

English Law, the Legal Profession, and Colonialism

Histories, Parallels, and Influences

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11 Winds of Change in Common Law Jurisdictions

The Concept of Good Faith and Fair Dealing in the Performance of Contracts*

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Orthodox Rule and Exceptions to It

The conservative view challenges the acknowledgement of good faith and fair dealing¹ as a general doctrine of English contract law.² There are binding authorities that deny the doctrine's presence.³ There is the decision of the House of Lords discarding the implication that parties are bound to act in good faith during negotiations.⁴ Though that view has recently been affirmed by the Supreme Court of the United Kingdom,⁵ there are decisions

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1 While the concept in question is most often referred to as "good faith and fair dealing" or "good faith", the former expression is only rarely used in the reverse sequence, as by Fancourt J. in *UTB LLC v. Sheffield United Limited* [2019] EWHC 2322 (Ch), §170.

2 Lord Sumption in *Versloot Dredging BV v. HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, §36; Moore-Bick LJ. in: *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* (2016) EWCA Civ 789, §45; Lord Burrows in: *Pakistan International Airline Corporation v. Times Travel (UK) Ltd.* [2021] UKSC 40, §95. A. Burrows, *A Restatement of the English Law of Contract* (Oxford University Press 2016) 93; J. W. Carter and W. Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' (2016) 75 Cambridge Law Journal 608, 613; H. Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 Current Legal Problems 1, 3–4; E. McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2018) 482ff; G. McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law' (2017) 70 CLP 1, 2, 22; H. Soper, 'Occam's Razor or Leggett's Multiblade—Good Faith or a Clean Shave?' (2021) 7 Journal of Business Law 580ff; S. Whittaker, 'Good Faith, Implied Terms and Commercial Contracts' (2013) 129 Law Quarterly Review 463ff.

3 Bingham LJ. in: *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q. B. 433, 439.

4 Lord Ackner in: *Walford v. Miles* (1992) 64 P&CR 166, 173.

5 Lord Hodge in: *Pakistan v. Times Travel* [2021], §§ 3, 27.

confirming enforceability of express term (instead of implied term) to negotiate in good faith.⁶

Although the orthodox view still remains the starting point, the concept in question is currently the subject of lively discussion. This is due to a number of English⁷ and Commonwealth⁸ cases claiming that a duty of good faith should be implied between parties to a contract. At the same time, some scholars note that the concept of good faith is already present in English law.⁹

The main argument raised against the introduction of good faith and fair dealing into common law jurisdictions is that it is difficult to assess what this concept means, in what circumstances it is applicable, and, finally, what parties affected by it should do. Even its supporters find these questions challenging to answer.¹⁰ The doctrine of good faith seems ill-fit to contract law, whose cornerstones are certainty of law and predictability of decisions. Still, those lawyers who support the view that the concept of good faith is already present in contract law, note that its application does not actually affect the values of certainty and predictability.¹¹

6 *Petromec Inc v. Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, §§115–121 (the express term concerned the negotiations of remuneration for additional works performed under a shipyard contract). In New South Wales: *United Group Rail Services Ltd. v. Rail Corporation (NSW)* [2009] NSWCA 177, §81 (the dispute resolution clause provided for a duty to negotiate in good faith). Note that these decisions concerned express terms to negotiate certain issues that might materialize in the framework of cooperation under existing contracts in good faith and not the terms of any instruments aimed only at starting negotiations from scratch and establishing a future contractual relationship.

7 *Yam Seng Pte Ltd. v. International Trade Corp Ltd.* (2013) 1 CLC 662.

8 In Australia: *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v. Airservices Australia* (1997) 76 FCR 151. In Canada: *Bhasin v. Hrynew* (2014) SCC 71.

9 D. Campbell, ‘Good Faith and the Ubiquity of the “Relational” Contract’ (2014) 77 *Modern Law Review* 460, 486; M. Chen-Wishart and V. Dixon, ‘Good Faith in English Contract Law’ in P. Miller and J. Oberdiek (eds), *Oxford Studies in Private Law Theory*, vol. 1 (Oxford University Press 2020) 195 (“We Already Have It”); J. Stapleton, ‘Good Faith in Private Law’ (1999) 52 *CLP* 1, 25, 36. *cf.* S. Rowan, ‘Abuse of Rights in English Contract Law: Hidden in Plain Sight?’ (2021) 84 *Modern Law Review* 1066ff. She claims that abuse of right is already present in English law and might be used as a better (than good faith) token to explain constraints on contractual power.

10 Chen-Wishart and Dixon (n 9), ‘Good Faith’ 197 (“elusive concept”). In Australia: *Eso Australia Resources Pty Ltd. v. Southern Pacific Petroleum NL* [2005] VSCA 228, §3: (“standard is nebulous”). In Canada: *Wallace v. United Grain Growers Ltd.* (1997) CanLII 332 (SCC), [1997] 3 SCR 701, §98 (“incapable of precise definition”). In the United States: *Northwest, Inc. v. Ginsberg* (2014) 134 S. Ct. 1422, 1431 (“it does not appear that there is any uniform understanding of the doctrine’s precise meaning”).

11 Chen-Wishart and Dixon (n 9), ‘Good Faith’ 189ff. *Yam Seng* (2013), 701 (“Its application involves no more uncertainty than is inherent in the process of contractual interpretation”); *Bhasin v. Hrynew* (2014), §80 (“Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance”).

Contemporary debate over the status of good faith and fair dealing is not isolated to England and Wales. Similar arguments, pro and contra, are presented in other common law jurisdictions. The courts pay attention to what is going on abroad. Interestingly enough, persuasive argumentation flows in multiple directions. On the one hand, the English courts, with their orthodox view still prevailing, frequently refer to the case law of Commonwealth countries. On the other hand, the American state laws that, in contrast to English law, recognize the concept insofar as it concerns performance of contract,¹² are thoroughly analyzed by Australian and Canadian judges. Although the law in Australia might not yet be settled (as it is in Canada), it seems that its development is leaning towards recognizing good faith. The courts often resort to the use of comparative argumentation. Even illustrations from civil law tradition have recently joined the many arguments applied in common law reasoning. In civil law countries, as well as in mixed jurisdictions,¹³ it is assumed that the concept of good faith and fair dealing is one of the most important principles of private law in general, and of contract law in particular.¹⁴ Good faith in an objective sense introduces equitable elements into the law by ordering the court to assess the parties' conduct from the perspective of a specific extra-legal model based on such intangibles as fairness, honesty, and decency. Finally, the English courts draw new outlooks and perspectives from the development of contract law in these common law jurisdictions, that could subsequently be incorporated into English law. Thus, winds of change are blowing, and the issue of re-thinking English contract law becomes the need of the moment.

