

THE BASIS OF CONTRACTUAL DUTIES OF GOOD FAITH

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In *Bhasin v Hrynew*, Cromwell J rightly observed that “[t]he jurisprudence is not always very clear about the source of the good faith obligations found in [contract] cases”.¹ Such confusion is lamentable. This paper will consider the basis of obligations of good faith in circumstances where there is no express term of the contract which provides for good faith performance of the contract.

Twenty years ago, Sir Thomas Bingham described good faith as “[t]he most important contractual issue of our time”.² In the recent past, some pressure towards recognising a general obligation of good faith has been exerted on the law of England and Wales by drives towards a greater degree of harmonisation within the European Union.³ As a result of the United Kingdom’s decision to leave the EU, such external influences are no longer likely to have much significance. But instead of looking outwards towards civilian jurisdictions, there is now a greater push towards an inwards-facing view of good faith as intrinsic to the very essence of contract and inherent in all contracts. It is notable that debates concerning good faith are of increasing prominence in all major common law jurisdictions.⁴

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¹ 2014 SCC 71, [2014] 3 S.C.R. 494 [52].

² “Foreword” in R Harrison *Good Faith in Sales* (Sweet & Maxwell London 1997) vi

³ See eg *Yam Seng* [124]; R Zimmerman and S Whittaker (eds) *Good Faith in European Contract Law* (Cambridge 2000).

⁴ For a helpful survey, see J Paterson, “Good Faith Duties in Contract Performance” [2014] OJCLJ 283.

The greater prominence afforded to good faith is probably linked to a perceived growth in “relational” contracts.⁵ It is very difficult to define the term “relational contract”, although clearly there is a difference between a spot contract for the one-off sale of a commodity and an agreement which is designed to last a long time and intended to be for the parties’ mutual benefit through a high degree of cooperation. It may be that differences between the two will lead to a law of contracts (plural) rather than contract (singular).⁶ However, it is suggested that such a significant step is not necessary, and that caution should be exercised before recognising “relational contracts” to be a “nominate” category of contract.⁷

In any event, it is clear that some judges feel uncomfortable about allowing parties to act in a ruthlessly self-interested way in certain types of “relational” agreements, at least. Some critics of good faith have pointed out that the case in favour of a wide-ranging notion of good faith has not been made with much rigour judicially.⁸ But that seems to be shifting too. For example, the decision in *Bhasin* shows a serious attempt by the Supreme Court of Canada to engage with the issue, and in England and Wales Leggatt LJ appears to be leading a brave crusade in support of general obligations of good faith with great intellectual force. Important recent decisions cannot lightly be brushed aside, and it is important to engage with them now.

Extra-judicially, Sir George Leggatt has observed that for the time being a broad doctrine of good faith still has only “shallow roots”, but that they “may be taking hold”.⁹ This is an important observation that deserves close scrutiny. If the roots of the good-faith tree are planted in the wrong place, they could disrupt the carefully-crafted landscape of contract law. It is therefore necessary to decide where the good-faith tree should be planted by the general law (if it is to be planted at all). Is good faith part of an “irreducible core” of all contracts, such that it is always present and can never be excluded? That would be a serious intrusion into the parties’ freedom to set the terms of their own

⁵ See eg I Macneil, “The Many Futures of Contract” (1974) 47 Southern California LR 691; H Collins, “Is a Relational Contract a Legal Concept?” in S Degeling, J Edelman and J Goudkamp (eds) *Contract in Commercial Law* (Lawbook Co, 2016); M Eisenberg, “Relational Contracts” in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (OUP, 1995); E McKendrick, “The Regulation of Long-term Contracts in English Law” in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (OUP, 1995); D Campbell, “Good Faith and the Ubiquity of the ‘Relational Contract’” (2014) 77 MLR 475.

⁶ Cf the debate in tort law: eg R Stevens *Torts and Rights* (OUP, 2007).

⁷ See section II.B **below**.

⁸ See eg M Bridge. “Good Faith, the Common Law and the CISG” [2017] Unif L Rev 1, 18. Of course, some judges have written forcefully on the topic extra-judicially: see eg Steyn LQR; J Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) 1 Denning LJ 131.

⁹ G Leggatt, “Contractual Duties of Good Faith”, (Lecture to the Commercial Bar Association, 18 October 2016) [43].

bargain.¹⁰ Or is good faith to be implied at law into contracts of certain types, such as employment contracts? This approach would limit the intrusive nature of good faith to particular categories of contracts only. Or is good faith only part of a contract if it can be implied as a matter of fact into the parties' particular contract? This approach is the least intrusive of all, and since it would be based upon the parties' intentions, it would appear to be largely unobjectionable (but also largely unremarkable).

It is suggested that as between sophisticated commercial parties of roughly equal bargaining strength a term of good faith should generally only be added to the express terms of a contract where it can be implied using the orthodox tests for implying a term in fact.¹¹ Beyond this, it is not clear whether good faith should operate as a *term* of the contract at all.¹² Ideas of good faith clearly operate at an abstract level throughout the law, and that includes contract law. Thus good faith might be thought to underpin a range of doctrines, such as misrepresentation, duress and mitigation.¹³ But that does not mean that there should necessarily be a free-standing duty of good faith, breach of which gives rise to a right to claim damages. Yet some recent decisions favour the introduction of such an obligation into contracts; contractual duties to perform in good faith that have not been expressly provided for by the parties will be the focus of this article.

It is important to consider significant developments in the law in common-law Canada and in England and Wales. Both have been prominent in advancing the law on good faith in recent years. However, it is worth noting at the outset that there may be good reasons why the laws in the two jurisdictions do not necessarily converge. Of course, each jurisdiction respects the developments in the other,¹⁴ but external pressures and the context within which each jurisdiction operates are not the same, especially as regards commercial contracts. In *Bhasin*, for example, the Supreme Court was conscious of the need to take into account the reasonable expectations of two major trading partners of

¹⁰ Cf *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413, 430 (Lord Reid): "it never has been the law that a person is only entitled to enforce his contractual rights in a reasonable way and that a court will not support an attempt to enforce them in an unreasonable way."

¹¹ See recently *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742. See Section II.C [below](#).

¹² D Markovits, "Good Faith as Contract's Core" in G Klass, G Letsas and P Saprai, *Philosophical Foundations of Contract Law* (OUP, 2014). See too E Peden, "Good Faith in the Performance of Contracts" (2003).

¹³ eg *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439 (Bingham LJ). Indeed, on one level it is arguable that good faith is inherent in all aspects of contract and is the essence of contract: see eg J Carter and E Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155.

