

# THE ROLE OF GOOD FAITH IN CONSTRUCTION CONTRACTS (gdfaithmauritus4)

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## LECTURE BY SIR RUPERT JACKSON AT THE 11<sup>th</sup> INTERNATIONAL CONFERENCE ON CONSTRUCTION LAW AND ALTERNATIVE DISPUTE RESOLUTION IN MAURITIUS ON 24<sup>th</sup> MAY 2018

### 1. INTRODUCTION

1.1 Scheme of this lecture. The scheme of this lecture is first to look at the origins of ‘good faith’ in Roman law and civil law; then to examine its more limited role in common law jurisdictions and to consider what (if anything) a contractual obligation of good faith actually means. I shall then touch briefly on the role of good faith in civil law jurisdictions. Finally, I shall focus on the exiguous role of good faith in construction contracts.

1.2 Definitions. This lecture uses the following definitions:

“England” means England and Wales.

“TCC” means the Technology and Construction Court in England.

### 2. ROMAN AND CIVIL LAW

2.1 Roman law. The Romans were ahead of their time in recognising a version of contract law. The original Roman conception of a contract was little more than a debt arising from a solemn promise to pay (*stipulatio*). By the first century BC the Romans recognised bilateral contracts, i.e. arrangements under which each party owed obligations to the other. Such contracts rested on *bona fides* and were enforced by *bonae fidei* actions. Gaius said that contractual obligations arose in one of four ways, namely *re* – by transfer of a thing; *verbis* – by uttering formal words; *litteris* – by a document; *consensu* – by a consensual contract. There were only four recognised categories of contract: sale, hire, partnership and mandate.

2.2 Civil law jurisdictions. Modern civil law jurisdictions are faithful to their Roman roots. Good faith is a general obligation which forms part of every contract. French and German law are typical in this regard.

2.3 France. Article 1134 of the French Civil Code provides:

*“Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.”*

2.4 Germany. Article 242 of the German Civil Code provides:

*“Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.”<sup>1</sup>*

2.5 Mauritius. Article 1134 of the Mauritius Civil Code is the same as Article 1134 of the French Civil Code.

### 3. COMMON LAW JURISDICTIONS

3.1 The traditional approach. Common law jurisdictions recognise a duty of good faith, if the contract contains an express term to that effect. Traditionally, however, the common law has not recognised an obligation of good faith as implicit in all contracts, or even in all commercial contracts.

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<sup>1</sup> “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”

## 3.2 England

- 3.2.1 Interfoto. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439 Bingham LJ famously stated:

*“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair,” “coming clean” or “putting one’s cards face upwards on the table. ...*

*English law has, characteristically, committed itself to no such overriding principle [as good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law has also made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.”*

- 3.2.2 Yam Seng. Equally famously, Leggatt J challenged the orthodox view in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB). He argued that England was swimming against the tide of EU legislation. Regulations implementing EU directives usually imported a requirement of good faith. Some US courts had accepted that all contracts have an implied good faith obligation. Other common law jurisdictions are moving in the same direction. He concluded at [131] that:

*“there seems ... to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying [a duty of good faith] in any ordinary commercial contract based on the presumed intentions of the parties.”*

- 3.2.3 The reaction to Yam Seng. Many commentators welcomed Leggatt J’s decision.<sup>2</sup> There was, however, a critical article in the Cambridge Law Journal<sup>3</sup> by Professors Carter and Courtney. They argued that the specific obligations which the promisor breaches either are or are not implied in fact. It is an unnecessary and illegitimate step, first, to imply an obligation to act in good faith and then, secondly, to derive specific obligations from that general obligation.