- 12 *Restatement of the Law (Second) Contracts as Adopted and Promulgated by the American Law Institute*, vol. 1 (St. Paul 1981) 99ff (hereinafter: "Restatement (Second) of Contracts"). R. Brooks, 'Good Faith in Contractual Exchanges' in A. Gold et al. (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020) 497ff; M. Eisenberg and M. Gergen, *Foundational Principles of Contract Law* (Oxford University Press 2018) 707; E. A. Farnsworth, 'Good Faith in Contract Performance' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 2002) 155ff; D. Markovits, 'Good Faith as Contract's Core Value' in G. Klass, G. Letsas and P. Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 272ff; J. Perillo, 'Abuse of Rights. A Pervasive Legal Concept' (1995) 27 *Pacific Law Journal* 37, 69ff; R. S. Summers, 'The General Duty of Good Faith—Its Recognition and Conceptualization' (1981–2) 67 *Cornell Law Review* 810ff; *Williston on Contracts* §63:22, Westlaw International, May 2022 Update.
- 13 The principle is recognized in Louisiana and in Quebec in their civil codes (art. 1759 and art. 6, respectively). Furthermore, in Quebec the abuse of right is prohibited explicitly by art. 7 of the Code and was banned by the judiciary even before that was introduced (*Houle v. Canadian National Bank* (1990) CanLII 58 (SCC)). The same is the case in Louisiana (cf. Perillo (n 12), 'Abuse of Rights' 78). For good faith as the underlying principle in Scots Law cf. H. MacQueen, 'Good Faith, PECL and Mixed Systems' (2018) 27 *University of Edinburgh School of Law Research Paper Series* 1, 18.
- 14 R. Zimmermann, S. Whittaker, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in R. Zimmermann and S. Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2008) 7ff.

Reluctance to accept the concept of good faith comes in clear contradiction to Lord Mansfield's famous decision in *Carter v. Boehm* (1766). Since then, dozens of case reports reiterate His Lordship's statement that an insured is under a duty to disclose all material facts to an insurer and that that duty is rooted in the principle of good faith, one "applicable to all contracts and dealings". Still, the recognition of the duty was later limited to insurance businesses and was treated as an exception.¹⁵ A quarter century later, Lord Kenyon decided *Mellish v. Motteux* (1792) on a premise that a seller should disclose to a buyer latent defects of which he or she was aware. The former was held liable towards the latter even though in the case at hand, a ship that was part of the subject matter of a deal, was sold "with all faults". Although the decision was justified by reasoning based on "honesty and good faith", it contradicted the prevailing principle of caveat emptor.¹⁶ Interestingly, a search query performed in internet databases shows that *Mellish v. Motteux* (1792), after being quickly overruled, was not cited again for two long centuries.¹⁷ It was retrieved by the Ontario Report in 1987,¹⁸ and then Australian¹⁹ and Canadian²⁰ courts started to reference it as well.

The propensity for common law lawyers to dismiss good faith as a legal doctrine is not absolute. There are branches of law such as insurance law, consumer law, and employment law, among others, wherein a resort to it might be either acceptable or even prescribed by statute.²¹ Reluctant to acknowledge good faith as a general doctrine, the courts have incrementally developed a number of particular "piecemeal solutions". The list of these includes rules for the construction of contracts, frustration of contract, promissory

15 In *Carter v. Boehm* (1766) 3 Burr 1905, 1910, good faith was actually understood as honesty in fact (duty of insured to share relevant information) while later development of common law made it cover fair dealing as well. The Insurance Act 2015 c. 4 s. 3. Lord Sumption in *Versloot Dredging* [2016], §8. M. Lobban, 'The Law of Insurance' in W. Cornish et al. (eds), *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford University Press 2010) 697–8.

16 *Mellish v. Motteux* (1792) 170 E.R. 113, 113–114. Cf. M. Lobban, 'Contractual Fraud in Law and Equity, c1750–c1850' (1997) 17 Oxford Journal of Legal Studies 441, 467. There have been attempts in the Chancery to promote good faith in real property transactions (cf. Lobban (n 15), 'Misrepresentation' 415, 418).

17 *Baglehole v. Walters* (1811) 3 Campbell 154, 170 E.R. 1338. The query was conducted in the databases of the Australasian Legal Information Institute, the British and Irish Legal Information Institute, the Canadian Legal Information Institute, the Commonwealth Legal Information Institute, and Westlaw International.

18 Report on Amendment of the Law of Contract, Ontario Law Reform Commission 1987 (hereinafter "Ontario Report"), 173.

19 *Renard Constructions* (1992), 265G–266A.

20 *Toronto Dominion Bank v. Berthin* (1994) Carswell Ont 4458, §82; *Bhasin v. Hrynew* (2014), §35.

21 Local laws in particular American states, however, exclude good faith in at-will employment agreements (R. Brooks, Good Faith . . . , p. 501).

estoppel, economic duress, undue influence, unconscionable bargain, and fiduciary duty.²²

Moreover, courts throughout the common law world frequently refer to good faith while assessing the position of a party who dealt with a non-owner of goods. In the civil law tradition this way of usage of the concept is referred to as the subjective (in contrast with the objective) meaning of good faith. The notion of good faith in such a case is another way to say that a purchaser was honest; that he or she was not aware that a seller was not authorized to take part in a deal. Despite that lack of authority, a bona fide purchaser might acquire a title for value.²³ The concept of bad faith (as a contradiction of good faith in the subjective meaning) has been utilized recently by Lord Burrows in *Pakistan International Airline Corporation v. Times Travel (UK) Ltd.* [2021]. In a context of negotiations between parties that lead to the settlement of a claim, His Lordship found that it was necessary to identify a “bad faith demand” in order to establish that there was inappropriate economic duress involved in an otherwise lawful act (lawful act economic duress). “Bad faith demand” was understood to mean “in the particular sense that the threatening party does not genuinely believe that it is owed what it is claiming to be owed”.²⁴ While the case was ultimately decided by the UK Supreme Court, David Richards LJ., sitting in the Court of Appeal, assessed the behaviour of the party from an objective perspective taking into account not only what it believed, but whether it had reasonable grounds to claim its case.²⁵

A Breakthrough Case and Relational Contracts

As already alluded to above, there are cases, although originating in lower courts, that contest the orthodox view, mainly as obiter dicta. The leading proponent of good faith and fair dealing in English law is Lord Leggatt. In *Yam Seng Pte Ltd. v. International Trade Corp Ltd.* (2013), Leggatt J. (as he was then known) opined that “the traditional English hostility towards a

22 Bingham LJ. in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433, 439. The relevance of piecemeal solutions has been recently confirmed by Lord Hodge in *Pakistan v. Times Travel* [2021], §§ 3, 27.

23 Stapleton (n 9), ‘Good Faith’ 11, 14, 24 (refers to “the norm of good faith” and “actual good faith”; these correspond with good faith in objective and subjective senses respectively). In Australia: *Service Station Association Ltd. v. Berg Bennett & Associates Pty Ltd.* (1993) 45 FCR 84, §91. In Canada: *Canada v. Toronto-Dominion Bank* (2018) FC 538 (CanLII), §§34ff. In the United States: *Restatement (Second) of Contracts* (n 12) 100 (Comment B to §205).

24 *Pakistan International Airline Corporation v. Times Travel (UK) Ltd.* [2021] UKSC 40, §102. Likewise, good faith as a lack of bad faith has been perceived by Coulson J. in *Soteria Insurance Limited (formerly CIS General Insurance Limited) v. IBM United Kingdom Limited* [2022] EWCA Civ 440, §121. In this case, following an express provision of a contract, a debtor’s contestation in good faith of an invoice precluded a creditor from terminating a contract for non-payment.