¹⁴ For example, *Bhasin* [57] cites *Yam Seng*; Leggatt J returned the compliment in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm); [2015] 2 All E.R. (Comm) 614 [97].

common law Canada – Quebec and the United States – which both have established doctrines of good faith in contract law.¹⁵ The commercial law of England and Wales, on the other hand, is much more international in its outlook.¹⁶ A large proportion of the disputes before the commercial courts in London involve parties with little relationship to the jurisdiction, beyond a choice of law clause.¹⁷ It is perhaps significant that England is such a popular jurisdiction and does not contain a broad doctrine of good faith. This may in fact be a competitive advantage¹⁸ that is not lightly to be discarded;¹⁹ the absence of good faith is often perceived to increase commercial certainty²⁰ and the respect afforded to freedom of contract, which is highly desirable for many commercial actors. Indeed, the rise of good faith has even been viewed as dangerous to the stability of English commercial law. In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* Moore-Bick LJ said:²¹

“It is interesting to note that in the case to which the judge referred as providing support for his view [of a general duty of good faith], *Bhasin v*

¹⁵ *Bhasin* [82].

¹⁶ Eg *James Buchanan & Co. Ltd. Respondents v Babco Forwarding & Shipping (U.K.) Ltd* [1978] A.C. 141, 162 (Lord Salmon): “foreign traders all over the world having no connection with this country have been constantly entering into contracts which provide that they are to be governed by English law and that any disputes that may arise under them are to be settled by arbitration in London or by our commercial court. It would seem that our system of administering justice enjoys considerable confidence abroad.”

¹⁷ As Bridge has written, “English law is the applicable law of choice in a very wide range of contracts, many of which have singularly little connection with England. There may be a number of reasons for this, but one is certainly that its commercial friendliness is popular with foreign business parties. Banks with head offices in Paris and Frankfurt feel no patriotic need to insist on their own national law, even in the case of transactions to be carried out in their home country”: “Doubting Good Faith” (2005) 11 NZBLQ 449.

¹⁸ Leggatt LJ clearly took a different view, regretting the fact that English law “would appear to be swimming against the tide” (*Yam Seng* [124]) in refusing to recognise a general obligation of good faith. See too *Bhasin* [36]; J Tarr, “A Growing Good Faith in Contracts” [2015] JBL 410. But good faith may be particularly appropriate in a jurisdiction with a strong mutual cultural background, such as France and Germany, so that in practice people do have a fair idea how the standard will be applied. But in international trade – to which English contract law often speaks – such a strong common legal cultural background is often missing, so the need for written and more hard edged rules becomes greater; for a parallel argument in the constitutional context, see RH Fallon Jr “‘The Rule of Law’ as a Concept in Constitutional Discourse” (1997) *Columbia LR* 1, 49, and 52.

¹⁹ Especially given the challenges and uncertainties that are already presented by Brexit. See too J Hobhouse, “International Conventions and Commercial Law: The Pursuit of Uniformity” (1990) 106 *LQR* 530, 535: “International Commerce is best served not by imposing deficient legal scheme upon it but by encouraging the development of the best schemes in a climate of free competition and choice”.

²⁰ In *Manifest Shipping Co Ltd v Uni-Polaris Ins Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [45] Lord Hobhouse said: “Lord Mansfield’s universal proposition [of good faith] did not survive. The commercial and mercantile law of England developed in a different direction preferring the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests.” Compare Cromwell J in *Bhasin* who thought good faith could bring “greater certainty” [34], [40]; see too Woo Pei Yee, “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” [2001] *OUCLJ* 195, 216-218. That stance is criticised in Section III [below](#).

²¹ [2016] EWCA Civ 789; [2017] 1 All E.R. (Comm) 483 [45].

Hrynew, 2014 SCC 71, [2014] 3 S.C.R.494, the Supreme Court of Canada recognised that in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland* [2013] EWCA Civ 200 this court had recently reiterated that English law does not recognise any general duty of good faith in matters of contract. It has, in the words of Bingham L.J. in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439, preferred to develop “piecemeal solutions in response to demonstrated problems of unfairness”, although it is well-recognised that broad concepts of fair dealing may be reflected in the court’s response to questions of construction and the implication of terms. In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some “general organising principle” drawn from cases of disparate kinds. For example, I do not think that decisions on the exercise of options under contracts of different kinds, on which he also relied, shed any real light on the kind of problem that arises in this case. There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619.”

The terms of the parties’ bargain should not lightly be interfered with. Basic principles of freedom of contract demand that parties are sovereign to agree whatever they like,²² with some exceptions made on the basis of public policy (such as illegality). It may be that “good faith” will come to be viewed as a doctrine required by public policy that cannot be excluded,²³ but that would be a drastic step²⁴ in England and Wales that seems ripe to provoke uncertainty, litigation, and controversy.²⁵ The eminent position of English law in commercial litigation demands a greater focus on certainty, and a more

²² “A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept”: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock).

²³ As is the case in France: Civil Code, Art 1104. See too UNIDROIT Art 1.7; S Waddams *The Law of Contracts* 7th ed (Canada Law Book, 2017) 345.

²⁴ J Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) 1 Denning LJ 131, 140.

²⁵ Although Woo Pei Yee, “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” [2001] OUCJLJ 195, 216-218 suggests that this is a price worth paying for “a fairer contractual regime”. See too P Finn, “Commerce, the Common Law and Morality” (1989) 17 MULR 87, 98-99. Compare eg M Bridge, “Does Anglo-Canadian Contract Law Need A Doctrine of Good Faith?” (1984) 9 Canadian Business LJ 385.

restrictive approach to good faith.²⁶ However, a corollary of that is that where the parties have expressly provided for their contract to be performed in good faith, that should be given effect by the court, and the express term of good faith interpreted according to the usual principles.²⁷ The key focus of debate is what approach should be taken where there is no express term of good faith in the contract.

I THE SCOPE OF GOOD FAITH

Before analysing the basis of good faith in contract law, it is helpful to outline briefly the scope of good faith. This is not an easy task. Attempts to define good faith have inevitably proven problematic;²⁸ indeed, Leggatt LJ has recently said that “[i]t is unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation [of good faith] involved”.²⁹ Commentators have similarly baulked at the prospect of providing a precise definition.³⁰ This is not an especially promising start: if “good faith” is impossible to define, it seems likely that introducing “good faith” into commercial contracts without further precision will lead to undesirable uncertainty and litigation.

It is important to appreciate that this apparently common law notion of good faith does not exist in a vacuum, but in a system influenced by equitable doctrines. The existence of the equitable jurisdiction is probably the principal

²⁶ See the recent extra-judicial comments of the Chancellor: “Our courts need to continue to demonstrate to the world that English law can safely be relied upon by the international business community for its certainty and dependability. We are the custodians of a precious commodity, and should exercise caution and restraint in the way we treat it”: G Vos, “Preserving the Integrity of the Common Law” (Lecture to the Chancery Bar Association, 16th April 2018) [61]. Lord Steyn previously observed that “The philosophy of *caveat emptor* rather than notions of good faith and fair dealing has dominated English contract law”: J Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) 1 Denning LJ 131, 136.