- 3.2.4 Some judges have also been critical of the *Yam Seng* approach. The Court of Appeal in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* specifically rejected such a general principle. Moore-Bick LJ said at [45]:

*“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.”<sup>4</sup>*

- 3.2.5 Sheikh Tahnoon. One of Leggatt J’s last cases as a High Court judge was *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] [2018] EWHC 333 (Comm). He handed down his reserved judgment on 22nd February 2018, with the added gravitas of being Leggatt LJ. At [167]-[169] he said:

*“A duty of good faith: It does not follow from the conclusion that he did not owe any fiduciary duties to Mr Kent that the Sheikh’s entitlement to pursue his own self-interest was untrammelled. I have*

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<sup>2</sup> See, for example, Jan van Durné, ‘On a clear day you can see the Continent – the shrouded acceptance of good faith as a general rule of contract law on the British Isles’, 31 *Construction Law Journal* (2015) 3-25; Trakman & Sharma, ‘The binding force of agreements to negotiate in good faith’, 73 *Cambridge Law Journal* (2014) 598-628.

<sup>3</sup> Carter & Courtney, ‘Good faith in contracts: is there an implied promise to act honestly?’, 75 *Cambridge Law Journal* (2016) 608-619

<sup>4</sup> *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [45] (Moore-Bick LJ).

previously suggested in *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB), at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, 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.

Although the observations that I made in the *Yam Seng* case about the scope for implying duties of good faith in English contract law have provoked divergent reactions, there appears to be growing recognition that such a duty may readily be implied in a relational contract. For example, in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) the parties agreed to collaborate to produce training manuals for pilots. The claimant provided the content for the manuals and the defendant converted the content into an electronic application, which the parties jointly published and marketed. The parties fell out. Anticipating the end of their joint venture, the claimant secretly accessed the defendant's database and downloaded material. After the contract was terminated, the claimant used the downloaded material to continue selling the electronic training manuals. One issue was whether the secret download was a breach of contract. There was no express term of the contract which prohibited it. But Mr Richard Spearman QC, sitting as a deputy High Court judge, characterised the joint venture agreement as a relational contract and held that there was an implied term of the contract requiring good faith in its performance. The defendant had breached that term by engaging in conduct that "would be regarded as commercially unacceptable by reasonable and honest people" (para 196).

In *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) a private contractor had agreed to dispose of cars for a police authority. The police authority gave instructions for one particular vehicle to be completely crushed; but they later found out that, instead of sending it to be crushed, the contractor had re-built the car, transferred the number plates from a different vehicle, and was using it in the contractor's own fleet. Dove J described the contract as "a relational contract par excellence" and held that it was an implied term that the contractor would perform the contract in good faith or – as he preferred to put it – with honesty and integrity. The judge concluded that, even if the contractor had not been deliberately fraudulent, there had been a breach of the implied term which amounted to a repudiatory breach of the contract."

3.2.6 The judge then referred to cases of non-relational contracts where the court had declined to find an implied duty of good faith. At [174] he held that the instant case did involve a relational contract and that business necessity did require the implication of a duty of good faith. Turning to the content of the obligation he said at [175]:

*"It is unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation involved. There is a considerable body of Australian authority on the subject which has informed the interpretation by English courts of express contractual duties of good faith: see Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), paras 91-97; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch), paras 240-246; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), paras 89-91. In *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; 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. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat 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: see *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), para 295, referred to above; and *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), para 98.”

3.2.7 Comment. It is not easy to see what this adds to the implied duty to co-operate and the other contractual obligations which already exist.

3.2.8 Relational contracts. Although I remain sceptical about the utility of the obligation, I must accept that a number of decisions from late 2015 onwards have accepted the proposition that, in the particular contractual context of ‘relational contracts’ (such as those involving a joint venture, franchise agreement, or long term distribution agreement), an obligation that parties act in good faith may be implied in fact. Cases supporting that limited position include:

- (a) *Globe Motors Inc v TRW LucasVarity Electric Steering*, where Beatson LJ noted, *obiter*, that (in the context of an ongoing exclusive supply agreement) had an argument been advanced that a good faith obligation required party A to provide party B with an opportunity to demonstrate that it could provide a particular product before party A sought that product from an alternative supplier, then such implication “might have given considerable force” to the claim.<sup>5</sup>
- (b) *National Private Air Transport Services Company (National Air Services) Ltd v Creditrade LLP and anor*, where Blair J endorsed *Yam Seng*, but decided that the instant contract (a sublease) was not apt for the implication of a duty of good faith.<sup>6</sup>
- (c) *Property Alliance Group Ltd v The Royal Bank of Scotland plc*, in which Asplin J accepted that there are ‘recognised categories’ of contracts in which good faith may be implied, but that the instant case (involving sophisticated commercial parties and express terms excluding fiduciary obligations) did not fall within any such category.<sup>7</sup>
- (d) *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC), in which Edwards-Stuart J held that a good faith obligation was implied into a 25-year PFI contract for the maintenance of roads. The council’s statutory ‘best value’ duty and its recognition in the contract were critical to the court’s decision. The judge accepted that generally “a duty of good faith is not usually implied into commercial contracts under English law”: see [81].