25 Referred to in *Pakistan v. Times Travel* [2021], §114.

doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced”.²⁶ His Honour advocated for the adoption of a duty of good faith and fair dealing as a term implied in fact, insofar as it concerned performance of so-called relational contracts.²⁷ According to him, relational contracts were for example joint venture agreements, franchise agreements, and long-term distributorship agreements, which

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.²⁸

The case at hand concerned parties to a distribution agreement. It established terms of cooperation wherein a claimant was to purchase goods from a defendant and then sell them at certain prices in airport duty-free shops located in the agreed territory. At some point in that cooperation the defendant started to sell these goods on the same market but at lower retail prices. Despite the fact that the distribution agreement did not include any express terms precluding such conduct, the claimant successfully asserted that in the context of cooperation as set forth by that agreement, the defendant was in breach of contract. The distribution agreement was found to be a relational contract that allowed for implying the duty of good faith between the parties. The defendant’s conduct was contrary to that implied duty since it was not appropriate for him to compete with his distribution partner.²⁹

Note that one of the New York state cases, mentioned only by its name in the above decision, might be the very source of the concept of relational contracts. In *Wigand v. Bachmann-Bechtel Brewing Co.* (1918) the parties agreed that a claimant would install and maintain a complete grain drying plant at a defendant’s brewery, advance initial and recurring payments to him, and purchase dry grains produced by the brewery. The defendant, in turn, was to prepare the space where the installation was to be erected, furnish steam to run it, and sell wet brewery grains produced by the brewing process at its brewery to the claimant. The enterprise entailed multifaceted cooperation—as depicted by Leggatt J. for relational contracts—and a significant initial investment by the claimant. Nonetheless, the defendant had sold its business after a certain time and ceased its brewing operations at the facility in question. This caused the claimant a complete disaster. Although the production closure was

26 *Yam Seng* (2013) 701.

27 Chen-Wishart and Dixon (n 9), ‘Good Faith’ 218ff, persuasively argues in favor of using the notion of “symbiotic” contracts.

28 *Yam Seng* (2013), 699; reiterated in *Al Nebayan v. Kent* [2018] EWHC 333 (Comm), §167.

29 *Yam Seng* (2013), 664.

not explicitly prohibited anywhere, the Court of Appeals of the State of New York found the defendant in breach of contract. The panel including Cardozo J. pronounced that “every contract implies good faith and fair dealing between the parties to it”. Indeed, the defendant’s conduct was contrary to the implied duty of good faith.³⁰ The deal in *Wigand* (1918) is a classic example of Leggatt J.’s relational contract.

Recently, in another English case concerning relational contracts, the court noted that while contract law does not reject the concept of good faith, it does “make clear that such a duty will not be routinely applied to all commercial contracts”. The case at hand concerned complicated dealings between the Post Office and sub-postmasters as its franchisees. Fraser J. elaborated on premises that made a finding of a relational contract in place possible, as well as on consequences of such a finding. It emerged that the idea of the relational contract is closely linked with an implication of a term of good faith and fair dealing.³¹ He proposed a non-exhaustive catalogue of specific features that are expected to be present in a relational contract between commercial parties. Among nine listed elements only the first of these was a “must have”: thus, if an express term prevented a duty of good faith from being implied, a contract could not be qualified as a relational one.³² Finding that particular contracts concluded between the Post Office and sub-postmasters were indeed relational contracts triggered an implication that parties were bound to act in good faith. That implied duty constrained exercise of contractual powers to terminate a contract in particular.³³

A finding of the existence of a relational contract does not mean that the duty of good faith permeates each of its aspects. Such a conclusion emerged in a recent case concerning a dispute between investors in the Sheffield United Football Club. These were the parties to an investment and shareholders’ agreement. Since one of them initiated a “Russian roulette” mechanism

30 *Wigand v. Bachmann-Bechtel Brewing Co.* (1918) 222 N.Y. 272, 277. Cited by Leggatt J. in *Yam Seng* (2013), 695.

31 *Bates and Others v. Post Office Limited, Judgment (No.3) “Common Issues”* [2019] EWHC 606 (QB), §§702ff, 710–11, 721.

32 *Bates v. Post Office* [2019], §§725–726 (“1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract. 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship. 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain. 4. The parties will be committed to collaborating with one another in the performance of the contract. 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract. 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships. 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty. 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment. 9. Exclusivity of the relationship may also be present”).

33 *Bates v. Post Office* [2019], §§721, 1122(1).

leading to the sale and purchase of shares in a subsidiary, they were no longer bound by any duty to act in good faith.³⁴

Implied Term of Good Faith

The controversies regarding the position of good faith and fair dealing in English contract law appear first of all in an issue as to whether a duty to act in good faith should be implied by a court into a relationship among parties. The establishment of that duty in contracts that neither provide for an express term that stipulate it nor exclude it, is attempted by means of implication of terms. A term may either be implied in fact or in law. It is assumed that the former is based on the presumed (actual) intentions of the parties to a particular individual contract. In turn, the latter is based on the imputed intentions of the parties to a class of contract, in which case the implication, as a legal incident of a contract, allows for a term to be implied, because it is founded in the nature of that class of contract. A term might be implied on the condition that it passes the test that a reasonable reader of it at the time the contract was made, would consider the term to be so obvious as to go without saying or because it is obviously necessary for the business efficacy of the contract. Even though the term at hand may be reasonable, it will not be implied unless it passes that test.³⁵

In certain circumstances, English courts find a duty of good faith and fair dealing as a term implied in fact.³⁶ However, it seems that in cases of relational contracts there is a growing tendency to treat the implication of good faith as one arising in law. A test that allows a term to be implied to act under a duty of good faith was passed in *Al Nehayan v. Kent* [2018]. Leggatt LJ. found a contract between the parties in question as “a classic instance of a relational contract” and noted that to imply a duty to act in good faith was essential to give effect to the reasonable expectations of the parties. While he did not address explicitly the issue as to whether the implication was one in fact or one in law, it was recently opined by Fancourt J. in *UTB LLC v. Sheffield United Limited* [2019] that it was the latter. A little later, based on the fact that the 25-year “public-private partnership” contract at hand was “a paradigm example of a relational contract”, Pepperall J. in *Essex CC v. UBB Waste (Essex) Ltd. (No. 2)* [2020] therefore inferred a conclusion that “the law implies a duty of good faith.”³⁷

34 *UTB LLC v. Sheffield United Limited* [2019], §§208, 529–30.

35 *Marks & Spencer Plc v. BNP Paribas Securities Services Trust Co. (Jersey) Ltd.* [2015] UKSC 72; Burrows (n 1), *A Restatement*, 91–3.

36 *Yam Seng* (2013), 701; *Bates v. Post Office* [2019], §721.

37 *Al Nehayan v. Kent* [2018], §174; *UTB LLC v. Sheffield United Limited* [2019], §200; *Essex CC v. UBB Waste (Essex) Ltd. (No. 2)* [2020] EWHC 1581 (TCC), §113. Jackson LJ. in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd. (t/a Medirest)* (2013) EWCA Civ 200, §105 (“there is no general doctrine of “good faith” in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract”).