²⁷ See recently *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619. A good example is the ISDA Master Agreement, a standard form agreement widely used for contracts in international financial markets. In certain circumstances, it requires one party to calculate sums due from the counterparty, with that calculation to be undertaken in good faith. The courts have been very clear that they will seek to give effect to this obligation under the ISDA Master Agreement: see eg *Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] EWCA Civ 188, [2014] 2 BCLC 451. See too eg *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch); *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)

²⁸ For surveys see eg E Farnsworth, “Good Faith in Contract Performance” in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (OUP, 1995); L Trakman and K Sharma, “The Binding Force of Agreements to Negotiate in Good Faith” [2014] CLJ 598; J Paterson, “Good Faith Duties in Contract Performance” [2014] OULJ 283; S Saintier, “The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a Bete Noire for the Civil and the Common Law” [2017] JBL 441.

²⁹ *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [175]

³⁰ See eg R Brownsword, N Hird and G Howells, “Good Faith in Contract: Concept and Context” in R Brownsword, N Hird and G Howells (eds) *Good Faith in Contract: Concept and Context* (Ashgate, 1999) 3: “good faith is an elusive idea, taking on different meanings and emphases as we move from one context to another”; Woo Pei Yee, “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” [2001] OULJ 195, 221.

reason why English law has not traditionally developed wide-ranging and general notions such as “good faith” and “abuse of rights”.³¹ “Good faith” in contract law is often considered to operate between two equitable doctrines at either end of the spectrum: fiduciary loyalty, where one party is expected to suborn his own interests to another; and unconscionability, which restricts a party’s ability to act “in a manner contrary to all good conscience”.

Clearly, there is broad scope for good faith to operate between a narrow doctrine of unconscionability – which does not impose a substantial limit upon a party’s freedom of contract or freedom of action more generally³² – and fiduciary loyalty, which is a very significant restriction on a party’s freedom to act. Because of the vast space between unconscionability and fiduciary loyalty, there are a wide range of potential definitions of good faith, some of which may be even less demanding than “unconscionability”.³³ It is for this reason that good faith has been said to encompass a “spectrum of norms”³⁴ ranging from honesty to fair dealing and co-operation (and, possibly, beyond). Two key aspects of good faith appear to be honesty and fidelity to the parties’ bargain.³⁵

Writing in the context of fiduciaries and good faith, Nolan and Conaglen have observed that:³⁶

“the notion of an obligation to act posited on good faith alone is open to more fundamental objections. Good faith is simply too vague a concept to direct and judge action with any acceptable degree of predictability. It is impossible to say with any clarity what behaviour is mandated by good faith alone. Furthermore, if a court were to delineate what a fiduciary should do solely by reference to good faith, good faith would override, as a source of obligation, any undertaking consensually assumed by the

³¹ See eg Sir Nicholas Browne-Wilkinson V-C in *Kingdom of Spain*. See too Lord Steyn, “Interpretation: Legal Texts and their Landscape” in B Markesinis (ed) *The Clifford Chance Millenium Lectures* (2000) 79.

³² See eg *Kent* [187]. Although Waddams has argued that a general, somewhat broader principle of unconscionability or unfairness should be adopted: *The Law of Contracts* 376-378. For further discussion, see eg E Peden, “When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability” (2005) 21 JCL 226.

³³ And good faith as actual honesty might even be less demanding than honesty: see Section II.A below.

³⁴ Eg H Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 CLP 297, 314. P Macdonald-Eggers and S Picken, *Good Faith and Insurance Contracts* (Informa, 2010) 1.14: “Good faith may require varying conduct in response to different stages of a contract’s life.”

³⁵ See eg *Yam Seng* [135]-[141], admittedly drawing upon the way express contractual duties of good faith had been interpreted; *Sheikh Tahnoon v Kent* [175], relying upon *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 [288] (Allsop CJ), who also included an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

³⁶ R Nolan and M Conaglen, ‘Good Faith: What Does It Mean for Fiduciaries and What Does It Tell Us About Them?’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP, 2010) 326.

fiduciary in cases of inconsistency. That hardly amounts to the respect for party autonomy which underpins English civil law.”

That criticism in the fiduciary context also applies in the contractual sphere. It may be that the umbrella label of “good faith” is what causes the most concern; the content of more precisely-defined duties that are implied on particular facts – such as “honesty” or “co-operation” – are perhaps easier to grasp.

“Honesty” might be located at the “least intrusive” end of the spectrum of good faith³⁷ – as opposed to “more intrusive” notions such as “reasonableness”, “co-operation” or “fair dealing”. However, “honesty” is itself difficult to define. If it is taken to mean “actual” or “subjective” honesty,³⁸ then it is not very intrusive at all, and may even be less of an imposition upon parties than “unconscionability”.³⁹ But it is not clear how stable such a narrow definition can be, and the travails of courts of equity in dealing with “dishonesty” have been rather depressing.⁴⁰ “Dishonesty” and “honesty” are of course closely related. After all, in *RBA v Tan*, Lord Nicholls said that dishonesty “means simply not acting as an honest person would in the circumstances”.⁴¹ Yet this simply begs the question: what would an honest person have done? The answer appears to be: he would not have acted dishonestly, but this is clearly circular and does not further our understanding of dishonesty or honesty.⁴²

Honesty and dishonesty are essentially jury questions.⁴³ In the most recent Supreme Court decision dealing with this issue, Lord Hughes said that “dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition”.⁴⁴ The inability clearly to define dishonesty may be unsettling to commercial parties in particular. The best guidance seems to be that dishonesty incorporates an objective element:⁴⁵ given what the defendant knew, would a

³⁷ In *Bhasin* [73] Cromwell J thought that dishonesty “means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”.

³⁸ See eg E Peden, “‘Implicit Good Faith’ – Or Do We Still Need an Implied Term of Good Faith?” (2009) 25 JCL 50; R Hooley, “Controlling contractual discretion” [2013] CLJ 65, 74-75.

³⁹ Although if there is a *term* of good faith, then the remedial consequences may well be different: damages may be available, rather than solely rescission.

⁴⁰ Notably in the context of dishonest assistance: see generally P Davies, *Accessory Liability* (Hart, 2015) 116-122. See too Zhong Xing Tan, “Keeping Faith With Good Faith? The Evolving Trajectory post-*Yam Seng* and *Bhasin*” [2016] JBL 420, 439-446; *Wingate v Solicitors Regulation Authority* [2018] EWCA Civ 366 [59]-[107] (Jackson LJ).

⁴¹ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC), 389.

⁴² See B Hale, “Dishonesty” (Bristol Alumni Association Lecture 2018). See too D Campbell, “Good Faith and the Ubiquity of the ‘Relational Contract’” (2014) 77 MLR 475, 489.

⁴³ B Hale, “Dishonesty” (Bristol Alumni Association Lecture 2018) 12-13.

⁴⁴ *Ivey v Genting Casinos (UK) Ltd, trading as Crockfords* [2017] UKSC 67, [2017] 3 WLR 1212 [48]. Cp *Bhasin* [80]: “The duty [of honesty] is also clear and easy to apply”.

