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

Jan van Dunné*

Civil law; Common law; Comparative law; Contracts; France; Good faith

Introduction

With its decisions in *Yam Seng* and *Mid Essex Hospital* the High Court has given a striking contribution to the discussion that developed over the last decades about what role the civil law concept of "good faith" may take in the contract law of a common law jurisdiction such as that of the UK.[1] Although in the last case the decision was overturned by the Court of Appeal in 2013, with the first case discussed in an obiter, illustrating the sensitive character of this issue, the decisions raised much comment in the legal press. In particular the Queen's Bench April 2013 decision in *Yam Seng*, accepting good faith as a source of contractual obligations, has drawn the attention of most contract lawyers, in the UK and abroad. Was this the announcement of a new spring, English common law joining its civil law sisters in accepting the good faith principle as the leading standard of conduct in the law of contract? It is perhaps no coincidence that the case was about the sale of fragrances under a distribution contract.

A remarkable feature of this new development, at least to a civil law observer, is that among a majority of positive reactions of London solicitor's firms in their digital Newsletters, discussing the consequences of the *Yam Seng* decision for legal practice, some firms advised clients to consider the use of a clause explicitly excluding the application of the duty of good faith in future contracts. The value of this drafting suggesting, in any civil law jurisdiction clearly out of bounds, will be discussed in this article, as part of an analysis of where the English Courts stand on this issue at the moment, in comparison to their civil law brethren.

The good faith debate actually had its origin in the growing interest English lawyers, academics and practitioners were taking in comparison of law, inspired

* Jan M. van Dunné, FCIArb, Professor of Law Emeritus, Erasmus University Rotterdam, Netherlands; *http://www.esl.eur.nl/normatieveuitleg* [Accessed December 30, 2014]. This article is based on a paper presented at a conference in London, January 22–24, 2014, "Advanced Contract Risk Management for the Utility and Power Generation Industry", and a Workshop held for Électricité de France Legal staff in Paris, on June 14, 2013.

[1] *Yam Seng Pte Ltd v International Trade Corp. Ltd* [2013] EWHC 111 (QB); [2013] 1 All E.R. (Comm); [2013] 1 C.L.C. 662; *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300, overturned in appeal: [2013] EWCA Civ 200; [2013] B.L.R. 265; [2013] C.I.L.L. 3342.

by an adjacent Continent where the principle of good faith is firmly embedded in all Civil Codes. Furthermore, it did not go unnoticed that an increasing number of common law jurisdictions worldwide, former colonies and dominions, already had accepted that principle as the core of contract law (and law of obligations in general). The US had the initiative with the Uniform Commercial Code of the 1960's accepting that general duty, inspiring Canada, Australia and New-Zealand decades later (with Singapore still hesitating). Was Britannia, that once ruled the waves, to be left behind as a grumpy old Lady, having difficulties to cope with modern times? To add to her discomfort, joining the EU has confronted the UK with an increasing number of Directives (starting with Consumer Law in 1993, implemented in 1999) and legislative EU Proposals (e.g. Common European Sales Law, 2011) that prominently carry the flag of good faith as a governing principle. In consequence it has become normal practice that English courts are faced with applying that general rule for instance in the assessment of unfair terms in consumer contracts.

This last observation does not meet approval in all quarters. The UK Government in its comment on the Proposal for a Common European Sales Law of 2011 has stated that the introduction of a general duty of good faith would be contrary to the common law system. It illustrates how this issue leads to opposite positions, also at the legislative level.

The developments on the reception of good faith in English law have received continuous attention in this Law Journal for its relevance for the construction industry. The two 2007 articles by S. Jackson and J. Mason are noted here, but also several articles in 1999 by R. Harrison, K. Groves, A. Heal, C. Jansen and R. Harrison. The same can be said for other English law reviews, often putting the issue in a broader context, and also textbooks on contract law in general.[2]

The construction industry was keen to see the potential of introducing the good faith concept into standard form building contracts, where the trend was to move away from the formalist approach to contract as a set of black letter rules to an agreement as the basis for sound management and collaboration, and even partnering of the parties. The potential for a reduction of disputes was another promising aspect. It all occurred in the shadow of the *Latham Report* (1994) and later reports, with similar recommendations for the future construction industry, clearly in the spirit of "never waste a good crisis".

Thus, under the JCT Non-Binding Partnering Charter the parties agree to "act in good faith; in an open and trusting manner, in a co-operative way to avoid disputes by adopting a no blame culture". Furthermore, the PPC 2000 requires the parties to "work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Project …" The JCT Constructing Excellence Contract Project Team Agreement 2011 states that the parties confirm their intention to work together with each other and with all other Project Participants "in a co-operative and collaborative manner in good faith and in the spirit of trust and respect".

[2] S. Jackson, "Good Faith in Construction—Will it Make a Difference and is it Worth the Trouble?", (2007) 23 Const. L.J. 420; J. Mason, "Contracting in Good Faith—Giving the Parties What They Want", (2007) 23 Const. L.J. 436. For sources of the 1999 articles in Cons. L.J. mentioned, and furthermore, publications in L.Q.R. (2000), and *Construction Law* (2004), see the footnotes in articles by Jackson and Mason.

This development in partnering contract forms was followed in construction contracts with a culmination in the latest version of the New Engineering Contract (NEC), designed to become the English alternative to the well-known FIDIC family of international construction contracts and nowadays increasingly used also outside the UK In The Hague, the Netherlands, the International Criminal Court of Justice, the ICC, currently is built under NEC3, and the Government of Hong Kong just announced its preference for that contract form, to give some examples. In NEC3, not surprisingly in the light of the above development, the following term is introduced:

> "10.1 The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation."

It is noted that the words "good faith" do not appear here, as was the case in the earlier standard partnering forms. Instead, the drafters used the above phrase, apparently in an effort to evade opposition from the side of more traditional users. The message, however, is clear.[3]

Returning to the Queen's Bench remarkable decision in *Yam Seng* in the spring of 2013, as said the Court of Appeal did not wait long to give its view, albeit obiter, in *Mid Essex Hospital*. In a phrase meant for the general public, to cut down any experiments in this field, it "reminded [itself] that there [was] no general doctrine of 'good faith' in English contract law". If parties wished to impose such duty, they had to do so expressly (per Jackson LJ).

Is the conclusion therefore justified that the revolution thus has come to an untimely end? To observers of this legal development a less radical conclusion might be that, as the French say of the wine developing in casks: *ça brouille*!—it is in fermentation! Therefore, it may be just a matter of time before the acceptance of good faith as a guiding principle of contract law, which as we saw is steadily gaining momentum in commercial legal practice, is commonly followed by the English judiciary in all instances.