In a leading Australian case on good faith—*Renard Constructions (ME) Pty v. Minister for Public Works* (1992)—Priestley JA. found a duty of good faith as a term implied both in fact (which in Australia is referred to as “ad hoc implication”) and in law. Indeed, he realized that it is hard to distinguish between these categories.³⁸ As to the proper classification, there are discrepancies between particular Australian courts. Judges who sit either in the Federal Court of Australia³⁹ or in the state courts of New South Wales⁴⁰ find a duty to act in good faith as a term implied in law. Their colleagues who practice law in Victoria find that term as one implied in fact.⁴¹ Note that the position of New South Wales courts might be conditioned by the fact that the merger of common law and equity law jurisdictions took place there much later than elsewhere. Reforms of the judicial system were conducted only in the 1970s,⁴² while in other Australian states these materialized at the turn of the nineteenth and twentieth centuries, following respective reforms in England and Wales in the 1870s.⁴³

As a consequence of English law’s tendency to treat the implication of good faith as one in fact and not in law, it is accepted that parties are allowed to introduce into their contract an express term excluding any implication of such a duty. Interestingly enough, even the decisions finding the duty as being implied in law in cases of relational contracts accept the parties’ option to explicitly exclude it.⁴⁴ One cannot imply a duty to act in good faith if an explicit term precludes one from doing so, since any implied term must be consistent with any express terms of the contract.⁴⁵ In addition, if a contract already refers to a duty of good faith in particular clauses that deal with detailed issues (e.g., an arbitration procedure), a presumption might be raised against an implication of additional good faith obligations pertaining to other aspects of the contractual relationship.⁴⁶

The courts have noted a reluctance to find an implied (in fact) duty of good faith if the contract in question is a detailed and meticulous one, and

38 *Renard Constructions* (1992), 260G.

39 *Hughes Aircraft Systems* (1997), 193E.

40 *Burger King Corporation v. Hungry Jack’s Pty Limited* [2001] NSWCA 187, §164; *Overlook v. Foxtel* [2002] NSWSC 17, §62.

41 *Eso Australia* [2005], §25.

42 Supreme Court Act 1970 no 52, s. 57; P. Finn, ‘Common Law Divergences’ (2013) 37 *Melbourne University Law Review* 509, 515–16, 535–6; A. Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common World’ (1994) 110 *Law Quarterly Review* 238, 253.

43 The Judicature Act 1873 c. 66, s. 25, 11. The reforms in the United States began even earlier when the Field Code was enacted in the state of New York in 1848 (K. M. Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) 197–202).

44 *cf* (n 37).

45 Thus, the general duty to act in good faith cannot prevail over the terms of any contract that prescribe in detail how to apply deductions and penalties (*Mid Essex Hospital Services* (2013), §§104–106, 152, 154). *Bates v. Post Office* [2019], §705; *UTB LLC v. Sheffield United Limited* [2019], §204; *Essex CC v. UBB Waste* [2020], §106.

46 *UTB LLC v. Sheffield United Limited* [2019], §207.

particularly if it was professionally drafted by sophisticated legal teams.⁴⁷ The agreements that were the basis of dealings between parties in *Yam Seng* (2013) and in *Al Nehayan v. Kent* [2018], wherein duty of good faith was actually implied, were, on the contrary, rather short notices put in general terms by non-lawyers. Nevertheless, even in cases of detailed contracts drafted in complex legalese there might be a possibility for implication in fact of a duty of good faith.⁴⁸

Similar to the English approach, Australian laws permit parties to exclude good faith by using express terms. Such is the case even in New South Wales, where a duty in question is found to be a term implied in law.⁴⁹ American state and Canadian provincial laws find it as a term implied (imposed) in law that operates irrespective of the intentions of the parties.⁵⁰ With exceptions, these laws preclude parties from contracting the duty out.⁵¹ Still, parties are permitted to modify the scope or to indicate the standard that will be applicable to their conduct.⁵²

Negative Duty of Good Faith

It is difficult to define a specific content of a duty of good faith and fair dealing based on an implied term. It is nonetheless certain that it depends on the circumstances of a case.⁵³ Judge-made law provides for several of the most common indications setting out the usual content of good faith. These are, in the words of Australian judge Allsop CJ.,

(1) an obligation to act honestly and with fidelity to the bargain; (2) an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; (3) and an obligation to act reasonably and with fair dealing having regard to the

47 *ibid* §206; *Bates v. Post Office* [2019], §714. *Eso Australia* [2005], §4 (“Where commercial leviathans are contractually engaged, it is difficult to see that a duty of good faith will arise.”).

48 *Yam Seng* (2013), 672; *Al Nehayan v. Kent* [2018], §173; *Bates v. Post Office* [2019], §735.

49 A. Terry and C. Di Lernia, ‘Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?’ (2009) 33 Melbourne University Law Review 542, 570–1; M. Warren, ‘Good Faith: Where Are We At?’ (2010) 34 Melbourne University Law Review 344, 356.

50 *Restatement (Second) of Contracts* (n 12) §205. *Bhasin v. Hrynew* (2014), §74; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* (2021) SCC 7, §§91, 94. It seems that in the latter case (Brown and Rowe JJ., Côté J. concurring), the minority was of the opinion that it is a term implied in fact (§133).

51 In *Northwest, Inc. v. Ginsberg* (2014) 134 S. Ct. 1422, 1432, the Supreme Court of the United States observed that some states allow exclusion (California), while others do not (New York). Ontario Report, 172–6. *Bhasin v. Hrynew* (2014) 75, §77 (“The obligations of good faith, diligence, reasonableness, and care . . . may not be disclaimed by agreement”); *C.M. Callow Inc. v. Zollinger* (2020) SCC 45, §84; *Wastech Services* (2021), §94.

52 In England and Wales: *Yam Seng* (2013), 701. In Canada: Ontario Report, 172–6; *Bhasin v. Hrynew* (2014), §§75, 77; *Wastech Services* (2021), §93. In the United States: *Restatement (Second) of Contracts* (n 12) 103 (Reporter’s Note to §205).

53 *Yam Seng* (2013), 699; *Bates v. Post Office* [2019], §§714, 721; *Essex CC v. UBB Waste* [2020], §116.

interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.⁵⁴

These three aspects of the duty will be elaborated, in a modified order, later in this chapter.

In *Yam Seng* (2013) and in *Al Nebhayan v. Kent* [2018], Leggatt LJ. noted that “the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people”.⁵⁵ This statement emphasised an objective element (in contrast to a subjective one). Thus, a duty of good faith might be breached despite a party’s being subjectively convinced that it is acting honestly.⁵⁶ An analogy can be found between the implied duty of good faith as presented in the above cases, and the “bad faith excluder” approach presented by Robert Summers,⁵⁷ as well as the prohibition against the abuse of right that is well known in civil law tradition.

The Canadian authority for recognition of good faith and fair dealing as a general doctrine is found in *Bhasin v. Hrynew* (2014). The Supreme Court of Canada adopted in this case a duty of honest performance as a term implied in law.⁵⁸ The dispute arose between a claimant who was a former agent of a leading educational agency in Alberta and two defendants: that agency itself, and one of its agents who was simultaneously a claimant’s competitor. The defendants negotiated between themselves a merger that would result (and indeed did result) in one claimant’s losing its share in the market. For several years they implemented a plan to take over the claimant’s business. Despite being frequently questioned about it by the claimant, they repeatedly denied that the merger talks were taking place. By misleading him they therefore prevented the claimant from preparing for imminent loss. They also attempted to force the claimant to let his competitor (who later became a second defendant) be his auditor. When the claimant refused to accept this, his contract was terminated by the agency.

The court found that the latter breached its contract with the former by acting contrary to an implied requirement of good faith in the form of duty of honest performance. That materialized in a negative way, as the duty not to lie

54 *Paciocco v. Australia and New Zealand Banking Group Limited* [2015] 236 FCR 199, §288. Repeated by Leggatt LJ. in *Al Nebhayan v. Kent* [2018], §175.

