to public procurement and private commercial tenders; iv) in this case no such tender process contract arose; v) good faith is a foundational standard in relation to both tender process contracts generally and pursuant to statute to the conduct of receivers; and vi) the appeal should be dismissed. My position on the operation of cancellation clauses in tender process contracts aligns with that taken by Rajnauth-Lee and Eboe-Osuji JJ, however one route by which I arrive there is through an explicit application of fundamental constitutional principles (which I have applied generally throughout my analysis).

[104] I also agree with Eboe-Osuji J that i) the issue estoppel point raised in this appeal fails; ii) the justification for tender process contracts lies in ‘*the normative anchor of integrity and business efficacy*,’ and is intended ‘*to give fairness and good faith legal sanction to that stage of the bidding process*;’<sup>45</sup> iii) a tender process contract ‘*will automatically result when a compliant bid is tendered*;’<sup>46</sup> and iv) that the good faith principle applies robustly to exclusion/cancellation/privilege clauses as an overarching organising principle of contract law.

[105] In my opinion no process contract came into being, because a fully compliant bid was never in fact submitted by Cara. There is therefore no ascribable liability on the Respondents/Receiver.

[106] In December 1999 and in response to the RFP i) when Cara submitted a proposal, describing its submission as an expression of interest made on condition of its completion of a due diligence assessment and the provision of further information; ii) duly paid the prescribed registration fee; iii) incurred costs associated with accessing documents relating to the hotel’s operations; and iv) did so in order to submit a subsequent unconditional offer, up to this point Cara was *preliminary-stage* bid-compliant. This was what the tender process contemplated, and Cara was adhering to that process. However, *preliminary-stage* compliance does not amount to a compliant bid.

[107] Cara applied for and was granted an extension to 12 January 2000 to submit its final proposal; yet it never submitted its final bid nor sought any further extensions to do so. *Preliminary-stage* compliance compels performance of mutual obligations throughout subsequent stages under a process contract, and in this regard, Cara failed. Therefore, they were no longer bid-compliant. And were, in fact, and after 12 January, in default of compliance as no final bid was ever submitted.

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<sup>45</sup> See [195], [196] (emphasis added).

<sup>46</sup> See [208] (emphasis added).

[108] Thus, since the existence of a fully compliant bid is an essential prerequisite for the formation of a private law commercial tender process contract, and since that never in fact crystallised in this matter, no process contract came into being.

### **Analysis**

[109] There is a public policy justification for developing Caribbean contract law to include the recognition and inclusion of *process contracts* into the common law governing private law commercial tenders, provided these demonstrate certain characteristics.

[110] There are four bases for developing contract law in Guyana to recognise and declare the existence of such process contracts: i) the Constitution; ii) conventional principles of contract law and case law; iii) statute (this case involves the appointment of a receiver under the Companies Act, Cap 89:01); and iv) pragmatic commercial realities and expectations. Further, because this is a policy based common law development and notwithstanding the commercial principles of freedom to contract and privity of contract, parties to private commercial tenders that meet the qualifying criteria cannot *opt out* (contractually or otherwise) of process contract obligations (by way of exclusion/ cancellation/ privilege clauses or otherwise), unless there are reasonable grounds for doing so, ameliorating terms, and subject to any relevant public policy considerations.

[111] In principle, the basic qualifying criteria for the possible creation of such process contracts are as follows. First, a formal tendering process. Second, evidence of an intention to create legal relations in relation to the tendering process (discerned from the prescribed terms, structure and process). Third, a compliant tender/bid. Thus, where there is an invitation to tender which amounts to a unilateral offer, which is accepted by submission of a compliant tender/bid, a tender process contract comes into being. It is the submission of a compliant tender (recognising and acknowledging expenses incurred in doing so, including any fees paid by the tenderer/bidder) that constitutes the consideration for the process contract arising

from the invitation to tender. In these circumstances there emerge, as essential terms of this process contract, a reasonable expectation that a valid and compliant tender/bid will be duly processed and treated fairly, reasonably and in good faith as circumscribed by the terms of the tender.

[112] A valid and compliant tender/bid is one which is capable of acceptance in law. However, there may be nuances: if, for example, the tender process is structured in stages, and the stated criteria are satisfied accordingly, culminating finally in a compliant bid. That is, a process contract may also arise where there is compliance with preliminary stages that contractually compels performance of mutual obligations throughout subsequent stages under the process contract – *and provided there is continuous stage-to-stage compliance culminating in a final compliant tender/bid.*

[113] In this context, a process contract arises automatically upon submission of a final valid and compliant tender/bid; and this can occur where there is compliance with preliminary stages that contractually compel continuous performance of mutual obligations throughout subsequent stages – *but only when a final fully compliant bid is submitted.*

[114] Whether a process contract arises is to be determined ultimately at the time when the fully compliant tender/bid is submitted. If one does arise, then at that time the rights of the parties under the process contract crystallise. This process contract obliges the treatment of all tenders and bids fairly, reasonably, and in good faith, and in accordance with the performance terms of the tender.

[115] Freedom to contract has limits, and there is an implied term that parties are expected to perform a contract. Furthermore, there are certain *fundamental obligations*, arising from the *fundamental ingredients* of a contract, that go to the very nature and integrity of a contract and that must be performed and cannot be arbitrarily or

unreasonably opted out of. Thus, there is an implied term that parties must carry out the fundamental obligations in the performance of a contract.

[116] Where there is an invitation to tender, tendering (or the tender process) is one of, if not the most fundamental ingredient(s). The intention to create legal relations is driven by the singular and core objective to select and award a tender (following an agreed process). Once a tender process contract comes into being, there are therefore fundamental obligations that arise around the core process of tendering and good faith is implied in the performance of those obligations. This good faith standard of performance is an objective one, and includes, necessarily and as part of the integrity of a tender process contract, a duty to consider and assess compliant bids. It is in this context that exclusion/cancellation/privilege clauses must be viewed. Such clauses are not easily conceivable as a part of the *fundamental ingredients* and constitutive of *fundamental obligations* in a tender process contract.

[117] A party that requests a tender/bid lays down a process to be followed. A bidder/tenderer is obligated to follow that process. If done, a process contract arises and the tender process must be followed with due regard for contractual fundamental obligations and implied good faith principles.

### **Constitutional Justifications**

[118] I offer these constitutional justifications at the beginning of this analysis, aware that some may prefer a more conventional contract law-based grounding. There is such a grounding that I will come to in due course and that can stand on its own. But I think it is important to begin with the Constitution. After all, the constitution is the supreme law in Guyana and as such constitutional principles are not just directive of state agencies, and its values permeate and create the entire legal order.

[119] On first principles, the justification for both the creation and content of a tender process contract is based on the principle of legality, grounded as it is in the rule of

law. In Caribbean constitutional states, like Guyana, the primary source of legality is the Constitution. The basic deep structure constitutional principle of the rule of law<sup>47</sup> informs the entire legal order including private contractual relationships.<sup>48</sup> Through the rule of law, the principle of legality and its correlates, fundamental fairness and good faith, permeate the legal order.<sup>49</sup> In short, the principle of legality is grounded in the sovereignty-supremacy principle of Guyanese constitutionalism.

[120] In *Belize International Services Ltd v Attorney General of Belize*,<sup>50</sup> this Court emphasised that legality is a substantive constitutional value, and that the common law must be developed in a manner consistent with it. Wit J and I treated legality as a principle that goes to the root integrity of the legal system, recognising that contractual relations, including commercial ones, cannot be insulated from the legal order in which they operate<sup>51</sup> – the sea in which they swim (confirmed most recently by this Court in its 2025 decision in *Clifford v LCW Investments, LLC*).<sup>52</sup>

[121] In *Belize International Services*, I articulated the concept of constitutional basic deep structure, explaining that certain values such as the rule of law and accompanying principles such as legality, fairness, reasonableness and good faith, are not optional norms but foundational commitments that shape the entire legal system.<sup>53</sup> It was held that when the State engages in commercial contracts, those values apply directly. The Court emphasised the State’s duty to act fairly, reasonably, and in good faith with its contracting parties, demonstrating how constitutional principles can shape contract law.

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<sup>47</sup> *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109; *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 AJ (GY), [2022] 2 LRC 491; *Controller of Supplies v Gas Tomza Ltd* [2025] CCJ 16 (AJ) BZ.

<sup>48</sup> Record of Appeal, *Cara Investments Ltd v Ram* (n 1).

<sup>49</sup> *ibid.*

<sup>50</sup> [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109.

<sup>51</sup> *ibid.* At [16] – [18] (Wit J) – in contract law there is a duty to act fairly, honestly and in good faith. At [41] (Anderson J) – the private law of contract is grounded in the rule of law. At [354], [356] (Jamadar J) – the rule of law is a substantive concept and there is an obligation to deal with contracting parties fairly, honestly, openly and with full disclosure – in good faith. At [357], [368] (Jamadar J) – the principle of legality goes to the integrity of the legal system.

<sup>52</sup> [2025] CCJ 17 (AJ) BZ at [136]: ‘In Anglo-Caribbean independent constitutional democracies, the rule of law is part of the basic deep structure and is constitutive. Inherent in the rule of law in these liberal democracies is the principle of legality (as is the enjoyment of avowed fundamental rights and freedoms). A principle which, because of the supremacy-inconsistency concept, governs the interpretation and application of all laws and the behaviours of all persons. The rule of law is linked to freedom in these constitutions, and the import is that persons are free to conduct their affairs within the contexts of rule of law legality’ (footnotes omitted).

<sup>53</sup> *ibid.* at [191] and citing *Guyana Geology and Mines Commission v BK International Inc* [2021] CCJ 13 (AJ) GY, [2022] 2 LRC 491, ‘This Court has emphasised that the principle of legality is intrinsic to democratic governance. The lawful purpose principle is therefore grounded in core Belizean constitutional first principles (footnote omitted).’

[122] *Belize International Services Ltd* was a case dealing with state contracts, but because the principle of legality permeates and creates the entire legal order, the concomitant values of fairness, reasonableness and good faith are of a more general application. *A fortiori*, in private commercial contexts, courts are not precluded from allowing these values to guide the incremental development of the common law and are indeed expected to do so. There is thus an unavoidable and developmental intersection of public constitutional law and private contract law.

[123] This approach is directly relevant to this case. The legality principle supplies the normative foundation for recognising minimum standards of conduct in structured commercial contractual processes. A tender process that is, say, arbitrary, dishonest, fundamentally unreasonable or unfair or lacking in *bona fides*, raises the same concerns identified in *Belize International Services Ltd*. Concerns whether technical or legalistic interpretations and applications of existing legal norms, in the context of tenders, could undermine the integrity of the prevailing legal system - in this instance, the commercial legal order. A legal order that is imbued with constitutional standards.

[124] In *Guyana Geology and Mines Commission ('GGMC') v BK International Inc*,<sup>54</sup> a case concerning the public advertisement for bids to rehabilitate a road and issues arising out of the bidding process, this Court also explained the relevance of the rule of law as an inviolable foundational principle of Caribbean constitutionalism.<sup>55</sup> Wit J expressly stated that the Court's custodial role<sup>56</sup> over legality and fairness is not confined to public law remedies, but extends to ensuring that the law as a whole, statutory and common law, remains coherent with constitutional values:<sup>57</sup>

... constitutional values and principles, being part of the Supreme Law, permeate the entire Guyanese legal order. Consequently, in Guyana (as in

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<sup>54</sup> [2021] CCJ 13 (AJ) GY, [2022] 2 LRC 491.

<sup>55</sup> *ibid* at [75] (Jamadar J): 'The rule of law is part of the inviolable basic deep structure of Guyanese constitutionalism.'

<sup>56</sup> *ibid* at [56]: 'But the law must be in tune with the Constitution, which not only imbues the law with meaning but also commands that it must be complied with. ... And it is the duty of the courts to put it into effect.'

<sup>57</sup> *ibid* at [55]. Citing this Court's decisions in *Bisnauth v Shewprasad* [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339 at [53], and *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100 at [181] – [183] (emphasis added).

other constitutional democracies) the interpretation and application of statutory law is thereby brought under the inescapable influence of constitutional law. This is not limited to public law; *private law also requires to be looked at through a constitutional lens*. And not only written law but also “unwritten” common law cannot escape the scrutiny of constitutional law.

[125] In similar vein, I opined that: ‘As a core constitutional and democratic value and principle, the rule of law mandates the principle of legality’.<sup>58</sup> And further:<sup>59</sup>

Thus, the rule of law permits an interrogation on its own terms, both in relation to methodology and substance, that transcends (even as it encompasses) the principle of statutory legality *per se* and *includes basic rule of law norms such as fairness, certainty, reasonableness, good faith, even proportionality and so on*.

[126] GGMC illustrates how courts, especially apex courts, are duty bound to shape legal doctrines to uphold, among others, the principles of legality and fairness throughout the legal order and in so doing, to reinforce constitutional fundamentals. The law of contract, and commercial tendering, are not exempt.

[127] This approach accords with well-established common law understandings of the adjudicative role of apex courts. John McCamus (2023) explains, in his analysis of the Supreme Court of Canada’s contract jurisprudence, that appellate courts in the modern common law era perform not only a dispute-resolution function but also a legitimate law-development function, particularly where existing doctrine risks becoming disconnected from its underlying values or modern commercial realities.<sup>60</sup> McCamus also identifies good faith as a persistent theme in this developmental role, noting that the Canadian doctrinal evolution reflects an effort to realign contract law with contemporary expectations of fairness, honesty, and just outcomes while maintaining legal certainty.

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<sup>58</sup> GGMC (n 54) at [76].

<sup>59</sup> *ibid* at [77] (emphasis added).

<sup>60</sup> McCamus, ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ (n 10).

- [128] The CCJ's articulation, in *Belize International Services Ltd v Attorney General of Belize* and *Guyana Geology and Mines Commission v BK International Inc*, of the impact throughout the Caribbean's legal order of constitutional deep structure and rule of law values, sits comfortably within this orthodox understanding of the apex court's function. And it provides jurisprudential legitimacy for the incremental common law policy development of contract law to include process contracts in the context of private commercial tenders, And it equally justifies an insistence on reasonableness, fairness and good-faith constraints where commercial realities, expectations and practices have evolved beyond traditional bilateral exchange models (a '*promise for a promise*', built on historical English private law notions of reciprocity and exclusive freedom to contract on agreed terms).
- [129] If legality and fairness are constitutional fundamentals, and if private law doctrines must operate coherently within constitutional norms, courts are entitled to shape private law (including the law of contract) in ways that reinforce these values. This creates a duty on courts to ensure that Caribbean contract law should evolve in line with constitutional values such as fairness and good faith.
- [130] Thus, in private commercial tendering, and more conventionally in terms of contract law, if the factual matrix (documents, circumstances, conduct) is such that it can reasonably be inferred (an objective standard) that the parties intended to create legal relations in relation to the tendering process (a meeting of the minds), that if a valid and compliant bid was made it would be duly considered and treated fairly and with integrity (according to the tendering process agreed on), that can give rise to a *collateral* process contract which binds the parties.
- [131] However, and going even further, in constitutional democracies such as Guyana, even if it was not specifically agreed or the inference was not readily apparent that if a bid was made it would be considered and treated fairly and with integrity, and because of the conjoint effects of the rule of law and the principle of legality, if the

three basic qualifying criteria stated above are met,<sup>61</sup> then a *pure* process contract will come into being as explained.<sup>62</sup>

[132] Significantly, and because this is a constitutionally value-laden policy based common law development and notwithstanding the commercial principles of freedom to contract and privity of contract, parties to private commercial tenders that meet the qualifying criteria *cannot opt out of or disclaim* (contractually or otherwise) process contract obligations (by way of exclusion/ cancellation/ privilege clauses or otherwise), unless there are reasonable grounds for doing so, ameliorating terms, and subject to any relevant public policy considerations.

### **Case and Conventional Contract Law Justifications**

[133] Commonwealth common law does not uniformly impose a universal duty of good faith in contract law, but it increasingly recognises good faith obligations in defined contexts, including where there are structured tendering processes.<sup>63</sup> This context-specific approach is thought to preserve commercial certainty while preventing arbitrary or dishonest or unreasonable or unfair conduct, and provides a coherent basis for recognising process contracts in private commercial tendering.

[134] The traditional English position is that there is no overarching duty of good faith – though as I have demonstrated at the beginning of this opinion, this was not always the case. English common law is conventionally described as having rejected a generalised duty of good faith in favour of certainty and freedom of contract.

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<sup>61</sup> At [111] above: The basic qualifying criteria for the possible creation of such process contracts are as follows. First, a formal tendering process. Second, evidence of an intention to create legal relations in relation to the tendering process (discerned from the prescribed terms, structure and process). Third, a compliant tender/bid.

<sup>62</sup> At [113] above: In these circumstances, a process contract arises automatically upon submission of a valid and compliant tender/bid; and where there is compliance with preliminary stages that contractually compels performance of mutual obligations throughout subsequent stages – provided and only when a final compliant bid is submitted. As to whether a process contract arises is to be determined at the time when the tender/bid is submitted. If one does arise, then at that time the rights of the parties under the process contract crystallise. This process contract obliges the treatment of all tenders and bids fairly, reasonably, in good faith, and in accordance with the terms of the tender.