A further outline of this comparative analysis

This article is meant, however, not to further speculate on what course the English courts will take in the near future, which next steps on this long and winding road. I leave that for the indigenous legal people, in my role of "unofficious bystander" from the Continent. What to my mind is needed first and foremost, is an analysis of what the good faith issue is all about, in an effort to bridge the gap between the common law and the civil law systems on the matter. What strikes a spectator from the other side of the Channel, is a common feature of the English debate on this issue: a comparison that is made with French law (as a typical and civil law jurisdiction and neighbour) where good faith is used as a general obligation, which however dramatically results in a false description thereof, of both theory and practice. Furthermore, in the debate concerning an area of contract law that is closely connected with the present topic if not an organic part of it, namely

[3] S. Jackson, in "Good faith revisited", (2014) 30 Const. L.J. 379, also refers to CIOB 2013, Complex Projects Contract, cl.5.1.

interpretation of contract, one finds a similar misconception of French law (or civil law in general), when it is said that under French law the subjective intentions of the parties prevail in the process of interpretation of contract. A phenomenon that is the antithesis of the situation under English law, so the argument goes, where the intention of the parties is established objectively, according to the reasonable expectation of the other party under the circumstances. Again, this view also is a complete misrepresentation of French law (and other civil law jurisdictions as well).

Bringing the subject of interpretation (or construction) of contract into this context may raise the question of what relevance it has for discussing the role of good faith as a general principle of contract law. There is however a strong connection between the two concepts, since an obligation or standard of conduct in the performance of contract does not stand by itself, its content is derived from what has been agreed between the parties in the contract in that respect. Therefore, establishing the contents of a contract by interpretation is a prerequisite to deciding on the conduct of a party which is the subject of dispute. A breach of contract can only be awarded after it is ascertained what specific contractual obligation exists between the parties and could possibly be breached, which clearly is the result of the interpretation of the contract in a previous phase of decision making.

In this context it is highly relevant that in civil law good faith, as will be demonstrated below, is commonly described as being based on the reasonable expectations of the parties, an exponent of the reliance theory. A familiar concept in the English doctrine of interpretation or construction of contract.

The inclusion of interpretation of contract in the following observations will give the opportunity to compare the common law use of implied terms to construe a contract with the civil law technique of treating implied terms as an instrument of contractual interpretation. It is just a matter of categorising a similar technique, leading to corresponding results. In the process, we will find that the current contributions of the English courts to the doctrine of construction of contract, the "contextual and purposive" interpretation and the use of "business common sense" as a criterion have their pendants in French law.

In sum, a better understanding of the existing French law (again, and other civil law jurisdictions) as it was developed over the last century in a debate much akin to that found recently in the UK, may be helpful in the discussion of the direction that might be taken by the English courts in the near future.

Thus far, much has been said already on what this article is aimed at, in winding up only a few further remarks. Firstly, to make any sense it has to be established what we are talking about when discussing good faith in its function of a general principle of contract law. As will be demonstrated, civil law countries, e.g. France, over the last century have known a discussion strikingly similar to the one carried on in the UK, which at times has a replay in our time. It is not uncommon to find also a continental practitioner questioning the supremacy of the good faith principle against the needs of legal practice ("certainty of the law"), opposing authors coming to the defence of court decisions on the topic, often drawn from academic circles. A debate which usually ends in a balance of opinions. Contract life must go on.

For a better understanding of the issue discussed here, one should also have insight in how the good faith principle is applied by the civil law courts in legal

practice. As will be demonstrated, the common approach of French courts is that good faith is not taken for the vague, ambiguous general rule as often presumed, but on the contrary as the source for a specific rule of conduct or obligation for contracting parties. The resulting duties, such as to provide safety to persons or goods carried in transport, to co-operate with the other party or to disclose information, are not unlike what the English courts have decided in comparable contract disputes, over the years. Therefore, *bien étonné de se trouver ensemble*! Furthermore, it is observed that what is occurring in the context of good faith here, basically is not too different from what one finds in the field of English tort law, where the duty of care as the standard to decide negligence cases since 1932 has led to a large number of individual duties related to what is required under the circumstances.

Another topic that must be covered, is the dual nature of the term "good faith" which also blurs the present discussion. It firstly is related to a subjective entity, namely the state of mind of a person (opposed to his "bad faith") but it also indicates a quality of acting against another person, namely acting as a reasonable man, the *bonus vir* of Roman times. The other person is putting his confidence or faith (*bona fides*) in the good behaviour of its contracting partner. Confusingly, the term "in good faith", already known by the Psalm poets of the Old Testament, has these two facets combined. For the moment, it suffices to say that the use of the words "good faith" does not help to make the debate on our subject more transparent. What English judges sometimes do, using the word "honest" in this context, however offers no solution either, since the dual nature of the term still remains: an honest conviction in conjunction with acting honestly. It is no coincidence that in the common law practice the term "good faith and fair dealing" has surfaced to cope with these difficulties. Perhaps the double axe should be reintroduced for the fasces bearers in court, one wonders.

Finally, it is noted that a minor excursion into jurisprudence—not what the clerks in Brussels understand by that term: the French concept of jurisprudence or case law, but legal theory. Even with superficial knowledge of the subject it must occur to the observer that the doctrine looming behind all debate, but hardly drawn into the discussion, is the will theory. Ruling supreme in the 19th century where most legal views on interpretation and the role of the good faith principle originated, either straightforward or in the guise of individualism or a laissez- faire economy, it still is present in the minds of participants to the debate, whether on the Continent or in the UK, and pops up in terms such as "the meeting of the minds" or "consensus" describing the foundation of a contract, and as "absolute rights" in the domain of its performance. Above all, the concept of "freedom of contract" as prime produce of individualism is the natural epicentre of this movement. The position of the will theory however was challenged in around 1875 when in most civil law countries on the Continent the reliance theory came to the surface, with good faith as its foundation. It will be explained how this dichotomy still is setting the agenda in any discourse on the present subject.

Few English lawyers will realise that the above will theory for English law in the second half of the 19th century was the cause to abandon the use of the good faith principle in contract law (and elsewhere) as commonly established in the previous centuries, with Lord Mansfield as only one of the eminent spokesmen

for the Bench of the time. This insight, also for this author a novel one, will be dealt with in the conclusions of this article. For some, it hopefully may soften the pain of joining the Continent on this matter, being a return to common roots.

Good faith coming to the English courts, from the 1980's onwards, first reactions. "No principles, please, we are British"

To start with, one may wonder whether the reliance on the good faith principle is a new issue that has come up lately before the courts. The answer, not surprising to anyone familiar with contract law as practiced in the UK, definitely is in the negative. The issue, touched upon already in the 1950's and 1960's, was well presented by Bingham LJ (as he then was) in his opinion in *Interphoto* in 1988, giving the following statement, still widely quoted:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing.
>
> […]
>
> English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. 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 also has made its contributions, 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."[4]

It is noted that in *Mid Essex Hospital* in appeal, Jackson LJ appears to be of the same view when he dismissed the idea of English contract law knowing a general doctrine of "good faith". It, however, remains to be seen whether the Appeal Court justices with their decision had a convincing hand in applying the "piecemeal solutions" in the style of Bingham LJ, a topic to be dealt with below.

Of the "many other ways" in which, according to Bingham LJ, the English courts succeeded in repairing unfairness in a contractual situation, mention can be made here of the use of implied terms, as the annex of construction of contract, and also of estoppel. A notable recent example of the latter figure is the decision in *ING Bank* .[5] It all nicely demonstrates that justice can be served by the use of

[4] *Interphoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All E.R. 348 CA.