⁴⁵ See too *Yam Seng* [144]

reasonable person consider that defendant to be dishonest? As a result, a defendant may be held to be dishonest even though he actually thought he was acting honestly.⁴⁶

Space precludes full consideration of the meaning of “good faith”, but it is suggested that in *Mid Essex Jackson LJ* was right to conclude that “the content of a duty of good faith is heavily conditioned by its context”.⁴⁷ Indeed, if good faith obligations arise through a term implied in fact, then the content of the term will necessarily be clear and moulded to the particular contract at issue. It is revealing that in (three of) the leading cases which have favoured a prominent role of good faith in contract law – *Bhasin, Yam Seng*, and *Sheikh Tahnoon v Kent* – the relevant terms could be defined much more precisely than simply “good faith”.

For instance, *Bhasin* concerned the marketing of education savings plans by Canadian American Financial Corp (Can-Am) to investors through retail dealers, known as “enrollment directors”. Mr Bhasin was an enrolment director who was very successful in selling Can-Am’s products. Bhasin and Can-Am entered into an agreement in 1998 to continue their relationship, and a term of the contract provided the contract would automatically renew at the end of the three-year term unless one of the parties gave six months’ written notice to the contrary. Problems arose because Mr Hrynew, another enrollment director for Can-Am and competitor of Bhasin, pressured Can-Am not to renew its agreement with Bhasin. Hrynew wanted to capture Bhasin’s lucrative niche market around which he had built his business. Can-Am appointed Hrynew to review its enrollment directors for compliance with securities laws, to which Bhasin unsurprisingly objected. Can-Am assured Bhasin that Hrynew was under an obligation to treat information confidentially and that the Securities Commission had rejected a proposal to have an outside person review the directors. Neither assurance was true. The dispute dragged on for a while, until ultimately in 2001 Can-Am gave Bhasin notice of non-renewal under the contract. Bhasin consequently lost the value in his business, which he would not have done had Can-Am been honest with him. The Supreme Court of Canada held that Can-Am had breached an implied term of honesty, and that narrow implied term was sufficient for the disposition of the appeal.⁴⁸

⁴⁶ As happened in *Ivey v Genting Casinos (UK) Ltd, trading as Crockfords* [2017] UKSC 67, [2017] 3 WLR 1212. The second limb of *R v Ghosh* [1982] QB 1053 no longer seems to apply: *DPP v Patterson* [2017] EWHC 2820 (Admin).

⁴⁷ *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 [109].

⁴⁸ [94]-[103].

Yam Seng concerned a distributorship deal whereby Yam Seng agreed to market, and ITC agreed to supply, Manchester United-related products in various territories around the world. Yam Seng was constrained from selling, or authorising for sale, products below a “particular price”. Leggatt J held that a general duty of good faith in the performance of the contract should be implied into the agreement. His Lordship thought that the usual techniques of construction led to this conclusion.⁴⁹ This general duty of good faith gave rise to two more specific duties. First, a duty for ITC to not ‘knowingly provide false information’ on which Yam Seng was likely to rely.⁵⁰ This term was breached on the facts, and the breach was considered repudiatory, justifying termination of the contract.⁵¹ Secondly, there was a duty on ITC not to authorise the sale of relevant products in the contractual territories below the ‘particular price’ that constrained Yam Seng. There was, however, insufficient evidence to establish breach of this duty on the facts. It might therefore be wondered whether Leggatt J really needed to rely upon good faith at all: it appears that he could have implied the two duties on the basis of the normal principles of implication, without invoking good faith.⁵²

In *Al Nehayan v Kent*, Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan and Mr Kent entered into a joint venture concerning luxury hotels and later a travel business. The joint venture was not successful, and Kent made repeated demands for extra funding from Sheikh Tahnoon. The Sheikh agreed to some initial requests, but then refused and sought to extricate himself from the joint venture. Leggatt LJ held that the parties were not in a fiduciary relationship⁵³ or a partnership.⁵⁴ Nevertheless, the judge held that there was a duty of good faith, which again gave rise to two more specific duties. As Leggatt LJ put it:⁵⁵

“For present purposes it is sufficient to identify two forms of furtive or opportunistic conduct which seem to me incompatible with good faith in the circumstances of this case. First, it would be inconsistent with that standard for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned

⁴⁹ Note that the term itself was not implied on the basis of good faith; rather an implied term of good faith was implied on the usual principles. Cf H Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 CLP 297. See Section II.C [below](#).

⁵⁰ *Yam Seng* [156].

⁵¹ *Ibid*, [173]–[174].

⁵² S Whittaker, ‘Good Faith, Implied Terms and Commercial Contracts’ (2013) 129 LQR 463; E Granger, ‘Sweating Over an Implied Duty of Good Faith’ [2013] LMCLQ 418.

⁵³ [153]–[166].

⁵⁴ [150]–[152].

⁵⁵ [176].

to a third party covertly and without informing the other beneficial owner. Second, while the parties to the joint venture were generally free to pursue their own interests and did not owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to obtain a financial benefit for himself at the expense of the other.”

The first duty was breached since Sheikh Tahnoon tried to sell his share of the business behind Kent’s back. The second imposes a substantial restriction on a commercial party’s ability to further his or her own interests. The decision in *Kent* is especially revealing because the implication of these terms is part of the ratio of the decision. However, it is suggested that the judge was perhaps generous to Kent in implying these terms; although such terms may have reflected the parties’ intentions on the facts of the case, there might generally be a reluctance to imply such intrusive terms into a commercial contract between two parties who were seeking to make a profit and looking after their own interests.⁵⁶

Given the ability to rely upon terms that are much more precise and provide more guidance than “good faith”, it may be doubted whether there is much utility in seeking a clear definition of “good faith”:⁵⁷ “good faith” could simply operate as a portmanteau and many different types of obligations fall underneath its umbrella.⁵⁸ This might partially explain the reliance in *Bhasin* upon good faith as a “general organizing principle”.⁵⁹

In *Bhasin*, Cromwell J thought that “[t]ying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility”.⁶⁰ But this assertion is somewhat conclusory. Perhaps some certainty is gained by linking good faith with the reasonable expectations of the parties,⁶¹ but the reasonable expectations of the parties are likely to be more precise than a vague

⁵⁶ See Section II.C below. Under the classical model of contract law, it has been said that “[i]n the market place, no man is his brother’s keeper”: P Aityah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979) 403.

⁵⁷ Of course, if there is an express term of good faith, this must be interpreted: eg *Berkeley Community Villages v. Pullen* [2007] EWHC 1330 (Ch); *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch).

⁵⁸ Cf *Malik v BCCI* [1998] AC 20, 34 (Lord Nicholls).

⁵⁹ *Bhasin*.

⁶⁰ [71]. See too G Leggatt, “Contractual Duties of Good Faith”, (Lecture to the Commercial Bar Association, 18 October 2016).