3.2.9 Literature about relational contracts. There is now a burgeoning literature about relational contracts. No self-respecting academic in this area can resist the temptation to write about them. One of the most influential papers is that by Professor Hugh Collins, published in 2016.<sup>8</sup> After discussing *Yam Seng* and two subsequent cases,<sup>9</sup> Collins concludes that “the building blocks of a legal concept of a relational contract seem to be in place”. He identifies four features of the paradigm of a relational contract:

- (a) A long term business relationship;

<sup>5</sup> *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396, [67]-[69] (Beatson LJ).

<sup>6</sup> *National Private Air Transport Services Company (National Air Services) Ltd v Creditrade LLP and anor* [2016] EWHC 2144 (Comm), [132]-[136] (Blair J).

<sup>7</sup> *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch), [275]-[276] (Asplin J).

<sup>8</sup> ‘Is a Relational Contract a Legal Concept?’ in Degeling, Edelman and Goudkamp (eds), *Contracts in Commercial Law* (Sydney, Thompson Reuters, 2016). Hugh Collins is Vinerian Professor of English Law at Oxford and a fellow of All Souls College.

<sup>9</sup> *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) and *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB)

- (b) Investment of substantial resources by both parties;
- (c) Implicit expectations of co-operation and loyalty that shape performance obligations in order to give business efficacy to the project;
- (d) Implicit expectations of mutual trust and confidence going beyond the avoidance of dishonesty.

I accept that there are contracts of that character and I have no objection to people giving them a label if they want to. Those contracts will generally contain express or implied obligations to co-operate and no doubt a host of similar obligations. But I question whether there is any need to super-add an obligation of good faith. The general law implies a duty to co-operate.<sup>10</sup> It is difficult to see what additional conduct an obligation of good faith will import, beyond those obligations arising under the express or implied terms.

3.2.10 Contracts requiring a party to hold the balance fairly between opposing interests. Many contracts require individuals to hold the balance between competing interests: the quantity surveyor assessing interim payments, the architect or engineer issuing certificates and so forth. Sometimes it is one of the two parties with opposing interests, which is required to hold the balance. In such a case there is an implied term that the party will do so fairly: *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [77]-[83]. That is different from a ‘good faith’ obligation. In *Portsmouth City Council* (above), the council was required to award service points for breaches by Ensign. It was implicit in the contract that the council would award service points fairly and not increase them to protect its own interests: see [90]. As I read the judgment, that was separate from the ‘good faith’ obligation. The contract in *Mid-Essex* provided for the employer to award service failure points for breaches, but the express provisions also specified precisely what points should be awarded for each type of breach, so there was no need for any additional implied term.

3.2.11 What about an obligation to negotiate in good faith? Here we are on firmer ground. ‘Faith’ is a state of mind. Negotiating in good faith means negotiating in a genuine attempt to reach a deal, rather than just going through the motions. In *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA Civ 891 the Court of Appeal upheld as enforceable the following contractual term: “Brasoil agrees to negotiate in good faith with Petromec the extra costs referred to in Clause 12.1 and 12.2 above and the extra time referred to in Clause 12.2 above . . . .” In reaching this (obviously sensible) conclusion the Court of Appeal distinguished the House of Lords’ decision in *Walford v Miles* [1992] 2 AC 128.

### 3.3 Australia

3.3.1 The general position. The Australian courts do not accept that an obligation of good faith should be implied generally into commercial or other contracts.<sup>11</sup> *Automasters Pty Ltd v Bruness Pty Ltd* [2002] WASC 286, an authority often cited in these discussions, is not really to the point. The contract in that case contained an express good faith obligation: see [139].