[5] *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353; [2012] 1 W.L.R. 472; [2012] Bus. L.R. 266. For the relevance of estoppel for construction contracts, see V. Ramsey and S. Furst, *Keating on Construction Contracts*, 9th edn (London: Sweet & Maxwell, 2012), Ch.12, "Various equitable doctrines and remedies", at para.12–001 ff. For implied promises to pay for extra work, see 4–040 ff.

either a sword (reasonable term implied, on which a party may rely) or a shield (estoppel, applied in defence of a party against the other party's unfair reliance on the letter of the contract), both when justified under the circumstances and generally accepted commercial practices. Which is phrased as "in accordance with commercial common sense" in the decision of 2011 in *Rainy Sky*, thereby giving a perfect picture of the English climate, in a broad sense.[6]

Finally, Bingham LJ, focusing on the case before him said in *Interphoto*:

> "The well-known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature …"[7]

In this last paragraph we see the basic conjunction of the text of the contract as a document and requirements of reasonableness or fairness ("good faith" for Continentals) in the performance of contract. An aspect which we also find prominently in the civil law system, the French Civil Code up front, to be discussed below. But first we will investigate how the English courts in the last decades coped with requirements of fairness in a contractual setting.

A few years later, Bingham LJ expressed a comparable view concerning the doctrine of frustration of contract, so often the battlefield of the reasonable solution and contractual fairness since the days of Lord Wright, in *Denny, Mott & Dickson*[8] providing the foundation for what was to become the "just and reasonable solution" theory.[9] In the *Wijsmuller Super Servant Two* case Bingham LJ had stated:

> "The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances …"[10]

It is noted that a similar approach recently was followed by the Supreme Court in the *Lloyds TSB* caseof 2013, where in the context of the circumstances prevailing at the time the contract was made (1997) the literal meaning of the contract text was put aside, in favour of how the words of the deed had to be read in the light of what a reasonable person would have taken them to mean in 1997. The "landscape, matrix and aim of the 1990 Deed […] could not be clearer", making the issue now "how its language best operates in the fundamentally changed and

[6] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900; [2012] Bus. L.R. 313.
[7] [1989] 1 QB 433 at 439.
[8] *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265; [1944] 1 All E.R. 678; 1944 S.C. (H.L.) 35.
[9] Compare M.P. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 16th edn., (Oxford: OUP, 2012), p.717 ff.
[10] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyds Rep. 1, CA.

entirely unforeseen circumstances in the light of the parties' original intentions and purposes".[11]

But let us leave the domain of frustration of contract, the ultimate stress test of a contract once agreed between the parties in happier times, and return to the calmer waters of performance of contract under normal conditions, and the question of what additional value the principle of good faith can offer here to a party in distress.

"Piecemeal solutions" to requirements of contractual fairness, alias good faith. Or: Who is afraid of the Big Bad Faith?

For a survey of the development of the courts' piecemeal approach in the years since *Interphoto* it is suggested to take the recent High Court decisions in *Yam Seng* and *Mid Essex Hospital* as guidance.[12] In the first case, concerning a long-term distribution agreement, Leggatt J discussing the acceptance of a general obligation of good faith quoted the "piecemeal solution" statement of Bingham LJ of 1988, noting that the general view appears to be that in English contract law there is no legal principle of good faith of general application. In the judge's view, however, "any traditional English hostility towards a doctrine of good faith in the performance of contract, to the extent that it still persists" is "misplaced".[13] For further details I refer to Jackson's article in the previous issue of this journal, just a few observations of my own here.

Interestingly, Mr. Leggatt's argument that the application of the good faith principle is entirely consistent with the case by case approach favoured in common law is based on his observation that the content of that duty is heavily dependent on context and established through a process of construction of the contract, and therefore the presumed intentions of the parties. Any doubts as to what is meant by these last words can be resolved by turning to the judge's earlier citation of Lord Hoffmann's approach in the *Belize* case. The traditional tests for implication of terms could be analysed as part of the exercise of construction of the contract: what would the contract, read as a whole against the relevant background, reasonably (and objectively) be understood to mean?[14]

In this context also the judge's citation of *Berkeley Community Village* is illuminating. In that case Morgan J described good faith as an

> "obligation to observe reasonable commercial standards of fair dealing in accordance with their actions that elated to the agreement and also requiring

[11] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3; [2013] 1 W.L.R. 366; [2013] 2 All E.R. 103 at [23] per Lord Mance. Construction of contract is seen as the basis for frustration of contract by G.H. Treitel, *The Law of Contract*, 10th edn. (London: Sweet & Maxwell, 1999), p.858 (1979, p.683), against the "just and reasonable solution" as advocated by Lord Denning, Michael Furmston and others. For a comparative analysis of this doctrine, see my article: "The Changing of the Guard: Force Majeure and Frustration in Construction Contracts: the Foreseeability Requirement Replaced by Normative Risk Allocation", (2002) 20 (2) I.C.L. Rev. 162–186, also available at *http://www.esl.eur.nl/normatieveuitleg* [Accessed December 30, 2014].

[12] *Yam Seng* [2013] 1 C.L.C. 662; *Mid Essex Hospital* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300, overturned in appeal: [2013] EWCA Civ 200; [2013] B.L.R. 265.

[13] [2013] EWHC 111 (QB) at [153].

[14] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988; [2009] Bus. L.R. 1316.

> faithfulness to the agreed common purpose and consistency with the justified expectation of the other party to the agreement."[15]

For the proper construction of the contract (a planning promotion agreement) the judge relied on *Interphoto* with the result that such agreement could create an obligation to act in utmost good faith towards each other, and reasonably and prudently at all times. The breach of that obligation was thereupon established since reasonable commercial standards of fair dealing or faithfulness to the agreed common purpose were not observed and the other party's justified expectations violated.

Equally interesting is the support for his view Leggatt J sought in the acceptance of good faith in English law in certain categories of contracts, for example contracts of employment and partnering contracts, where the relation of the parties has a fiduciary character. He extended that notion to what was termed "relational contracts", such as joint venture agreements, franchise agreements and long-term distribution agreements. It is not hard to see construction contracts fitting into that category, as by definition long-term and relational, which makes the judge's qualification particularly worth reading. Such agreements namely

> "may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements".[16]

The contours of NEC3 are looming in the background here.

Our next case is *Mid Essex Hospital*,[17] where for an outline of the facts and the decisions another reference is made to the article by Jackson in the previous issue of this journal. Therefore only a few supplementary remarks, followed by comments on what the appeal court decided. The case already is a running gag in legal circles, also on the Continent: "the tomato ketchup sachets and the mousse being out of date", in this seven year services contract, providing the hospital several catering facilities. I expect these objects will get the same status as the snail in the proverbial ginger ale bottle of the 1930's, when tort received its modern form. The tomato ketchup found in a fridge actually was not the brand used by the Contractor (Medirest) and the mousse was only one day out of date, which did not prevent the Employer (the Trust) to apply staggering deductions. Together with the other failures found by the Trust (such as a fridge not indicating temperature—while being defrosted; out of date bagels—belonging to staff or patients, and two spoons wedging open fire doors) and the size of deductions applied (between £30,000 and £90,000 for each failure) not surprisingly, brought Cranston J to the view that these deductions were "patently absurd" and made in "in the most cavalier fashion".