⁶¹ eg *LAC Minerals Ltd v International Corona Resources* [1989] 2 SCR 574, 667 (La Forest J): “It is difficult to see how giving recognition to the parties’ expectations will throw commercial law into turmoil”.

resort to “good faith”. Of course, a general doctrine of good faith would allow courts greater flexibility to achieve just results,⁶² but it is not at all clear that commercial parties are happy for courts to play an active role in this context, beyond determining what the parties have agreed by reference to the terms of the contract. Those terms are very likely to be more specific than good faith – especially if relying upon a term implied in fact.

II BASIS OF GOOD FAITH

A Irreducible core

The idea that good faith is the “life of commerce” is of very long standing.⁶³ And in *Carter v Boehm* Lord Mansfield famously said that “good faith is a principle applicable to all contracts”.⁶⁴ The suggestion that good faith is a core element in contract law is therefore not entirely surprising. Consistent with that line of thinking, Cromwell J in *Bhasin* said that “[b]ecause the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it”.⁶⁵ In *Bhasin*, the court did not need to go further than a duty of honesty, but on appropriate facts the Supreme Court of Canada indicated a willingness to go beyond mere “honesty”. Significantly, Cromwell J did not think that the duty of honest performance was based upon an implied term, but rather “a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance”.⁶⁶

Although Cromwell J indicated that honest performance was non-excludable, he also went on to say:

“I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

⁶² See eg R Powell, “Good Faith in Contracts” [1956] CLP 16, 26. S Saintier, “The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a Bete Noire for the Civil and the Common Law” [2017] JBL 441, 453: “its vagueness is also its primary asset since it is fluid and allows adaptability to the context”.

⁶³ eg *AG v Thomas Japp/Jupp* (12 October 1632).

⁶⁴ (1766) 3 Burr 1905, 1909.

⁶⁵ [75].

⁶⁶ [74].

The obligations of good faith, diligence, reasonableness, and care . . . may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.”

Interestingly, Cromwell J invoked the language of a minimum core that had to be respected (although the UCC provisions go further than the Canadian court did in *Bhasin*). Yet the idea of an “irreducible core” is controversial in the contractual context.

By contrast, the notion of an “irreducible core” is now common in the law of trusts. In *Armitage v Nurse*, Millett LJ said:⁶⁷

“there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.”

The outer edges of the “core” have proved to be difficult, but the existence of some minimum criteria that need to be satisfied for there to be a trust is generally well-accepted.⁶⁸ This is important given that trusts bind more than just the parties who enter into a transaction; parties beyond the settlor and trustee need to know whether a trust has been created (in particular the beneficiaries). Trusteeship is an office, and a trust will not fail for want of a trustee. Moreover, a beneficiary enjoys property rights under a trust, and the protection thus afforded to a beneficiary in the event of the trustee’s insolvency, for instance, means that it should be clear from the outset whether a trust has been created. It is reasonable for the law to demand that certain requirements be met for the law to offer strong protection to beneficiaries as a result of the mechanism used being characterised as a trust.

Contracts, on the other hand, do not have the same import. They only bind the parties to the agreement, and only have any binding force as a result of

⁶⁷ [1998] Ch 241, 253.

⁶⁸ See eg D Hayton, ‘The Irreducible Core Content of Trusteeship’, Ch 3 in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford 1996); D Fox, “Non-Excludable Trustee Duties” (2011) 17 *Trusts & Trustees* 17.

the parties' intentions (objectively assessed). As a result, the intentions of the parties should be paramount. The institution of contract is inherently facilitative, and the central idea of freedom of contract means that parties should be free to agree to whatever terms they wish (as long as not contrary to public policy). It is therefore doubtful whether there is much of interest in any "irreducible core" of contract, if this concept is even to be employed in the contractual sphere. A sufficiently certain promise intended to be binding may be sufficient; even the doctrine of consideration is under sustained attack at the moment.⁶⁹

Of course, a contract to commit a serious crime will not be enforced by the courts,⁷⁰ but that is not to say that it is a *term* of the contract that there will be no illegality. Although it may be that parties cannot exclude honesty from their contractual bargains,⁷¹ that does not mean that there is necessarily a term in every contract that obligations should be performed honestly. Instead, the general obligation to act honestly may be enforced through the tort of deceit, for example. But the remedies for breach of contract and deceit are not the same.⁷² Nevertheless, there are some terms that seem to operate as default rules in all contracts, such as the implied term that neither party will prevent the other from performing the contract.⁷³

More speculatively, it is not even clear that honesty should be non-excludable. If both parties do not trust each other, but are nevertheless willing to enter into a contract because they decide that that is the best solution for each, then it is fictional to say that they are entitled to expect honest conduct from the other if in fact they do not.⁷⁴ The parties may need to contract with each other out of necessity, but if both parties are happy to proceed with the contract in a spirit of mistrust and always checking the other party's position, it is arguable that the law should not prohibit them from doing so.⁷⁵ And if one party proposes a draft contract which expressly states that the contract should be performed

⁶⁹ See eg *NAV Canada and Rosas v Toca* 2018 BCCA 191. This issue was ultimately not recently confronted by the Supreme Court of the United Kingdom: *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

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⁷⁰ Although the law on illegality is a mess in England following *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467; see generally S Green and A Bogg (eds) *Illegality After Patel v Mirza* (Hart, 2018).

⁷¹ *Plan B Trustees Ltd v Parker (No 2)* [2013] WASC 216; (2013) 11 ASTLR 242 at [232] (Edelman J); but see immediately below.

⁷² Significantly, the remedies awarded for breach of a duty of good faith in *Bhasin and Sheikh Tahnoon v Kent* reflected the contractual expectation measure rather than the tortious measure.

⁷³ *Southern Foundries (1926) Limited v Shirlaw* [1940] A.C. 701, 717 (Lord Atkin). Cf E Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 Sydney LR 230

⁷⁴ For further discussion of the role of trust, see N McBride, *Key Ideas in Contract Law* (Hart, 2017) ch 2.