<sup>63</sup> *Ron Engineering & Construction (Eastern) Ltd* (n 13); *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, *Blackpool and Fylde Aero Club Ltd* (n 5); *Hughes Aircraft Systems International* (n 6); *Tercon Contractors Ltd* (n 17); ; *Bhasin* (n 40) at [56]; McCamus ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ (n 10).

However, express good faith obligations are enforceable where they are sufficiently certain. Where parties expressly agree to negotiate or perform obligations in good faith, courts will enforce such clauses if their content is workable and anchored to the contract.<sup>64</sup>

[135] English courts have also recognised that obligations of honesty and good faith may be implied as a matter of fact where they reflect the parties' presumed intentions and the commercial context. Even where a contract confers wide exercise of contractual discretion, the modern English common law constrains its exercise to prevent abuse, arbitrariness, or capriciousness, and instead demands that decisions be taken honestly and in good faith.

[136] Moreover, there is increasing recognition that the public law requirements of rationality and *Wednesbury* reasonableness are applicable where contractual discretion is to be exercised, demonstrating the alignment of public and private law policy approaches to the development of contract common law. All of this was affirmed by the UK Supreme Court in 2015, in *Braganza v BP Shipping Ltd*.<sup>65</sup>

[137] Indeed, in 2013, in *In Yam Seng Pte Ltd v International Trade Corp Ltd*,<sup>66</sup> Legatt J in the High Court of England and Wales, in what has become something of a *locus classicus*, rejected the idea that English law is hostile to good faith,<sup>67</sup> explaining that obligations of honesty<sup>68</sup> and fidelity to the parties' bargain,<sup>69</sup> as aspects of good faith, may be implied where consistent with the presumed intentions of honest commercial parties.<sup>70</sup> For him, and as a matter of construction:<sup>71</sup>

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<sup>64</sup> *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd* [2021] EWHC 3015 (CH).

<sup>65</sup> [2015] 4 All ER 639 at [20] – [28].

<sup>66</sup> [2013] 1 All ER (Comm) 1321.

<sup>67</sup> *ibid* at [153]: 'I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.'

<sup>68</sup> *ibid* at [135].

<sup>69</sup> *ibid* at [139].

<sup>70</sup> *ibid* at [119] – [154].

<sup>71</sup> *ibid* at [144].

... the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. ... The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.

[138] With this background in mind, it is unsurprising that there are Commonwealth jurisdictions that have developed their jurisprudence to recognise and enforce autonomous process contracts in private law commercial tenders. Examples are Canada<sup>72</sup> and Australia.<sup>73</sup> The UK and New Zealand approach the matter somewhat differently and through the lens of collateral contracts and implied terms.<sup>74</sup> However, South Africa, India and jurisdictions in the Caribbean are generally more equivocal and do not always expressly recognise autonomous process contracts in private law commercial tenders.

[139] In these latter jurisdictions, and again generally, tender invitations are ordinarily treated as invitations to treat, with enforceable contractual relations arising only upon acceptance of a bid. Courts in Caribbean jurisdictions have also generally regulated tender processes through public law and constitutional principles rather

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<sup>72</sup> In *Ron Engineering & Construction (Eastern) Ltd* (n 13), the Supreme Court of Canada established that the submission of a compliant tender gives rise to a binding unilateral process contract (Contract A) between the owner and the tenderer, rendering the bid irrevocable for the stipulated period and obliging the owner to treat bidders fairly and in accordance with the tender terms. Acceptance of the tender then forms the performance contract (Contract B). In *MJB Enterprises Ltd* (n 14), the Court confirmed that Contract A includes an implied obligation to accept only compliant bids, which is not displaced by a privilege clause, and that breach may attract expectation damages. In *Tercon Contractors Ltd* (n 17), the Court held that awarding a contract to an ineligible bidder breached Contract A and clarified the three-step framework governing exclusion clauses.

<sup>73</sup> In *Hughes Aircraft Systems International* (n 6), the Federal Court held that a tender process contract arose upon lodgement of the tender, containing an implied obligation particularly where the purchaser is a public authority, to conduct the tender fairly and in accordance with the stated assessment criteria. Departure from those criteria constituted a breach. However, the existence of a tender process contract depends on ordinary principles of contract formation and may be excluded by clear tender terms. In *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726, no process contract was found where the tender conditions expressly denied the creation of legal relations and reserved unfettered discretion to the principal. By contrast, in *Cubic Transportation Systems* (n 23) despite an express disclaimer, the Court held that a tender process contract existed on balance, implying an obligation of honesty, reasonableness, and fairness, though no breach was ultimately established.

<sup>74</sup> In *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, the House of Lords held that a referential bid was invalid as it undermined the integrity of a sealed-bid tender process. The invitation to tender was construed as an offer to accept the highest fixed bid, giving rise to a unilateral contract upon submission of a compliant bid and establishing that clear tender promises may create binding obligations. In *Blackpool and Fylde Aero Club Ltd* (n 5), the Court of Appeal recognised a collateral contract obliging the authority to consider all timely and compliant tenders, introducing a two-contract analysis whereby the tender process may generate enforceable obligations distinct from the substantive contract formed on acceptance. Subsequent UK authority has applied this principle cautiously, requiring clear evidence of an intention to create legal relations, as illustrated by *Adferiad Recovery Ltd v Aneurin Bevan University Health Board* [2021] EWHC 3049 (TCC), where no process contract was implied due to express disclaimers and lack of demonstrated intention. New Zealand law adopts a similar approach. In *Palmerston North City Council* (n 24), the Court held that a tender process contract arose where detailed tender requirements objectively demonstrated an intention to create legal relations, obliging the council to award the contract to the lowest compliant tenderer.

than by recognising autonomous private law process contracts, though there are no definitive authorities excluding the possibility of such contracts arising.<sup>75</sup> However, there are a few decisions that have explored the possibility of process contracts in tendering.<sup>76</sup> Of these decisions, one is especially noteworthy. In *Lutchmeesingh's Transport Contractors Ltd v NIDCO Ltd*,<sup>77</sup> the issue ultimately became whether an implied duty of good faith under a tender process contract required the *invitor* to provide detailed or sufficient reasons when withdrawing from negotiations. Kokaram J concluded i) a tender process contract existed and included a duty of good faith; but ii) that duty was limited in scope and did not extend to a requirement to justify or explain the decision to withdraw from negotiations.

[140] Given the constitutional justifications explained, I am of the opinion that the thread of jurisprudence that this Court should follow in its development of Caribbean jurisprudence in this area should align with the Canadian approaches. Indeed, even without constitutional underpinnings, and following more conventional contract law principles, one arrives at the same position.

[141] In Canada, the concept of a *process contract*, also referred to as 'Contract A', in tendering, represents a contractual relationship formed upon the submission of a compliant bid in response to an invitation to tender, imposing obligations on the party inviting bids, and indeed, also on the bidder. Happily, this distinct conceptual contractual framework aligns with the applicable constitutional approaches described in this opinion.

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<sup>75</sup> Caribbean courts have consistently declined to recognise any doctrine equivalent to Canada's Contract A or to treat the submission of a tender as automatically giving rise to a binding process contract. In *National Contractors Ltd v National Development Corp* LC 2000 HC 10 (CARILAW), (9 April 2000), the Court held that a statutory corporation's tender decisions were matters of public law reviewable only on administrative law grounds, with no contractual obligations arising at the pre-award stage. This public law orientation was reinforced in *Galloway v Minister of Communications Works and Labour* (MS HC, 6 November 2015) and *Build-Rite Construction & GM Associates v NIF Resort Management Co Ltd* [2015] JM SC 21, JM 2015 SC 21 (CARILAW) where procurement duties flowed from statute, fairness, rationality, and legitimate expectation rather than any implied tender process contract. In private tendering, courts likewise apply orthodox contract principles. In *Freight Management Ltd* (n 26) and *Clinitech Co Ltd* (n 29), the Court rejected the existence of any interim or automatic process contract absent clear offer, acceptance, intention, and certainty. The Court of Appeal in *Montpellier Farm Ltd v Antigua Commercial Bank* (AB CA, 26 October 2015) emphasised that contracts are not lightly to be implied, while *Lutchmeesingh's Transport Contractors Ltd* (n 28) confirmed that any pre-award obligations must be narrowly confined to express tender terms. Collectively, these authorities show that Caribbean tender law is governed by statutory public law controls and orthodox contract doctrine, not by an implied or automatic process contract.

<sup>76</sup> See *Freight Management Ltd* (n 26); *Caribbean Cement Co Ltd* (n 27); *Lutchmeesingh's Transport Contractors Ltd* (n 28); *Clinitech Co Ltd* (n 29).

<sup>77</sup> *Lutchmeesingh's Transport Contractors Ltd* (n 28).

[142] In *R (Ontario) v Ron Engineering & Construction (Eastern) Ltd*,<sup>78</sup> the Supreme Court of Canada held that the submission of a compliant bid creates a binding process contract between the owner and the bidder. The court held that a unilateral contract, Contract A, arose automatically upon the submission of a tender between the contractor/bidder and the owner, whereby the tenderer could not withdraw the tender for a specified period of time, after which, if the tender had not been accepted, the deposit could be recovered by the tenderer.

[143] The principal term of contract A was the irrevocability of the bid, and the corollary term was the obligation of both parties to enter into a construction contract, Contract B, upon the acceptance of the tender. The deposit was required to ensure the performance by the contractor/tenderer of its obligations under Contract A. The test to determine whether a process Contract A was to be imposed, was when the tender was submitted, not at a later date, and at that time the rights of the parties under Contract A crystallised, at least in circumstances where the tender was capable of acceptance in law. This contract obliges the owner to treat all bidders fairly and in accordance with the tender terms. Acceptance of a bid then forms Contract B, the substantive performance contract.

[144] Subsequent Canadian Supreme Court decisions refined the doctrine. In *MJB Enterprises Ltd v Defence Construction (1951) Ltd*,<sup>79</sup> the court confirmed that Contract A includes an implied obligation to accept only compliant bids. Submitting a tender in response to an invitation can create a separate process contract, distinct from the performance contract, if the parties intended this outcome.

[145] In this case, Contract A arose because the Respondent's invitation implied an offer to consider valid bids, and the Appellant's submission constituted acceptance and consideration. The tender documents did not require awarding Contract B to the

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<sup>78</sup> *Ron Engineering & Construction (Eastern) Ltd* (n 13).

<sup>79</sup> *MJB Enterprises Ltd* (n 14).

lowest bidder but implied a term that only compliant bids would be accepted, based on the presumed intentions of the parties and the need for business efficacy. Importantly, an existing privilege clause did not override this obligation. By awarding Contract B to a non-compliant bidder, the Respondent breached Contract A. It was held that the Appellant was entitled to expectation damages for lost profits, as the loss of Contract B was foreseeable and not too remote.

[146] In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*,<sup>80</sup> the Supreme Court addressed the vexing matter of exclusion clauses and clarified the scope of liability under Contract A. The court held that British Columbia breached its tendering contract by awarding a highway construction contract to a bidder that partnered with an ineligible firm, contrary to the RFP's terms. Although the RFP contained an exclusion clause barring claims for damages, the court ruled that the clause did not apply to this breach. It adopted a three-step framework for exclusion clauses: (1) determine if the clause, properly interpreted, covers the breach; (2) assess whether the clause was unconscionable at formation; and (3) consider whether public policy requires non-enforcement. Applying this test, the clause did not shield British Columbia and *Tercon* was entitled to damages for lost profits.

[147] Thus, over a period of about 30 years, beginning with the *Ron Engineering* case, the Supreme Court of Canada has made it clear that Canada's approach formally recognises process contracts, imposing clear duties of fairness, responsibility, transparency and accountability in private commercial tendering relationships – all of which may be captured by what can be described as good faith requirements.

[148] There are however, constraints to good faith obligations in private law commercial tender process contracts. A consistent challenge arises in the context of whether parties, in the exercise of freedom to contract, may exclude or limit implied duties of good faith through clear and express drafting. Courts have generally emphasised

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<sup>80</sup> *Tercon Contractors Ltd* (n 17).

that good faith, even when expressly stipulated, is ordinarily concerned with honesty, and therefore with fidelity to the agreement and adherence to the agreed contractual framework, rather than with open-ended notions of reasonableness or fairness detached from the contract's structure.

[149] In Caribbean contexts, and because of constitutional imperatives, the opting out of or disclaimer of good faith obligations in a tender process contract, is more circumscribed. As explained, parties to private law commercial tenders that meet the qualifying criteria cannot *opt out of or disclaim* (contractually or otherwise) process contract obligations (by way of exclusion/cancellation/privilege clauses or otherwise), unless there are reasonable grounds for doing so, ameliorating terms, and subject to any relevant public policy considerations. In this regard, and in more conventional contractual terms, the notions of *fundamental obligations* arising from the *fundamental ingredients* of a contract are apt, as explained above.

[150] Thus, these two considerations of constraint and disclaimer, find a fair balance in the distinction between recognising good faith as a legitimate contractual constraint and allowing it to expand into a general supervisory jurisdiction over commercial decision-making. While parties may seek to narrow good-faith obligations by express drafting, they cannot unequivocally remove its operation once a process contract has come into being.

### **CCJ Jurisprudence**

[151] This Court's jurisprudence and reasoning in *Sandy Lane Hotel Co Ltd v Cato*<sup>81</sup> and *Arjoon v New Building Society Ltd*,<sup>82</sup> though occurring in the context of employment contracts, can be applied more broadly – and should be. The important development of the law in these cases is to be found in the Court's discussions about implied obligations of honesty, trust, and confidence arising from the particular nature of the contractual relationships and the reasonable expectations created by

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<sup>81</sup> [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW).

<sup>82</sup> [2024] CCJ 7 (AJ) GY.

the nature of those contracts – the intention of the parties inferred from, among other things, contractual context.<sup>83</sup>

[152] Also, in *Insurance Corp of Belize Ltd v Kahtal Resorts International Ltd*,<sup>84</sup> I explicitly treated good faith as an underlying concept to be implied into certain contracts, including insurance contracts (in that case), because of the intention of the parties, the nature of the contractual relationships, the structure of the contracts, and the potential vulnerability of a class of parties (the insured).<sup>85</sup>

[153] The core elements in approaches are arguably, and by analogy, equally applicable to performance in other relational and process-based contracts such as private law commercial tenders. What this Court considered critical in these cases was the nature of the contractual relationships, the structure of the contractual arrangements, and the potential vulnerability of a class of parties to the contracts. The three baseline criteria for establishing a process contract in commercial tendering fit easily within this Court’s developmental approaches to recognising good faith as an essential term of certain types of contracts.

[154] Further, and even though it may not be completely apt in this appeal given the limited opportunities of submissions on the point, this Court is seemingly moving towards a common law contractual policy approach (i) acknowledging that good faith contractual performance - that parties generally must perform their contractual duties honestly, reasonably and fairly and not capriciously or arbitrarily, is a general organising principle of the common law of contract; and (ii) that there is a common law duty which applies to all contracts to act honestly, fairly and in good faith in the performance of contractual obligations.

[155] In doing so, this Court is aligning itself further with the Canadian jurisprudence on the point: that good faith as a general organising and underpinning principle is a

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<sup>83</sup> *ibid* at [27] – [29], [85] – [86]. See also *Sandy Lane* (n 81) at [68] – [71].

<sup>84</sup> [2024] CCJ 5 (AJ) BZ, BZ 2024 CCJ 3 (CARILAW).

<sup>85</sup> *ibid* at [73] – [76], [82] – [83].

performance standard that brings essential coherence and certainty to the law, which is consistent with contemporary commercial realities as a fundamental element of the common law of contract.<sup>86</sup> It remains to be seen whether, or maybe more appropriately when, this step will be taken.

### **Statutory Justifications**

[156] The Guyana Companies Act<sup>87</sup> expressly embeds good faith as a governing standard of private commercial conduct, requiring honesty, fairness, and respect for reasonable expectations in the exercise of legal and contractual power. The Companies Act expressly requires directors and officers to act honestly and in good faith with a view to the best interests of the company, and to exercise the care, diligence and skill of a reasonably prudent person.

[157] In so as receivers are concerned, the position in Guyana is explicit. Section 278 of the Companies Act of Guyana<sup>88</sup> provides that:

A receiver or receiver-manager of a company appointed under an instrument must –

- (a) act honestly and in good faith; and
- (b) deal with any property of the company in his possession or control in a commercially reasonable manner.

[158] That duty of good faith is applied objectively and enforced by courts in purely commercial disputes (*Clifford v LCW Investments, LLC*).<sup>89</sup> My analysis in *Clifford* makes clear that good faith is a justiciable standard governing the exercise of private commercial power, grounded in the principles of legality and lawful purpose. These principles of legality and lawful purpose, though grounded in statute

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<sup>86</sup> *Bhasin* (n 40).

<sup>87</sup> Cap 89:01, s 96.

<sup>88</sup> Cap 89:01, s 278.

<sup>89</sup> *Clifford* (n 52).

in *Clifford*, have more fundamental roots in Caribbean constitutionality and in the general common law.

[159] The existence of statutory good faith obligations in Guyana, undermines any suggestion that good faith is too vague or incompatible with commercial certainty. On the contrary, Caribbean legislatures have expressly chosen good faith as a fundamental standard in commercial governance, reinforcing the legitimacy of its incremental application in the commercial spheres of contract law.

### **Conclusion**

[160] The recognition and enforcement of process contracts in private law tendering adds certainty to the law, that is aligned and consistent with contemporary Caribbean commercial realities and expectations. Equally important, is the recognition that the principle of good faith also applies robustly to the performance of tender process contracts and indeed to the performance of all contracts, and most importantly, that it is aligned with and anchored in Caribbean constitutionalism. And, where there is a breach of contract, the failure to meet good faith standards can result in contractual liability.

[161] Freedom to contract in a constitutional democracy does not countenance contracting *outwith* core constitutional core values, such as the principle of legality. Furthermore, the irrevocable value of dignity - the intrinsic worth of each and every person, constrains how we can, and how we are allowed, to deal with each other. We are part of a larger community, and to perpetuate that community in sustainable ways, demands the regulation of behaviour. This applies as much to ‘commerce’ – ‘commercial communities’, as to other forms of community life. In this regard, good faith, reasonableness and fairness are all constituent elements for creating, sustaining and stabilising relationships in the systems of commerce, including the legal systems.

[162] In the Co-operative Republic of Guyana, which intentionally sets about to create ‘a republican community’<sup>90</sup> with socialist ideals,<sup>91</sup> the pursuit of individual goals must be balanced against respect for others and their aspirations. And in such a democratic society, both must operate in regulated contexts that create continuously viable economic systems - even though the greatest good for the greatest number may not always align exactly with respect for the autonomy of each individual member of the society.

[163] In this matter, the Court ultimately concludes that no process contract ever arose between Cara and the Receiver, because Cara never submitted a valid and compliant final bid. Although Cara initially complied with the preliminary requirements under the RFP, its failure to submit the final tender by the extended deadline meant that the essential prerequisite for the formation of any contractual, collateral, or implied obligations was never satisfied.

[164] Without a compliant bid, there was no contractual foundation (whether express, implied, or arising from commercial tender practice) that could impose upon the Receiver any obligation to consider or evaluate Cara’s proposal, or to act towards Cara according to standards of fairness, reasonableness, or good faith in processing tenders.

[165] Consequently, the Receiver’s failure to consider or respond to Cara’s incomplete proposal, or to notify Cara of the outcome of the tender process, did not amount to unlawfulness. The tender process never advanced to a stage at which any duty to communicate outcomes or to assess bids was engaged, particularly in circumstances where the process was overtaken by the commencement of litigation and the subsequent undertakings that froze further steps. The absence of a compliant bid meant that no rights crystallised in Cara’s favour that could ground

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<sup>90</sup> Preamble to the Constitution of the Co-operative Republic of Guyana Act, Cap 1:01.

<sup>91</sup> Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, art 1.

a complaint about the manner in which the Receiver managed or concluded the tender process.

[166] For the same reason, Cara cannot claim to have been deprived of any genuine opportunity to acquire or manage HTL. Whatever commercial aspirations Cara may have held were contingent upon its own compliance with the tender requirements, and because there was no compliance, no legally recognisable opportunity ever matured. Any loss asserted by Cara is therefore not attributable to the Receiver but to the fact that Cara never placed itself in the position required to have its bid considered.

[167] In these circumstances, I would also dismiss this appeal.

## **EBOE-OSUJI J:**

### **Introduction**

[168] I have read in draft the lead judgment of Rajnauth-Lee J. I concur with her disposition of the appeal and with her reasoning. I concur in particular with her conclusions to the effect that good faith is part of contract law; that Contract A automatically comes into existence upon the submission of a compliant bid in a tendering process; and, that once a compliant bid is submitted in a tendering process, the parties are generally not free to opt out of or disclaim the express or implied terms of Contract A by reliance on cancellation clause, unless there are reasonable grounds for doing so. I have also read in draft the concurring opinion of Jamadar J. As his conclusions are to the same effect, I similarly concur with him.

[169] I write now to explain my concurrence fully given the importance of the legal principles animated by this case. There are three parts to my own opinion. Part I deals with the preliminary matter of Appellant's arguments on issue estoppel. Part II engages aspects of contract law provoked by counsel's submissions in relation to

the tendering process; and Part III deals with the unique circumstances of this case, considered against the background of the principles discussed in Part II.

### **Part I: The Matter of Issue Estoppel**

[170] As part of the Appellant's appeal, it was argued that the judgment of Chang CJ was wrong to have held (on 7 June 2012) that there was no 'Contract A' between the Appellant and the First Respondent. [The type of contract called 'Contract A' is discussed in Part II of this opinion.] The basis of that argument was that in an earlier decision (rendered on 25 April 2002), Moore J held that there was a Contract A. That being the case, argued the Appellant, the question regarding the existence of Contract A was *res judicata* relative to the inquiry that Chang CJ was seised of. The argument is surprising. I agree with Rajnauth-Lee J's disposition of the question and her reasoning in that regard.

[171] It is entirely unremarkable that Chang CJ found that there was no Contract A although Moore J had earlier declined to strike out a Statement of Claim alleging the existence of Contract A. There was no inconsistency between the two outcomes, because the orientations of the inquiries resulting in the two different outcomes were indeed different.

[172] From the perspective of Chang CJ's inquiry and judgment, Moore J's ruling never engaged issue estoppel concerning the existence of Contract A. Moore J's ruling merely disposed of a preliminary procedural motion seeking: '[a]n order striking out the plaintiff[s] Statement of Claim and an order dismissing the plaintiff[s] action ... on the ground that the Statement of Claim: a) discloses no reasonable cause of action; b) is frivolous and vexatious; and, is an abuse of the process of the court.'<sup>92</sup> In support of that motion, the First Respondent averred in part as follows:

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<sup>92</sup> Record of Appeal, 'Respondent's Originating Notice of Motion' 135.

9. I have been advised by [counsel] that the plaintiffs indorsement of claim contain *vague generalities* and *no cause of action known to the Law of Guyana*.
10. That I have concluded from the plaintiff[’s] said action *an attempt [...] to frustrate the expeditious conclusion of the matters* relating to the debts owed by the hotel to the Bank of Nova Scotia *with the sole and predominant purpose of purchasing the hotel at a price below its true value.*<sup>93</sup>

[173] The assertion that a Statement of Claim discloses ‘no cause of action’ known to law requires keeping in mind that a ‘cause’ of legal action in that context means: ‘[t]he matter about which a person goes to law; a legal case; (the case of one party in) a lawsuit; a side or position in a legal dispute.’<sup>94</sup> It entails, in other words, a matter that puts judicial inquiry into motion. In the context of a motion to *strike out* a Statement of Claim, it means nothing more than that the Statement of Claim discloses no *allegation*—mark the word ‘allegation’—that implicates a right recognised by law, which a court of law may proceed to examine. In other words, a justiciable claim. A successful strike-out motion would promptly bring the case to an end: no judicial inquiry may then be conducted on the merits of the allegation(s) made in the Statement of Claim. But an unsuccessful strike-out motion means that the court must proceed and conduct judicial inquiry on the merits of the allegation(s) made in the Statement of Claim.

[174] In the ruling upon which the Appellant relies for the issue estoppel argument made before us, Moore J appropriately situated the matter before him on the fact that the ‘Defendants filed an Originating Notice of Motion seeking an Order to strike out the Plaintiff[’s] Statement of Claim and to dismiss the action on the ground that the Statement of Claim discloses no reasonable cause of action against the Defendant and is frivolous and vexatious and an abuse of the process of the Court.’<sup>95</sup>

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<sup>93</sup> Record of Appeal, ‘Christopher Ram’s Affidavit in Support of Motion to Dismiss/Strike Out Action’ 140 (emphasis added).

<sup>94</sup> See *Shorter Oxford English Dictionary on Historical Principles* (6th edn, OUP, 2007) vol 1 365.

<sup>95</sup> See Moore J’s ruling on the motion to strike out the Statement of Claim. Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 25 April 2002) 198.

[175] Following his review of the arguments made on both sides, Moore J boiled the strike-out motion down to what he called a ‘fallacy.’ As he put it: ‘The fallacy in the argument on behalf of the Defendant is that it assumes the Plaintiffs *allege* a contract directly involving the making of an award. *The contract disclosed on the Statement of Claim* relates to the obligation of the Defendant to act fairly, transparently and reasonably in the business sense. The Plaintiffs *allege* that he did not. The Plaintiffs’ expectation was for a fair chance or opportunity, not a certainty.’<sup>96</sup>

[176] Rejecting that fallacy, the learned judge held—under the segment of his ruling titled ‘Decision’—‘that the *Statement of Claim* discloses a *cause of action* i.e. a contract between the Plaintiffs and the Defendant. The motion is accordingly refused.’<sup>97</sup> He was only identifying ‘a cause of action’ that warranted a judicial inquiry. He was not determining that ‘cause of action’ on the merits.

[177] It should thus be all too clear, both on the face of the ruling and on an elementary understanding of the judicial process, that the *issue* in Moore J’s ruling on the motion was limited to the question whether the *allegations* made in a *Statement of Claim* revealed a matter—i.e. a cause of action—which should trouble the judicial system with a substantive inquiry on the merits of the cause.

[178] Perhaps, one way to explain the significance of Moore J’s ruling is that it only reset the Statement of Claim and the claims in it back to the condition in which the litigation would ordinarily be, as if the strike-out motion had not been made. In that condition, the case would proceed to the substantive inquiry in the ordinary way. That is to say, the ruling merely removed an obstacle or objection to the inquiry being made on the merits of the allegations made in the Statement of Claim. In that sense, Moore J must be taken to have said nothing more than this: ‘Mr Ram, I refuse to strike out Cara’s Statement of Claim. That Statement of Claim reveals a cause of

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<sup>96</sup> Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 25 April 2002) 203 (emphasis added).

<sup>97</sup> *ibid* (emphasis added).

action or justiciable allegations that should go to trial so that the allegations in it can be inquired into in the ordinary way.’ Having removed that obstacle against the case proceeding in the ordinary way, the case rightly proceeded in the ordinary course of civil litigation before Chang CJ—as if the strike-out motion resulting in Moore J’s ruling had not been made at all.

[179] Moore J’s ruling could not, therefore, be reasonably understood as having any bearing on the substantive inquiry on the merits of the case. That substantive inquiry was the subject of the judgment of Chang CJ. In the end, beyond dismissing the attack against the Statement of Claim so that Chang CJ could try the case on the merits, Moore J’s ruling had absolutely no further importance or value in the proceedings before Chang CJ.

[180] The Appellant is not assisted by the supporting argument made on its behalf that the Respondent did not appeal Moore J’s ruling. Any appeal to speak of in that regard would necessarily only concern the procedural issue as to whether (or not) the *allegations* made in the *Statement of Claim* revealed a ‘cause of action,’ etc. On no reasonable view could any such appeal engage the *merits* of those allegations following a judicial inquiry on the facts of the case, in the ordinary way.

[181] I would therefore dismiss the Appellant’s appeal on issue estoppel.

## **Part II: Aspects of Contract Law and the Tendering Process**

### **The Idea of an Ancillary Contract in the Bidding Process**

[182] I now turn to certain legal principles that the tendering process raises. They were the subject of much debate in the appeal. Mr Boston SC urged the Court to lay down some guiding principles that may assist those confronted with similar questions in the future.

[183] In the preface to his classic treatise published in 1879 on the law of contract, Sir William Anson observed that ‘[t]he law of contract so far as its general principles go has been happily free from legislative interference: it is the product of *the vigorous common sense of English Judges ...*’.<sup>98</sup> In that regard, the editors of a contemporary edition of *Chitty on Contracts* observe that ‘[t]he common law (including equity for this purpose) still provides the fundamental rules governing all aspects of the law applicable to contracts generally ...’.<sup>99</sup> Indeed, from all indications, the entire edifice of the common law of contract, as a regime of obligations arising from promise, was constructed from the ground up by common law judges over time.<sup>100</sup> Assumpsit, which received a favourable turning point in the *Slade’s Case*,<sup>101</sup> adjudicated in 1602 by ‘all the Justices of England, and Barons of the Exchequer,’<sup>102</sup> was a main beam of the structure.<sup>103</sup> These, of course, are unsurprising reprisings of a well-understood truism on the general development of the common law, only recently recalled in this Court’s case law.<sup>104</sup>

[184] As will become evident presently, the legal questions involved in the very transaction that occasioned the present appeal—i.e. the tendering process—aptly illustrate the handiwork of common law judges in shaping and reshaping the law of contract in its various aspects in other parts of the common law world.

[185] For present purposes, the story may begin with the classic case of *Spencer v Harding*.<sup>105</sup> Decided in 1869, it is famous for the proposition that a call for tender entailed nothing more than an ‘invitation to treat’—meaning an overture signalling

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<sup>98</sup> Sir William Anson, *Principles of the English Law of Contract* (Clarendon Press 1879) vi (emphasis added).

<sup>99</sup> H G Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1 para 1-003.

<sup>100</sup> See S J Stoljar, *A History of Contract at Common Law* (Australian National University Press 1975); A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press 1975); J Beatson, *Anson’s Law of Contract* (28th edn, OUP 2002) 10–17; M P Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, OUP 2012) ch 1; Beale (n 99) para 1-003.

<sup>101</sup> *Slade’s Case* (1602) 4 Co Rep 92 b, 76 ER 1074.

<sup>102</sup> *ibid* at 1075.

<sup>103</sup> See A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press 1975); S J Stoljar, *A History of Contract at Common Law* (Australian National University Press 1975) chs 3, 4; J Beatson, *Anson’s Law of Contract* (28th edn, OUP 2002) 13–16; M P Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, OUP 2012) 5–8.

<sup>104</sup> See *Massy Stores (Barbados) Ltd v Forde* [2025] CCJ 15 (AJ) BB at [79]–[90], [103]–[106].

<sup>105</sup> *Spencer* (n 9).

availability to start negotiating—and not an offer of contract that the tenderer accepted by making a bid. The proposition was more precisely stated thus:

In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.<sup>106</sup>

[186] The rule in *Spencer v Harding* remains valid as regards the ultimate contract that results substantively from the bidding process—now generally described as ‘Contract B’ (explained below). In that sense, *Spencer v Harding* is not contradicted by what came later, as discussed immediately below.

[187] More than a century later, there developed within the Commonwealth jurisdictions a tendency for the courts to recognise that the bidding process *can* occasion a preliminary contract preceding the substantive contract that preoccupied *Spencer v Harding*. From all accounts, that trend began in Canada. In the leading case of *R (Ontario) v Ron Engineering & Construction Ltd*,<sup>107</sup> the Canadian Supreme Court recognised that such a contract could be created and may be called ‘Contract A,’ as opposed to the substantive contract called ‘Contract B’. In contrast with subsequent cases, it was the tenderer that bore the brunt of that development in *Ron Engineering*.

[188] Ron Engineering & Construction Ltd submitted a CAD2.748 million bid for a construction project, paying the required bid deposit of CAD150,000. At the opening of the bids, it was discovered that Ron Engineering’s bid was by far the lowest of the eight tendered—lower by CAD632,000 than the second lowest bid. It occurred to Ron Engineering at that point that its bid contained an error. The employee that prepared and submitted the tender documents on its behalf had

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<sup>106</sup> *ibid* at 564.

<sup>107</sup> *Ron Engineering & Construction (Eastern) Ltd.* (n 13).

omitted to include an amount of CAD750,058 in their bid figure. But for that mistake, Ron Engineering's bid figure would have been a little over CAD3.498 million. Ron Engineering immediately informed the project owner of the mistake and requested to withdraw the bid. The project owner refused the request and awarded the contract to Ron Engineering as the lowest bidder. When Ron Engineering declined the contract, the project owner forfeited Ron Engineering's bid deposit of CAD150,000 in accordance with a term of the request for proposals ('RFP') and awarded the contract to the second lowest bidder. Ron Engineering sued to recover it. The trial judge ruled in favour of the project owner. Ron Engineering appealed successfully: the Court of Appeal held that the project owner could not accept the bid which it knew contained a significant error.

[189] The project owner successfully appealed, in turn, to the Supreme Court of Canada. The Court found that the tendering process involves two contracts: 'Contract A' and 'Contract B'. The first contract—Contract A—is a process or preliminary contract formed between the bid requestor and anyone who submits a compliant bid. The second contract—Contract B—is the substantive contract awarded to the winning bidder.

[190] As regards the formation of Contract A, the request for bids is an offer which is accepted upon the submission of a compliant bid. Given that a contract becomes binding upon the acceptance of an offer, it meant that Ron Engineering couldn't withdraw its compliant bid once Contract A was formed. On the facts of Ron Engineering's case, the legal position was not altered by the company's eventual realisation that its bid contained an error and its prompt communication of the mistake to the project owner. This was because the project owner, on the facts of the case, was unaware of Ron Engineering's mistake at the time Contract A was formed, which was at the time of Ron Engineering's submission of its bid. It was long afterwards—at the opening of the bids—that it occurred to Ron Engineering itself that its bid contained a mistake. By then, it was far too late for the mistake to vitiate Contract A on grounds of a mistake known to both parties.

[191] The unique importance of *Ron Engineering*, as a matter of law reform, is mainly in its recognition that a process or preliminary contract—Contract A—would be formed as part of the tendering process. Subsequent judgments along that line developed the law regarding the necessary terms that would be implied into Contract A: with the burden of those terms resting primarily upon the bid requestors. In that regard, the Supreme Court of Canada consistently held in the subsequent cases that a vital term to be implied into Contract A is the duty on bid requestors to treat all compliant bidders fairly, on equal terms, in accordance with the process set out in the RFP.

[192] About a decade later, in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*,<sup>108</sup> the English Court of Appeal, with Bingham LJ (as he then was) writing the lead judgment, similarly recognised the incidence of a ‘collateral’ contract as a feature of the bidding process. Later in New Zealand<sup>109</sup> and Australia,<sup>110</sup> such a preliminary contract has also been recognised and is alternatively termed ‘process contract.’

[193] In this appeal, then, the judges of this Court are confronted with the question of whether to bring their own ‘vigorous common sense’ to orient an important aspect of law of contract in the context of the bidding process in the Caribbean region, in the same way that the ‘vigorous common sense’ of judges in other parts of the Commonwealth has already directed the development of the common law of contract in the same domain of commercial transactions.

[194] I concur with Rajnauth-Lee and Jamadar JJ that it is entirely sensible to recognise the incidence of a collateral contract as a feature of the bidding process. The phenomenon recognises that the bidding process is just that: a *process*. The bidding process is not a bilateral engagement between only two sides. It is rather a multilateral process that rests on the defining feature of a competition—and

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<sup>108</sup> *Blackpool and Fylde Aero Club Ltd*. (n 5).

<sup>109</sup> See *Palmerston North City Council* (n 24). See also *Transit New Zealand* (n 25).

<sup>110</sup> See *Hughes Aircraft Systems International Inc* (n 6).

possibly one in which the competitors are likely to have expended much effort if not also costs. Iacobucci J of the Canadian Supreme Court rightly captured that underlying consideration in terms that ‘[t]he rationale for the tendering process ... is to replace negotiation with competition.’<sup>111</sup> That competition, he continued, entails certain risks for the tenderers who may not be awarded Contract B in the end, although they had been required to expend effort and money in preparing their tenders in accordance with strict specifications.<sup>112</sup> A tenderer may also be required to submit bid security, which (although returnable if the tender is not accepted) is a significant amount of money to raise and lock down for the period of time between the submission of the tender and the decision to award Contract B to another bidder.<sup>113</sup>

[195] The circumstances and promises of that process thus require the normative anchor of integrity and business efficacy.<sup>114</sup> That anchor rests on a legal obligation to operate in accordance with the explicit or implied promise entailed in the process, necessarily indicated in the RFP. Bingham LJ persuasively provided the litmus test of that promise as follows: ‘Had the [tenderer], before tendering, inquired of the [requestor] whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been “of course.” The law would, I think, be defective if it did not give effect to that.’<sup>115</sup> The defect, he correctly explained, would indeed entail ‘an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties.’<sup>116</sup> In a similar reasoning in *Martel Building Ltd v Canada*, the Canadian Supreme Court presumed that it is the intention of the parties that the bidding process implied a term of fairness and consistency in the assessment of the tender bids—no doubt the apparent point of Contract A—because of the ‘obviousness’ of the proposition ‘that the parties, if questioned, would clearly agree that this

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<sup>111</sup> See *MJB Enterprises Ltd* (n 14) at [41].

<sup>112</sup> *ibid.*

<sup>113</sup> *ibid.*

<sup>114</sup> See *Tercon Contractors Ltd* (n 17) at [67]; see also *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116 at [107]; *Martel Building Ltd* (n 15) at [88]; *MJB Enterprises Ltd* (n 14) at [41].

<sup>115</sup> See *Blackpool* (n 5) at 31.

<sup>116</sup> *ibid* at 30.

obligation had been assumed,' in view of 'the costs and effort associated with preparing and submitting a bid'.<sup>117</sup> Accordingly, '[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved.'<sup>118</sup> The implications of the failure to imply such a term in the bidding process include the risk that 'tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.'<sup>119</sup>

[196] The overriding purpose of such a collateral contract, therefore, is indeed to give fairness and good faith legal sanction at that stage in the bidding process. The general run of the case law seems to stress those norms particularly as a matter of equal opportunity for all compliant tenders to be considered on the same basis. It is in the very nature of any process held out as a competition. That duty of fairness also bears upon the relationship between the tenderer and the requestor, although that aspect of the duty is not uniformly emphasised in the case law. But the expense and effort of bidders fully bear it out.

### **'Contract A' as a Matter of Possibility**

[197] Rajnauth-Lee J observed in the lead judgment that '[i]t is important to underscore that a process contract or Contract A does not automatically arise *simply* because a tender has been submitted.'<sup>120</sup> Retaining the focus on the word 'simply,' I fully concur. Contract A arises only when a compliant bid is submitted, not *simply* because a bid is submitted. Certain observations are called for in that regard.

[198] There appears to have developed in the case law a marked tendency to express the recognition of Contract A in non-definite terms: a *possibility*. Indeed, the language seems to me at times much too chary to be helpful to the business community. Take

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<sup>117</sup> *Martel Building Ltd* (n 15) at [88].

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

<sup>120</sup> See at [63] above (emphasis added).

for instance, the following representative formulation employed in a leading Australian case:

The existence of a pre-award or process contract in tenders is not automatic. Whether or not a process contract exists depends on the intention of the parties: ... In an appropriate case a bilateral contract is formed with each tenderer who submits a complying tender. The contents of this bilateral contract depend on the intentions of the parties. The terms, express or implied, of the request for tender will be an important factor in determining the intention of the parties.<sup>121</sup>

[199] The language of the inaugural Canadian case law was unambiguous in stating that Contract A *would* result from a compliant tender. In *Ron Engineering*, Estey J notably wrote of the incidence of Contract A in terms such as: ‘This contract is brought into being *automatically* upon the submission of a tender’;<sup>122</sup> and ‘Contract A (being the contract arising *forthwith* upon the submission of the tender) comes into being *forthwith* and *without further formality* upon the submission of the tender.’<sup>123</sup> The pronouncements thus led Professor McCamus, a leading contract law scholar in Canada, to an understanding of the import of *Ron Engineering* in the following way: ‘The invitation [to tender] itself was considered to be an offer which, when accepted by the submission of a bid, constituted what was referred to by the Court as “Contract A”.’<sup>124</sup>

[200] Later judgments appear to have adopted language laden with an overabundance of caution. In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, for instance, Cromwell J, writing for the majority of the Canadian Supreme Court, said this: ‘Submitting a compliant bid in response to a tender call *may* give rise to a contract—called Contract A—between the bidder and the owner,

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<sup>121</sup> *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [109].

<sup>122</sup> See *Ron Engineering & Construction (Eastern) Ltd* (n 13) at 119 (emphasis added).

<sup>123</sup> *ibid* at 121 (emphasis added).

<sup>124</sup> McCamus (n 10) at 14. See David Miachika, Lauren Kristjanson and John Pratt, ‘Resolving Disputes Arising from the Bidding and Tendering Process’ (Borden Ladner Gervais LLP (BLG), 15 April 2016) 4 <[https://www.blg.com/-/media/Legacy-News-And-Publications/Documents/Publication\\_4476.pdf](https://www.blg.com/-/media/Legacy-News-And-Publications/Documents/Publication_4476.pdf)> accessed 10 March 2026 where similarly, a trio of lawyers from one of Canada’s leading law firms observed as follows: ‘According to the Court, Contract A *will crystallize* when an owner’s call for tenders is responded to by a bidder through submission of a compliant bid. Individual contracts will be entered into between the owner and each compliant bidder, governed by the terms of the call for tenders.’

the express terms of which are found in the tender documents. The contract may also have implied terms .... The key word, however, is “may”.<sup>125</sup> He cited a passage in *MJB Enterprises Ltd v Defence Construction (1951) Ltd* in which it is said that ‘[w]hat is important ... is that the submission of a tender in response to an invitation to tender *may* give rise to contractual obligations ...’.<sup>126</sup>

[201] With respect, the emphasis on ‘may,’ which underscores the statement of the principle in the language of possibility, especially when leaned upon the hackneyed *intention of the parties*,<sup>127</sup> is in my view worse than unnecessary. It is unnecessary because the motivating concern is not unique to the formation of Contract A anymore than it is to the formation of Contract B or, indeed, any other kind of contract. In other words, Contract A—as with Contract B or a contract of any class or kind—is equally susceptible of the possibility that the facts of a particular case may not legally support the formation of a contract in the first place; and, a contract initially formed or purported to have been formed may be vitiated as void, voidable or unenforceable, according to familiar principles of contract law. Why then emphasise the *possibility*, in a seemingly peculiar way in the discussion of the idea of Contract A, that the factual circumstances of a given case may not avail its formation?

[202] But the emphasis on ‘may’ is worse than unnecessary because it fosters, at least, uncertainty in the law. Its daunted bearing obscures a ready grasp of the intended concept. And, more than that, it may foster false hope. For, the emphasis may encourage legal advisers of firms issuing tender documents to suppose—perhaps ultimately in vain—that Contract A can be written out of the tender documents. The obscurity entails the chimera sensibly described by one commentator as follows:

The unsuccessful litigant is told that his objective—to exclude or limit liability, for example—can be achieved, but that he has simply failed to

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<sup>125</sup> *Tercon Contractors Ltd* (n 17) at [17] (emphasis added).

<sup>126</sup> *ibid.* See also *MJB Enterprises Ltd* (n 14) at [19] (emphasis added).

<sup>127</sup> See *MJB Enterprises Ltd* (n 14) at [19].

reach it on this occasion. The implicit invitation is to go away and try again, when in fact the court's true purpose is a substantive, distributional one: to prevent that particular thing from being done at all.<sup>128</sup>

[203] It is indeed difficult, in my view, to envision a 'tendering' process—properly so called—in which Contract B can result without a prior Contract A. With the essential element of *competition* removed from the process, the result would be an organic chain of bilateral negotiations. It is then not a tendering process. I thus see no reason to cast the proposition about the incidence of Contract A in the diffident terms of a mere *possibility*. The reason for that *possibility*—which is the implication of the duty of fairness and good faith—should justify a confident statement of the principle that a tender submitted in compliance with a request for such tender without more *will*, subject to well-understood principles of contract law, result in the ancillary contract generally known as Contract A.

[204] On the related question of what the law may recognise as proper terms for such a contract, I agree that the search must begin with the express terms of the tender documents<sup>129</sup> (which may be a request for tender, a request for proposals, a request for quotes or a similar document issued by the requestor) describing the objective of the transaction, the applicable conditions that invitees must meet, the timelines for doing so, and so on. The terms of Contract A may also include those implied by customary practice relating to the transaction in question or the presumed intentions of the parties compelled by considerations of business efficacy and transactional integrity<sup>130</sup>—provided that the presumption of intentions on these bases isn't detached from the intentions of the actual parties to the contract.<sup>131</sup>

[205] Even that last proviso (that the presumption of intentions of the parties is not detached from the intentions of the actual parties to the contract) may not

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<sup>128</sup> David Tiplady, 'The Judicial Control of Contractual Unfairness' (1983) 46 Mod L Rev 601.

<sup>129</sup> See *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116 at [30], [106]; *Martel Building Ltd* (n 15) at [81]; *Ron Engineering & Construction (Eastern) Ltd* (n 13) at 119.

<sup>130</sup> See *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116 at [30], [106]. See also *Ron Engineering & Construction (Eastern) Ltd* (n 13) at 119.

<sup>131</sup> See *MJB Enterprises Ltd* (n 14) at [29]. See also *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116 at [31].

meaningfully sustain the hope that it invites, the hope of a circumscribed judicial intervention. The futility of the hope may lie in the question whether there would be an occasion for litigation about the ‘contractual intention’<sup>132</sup> where the parties to the contract are in agreement as to what that intention is. It is their essential disagreement in that regard that occasions judicial intervention and the incidental need to imply terms.

[206] But what does it mean to imply terms to a contract, on the basis of their presumed intention? The idea runs, no doubt, on the rails of business efficacy. It is that ideal of business efficacy that directs what other terms—beyond those explicitly stated in the contract—may properly be implied into the contract because of the presumed intention of the parties.<sup>133</sup> MacKinnon LJ’s ‘officious bystander’ test classically captures what is proper to imply in a contract. It is ‘something so obvious that it goes without saying.’ As he put it:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while one of the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, “Oh, of course!”<sup>134</sup>

[207] Again, there is nothing about these elements that is peculiar to Contract A in the bidding process. They apply in any other kind of contract.

[208] All of which is to say, it is not necessary to speak of Contract A uniquely as something that only *may* result from the tendering process. It is safe enough to state the proposition in the more confident manner in which it was originally stated in *Ron Engineering*: Contract A *will automatically* result when a compliant bid is tendered in the process—subject, of course, to ordinary principles of contract law.

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<sup>132</sup> See Tiplady (n 128) at 606.

<sup>133</sup> See also a very useful discussion of the concept by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

<sup>134</sup> *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227.

## **Cancellation Clauses in Requests for Proposals**

[209] Clause 2.6 of the RFP in this case assumed a high profile at the hearing of this appeal. According to the clause:

The Receiver-manager is not bound to accept any of the Proposals submitted and reserves the right to reject Proposals in whole or in part, and to discuss different or additional aspects with any Investor, to terminate the process described in this RFP and in the Preliminary Information Package at any time before definitive agreements are executed.<sup>135</sup>

[210] It is something of a standard clause in tender documents. It is an escape clause that is also called a ‘cancellation clause’ (as in this case) or ‘privilege clause’ (in Canadian lexicon). Its purpose is to preserve for the bid requestor the prerogative of withdrawal from the process.

[211] Inevitably, that clause engages questions about freedom of contract. ‘The freedom of contract dogma,’ observed one commentator, ‘is the real hero or villain in the drama of the insurance cases, but it prefers to remain in the safety of the background if possible, leaving the actual fighting to consideration and to the host of other satellites—all of which is very often confusion to the audience which vaguely senses the unreality of the atmosphere.’<sup>136</sup> Professor Kessler’s observations about ‘freedom of contract’ in the context of insurance cases, is very much applicable in the context of the bidding process, especially as regards the operation of the privilege or cancellation clause. That is to say, cancellation clauses are undoubtedly amongst ‘the host of other satellites’ that fight the frontline battle for freedom of contract.

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<sup>135</sup> See Record of Appeal, ‘Hotel Tower: Request for Proposals’ 399.

<sup>136</sup> Friedrich Kessler, ‘Contracts of Adhesion—Some Thoughts about Freedom of Contract’ (1943) 43 Colum L Rev 629, 639.

### *Freedom of Contract*

[212] At the zenith of its influence in the 19th century,<sup>137</sup> ‘freedom of contract’ gained a blunt champion as a legal theory in the person of Sir George Jessel MR. In *Bennet v Bennet* (1876), a decision that ‘shocks the modern conscience, and indeed, probably shocked the conscience of many at the time,’ as Professor Atiyah put it,<sup>138</sup> Sir George unapologetically rendered judgment in favour of a loan shark who lent money at a usurious interest rate to a vulnerable man whom the Master of the Rolls was prepared to accept was an alcoholic who probably drank himself to death at the age of 36 while the loan remained unpaid.<sup>139</sup> Apparently, the debtor, Major Philip Bennet, was a ‘land-rich cash-poor’ member of the gentry who borrowed money in a series of transactions at an interest rate of up to 60 per cent. Upon his untimely death, the creditor sought to enforce the loan agreement against his estate. The deceased’s executors contested the transaction at that rate and offered instead to pay off the loan at 5 per cent interest rate. In the ensuing administration proceeding before Jessel MR, the executors introduced evidence ‘to the effect that Major Bennet had long been in the habit of drinking hard, and that this had led to his having two attacks of *delirium tremens*, one in the summer of 1874, and the other in Feb. 1875; that his intellect was enfeebled by drink, and his memory impaired, so that he had become prematurely old and a complete wreck, and incapable of business or of understanding what he was doing, and that he was likely to be easily taken in by any designing person; that he had for a year before his death given up the management of his household to his wife, and that he could not have understood that the interest which he had agreed to pay amounted to 60 per cent. per annum.’<sup>140</sup> Although the lender asserted that Bennet appeared to be in possession of his wits during their interactions, the rebuttal proved unnecessary, because Jessel MR declined to consider the merits of the case on either side of the issue of Bennet’s mental capacity. He considered instead that since there was no question of forgery raised against the promissory notes that evidenced the loans, it was up to the

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<sup>137</sup> See Beale (ed), *Chitty on Contracts* (n 99) para 1-031. See also J Beatson, A Burrows, Anson J Cartwright, *Anson’s Law of Contract* (30th edn, OUP 2016) 18.

<sup>138</sup> P S Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 388.

<sup>139</sup> *Bennet v Bennet* (1880-1881) 43 LT 246.

<sup>140</sup> *ibid* at 247.

executors to commence proceedings to set aside the loan transactions on grounds of fraud or insanity. Short of that, he held, the loan transactions could not be impugned. ‘Cases sometimes occur,’ said the Master of the Rolls, ‘in which men are urgently in need of money, but can only obtain it on the most onerous terms.’<sup>141</sup> His disinclination to consider evidence that Bennet was mentally impaired ironically did not prevent him from presuming that Bennet, though an alcoholic, was in firm possession of his wits when he executed the promissory notes. As Jessel put it:

I was told that he was in the habit of drinking, ...become mentally incapacitated and unable to understand what he was doing. But I will assume him to have been a drunkard; a man who has had delirium tremens may recover and take a strong dose [of remedy], and be able to write very firmly. A man may agree to pay 100 per cent if he chooses. There is no reason why a man should not be a fool. A man is allowed by law to be a fool if he likes. Suppose Major Bennet had gambled on the Stock Exchange, or at a gaming table, or had spent his substance in debauchery. A man may be a foolish man to do that, but still the law does not prevent him from being a fool.<sup>142</sup>

[213] Jessel was unimpressed with the executors’ offer to pay off the loan at the interest of 5 per cent. ‘[B]ut why should a usurer take 5 per cent.? He carries on a most disreputable trade, which no respectable person would carry on; therefore he must be paid for the loss of his character in carrying on such a business, as well as for the risk he runs of losing his money. Why should he do that for 5 per cent.? It is not reasonable.’<sup>143</sup> So there, for freedom of contract. An intellectual construct that must, in Jessel MR’s worldview, facilitate even ‘a most disreputable trade’!

[214] In a judgment of the same era and vein, Jessel MR delivered a dictum repeatedly quoted as a main blazon of the freedom of contract movement in the case law:

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<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.*

[I]f there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.<sup>144</sup>

[215] There was always the worry that even the proviso in Jessel MR's freedom of contract dictum—i.e. that the contract be seen to have been 'entered into freely and voluntarily'—didn't quite thrive in the neighbourhood of the more dominant propositions around it, possibly coloured by his *Bennet v Bennet* sentiment that the law doesn't prevent people from being fools. Notably, Lord Diplock was to restate the freedom of contract with no allusion to the proviso. He said:

A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words.<sup>145</sup>

[216] The failure to ask whether the contract in question had really been 'entered into freely and voluntarily' provoked understandable concerns that the 'phrase is now often used in such a way as to deny to one party what it actually claims to achieve for him.'<sup>146</sup> Indeed, one of the resonant indictments of the freedom of contract doctrine is its tendency to perpetuate inequality at the expense of traditionally disadvantaged persons who are equally entitled to the dividends of an integrated society. The experience satirised in Nobel laureate Wole Soyinka's poem 'Telephone Conversation'<sup>147</sup> is sufficiently reflected in the realms of

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<sup>144</sup> *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

<sup>145</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848.

<sup>146</sup> See Nicholas S Wilson, 'Freedom of Contract and Adhesion Contracts' (1965) 14 Int'l & Comp LQ 172.

<sup>147</sup> Wole Soyinka, 'Telephone Conversation' (All Poetry, 13 September 2012) <<https://allpoetry.com/poem/10379451-Telephone-Conversation-by-Wole-Soyinka>> accessed 10 March 2026.

jurisprudence.<sup>148</sup> There is a serious danger that such attitudes and conduct can be hidden behind the veil of contract freedom and cancellation clauses.

[217] Commenting on the consequences of the freedom of contract, Atiyah observed that ‘[t]hey bring, in particular, the recognition that some individuals are better equipped to exercise free choice than others, through natural aptitude, education, or the possession of wealth. And the greater is the scope for the exercise of free choice, the stronger is the tendency for these original inequalities to perpetuate themselves by maintaining or even increasing economic inequalities.’<sup>149</sup> That worry is typically, but not exclusively, encountered in contracts of adhesion, where the dominant party presents a contract document—with an exemption clause—which the counterparty was left with no real choice but to sign. The courts’ tendency was to enforce it merely because it was signed, with no concern about its fairness or good faith—or ‘economic justification’ as Atiyah would put it<sup>150</sup>—in the overall context of the transaction in question.

[218] Lord Denning’s 1982 judgment in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* memorialises the eventual waning of the charm of the freedom of contract ‘idol’. In a dictum that must be quoted at length, Lord Denning, in his classic style, described what he called ‘a bleak winter’ of contract law:

None of you nowadays will remember the trouble we had—when I was called to the Bar—with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. *No matter how unreasonable they were, he was bound. All this was done in the name of “freedom of contract”. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, “Take it or leave it”. The little man had no option but to take it. The big concern could and did exempt itself*

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<sup>148</sup> See, for instance, *Constantine v Imperial Hotels Ltd* [1944] 1 KB 693 (a case of racism); and *Timothy v Simpson* (1834) 6 C & P 499, 172 ER 1337 (a case of antisemitism).

<sup>149</sup> Atiyah (n 138) 6.

<sup>150</sup> *ibid* 702.

*from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, “You must put it in clear words” the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them. It was a bleak winter for our law of contract. ...*<sup>151</sup>

[219] In our own time, the ‘freedom of contract’ theory no longer enjoys the sway it once had. ‘Today,’ wrote the editors of a classic text on the law of contract,

the position is seen in a different light. Freedom of contract is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of modern society it has ceased to have much idealistic attraction except, perhaps, to the proponents of a completely free market economy, who have advanced it in recent years in a modern and sophisticated way, some using the tools of microeconomic analysis. But whatever its status may be as an ideal, the concept of freedom of contract has suffered severe inroads as the result of developments in modern social life and policy.<sup>152</sup>

[220] Atiyah wrote a vigorous book on the demise of the freedom of contract.<sup>153</sup> Perhaps part of the tipping point was that ‘[a] principle which had originally been justified by the political economists was pursued by the Courts to an extent which had no economic justification.’<sup>154</sup> But it seems to me that not even a valid *economic* justification of the freedom of contract doctrine could truly make it *socially* inappropriate to accept that part of the arbitral mandate of judges is to inquire into questions of fairness at the heart of a dispute between members of the society—whatever be the source of such a dispute. That consideration is enough to warrant the observation that it is no doubt ‘salutary to acknowledge openly that the Courts are often concerned with the fairness of a bargain.’<sup>155</sup>

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<sup>151</sup> *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296–297 (emphasis added).

<sup>152</sup> J Beatson, A Burrows, Anson J Cartwright, *Anson’s Law of Contract* (30th edn, Oxford University Press 2016) at 4–5.

<sup>153</sup> Atiyah (n 138).

<sup>154</sup> *ibid* 702.

<sup>155</sup> *ibid* 703.

[221] For a final word on the freedom of contract theory, it is perhaps apposite to note that a reflexive retort often encountered in its support is the *à prendre ou à laisser* [‘take it or leave it’] riposte<sup>156</sup> that Lord Denning alluded to in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*. The obvious flaws of contracts of adhesion<sup>157</sup> make the riposte unimpressive. It must, it seems to me, contend with the consideration that no one needs to bring his goods or services to the public or marketplace if he needs to retain complete freedom to still do as he pleases with them. The better argument, it seems to me, must be this: anyone who seeks to ply his goods or services to the public or marketplace must do so on the basis of fairness and good faith and the duties they compel. It is part of the judicial mandate to adjudicate the question. It may not be necessary to invite the aide of the social contract philosophy to explain that judicial mandate as part of the overall bargain of life in the civic society. David Hume notably spoke of that bargain in terms of ‘the rules of justice’ compelled by ‘the necessity of society to [the] mutual subsistence’ of its members.<sup>158</sup> Those members include ‘the big concern’ and ‘the little man,’ as Lord Denning would describe them.

### ***Duty of Fairness and Good Faith***

[222] In *Prenn v Simmonds*, Lord Wilberforce observed that ‘[t]he time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.’<sup>159</sup> He saw no need to account for that evolution in the law of contract by referring to ‘any modern, antiliteral, tendencies, for Lord Blackburn’s well-known judgment in *River Wear Commissioners v Adamson* provides ample warrant for a liberal

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<sup>156</sup> See Kessler (n 136) at 632.

<sup>157</sup> See, for instance, *George Mitchell (Chesterhall) Ltd* (n 151) at [25] (Lord Denning MR). See also Kessler (n 136) at 632–633.

<sup>158</sup> As he put it: ‘[M]en *invented* the three fundamental laws of nature, when they observed *the necessity of society to their mutual subsistence*, and found that it was impossible to maintain any correspondence together, without some restraint on their natural appetites. The same self-love, therefore, which renders men so incommodious to each other, taking a new and more convenient direction, produces *the rules of justice*, and is the *first* motive of their observance. But when men have observed, that though the rules of justice be sufficient to maintain any society, yet it is impossible for them, of themselves, to observe those rules in large and polished societies: they establish government as a new invention to attain their ends, and preserve the old, or procure new advantages, by a more strict execution of justice. So far, therefore, our civil duties are connected with our natural, that the former are invented chiefly for the sake of the latter; and that the principal object of government is to constrain men to observe the laws of nature’: David Hume, *A Treatise of Human Nature* (1966) vol 2, 243–244 (emphasis added).

<sup>159</sup> *Prenn v Simmonds* (1971) 1 WLR 1381 at 1383–1384 (emphasis added).

approach.’<sup>160</sup> But the approach to the interpretation of contracts which Lord Wilberforce articulated in *Prenn* was later the subject of commentary by Lord Hoffman in *ICS v Bromwich BS*. He ‘[did] not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* ... and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* ... is always sufficiently appreciated.’<sup>161</sup>

[223] In that evolutionary story, we are reminded once more of how the law of contract has been conceived and shaped by judges over generations. That evolution continues as common law judges have refined and adjusted the law of contract by recognising a duty of fairness and good faith in contractual relations; either inspired by a process of codification (as in the Uniform Commercial Code in the United States) or through the traditional function of common law judges to develop and adapt the common law from time to time,<sup>162</sup> lest ‘the common law would be the same now as it was in the reign of King Henry II.’<sup>163</sup>

[224] The related values of fairness and good faith represent an area in which judges of different eras have over time moved the pendulum of the common law back and forth. It is inevitable that this Court must also grapple with that evolutionary trend.

### **The Jurisprudential March of Good Faith**

[225] In an epochal judgment authored on behalf of the Supreme Court of Canada, Cromwell J recalled that a leading Canadian scholar had remarked in 1984 that the common law had taken a ‘kind of perverted pride’ in resisting the place of good faith in contractual relationships.<sup>164</sup> That resistance was obviously sustained by lingering loyalty to the doctrine of freedom of contract that dominated the outlook

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<sup>160</sup> *ibid* at 1384 (citation omitted).

<sup>161</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114 (citations omitted).

<sup>162</sup> *McCamus* (n 10) at 8.

<sup>163</sup> See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377.

<sup>164</sup> *Bhasin* (n 40) at [36]. Also citing John Swan, ‘Whither Contracts: A Retrospective and Prospective Overview,’ in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984) 125, 148.

of lawyers during the eighteenth and nineteenth centuries;<sup>165</sup> although prior to BREXIT, regulations promulgated by the European Union might have attenuated British law given EU law's imposition of the notions of fairness and good faith in contractual relations—at least in consumer contracts.<sup>166</sup>

[226] But the history of the common law does not inevitably reveal consistent resistance to the ideals of fairness and good faith. There is enough in the law reports to inform the view that fairness and good faith were cherished virtues in the older case law.<sup>167</sup> In *Mellish v Motteux*, for instance, Lord Kenyon observed that '[t]here are certain moral duties which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But *in contracts of all kinds*, it is of the highest importance that courts of law should compel the observance of honesty and *good faith*.'<sup>168</sup> Similarly, in *Carter v Boehm*, Lord Mansfield suggested that good faith is '[t]he governing principle' that 'is applicable to *all* contracts and dealings.'<sup>169</sup>

[227] In *Earl of Aylesford v Morris*, Lord Selborne LC considered that there was 'always fraud presumed or inferred from the circumstances or conditions of the parties contracting'; notable amongst such circumstances or conditions are 'weakness on one side, usury on the other, or extortion, or advantage taken of that weakness.'<sup>170</sup> To be sure, Lord Selborne explained that '[f]raud does not here mean deceit or circumvention; it means *an unconscientious use of power* arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact *fair, just, and reasonable*.'<sup>171</sup> Although Lord Selborne was discussing the operation of equity in relieving onerous

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<sup>165</sup> See Beale (ed) (n 99) para 1-044.

<sup>166</sup> *ibid*.

<sup>167</sup> See Robert McDougall, 'The Implied Duty of Good Faith in Australian Contract Law' (2006) 108 *Australian Contract Law Newsletter* 36.

<sup>168</sup> *Mellish* (n 34) at 113–114 (emphasis added).

<sup>169</sup> *Carter v Boehm* (1766) 3 Burr 1905 at 1910, 97 ER 1162 at 1164 (emphasis added).

<sup>170</sup> *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, at 489.

<sup>171</sup> *ibid* at 490–491 (emphasis added).

burdens (in this case, the burden on reversionary interests in inheritance), it still illustrates how the judicial function has through the years given value to the norms of fairness and good faith in the law of contract, more so than the freedom of contract pedantry has been willing to admit.

[228] There is in our own time an unavoidable current of legal recognition of fairness and good faith in contractual relations in many common law jurisdictions. In the United States, the obligation of good faith in contractual relations is specifically provided for in §1-304 of the Uniform Commercial Code, a joint project of the Uniform Law Commission and the American Law Institute.<sup>172</sup>

[229] Within the Commonwealth, the Canadian Supreme Court has deliberately carved a modernising path in contractual relations in common law, in ways that have unambiguously emphasised the ideals of fairness and good faith as proper considerations in that relationship. That evolution began with *Ron Engineering*, where, as noted earlier, the Supreme Court moved away from the old position that a call for tender entails only an invitation to treat: holding, instead, that the tendering process contemplates a collateral contract (Contract A), which is preliminary to the eventual main contract (Contract B).

[230] Notably, the ratio of *Ron Engineering* regarding Contract A mainly contemplated, it appears, the expectations of transactional certainty amongst requestors and bidders. That expectation necessitated the irrevocability of Contract A once formed. In that case, the tenderer was held to bear the burden of that expectation, in the sense of being bound by Contract A. In subsequent case law—still of the *Ron Engineering* progeny—‘fair and equal’ treatment of all compliant bids received

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<sup>172</sup> According to the Uniform Law Commission, ‘The Uniform Commercial Code (UCC) is a comprehensive set of laws governing all commercial transactions in the United States. It is not a federal law, but a uniformly adopted state law. Uniformity of law is essential in this area for the interstate transaction of business. Because the UCC has been universally adopted, businesses can enter into contracts with confidence that the terms will be enforced in the same way by the courts of every American jurisdiction. The resulting certainty of business relationships allows businesses to grow and the American economy to thrive. For this reason, the UCC has been called “the backbone of American commerce.”’ See, ‘Uniform Commercial Code’ (Uniform Law Commission, 13 December 2018) <[www.uniformlaws.org/acts/ucc](http://www.uniformlaws.org/acts/ucc)> accessed 10 March 2026. It provides, in §1-304, that ‘[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.’ See ‘§ 1-304. Obligation of Good Faith’ (Cornell Law School Legal Information Institute, 23 February 2015) <[www.law.cornell.edu/ucc/1/1-304](http://www.law.cornell.edu/ucc/1/1-304)> accessed 10 March 2026.

emphasis as the main value of Contract A, with the requestor being bound by it. That was the clear message beginning with *Martel Building Ltd* and continued with the later judgments.<sup>173</sup>

[231] Ultimately, in *Bhasin v Hrynew*,<sup>174</sup> the Canadian Supreme Court gave a robust reception to the duty of good faith. It should be pointed out that the dispute in *Bhasin v Hrynew* did not concern the tendering process. But, as will be shown later, the principles enunciated in the judgment were bound up with principles enunciated earlier in the tendering cases.

[232] Although the ‘notion of good faith ha[d] deep roots in contract law and permeate[d] many of its rules,’ observed the Court in *Bhasin v Hrynew*, the Anglo-Canadian common law ‘resisted acknowledging any generalized and independent doctrine of good faith performance of contracts.’<sup>175</sup> The result was an ‘unsettled and incoherent body of law’ that developed ‘piecemeal,’ which was ‘difficult to analyze.’<sup>176</sup> That approach was out of step with the law as applied in the province of Quebec and in most jurisdictions in the United States. The resulting law was ‘not consistent with the reasonable expectations of commercial parties.’<sup>177</sup>

[233] It was against that background that the Court considered it opportune to take ‘incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just.’<sup>178</sup> The first such step, according to the Court, was to acknowledge good faith in contractual relations as ‘a general organizing principle of the common law of contract.’<sup>179</sup> Good faith, as such, ‘underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance.’<sup>180</sup> In

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<sup>173</sup> See *Martel Building Ltd* (n 15) at [84]–[89], [92], [95], [96], [98], [100]; *Double N Earthmovers Ltd v Edmonton (City)* [2007] 1 SCR 116 at [32], [52], [107], [124]; *Tercon Contractors Ltd*(n 17) at [59], [63], [71], [93].

<sup>174</sup> *Bhasin* (n 40).

<sup>175</sup> *ibid* at [32].

<sup>176</sup> *ibid*.

<sup>177</sup> *ibid*.

<sup>178</sup> *ibid* at [33].

<sup>179</sup> *ibid*.

<sup>180</sup> *ibid*.

the ensuing analysis, the Court catalogued the various instances in which the common law has recognised the duty of good faith and fair dealing.<sup>181</sup> To all intents and purposes, it was a full circle loop back to Lord Mansfield’s dictum two and a half centuries earlier in *Carter v Boehm* (as seen earlier) that good faith is ‘[t]he governing principle’ that ‘is applicable to *all* contracts and dealings.’<sup>182</sup>

[234] What the SCC did in *Bhasin v Hrynew* was to underlay the common law’s patchwork recognition of good faith across the landscape of law of contract, with a consistent system of recognition of good faith across that landscape. It did so by considering good faith as an underlying or overarching ‘organising principle’ of the law of contract. It is that organising principle that explained the old patchwork arrangement of recognition of good faith.<sup>183</sup> Nevertheless, the incremental development of the law encourages no *assumption* in any case that a claim of breach of good faith may succeed if that claim is not brought under one of the existing legal grounds that comprise the patchwork, notwithstanding the general recognition of good faith as an organising principle of contract law.<sup>184</sup> However, the courts may recognise new grounds in appropriate cases, because the categories are never closed to the future.<sup>185</sup>

### **Good Faith Elsewhere in the Commonwealth**

[235] As noted earlier, the effect of *Bhasin v Hrynew* was to bring contract law in the rest of Canada in line with contract law in Quebec and most of the United States, in the sense of recognising ‘good faith’ as an ‘organising principle’ of contractual relations.<sup>186</sup>

[236] Elsewhere in the Commonwealth, good faith has retained a tenacious grip on contemporary case law, despite the grudging attitude of some judges in those

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<sup>181</sup> *ibid* at [42]–[58].

<sup>182</sup> *Carter* (n 169) at 1164 (emphasis added).

<sup>183</sup> *Bhasin* (n 40) at [63], [64], [66].

<sup>184</sup> *ibid* at [66].

<sup>185</sup> *ibid* at [66], [69].

<sup>186</sup> *ibid* at [32].

jurisdictions. At the High Court of Australia, for instance, Kirby J registered an apparent Hail Mary dictum in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, evidently in the hope of slowing the march of case law down the road of good faith.<sup>187</sup> The other six members of the court declined to echo him. In their joint opinion, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ noted instead that ‘whilst the issues respecting the existence and scope of a “good faith” doctrine are important, this is an inappropriate occasion to consider them.’<sup>188</sup> In his separate opinion, Callinan J also thought it unnecessary to take up the matter.<sup>189</sup>

[237] Notably, such efforts didn’t manage to dislodge the hold that the influential judgments of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*<sup>190</sup> and Finn J in *Hughes Aircraft Systems International v Airservices Australia*<sup>191</sup> have had on the aptitude of Australian judges who have accepted the norm of good faith and applied it as a vital element of contract law.<sup>192</sup>

### ***The Meaning of Good Faith***

[238] Throughout the case law, one lingering difficulty that seems to trail the concept of good faith is its definition. The case law, however, supplies enough pronouncements to ground actionable understanding of the concept. In *Bhasin v Hrynew*, for instance, the Supreme Court of Canada explained that the ‘organizing

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<sup>187</sup> (2002) 240 CLR 45 at [87]–[89]. As he observed:

[87] ... The Court was taken to case law both in this country and overseas as well as to academic commentary to demonstrate a growing tendency to imply into private contractual dealings a covenant of good faith and fair dealing. As expressed in some United States decisions, this is a principle that is not confined to an obligation to exercise express contractual powers fairly and reasonably. In some parts of the United States, the obligation has been accepted as a general implied contractual term in its own right.

[88] However, in Australia, such an implied term appears to conflict with fundamental notions of caveat emptor that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include.

[89] In the present appeal, it is unnecessary to explore this question further. ...

<sup>188</sup> *ibid* at [40].

<sup>189</sup> *ibid* at [156].

<sup>190</sup> *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 256, 263–268.

<sup>191</sup> *Hughes Aircraft Systems International* (n 6) at 188–198.

<sup>192</sup> See for instance, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903 at [34]; *Far Horizons Pty Ltd v McDonald’s Australia Ltd* [2000] VSC 310 at [120]; *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 at [145]–[173]; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2005) Aust Contract R 90-213 (Finkelstein J) (affirmed without deciding the point, see (2006) 149 FCR 395; *NT Power Generation Pty Ltd v Power & Water Authority* (2001) 184 ALR 481 at 574.

principle [of good faith] is simply that parties generally must perform their contractual duties *honestly* and *reasonably* and *not capriciously* or *arbitrarily*.<sup>193</sup> It thus follows that dishonesty, unreasonableness, and capriciousness (or arbitrariness) are inconsistent with good faith.

[239] ‘Fair dealing’ is also an understood part of the meaning of good faith. In that broader connection, the Supreme Court of Canada brought the tendering process within the organising principle of good faith that was enunciated in *Bhasin v Hrynew*. It did so in the observation that ‘[t]his Court has also recognized *that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context*. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids ...’.<sup>194</sup>

[240] In *Burger King Corp v Hungry Jack’s Pty Ltd*, the New South Wales Court of Appeal explained the meaning of good faith as follows: ‘[I]t is worth noting that the Australian cases make no distinction of substance between the implied term of reasonableness and that of good faith. As Priestley JA said in *Renard* at 263: “*The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith*”.’<sup>195</sup> Continuing, the Court observed that ‘Priestley JA commented further at 265 that: “*in ordinary English usage there has been constant association between the words fair and reasonable. Similarly, there is a close association of ideas between the terms unreasonableness, lack of good faith and unconscionability.*”’<sup>196</sup>

[241] And here, it may be recalled that the concept of contract is often described by the synonym of ‘bargain’.<sup>197</sup> It has been observed in that regard that the ‘common law

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<sup>193</sup> *Bhasin* (n 40) at [63] (emphasis added).

<sup>194</sup> *ibid* at [56] (emphasis added).

<sup>195</sup> *Burger King Corp v Hungry Jack’s Pty Ltd* [2001] NSWCA 187 at [169] (emphasis in original).

<sup>196</sup> *ibid* at [170] (emphasis in original).

<sup>197</sup> As observed by the authors of M P Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (16th edn, Oxford University Press 2012) 10, the notion was accepted by sixteenth-century judges that ‘only “bargains” (ie commercial contracts of exchange) should be enforced’.

has long stressed the commercial flavour of its contract. An Englishman is liable not because he has made a promise, but because he has made a bargain.’<sup>198</sup> It may be considered that a ‘bargain’ means an understanding ‘between two parties settling how much each *gives and takes*, or what each *performs and receives*, in a transaction between them; a compact.’<sup>199</sup> In a related way, it may further be considered that the ‘function of [the] judge is ... to ensure, as far as practical experience permits, that the reasonable expectations of honest men [and women] are not disappointed.’<sup>200</sup> Consequently, good faith in the contractual relationship must then include an obligation to refrain from taking all the advantages of a contract in cynical or manipulative circumstances that would wholly (or almost wholly) defeat the minimal benefit that the contract typically contemplates for the counterparty. There can be no commercial sense—or ‘economic justification’—to the notion of ‘bargain’ in any contrary understanding of what the notion of ‘contract’ entails as such.

[242] Elisabeth Peden, in an acclaimed academic commentary, offered this entirely appropriate description of good faith in the law of contract:

Most basically, by using the obligation to perform in good faith as a principle of construction the courts are merely required to ensure that the parties have genuinely adhered to the bargain which they entered into. This will require an examination of the whole contract and the underlying intentions. Strict rights may not be adhered to, if in the context of the contract as a whole, this would subvert the character of the contract. Most cases that discuss the concept do so in terms of negatives, that is, what is not in breach of good faith. This makes sense, since it is the context of the contract read as a whole that will indicate what is appropriate and what is not.<sup>201</sup>

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<sup>198</sup> *ibid* 41.

<sup>199</sup> See definition of ‘Bargain’ *Oxford English Dictionary* (2026) <<https://www.oed.com/search/dictionary/?q=bargain>> accessed 10 March 2026 (emphasis added).

<sup>200</sup> See M P Furmston (n 197) at 41.

<sup>201</sup> Elisabeth Peden, ‘Incorporating Terms of Good Faith in Contract Law in Australia’ [2001] 23 *Sydney L Rev* 222, 238 (footnote omitted).

[243] In that understanding of ‘good faith,’ equity must play an obvious role. And neither the law nor equity should permit a contractual relationship to be conceived of as an unrestrained ‘dog eat dog’ encounter between two parties in the wilderness.

[244] In my view, then, ‘good faith’ should be given a meaning broad enough to encompass the understandings revealed in *Bhasin* and in *Burger King Corp*, as reviewed above. It is certainly broad enough to embrace the obligations of honesty, reasonableness, non-capriciousness, non-arbitrariness, and fair dealing in mutual contractual relations.

### ***Good Faith and the Cancellation Clause***

[245] It stands to reason that it is that conception of good faith as an organising principle of contract law that helps to explain the Canadian Supreme Court’s entirely sensible treatment of cancellation clauses—generally called ‘privilege clauses’ in Canada—in the tendering process in the Court’s earlier case law. As Iacobucci J put it in *MJB* on behalf of the Court, ‘the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.’<sup>202</sup> Hence, ‘I do not find that the privilege clause overrode the obligation to accept only compliant bids, because on the contrary, there is a compatibility between the privilege clause and this obligation.’<sup>203</sup>

[246] That, in my view, is one more instance in which good faith manifests itself as an ‘organising principle’ of contract law.

### **Duty of Fairness in the Private Sector**

[247] In his judgment at trial, Chang CJ stoked the debate as to whether the duty of fairness that defines Contract A is a norm that applies in tendering process in the

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<sup>202</sup> See *MJB Enterprises Ltd* (n 14) at [44].

<sup>203</sup> *ibid* at [45]. See also *Martel Building Ltd* (n 15) at [89]; *Tercon Contractors Ltd* (n 17) at [64], [76].

private sector. ‘It may be significant to note,’ he wrote, ‘that the cases of *Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council*; *Hughes Aircraft Systems International v. Air Services Australia* and *Hermon CFEM (U.K.) Ltd. v. Corporate Officer of the House of Commons* all dealt with invitations to tender made by public authorities in respect of which it is not unreasonable to imply a promise not only to consider all conforming tenders but also to consider them fairly. The instant case is not at all concerned with an invitation to tender by a public authority but by the Receiver of a private commercial bank whose duty is to act not in the public interest but rather in the interest of the private bank as the debentures holder.’<sup>204</sup>

[248] It seems to me that the ember of that debate ought to be doused. Doing so begins with the correct approach adopted by the Court of Appeal on the point, if I understood them well. ‘A simple consideration in this regard,’ they said, ‘is whether the Chief Justice was correct. We believe that *the duty to act fairly applies throughout*.’<sup>205</sup> Following that observation, the Court of Appeal correctly indicated that the point turned on traditional contract law analysis, according to which ‘courts will seek to ascertain the intention of the parties and must not make a contract for them in order to do so.’<sup>206</sup>

[249] Similarly in the leading Australian case of *Hughes Aircraft Systems International v Airservices Australia*, Finn J considered that for purposes of implying the duty of fairness into a contract in which a public body is a party, it was enough to use traditional law of contract considerations to resolve the question. This was notwithstanding that there are further considerations (beyond the traditional contract law analysis) on which the law imposes on public bodies the duty to act fairly.<sup>207</sup> For Finn J, the traditional contract law considerations revolve around the concept of ‘necessity.’ As he put it:

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<sup>204</sup> See Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 7 June 2012) 297 (Chang CJ (Ag)).

<sup>205</sup> Record of Appeal, *Cara Investments Ltd v Ram* (n 1) 1543 (emphasis added).

<sup>206</sup> *ibid.*

<sup>207</sup> See *Hughes Aircraft Systems International v Airservices Australia* (n 6) at 41–42.

As the respondent emphasised in its submission, the central criterion manifest in [the] decisions for so implying a term is the requirement of “necessity”. Explanation of this was in turn given by McHugh and Gummow JJ in *Byrne’s* case ... where their Honours noted that:

Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined. Hence, the reference in the decisions to “necessity” ... This notion of “necessity” has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law.<sup>208</sup>

[250] Against that background, Finn J found it ‘strictly unnecessary to express a concluded view’ on the submission of counsel in the case who sought to argue the Contract A still ‘would be “workable and effective” without the introduction into them of the implied term [of fairness.]’<sup>209</sup> Rejecting that submission, Finn J observed that ‘the “workability and effectiveness” suggested [by counsel] could well be said only to exist in competitive contracts of this type if they contained the binding reassurance of fair dealing in their performance—the more so where the contract to be let involves the expenditure of “publicly owned” funds ...’.<sup>210</sup> Reiterating the point, he further observed that ‘[i]f the purpose of a tender process contract is to be accomplished, if contractor-tenderers are to be given an effective opportunity to enjoy the fruits of the bid and not to have that opportunity destroyed by the unfair dealing of the other party to the contract, a duty such as I have described would appear to me to be a presupposition of such a contract.’<sup>211</sup>

[251] Given that traditional contract law considerations (contrasted with administrative law or other public law considerations) characterise contractual relations between non-public entities, Finn J’s resort to them in contractual relations involving public entities (such that implies a duty of fairness in a commercial dealings), effectively

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<sup>208</sup> *ibid* at 38.

<sup>209</sup> *ibid* at 38–39.

<sup>210</sup> *ibid*.

<sup>211</sup> *ibid* at 39.

undermines any suggestion that different standards must apply in transactions between non-public entities (as in the present appeal).

[252] In *Burger King Corp v Hungry Jack's Pty Ltd*, another leading Australian case, the Court of Appeal of New South Wales held in the context of a franchise development agreement between two non-public entities—operators of fast-food eateries—that their agreement was ‘subject to implied terms of reasonableness and good faith.’<sup>212</sup>

[253] The Supreme Court of Canada has not restricted the conception and operation of its ‘Contract A’ jurisprudence to public sector tendering process. As we saw in *Bhasin*, that court held that ‘good faith’ is ‘a general organizing principle of the common law of contract.’ As noted earlier, it was a profound legal proposition laid down in the context of dealings between non-public counterparties to a contract. Furthermore, as part of the jurisprudential building blocks of that proposition, the court specifically recalled its earlier jurisprudence in *Martel Building Ltd v Canada*; *MJB Enterprises Ltd v Defence Construction (1951) Ltd*; and, *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, saying, as we saw earlier, that ‘[t]his Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids.’<sup>213</sup>

[254] The irrelevance of public-private entity distinction in the tendering process, from the perspective of implying a *contractual* duty of fairness in Contract A, becomes apparent in a scenario in which a public entity is a bidder and a non-public entity the bid requestor. It is difficult to imagine validity for the argument that the duty of fairness will then not operate amongst all bidders, merely because one of the tenderers happens to be a public entity.

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<sup>212</sup> *Burger King Corp* (n 195) at [186].

<sup>213</sup> See *Bhasin* (n 40) at [56].

- [255] Before I leave this point, it should be observed that the public entity consideration can have meaningful orientation elsewhere. The public sector bid requestors (including quasi-public entities) are often governed by procurement regulatory frameworks laid down in statutes, delegated legislation, and derivative manuals. It is even possible that the procurement obligations of the public sector are dictated by free trade or common market treaties to which the given jurisdiction is a state party.
- [256] These regulatory frameworks direct the procurement process for the relevant public sector, to ensure that every individual or corporate citizen in a state, a federation or a common market area enjoys fair, equal and open access to government contracts. They direct when and how the public entity must conduct an open, competitive procurement process. They indicate the terms and conditions of the process, how any resulting dispute may be resolved, and so on.
- [257] That is to say, the objective of the public sector procurement regulatory framework may be wider than merely to ensure that bidders are treated fairly—as a matter of contract law—after they have submitted bids. The overriding objective may include a *requirement* upon the public sector entity to open the procurement to competition.
- [258] Private sector bid requestors are not guided by the same public sector regulatory frameworks. As a general proposition, they may not even be required by general law (except possibly by their own internal operating procedures) to engage in a competitive tendering process. But the object of Contract A jurisprudence is that once a public entity engages the tendering process, it must do so in good faith: this includes the duty to treat all compliant tenders fairly. And, in those circumstances, ‘the duty to act fairly applies throughout,’ as the Court of Appeal correctly observed in this case.<sup>214</sup> I understood the Court of Appeal to mean ‘throughout’ the legal landscape, with no distinction made between the public and the private sector.

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<sup>214</sup> Record of Appeal, *Cara Investments Ltd v Ram* (GY CA, 7 June 2024) 1543.

[259] I thus fully concur with the opinions of Rajnauth-Lee and Jamadar JJ in their united views that the regime of Contract A would operate in tendering processes with no distinction made between the public and private sectors.

### **Part III: The Circumstances of the Case at Bar**

[260] The question now is whether the facts of the case in this appeal sufficiently anchor the legal principles laid down to guide the resolution of the problem, in favour of the Appellant.

[261] The Appellant's claim is that it had a Contract A with the First Respondent. I shall now examine the validity of that claim.

[262] The issues in the appeal arose from the fate of a hotel that fell on hard times. In that regard, the record of the case tells the following story. Established in 1866, the Hotel Tower (the 'Hotel') apparently was once a premier hotel in Guyana's capital city, Georgetown. For over a century, it held its leading place. But it eventually encountered impressive competition.<sup>215</sup> Its fortunes rolled downhill from then, for reasons that included 'declining business, massive infrastructural development, high debt servicing, increased competition, some risky management decisions, severe cash flow difficulties.'<sup>216</sup> The high debt that it needed to service included loans from the Bank of Nova Scotia (the 'Bank') whose loans were secured by charges (both fixed and floating) created by three debentures in 1992, 1995 and 1998,<sup>217</sup> amounting up to USD2,538,102.<sup>218</sup> Eventually on 9 April 1999, the Bank, needing to enforce the debt, appointed Christopher Ram, the First Respondent, as Receiver-Manager, to manage the Hotel with the view to liquidating the Hotel's assets and those of its fully owned subsidiary, Emerald Tower Hotel, in order to pay off the bank debt that had been secured against those assets.<sup>219</sup> The Bank made

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<sup>215</sup> See Record of Appeal, 'Hotel Tower: Request for Proposals' 395.

<sup>216</sup> *ibid.*

<sup>217</sup> Record, 142, 210, 577.

<sup>218</sup> Record, 285, 524, 527, 653, 666, 677, 685. See also the trial judgment in Record of Appeal, *Cara Investments Ltd v Ram* (GY HC, 7 June 2012) 285 (Chang CJ (Ag)); Record of Appeal, *Cara Investments Ltd v Ram* (GY CA, 7 June 2024) 1530–1531.

<sup>219</sup> Record, 538, 547. See also Record, 253, 255.

the appointment pursuant to its right as a secured creditor under the debentures, as allowed under the Companies Act of Guyana.<sup>220</sup>

[263] It may help to note that under the laws of Guyana, a *receiver* of a company in receivership may (subject to the rights of secured creditors), receive the income from the business operation, pay the liabilities connected with the company's property, and realise the security interests of the creditor on behalf of whom he is appointed. And except to the extent permitted by the court, a bare receiver may not carry on the business of the company.<sup>221</sup> A *receiver and manager* or (*receiver-manager*), on the other hand, may *also* 'carry on any business of the company to protect the security interest of those on behalf of whom he is appointed.'<sup>222</sup> This detail—about the management role of the Receiver-Manager—is important in the context of this case. It may help to explain the anxieties that fuelled this litigation.

[264] Immediately upon the appointment of the First Respondent as the Receiver-Manager for the Hotel, he received overtures from Paul Stephenson, the co-chairman of Cara Investment Ltd, the Appellant. The initial overtures were apparently memorialised in a letter in friendly tones that Mr Stephenson wrote to the First Respondent dated 23 April 1999. Referring to the First Respondent by his first name 'Chris,' Mr Stephenson 'welcomed the opportunity yesterday to share some ideas and concepts on the Hotel Tower.'<sup>223</sup> The indicated encounter apparently had also afforded Mr Stephenson 'the opportunity to outline the future plans for Cara, both in Guyana and Regionally.'<sup>224</sup> As part of those future plans, it seems, Mr Stephenson indicated that (a) he would be in Saint Vincent for much of following week, meeting with the contractors to activate works to be completed by December 1999, when he and his colleagues would open a Cara Suites and a Cara Lodge on the Island; and, (b) he would 'instruct the managers of Cara Suite and

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<sup>220</sup> See Companies Act (n 31) s 271(1).

<sup>221</sup> *ibid* s 273.

<sup>222</sup> *ibid* s 274. See also, *Re Manchester and Milford Rly Co, ex p Cambrian Rly Co* (1880) 14 Ch D 645 at 653 (Jessel MR).

<sup>223</sup> See Record, 572.

<sup>224</sup> *ibid*.

Cara Lodge that our first referral hotel for accommodation and F&B [ie food and beverages] requirement will be Tower Hotel Ltd [*sic*].<sup>225</sup>

[265] Through that letter, Mr Stephenson informed the First Respondent that upon his (Mr Stephenson's) return from Saint Vincent and the Grenadines the following week, he would revert to the First Respondent 'with reference to the current operation and any assistance we can be to your company as Receiver-Manager.'<sup>226</sup>

[266] Mr Stephenson's testimony at trial appears to shed much light on the significance of this letter. According to the trial judge's notes of that testimony, 'I first spoke to Mr. Ram,' said Mr Stephenson, 'shortly after he was appointed to see how the indebtedness would be dealt with. Multiple approaches to his problem [were] available [,] he had [to] consider those approaches to determine the best approach. I understand the distinction between a receive[r] and a receiver manager. Mr Ram was a receiver manage[r]. If *managed* property, it could be feasible after ...'<sup>227</sup>. And '[o]ur written interest was to *manage* the hotel. Our preferred interest was to acquire the assets.'<sup>228</sup> Mr Stephenson thus had a distinct interest in having the Appellant awarded a contract to *manage* the Hotel.

[267] Indeed, a second letter that Mr Stephenson wrote to the First Respondent, also dated 23 April 1999, was more formal and more direct about Mr Stephenson's intentions.<sup>229</sup> It informed that Mr Stephenson and his colleagues, representing the Appellant (hereafter the 'Appellant's Representatives') had engaged in discussions with the Hotel's representatives (ie board members and shareholders) and the Bank, prior to the First Respondent's appointment as Receiver-Manager, concerning the Appellant's Representatives' interest in having the Appellant retained as the

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<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

<sup>227</sup> Record, 240 (emphasis added).

<sup>228</sup> *ibid* (emphasis added).

<sup>229</sup> Record, 365.

managing company for the Hotel, with a view to turning it into a profitable venture.<sup>230</sup>

[268] In the detail, Mr Stephenson (on behalf of the Appellant) informed the First Respondent that the Appellant's Representatives:

- (i) were 'now prepared to re-activate [their] interest';
- (ii) had 'gained support and agreement from the existing Board of Hotel Tower Ltd, and of the majority shareholders to [the Appellant's Representatives'] proposal and [the Appellant's] proposed future role with the hotel ... prior to [the 1<sup>st</sup> Respondent's] appointment [as Receiver-Manager]';
- (iii) had 'jointly gain[ed] approval from Bank of Nova Scotia to actively pursue' the Appellant's Representatives' proposal with the 1st Respondent; and,
- (iv) had received 'provisional approval for the project in principle from Development Finance Ltd in Trinidad to assist with the financing required.'<sup>231</sup>

[269] Importantly, Mr Stephenson informed the First Respondent that 'discussions [were] ongoing' between [Bank of] Nova Scotia, Development Finance Ltd and the Appellant 'in terms of possible joint financing required to re-finance the existing debt and provide additional funding required to complete the refurbishment [of the Hotel] and bring the hotel to full operational status.'<sup>232</sup>

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<sup>230</sup> *ibid.*

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

[270] All this proved to be the run up to the point of the letter. And it was put in these unmistakable terms: ‘*In summary, Cara wishes to become/appointed the Operating Management Company for Hotel Tower.*’<sup>233</sup>

[271] It was thus clear from the foregoing evidence, that at all material times, the Appellant had a primary desire ‘to become/appointed the Operating Management Company for Hotel Tower.’ The fact that prior to the First Respondent’s appointment as Receiver-Manager, Mr Stephenson (in his own words) had both a pre-existing inside track into the Hotel’s corporate power structure,<sup>234</sup> and that through it he had been pursuing a pre-existing interest to manage the Hotel,<sup>235</sup> are not insignificant features of the story. Indeed, they are in my view, something of a catalyst in the dynamics of events that culminated in this litigation. I shall return to this later, under the discussion subtitled ‘Motivations for the Litigation.’

[272] The First Respondent apparently steered clear of Mr Stephenson’s wish to secure from the First Respondent a bilateral management contract for the Appellant. The First Respondent chose, instead, to proceed with a publicly announced tendering process. He gave that indication to Mr Stephenson in a letter dated 17 May 1999,<sup>236</sup> and confirmed it in a follow-up letter dated 11 August 1999.<sup>237</sup> In the 12 November 1999 and the 17 November 1999 editions of the *Starbroek News* newspaper, the First Respondent published his intention to issue a request for proposals by calling for expressions of interest in that regard.<sup>238</sup>

[273] It is not difficult to understand why the First Respondent, as Receiver-Manager, might have preferred to deal with Mr Stephenson at arms-length, however disappointing that stance might have been for the latter. To begin with, upon his appointment as Receiver-Manager, the primary interests that the First Respondent

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<sup>233</sup> *ibid* (emphasis added).

<sup>234</sup> Recall that, according to Mr Stephenson, he had ‘gained support and agreement from the existing Board of Hotel Tower Ltd, and of the majority shareholders’ for the Appellant’s Crew’s proposal and the Appellant’s ‘proposed future role with the hotel’ prior to the Respondent’s appointment as Receiver-Manager. See Record, 365.

<sup>235</sup> *ibid*.

<sup>236</sup> Record, 367.

<sup>237</sup> Record, 388.

<sup>238</sup> Record, 577, 578.

was duty-bound to protect were those of the Bank that appointed him and those of the Hotel that he must manage for its own commercial good—to the extent that it was possible to reconcile those two interests (a traditional quandary for receivers). In the circumstances, the First Respondent was entitled to bring his own judgement to bear in the discharge of those obligations—provided he did so in a commercially reasonable manner. He was not required to sympathise with the interests of the Appellant, even if the Hotel’s management, directors or shareholders harboured such sympathies prior to the First Respondent’s appointment as Receiver-Manager.

### *The Appellant’s Bid*

[274] Following the First Respondent’s public announcement of the tendering process, the Appellant’s Representatives submitted the Appellant’s bid under cover of a letter dated 23 December 1999,<sup>239</sup> and duly paid the required bid fee of GYD18,000.<sup>240</sup> (amounting to USD100). The Appellant’s bid offer was for USD2 million.<sup>241</sup> It was, notably, below the USD2.5 million that the Hotel owed the Bank; and would thus not have covered that debt.<sup>242</sup>

[275] What is more—and importantly so—the Appellant’s bid was *conditional* on the conduct of due diligence and its verification process, notably in the following terms:

‘Bid for Hotel Tower’ as described in the attached Bid Document is *conditional* on the following:

- (1) Due diligence by Cara Investments is carried out in a timely manner (see Chapter (VI) *Required Time Frame*).
- (2) *After completion of due diligence and its verification process, then* if Cara is selected as the ‘designated investor’ after notification by the Receiver-Manager, terms of payment would then apply.

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<sup>239</sup> Record, 438.

<sup>240</sup> Record, 432.

<sup>241</sup> Record, 443.

<sup>242</sup> Record, 261.

- (3) *The additional information as requested (see/attached) has been made available to us before completion of due diligence process.*
- (4) *Cara Investments Ltd would only be prepared and in a position to be considered as your ‘Designated investor’ after we have completed our due diligence process.*<sup>243</sup>

[276] Both the ‘Required Time Frame’ for the conduct of the due diligence inquiries (as a *condition* of the Appellant’s bid) and the stated terms of that condition are important. The Appellant’s Representatives proposed the timeframe for the ‘completion of due diligence and its verification process’—as conditions of the Appellant’s bid—to start on 5 January 2000 and finish on 27 January 2000.<sup>244</sup> Beyond that, the Appellant’s Representatives proposed a conclusion of negotiations by 8 February 2000 and finalisation of the transaction by 15 February 2000.<sup>245</sup>

[277] To all intents and purposes, the Appellant’s proposed timetable was a counterproposal to the First Respondent’s revised timetable which was as follows<sup>246</sup>:

- 24 November 1999: *Issue of RFP and Opening of Documents Room*
- 10 December 1999: *Deadline for Inquiries*
- 29 December 1999: *Submissions Closing Date for Proposals*
- 11 January 2000: *Evaluation of Proposals*
- 18 January 2000: *Commencement of Negotiations*
- 27 January 2000: *Approval of Agreements*
- 5 February 2000: *Completion of Investment Transaction.*

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<sup>243</sup> Record, 469 (emphasis added).

<sup>244</sup> Record, 468.

<sup>245</sup> *ibid.*

<sup>246</sup> Record, 431.

[278] The foregoing timetable by the First Respondent was a revision of his original timetable set out in this footnote.<sup>247</sup>

[279] Side-by-side, the revised timelines indicated in the First Respondent’s RFP and the ‘Required Time Frame’ comparatively indicated in the Appellants’ bid document thus appear as follows:<sup>248</sup>

	<b>FIRST RESPONDENT</b>	<b>APPELLANT</b>
<i>Submission</i>	29 December 1999	29 December 1999
<i>Due Diligence Start</i>		5 January 2000
<i>Evaluation</i>	11 January 2000	
<i>Due Diligence Finish</i>		27 January 2000
<i>Negotiations Complete</i>	18 January 2000	8 February 2000
<i>Approval</i>	27 January 2000	
<i>Completion</i>	5 February 2000	15 February 2000

[280] Clause (4) of the Appellant’s bid conditions notably insisted not only that the Appellant ‘would *only* be prepared ... *to be considered*’ as the bid winner, but also would only be ‘in a position to be considered’ as the bid winner—*after* it had conducted the due diligence inquiries that it desired to conduct and had those inquiries verified by its financial backers. The difficulty with that condition is that it appears to rest on the phrase ‘to be considered.’ But for that phrase, the clause might have been taken as consistent with the RFP; since the RFP contemplated that whoever emerged successful as the ‘Selected Investor’ at the end of the tendering process would be afforded a further opportunity to undertake due diligence

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<sup>247</sup> As indicated in the RFP, the original timetable was as follows:

- 18 October 1999: *Issue of RFP and Opening of Documents Room*
- 1 November 1999: *Deadline for Inquiries*
- 12 November 1999: *Submission Closing Date for Proposals*
- 19 November 1999: *Evaluation of Proposals*
- 22 November 1999: *Commencement of Negotiations*
- 26 November 1999: *Approval of Agreements*
- 10 December 1999: *Completion of Investment Transaction*. See *ibid* at 397.

<sup>248</sup> Record, 468.

inquiries, in addition to the due diligence inquiries that all bidders would have conducted ‘in the course of preparing their proposals.’<sup>249</sup> It may be noted that the First Respondent’s revised timetable had allowed bidders time to conduct due diligence inquiries *before* the submission of their bids, as seen below:

- 24 November 1999: *Issue of RFP and Opening of Documents Room*
- 10 December 1999: *Deadline for Inquiries*, and
- 29 December 1999: *Submissions Closing Date for Proposals*.<sup>250</sup>

[281] Evidently, the dates between ‘Opening of Documents Room’ and ‘Submissions Closing Date for Proposals’ afforded a window for due diligence inquiries before the bidders’ submissions of their tenders.

[282] It is not clear from the Appellant’s bid conditions that the point of its cl (4) was merely to emphasise that the Appellant would not *accept* designation as the selected investor until it had done the further due diligence inquiry that the RFP had already contemplated for the ‘Selected Investor’. Given (as indicated earlier) that the RFP had already contemplated due diligence inquiries for all bidders before selection and a further due diligence for the successful bidder following selection (evidently including any due diligence that remained to be done after the first afforded opportunity), the Appellant’s failure to clarify that cl (4) was merely reiterating or emphasising that due diligence regime already contemplated in the RFP thus left the impression that the Appellant was contemplating a different due diligence arrangement in cl (4). That impression was underscored by the Appellant’s insistence that it was not prepared ‘to be considered’ as the selected investor until it had

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<sup>249</sup> Record, 403 (cl 11.0 of the RFP): ‘The *Selected Investor* will be afforded the opportunity to undertake due diligence to confirm the assessments of Hotel Tower Limited’s operations including its subsidiary Emerald Tower Limited made in the Proposal. In anticipation of that process, Investors submitting Proposals should indicate the additional information that they believe is required and the timeframe for conducting and completing the due diligence process. As Investors will have the opportunity to conduct due diligence regarding Hotel Tower Limited in the course of preparing their Proposals, it is envisaged that the time required for a Selected Investor to conduct additional due diligence would be of short duration’ (emphasis added).

<sup>250</sup> See Record, 431.

conducted the due diligence inquiries in the terms indicated in its conditions. From that perspective, the Appellant's bid conditions were thus open to interpretation that the Appellant did not wish its bid 'to be considered' until it had conducted the due diligence that it insisted it needed to conduct in the circumstances indicated in its conditions.

[283] Indeed, the impression that the Appellant contemplated a different due diligence arrangement appears to have been driven home by cl (2) of the Appellant's conditions, which took the Appellant's stated timetable for completion of the due diligence inquiries outside the timetable of the due diligence inquiries contemplated in the RFP. It appears so for this reason: while the RFP contemplated that the first round of diligence would have been done 'in the course of preparing' the bid proposal—in light of the opportunity afforded the bidders to review the Hotel's information package and examine its corporate and operational records<sup>251</sup> in the Documents Room (with copies of documents made available upon payment of a copying fee)<sup>252</sup>—the Appellant's proposal which had *already* been prepared required an opportunity to undertake the primary due diligence inquiries after the Appellant's proposal had already been submitted, but before the Appellant's selection as the selected investor.

### ***Formation of Contract A***

[284] From the foregoing review, the Appellant's bid thus entailed unique features that significantly trouble its claim that a Contract A had been formed between the Appellant and the First Respondent at any point between the Appellant's tendering of that bid and the commencement of this litigation.

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<sup>251</sup> It appears that the documents in question were: the Memorandum and Articles of Association; the Articles of Continuance; the Statement of Affairs (as at 12 April 1999); financial statements for current year (1999); the accounts for the previous five years; building plans; the Emerald Tower Lease Documents; Employee Information - staffing levels; and Preliminary Information Package. See Record, 91.

<sup>252</sup> Record, 91, 92, 577, 578.

[285] Specifically, the difficulty was that the Appellant did not tender an unconditional bid. Rather, its bid was specifically presented, as seen earlier, on the condition that it must first be allowed an opportunity to conduct due diligence inquiries according to the timeline which it indicated in repeated terms as a '*Required Time Frame*'.<sup>253</sup> Furthermore, the Appellant insisted that the due diligence inquiries it required must be verified by the third parties who would provide it, the money it needed to buy the Hotel's assets under tender.<sup>254</sup> Those were material conditions to the Appellant's bid. And there is simply no evidence that the Appellant had vacated, lifted or waived those conditions as of when it commenced the litigation—even assuming on traditional principles of contract law that it is possible to vacate such conditions and automatically reengage the original offer. That consideration is enough to derail the Appellant's claim that there was a Contract A between it and the First Respondent.

[286] The legal implications of the Appellant's conditions (as discussed below) are unaltered by the fact that the Appellant tendered its offer technically within the deadline laid down by the First Respondent. The value of the Appellant submitting its bid within that deadline was to save it from outright disqualification on grounds of missed deadline. It does not alter the legal implications of attaching conditions to the submitted bid, which conditions were intended to operate beyond the point of submission of the bid.

[287] The subsistence of the Appellant's bid conditions troubles the view that a contract was created when the Appellant tendered its bid. Perhaps, the test of integrity in the Appellant's claim may well lie in a consideration of the situation from the Appellant's own perspective, had the First Respondent disregarded those conditions unilaterally and then proceeded to treat the Appellant's bid as creating a binding contract immediately upon the

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<sup>253</sup> See Record, 468, 469.

<sup>254</sup> Record, 469.

Appellant's submission of its tender—or at any time before the Appellant felt comfortable enough to waive them. That integrity test was specifically pointed out in *Jones v Daniel*.<sup>255</sup> Nor can it be said that there was a meeting of the minds between the Appellant and the First Respondent as to the formation of Contract A immediately upon the Appellant's submission of its conditional bid, while those conditions precedent remained outstanding.

[288] The difficulty is adequately accounted for in the old rule that a 'conditional assent to an offer does not constitute acceptance. ... The result is that neither party is subject to an obligation.'<sup>256</sup> In other words, the parties are said to be in *locus pœnitentiæ*, meaning in a position to withdraw in the meantime.<sup>257</sup> There is a very long line of authorities that underscores the proposition.<sup>258</sup>

[289] It is true that the general fact pattern engaged in much of the case law on the subject entails the phenomenon of 'subject to contract,' often encountered in the communication between the parties envisaging the drawing up and signing of an engrossing document beyond the exchange of letters that disclosed their respective amenability to an agreement. The construction of the exchange of letters between the parties has generally led to the finding that there was no contract between the parties in the absence of the contemplated engrossing document. In *Von Hatzfeldt-Wildenburg v Alexander*, that orientation of the law was famously put in these terms:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a

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<sup>255</sup> See *Jones v Daniel* [1894] 2 Ch 332 at 335: '[I]t would not have been fair as against the Plaintiff to have said on behalf of the Defendant, if he had been willing so to say immediately he received that letter, that the Plaintiff was bound by an absolute contract for £1450 without obtaining a deposit and without any conditions whatever as to title or otherwise. I do not think that that was the Plaintiff's intention.'

<sup>256</sup> M P Furmston (n 197) 52.

<sup>257</sup> *ibid* 53.

<sup>258</sup> The case law include the following but are not limited to them: *Winn v Bull* [1877] 7 Ch D 29; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 288–289; *Rossdale v Denny* [1921] 1 Ch 57; *Coope v Ridout* [1921] 1 Ch 291; *Chillingworth v Esche* [1924] 1 Ch 97; *Eccles v Bryant* [1948] 1 Ch 93; *Munton v Greater London Council* [1976] 2 All ER 815; *Derby & Co Ltd v ITC Pension Trust Ltd* [1977] 2 All ER 890 at 895.

*condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction **already agreed to** will in fact go through. In the former case there is no enforceable contract **either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.** In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire.<sup>259</sup>*

[290] According to that analysis, if the construction of the exchange of letters leads to the conclusion that the parties had ‘already agreed to’ the contract and the further condition was merely intended to address the modalities for the performance of what was ‘already agreed to,’ then the parties would be bound to what they had ‘already agreed to.’ On the other hand, if the condition is intended to be a term of the agreement, then no contract would be found to have been formed until that condition is accepted or waived.

[291] Evidently, the ‘subject to contract’ cases reiterate the law’s refusal to ‘recognise a contract to enter into a contract.’ There is, however, more to that line of case law. It sufficiently implicates the law’s discomfort with recognising a contractual obligation in the event of an outstanding predicate condition for the purported contract. Notably, the dictum in *Von Hatzfeldt-Wildenburg v Alexander*—that ‘there is no enforceable contract *either* because the condition is unfulfilled *or* because the law does not recognize a contract to enter into a contract’ (emphasis added)—sufficiently reflects the double trouble.

[292] The alternative concern—ie the law’s discomfort with recognising a contract in the event of an outstanding predicate condition—is adequately explained by Lord Greene MR in *Eccles v Bryant*: ‘Parties become bound by contract

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<sup>259</sup> *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 288–289 (emphasis added).

when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts of each case, ...'.<sup>260</sup> In *Crossley v Maycock*, Sir George Jessel MR observed that 'if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then until those conditions are accepted there is no final agreement such as the Court will enforce.'<sup>261</sup>

[293] And, as indicated earlier, the obvious practical difficulty with the contrary view presents itself if the matter is considered, as was done in *Jones v Daniel*, from the plaintiff's perspective: in any scenario in which it was to the defendant's advantage to insist that a contract immediately came into existence upon the plaintiff's communication of a purported acceptance, regardless of a material condition that the plaintiff took care to stipulate.<sup>262</sup>

[294] I hasten to add here that the insertion of what I termed 'a material condition' in the preceding paragraph is in appreciable contrast with the *Nicolene Ltd v Simmonds*<sup>263</sup> line of authorities, which instruct that the insertion of 'meaningless' words or phrases or clauses will not prevent a court from finding that the parties had concluded a binding contract when in fact 'nothing remained to be negotiated'.<sup>264</sup> That principle does not assist the Appellant in this case. The Appellant's conditions were not meaningless words added when nothing remained to be negotiated. The stipulation that the Appellant required a due diligence inquiry and that such must be verified by a third party—all as conditions precedent to the bid being considered—are material conditions in my view.

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<sup>260</sup> *Eccles v Bryant* [1948] 1 Ch 93 at 104 (Lord Greene MR) (emphasis added).

<sup>261</sup> *Crossley v Maycock* (1874) L R 18 Eq 180 at 181–182.

<sup>262</sup> See *Jones* (n 255) at 335: '[I]t would not have been fair as against the Plaintiff to have said on behalf of the Defendant, if he had been willing so to say immediately he received that letter, that the Plaintiff was bound by an absolute contract for £1450 without obtaining a deposit and without any conditions whatever as to title or otherwise. I do not think that that was the Plaintiff's intention.'

<sup>263</sup> *Nicolene Ltd v Simmonds* [1953] 1 QB 543 at 547.

<sup>264</sup> See *Michael Richards Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416 at 424. See also *Munton v Greater London Council* [1976] 2 All ER 815 at 821.

[295] Nor, indeed, do the facts take the Appellant's case outside the general ambit of the 'subject to contract' cases. This is in the sense that there was no engrossing contractual document as yet between the parties, evidencing a Contract A between them. The existence of such a contract is only a matter of construing the exchange of communications—including the Appellant's bid document relative to the First Respondent's RFP. That being the case, the Appellant's indication of conditions in its bid document doesn't truly put it in a different position than the earlier authorities in which the courts declined to recognise a contract between the parties in the event of an outstanding condition indicated in the communication purportedly entailing acceptance.

[296] The legal situation is recapped in a classic textbook on contract law: 'The intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the coincidence of the terms of the acceptance with those of the offer. These requirements may be summed up in the general rule, sometimes called the "mirror image" rule, that the acceptance must be absolute, and must correspond with the terms of the offer.'<sup>265</sup> In other words, for an acceptance to form a contract, it must be 'an acceptance *simpliciter*.'<sup>266</sup> The Appellant's bid document did not communicate acceptance *simpliciter*.

[297] And, as has been observed in another classic work, 'It must therefore be in each case a question of construction whether the parties intended to undertake immediate, if temporary, obligations, or whether they were suspending all liability until the conclusion of formalities. Have they, in other words, made the operation of their contract conditional upon the execution of a further document, in which case their obligations will be suspended, or have they made an immediately binding agreement, though one which is later to be merged into a more formal contract?'<sup>267</sup>

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<sup>265</sup> J Beatson, A Burrows, Anson J Cartwright (n 152) at 43. See also *Crossley* (n 261); *Jones* (n 255).

<sup>266</sup> *Jones* (n 255) at 335.

<sup>267</sup> M P Furmston (n 197) at 53.

[298] The Appellant's bid was conditional on two prerequisites the outcomes of which could not be assured at the time it submitted the bid. The first was that the Appellant must conduct due diligence inquiries at a time between its submission of bid and the consideration of that bid. This was different from the manner of due diligence contemplated in the RFP, which was that due diligence was to be conducted before submission of the bid and further diligence conducted by the eventual bid winner after selection. The second prerequisite contained in the Appellant's bid document was that the Appellant's financial backers must verify those due diligence inquiries before the Appellant's bid could be considered. The rationale for these conditions is entirely understandable. But it is precisely that rationale that undermines the Appellant's claim that its bid created a contract. That rationale was simply about the Appellant taking care to preserve a *locus pœnitentiæ* for itself in the meantime, by ensuring that its submission of a bid did *not* create a contract that bound it immediately upon submitting its bid. On no reasonable view, then, could it be said that the Appellant's submission of that tender created a contract that bound the First Respondent while those conditions subsisted.

[299] Furthermore, beyond those subsisting conditions, the Appellant had also requested a deferred timeframe within which to address those conditions. And, while those conditions remained outstanding, the Appellant commenced the litigation that culminated in this appeal. The essential dispute in the litigation concerned the Appellant's claim—and the First Respondent's denial—that the First Respondent was administering the tender process either in a manner that violated the terms of the RFP or in a manner that was not commercially reasonable, or both.

[300] The significance of the Appellant's requested deferred timeframe within which to resolve its bid conditions, while commencing the litigation during the subsistence of those conditions, was enlarged by the added layer of an interim injunction that the Appellant immediately brought upon

commencement of the litigation—thus arresting the First Respondent’s further action on the tendering process pending a judicial resolution of the dispute. The First Respondent has offered a cynical interpretation of this strategic move, suggesting that it was a move in bad faith—‘an attempt ... to frustrate the expeditious conclusion of the matters relating to the debts owed by the hotel to the Bank of Nova Scotia with the sole and predominant purpose of purchasing the hotel at a price below its true value.’<sup>268</sup> It is unnecessary to engage that inquiry. It is significant that the Appellant had not, at all material times, lifted or vacated the conditions that it placed on its bid. Thus, by its own actions and omissions, it prevented the formation of Contract A ‘upon the submission of [the] tender,’ in the manner contemplated by the most positive understanding of the authorities on the subject.<sup>269</sup> It is true that *Ron Engineering* stands for the proposition that Contract A ‘is brought into being automatically upon the submission of a tender’;<sup>270</sup> but that understanding does not apply when bids are tendered on the basis of unvacated conditions. Hence, Rajnauth-Lee J’s correct observation that Contract A does not result simply because a bid was submitted.

### ***Motivations for the Litigation***

[301] As a final matter, I must say a word about the motivations for this litigation. As indicated earlier, the fact that prior to the First Respondent’s appointment as Receiver-Manager, Mr Stephenson (in his own words) had both a pre-existing inside track into the Hotel’s corporate power structure, and that through it he had been pursuing a pre-existing interest to manage the Hotel, are not insignificant features of the story. Indeed, as I indicated earlier, they suggest something of a catalyst in the dynamics of events that culminated in this litigation.

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<sup>268</sup> See Record of Appeal, ‘Affidavit in Support of Motion to Dismiss/Strike Out Action’ 140 at para 10.

<sup>269</sup> See *Ron Engineering & Construction (Eastern) Ltd* (n 13) at 119.

<sup>270</sup> *ibid.*

[302] They may explain the sustained attitude of fault-finding that Mr Stephenson and his colleagues displayed towards the First Respondent, which proved directly eventful in occasioning this litigation. That attitude correlates to the following allegations or suggestions made by Mr Stephenson: (i) a suspicion that the First Respondent was engaged in self-dealing—i.e. acting in his own self-interest—possibly by seeking to perpetuate the *managing* dimension of his role as Receiver-Manager or alternatively manoeuvring to award the tender irregularly to a non-compliant bidder with whom he was associated;<sup>271</sup> (ii) an allegation that the First Respondent was not acting in the interest of the Hotel’s shareholders but his own;<sup>272</sup> (iii) undisguised suggestion that the First Respondent was ‘being unbusinesslike and non-commercial’ or at least slovenly in his role as Receiver-Manager.<sup>273</sup> It seems to me that these allegations at least partly fuelled the feelings that ignited this litigation.<sup>274</sup>

[303] I make no definitive pronouncements as to the correctness of these allegations. Still, against their background, it seems instructive to me that Mr Stephenson had directly claimed that Mr John Carpenter, one of the Hotel’s directors,<sup>275</sup> had effectively accused the Respondent of ‘insider trading.’<sup>276</sup> During the oral hearing of this appeal, it was pointed out that Mr Carpenter said no such thing in his short testimony at trial.<sup>277</sup> In his oral submissions before this Court, Mr Datadin, counsel for the Appellant, acknowledged that short-coming in the actual evidence at trial; but sought to minimise its import by suggesting, casually, that the claim was an insignificant detail, if not

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<sup>271</sup> Record of Appeal, ‘Affidavit of Davina Stephenson’ 81 para 17. It is also notable that in the affidavit of Rawle Dundas (General Manager of Cara Inn, a hotel managed by the Appellant), sworn on behalf of the Appellant, the Appellant reiterated its opposition to the First Respondent’s carrying on of the business of the Hotel. See Record of Appeal, ‘Affidavit of Rawle Dundas in Answer’ 144 para 6).

<sup>272</sup> Record of Appeal, ‘Mr Stephenson’s Letter to the Respondent’ (19 January 2000) para C.

<sup>273</sup> Record of Appeal, ‘Affidavit of Davina Stephenson in Support of Motion for Interim Injunction’ 81 para 13.

<sup>274</sup> *ibid* paras 13, 17. See also Record of Appeal, ‘Statement of Claim’ 131 para 8.

<sup>275</sup> See Record of Appeal ‘Johnny Carpenter’s Testimony’ 250.

<sup>276</sup> As Mr Stephenson put it in an affidavit sworn in support of a motion for an interim injunction, ‘the facts bespeak the concerns of the Plaintiffs. The Directors of Hotel Tower will confirm this. At a meeting between selected Shareholders and the Defendant, Mr Johnny Carpenter after hearing the Defendant’s proposals asserted that they amounted to inside trading and manifested a conflict of interest by the Defendant with which he would have nothing to do. He left the meeting and has not since recanted.’ See Record of Appeal, ‘Mr Stephenson’s Reply Affidavit in Support of the Appellant’s Motion for Interim Injunction’ 119-120 para 9.)

<sup>277</sup> See Record, 250.

superfluous; as the material issue was only that the First Respondent had discarded the Appellant's bid.<sup>278</sup> I do not accept the subterfuge. For one thing, the claim was made in a solemn document—an affidavit—that counsel (a silk, not Mr Datadin) clearly had a hand in preparing<sup>279</sup> for purposes of effecting a judicial outcome. Judicial proceedings are a very serious matter: it is not a cocktail party, where parties and their counsel may feel free to engage in immaterial or ill-considered banter. Indeed, counsel for the Appellant had in the past described the claim as a 'serious' allegation.<sup>280</sup> The failure of Mr Carpenter to testify to that hitherto 'serious' allegation while on the witness stand could not then convert the claim into an insignificant detail in the case. Viewed in its temporal context, the allegation went to the root of the cause of action.

### **Conclusion**

[304] Although the bidding process contemplates the formation of an ancillary contract known as Contract A, the facts and circumstances of a particular case may not permit that finding. The discussion in Part III of this opinion bears out Chang CJ's finding, upheld by the Court of Appeal, that there was no Contract A between the Appellant and the First Respondent. I see no reason to overturn that finding, notwithstanding elements of mischaracterisation evident in the analyses. The Court of Appeal and Chang CJ approached their analyses from the perspective that the First Respondent's RFP was 'an invitation to treat,' regarding which the Appellant made no offer capable of acceptance by the First Respondent. In my respectful view, those terminologies and their ascriptions were less than apt. As indicated in the analysis conducted in Part III of this opinion, the First Respondent's RFP was the offer; and the Appellant's bid might have been the acceptance but failed to meet the legal mark because it was not an unconditional acceptance

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<sup>278</sup> See also Record of Appeal, 'Written Submissions of Mr Datadin on Behalf of the Appellants', (before the High Court, 15 March 2012) 217.

<sup>279</sup> See Record of Appeal, 'Reply Affidavit of Mr Stephenson' 120, 126 paras 11, 17.

<sup>280</sup> See Record, 114.

capable of creating a contract. It is for that reason that there was no Contract A.

**Disposition**

[305] It is for the foregoing reasons that I concur with Rajnauth-Lee J in dismissing the appeal in the terms that she does.

/s/ W Anderson

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**Mr Justice Anderson (President)**

/s/ M Rajnauth-Lee

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**Mme Justice Rajnauth-Lee**

/s/ P Jamadar

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**Mr Justice Jamadar**

/s/ C Ononaiwu

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**Mme Justice Ononaiwu**

/s/ C Eboe-Osuji

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**Mr Justice Eboe-Osuji**