As so often is the case in a dispute, in my experience as arbitrator, it was the action of one person within the Trust, clearly on a collision course with the Contractor (usually because such person has another contractor in mind to put on

[15] *Berkeley Community Villages v Pullen* [2007] EWHC 1330 (Ch); [2007] 3 E.G.L.R. 101; [2007] 24 E.G. 169 (C.S.) at [97].
[16] *Yam Seng* [2013] 1 C.L.C. 662 at [131], [142]
[17] *Mid Essex Hospital* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300, overturned in appeal: [2013] EWCA Civ 200; [2013] B.L.R. 265.

the job, for personal reasons-again my arbitral practice is leading me here). The Trust, after obtaining legal advice much later however reduced its deductions considerably, which in court proved to be an essential fact in establishing whether the breach was of a "repudiatory" nature. It then was considered sufficient to repair the repudiatory character of the breach, required for entitlement to terminate the contract.

Incidentally, there were initial difficulties with Medirest's performance of the contract, partly due to the fact that it had to take over personnel from the hospital, but at the time of "ketchup and mousse" incidents these problems had been solved. I mention these facts because it makes it easier to understand the position the judge in first instance, Mr. Cranston, was taking in the dispute.

The legal battle concentrated on the meaning of cl.3.5 with its reference to good faith, in particular when the case later was heard in appeal. What counted, however, for Cranston J was that the Trust by its actions had destroyed the working relationship. After making the deductions, soon totalling £716,000, more importantly it refused to provide any justification to the Contractor Medirest nor to respond to its requests for high-level meetings to resolve the matter or to implement the dispute resolution provisions. The judge found these breaches going to the heart of the contract, and therefore material. In a devastating conclusion it was held "difficult to imagine, in practice, behaviour more likely to result in a breakdown of relationship with Medirest than what the Trust adopted".[18]

In this context the judge had referred to the *Berkeley Community Villages* case, discussed before, with the acceptance of "a duty to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose and to act consistently with justified expectations".[19] The judge further reviewed the *Qatari Diar* case also involving a contract where parties in a long term contract had to act in the utmost good faith, a joint venture agreement requiring continuous and detailed cooperation between the parties. Also *Manifest Shipping* was considered wherein the court had doubted how, without bad faith, there could be a breach of the duty of good faith.[20] The Trust had argued namely that the duty to cooperate in good faith could only be breached by behaviour undertaken in bad faith. This view was rejected by the judge. Turning to cl.3.5, he accepted that it would of course catch acts done in bad faith, but it was seen broader than that: the clause qualified how the duty to cooperate should be performed. The wording, in the judge's view, referred to the common purpose that the Trust was pursuing with Medirest, namely both parties trying to deliver a service which would benefit the general public when using the hospital. The objective standard of conduct demanded in this case of both parties primarily encompassed faithfulness to this common purpose. Fair dealing and acting consistently with justified expectations were, in a sense, corollaries of that.

In this approach of the judge in first instance, the common purpose of the long-term services contract is taken as central element in the construction of cl.3.5.

[18] *Mid Essex Hospital* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300 at [103].
[19] *Mid Essex Hospital* [2012] EWHC 781 (QB); [2012] 2 All E.R. (Comm) 300 at [31].
[20] *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); [2010] C.I.L.L. 2908; [2010] N.P.C. 74; *Manifest Shipping Co v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 A.C. 469; [2001] C.L.C. 608.

This is the more important, as in appeal this aspect seems to be largely lost out of sight, as we will see shortly.

Finally, it is noted that the judge made use of an additional argument, namely that the discretion the Trust had under the contract in the calculation of service point failures (under cl.5.8) according to the authorities is not to be exercised in an arbitrary, irrational or capricious manner.[21] Such obligation was likely to be implicit in any commercial contract under which a party has the right to make a decision that affects both parties whose interests are not the same. In the interpretation of reasonable persons such clause would be considered as conferring power on the Trust to act with a purpose of curbing performance failure and not to generate discounts on service payments. The judge also held that this implied obligation to exercise discretion properly could not have been excluded under the contract, as alleged by the Trust. Mr Cranston thereby relied on the *Belize* case: one cannot preclude the implication of terms which are necessary to give business efficacy and which give effect to what the parties must be taken to have meant.

The Court of Appeal's effort to curb acceptance of good faith as a general principle in Mid Essex Hospital. Just a matter of interpretation of contract?

The rather extensive presentation of the Queen's Bench decision in *Mid Essex Hospital*, in conjunction with the *Yam Seng* decision of the same vintage, was necessary to better understand what exactly is happening when the Court of Appeal decided to overturn that decision, in particular, to evaluate the argumentation of the appeal justices in doing so. The impression seems justified, namely, that their decision has strong legal policy undertones, to the effect that the trend to increasingly accept good faith as a general rule of contract in the High Court must be checked. A bold statement indeed, however as an observer from the Continent I am well acquainted with this phenomenon. It also will give me the opportunity to analyse what course an appeal might have taken in a civil law setting, under the aegis of good old *bona fides*.

In the Court of Appeal's decision, which was also summarised by Jackson in his article in this issue, two topics are placed in the centre: the meaning of cl.3.5 with its reference to good faith, and the conviction that under English law no general obligation of good faith is accepted. The first consequence of this approach is, that if cl.3.5 is ineffective or upon interpretation held to be not applicable to the alleged breach of duties by the Trust with its deduction actions (under cl.5.8), the only way a party may rely on the rule of good faith would have been to expressly put it into the contract. Secondly, a party making use of cl.5.8, with no good faith duty in place, is free to make use of that clause at its discretion—exactly what was happening in this case. In both lines of thought, rejection of good faith as a general principle is crucial for the outcome.

To understand the decision of the appeal court, an analysis is needed of the road the justices are following here, deviating from the one taken by the judge of first instance. It is suggested, that the Appeal Court justices, leaning over backwards

[21] Cranston J referred here to *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No.2)* [2008] EWCA 116; [2008] Bus. L.R. 1304; [2008] 1 Lloyd's Rep. 558.

in their effort to keep good faith out, appear to have lost track of the more traditional, "piecemeal solutions" approach to the issues of construing cll.3.5 and 5.8 in the context and under the given circumstances.

The subject of interpretation, cl.3.5, to start with, reads as follows:

> "The Trust and the Contractor [Medirest] will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract."[22]

This clause does not strike as a prime example of contract drafting. The Court of Appeal took the view that the first sentence of cl.3.5 contains "a jumble of different statements, set out in an incoherent order", which resulted in the clause having a very malleable meaning "depending upon where one placed the caesuras and what imaginary punctuation one inserted".[23] It is noted however that, if read with the acceptance of a general rule of good faith in mind it is not hard to see the "reasonable action" necessary for "efficient transmission of information and instructions" as just an elaboration of such rule, giving examples of duties it creates. The general character of the good faith rule is emphasised in the last part of this clause: "to enable the Trust and any Beneficiary to get the full benefit of the contract".