⁷⁵ See too M Hogg, "The Implication of Terms-in-Fact: Good Faith, Contextualism and Interpretation" (2017) 85 George Washington LR 1660, 1667.

honestly, but this is deliberately deleted by the other party such that no express term is included in the contract, it seems very tough to then impose a term of honest performance when this was clearly rejected by one of the parties. This hypothetical is admittedly somewhat far-fetched,⁷⁶ but it raises the issue that if even (a duty of) honesty is possibly excludable, then wider duties generally incorporated under the umbrella of good faith should also be excludable.⁷⁷

If good faith can be excluded, then it is not part of an “irreducible” core. This seems appropriate. Moreover, it is important to remember that not all contracts are for the mutual benefit of both contracting parties. Some contracts represent a zero-sum game, and what is good for one will necessarily be bad for the other.⁷⁸ Indeed, the uncertainty inherent in any doctrine to regulate opportunistic behaviour may itself be opportunistically invoked.⁷⁹

B Term implied at law

Terms implied at law are notoriously tricky. But courts clearly have the power to decide that all contracts of a defined type should include a particular implied term. Importantly, terms implied at law⁸⁰ do not depend upon the parties’ intentions. Rather, the court decides that a particular term is a necessary incident of all contracts of a defined type for broader reasons.⁸¹ It has been suggested that broad notions of good faith explain why terms are implied in such a manner,⁸² but that remains somewhat opaque if good faith is not clearly defined. Indeed, it is important to remember that a term will not be implied just because it is reasonable to do so, but must be *necessary* for the operation of

⁷⁶ Cf *Bhasin* [81]. Hooley argues that honesty should be non-excludable, but adopts a subjective definition of honesty (see eg R Hooley, “Controlling contractual discretion” [2013] CLJ 65, 81-82) which does not seem to map on to the positive law, whilst arguing that “parties retain the ability to contract out of any higher standard of behaviour” (ibid 88). Note too that liability for deceit is not thought to be excludable in contract: *Standard Chartered Bank v Pakistan National Shipping Corpn and Others (Nos 2 and 4)* [2002] UKHL 43; [2003] 1 A.C. 959, [22].

⁷⁷ M Hogg, “The Implication of Terms-in-Fact: Good Faith, Contextualism and Interpretation” (2017) 85 *George Washington LR* 1660, 1687-1689.

⁷⁸ See recently *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2018] EWCA Civ 355. Cf G Leggatt, “Contractual Duties of Good Faith”, (Lecture to the Commercial Bar Association, 18 October 2016) [26].

⁷⁹ J Morgan, “Against Judicial Review of Discretionary Contractual Powers” [2008] *LMCLQ* 230, 236-237.

⁸⁰ Or ‘standardised’ rather than ‘individualised’ implied terms: see *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, [2002] 1 AC 408, 458–59 (Lord Steyn).

⁸¹ *Liverpool City Council v Irwin* [1977] AC 239; E Peden, ‘Policy Concerns Behind Implication of Terms in Law’ (2001) 117 *LQR* 459.

⁸² Cf H Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 *CLP* 297. See too D Campbell and H Collins, “Discovering the Implicit Dimensions of Contract” in *Implicit Dimensions* 33

such contracts.⁸³ Using good faith as a basis to imply a term of good faith tends to circularity and inconsistency. Even if good faith is the latent basis for terms implied at law, that should lead to the implied term being more precise than simply “good faith”.

Courts are, generally, rightly wary of exercising their powers to imply terms at law.⁸⁴ Imposing terms upon parties in such a manner is highly intrusive. That is why the requirement that such terms be necessary rather than just reasonable should be taken seriously. However, it is clear that there may often be a tendency to define the *type* of contract at issue rather narrowly, and thereby blur the boundary between terms implied in fact and terms implied at law:⁸⁵ if the type of contract essentially covers barely more than the particular contract at issue, then the distinction between a term implied at law and in fact is very thin indeed.

If non-express obligations of good faith in contract law are based upon terms implied at law, it should be noted that this is less intrusive than an approach based upon a term of good faith being part of the “irreducible core” of contract. That is because not *all* contracts would be subject to a duty of good faith, but only contracts of certain types for which good faith would be considered to be a necessary legal incident, and the duty could be excluded by the parties. Examples of contracts where obligations of good faith have been implied at law often involve a power imbalance between the contracting parties, such as that which arises in the contract of employment.⁸⁶

Where there is no such imbalance of power between commercial parties, it is less obvious that there is any need to imply a term of good faith. As regards spot contracts for the sale of commodities it would be very surprising to see an implied term of good faith, and such a term would serve little purpose: any breach of a term of good faith would invariably constitute a breach of a different term of the contract anyway.⁸⁷ The debate is now focussed upon whether a term should be implied at law into “relational contracts”, but if the duty of good faith consists only of the duty to act honestly and fidelity to the terms of the contract, then it may be difficult ultimately to justify its restriction to “relational” contracts.

⁸³ This was emphasised by the House of Lords in *Liverpool City Council v Irwin* [1977] AC 239, overturning the broader approach adopted by Lord Denning MR in the Court of Appeal: [1976] Q.B. 319.

⁸⁴ After all, unelected judges do not have the democratic legitimacy of Parliament when deciding that all contracts of a certain type should include a particular implied term.

⁸⁵ Cf *Scally v Southern Health and Social Services Board* [1992] 1 AC 294.

⁸⁶ Eg *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20.

⁸⁷ Cf *Bhasin* [60].

In *Monde Petroleum*, Richard Salter QC, sitting as a Deputy High Court judge, was “clear that the mere fact that a contract is a long-term or relational one is not, of itself, enough to justify such an implication”.⁸⁸ It is suggested that such an approach should be supported. After all, some long-term contracts may be zero-sum rather than mutually beneficial,⁸⁹ and it might be doubted whether the concept of “relational contracts” is sufficiently definite to constitute a nominate category of contracts;⁹⁰ some contracts will exhibit more “relationality” than others.

In *Yam Seng*, Leggatt J doubted whether English law had reached the stage where it would be “ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts”.⁹¹ He preferred to imply a term in fact. However, in *Sheikh Tahnoon v Kent* Leggatt LJ took a significant step towards the implication at law of terms of good faith into “relational contracts”. His Lordship thought that “relational contracts” was a category of contract:⁹²

“I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such ‘relational’ contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.”

Leggatt LJ went on to hold that “the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith.”⁹³ Encouragingly, this highlights that an implied term can be excluded (so is not part of an “irreducible core”). Less persuasively, this approach suggests that a vague obligation of good faith is

⁸⁸ [2016] EWHC 1472 (Comm); [2017] 1 All E.R. (Comm) 1009 [250] (not considered on appeal: ([2018] EWCA Civ 25).

⁸⁹ Eg *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2018] EWCA Civ 355. See too *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC (Ch) 2313.

⁹⁰ For further discussion, see eg H Collins, “Is a Relational Contract a Legal Concepts?” in S Degeling, J Edelman and J Goudkamp (eds) *Contract in Commercial Law* (Lawbook Co, 2016).

⁹¹ [131]. Cf *Bhasin* [33]

⁹² [167].

⁹³ [174].

prima facie a necessary incident of all relational contracts (however that be defined). In any event, it was not necessary to rely upon a term implied at law in *Kent*: Leggatt LJ also held that a term could be implied in fact.⁹⁴

Terms implied in fact reflect the (unexpressed) intentions of the parties, but not terms implied at law. Implying a term at law therefore means that the relevant term might not correspond to the intentions of the parties. There are good reasons to be cautious of an intrusive term of good faith implied by law. The risk of self-seeking or opportunistic behaviour may simply be priced in to the contract from the outset, and implying terms may disturb a careful equilibrium crafted by the parties in the terms of the contract. Moreover, it is now abundantly clear that express terms of good faith will be given effect by the court.⁹⁵ This reduces the need to imply such terms at law into contracts between well-advised sophisticated commercial parties.⁹⁶ Such parties should be aware of their ability to regulate their own agreements and relationships, and should be encouraged to do so. It is suggested that a failure to do so may well be deliberate, and that courts should be wary of implying a term of good faith that was not expressly included – especially through implication at law rather than implication in fact.