3.3.2 Special categories of contract where a duty of good faith is recognised. The Australian courts:

<sup>10</sup> *Mackay v Dick* (1881) 6 App Cas 651

<sup>11</sup> And the High Court declined to endorse the argument in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5.

*“have been willing to imply such a duty in contracts for joint ventures or partnerships where there is a need for a high degree of cooperation and reliance by all the parties on the good faith of each other party, particularly in the context of their working together to achieve a common objective.”*<sup>12</sup>

### 3.4 Singapore

3.4.1 The One Suits. According to the *obiter* summary in *The One Suits Pte Ltd v Pacific Motor Credit (Pte) Ltd*, the Singapore courts evince the same general approach: namely, rejecting the suggestion that a general duty of good faith should be implied in law to commercial contracts across the board, but accepting the possibility of such implication in fact in the context of contracts which involve a high degree of reliance and partnership.<sup>13</sup>

### 3.5 Canada

3.5.1 Bhasin v Hrynew. Canada has gone further than any other common law jurisdiction in recognising a duty of good faith in commercial contracts. In *Bhasin v Hrynew* [2014] SCC 41 C employed B on a 3-year contract, which was renewable unless either party gave notice. C misled B in discussions and, unexpectedly, gave notice of non-renewal. The Canadian Supreme Court, reversing the Alberta Court of Appeal, held that C was in breach of an implied duty of good faith. Cromwell J, delivering the principal judgment, with which other members of the court agreed, said:

*“[63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.*

*[64] As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations ...*

*[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.*

*[66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. 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 of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.”*

3.5.2 Academic comment. In a penetrating paper<sup>14</sup> published shortly after *Bhasin*, Professor David Percy of Alberta University argued that it is difficult to identify conduct which

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<sup>12</sup> *Insurance Commission of Western Australia v The Bell Group Ltd (in liq)* [2017] WASC 122 (Supreme Court of Western Australia), [57] (Pritchard J), citing *Tote Tasmania Pty Ltd v Garratt* (2008) 17 Tas R 320, [17] and *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, [597].

<sup>13</sup> *The One Suits Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 21 (Singapore Court of Appeal), [44] (Menon C), Chao and Leong JJA).

<sup>14</sup> ‘The emergence of good faith as a principle of contract performance’, in Degeling, Edelman and Goudkamp (eds), *Contracts in Commercial Law*, (Sydney, Thompson Reuters 2016)

is a breach of the good faith obligation but not a breach of any specific obligation. He appointed out that good faith did not make any difference to the actual decision in *Bhasin*. On the Supreme Court’s analysis, C was in breach of more specific obligations.

### 3.6 Hong Kong

3.6.1 The traditional position. In *Aktieselskabet Dansk Skibsfinansering v Wheelock Marden* [1994] HKCA 384 the Court of Appeal allowed the defendants’ appeal against a finding of misrepresentation. At [61] Godfrey and Liu JJA stated:

*“It must first be observed, as ADS accepts, that our law does not recognise what was described in argument as a “free-standing” duty of disclosure. In a commercial negotiation, one party may be aware of some fact which would to his knowledge materially affect the course of the negotiation if disclosed to the other. But he is not, ipso facto, obliged to disclose it.”*

In support of that proposition they set out the passage from Bingham LJ’s judgment in *Interfoto* quoted in paragraph 3.2 above.

3.6.2 Pre-Yam Seng cases. There appear to have been two subsequent cases which address the question of implication of a contractual duty of good faith, both pre-dating *Yam Seng*. In *Hyundai Engineering and Construction Company Ltd v Vigour Ltd* (2005), Reyes J at first instance was concerned mainly with the question of a duty of good faith in pre-contractual negotiations (which was rejected), but noted in passing that a contract included ‘an implied obligation of cooperation and good faith.’<sup>15</sup> In *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* (2012), the Court of Appeal held that, in the context of an exclusivity arrangement, the parties to a contract stood in a fiduciary relationship such that one party was under an implied contractual duty to ‘use its best or at least reasonable endeavours in good faith’ to reach a deal on its counterpart’s debts with third party creditors.<sup>16</sup> There is no further substantive treatment of the issue in cases post-dating the *Yam Seng* decision.