Jackson LJ, writing the controlling opinion, clearly held the opposite view, guided by the observation that "there [was] no general doctrine of 'good faith' in English contract law" and parties for that purpose had to impose such obligation expressly.[24] In consequence, the true construction of this clause in the Lord Justice's view was that the general duty to cooperate in good faith existed only in respect of the two stated aims:

> "i) the efficient transmission of information and instructions;
> ii) enabling the Trust or any beneficiary to derive the full benefit of the contract."[25]

Therefore, cl.3.5 only held that the parties would "work together honestly endeavouring to achieve the two stated purposes".[26]

Thus, the Trust's use of cl.5.8 applying gigantic deductions on the contractor for minimal, alleged failures was not curbed by good faith. It neither was influenced by an implied term that the Trust "would not act in an arbitrary, capricious of irrational manner in relation to awarding servicer failure points", according to the Court of Appeal as set out in previous paragraphs.[27] There was "an absolute contractual right" in place and the Trust's discretion will "simply [permit] the Trust to decide whether or not to exercise an absolute contractual right".[28]

The Court of Appeal also held that with the allegedly wrongful deductions the Trust did not breach cl.3.5 for two reasons. In the first place, there was no required finding that it had acted dishonestly, as opposed to mistakenly. Secondly, the

[22] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [14].
[23] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [97].
[24] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [105].
[25] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [107].
[26] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [112].
[27] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [2].
[28] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [90]–[91].

deductions did not relate to the two stated purposes and therefore did not fall within the range of cl.3.5.[29] Although there was "the breakdown of personal relationships at management level, there was no breach of clause 3.5 on either side".[30]

A closer look at the Court of Appeal's decision in Mid Essex Hospital. Hard cases make bad law

The indicated two foundations of the Court of Appeal's position on the present issue each raise questions in regard to the traditional way of handling such cases by the courts, Lord Bingham's "piecemeal solutions". The way of dealing with the true construction of cl.3.5 by the Appeal Court is hard to reconcile with what the courts are doing since the *ICS* case of 1998,[31] the "purposive and contextual interpretation", when taking into account purpose and context of the contract, which was the manifest approach in the first instance, by Cranston J. Only the year before, the Court of Appeal itself had stressed the "overall commercial purpose of the purchase agreement" to determine the meaning of an unclear exemption clause, in *Mir Steel*.[32] Also the phrase used by Lord Hoffmann in *ICS* comes to mind, that "something may have gone wrong with the language". It is suggested that here the "jumble of statements in an incoherent order" may suffice to accept bad drafting of cl.3.5 and forget about taking literally the words of the clause or their syntactic order and punctuation.

Furthermore, against the view on the absolute right of a party and its absolute discretion, that is, dismissing the use of an implied term holding its reasonable and non-capricious application, there is a wealth of authorities, some of which were examined by Cranston J.[33] The weakness of this foundation of the decision in appeal is perhaps best illustrated by citing the decision in *Costain* by Jackson J (as he then was), which is completely of another nature.[34] It concerned a contract under NEC2, with what is now cl.10.1 under NEC3 contained in the Recitals, therefore the obligation "to act in the spirit of mutual trust and co-operation" (which is "good faith" for non-Continentals). Mr. Jackson in that case held, in a decision that contains in his words "significance extending beyond the boundaries of the present litigation", that, although the NEC is more specific and objective than "conventional" construction contracts:

> "[T]here are still many instances where the project manager has to exercise his own independent judgment […] When the project manager comes to

[29] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [114].

[30] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [120].

[31] *ICS* [1998] 1 All ER 98 at [114-115]

[32] *Mir Steel UK Ltd v Morris* [2012] EWCA Civ 1397 at [36]; [2013] 2 All E.R. (Comm) 54; [2013] C.P. Rep. 7. In this case, Mir Steel relied on *Canada Steamship Lines Ltd v King, The* [1952] A.C. 192; [1952] 1 All E.R. 305; [1952] 1 Lloyd's Rep. 1, for the strict interpretation of the exemption clause, however without success. See also *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38; [2013] 2 Lloyd's Rep. 270, where an exclusion clause was not taken for its literal meaning, but construed consistently with business common sense.

[33] The authorities reviewed by Leggatt J in *Yam Seng* include *Anglo Group Plc v Winther Brown & Co Ltd* (1997) TCC 413 and the cases mentioned before: *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch); [2007] N.P.C. 71; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch); [2010] C.I.L.L. 2908; [2010] N.P.C. 74; and *Manifest Shipping* [2001] C.L.C. 608.

[34] *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC); [2005] T.C.L.R. 6, on the Channel Tunnel High Speed Rail Link Project. See on this case also D. Thomas, *Keating on Nec3* (London: Sweet & Maxwell, 2012), p.41, and on implied terms to co-operation in general (which are "usual to imply"), Ramsey and Furst, *Keating on Construction Contracts*, para.3-046.

> exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in *Sutcliffe* do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor."[35]

The project managers had argued that *Sutcliffe*[36] did not apply since the contract was not a conventional contract, and also that under the Entire agreement clause an implied term by custom was prevented by clause Z.11. Jackson J however accepted the view that a normal duty which any certifier has on these occasions is holding a balance between employer and contractor, which leaves no room for any term implied by custom: "The implied obligation of a certifier to act fairly, if it exists, arises by operation of the law not as a consequence of custom".[37]

In another argumentation the certifier's duty was formulated with the phrase "in good faith". In the light of the *Mid Essex Hospital* decision it is interesting to read Mr. Jackson's observation on the term "good faith" in 2005. It starts with saying: "Sometimes it is used as a synonym for 'impartiality'. Sometimes it is used as a synonym for 'honestly'".[38] Criticising the term as "ambiguous", the judge further said that:

> "A semantic debate about the precise meaning of the phrase 'in good faith' in the context of certification seems to me to serve no useful purpose. I have therefore concentrated on the question whether there was a duty of impartiality and whether, arguably, that duty was breached."[39]

The duty to cooperate as an implied term is not a novel thing, it was accepted already in 1977 in *Liverpool City Council v Irwin* in a contract for the tenancy of a flat.[40] It is also used to control the misuse of contractual powers during performance of the contract, such as in the *Mallone* case where the contract stated that the amount of share options granted to a dismissed manager should depend on whatever grant "the Directors in their absolute discretion determine".[41] The Court of Appeal held that the apparently absolute discretion was limited by an implied term that required the power to be exercised honestly, not capriciously or for an improper motive, and not irrationally in the sense that no reasonable employer would have exercised the power this way.[42] The decision to award no stock options was held to be irrational because the option scheme implied that this deferred remuneration would be assessed by reference to good performance and loyalty.