C Term implied in fact

Terms implied in fact are often so obvious that they “go without saying”.⁹⁷ A term may be implied in order to give the contract “business efficacy”:⁹⁸ the parties must have intended that the contract would “work”. If an officious bystander were to ask the parties if a certain term was included in the contract, both parties must reply “Oh, of course!” for the term to be implied.⁹⁹

Terms implied in fact reflect the intentions of the parties, and do not represent a great intrusion into freedom of contract: the implied terms are part of the contract agreed by the parties. They are sometimes said to be “intrinsic” to the bargain¹⁰⁰ rather than imposed by law. However, it is not clear that – as

⁹⁴ [174]; see Section II.C **below**.

⁹⁵ See n27 **above**.

⁹⁶ E McKendrick, “The Regulation of Long-term Contracts in English Law” in J Beatson and D Friedmann, *Good Faith and Fault in Contract Law* (OUP, 1995) 329-333. Cp *Yam Seng* and *Kent*, below.

⁹⁷ *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206, 227 (MacKinnon LJ).

⁹⁸ *The Moorcock* (1889) 14 PD 64.

⁹⁹ *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206, 227 (MacKinnon LJ).

¹⁰⁰ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [82] (Jackson LJ).

between commercial parties – a term of good faith should readily be implied. It will often be the case that a contract is efficacious even without such an implied term,¹⁰¹ and in those circumstances the test enunciated in *The Moorcock* would not be satisfied. Moreover, if an officious bystander were to ask both parties: “Is there also a term that the contract be performed in good faith?” the parties might not respond: “Oh, of course!” but rather: “What do you mean by good faith?” As a result, the test laid down in *Shirlaw* would not be fulfilled either.

It is perhaps for this reason that in cases where a term has been implied in fact, judges have been more particular about the content of the implied term, rather than simply implying a general term of good faith. Admittedly, a term implied into a contract still has to be interpreted,¹⁰² but it is sensible to demand that the term implied be as precise and narrow as possible in order to minimise the danger of disrupting the parties’ bargain and adjusting the allocation of risk agreed in the contract. After all, implying a term is an altogether more intrusive exercise than interpretation; as Sir Thomas Bingham observed in *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd*:¹⁰³

“The courts’ usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power”.

For example, in *Yam Seng*, the terms implied into the bargain were narrower and better-defined than a broad resort to “good faith”. Leggatt J understandably relied upon the then-applicable but now-discredited test for implied terms of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd*,¹⁰⁴ but that test is too loose:¹⁰⁵ it should not be easy to imply a term into a contract, and the test of necessity must be strictly adhered to. It may be that the general approach of Lord Hoffmann to both interpretation and implication was

¹⁰¹ *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm); [2017] 1 All E.R. (Comm) 1009 (this issue was not considered on appeal: [2018] EWCA Civ 25).

¹⁰² The two exercises are related but distinct: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742.

¹⁰³ [1995] EMLR 472, 481.

¹⁰⁴ [2009] UKPC 10, [2009] 2 All ER (Comm) 1 [21].

¹⁰⁵ *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742.

based upon a strong notion of good faith and fair dealing being implicit in English law,¹⁰⁶ but it is important to reiterate that terms cannot be implied just because it is reasonable to do so: an implied term must be *necessary*.

Of course, even a stringent test of necessity might be fulfilled in some instances. But the focus on an individual contract means that the implied term can be tailored to the particular circumstances of the case. Thus in *Sheikh Tahnoon v Kent* Leggatt LJ again implied more precise and narrow terms than “good faith”.¹⁰⁷ Admittedly, these terms may themselves have been somewhat generous to Kent on the facts of the case, but must have been found by the judge to respond to the test of necessity when considering the intentions of the parties. Although Leggatt LJ cited *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*,¹⁰⁸ he did not expressly deal with the stringent nature of the test set out by the Supreme Court for implied terms and how it applied to the facts of the case.

Collins has criticised a greater focus on terms implied in fact rather than terms implied at law, since “it relieves the court of having to engage with the complexity of its legislative task, even though its decision is likely to be adopted as a precedent in future cases”.¹⁰⁹ But it is not clear that these cases should serve as precedents, unless a defined *type* of contract can be discerned into which a particular term should always be implied. Rather, the term should only be applied if necessary in the individual circumstances of the particular case. That has a number of consequences, which will be analysed in the next section of this paper.

III IMPLICATIONS OF THE “INDIVIDUALISED IMPLIED TERM APPROACH”

Focussing upon the particular contract at issue when deciding whether to imply any duties considered under the umbrella of “good faith” has a number of

¹⁰⁶ M Bridge, “Doubting Good Faith” (2005) 11 NZBLQ 441-442. See too R Brownsword, “After *Investors*: Interpretation, Expectation and the Implicit Dimension of the ‘New Contextualism’” in D Campbell, H Collins and J Wightman (eds) *Implicit Dimensions of Contract* (Hart, 2003). Calnan has commented that “there is also no doubt that English judges use interpretation as a back-door way of bringing concepts of reasonableness and good faith into English law”: R Calnan, *Principles of Contract Interpretation* (2nd ed, 2017) 7.18.

¹⁰⁷ See Section I **above**. See too eg *Bristol Groundschool Ltd v Whittingham* [2014] EWHC 2145 (Ch); *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB).

¹⁰⁸ [2015] UKSC 72; [2016] AC 742.

¹⁰⁹ H Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 CLP 297, 308. See too Woo Pei Yee, “Protecting Parties’ Reasonable Expectations: A General Principle of Good Faith” [2001] OJCLJ 195, 204

advantages. It affords the greatest protection to parties from the imposition of obligations of good faith which were not expressly provided for in the agreement. Moreover, neither party should be surprised by a term which is necessary to make the agreement work, or to which they would both have instantly agreed had they been asked by an officious bystander.

Of course, in some types of contract (such as the employment contract) duties of good faith will still be implied regardless of the parties' intentions, but this is simply necessary in those types of agreement. Parties may be thought to "sign up" for duties of good faith when entering into types of contract where good faith is necessary to make that category of contract work. The intrusion into the parties' ability to define the content of their agreement is therefore minimised.

A broader approach to good faith – whereby all contracts would be subject to duties of good faith – would undermine the parties' ability to set the terms of the contract, and to be free from terms to which they would not have agreed and did not agree.¹¹⁰ The suggestion in *Bhasin* that this would enhance commercial certainty¹¹¹ seems optimistic and prone to provoke a great deal of litigation from parties seeking to escape a bad bargain.¹¹² A party may well regret not having provided for an express term of good faith, but it is difficult to be sure what the consequences of inserting such a term would have been. Perhaps the other party would have refused to contract at all. Or perhaps it would have asked for something different in return. Many contracts are finely-balanced in their final form after a long period of negotiations, and it will often be difficult to assume that duties of good faith do not disrupt the parties' agreed allocation of risk. Indeed, the risk of future changes and parties' acting other than in good faith may be priced into the contract itself. It is undesirable for a sweeping approach to be adopted by the courts, and preferable to focus upon the particular parties concerned by any given dispute.