55 *Yam Seng* (2013), 699; *Al Nebhayan v. Kent* [2018], §175. Reiterated in *Bristol Groundschool Ltd. v. Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), §196.

56 *Bates v. Post Office* [2019], §711; *Essex CC v. UBB Waste* [2020], §116.

57 Summers (n 12), ‘The General Duty’ 819ff.

58 *Bhasin v. Hrynew* (2014) SCC 71, §§73–80; C. Hunt, ‘Good Faith Performance in Canadian Contract Law’ (2015) 74 CLJ 4–7; K. Maharaj, ‘An Action on the Equities: Re-Characterizing Bhasin as Equitable Estoppel’ (2017) 55 Alberta Law Review 2017, 199ff; S. Waddams, ‘Good Faith, Good Conscience, and the Taking of Unfair Advantage’ in A. Dyson, J. Goudkamp, and F. Wilmot-Smith (eds), *Defences in Contract* (Bloomsbury Publishing 2017) 83–6.

or otherwise knowingly mislead other parties about matters directly linked to the contract's performance. Despite previous contradictory decisions by other authorities, the Supreme Court of Canada acknowledged the presence of an "organizing principle of good faith" in contract law. It noted that recognition of the doctrine was achieved as a step in the incremental development of the law and therefore the value of bringing back certainty and coherency to the law that was to be achieved.⁵⁹

C.M. Callow Inc. v. Zollinger (2020), an appeal from Ontario, went one step further. A claimant was providing winter services for a defendant who was a property manager. The winter maintenance contract was agreed for two years and provided for a ten-day termination period. Despite a decision to terminate that was made soon after the first winter, the claimant was reassured by the defendant that the latter was satisfied with the services, and that there was no risk of losing the contract. With a view to be awarded with a subsequent contract for a following period, the claimant rendered services free of charge for the defendant. Nevertheless, after these were finished and just before the next winter season started, his contract was terminated. The court resolved that a non-disclosure of anticipated termination in circumstances where the defendant knew what the claimant was doing was actually a breach of a duty of honest performance. This was the case because the defendant actively deceived the claimant.⁶⁰ In consequence, the defendant's exercise of termination rights was found to be dishonest and triggered an award for damages.⁶¹

Prohibition Against Obstruction

This is the second of the three aspects of the duty to act in good faith indicated earlier. This very feature of the concept in question was pointed out in one of the New York State cases later cited in the Commonwealth jurisdictions. In *Kirke La Shelle Co. v. Armstrong Co.* (1933) the Court of Appeals noted that

in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.⁶²

59 *Bhasin v. Hrynew* (2014), §§41, 65, 73, 92–3 ("There is a general organizing principle of good faith that underlies many facets of contract law.").

60 *C.M. Callow Inc. v. Zollinger* (2020), §38. The minority (Cote J. §§184, 200) was of the opinion that the duty of honest performance cannot introduce new positive duties to disclose (and mere silence cannot be considered dishonest unless there is positive duty to speak). Thus, there is only a negative duty not to lie.

61 *C.M. Callow Inc. v. Zollinger* (2020), §§107–9, 140–2, 145.

62 *Kirke La Shelle Co. v. Armstrong Co.* (1933) 263 N.Y. 79, 87. *cf. Restatement (Second) of Contracts* (n 12) 101 (Comment D illustrations 2–3 to §205).

On the other side of the Atlantic and nearly a century later, the English court attempted to identify examples of “furtive or opportunistic conduct . . . incompatible with good faith” in the context of a dispute between joint venture partners (*Al Nehayan v. Kent* [2018]). As both businessmen were beneficial owners of particular joint venture companies, it was found to be a breach of duty of good faith to enter into covert negotiations to sell interest in a company to a third party, or to exercise shareholder’s rights in order to profit at the expense of the other partner. Therefore, one of them was not permitted to leave the joint venture or to use corporate rights with the objective of forcing the other one to reimburse lost investment.⁶³ In another case, the court found a duty not to wilfully obstruct or hinder the operation of contractual clauses that vested the other party with particular rights.⁶⁴

In other words, in those cases, as well as in *Yam Seng* (2013), the party was not allowed to act inconsistently with itself by taking back from the other party a right that was granted to the latter. That dimension of good faith is expressed as well in American,⁶⁵ Australian,⁶⁶ and Canadian⁶⁷ case law.

Restraint Over Contractual Powers

The third constituent from Allsop CJ.’s catalogue referenced above might be also found listed in the American Restatement (Second) of Contracts.⁶⁸ The courts in common law jurisdictions refer to the notion of good faith and fair dealing while assessing apparently unrestricted powers vested by a contract to one of its parties. The question is posed as to whether these powers are confined by the doctrine of good faith. As early as in *White and Carter (Councils) Ltd. v. McGregor* (1962), Lord Reid considered whether a creditor’s freedom to elect a remedy should be limited in the event of a debtor’s breach of contract. Was the latter free to choose between claiming a contract’s performance in kind or a payment of compensation? His Lordship pointed out that the creditor should not act arbitrarily. Thus, if among the available alternatives, the creditor chose the one that did not provide a measurable benefit (legitimate interest), but rather led to a debtor’s particular disadvantage, such an election should not enjoy legal protection. Despite this statement’s being an obiter dictum, the courts approved it in subsequent decades. Importantly, these later references did not go beyond the issue considered by the court, that is, whether a contract’s enforcement in kind can be requested in lieu of

63 *Al Nehayan v. Kent* [2018] EWHC 333 (Comm), §§176, 239.

64 *UTB LLC v. Sheffield United Limited* [2019], §§529–30.

65 *Wigand* (1918), 272ff.

66 *Overlook v. Foxtel* [2002], §67; *Esso Australia* [2005], §28.

67 *Bhasin v. Hrynew* (2014), §§65, 73.

68 *Restatement (Second) of Contracts* (n 12) 102–3 (Comment E illustration 8 to §205); Eisenberg and Gergen (n 12), *Foundational Principles* 708; Perillo (n 12), ‘Abuse of Rights’ 71.

compensation.⁶⁹ In recent decades the prohibition against arbitrary conduct has been extended to other instances. Thus, party cannot enforce its contractual powers arbitrarily or terminate an agreement arbitrarily.⁷⁰

Even before the concept of good faith and fair dealing was recognized as a general doctrine of Canadian law, it was known in the area of employment law. *Greenberg v. Meffert* (1985) concerned a dispute over an exercise of powers conferred to a principal by an agency contract. One of its clauses allowed a principal to decide how to distribute an agency fee that was cashed in after expiration of an agreement with an agent who facilitated a particular sale. While the clause on its face value provided for an unfettered power, the Court of Appeal in Ontario noted that the principal “must act reasonably in exercising its discretion, and also honestly and in good faith”. Thus, the principal’s decision should be constrained by objective standards and, in absence of explicit provisions to the contrary, be made reasonably. In the case at hand the court resolved that the exercise of that discretion was not based on reasoned considerations and thus was not legitimized.⁷¹

In Australia, discussion of the duty of good faith and fair dealing was set in motion in *Renard Constructions* (1992). The case, decided by the Court of Appeal of New South Wales (which is the apex court in that state), concerned an exercise of termination clause in a contract for public works. Its express term actually empowered a principal to terminate it on condition that he was “not satisfied” with the progress of the contractor’s work. In its wording the clause seemed to vest an unrestricted right to decide whether to trigger termination. In the case at hand the works were indeed delayed, but the reason for that was a non-delivery of required construction elements by the principal. Irrespective of that fact the latter terminated the contract. The court reached an opinion that powers granted to the principal, in particular those allowing it to assess another party’s performance, were to be exercised reasonably, that is, in good faith.⁷²

The decision in *Abu Dhabi National Tanker Co. v. Product; Star Shipping Ltd. (The “Product Star”)* (No. 2) [1993] concerned argument over the exercise of a charterparty.⁷³ An owner rejected a charterer’s request to proceed with

69 *White and Carter (Councils) Ltd. v. McGregor* [1962] AC 413. Moore-Bick LJ. in: *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* (2016) EWCA Civ 789, §§29–33, 45 (attention drawn to the fact that the presence of such piecemeal solutions as the one applied by Lord Reid takes away the need to acknowledge the general principle of good faith).

70 *cf.* decisions referred to below in this section of the chapter.

71 *Greenberg v. Meffert* (1985) CanLII 1975 (ON CA).

72 *Renard Constructions* (1992), 257C-264A (Priestley JA.: “The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith.”), 280F (Handley JA.: the clause in question “should be construed as requiring the principal to act reasonably as well as honestly in forming the opinion”).

73 *Abu Dhabi National Tanker Co. v. Product; Star Shipping Ltd. (The “Product Star”)* (No. 2) [1993] 1 Lloyd’s Rep. 397.

a vessel to Ruwais in the UAE during the Iraq–Iran war. This port was said to be unsafe due to military activity in the Persian Gulf. While the charterparty provided the owner with a right not to accept a destination requested by the charterer that was deemed to be unduly precarious, it turned out that the indicated route was actually safe. The essential question was whether the owner abused the power given to it by the contract. Leggatt LJ,⁷⁴ noted

that not only must the discretion be exercised honestly and in good faith, but having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries.

The court thereby drew attention to notions that recall the subjective and objective meanings of good faith. Even if the owner’s managers were actually afraid (subjectively) of the vessel’s fate, there were no reasons (objectively) to fear for its wellbeing. Since the owner’s refusal to proceed was issued without relevant information being collected, the charterer succeeded. In the same way as in the Australian case just referred to above, the lack of needed data in the decision process amounted to breach of contract.⁷⁵ Indeed the owner’s decision was not prompted by any information regarding naval risk, but by the progress of a collateral dispute between the parties. The contractual powers were therefore exercised by the owner for a different purpose than those for which they were agreed upon.

Since this decision, the implied duty not to exercise discretionary powers arbitrarily or capriciously has been referred to in different contexts by courts of several jurisdictions.⁷⁶ In a recent English case—*Bates v. Post Office* [2019]—the clauses permitting the termination or suspension of a franchising agreement were taken under inspection. These seemingly unfettered terms empowered the Post Office to either suspend sub-postmasters (should there be suspicion of fraud on their part) or to terminate the relationship with them. The court noted that any decision to exercise these contractual powers should “take into account all relevant factors, and not take account of irrelevant ones”.⁷⁷

⁷⁴ The judge in this case was Sir Andrew Leggatt, the father of George, Lord Leggatt, judge in *Yam Seng* (2013) and *Al Nehayan v. Kent* [2018], and incumbent Justice of the Supreme Court of the United Kingdom.

⁷⁵ *Renard Constructions* (1992), 275E–276E (Meagher JA.: “the powers . . . may be exercised by the principal in his own interests provided he understands what he is doing.”), 279C (Handley JA.: “For myself I prefer to regard these matters as demonstrating that the principal’s decision, however honest, was objectively unreasonable and therefore an invalid exercise of the power.”).

⁷⁶ In England and Wales: *British Telecommunications Plc v. Telefónica O2 UK Ltd.* [2014] UKSC 42, §37; *Braganza v. BP Shipping Ltd.* [2015] UKSC 17, §20. In Australia: *Overlook v. Foxtel* [2002], §§83–84; *Eso Australia* [2005], §28. In Canada: *Bhasin v. Hrynew* (2014), §50; *C.M. Callow Inc. v. Zollinger* (2020), §§47, 84; *Wastech Services* (2021), §§4, 62.

⁷⁷ *Bates v. Post Office* [2019], §§879, 895, 899, 1122(3); *Essex CC v. UBB Waste* [2020], §96.

Canadian authority in that respect—*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* (2021)—concerned a dispute between a waste transportation and disposal company and a municipal authority that were bound by a long-term agreement. The former claimed that the latter’s decision to reallocate waste collection centres breached an implied duty of good faith in its exercise of its contractual powers in an arbitrary way because the decision significantly reduced the company profits of the former. The Supreme Court of Canada found that the duty to act in good faith was not breached. Indeed, the municipal authority made its decision in consideration of reasonable arguments (operating the system in the most cost-effective manner). The court emphasized that while assessing whether the powers were exercised arbitrarily or capriciously, one has to take into account the purpose for which the powers were created. If, indeed, the party resorted to contractual discretion in order to achieve a different purpose, then it would have breached the requirements of good faith, with a result in breach of contract. The court noted that it should not evaluate parties’ motives, but rather focus on the parties’ bargain that is the source of the discretionary powers. In reaching its conclusion, it referenced not only Canadian decisions (indicated many years earlier in the Ontario Report) but also *Renard Constructions* (1992) as well as “*Product Star*” [1993].⁷⁸

Loyalty to a Bargain

Finally, Allsop CJ. mentioned “an obligation to act honestly and with fidelity to the bargain”. Comment A to §205 of the Restatement (Second) of Contracts similarly commanded parties to a contract that their conduct be consistent with “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party”.⁷⁹

Reference to trust and fidelity in the context of good faith often leads to ambiguity when it is not clear whether an implication of good faith triggers a fiduciary relationship between the parties to a contract. In *Yam Seng* (2013) Leggatt J. elaborated that although relational contracts involve trust and confidence, these are of a different kind than those involved in a fiduciary relationship. He explained that what matters is “fidelity to the parties’ bargain”. It did not amount to a subordination by one party of its own interests to those of another but “it is trust that the other party will act with integrity and in a spirit of cooperation”.⁸⁰

78 *Wastech Services* (2021), §§66, 69–73, 88, 111.

79 *Restatement (Second) of Contracts* (n 12) 100 (Comment A to §205).

80 *Yam Seng* (2013), 697–8; *Al Nebayan v. Kent* [2018], §167; *Bates v. Post Office* [2019], §738 (“Transparency, co-operation, and trust and confidence are (. . .) implicit within the implied obligation of good faith.”).

Similar statements can be found in Australian decisions.⁸¹ In the line of Canadian cases, the Supreme Court of Canada emphasized that a duty of good faith and fair dealing “does not impose a duty of loyalty or of disclosure, or require a party to forego advantages flowing from the contract”.⁸²

Comparative Argumentation and Commonwealth Dialogue

The decision in *Yam Seng* (2013) was preceded by a broad comparative perspective that included argumentation concerning American, Commonwealth, and European laws. References to both judge-made law developed in particular American states, as well as to statutes and non-binding instruments introduced there, are frequent in Commonwealth cases. Priestley JA. explained in *Renard Constructions* (1992) that Australia and the United States share “broad similarity of economic and social conditions”. One of the reasons, mentioned in *Bhasin v. Hrynew* (2014), for reconsideration of the status of good faith was to harmonize common law in Canada with that of its trading partners—Quebec and the United States.⁸³ Socio-economic similarities make it much easier to look for persuasive authorities from other common law jurisdictions. Many Australian judgments cited the New York decision in the above-mentioned *Wigand v. Bachmann-Bechtel Brewing Co.* (1918). Priestley JA. noted that American courts in New York and California were consistently applying good faith while that concept was forgotten elsewhere.⁸⁴ In *Bhasin v. Hrynew* (2014) attention was drawn to another early case decided by a New York court: *Kirke La Shelle Co. v. Armstrong Co.* (1933).⁸⁵

Other American sources which have been presented as signposts of good faith development in common law jurisdictions included black-letter instruments. The Uniform Commercial Code was first published in 1952.⁸⁶ It has been gradually enacted as a statutory law and today, in part at least, is binding law throughout the United States. Originally, the UCC provided for two distinct definitions of good faith. The first was of a general application and equated good faith with “honesty in fact”, namely the subjective meaning of the concept (§1–201(19)). The latter introduced an objective element of fair

81 *Burger King* [2001], §187; *Overlook v. Foxtel* [2002], §67; *Eso Australia* [2005], §29; *Paciocco* [2015], §§289, 292.

82 *Bhasin v. Hrynew* (2014), §73; *C.M. Callow Inc. v. Zollinger* (2020), §51; *Wastech Services* (2021), §§101, 106–7, 113.

83 *Renard Constructions* (1992), 268A; *Bhasin v. Hrynew* (2014), §41.

84 Cited by Priestley JA. in: *Renard Constructions* (1992), 265F–226A; Gummow J. in *Service Station Association* (1993), §§94, 96; Allsop P. in *United Group Rail Services* [2009], §58; and in *Paciocco* [2015], §287.

85 *Bhasin v. Hrynew* (2014), §85. Cited also by Gummow J. in: *Service Station Association* (1993), §96, along with another New York case *Brassil v. Maryland Casualty Co.* (1914) 104 N.E. 622.

86 Teeven (n 43), *A History* 222.

dealing: “observance of reasonable commercial standards of fair dealing in the trade” (§2-103(1)(b)). Importantly, the scope of that latter definition was limited just to a category of sales contracts and a class of professional merchants.⁸⁷

Later, in 1981 the Restatement (Second) of Contracts was published by the American Law Institute. Despite being a non-binding authority, it has had profound impact on judge-made law throughout the United States. In contrast to its predecessor, the first Restatement of Contracts of 1932, it provided for a general definition of good faith, drafted to expose its objective meaning. According to its §205: “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement”. That definition was of general application as it was neither restricted to sales nor to merchants. Still, it explicitly constrained the duty to contractual performance and enforcement, leaving apart any negotiations stage.⁸⁸

The current version of the UCC (in the relevant part introduced in 2001) includes the revised definition that follows the model adopted by the Restatement. The requirement of good faith in the objective meaning was up to then limited to sales and to merchants. Since the definition was carried over from article 2 “Sales” to article 1 “General Provisions”, it encompasses now all contracts regulated by the UCC except those as found in article 5 “Letters of Credit”. Thus, good faith “means honesty in fact and the observance of reasonable commercial standards of fair dealing” (§1-201(20)) and “every contract or duty within imposes an obligation of good faith in its performance and enforcement” (§1-304).⁸⁹

American law proved to be influential in the Canadian province of Ontario. There, the Ontario Law Reform Commission published the Report in 1987 that called on the legislature to enact regulatory legislation to settle the matter without necessitating further court intervention. The reform proposal featured the implementation of good faith into contract law along the model proposed by the Restatement. It noted that Ontario courts were already applying rules of good faith and fair dealing while not calling that concept by its recognized name.⁹⁰

These American and Canadian instruments have been referred to in judicial decisions that proved to be influential in further development of good faith in common law jurisdictions. The leading Australian case, *Renard Constructions*

87 Uniform Commercial Code §1-201, §1-304 (Official Comment), Westlaw International, December 2021 Update.

88 *Restatement (Second) of Contracts* (n 12) 99ff.

89 UCC §1-201, §1-304 (Official Comment).

90 Ontario Report, 166ff. The Restatement (Second) of Contracts was referred to by the already cited Ontario decision: *Greenberg v. Meffert* (1985).

(1992),⁹¹ the English *Yam Seng* (2013) case,⁹² and the Canadian *Bhasin v. Hrynew* (2014) case prove to be excellent examples of comparative argumentation being used to explain the current law. The last decision not only mentioned English case concerning piecemeal solutions (*Interfoto Picture Library* [1989]), but also those cases that either boldly recognize the duty of good faith (*Yam Seng* (2013)), or only accept the implication of that duty as an exception (*Mid Essex Hospital Services* (2013)). It further referred to Australian judge-made law illustrated by *Renard Constructions* (1992).⁹³

The above-mentioned leading cases referenced not only cases and statutory instruments but also academic literature calling for recognition of the doctrine. Many Commonwealth decisions cite works by American Professors E. Allan Farnsworth⁹⁴ and Robert Summers,⁹⁵ who have both championed the concept in question since the 1960s. Significant input from an English perspective was spotted by Priestley JA., who recalled Lord Steyn's lecture at Oxford University in 1991 where he presented an incremental development of good faith in common law jurisdictions.⁹⁶

In his seminal decision in *Yam Seng* (2013) Leggatt J. did not constrain his comparative perimeter to common law jurisdictions (Australia, Canada, New Zealand, or the United States). He also resorted to arguments based on authorities stemming from mixed jurisdictions (Scotland), and civil law tradition, referencing Roman law, laws of particular European countries (France, Germany, Italy), and European harmonization projects (PECL, CESL).⁹⁷ Interestingly enough, the Dutch law with its art. 6:2 of the *Burgerlijk Wetboek* setting reasonableness and fairness as the standards in law of obligations was

91 Priestley JA. referred to the UCC (266B), the Restatement (267B), and to the Ontario Report (267C). Cf. *Service Station Association* (1993), §§92–95 (the Restatement, Canadian law), *Hughes Aircraft Systems* (1997), 191E (the Restatement, Canadian, New Zealand laws), *Burger King* [2001], §147 (UCC and the Restatement); *United Group Rail Services* [2009], §58 (UCC), *Commonwealth Bank of Australia v. Barker* [2014] HCA 32, §105 (the Restatement), *Paciocco* [2015], §§287–91 (UCC).

92 Leggatt J. referred to the UCC and to the Restatement (695).

93 *Bhasin v. Hrynew* (2014), §§42, 57, 58 (there is a reference to *Burger King* [2001] as well).

94 In Australia: *Renard Constructions* (1992), 265F–6A; *Service Station Association* (1993), §§92–94; *United Group Rail Services* [2009], §58; *Paciocco* [2015], §§287–91. In Canada: *Bhasin v. Hrynew* (2014), §§61, 76.

95 In Australia: *Renard Constructions* (1992), 266E; *Burger King* [2001], §150; *Overlook v. Foxtel* [2002], §69. In Canada: *Bhasin v. Hrynew* (2014), §84.

96 *Renard Constructions* (1992), 264F. Lord Steyn's approach pointing out similarities between good faith, and the already recognized goal of protection of reasonable expectations was later presented extra-judicially in: J. Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 438–9.