Another, more recent example, also from the Court of Appeal, is the *Freesat* case, where Freesat had contractual discretion to allocate numbers on its broadcasting platform to JML's television channels. This discretion was subject

[35] *Costain* [2005] T.C.L.R. 6 at [37], [43]–[44].
[36] *Sutcliffe v Thackrah* [1974] A.C. 727; [1974] 2 W.L.R. 295; [1974] 1 All E.R.859.
[37] *Costain* [2005] T.C.L.R. 6 at [51].
[38] *Costain* [2005] T.C.L.R. 6 at [69].
[39] *Costain* [2005] T.C.L.R. 6 at [69]. In the same sense, the decision of Jackson J in the TCC in the case of *ScheldebouwBV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] B.L.R. 113; 105 Con. L.R. 90.
[40] *Liverpool City Council v Irwin* [1977] A.C. 239; [1976] 2 W.L.R. 562; [1976] 2 All E.R. 39, discussed by H. Collins, *The Law of Contract*, 4th edn (Cambridge: CUP, 2003), p.334, in Ch.15, "Co-operation". The author, interestingly, also develops the principle of "fairness" as substitute for good faith, see Ch.13 and Ch.2.
[41] *Mallone v BPB Industries Ltd* [2002] EWCA Civ 126; [2003] B.C.C. 113; [2002] I.C.R. 1045 at [12].
[42] *Mallone* [2002] I.C.R. 1045, see Collins, *The Law of Contract*, p.340, quoted here.

to a contractual "Listing Policy" which set out a number of factors that Freesat would consider. Moore-Bick LJ held

> "… Freesat should have the right to exercise its own judgment in the matter, subject only to compliance with the Listing Policy and the implied obligation not to act in an arbitrary, irrational or capricious manner. Such an obligation is likely to be implicit in any commercial contract under which one party is given the right to make a decision on a matter which affects both parties whose interests are not the same …"[43]

It does not surprise that the above authorities have brought authors of textbooks such as Collins and Keating to firmly accept the duty to cooperate by way of an implied term as existing law, and also to see the discretion to use an absolute contractual right as existing under the implied obligation to act reasonably and impartially, and not arbitrarily, irrationally or capriciously. Therefore, it is the more surprising to read the Court of Appeal's decision in *Mid Essex Hospital* going directly against that common understanding of the law.

This observation is supported by several High Court decisions, explicitly using the concept of good faith in this context. In the *Ross River* cases for instance, Morgan J in a decision of 2012 concerning a joint venture on development of building sites accepted the breach of a fiduciary obligation of good faith, not seen as a general obligation but tailored to the particular circumstances: defendants Waveley Commercial Ltd, were held to owe a duty not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of the other party.[44] Likewise, in an older decision involving Cambridge City FC, Briggs J established a breach of the duty of good faith notwithstanding that there were express provisions dealing with disclosure which were not operated in the circumstances.[45] The duty was not seen as a general duty to make full disclosure of all material information as that would run counter to the express disclosure provisions. The "single-minded regard" to the interest of the purchaser when the adviser should have either declined to respond or been frank if responding, was held as a wrong, of tortious nature.

Returning to the *Mid Essex Hospital* case, some final remarks on that intriguing decision in appeal. The Lord Justices Lewison and Beatson wrote concurring opinions. The latter addressed the *Yam Seng* decision that just had appeared (and relied upon by counsel), observing that as Leggatt J had stated "what good faith requires is sensitive to context" and that the test of good faith is objective in the sense that it is commercially acceptable to reasonable and honest people and that its content "is established through a process of construction of the contract".[46] Beatson LJ concludes then that the contract was

> "a detailed one which makes specific provision for a number of particular eventualities … care must be taken not to construe a general and potentially

[43] *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 at [14]. See in the same sense *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* [1996] C.L.C. 1435; 78 B.L.R. 42; 49 Con. L.R. 1 on the employer's agent's duties under JCT (DB), summarised as "The agent must demonstrate a very high duty of good faith", thus D. Chappell, *Building Contract Claims*, 5th edn (Chichester: Wiley-Blackwell, 2011), p.352.

[44] *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 81 (Ch) at [259].

[45] *Ross River v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All E.R. 1004; 117 Con. L.R. 129.

[46] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [141] ff. and [151] ff.

> open-ended obligation such as an obligation to 'co-operate' or 'to act in good faith' as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them."[47]

If Beatson LJ did not approve of Leggatt J's decision, it was carefully wrapped in general statements. The last one, it is observed, clearly also runs counter to the other High Court and Court of Appeal decisions just discussed. The Lord Justice earlier in his opinion had stated that "the scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context".[48] A statement that is scoring high on the range of truisms. It also is a Roman maxim of interpretation, found in all civil codes on the Continent inspired by the French Code civil art.1161 CC.

In conclusion, neither Beatson LJ, nor his brethren, Jackson LJ first and foremost, when dismissing the approach in first instance by Cranston J in relation to an obligation of good faith, failed to give any convincing argumentation in the light of the state of legal authority, judicial or doctrinal. This conclusion of mine, in humble submission of course, may have relevance when evaluating recent decisions in which the present appeal court decision is followed, such as that of the High Court (TCC) in *TSG Building Service*, by Akenhead J.[49] Here I again refer to Jackson's article in the previous issue of this Journal for details. Prominently in this decision we find the rejection of an obligation to act reasonably in exercising a party's right to require rectification of defects, which is seen as an absolute right, whilst the same position was taken in relation to the obligation to act reasonably in proceedings with adjudication, a party's referring a dispute to adjudication.

We are coming to the final part of this article, observations on the legal policy undertones of the *Mid Essex Hospital* decision in appeal and, in particular, the current misunderstandings if not folklore on what good faith as a general obligation of contract is all about, with the French *bonne foi* on the central stage. In short, the *fides phobia*. A malady which, incidentally, is not restricted to the British Isles. It is also found on the Continent, in some commercial legal circles where playing hard ball is a favourite sport.[50]

The French connection. Good faith operating in a civil law climate

Thus far, at a number of occasions reference was made to the way a court would come to solutions under civil law, of which French law is a good example. It is about time to elaborate on this theme, however not without hesitation. The reluctance to embark upon this subject is based on the length this article has reached already (which of course, is only due to complexity of the court decisions discussed) and the knowledge that a relation with editors, as with employers, should not be

[47] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [154].
[48] *Mid Essex Hospital* [2013] EWCA Civ 200; [2013] B.L.R. 265 at [151].
[49] *TSG Building Service Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC); [2013] B.L.R. 484; 148 Con. L.R. 228.
[50] Michael Furmston, in Furmston, *Cheshire, Fifoot & Furmston*, always was sympathetic to good faith in contract law. In his latest edition (2012) a paragraph is dedicated to that subject, with reference to English literature of the 1990s, including an author by the name of J. Beatson (!). See p.33 ff. and p.795.

over-stressed. Therefore, brevity is sought here for a topic that actually would deserve an article of its own.

Firstly, it should be understood that in a civil law system from times immemorial the good faith principle, leading to concrete contractual duties only operates in conjunction with the rule that obligations expressly agreed under the contract should be honoured. This juxtaposition is well illustrated in the source of the principle, art.1134 of the French Code civil, the sample provision for all other Continental codes that copied the French code, including that of countries like Romania. In s.1 of the article, it says that "*les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*". Parties therefore are bound by contract as it were by law. This rule is not just meant as a courtesy to adepts of contractual legal certainty, paying lip-service only. As was said in the famous phrase used in French Parliament at the time: "*[o]n lie des boeufs par les cornes et les hommes par les paroles*", a man is bound by his words as an oxen by the horns. Clear language therefore.

Meanwhile, the article in one breath in s.3 states that "*les conventions doivent être executées de bonne foi*". In addition, the next article, 1135 CC, elaborating the theme, prominently holds that:

> *"Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature*."

Here we find *la bonne foi* in the guise of equity, accompanied by custom and in the shadow of the law, which also may supplement the contract.

As the outcome of a long legal debate, the common view is that both articles should be taken together to get the code's meaning and not taken separately, for instance to score on the level of certainty of the law, taking the letter for the spirit of the contract. As Jean Carbonnier formulates it, in the 22nd edition of his treatise on the law of obligations: the "law of the contract", just like state law, is to be applied according to its "*esprit, présumé raisonable et équitable (cf. a. 1135)*".[51] It is no coincidence, that another influential French author, Philippe Malaurie, discussing the article just quoted, states that it practically equals to what in England is known as the use of implied terms.[52] When one re-reads the illustrious *Moorcock* case of 1889,[53] introducing the modern use of implied terms, it is striking to see words as the "nature of the contract" and "business efficacy" used, which reminds a modern reader of the current phrases "purpose of the contract" or "purposive interpretation". It was, of course, directed at providing to mooring vessels a safe berth at low tide.[54]

In the arts 1134 and 1135 CC we find in a nutshell the system as it was derived from the Godfathers of the Code, Pothier and Domat. It was based on the legal

[51] J. Carbonnier, *Droit civil IV, Les Obligations*, 22nd edn (PUF: 2000) (2004), nr.113, p.226. An echo of Montesquieu's epoch-making treatise *De l'esprit des lois* (1748) can be heard here.

[52] P. Malaurie and L. Aynès, *Cours de Droit civil. Les Obligations*, 2nd edn, (Cujas: 1990), p.344. Compare also Malaurie, Aynès and Stoffel-Munck, *Les obligations*, 2nd edn, (Répertoire Defrénois: 2005), nr.764.

[53] *The Moorcock* (1888) 13 P.D. 157 and (1889) 14 P.D. 64; [1886–90] All E.R. Rep. 530.

[54] The Court of Appeal also made use of the "presumed intention of the parties", and of reason. The essence is found in Bowen LJ's statement "The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction". A view that is still impressive.

practice and doctrine at the time, and still is an accurate picture of how the law stands today. In consequence, the fear of English justices that with acceptance of the general obligation of good faith one is throwing the other obligations as agreed under the contract out of the window, is utterly unfounded.

This, however, is not the whole story; law, as life, is not that easy. What comes in namely, is the contribution of the third section of art.1134 CC, which has always been used to establish what the obligations indicated in s.1 contain. But what should be mentioned first, is that the interpretation of contractual provisions was structured separately by the French legislator in the arts 1156–1164 CC, *les Directives d'interprétation*: Roman maxims of interpretation as they were commonly used in legal practice, only slightly modernised. They were actually copied from the books of Domat and Pothier as the restatement of the law of the day. These articles too, were replicated in all Code civil lookalikes on the Continent. It is an old treasure site, one finds there rules on contextual interpretation, that is, the context of the surrounding contractual provisions (the whole document, the worry of Beatson LJ as we saw) and the circumstances of the case (idem, its "overall context"), and also the role of custom, the *contra proferentem* rule and most importantly, the maxim taking the purpose of the contract as its central element. In good school Latin, one should interpret a contract *ut res magis valeat quam pereat*—in a way the contract will flourish, and not perish (*l'interprétation validante*). In brief, purposive interpretation.The French judiciary, arguably one of the most creative groups of legal professionals in the world, always had a good hand in expanding the reach of the Civil code system. Thus, by the end of the 19th century, the courts devised the concept of "abuse of law", *nota bene* in relation to the right most absolute and holy, the right of property: *le droit inviolable et sacré*. The famous case of a land owner who in a nuisance conflict put up a high chimney to obstruct his neighbour's view. "Abuse of law" then originated as a legal figure and found wide-spread following all over the Continent. It conspicuously is not requiring proof of bad faith or lack of honesty on the side of the troublesome neighbour, a weighing of interests by the judge will suffice. This perhaps may inspire some English justices inclined to protecting "absolute rights" in contract or requiring proof of dishonesty of an actor, as we saw before. It is noted that the concept of "abuse of law" has its common law equivalent in estoppel, as it was developed, also by the courts, with the *High Trees* case of 1947 as a start, with Denning J (as he then was) in a typical creative mood.[55] The *ING* case of the Supreme Court in 2013, mentioned above, is only a recent example.

This still is not the whole story of Continental interpretation, *à la Française*. From the 1930's on, a short track method of interpretation was formulated in legal doctrine, followed by the courts. Enter: s.3 of art.1134 CC, sharing hands with art.1135, Lady *Bonne foi* in splendid appearance. In result, the leading textbooks on French contract law, as part of the Law of Obligations, over the last decades commonly characterise interpretation of contract as *l'interprétation objective*. It is also described as *la thèse objective*.[56]

[55] *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130; [1956] 1 All E.R. 256 (Note); 62 T.L.R. 557.

[56] See for details: Carbonnier, *Droit civil IV*, nrs.113 ff.; 142 ff.; Malaurie and Aynès, *Cours de Droit civil. Les Obligations*, nrs. 614; 630 ff.; J. Ghestin, *Traité de droit civil. Les effets du contrat*, 2nd edn, (1994), nrs. 39–51; B. Starck, H. Roland and L. Boyer, *Obligations. 2. Contrat*, 5th edn. (1995), nr.165 ff.

Already in 1933, Louis Josserand, a highly respected lawyer at the time, introduced the term *le forçage du contrat* to characterise interpretation of contract. A term which is hard to translate, literally: the forcing of plants in hothouses, it comes close to developing a contract, assisting its growth.[57] The concept was widely quoted, mostly by adherents of interpretation in an objective mode, but at times also by its opponents, to illustrate how deep one can fall in such approach, leading to a brutal violation of the text. Which reminds us of the dual citation *The Moorcock* receives in English legal circles, in more conservative settings also in the pejorative sense of "flushing the Moorcock"—a poor lawyer's trick.

Charles Jarrosson, advocate and professor at University Paris II, and clearly a follower of Josserand, coined the term *l'interprétation créatrice du contrat* in 1987, the "creative interpretation of contract". It all reminds us of the Roman maxim *ut res magis valeat*: in the interpretation of contracts let them flourish, not perish.