3.6.3 Enforcement of arbitration awards. The Hong Kong courts have for many years recognised that the good faith principle prevents a party to arbitration keeping a point about the composition of the tribunal up its sleeve, only to pull it out if the arbitration is lost: see *China Nanhai Oil v Gee Tai Holdings* [1995] 2 HKLR 215 at [225] and *Herbei Import and Export Corp’n v Polytech Engineering* [1999] 2 HKCFAR 111. In this context good faith comes very close to estoppel. Indeed, it is doubtful how far the good faith principle can go beyond estoppel. In *Astro Nusantara International BV v Pt Aynnda Prima* [2016] HKCA 595 the Court of Appeal said at [69]:

*“We do not think it controversial it is important to have regard to the “choice of remedies” principle. We agree with Mr Landau that the principle of “good faith” and the “choice of remedies” principle are not mutually exclusive but complementary. Applying the principle of “good faith” too rigorously whenever there is a failure to pursue active remedies might bring this into conflict with the “choice of remedies” principle. The answer may be that regard should be had to the full circumstances why an active remedy is not pursued or other relevant considerations (such as whether there was a clear reservation of rights so the opposite party was not misled).”*

## 4. GOOD FAITH IN CIVIL LAW JURISDICTIONS

4.1 Mauritius is a civil law jurisdiction. Many of you are civil lawyers, rather than common lawyers. I am not a civil lawyer, although I expect to learn a great deal about your systems in the near future, as a result of arbitrations for which I am nominated.

<sup>15</sup> *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2004] HKCFI 205 (Hong Kong Court of First Instance), [99] (Reyes J).

<sup>16</sup> *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2012] HKCA 296 (Hong Kong Court of Appeal), [37(1)] and [37(23)] (Cheung JA).

- 4.2 Convergence. Despite the handicap of being a mere common lawyer, I would point out that there is a trend towards convergence of the common law and the civil law. Both systems of law tend to reach the same results, although by different routes. Severine Saintier wrote an article in the Journal of Business Law last year, neatly illustrating this convergence: “The elusive notion of good faith in the performance of a contract, why still a bete noir for the civil and the common law?”. The common law recognises restrictions on the exercise of contractual discretion. A party must not exercise such discretion in a manner which is arbitrary, capricious or irrational. There is also the implied obligation to co-operate as noted above. These rules usually lead to the same outcome as the ‘good faith’ provision in a civil law jurisdiction. As Ms Saintier points out, under French law the good faith and abus de droit principles operate as restraints, but a party is still entitled to pursue its own commercial interest. In *Societe Les Marechaux Cass. Comm*, 10-07-2007, the Cour de Cassation observed: “The courts’ control of bad faith is limited to the contractual prerogatives and cannot affect the substance of the contract”.
- 4.3 It will be interesting to hear in the course of this conference whether any of the cases discussed in section 5 below would have been decided differently in a civil law jurisdiction such as Mauritius.

## 5. CONSTRUCTION CONTRACTS IN COMMON LAW JURISDICTIONS

- 5.0 LB Merton v Leach. *London Borough of Merton v Leach* (1985) 32 BLR 51 (a case in which I appeared as junior counsel over thirty years ago) involved a contractor’s claim for extensions of time, with consequential loss and expense. The contract was in the JCT Standard Form, 1963 – a form widely used in the industry for many years. Vinelott J held that there was an implied term that Merton would not hinder or prevent the contractor from carrying out its obligations in accordance with the terms of the contract and from executing the work in a regular and orderly manner; there was also an implied duty to do whatever was necessary in order to enable the contract to be carried out. The implementation of the contract required close co-operation between the contractor and the architect. Therefore, the implied undertaking by the building owner extended to those things which the architect must do to enable the contractor to carry out the work. The judge reached these conclusions applying basic general principles. He also held that there was no implied duty of good faith. Indeed, against that background, it is difficult to see what an implied duty of good faith would have added.
- 5.1 Modern construction contracts and PFI contracts. Construction contracts sometimes and PFI contracts generally have the incidents of ‘relational contracts’ as identified by Professor Collins. An example is the *Portsmouth City Council* case discussed in paragraphs 3.5 and 3.6 above. Many bespoke construction contracts and some standard forms now include ‘good faith’ requirements or similar provisions. In practice, it is difficult to see what these aspirational provisions add to the black letter terms of the contract.
- 5.2 In *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 a development agreement between the land owner and the developer contained a good faith clause. Mr Stephen Furst QC, sitting as a deputy High Court judge, rejected the submission that this obliged either party to accept less favourable financial terms following the property market crash in 2008. The judge observed at [91]:

*“Thus good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.”*

- 5.3 The NEC suite of contracts. The NEC contracts expressly require parties to work together in a co-operative manner. Clause 10.1 of NEC3 provides:

*“the [parties] shall act as stated in this contract and in a spirit of mutual trust and co-operation.”*

Clause 10 of NEC4<sup>17</sup> provides:

*“10.1: The Parties, the Project Manager and the Supervisor shall act as stated in this contract.  
10.2: The Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and co-operation.”*

5.4 Costain v Tarmac. In *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC); [2017] BLR 239 Tarmac supplied concrete to Costain pursuant to the NEC3 Framework Contract Conditions (“NEC3 FC”) and the NEC3 Supply Short Contract Conditions (“NEC3 SST”). Clause 10.1 of NEC3 FC provided:

*“The Employer and the Supplier shall act as stated in this contract and in the spirit of mutual trust and co-operation.”*

Clause 93 of NEC3 FC provided strict time limits for commencing adjudication and arbitration. Costain subsequently brought proceedings in the TCC because of defects in the concrete. Tarmac applied to stay the proceedings on the grounds that there was an arbitration clause. Tarmac also maintained that Costain could not pursue any adjudication or arbitration, because it had missed the time limit. Costain maintained that Tarmac was in breach of clause 10.1 by letting Costain fall into that trap. Coulson J rejected that submission.

5.5 At [119] – [124] Coulson J said:

*“119. Now turn to whether or not clause 10 (the ‘mutual trust’ provision) makes any difference to this analysis. It appears that the claimant maintains that, even if (as I have found) the defendant said or did nothing which ‘crossed the line’ (i.e. made a representation that was inconsistent with the point they subsequently took) the defendant was in breach of clause 10.1 in any event. This rather startling submission means that, in essence, the claimant must argue that, as a result of the mutual trust obligation, the defendant had an express obligation to point out to the claimant the nature, scope and potential effect of clause 93 (including the time bar). I consider that to be contrary to the passages set out at paragraphs 102-108 above. In any event, for the reasons set out below, I reject that submission.*

*120. In Keating on NEC3 (First Edition 2012) at paragraph 2-004, a parallel is drawn between ‘mutual trust and cooperation’ and obligations of ‘good faith’. The authorities dealing with ‘good faith’ are mainly from outside the United Kingdom, because good faith has not been, at least until recently, a concept that has gained much traction in the English common law. One of the leading Australian cases on the topic is Automasters Australia PTY Limited v Bruness PTY Limited [2002] WASC 286 which, as set out in Keating NEC3 is authority for the following propositions:*

- “(1) What is good faith will depend on the circumstances of the case and the context of the whole contract.*
- (2) Good faith obligations do not require parties to put aside self-interests; they do not make the parties fiduciary.*
- (3) Normal reasonable business behaviour is permitted but the court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive.*
- (4) The duty is one ‘to have regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.’”*

*121. Keating goes on to say that, in the light of that authority and other cases concerned with implied terms in employment contracts, the term of mutual trust and co-operation suggests that, whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are “honest, fair and*

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<sup>17</sup> The NEC4 suite is an evolution of the existing NEC3, rather than a fundamental change: see M Bahl, ‘Construction projects and risk management: NEC4 – the evolution of contracts’, (2017) 33 Cons LJ 438-441.

reasonable, and not attempts to improperly exploit” the other party. Or as it is described in another Australian case, *Overlook v Foxtel* (2002) *Aust Contract R* 90-143, “a party is precluded from cynical resort to the black letter”.

122. For completeness, I note that, in *F & C Alternative Investments (Holdings) Limited v Barthelemy* (Nos. 2 and 3) [2011] EWHC 1731 (Ch) Sales J (as he then was), when dealing with an obligation of utmost good faith, referred to another Australian case (*Macquarie International Health Clinic PTY Limited v South West Area Health Service* [2010] NSWCA 268, and said that:

“It is a form of contractual duty which requires the obliger to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting.”

123. I respectfully agree with that summary. I agree too with the passage in Keating about not improperly exploiting the other party, although I am a little uneasy about a more general obligation to act ‘fairly’; that is a difficult obligation to police because it is so subjective. Further, it might be said that the mutual trust provision does little more than say expressly what Vinelott J thought was implied into all construction contracts: see *Merton LBC v High Stanley Leach* (1986) 32 BLR 51.

124. Taking the obligation of mutual trust and co-operation (or even good faith) at its highest, it meant that, in the present case, the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case. For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied on. But beyond that, on any view of clause 10.1, there can have been no further obligation, because otherwise the provision would have required the defendant to put aside its own self-interest.”

5.6 Comment. What is significant about that case is the judge’s valiant struggle to ascribe to clause 10.1 any meaning which was *additional* to the existing obligations. His reference to *Merton v Leach* is particularly pertinent.

5.7 Partnering contracts. Many partnering contracts use aspirational language about how well the parties will work together. When they subsequently fall out the courts face the problem of interpreting and applying those aspirational provisions. In *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) a contract for building and maintenance services contained the following provision at clause 1.1:

“The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and [3] in all matters governed by the Partnering Contract they shall act reasonably and without delay.”

Clause 2.1 provided:

“The Partnering Team members shall establish, develop and implement their partnering relationships, within their agreed roles, expertise and responsibilities and in accordance with the Partnering Documents, with the objectives of achieving for the benefit of the Term Programme and for the mutual benefit of Partnering Team members:-

(i) trust, fairness, mutual cooperation, dedication to agreed common goals and an understanding of each other’s expectations and values;”

Clause 13.3 of the contract permitted either party to terminate the contract for any reason or no reason. Akenhead J rejected the contention that the partnering provisions constrained the right of either party to terminate. He also rejected the contention that there was an implied term of

good faith. He added that even if there was such an implied term it would not restrict the right of either party to terminate under clause 13.3.

- 5.10 Fujitsu. In *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) FSL agreed to provide IT services under a subcontract with IBM over a ten-year period, later extended to 13 years. The parties agreed to “comply with partnering principles”. IBM agreed to comply with “Good Industry practice”. Edwards-Stuart J rejected the contention that IBM owed FSL fiduciary duties. He also rejected the contention that there was any implied obligation of good faith in the contract.
- 5.11 What is the effect of an express 'good faith' obligation in a construction contract? A 'good faith' obligation in a construction contract may encourage an arbitrator or judge called upon to construe the contract to be 'bold': in other words, to be slightly more willing to give effect to the obvious purpose underlying the contract. But even with such a clause in place, there are strict limits to how far she or he can go: see *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. Where a contract bites upon the inner thoughts of a party a good faith obligation may add a specific duty, the obvious example being an obligation to negotiate or mediate in good faith. It is doubtful that an obligation of good faith adds to the obligations of a certifier beyond what is already spelt out in the general law.
- 5.12 If a construction contract contains no express 'good faith' provision, should one generally be implied? No. There is generally no reason to imply such a nebulous provision of little utility. There is also a wider policy consideration. A large number of individuals, who had nothing to do with drawing up the contract, have to operate in accordance with its provisions. Some may be employees of the building owner or contractor. Others may be outsiders, such as certifiers or measurers or subcontractors. They all need to know what the contract requires and what the contract permits. To that end, they do not speculate about ethics or metaphysics. Nor do they ring up their lawyers at every turn. They look at the black letter provisions of the contract. That is what the court should do as well.

Sir Rupert Jackson

4 New Square

24<sup>th</sup> May 2018

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