Commercial parties should be able to draft their agreements as they see fit, secure in the knowledge that duties of good faith only arise as implied terms and can therefore be excluded.¹¹³ Such exclusion may be express or implied.

¹¹⁰ Especially if such duties could not be excluded: see eg J Morgan, "Against Judicial Review of Discretionary Contractual Powers" [2008] LMCLQ 230.

¹¹¹ *Bhasin* [34], [40], [62], [80].

¹¹² See the recent Canadian litigation in *Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec* 2018 SCC 46. Cf S Burton, Reply to Ewan McKendrick, "History and Theory of Good Faith Performance in the United States" in L DiMatteo and M Hogg, *Comparative Contract Law: British and American Perspectives* (OUP, 2016) 210.

¹¹³ Assuming the parties wish to exclude good faith; they could, on the other hand, expressly provide for obligations of good faith.

This protects the parties' sovereignty and ability to define the limits of their agreements. Indeed, the fact that many commercial contracts now tend to be very detailed¹¹⁴ possibly means that the scope for implied terms of good faith is narrow: if the parties could have provided for duties of good faith and did not, the inference might more appropriately be that no term should be implied.

Sir George Leggatt has suggested, extra-judicially, that “[r]ecognising a default obligation of good faith performance may help to reduce the need for elaborate documents and make short contracts less risky”.¹¹⁵ But in practice this is unlikely to prove true. It would take a substantial culture shift for commercial contracts to be short and pithy.¹¹⁶ That would no doubt be desirable, but is unlikely to be achievable. The growth in complicated and detailed agreements is unlikely to be radically stunted. Of course, short contracts would leave more scope for terms to be implied (as was the case in both *Yam Seng* and *Sheikh Tahnoon*¹¹⁷), but it is suggested that it is not unduly onerous for sophisticated commercial parties to be expected to include express terms of good faith if that is what they wish.¹¹⁸ Good faith is too novel and potentially disruptive to become a default rule (at least in one big leap, and at least in the commercial context).

IV CONCLUSION

The notion of “good faith” continues to evoke much critical interest. Many of the difficulties of implementing obligations of “good faith” in contract law, however, concern the label. There are fears that good faith operates at too high a level of abstraction to be useful,¹¹⁹ and that more precise duties need to be formulated.¹²⁰ Indeed, in the leading decisions of *Bhasin*, *Yam Seng* and

¹¹⁴ Eg Lord Neuberger has observed, “[t]he increased volume, size and complexity of legal documents”: “Foreword” to D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (London 2010), vii. Perhaps significantly, in both *Yam Seng* and *Kent* there was no detailed written contract.

¹¹⁵ G Leggatt, “Contractual Duties of Good Faith”, (Lecture to the Commercial Bar Association, 18 October 2016) [30].

¹¹⁶ See eg *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC); [2017] B.L.R. 216 [67] Coulson J: “modern day contracts of this kind are so complicated that nobody (not even the consultants) bothers to check the actual documentation being signed.”

¹¹⁷ Indeed, the latter contract was oral rather than written.

¹¹⁸ For a robust approach arguing that parties should insert express obligations of good faith and courts should not imply similar terms (at least in the context of discretionary powers) see J Morgan, “Against Judicial Review of Discretionary Contractual Powers” [2008] LMCLQ 230.

¹¹⁹ S Burton, “Reply to Ewan McKendrick, “Good Faith in the Performance of a Contract in English Law”” in L DiMatteo and M Hogg, *Comparative Contract Law: British and American Perspectives* (OUP, 2016) 222

¹²⁰ M Bridge, “Does Anglo-Canadian Contract Law Need A Doctrine of Good Faith?” (1984) 9 Canadian Business LJ 385.

Sheikh Tahnoon v Kent the courts all suggested that obligations of good faith were owed, but also formulated more precise duties which could be relied upon. Even though it was not necessary to find an obligation to perform the contract in good faith, the courts clearly provided some impetus to shift the law in the direction of recognising duties of good faith.

Similarly, there appears to be a drift in the manner in which such a duty is incorporated into the contract. In *Yam Seng*, for example, Leggatt J relied exclusively on implication in fact,¹²¹ but in *Sheikh Tahnoon v Kent* Leggatt LJ relied on both implication in fact and implication at law.¹²² It may be that the term implied in fact is “hardening”¹²³ into a term implied at law. However, given the difficulties in defining the type of contract involved, it is necessary to be clear about the tests being applied for both terms implied in fact and terms implied at law. Perhaps this “hardening” is a stepping stone to viewing such expansion of the scope of obligations of good faith duties of good faith “both as an obligation in interpreting existing provisions and as an additional implied term where there are no relevant express terms to be interpreted”.¹²⁴ The ultimate end point of such developments may be to consider obligations of good faith to be present as a default in all contracts, following the thrust of the decision in *Bhasin*, and perhaps even mandatory.¹²⁵

It is suggested that the courts should be circumspect about the development of the law in this area, and not make too big a leap too quickly. The piecemeal development of the common law favours incremental development.¹²⁶ On this basis, it becomes possible to check at every stage whether the law is satisfactory, whether each small step taken poses problems, and whether further steps need to be taken. Terms of “good faith” – unless expressly formulated as such as part of the express terms of a contract – are currently relatively rare in contracts.¹²⁷ Their development should continue to depend – at least for now - on whether a particular term meets the stringent criteria for terms implied in fact. Terms should not be implied at law unless the category of contract at issue can be clearly defined. Whether there is room to imply a term in fact will depend entirely on the facts of a given case, but it is

¹²¹ E McKendrick, “Good Faith in the Performance of a Contract in English Law” in L DiMatteo and M Hogg, *Comparative Contract Law: British and American Perspectives* (OUP, 2016).

¹²² See too *Bhasin* [74].

¹²³ G Leggatt, “Contractual Duties of Good Faith”, (Lecture to the Commercial Bar Association, 18 October 2016) [50]

¹²⁴ R Harrison *Good Faith in Sales* (Sweet & Maxwell London 1997) 29.

¹²⁵ For further discussion, see E Peden, “Good Faith in the Performance of Contracts” (2003).

¹²⁶ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439.

¹²⁷ See also *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat).

important to remember that “an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it”.¹²⁸ A term will be implied only if it is necessary to do so, and in the commercial context it may well not be necessary to do. If well-advised commercial parties wish particular duties to govern their relationship, they should be encouraged to stipulate such duties expressly in their contracts.

¹²⁸ *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396; [2017] 1 All E.R. (Comm) 601 [68] (Beatson LJ), relying on *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch)