



Contract Law: Text Cases and Materials (11th edn)

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Abstract

This chapter discusses the role of good faith in contract law, first analysing the decision in *Walford v. Miles* [1992] 2 AC 128, where it was held that an obligation to negotiate in good faith is not valid. It then examines the reasons that led to the decision and also explores its limits. Next, the chapter considers the arguments that have been advanced in support of the refusal of English law to recognize the validity of a doctrine of good faith and then turns to the arguments that have been advanced by those who support the recognition of a doctrine of good faith. It concludes by examining the development of a doctrine of good faith in the performance of contracts.

Keywords: English contract law, good faith, good faith in the performance of contracts, good faith in the negotiation of contracts, *Walford v. Miles*

Central Issues

1. While English contract law is influenced by notions of good faith, it does not, as yet, recognize the existence of a general doctrine of good faith. In this respect English law stands out from many other legal systems in the world.
2. The fact that English law does not recognize a doctrine of good faith does not mean that the rules of contract law do not generally conform with the requirements of good faith. It would be surprising if the rules encouraged parties to behave in bad faith. The difference between

English law and other legal systems is in some ways one of legal form rather than substance. Conclusions that would be reached in other legal systems by invocation of the doctrine of good faith can be reached in other ways by the English courts.

3. However, now that good faith is taken into account when considering whether a term in a consumer contract constitutes an unfair term (see Chapter 14), the question has arisen whether the influence of good faith will extend beyond the scope of the legislation and percolate into other areas of contract law (particularly commercial contracts). In many ways there is no reason why it should. But there are some signs of a change in both judicial and academic attitudes to good faith. Hostility or scepticism is being replaced by greater receptiveness. This being the case, English contract law may yet develop in the direction of recognizing a duty of good faith, at least in the performance of contracts.
4. It is therefore necessary to examine the arguments both for and against the introduction of a doctrine of good faith into English law and to consider the different forms that such a doctrine might assume.

15.1 Introduction

The requirement of good faith having been introduced into English law in relation to consumer contracts, first by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) and now by Part 2 of the

p. 491 Consumer Rights Act 2015 (see 14.2), raises for consideration the issue of whether good faith should be confined to this particular context and type of contract or whether it is of more general application and has a greater role to play in the modern English law of contract. When the Regulations were first enacted in 1994 the good faith requirement excited a considerable amount of interest among English contract lawyers because English law did not then recognize a doctrine of good faith in contract law. In the absence of such a general doctrine, how would the English courts interpret the good faith requirement in the Regulations? As it has turned out, the courts do not seem to have experienced any particular difficulty in giving effect to the good faith requirement. They have recognized its European origins and have not sought to interpret it from a national perspective. At first instance in *Director General of Fair Trading v. First National Bank* [2000] 1 WLR 98, 109 Evans-Lombe J, after noting that the origin of the Regulations is a Council Directive, stated:

[I]t is clear, therefore, that the words ‘good faith’ are not to be construed in the English sense of absence of dishonesty but rather in the continental civil law sense.

In the Court of Appeal Peter Gibson LJ stated ([2000] QB 672, 687) that “good faith” has a special meaning in the Regulations, having its conceptual roots in civil law systems’. Drawing on Anson’s *Law of Contract* (27th edn, Oxford University Press, 1998), p. 293 he stated that the ‘good faith’ element:

seeks to promote fair and open dealing, and to prevent unfair surprise and the absence of real choice. A term to which the consumer's attention is not specifically drawn but which may operate in a way which the consumer might reasonably not expect and to his disadvantage may offend the requirement of good faith. Terms must be reasonably transparent and should not operate to defeat the reasonable expectations of the consumer. The consumer in choosing whether to enter into a contract should be put in a position where he can make an informed choice.

In the House of Lords ([2001] UKHL 52, [2002] 1 AC 481) both Lord Bingham (at [17]) and Lord Steyn (at [36]) recognized that good faith is an 'objective criterion' which imports the 'notion of fair and open dealing'. Two further points should be noted from the speech of Lord Bingham. The first is his observation that the Member States of the European Union 'have no common concept of fairness or good faith'. This is an important point. While civil law systems do recognize a doctrine of good faith, their conception of good faith is not homogeneous. The second point that should be noted is Lord Bingham's remark that good faith is not a concept that is 'wholly unfamiliar to British lawyers'. Good faith had its 'champion' in Lord Mansfield in the eighteenth century and traces of his support for good faith are still to be found in English law (particularly in relation to insurance contracts). These two observations suggest that care should be taken when comparing English law with the law of our civilian counterparts. They suggest that the stark contrast that is often drawn between the common law and the civil law can be overstated both because the civil law systems are not themselves united, at least in relation to their conception of good faith, and because good faith is not in fact an unknown commodity to common lawyers.

Nevertheless, the requirement of good faith as enacted in the Regulations (and now in Part 2 of the Consumer Rights Act 2015) does present an important challenge to English lawyers and judges. It forces them to talk

p. 492 openly about good faith and, once they articulate ← a conception of good faith, the question will arise for consideration whether it should be confined to the particular context of the applicable legislation or whether its influence should extend more broadly. There is no immediate reason why Part 2 of the Consumer Rights Act 2015 should lead to the recognition of a general doctrine of good faith. Part 2 of the Act is not of general application. It only applies to consumer contracts that fall within its scope. But this does not mean that the legislation will not have a wider influence on the development of English law. Many commentators have argued that English law should recognize a doctrine of good faith and there are signs that current members of the judiciary are more receptive to the idea that good faith should have a role to play in English contract law. There is, however, a difficulty. That difficulty is the decision of the House of Lords in *Walford v. Miles* [1992] 2 AC 128, in which it was held that English law did not recognize the validity of an obligation to negotiate in good faith. Any recognition of a general doctrine of good faith would require re-consideration of the decision in *Walford* and its scope and that can only be done by the Supreme Court. It is also far from clear that the Supreme Court will take the step of recognizing a general doctrine of good faith. In its most recent pronouncement on the matter, Lord Hodge, giving the judgment of the majority of the court, affirmed that there is 'no general principle of good faith in contracting in English law' (*Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [44]). This statement is unlikely to be the last word on the matter, given that the question of whether or not English law should recognize a general doctrine of good faith was not in issue before the Supreme Court, but it does recognize the continued reluctance of English law to embrace a general doctrine of good faith.

We shall therefore start with the decision in *Walford*. It is necessary both to examine the reasons that led to the decision and also to explore its limits. Having done that we shall then consider the arguments that have been advanced in support of the refusal of English law to recognize the validity of a doctrine of good faith and then turn to the arguments that have been advanced by those who support the recognition of a doctrine of good faith.

15.2 *Walford v. Miles*

A leading case is the decision of the House of Lords in *Walford v. Miles* [1992] 2 AC 128, where it was held that an obligation to negotiate in good faith is not enforceable.

Walford v. Miles

[1992] 2 AC 128, House of Lords

The defendants, Mr and Mrs Miles, were the owners of a company, PNM Laboratories Ltd. They decided to put the company up for sale in 1986. A third party offered £1.9 million for the business and its premises. The plaintiffs, the Walfords, entered into negotiations with the defendants in March 1987. The defendants were prepared to warrant that at the date of completion the cash resources in the company's bank account would not be less than £1 million and that the trading profits for the 12 months after completion would be not less than £300,000 before tax. On 12 March 1987 the parties reached agreement in principle for the sale of the business. On 18 March the plaintiffs sent a letter to the defendants which recorded an agreement reached between the parties the previous day.

← The letter recorded that the plaintiffs had promised to provide a comfort letter from their bank which confirmed that they were prepared to provide the finance of £2 million in order to enable the plaintiffs to acquire the company. In return the defendants agreed that if they received a letter from the bank to this effect by the end of the week they would terminate negotiations with any third party with a view to concluding an agreement with the plaintiffs. On 18 March the plaintiffs' bank duly provided a letter which stated that it had offered the plaintiffs loan facilities to enable them to acquire the company for £2 million. On 25 March the defendants confirmed that, subject to contract, they were prepared to sell the company to the plaintiffs for £2 million. On 30 March a letter was written to the plaintiffs on behalf of the defendants which stated that they had decided to sell the company to a third party.

The plaintiffs brought an action against the defendants for damages for breach of contract. They claimed damages of £1 million (on the basis that they had lost the opportunity to purchase a company worth £3 million for £2 million) and they also claimed damages for misrepresentation by the defendants in continuing to deal with third parties. The trial judge awarded the plaintiffs damages of £700 in respect of the misrepresentations made by the defendants. In relation to the claim for breach of contract, the trial judge ordered that damages for the alleged loss of opportunity be assessed but the Court of Appeal allowed the defendants' appeal. The plaintiffs appealed to the House of Lords where it was held that the agreement recorded in the defendants' letter of 18 March was unenforceable.

Lord Ackner

The Walfords relied upon an oral agreement, collateral to the negotiations which were proceeding, to purchase the company and the land it occupied 'subject to contract'. The consideration for this oral agreement was twofold—firstly the Walfords agreeing to continue the negotiations and not to withdraw and, secondly, their providing the comfort letter from their bankers in the terms requested.

For this consideration it was alleged in paragraph 5 of the statement of claim as follows:

'the first defendant on behalf of himself and the second defendant would terminate negotiations with any third party or consideration of any alternative with a view to concluding an agreement with the Plaintiffs and further that even if he received a satisfactory proposal from any third party prior to the close of business on 25 March 1987, he would not deal with that third party or give further consideration to any alternative.'

As thus pleaded, the agreement purported to be what is known as a 'lock-out' agreement, providing the plaintiffs with an exclusive opportunity to try and come to terms with the defendants, but without expressly providing any duration for such an opportunity.

For reasons which will become apparent hereafter, it was decided to amend this paragraph by the following addition:

'It was a term of the said collateral agreement necessarily to be implied to give business efficacy thereto that, so long as they continued to desire to sell the said property and shares, the first defendant on behalf of himself and the second defendant would continue to negotiate in good faith with the plaintiff.'

Thus the statement of claim alleged that, not only were the defendants 'locked-out' for some unspecified time from dealing with any third party, but were 'locked-in' to dealing with the plaintiffs, also for an unspecified period. ...

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The validity of the agreement alleged in paragraph 5 of the statement of claim as amended

The justification for the implied term in paragraph 5 of the amended statement of claim was that in order to give the collateral agreement 'business efficacy', Mr Miles was obliged to 'continue to negotiate in good faith'. It was submitted to the Court of Appeal and initially to your Lordships that this collateral agreement could not be made to work, unless there was a positive duty imposed upon Mr Miles to negotiate. It was of course conceded that the agreement made no specific provision for the period it was to last. It was however contended, albeit not pleaded, that the obligation to negotiate would endure for a reasonable time, and that such time was the time which was reasonably necessary to reach a binding agreement. It was however accepted that such period of time would not end when negotiations had ceased, because all such negotiations were conducted expressly under the umbrella of 'subject to contract'. The agreement alleged would thus be valueless if the alleged obligation to negotiate ended when negotiations as to the terms of the 'subject to contract' agreement had ended, since at that stage the Miles would have been entitled at their whim to refuse to sign any contract.

Apart from the absence of any term as to the duration of the collateral agreement, it contained no provision for the Miles to determine the negotiations, albeit that such a provision was essential. It was contended by Mr Naughton [counsel for the plaintiffs] that a term was to be implied giving the Miles a right to determine the negotiations, but only if they had 'a proper reason'. However in order to determine whether a given reason was a proper one, he accepted that the test was not an objective

one—would a hypothetical reasonable person consider the reason a reasonable one? The test was a subjective one—did the Miles honestly believe in the reason which they gave for the termination of the negotiations? Thus they could be quite irrational, so long as they behaved honestly.

Mr Naughton accepted that as the law now stands and has stood for approaching 20 years, an agreement to negotiate is not recognised as an enforceable contract. This was first decided in terms in *Courtney & Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297, where Lord Denning MR said, at pp. 301–302:

‘If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.’

The decision that an agreement to negotiate cannot constitute a legally enforceable contract has been followed at first instance in a number of relatively recent cases. ...

[He set out the cases and continued]

In the Court of Appeal and before your Lordships Mr Naughton submitted that [*Courtney & Fairbairn Ltd v. Tolaini Brothers* and *Mallozzi v. Caripelli SpA* [1976] 1 Lloyd’s Rep 407] were distinguishable from the present case, because that which was referred to negotiation with a view to agreement in those cases was an existing difference between the parties. In the present case, so it was contended, by the end of the telephone conversation on 17 March there was no existing difference. Every point that had been raised for discussion had been agreed. However this submission overlooked that what had been ‘agreed’ on the telephone on 17 March was ‘subject to contract’. Therefore the parties were still in negotiation even in relation to those matters. Further, there were many other matters which had still to be considered and agreed.

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← Before your Lordships it was sought to argue that the decision in Courtney’s case [1975] 1 WLR 297 was wrong. ... While accepting that an agreement to agree is not an enforceable contract, the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined ‘in good faith’. However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to

pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question—how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an ‘agreement’? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a ‘proper reason’ to withdraw. Accordingly a bare agreement to negotiate has no legal content.

The validity of the agreement as originally pleaded in the statement of claim

Paragraph 5 of the statement of claim, as unamended, followed the terms of the oral agreement as recorded in the penultimate paragraph of the letter of 18 March

[He set out the unamended paragraph set out above and continued]

Despite the insistence by Mr Naughton upon the implied term pleaded in the amendment involving the obligation to negotiate, Bingham LJ, in his dissenting judgment, considered that that obligation could be severed from the agreement. He concluded that the agreement, as originally pleaded was a valid and enforceable agreement and entitled the Walfords to recover whatever damages they could establish resulted in law from its repudiation.

Before considering the basis of Bingham LJ’s judgment, I believe it helpful to make these observations about a so-called ‘lock-out’ agreement. There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period of time not to negotiate with anyone except A in relation to the sale of his property. There are often good commercial reasons why A should desire to obtain such an agreement from B. B’s property, which A contemplates purchasing, may be such as to require the expenditure of not inconsiderable time and money before A is in a position to assess what he is prepared to offer for its purchase or whether he wishes to make any offer at all. A may well consider that he is not prepared to run the risk of expending such time and money unless there is a worthwhile prospect, should he desire to make an offer to purchase, of B, not only then still owning the property, but of being prepared to consider ← his offer. A may wish to guard against the risk that, while he is investigating the wisdom of offering to buy B’s property, B may have already disposed of it or, alternatively, may be so advanced in negotiations with a third party as to be unwilling or for all practical purposes unable, to negotiate with A. But I stress that this is a negative agreement—B by agreeing not to negotiate for this fixed period with a third party, locks himself out of such negotiations. He has in no legal sense locked himself into negotiations with A. What A has achieved is an exclusive opportunity, for a fixed period, to try and come to terms with B, an opportunity for which he has, unless he makes his agreement under seal, to give good consideration.

I therefore cannot accept Mr Naughton's proposition, which was the essential reason for his amending paragraph 5 of the statement of claim by the addition of the implied term, that without a positive obligation on B to negotiate with A, the lock-out agreement would be futile.

The agreement alleged in paragraph 5 of the unamended statement of claim contains the essential characteristics of a basic valid lock-out agreement, save one. It does not specify for how long it is to last. Bingham LJ sought to cure this deficiency by holding that the obligation upon Mr Miles and his wife not to deal with other parties should continue to bind them 'for such time as is reasonable in all the circumstances'. He said:

'[T]he time would end once the parties acting in good faith had found themselves unable to come to mutually acceptable terms ... the defendants could not ... bring the reasonable time to an end by procuring a bogus impasse, since that would involve a breach of the duty of reasonable good faith which parties such as these must, I think, be taken to owe to each other.'

However, as Bingham LJ recognised, such a duty, if it existed, would indirectly impose upon the Miles a duty to negotiate in good faith. Such a duty, for the reasons which I have given above, cannot be imposed. That it should have been thought necessary to assert such a duty helps to explain the reason behind the amendment to paragraph 5 and the insistence of Mr Naughton that without the implied term, the agreement, as originally pleaded, was unworkable—unworkable because there was no way of determining for how long the Miles were locked out from negotiating with any third party.

Thus even if, despite the way in which the Walfords' case was pleaded and argued, the severance favoured by Bingham LJ was permissible, the resultant agreement suffered from the same defect (although for different reasons), as the agreement contended for in the amended statement of claim, namely that it too lacked the necessary certainty, and was thus unenforceable.

I would accordingly dismiss this appeal with costs.

Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Jauncey of Tullichettle, and Lord Browne-Wilkinson concurred.

Commentary

There were two aspects to the agreement between the parties in *Walford*. The first was a lock-out agreement and the second was a lock-in agreement. What is the function of these agreements? Essentially, their function is to buy time in the context of a transaction such as a take-over bid. Parties often incur considerable expense when mounting a take-over bid and it may be important for them to buy a period of time in which to attempt to reach agreement or to put the deal together (in terms of putting the finance in place, etc.). What is the difference between a lock-out and a lock-in agreement? The difference is that a lock-out agreement precludes

p. 497 a party from negotiating with any other party but does not actually require him ← to negotiate with the other party to the lock-out agreement, while a lock-in agreement does actually require the parties to negotiate with one another with a view to reaching agreement.

On the facts of *Walford* the House of Lords held that the lock-out agreement was unenforceable because it did not have a fixed time limit. While this was fatal to the lock-out agreement in *Walford* itself, it will not be an insuperable obstacle in other cases. It can be overcome by careful drafting. All that is required is the insertion into the lock-out agreement of a fixed point in time at which the agreement comes to an end. This was done in *Pitt v. PHH Asset Management Ltd* [1994] 1 WLR 327 where a 14-day lock-out agreement was held to be enforceable.

The conclusion of the House of Lords in relation to lock-in agreements is, however, more problematic because it was held that they are inherently unenforceable. Lord Ackner gave two reasons for his refusal to recognize the validity of an obligation to negotiate in good faith. The first was that such an agreement was, in his view, too uncertain to be enforced (see the discussion of the ‘agreement to agree’ cases at 4.1). The second was that a duty to negotiate in good faith was ‘inherently repugnant to the adversarial position of the parties involved in negotiations’. The imposition of such a duty was, in his opinion, ‘inconsistent with the position of a negotiating party’.

It is the reasoning of the House of Lords in relation to the lock-in aspect of the agreement that is of primary significance for this chapter. The conclusion that English law does not recognize the validity of a duty to carry on negotiations in good faith makes it more difficult for a court to recognize the existence of a doctrine of good faith in English contract law. However, Lord Ackner did not state that in no circumstances would an English court recognize the validity of a duty of good faith and it has since been suggested that the alleged hostility of English law to the existence of a doctrine of good faith in the performance of a contract is ‘misplaced’ (see *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [153]). Nevertheless, the robust language which he used suggests that he did not envisage a role for a doctrine of good faith in English law.

However, the fact that English law does not presently recognize the existence of a *doctrine* of good faith does not mean that good faith has no impact at all on English contract law. It does in the sense that it has an influence upon the formulation of the rules of contract law. In *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194, Steyn LJ stated (at p. 196) that:

a theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a Judge to depart from binding precedent. On the other hand, if the *prima facie* solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness.

The limits of this principle should, however, be noted. In particular, it does not entitle a judge to ‘depart from binding precedent’. The judge can only subject an argument that appears to run contrary to the reasonable expectations of honest men (or ‘good faith’) to ‘rigorous re-examination’. In *Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [27] Lord Hodge confirmed that ‘the English law of contract seeks to protect the reasonable expectations of honest people when they enter into contracts’

← and cited as support for this proposition the analysis of Lord Steyn. Lord Hodge then proceeded to observe that the principle identified by Lord Steyn was 'an important principle which is applied to the interpretation of contracts' but he then noted that

in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognised a general principle of good faith in contracting. Instead, English law has relied on piecemeal solutions in response to demonstrated problems of unfairness.'

On this view English contract law is influenced by the idea of good faith, and its individual rules may even be said to be reflective of good faith, but there is, as yet, no overriding 'general principle of good faith in contracting in English law'.

Before turning to the criticism that has been levelled against *Walford*, it is worth noting one point which may suggest that *Walford* was on its facts correctly decided. That point relates to the measure of damages sought to be recovered by the plaintiffs. The plaintiffs brought a claim for damages of £1 million. The size of the claim might possibly have had an impact on the outcome of the case. In some legal systems a breach of an obligation to negotiate in good faith gives rise to a claim for damages, the aim of which is to entitle the claimant to recover the money wasted on the negotiations. The aim is not to give the claimant the profit which it would have made had the negotiations resulted in the conclusion of a profitable contract. In this connection it is worth noting that the plaintiffs in *Walford* recovered damages of £700 in respect of the misrepresentations made by the defendants. This sum may have represented the plaintiffs' wasted expenditure. To the extent that it did, the result of the case, albeit not the language in which it was expressed, may be consistent with that which would be reached in many other legal systems.

The decision in *Walford* has been criticized principally on the ground that it does not impose a sanction on a party who negotiates in bad faith but does not make any misrepresentations. This point has been made by Lord Steyn, writing extrajudicially ('Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 439), when he stated:

It is ... surprising that the House of Lords in *Walford v. Miles* held that an express agreement that parties must negotiate in good faith is unenforceable. Lord Ackner observed that the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. As the Unidroit principles make clear it is obvious that a party is free to negotiate and is not liable for a failure to reach an agreement. On the other hand, where a party negotiates in bad faith not intending to reach agreement with the other party he is liable for losses caused to the other party. That is a line of reasoning not considered in *Walford v. Miles*. The result of the decision is even more curious when one takes into account that the House of Lords regarded a best endeavours undertaking as enforceable. If the issue were to arise again, with the benefit of fuller argument, I would hope that the concept of good faith would not be rejected out of hand.

However, as we have noted, it is possible to confine the decision in *Walford* to the context of a duty to negotiate and to reach the conclusion that it does not preclude the recognition of a duty of good faith in the performance of a contract. Given the degree of uncertainty which English contract law currently exhibits towards the recognition of a duty of good faith in a contractual context (whether that context is the negotiation of a contract, its performance, or its termination), it is necessary to examine the arguments for and against the recognition of a duty of good faith in English contract law.

p. 499 **15.3 Good Faith: The Negative View**

What are the reasons that have led the English courts to refuse to recognize the validity of a doctrine of good faith? The principal reasons have been summarized by Professor Brownsword in the following terms:

R Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford University Press,

2006), pp. 114–120

The arguments against adopting a general principle of good faith are well-rehearsed. At least five negative themes are recurrent.

First, it is objected that a doctrine of good faith, by requiring the parties to take into account the legitimate interests or expectations of one another, cuts against the essentially individualistic ethic of English contract law. ...

Secondly ... it is said that good faith is a loose cannon in commercial contracts. Whilst everyone agrees that a doctrine of good faith represents some set of restrictions on the pursuit of self-interest, the objection is that it is not clear how far these restrictions go. In other words, good faith presupposes a set of moral standards against which contractors are to be judged, but it is not clear whose (or which) morality this is. Without a clear moral reference point, there is endless uncertainty about a number of critical questions—for example, about whether good faith requires only a clear conscience (subjective good faith) or whether it imports a standard of fair dealing independent of personal conscience (objective good faith); whether good faith applies to all phases of contracting, including pre-contractual conduct; whether good faith regulates only conduct (namely, how the parties conduct themselves during the formation of the contract and, subsequently, how they purport to rely on the contractual terms for performance, termination, and enforcement) or also the content (substance) of contracts (in other words, whether good faith regulates matters of procedure and process or also matters of contractual substance); whether a requirement of good faith adds anything to the regulation of bad faith (that is, whether good faith simply comprises so many instances of bad faith); whether good faith imposes both negative and positive requirements (covering, say, non-exploitation, non-opportunism, non-shirking as well as positive co-operation, support, and assistance); and so on.

Closely related to the second concern ... there is a third concern, namely that a doctrine of good faith would call for difficult inquiries into contractors' states of mind. Often the literature on good faith emphasises that the question of whether a contractor has acted in good faith hinges on the contractor's reasons for action. This is not to be confused with matters of subjective honesty, but it does involve speculating about a contractor's reasons. ...

Fourthly, if good faith regulates matters of substance in a broad sense (including the remedial regime) (which it seems to do once we view it as a kind of implied term for co-operation), then this impinges on the autonomy of the contracting parties. Accordingly, even if the sceptics allow (if only for the sake of argument) that good faith may legitimately regulate the process of contracting, to ensure that agreement is genuine, they will argue that, once good faith trespasses on substance, it restricts the autonomy of the parties and it is inconsistent with the fundamental philosophy of freedom of contract, with the idea that contract law should set a calculable framework for self-regulation by the parties. If we combine the thought that good faith imports an uncertain discretion with the thought that good faith challenges the autonomy of contracting parties, we have powerful reasons to be sceptical about the wisdom of adopting such a doctrine. ...

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← The final thread of the sceptical negative view is that a general doctrine of good faith goes wrong in failing to recognise that contracting contexts are not all alike. If contract law is to be sensitive to context, it cannot be right to apply a doctrine of good faith irrespective of context. As Michael Bridge has said:

‘It is a fair reproach to English contract law that it unthinkingly treats the rules and principles of commodity sales, time and voyage charterparties and so on as though they could be applied without modification in very different contractual settings. Good faith theorists should avoid making the same sort of mistake. In my view, what is needed is an informed treatment of different areas of commercial contract and market activity.’

Bridge goes on to argue that it would be wholly inappropriate to introduce a doctrine of good faith into the commodities markets, where dealing is intrinsically competitive and where opportunistic behaviour is to be expected. This is not to say that, even in the commodities markets, good faith is totally rejected. However, insofar as notions of good faith are accepted, they are taken up in the standard terms of the trade and this, Bridge argues, is the way that the market best deals with new questions of fair dealing.

To sum up, the case against the adoption of a general principle of good faith is that English contract law is premised on adversarial self-interested dealing (rather than other-regarding good faith dealing); that good faith is a vague idea, threatening to import an uncertain discretion into English law; that the implementation of good faith doctrine would call for difficult inquiries into contracting parties’ reasons in particular cases; that good faith represents a challenge to the autonomy of contracting parties; and, that a general doctrine cannot be appropriate when contracting contexts vary so much—in particular, harking back to the first objection, a general doctrine of good faith would make little sense in those contracting contexts in which the participants regulate their dealings in a way that openly tolerates opportunism.

Some of these reasons can be identified in the speech of Lord Ackner in *Walford*, particularly the first one. The second and third objections are related in the sense that they are directed to the uncertainty that would be generated by the recognition of a doctrine of good faith. This is an objection that must be taken seriously. English lawyers tend to be hostile to broad, general principles (see *Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [27]: ‘in contrast to many civil law jurisdictions, English law has never recognised a general principle of good faith in contracting’). They are much more comfortable when reasoning incrementally and by analogy with the existing body of case-law (see E McKendrick, ‘Good Faith: A Matter of Principle?’ in A Forte (ed), *Good Faith in Contract and Property Law* (Hart, 1999), p. 39). Thus the fact that there are individual rules of English contract law that are consistent with the requirements of a doctrine of good faith cannot necessarily be used to support the proposition that English law should recognize a general doctrine of good faith (for support for this stance see *Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [27]). Provided that the individual rules work, why abandon them in favour of a broad, general principle? The fifth objection noted by Professor Brownsword is an important one, in the sense that objections to a doctrine of good faith tend to come from particular contexts, most notably the commodity markets. It is true that these markets are competitive and

that they may, to that extent, require special treatment. But not all contracts are concluded in such a competitive environment and, where they are not, the law should not necessarily be so hostile to the existence of an obligation to act in good faith.

p. 501 **15.4 Good Faith: The Neutral View**

Professor Brownsword also identifies a neutral view of good faith. While ultimately the neutrality thesis inclines towards the negative view, it is nevertheless important to identify its existence because it is probably a view that is held by many English lawyers. Holders of the neutral view of good faith see nothing ‘intrinsically objectionable about a good faith doctrine’ (R Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford University Press, 2006), p. 120) but point out that ‘English law has its own doctrinal tools for achieving the results that are achieved via a good faith doctrine in other jurisdictions’. Professor Brownsword identifies two versions of the neutrality thesis and argues that they both incline towards scepticism for the following reasons:

R Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford University Press,

2006), pp. 120–121

The paradigm of neutrality holds: (i) that there is a strict equivalence between a general doctrine of good faith and the piecemeal provisions of English law that regulate fair dealing (we can call this ‘the equivalence thesis’) and (ii) that it makes no difference whether English law operates with a general doctrine or with piecemeal provisions (we can call this the ‘indifference thesis’). Once we differentiate between the equivalence and the indifference theses, and once we distinguish between holding these theses in the abstract as against in the context of an ongoing legal system, it becomes apparent that the neutral view has a strong bias towards the negative view.

One way in which this bias will reveal itself is if we imagine a neutral, who accepts both the equivalence and the indifference theses *in the abstract*, but who is now asked whether it would be sensible to replace the English piecemeal approach with a general doctrine of good faith. Clearly, since (*ex hypothesi*) nothing is to be gained by replacing one approach with the other, the neutral must take a negative view on this practical question (unless, for some bizarre reason, incurring transaction costs is judged to be a good thing).

Suppose, though, the proposal is not to replace the English piecemeal approach with a general doctrine of good faith, but to supplement the former with the latter so that they would exist alongside one another in English law. What would the neutral say to this? Again, the neutral would have good reason to take the negative view. If, as the neutral believes, there is a strict equivalence between the piecemeal approach ... and a general doctrine of good faith, it seems a needless duplication to supplement the former with the latter. Worse, the neutral might fear that specific doctrines, with well defined functions, are liable to become clouded once a general background standard is in play, for lawyers might be uncertain not only about whether they should found themselves on the traditional doctrines or the new general standard but also about where the boundaries of the traditional doctrines now lie.

As has been pointed out, a number of rules of English contract law can be rationalized as examples of the operation of a doctrine of good faith. Professor Clarke has pointed out (‘The Common Law of Contract in 1993: Is There a General Doctrine of Good Faith?’ (1993) 23 *HKLJ* 318, 319) that the ‘foundations of a general rule of good faith can be discerned in the common law dust’. Thus far (with the notable exception of the judgment of

p. 502 Leggatt J in *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [120]–[154], see 15.6) these individual instances have not been developed into a unified principle. The clearest example of the express recognition of a role for good faith is in relation to insurance contracts which at common law were known as contracts of the utmost good faith or contracts ‘*uberrimae fidei*’ (*Carter v. Boehm* (1766) 3 Burr 1905). It is here that Lord Mansfield has had his greatest influence, albeit that that influence is now largely confined to insurance contracts. Other examples can be found of rules which can be rationalized in terms of good faith: the rule which prevents a party snapping up a bargain which he knew was not intended by the other contracting party (*Hartog v. Colin and Shields* [1939] 3 All ER 566, 2.3), the limited duty of disclosure which English law recognizes (see, for example, *Notts Patent Brick and Tile Co v. Butler* (1866) 16 QBD 778, 17.3), the operation of the doctrines of promissory estoppel (*Central London Property Ltd v. High Trees House Ltd* [1947] KB 130, 5.3.2) and estoppel by convention (*Amalgamated Investment and Property Co v. Texas Commerce International Bank Ltd* [1982] QB 84, 5.3.4), and the willingness of the courts to imply terms

into a contract in particular situations (see, for example, *Scally v. Southern Health and Social Services Board* [1992] 1 AC 294, 10.4.2), particularly in relation to the control of the exercise of a contractual discretion (see, for example, *Paragon Finance plc v. Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685, 10.4.2). Yet the fact that individual rules can be rationalized in terms of good faith does not necessarily lead to the conclusion that English law should adopt a general doctrine of good faith. It can be taken as evidence of the fact that the law can operate satisfactorily with a series of individual rules and, this being the case, why ‘cloud’ their sphere of application by the adoption of a general principle of good faith?

Professor Brownsword also notes that holders of the neutral view point out that English law has its ‘own doctrinal tools for achieving the results that are achieved via a good faith doctrine in other jurisdictions’. There is a considerable amount of truth in this claim. Other legal systems do use the doctrine of good faith to deal with issues which English law manages in other ways. One example of this is provided by the way in which the law responds to events which occur after the formation of the contract which have the effect of rendering performance of the contract impossible, illegal, or impracticable. English law has developed a distinct doctrine of frustration to deal with these issues, albeit that the doctrine operates within rather narrow limits (see further Chapter 21). German law, on the other hand, uses the doctrine of good faith to regulate these matters. It is not clear what English law stands to gain from abandoning a more focused doctrine such as frustration in favour of a potentially amorphous, multi-purpose doctrine of good faith. Of course, it could be argued that a doctrine of good faith might encourage English courts to develop a broader, more flexible doctrine of frustration but such a development would not necessarily be desirable and, in any event, that development could occur within the existing doctrine of frustration and does not have to wait for the creation of a doctrine of good faith. Alternatively, it could be argued that good faith is in fact the basis of the doctrine of frustration so that an analogy can indeed be drawn here between English law and German law. While it is true that English lawyers have never been able to identify the basis of the doctrine of frustration with any precision (see 21.7), it would not seem to be much of an advance to conclude that the foundation of the doctrine is good faith because such a conclusion would only serve to open up the debate as to what we mean by good faith. Further, it is not clear what practical consequences, if any, would follow from the conclusion that good faith was the basis of the doctrine of frustration. The disadvantages of rationalizing the doctrine of frustration in terms of good faith would therefore seem to outweigh its advantages.

p. 503 15.5 Good Faith: The Positive View

Turning now to the positive side of the equation, what reasons can be advanced to support the recognition of a general doctrine of good faith in English law? Professor Brownsword has set out a positive case for a doctrine of good faith in the following terms:

R Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford University Press,

2006), pp. 123–130

First, to the extent, that English law already tries to regulate bad faith dealing, it may be argued that it would be more rational to address the problem directly (rather than indirectly) and openly (rather than covertly) by adopting a general principle of good faith. ...

Secondly, in the absence of a doctrine of good faith, it may be argued ... that the law of contract is ill-equipped to achieve fair results, on occasion leaving judges ‘unable to do justice at all’. ...

Thirdly, turning on its head the negative arguments against a general principle of good faith, it might be argued that, with such a principle, the courts are better equipped to respond to the varying expectations encountered in the many different contracting contexts—and, in particular, it might be argued that the courts are better able to detect co-operative dealing where it is taking place. Thus, the argument runs, if English contract law adopted a doctrine of good faith, it would pose questions of contractual interpretation and implication in a context, not only of background standards of fair dealing, but more immediately of the concrete expectations of the parties. Such concrete expectations would be based as much on the way that the parties related to one another (whether they dealt with one another in an adversarial or non-adversarial manner) as on the express provisions of the agreement. As a result, English law would recover the ability to give effect to the spirit of the deal in a way that prioritised the parties’ own expectations. ...

Finally, it is arguable that the beneficial effects of a good faith doctrine go beyond (reactive) dispute-settlement, for a good faith contractual environment has the potential to give contracting parties greater security and, thus, greater flexibility about the ways in which they are prepared to do business ... The more that contract doctrine provides a security against the risks of opportunism and exploitation to which co-operative dealing exposes a contractor, the more willing (other things being equal) contractors will be to deal in a way that optimises their interests (even though they are thereby exposed to risk). Thus, as good faith finds a place in the law, and as the contractual environment becomes more congenial to trust and risk-taking, it is possible that these reciprocal influences will work together to promote ever more co-operative thinking in both legal doctrine and contracting practice.

In sum ... a good faith doctrine allows problems of bad faith to be addressed in a clean and direct fashion; it enables judges at all levels to deal in a coherent and an effective manner with cases of unfair dealing; it can bring the law much more closely into alignment with the protection of reasonable expectations (which, it must be recognised, vary from one contracting situation to another); and it can contribute to a culture of trust and co-operation that enhances the autonomy of contractors and that, on a larger scale, is an important feature of successful economies.

An illustration of the proposition that English law should attack issues of bad faith directly rather than indirectly can be provided by the law relating to the incorporation of onerous terms into a contract. As we have seen (see 9.3), the more onerous or unusual the contract term, the greater the steps that must be taken in order to draw the existence of the term to the attention of the other party before it can be incorporated into the contract. This rule is open to criticism on the ground that it fails to explain why it is that certain terms are more difficult to incorporate into a contract than others. A doctrine of good faith might

more readily provide a foundation for the reluctance of the English courts to conclude that onerous or unusual terms have been incorporated into a contract (a point which was acknowledged by Bingham LJ in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433, 439, see 9.3). But even if it is accepted that good faith provides a more secure conceptual foundation for the rule, this is not necessarily an argument in favour of a change in the present substantive law. Rather, it appears to be an argument that relates to the way in which we organize or classify the existing rules.

This, however, leads us on to the second argument noted by Professor Brownsword which goes beyond a reflection of the current state of the law and takes on a reforming role. This is a familiar theme in writings on good faith. Thus Professor Friedmann has argued ('Good Faith and Remedies for Breach of Contract' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), pp. 399–400) that 'good faith may provide a unifying concept for a number of distinct rules dealt with under different headings, and contribute to a greater consistency in the law by exerting pressure upon rules which are incompatible with the idea of good faith'. The first part of this quotation makes an organizational point, but the latter part goes beyond re-organization and assumes a reforming mission. The potential of good faith to bring about change and reform can also be illustrated by the experience of German law where it has been said that the 'doctrine of good faith has been used by the courts to create new causes of action where no cause of action existed in statutory law' (W Ebke and B Steinhauer, 'The Doctrine of Good Faith in German Contract Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), p. 171).

So what impact might the doctrine of good faith have on the present rules of English contract law? An illustration of its potential role is provided by the decision of the Privy Council in *Union Eagle Ltd v. Golden Achievement Ltd* [1997] AC 514. Would this case be decided the same way if English law recognized a doctrine of good faith? The plaintiff purchaser agreed to buy a flat in Hong Kong and paid 10 per cent of the purchase price (HK\$420,000) as a deposit. The agreement specified the date, time, and place of completion and time was stated to be in every respect the essence of the agreement. Completion was to take place on or before 30 September 1991 and before 5 p.m. on that day. Clause 12 of the agreement stated that, if the purchaser failed to comply with any of the terms and conditions of the agreement, the vendor had the right to rescind the contract and forfeit the deposit. The plaintiff failed to complete by the stipulated time and tendered the purchase price ten minutes after the time for completion had passed. The vendors refused to accept late payment, rescinded the contract, and forfeited the deposit. The plaintiff refused to accept the defendants' decision to rescind the contract and brought an action seeking to have the contract specifically enforced. His attempt was unsuccessful. Lord Hoffmann stated (at p. 517) that the 'chief question' in the case was 'whether the court has, and should have exercised, an equitable power to absolve the purchaser from the contractual consequences of having been late and to decree specific performance'. The plaintiff argued that the court did have such an absolving power and that equity would intervene to restrain the enforcement of legal rights when it would be unconscionable to insist upon them. The plaintiff maintained that the element of unconscionability was present on the facts of this case: the breach was a slight one, but the consequences were, to say the least, drastic.

p. 505 ← Lord Hoffmann rejected the plaintiff's argument and answered the chief question in the negative. He maintained that the principle invoked by the plaintiff was both contrary to the authorities and to the needs of the business world. In his view the parties should be able to know with certainty that the terms of the contract

will be enforced. A jurisdiction to intervene in cases of 'unconscionability' would not produce such certainty. Indeed, the mere existence of a discretion to grant relief would be used as a negotiating tool by a defaulting purchaser. While equity will intervene to grant relief in cases of late payment of money due under a mortgage or rent due under a lease (see *G and C Kreglinger v. New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 35), this jurisdiction does not extend to the case of a contract for the sale of land. In a volatile market a vendor will want to know whether or not he can terminate the contract and deal with someone else. The law should, as far as possible, enable the vendor to know whether or not he is entitled to terminate.

The need for certainty was therefore paramount and the existence of a jurisdiction to grant relief in cases where it would be unconscionable for the vendor to exercise his right to rescind was rejected on the ground that it would detract from the need for a certain rule. This is an issue on which reasonable people will disagree and, indeed, courts in other jurisdictions take a broader view of the equitable jurisdiction to grant relief. A case can be made out that greater emphasis should have been placed upon the motive of the vendor in deciding to terminate and forfeit the deposit. Surely he behaved unreasonably in refusing to accept a ten-minute delay in receiving the purchase money? Should a vendor be entitled to act capriciously and terminate because, for example, he does not like the purchaser or because the market has moved in his favour and it has become economically advantageous for him to find a way out of the contract which he has concluded? The argument that he should not be so entitled is not without its merits. But the point of the illustration is not to debate these rival merits. It is to point out that the law cannot accept the validity of both arguments. It has to choose and English law has chosen to come down on the side of certainty.

Would the introduction of a doctrine of good faith alter that choice? This is one of the real difficulties that is likely to be caused by any recognition of a doctrine of good faith in English law, namely that it will, at least initially, enable parties to re-litigate points of law that were previously settled. In this particular case it is suggested that a doctrine of good faith should not have the effect of changing the result of the case. The result in *Union Eagle* is not as harsh as it appears at first sight. Lord Hoffmann left open the possibility that the purchaser may be able to obtain relief in extreme cases. In so far as the sum retained by the vendor exceeds a genuine pre-estimate of the loss or a reasonable deposit the court has 'a discretion to order repayment of all or part of the retained money'. And where the vendor has been unjustly enriched by improvements made at the purchaser's expense, the purchaser may have a personal restitutionary claim to recover any unjust enrichment which the vendor has obtained as a result of the work done prior to the termination. The advantage of these remedies is that they do not undermine the promotion of certainty. While the vendor should be able to know whether or not he is free to terminate the contract with the purchaser and deal with the land, it does not follow that the vendor should know with the same certainty whether or not he is entitled to retain any pre-payment made by the purchaser. In other words, while the vendor should have restored to him the 'freedom to deal with his land as he pleases', he should not have the same freedom in relation to the financial consequences of termination. This accommodation of the conflicting interests of the vendor and purchaser seems to be a reasonable one and it should not be disturbed by the creation of a doctrine of good faith.

One further argument in favour of a doctrine of good faith, which is not noted by Professor Brownsword, is that good faith is an integral component of the law of contract in other jurisdictions and is also a mandatory part of international restatements of contract law. ← In a global economy this is an increasingly important argument. But it is not conclusive. An examination of the role of good faith in other legal systems and in

international restatements of contract law reveals that they embrace different conceptions of good faith. The most limited version of good faith is to be found in Article 7(1) of the Vienna Convention on Contracts for the International Sale of Goods, which states that in the interpretation of the Convention regard is to be had, inter alia, to the ‘observance of good faith in international trade’. The scope of this provision is the subject of considerable controversy. Some commentators take the view that this provision amounts to the imposition of a duty of good faith upon the parties, but this appears to ignore the fact that the role of good faith in Article 7(1) is confined to the ‘interpretation’ of the Convention. This being the case, it seems preferable to conclude that the Article is directed to the courts and not to the parties. In other words, the court, in the interpretation of the Convention, must have regard to the observance of good faith in international trade. A broader view of good faith is to be found in the United States where the Uniform Commercial Code states in section 1–304 that ‘every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement’ and, for this purpose, section 1–201 defines good faith as ‘honesty in fact and the observance of reasonable commercial standards of fair dealing’. This version of good faith is more extensive than that found in the Vienna Convention in that it is clearly directed to the parties. But it is limited in the sense that it is confined to performance and enforcement of the contract, and does not extend to the pre-contractual stage. Further, the recognition of a duty of good faith in the performance and enforcement of contracts in section 205 of the Restatement (Second) of Contracts has been hailed as a reflection of ‘one of the truly major advances in American contract law during the past fifty years’ (see R Summers, ‘The General Duty of Good Faith—Its Recognition and Conceptualization’ (1982) 67 *Cornell Law Review* 810). A still broader view of good faith is to be found in a range of national and international instruments. For example, Article 242 of the German BGB states that ‘the debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage’; Article 1104 of the revised French Civil Code states that contracts must be negotiated, formed, and performed in good faith; Article 1.7 of the Unidroit Principles of International Commercial Contracts states that ‘each party must act in accordance with good faith and fair dealing in international trade’. The comment to Article 1.7 states that ‘good faith and fair dealing may be considered to be one of the fundamental ideas underlying the Principles’. The importance of ‘good faith’ to the Unidroit Principles can be seen in the fact that parties may not exclude or limit this duty. There is something of a paradox in the idea that one can have mandatory rules in non-binding Principles. Thus there may be no effective sanction in the event that the parties choose to incorporate the Principles into their contract but nevertheless decide to exclude good faith. But the fact that the duty is declared to be mandatory demonstrates the significance of good faith to the Principles.

15.6 Good Faith in the Performance of a Contract?

It is possible that at some future point English contract law will come to accept the existence of a doctrine of good faith. The arguments for and against the recognition of such a duty are finely balanced. Since *Walford v. Miles* was decided there have been some signs of a more sympathetic judicial stance towards good faith (see,

^{p. 507} for example, *Timeload Ltd v. British Telecommunications plc* [1995] EMLR 459; *Philips Electronique Grand Publique SA v. British Sky Broadcasting Ltd* [1995] EMLR 472; *Haines v. Carter* [2002] UKPC 49; and *Pratt Contractors Ltd v. Transit New Zealand* [2003] UKPC 33). On the other hand, the Supreme Court has more recently affirmed the traditional position that English law does not recognize a general principle of good faith

in contracting (*Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [27] and [44], although contrast the more nuanced approach of Lord Burrows which focused at [95] on the appropriateness of the duty on the facts of the case: 'I do not think that this is an appropriate case in which to rely on a general principle of good faith dealing in so far as that would require a court to try to apply a standard of what is commercially unacceptable or unreasonable behaviour').

The clearest sign of a possible recognition of a duty of good faith in the performance of a contract can be seen in the judgment of Leggatt J in the following case:

Yam Seng Pte Ltd v. International Trade Corporation Ltd

[2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321

The parties entered into a contract under which the defendant granted to the claimant the exclusive rights to distribute certain fragrances bearing the name 'Manchester United' in specified parts of the Middle East, Asia, Africa, and Australasia. The contract did not work out as the parties had hoped and the claimant terminated the contract, giving as its principal reason for doing so various breaches of contract by the defendant. The claimant alleged that the defendant had failed to ensure that orders placed by the claimant were shipped promptly, had failed or refused to supply to the claimant all of the specified products, and had undercut the sale by the claimant of the products at Singapore airport by permitting the same goods to be sold more cheaply in the Singapore domestic market. The claimant also submitted that there was an implied term of the agreement that the parties would deal with each other in good faith. The section of the judgment dealing with this aspect of the claim is set out below:

Leggatt J

121. The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see *Chitty on Contract Law* (31st Ed), Vol 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439 are often quoted:

'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table." It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'

122. Another case sometimes cited for the proposition that English contract law does not recognise a duty of good faith is *Walford v. Miles* [1992] 2 AC 128, where the House of Lords considered that a duty to negotiate in good faith is 'inherently repugnant to the adversarial position of the parties when involved in negotiations' and 'unworkable in practice' (per Lord Ackner at p. 138). That case was concerned, however, with the position of negotiating parties and not with the duties of parties who have entered into a contract and thereby undertaken obligations to each other.

123. Three main reasons have been given for what Professor McKendrick has called the ‘traditional English hostility’ towards a doctrine of good faith: see McKendrick, *Contract Law* (9th Ed) pp. 221–2. The first is the one referred to by Bingham LJ in the passage quoted above: that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.
124. In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the *Interfoto* case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems—including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in *Chitty on Contract Law* (31st Ed), Vol 1 at para 1-043. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission’s proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.
125. It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by the fact that such a doctrine has long been recognised in the United States. ...
126. In recent years the concept has been gaining ground in other common law jurisdictions. ...
[He set out examples from Canada, Australia, and New Zealand and continued]
131. Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there

seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.

p. 509

132. Traditionally, the two principal criteria used to identify terms implied in fact are that the term is so obvious that it goes without saying and that the term is necessary to give business efficacy to the contract. More recently, in *Attorney General for Belize v. Belize Telecom Ltd* [2009] 1 WLR 1988 at 1993–5, the process of implication has been analysed as an exercise in the construction of the contract as a whole. In giving the judgment of the Privy Council in that case, Lord Hoffmann characterised the traditional criteria, not as a series of independent tests, but rather as different ways of approaching what is ultimately always a question of construction: what would the contract, read as a whole against the relevant background, reasonably be understood to mean?
133. The modern case law on the construction of contracts has emphasised that contracts, like all human communications, are made against a background of unstated shared understandings which inform their meaning. The breadth of the relevant background and the fact that it has no conceptual limits have also been stressed, particularly in the famous speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at pp. 912–3, as further explained in *BCCI v. Ali* [2002] 1 AC 251 at p. 269.
134. Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement.
135. A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust. Yet it is seldom, if ever, made the subject of an express contractual obligation. Indeed if a party in negotiating the terms of a contract were to seek to include a provision which expressly required the other party to act honestly, the very fact of doing so might well damage the parties' relationship by the lack of trust which this would signify.
136. The fact that commerce takes place against a background expectation of honesty has been recognised by the House of Lords in *HIH Casualty v. Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61. In that case a contract of insurance contained a clause which stated that the insured should have 'no liability of any nature to the insurers for any information provided'. A question arose as to whether these words meant that the insured had no liability even for deceit where the insured's agent had dishonestly provided information known to be false. The House of Lords affirmed the decision of the courts below that, even though the clause read literally would cover liability for deceit, it was not reasonably to be understood as having that meaning. As Lord Bingham put it at [15]:

'Parties entering into a commercial contract ... will assume the honesty and good faith of the other; absent such an assumption they would not deal.'

To similar effect Lord Hoffmann observed at [68] that parties 'contract with one another in the expectation of honest dealing', and that:

'... in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly.'

- p. 510
137. As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.
 138. In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include 'improper', 'commercially unacceptable' or 'unconscionable'.
 139. Another aspect of good faith which overlaps with the first is what may be described as fidelity to the parties' bargain. The central idea here is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract. That principle is well established in the modern English case law on the interpretation of contracts: see e.g. *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900; *Lloyds TSB Foundation for Scotland v. Lloyds Banking Group plc* [2013] UKSC 3 at [23], [45] and [54]. It also underlies and explains, for example, the body of cases in which terms requiring cooperation in the performance of the contract have been implied: see *Mackay v. Dick* (1881) 6 App Cas 251, 263; and the cases referred to in *Chitty on Contracts* (31st Ed), Vol 1 at paras 13-012–13-014. ...
 141. What good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose

the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information.

142. In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships—such as partnership, trusteeship and other fiduciary relationships—on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such ‘relational’ contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements.
- p. 511
143. The Agreement in this case was a distributorship agreement which required the parties to communicate effectively and cooperate with each other in its performance. In particular, ITC needed to plan production and take account of the expected future demand from Yam Seng for Manchester United products. For its part Yam Seng, which was incurring expense in marketing the products and was trying to obtain orders, was arguably entitled to expect that it would be kept informed of ITC’s best estimates of when products would be available to sell and would be told of any material change in this information without having to ask. Yam Seng’s case was not advanced in this way, however, and it is therefore unnecessary for me to decide whether the requirements of good faith in this case extended to any such positive obligations of disclosure.
144. Although its requirements are sensitive to context, 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 standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in *Royal Brunei Airlines v. Tan* [1995] 2 AC 378 at pp. 389–390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. 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.

145. Understood in the way I have described, there is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts. It is consonant with the theme identified by Lord Steyn as running through our law of contract that reasonable expectations must be protected: see *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, 196; and (1997) 113 LQR 433. Moreover such a concept is, I believe, already reflected in several lines of authority that are well established. One example is the body of cases already mentioned in which duties of cooperation in the performance of the contract have been implied. Another consists of the authorities which show that a power conferred by a contract on one party to make decisions which affect them both must be exercised honestly and in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see e.g. *Abu Dhabi National Tanker Co v. Product Star Shipping Ltd (The 'Product Star')* [1993] 1 Lloyd's Rep 397, 404; *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558, 575–7. A further example concerns the situation where the consent of one party is needed to an action of the other and a term is implied that such consent is not to be withheld unreasonably (in a similar sense): see e.g. *Gan v. Tai Ping (Nos 2 & 3)* [2001] Lloyd's Rep IR 667; *Eastleigh BC v. Town Quay Developments Ltd* [2010] 2 P&CR 2. Yet another example, I would suggest, is the line of authorities of which the *Interfoto* case is one which hold that an onerous or unusual contract term on which a party seeks to rely must be fairly brought to the notice of the other party if it is to be enforced.
146. There are some further observations that I would make about the reasons I mentioned earlier for the reluctance of English law to recognise an implied duty on contracting parties to deal with each other in good faith.
147. First, because the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.
- p. 512
148. Second, as the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.
149. Third, a further consequence of the fact that the duty is based on the parties' presumed intention is that it is open to the parties to modify the scope of the duty by the express terms of their contract and, in principle at least, to exclude it altogether. I say 'in principle at least' because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly.

150. Fourth, I see no objection, and some advantage, in describing the duty as one of good faith 'and fair dealing'. I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression 'good faith' is used.
151. Fifth, in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the *Interfoto* case as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table', this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.
152. Sixth, the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.
153. In the light of these points, 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.

Commentary

The reasons given by Leggatt J in his carefully reasoned judgment in support of the recognition of a duty of good faith in the performance of a contract are, essentially, three-fold: (i) the influence of comparative law, (ii) some of the current rules of English contract law may be explained in terms of a duty of good faith in the performance of a contract, and (iii) the arguments against the recognition of such a duty are over-stated. Each of these points can be contested. The fact that other legal systems recognize such a duty does not mean that English law must do so too. The acknowledgement that some of the rules of English contract law can be said to be consistent with the existence of such a duty does not mean that these cases are authority for the recognition of such a duty. Finally, the arguments which are said to over-state the case against the recognition of such a duty appear to have the support of the House of Lords in *Walford*, and the suggestion that the authority of the latter case can be confined to the negotiation of contracts is not beyond challenge. The technique used by Leggatt J to give effect to the duty of good faith in the performance of a contract was an implied term, whether a term implied in fact or a term implied in law (on which see 10.4.1 and 10.4.2).

p. 513 ← The arguments for and against the recognition of a duty of good faith in the performance of a contract remain delicately balanced. Subsequent judicial consideration of the issue has not resolved the matter. In *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265, [107] Jackson LJ, while noting that English contract law does not recognize a general doctrine of good faith, cited *Yam Seng* for the proposition that it may do so 'as an incident of certain categories of contract'. In so far as this may be thought to amount to an approval of *Yam Seng*, it is approval only in relation

to terms implied in law and studiously refrains from giving approval to the section of Leggatt J's judgment where he discusses the implication of such a term as a matter of fact. While Beatson LJ referred to *Yam Seng* (at [150]), it is not possible to discern from his brief summary of the case whether he supported the suggestion that English law should recognize a duty of good faith in the performance of a contract. In *TSG Building Services plc v. South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] BLR 484, [46] Akenhead J said of *Yam Seng* that he would not 'draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts'.

15.6.1 Good Faith as an Express Term

It is suggested that a distinction can be drawn between two situations. The first arises where there is an express term of a contract which requires the parties to act in good faith in the performance of a contract. There is no doubt that such a clause is now enforceable (see *Compass Group UK and Ireland Ltd v. Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265), although there remain doubts about the extent to which the same can be said about an express obligation to negotiate in good faith. A dispute resolution clause in an existing and enforceable contract which requires the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute may be referred to arbitration has been held to be enforceable (*Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2014] 2 Lloyd's Rep 457) and, building on cases such as this, English law may yet develop in the direction of recognizing the enforceability of an express obligation to negotiate in good faith (*Knatchbull-Hugessen v. SISU Capital Ltd* [2014] EWHC 1194 (QB)). But *Walford v. Miles* may still stand in the way of such a development.

In relation to an express obligation to act in good faith in the performance of the contract the remaining difficulty relates to the meaning of the words 'good faith'. The leading authority on this issue is now the decision of the Court of Appeal in *Re Compound Photonics Group Ltd* [2022] EWCA Civ 1371. The decision confirms a number of points of importance. The first and most important point is that, like any question of interpretation of a contract (on which see Chapter 11), the meaning of 'good faith' will depend upon the context in which the words are used ([147]). At first sight, this does not appear to be a particularly helpful statement in so far as it does not provide the certainty which would be afforded were the words to be given a single meaning that applied in all cases. But the conclusion is probably inevitable given that good faith is likely to be a more demanding obligation in the context of a long-term joint venture agreement where there is a high degree of trust between the parties than in the case of a short-term contract where the parties continue to pay primary attention to their own commercial interests.

Second, this connection to the general principles applicable to the interpretation of contracts is helpful in so far as it reminds us of the limited precedent value of cases concerned ← with the interpretation of contracts (see 11.4.1) so that the focus of any court asked to interpret the words 'good faith' in a contract should be upon the meaning of the words in the context of the particular contract in which they appear and not on extracting from the case-law, some of which has been decided in other jurisdictions and in other contexts, general propositions of supposedly universal application or 'minimum standards' in relation to the meaning of 'good faith' ([148]). For this reason, the Court of Appeal was particularly critical of attempts to deduce from

the existing case-law ‘minimum standards’ of conduct that a party must comply with in order to fulfil an obligation to act in ‘good faith’ ([149]–[150]). In all cases the focus must be on the meaning of the words viewed in the context of the contract as a whole.

Third, the core content of a ‘good faith’ obligation is an obligation to act honestly ([149]). This is not to say that good faith is synonymous with an obligation to act honestly but this is its most likely ingredient (and, as Leggatt J observed in *Yam Seng* at [149], it is improbable that parties would in practice seek to exclude a duty to act honestly, even if, which is doubtful, the law permitted them to do this). It is possible that a duty to act in ‘good faith’ may make more onerous demands of contracting parties, such as fidelity to their bargain or require them to observe certain standards of transparency or procedural fairness, but these obligations must be demonstrated to arise from the terms of the parties’ contract or from the nature of their relationship (for example, they are partners or their relationship can be characterized as fiduciary in nature). To the extent that ‘good faith’ is found to be a more demanding obligation than an obligation to act honestly, the evidence to support that more demanding obligation must be found in the terms of the contract and its surrounding circumstances (or ‘matrix of fact’) and not in statements of principle to be extracted from judgments given in other cases.

Finally, an obligation to act in ‘good faith’ is most likely to be breached by a party who has acted in ‘bad faith’. One reason for the focus on the ingredients of ‘bad faith’ rather than ‘good faith’ is that the courts do seem to find it easier to identify ‘bad faith’ conduct (for example, misleading or oppressive conduct) than they do to identify what amounts to acting in ‘good faith’ (that is to say, the positive side of the equation such as an obligation to take account of the interests of the other party to the contract). Indeed, authority can be found to support the proposition that, unless a party has acted in bad faith, it cannot be in breach of a duty of good faith (*Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2003] 1 AC 469, [111]). At one level this focus on ‘bad faith’ rather than ‘good faith’ does not seem to advance matters very far because it simply shifts the debate about the meaning of ‘good faith’ to a debate about the meaning of ‘bad faith’. But it does confirm that a ‘good faith’ obligation is most likely to be breached by a party who has behaved badly, for example, by engaging in ‘conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest’ (*Re Compound Photonics Group Ltd*, [241]). On this basis a party who has simply put its own commercial interests above those of its contracting party is unlikely to be found to have breached an obligation to act in good faith.

15.6.2 Good Faith as an Implied Term

The second situation is one in which the attempt is made to imply a good faith term into the contract between the parties. The decision of Leggatt J in *Yam Seng* stands as authority for the proposition that the court can, in an appropriate case, imply a term requiring good faith in the performance of the contract into the contract between the parties. The situation in which such a term is most likely to be implied is where the contract

p. 515 between the parties ← is a ‘relational’ one which may be defined, in broad terms, as a long-term, collaborative, or co-operative relationship, one feature of which is that the parties repose trust and confidence in one another (see *Al Nehayan v. Kent* [2018] EWHC 333 (Comm), [167]–[174] and *Bates v. Post Office* [2019] EWHC 606 (QB), [725]–[726] and [738]). A ‘relational’ contract should not, for this purpose, be equated with a long-term contract given that a long-term contract may take the form of a detailed contract negotiated at

arm's length into which it would not be appropriate to imply a good faith term (see *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322 (Ch), [202]–[204] and *Cathay Pacific Airways Ltd v. Lufthansa Technik AG* [2020] EWHC 1789 (Ch), [185]–[221]). Rather, the hallmark of a 'relational' contract for this purpose should be the lack of detailed written terms and reliance by the parties instead on informal understandings and mutual trust and confidence. Outside this category of 'relational' contracts, cases subsequent to *Yam Seng* have been reluctant to make that implication. The reluctance of the courts to imply such a term can be ascribed to two particular factors.

The first is that the implication of such a term is inconsistent with the arm's length nature of the relationship between the parties (see, for example, *Myers v. Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch), [2016] 1 BCLC 719 and *Cathay Pacific Airways Ltd v. Lufthansa Technik AG* [2020] EWHC 1789 (Ch), [223]). Here the reluctance to imply the term is linked in part to the substantive content of the term. The more demanding it is, the less likely it is to be implied because of uncertainty over whether or not it will give effect to the intention of the parties (*Hamsard 3147 Ltd v. Boots UK Ltd* [2013] EWHC 3251 (Pat)). However, it is unlikely that Leggatt J envisaged the implication of an onerous duty on the parties. His emphasis was on the need to give effect to the intention of the parties and, on this basis, the term may require little more than honesty which should be readily implied (and, as he observed, may not be capable of exclusion). But courts in some subsequent cases have read a more demanding standard into the good faith term and this has rendered them unwilling to imply the term into the contract before them.

The second is that the implication of a general duty of good faith would be inconsistent with, or cut across, other terms of the contract. Thus the courts have declined to make the implication where its effect would be to cut down the scope of an obligation which the parties have expressed in absolute terms (*Greenclose Ltd v. National Westminster Bank plc* [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169) or where it would duplicate or render redundant other clauses of the contract which could be characterized in terms of good faith (*Portsmouth City Council v. Ensign Highways Ltd* [2015] EWHC 1969 (TCC), [2015] BLR 675).

On this basis the effect of the decision of Leggatt J in *Yam Seng* may be limited. While in theory courts may now be able to imply a term into a contract requiring the parties to act in good faith in the performance of their contract, in practice the courts will be slow to do so, with the consequence that contracting parties who wish to impose on themselves a duty of good faith in the performance of the contract would be well advised to do so expressly (*Chelsfield Advisers LLP v. Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch), [80]).

15.6.3 Conclusion

In terms of the status in English law of an obligation to act in good faith in the performance of a contract, the emphasis placed by Leggatt J in *Yam Seng* on the fact that the duty should give effect to 'the presumed intention of the parties' and their desire to 'bind themselves in order to co-operate to their mutual benefit' suggests that his aim was not to use the duty of good faith in the performance of a contract as a vehicle by

^{p. 516} which to impose significant new duties on contracting parties. Rather, his aim might have been to promote and protect the expectation of honesty and to encourage adherence to standards of commercial dealing which are generally accepted in the marketplace. There is much to be said for the latter approach provided that the law is developed carefully and incrementally, paying due attention to the legitimate interests of contracting parties in preserving their autonomy. The question which remains to be answered is whether

the judiciary in subsequent cases will be willing to follow the suggestion which has been made by Leggatt J and hold that, while English law does not recognize a duty of good faith in the negotiation of a contract, it does recognize and give effect to a duty to act in good faith in the performance of a contract.

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