97 *Yam Seng* (2013), 695–6. Resort to civil law is to be found as well in Australian (Finn J. in *Hughes Aircraft Systems* (1997), 192F, recalled generally "civil law"—without indicating any particular example—and Unidroit Principles of International Commercial Contracts) and Canadian authorities (Ontario Report, 169–70 referenced German, French, Italian, and Swiss laws). Interestingly, the *Restatement (Second) of Contracts* (n 12) 103 (Reporter's Note to §205), draws attention to the development of good faith in German law.

not taken into consideration. While a continental comparative lawyer would probably reach out to the Dutch law as an essential part of its argument, it is hard to say why such references are missing in those common law cases that resort to the comparative reasoning.

Leggatt J. did not reach to the law of the Canadian province of Quebec, which is an example of a mixed jurisdiction. The decisions of the Supreme Court of Canada often prove to be a source of lively dispute among its judges concerning the appropriateness of resorting to comparative arguments drawing from Quebec law, while resolving cases on good faith arising in common law provinces. In *Bhasin v. Hrynew* (2014) the court and its majority in both *C.M. Callow Inc. v. Zollinger* (2020) and in *Wastech Services* (2021) found references to the bijural Canadian environment as an advantage that “shed[s] light on how the jurisdictionally applicable rules work” and welcomed the use of Quebec rulings as persuasive authority.⁹⁸ To the contrary, the minority in both of the latter decisions was of the opinion that references to Quebec law only “inject uncertainty and confusion into the law” as the comparative approach was not necessary to adjudicate these cases.⁹⁹

Conclusion: Underlying Principle

It seems that in Australia¹⁰⁰ and Canada, following the example set by the American law, the concept of good faith as the underlying principle of contract law has been accepted. Recall that the UCC explicitly caveats that its §1–304

does not support an independent cause of action for failure to perform or enforce in good faith” but “merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.¹⁰¹

Several years after *Renard Constructions* (1992) was decided, the Federal Court of Australia followed that ruling and recognized good faith as a general doctrine in *Hughes Aircraft Systems International v. Airservices Australia* [1997]. There, Finn J. stated that “fair dealing is a major (if not openly articulated) organising idea in Australian law”.¹⁰² However, there are judgments, including that of the High Court of Australia in 2014, that are sceptical to

98 *Bhasin v. Hrynew* (2014), §83; *C.M. Callow Inc. v. Zollinger* (2020), §§57, 58; *Wastech Services* (2021), §§108ff. These were appeals from Alberta, Ontario, and British Columbia, respectively.

99 Brown J. (Moldaver and Rowe JJ. concurring) in *C.M. Callow Inc. v. Zollinger* (2020), §§122–3, 156–65, 170; Brown and Rowe JJ. (concurring), Cote J. (dissenting reasons) in *Wastech Services* (2021), §§139, 191.

100 Certainly in New South Wales, while elsewhere the law in this area might not yet be settled.

101 UCC §1–304 (Official Comment).

102 *Hughes Aircraft Systems* (1997), 190E, 192D.

that idea and note that law in that area is not settled.¹⁰³ Although the apex court in New South Wales (*United Group Rail Services* [2009]) and the Federal Court of Australia (*Paciocco* [2015]) had applied the concept of good faith in respective cases, they acknowledged as well that the law is not yet settled in Australia.¹⁰⁴

In another hemisphere, but in the same mood, the Supreme Court of Canada in *Bhasin v. Hrynew* (2014) recognized good faith and fair dealing as an underlying principle of contract law. As later explained in *C.M. Callow Inc. v. Zollinger* (2020), the organizing principle of good faith is “not a free”. This means that piecemeal solutions still matter, but that the organizing principle makes it easier for new doctrines to be incrementally developed.¹⁰⁵

The main argument against the concept of good faith and fair dealing in English law is the fear of uncertainty of law and unpredictability of court decisions. Those English lawyers who discard this concept consider good faith as an independent cause of action that allows for the (arbitrarily) establishment of rights and duties of the parties. The concept, if understood in this way—as an overarching principle—indeed entails palm tree justice.¹⁰⁶

However, those who call for recognition of good faith and fair dealing do not sponsor that concept as an overarching principle but only as an underlying principle with cases of good faith application being developed incrementally. That doctrine works only “in the background” of a legal system providing for justification of specific measures such as Bingham LJ.’s piecemeal solutions.¹⁰⁷ This is, to use the metaphors coined by Mindy Chen-Wishart and Victoria Dixon, the “measured tortoise” version of “humble” or “lite” good faith. That version, according to them, already recognized in Australia and Canada,¹⁰⁸ comes in clear contradiction to the “charging bull” and to the

103 *Service Station Association* (1993), §§96–7; *Commonwealth Bank of Australia v. Barker* [2014] HCA 32, §§104, 107.

104 *United Group Rail Services* [2009], §61; *Paciocco* [2015], §287. Note that appeals from the Federal Court of Australia are heard by the High Court of Australia.

105 *Bhasin v. Hrynew* (2014), §§66, 93; *C.M. Callow Inc. v. Zollinger* (2020), §§44, 70; *Wastech Services* (2021), §51.

106 That, in turn, might deter parties from choosing English law and jurisdiction. Cf. J. Ainslie, ‘Good Faith and Relational Contracts: A Scots-Roman Perspective’ (2022) 26 *The Edinburgh Law Review* 29, 32; Chen-Wishart and Dixon (n 9), ‘Good Faith’ 193.

107 M. Arden, ‘Coming to Terms with Good Faith’ in M. Arden (ed), *Common Law and Modern Society. Keeping Pace with Change* (Oxford University Press 2015) 54, 61–3; G. Leggatt, ‘Contractual Duties of Good Faith’ Lecture to the Commercial Bar Association on 18 October 2016, §61.

108 One might wonder whether the Canadian approach to the concept as presented in leading cases should rather belong to the “relentless woodpecker” species. Cf. *Bhasin v. Hrynew* (2014), §§66 (“Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law.”).

“relentless woodpecker” models, which are exemplified in the former case by an overarching principle, and in the latter by that strain of an underlying principle that is to be found in the UCC. The difference between both species of underlying principle (“measured tortoise” and “relentless woodpecker”) is a matter of degree as they differ in the pace of change precipitated.¹⁰⁹

All in all, English contract law in that area is not yet settled. The judicial proclamations on that law that have been referred to in this chapter originated in the lower courts and mainly bear the feature of obiter dicta. Still, there are incumbent justices of the Supreme Court of the United Kingdom, namely Lady Arden and Lord Leggatt, who foster recognition of good faith in the English law.¹¹⁰ Thus, the future should bring an answer as to whether the court will stay with the “measured tortoise” approach or rather accept the “relentless woodpecker” model. Recent history up to the point where we find English contract law today has been prompted by mutual dialogue between the courts of particular common law jurisdictions. Its future, alike, will be molded in a global context, since that law will probably develop together with Australian and Canadian laws. In Brexit’s aftermath the English links with the civil law tradition will plausibly weaken in favor of traditional ties with other common law jurisdictions. Paradoxically, due to English law’s obvious affinity to them, English lawyers might be much more prone to the adoption of the “measured tortoise” or even “relentless woodpecker” models than they were before Brexit, when splendid isolation aimed at avoiding civil law transplants from the continent such as the threat of the “charging bull” model. So, it seems that the winds of change might be blowing much stronger.

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109 Chen-Wishart and Dixon (n 9), ‘Good Faith’ 187ff, 198–204.

110 *cf.* footnote 107.

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