In the normative approach to the role of good faith under the arts 1134 and 1135 CC, also the influential author René Demogue had a large contribution. His view on contract, dating from the 1930s as well, inspired later generations:

> *"Les contractants forment une sorte de microcosme; c'est une petite société où chacun doit travailler pour un* but *commun qui est la somme (ou davantage) des buts individuels poursuivis par chacun, absolument comme dans la société civile ou commerciale".*[58]

After the last World War this view of the duty of collaboration of the parties was further developed into what Ghestin aptly has called "*le renforcement du contenu du contrat*", in an objective assessment of the contents of contract.[59] Interestingly, this leads to the acceptance by the courts of a number of concrete duties of the type we came across earlier in English law under the heading of "implied terms". To name a few, in their original appearance: *les obligations de securité, de renseignement et de conseil (d'information), de surveillance, de loyauté, de coopération, de non-concurrence*.[60]

This all occurred some time ago, in more recent times young scholars like Denis Mazaud (a third generation of the famous lawyer family) advocate a further development of this approach, leading to the concept of "*solidarité*" as the foundation of contract, in a triumvirate with "*fraternité*" and "*loyauté*", actually just one step ahead from the "duty of loyalty" that was accepted already by the courts. This view however caused sensitive reactions from authors of an older generation, such as Jean Carbonnier, who is getting somewhat cynical when seeing how these Young Turks are dreaming of transforming contract into "marriage" as the archetype—in a time frame where divorce is a common feature.[61]

[57] Compare: L. Leveneur, "Le forçage du contrat", *Droit et Patrimoine*, 1998, p.69; Malaurie in his handbook dedicates a sub-chapter to this legal concept, nr.632 ff. See on this subject also, available on internet, recent PhD and Master theses, e.g. by Clémentine Caumes, diss. Avignon 2010; Aurore Portefaix, Nimes 2007; Fanny Bugnet, Montpellier 2007.

[58] Demogue VI, nr. 3 ff., 1931, cited by Carbonnier, *Droit civil IV*, nr.114.

[59] Ghestin, *Traité de droit civil. Les effets du contrat*, nr.50 "En interprétant objectivement un contrat, le juge fait oeuvre normative".

[60] Ghestin, *Traité de droit civil. Les effets du contrat*, nr.44 ff; Starck, Roland and Boyer, *Obligations. 2. Contrat* , nr.1198 ff.; Malaurie and Aynès, *Cours de Droit civil. Les obligations*, nr.633 ff.

[61] Carbonnier, *Droit civil IV*, at nr.114, with further sources. Mazaud's article discussed is from 1999, a similar contribution by J. Mestre is of 1986, and there are many more (e.g. by C. Jamin, and B. Fauvarque-Cosson).

So much for a short excursion into French law of contract, not touching upon most recent developments, nor to its contributions to European comparative legislative projects. To my impression, the English legal community seems not be aware of the state of civil law, demonstrated here with the French example. It even is worse than that, one usually finds a complete misrepresentation of it in the literature and even in opinions of Law Lords. Thus the common view on interpretation of contract in French law holds that it is purely based on the establishment of the subjective (actual) intention of the parties. To give two examples: Jonathan Morgan in his fairly recent, interesting book *Great Debates in Contract Law*, and Lord Hoffmann in *Chartbrook*.[62] The source of this completely erroneous view is a Canadian scholar, Catherine Valcke, cited as a specialist on this subject by English lawyers.[63] It induces Lord Hoffmann to conclude "the French view [is] that contract is a matter of the purely subjective intentions of the parties; this philosophy could not simply be transported into English law" (as quoted by Jonathan Morgan). An opportunity missed to bridge the gap between the two legal cultures, it is observed.

I will have to refrain from elaborating this critical observation for reason of editing constraints.[64] It may suffice to mention art.1156 CC in this context, the first of the interpretation "directives" of the Civil code, stating that in the interpretation of contract the focus should be the common intention of the parties and not the literal sense of the provisions used. It is a common pitfall for the comparative lawyer, taking this statute text literally, and forgetting about the intention of the legislator, its spirit, if not our Roman heritage.[65] A caveat is here, that when the will theory ruled supreme, as it did in the greater part of the 19th century, this art.1156 CC was placed on an altar, for the believers. It is noted, that also in our time there still are believers, with individualism, freedom of contract, certainty of the law as dogmas kept in deep veneration.[66]

It is about time to return to the misty, white coasts of Albion, and to bring the expedition to an end. However, not without going into the glorious history of English law on the subject, the acceptance of good faith in the courts of the 18th century and thereafter, far into the next century. A well-kept secret, it seems.

[62] J. Morgan, *Great Debates in Contract Law*, (London: Palgrave Macmillan, 2012), p.99; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101; [2009] Bus. L.R. 1200 at [39] per Lord Hoffman. In the same sense: Lord Steyn, describing the "subjective approach of the civil law system", in (2003) 25 *Sydney Law Review* 5, at 10; B. Nicholas, *The French Law of Contract*, 2nd edn (Oxford: OUP, 1992/2005), p.47, with a slight nuance only.

[63] C. Valcke, "On Comparing French and English Contract Law: Insights from Social Contract Theory", 2008, p.4 ff.; (2009) IV *Journal of Comparative Law*, pp.69–95, available on internet, quoted here (where, incidentally, Lord Hoffmann's citation of her article in *Chartbrook* is appearing on her CV). See also her contribution to *Exploring Civil Law* (Oxford: Hart Publ., 2009), pp. 77-114.

[64] Just one further note. S. Vogenauer, "Interpretation of Contracts: Concluding Comparative Observations"in A. Burrows and E. Peel, in *Contract Terms*, (Oxford: OUP, 2007), p.123, , is somewhat unbalanced in his discussion of French law, giving too much attention to the subjective approach (although rightly characterised as "subjective rather in ideology and rhetoric than in substance") and disregarding the sources mentioned above in this article.

[65] Thus, Valcke, "On Comparing French and English Contract Law: Insights from Social Contract Theory" p.5 (text and footnote13 ff.). The French literature which I discussed above, conspicuously is completely absent in Mrs. Valcke's analysis of French law.

[66] Another complication here is the introduction of the *théorie de l'acte claire* in the late 19th century, stating that art.1156 CC was only written for obscure and ambiguous terms, and had to do only with cases of doubt. Subsequently, the *Cour de cassation* in the 20th century developed the doctrine of *clauses claires et précises*, whereby resorting to the common intention of parties was not allowed. This subject, familiar to contract lawyers of any jurisdiction, must however rest here. A complication typical for the French appeal system is that the *Cour de cassation* as the highest court is only hearing issues of law, not of fact. See: Ghestin, *Traité de droit civil. Les effets du contrat*, nrs 13–28.

Conclusions. A distant mirror: good faith commonly accepted as principle of contract law in England at the time of Lord Mansfield

Conclusions should be brief, the indolent reader should not be comforted too much. I therefore will not attempt to summarise this article, but prefer to present a few last general remarks. Firstly, it is noted that as a fact of life, there are always two side to the coin, or as once an American co-arbitrator used to say to me: "a slice of bread has two sides" (I later found out he was a crook). One of the nicest expressions I found, is by an American author explaining the old dichotomy of good faith versus certainty of contract: "they hunt in pairs". Members of the Bench, in particular, will have a keen eye for that, the Bar usually is hired to advocate only one aspect and turn a blind eye to the other.

Another point I would like to stress, is that good contract drafting can make a world of difference, with the result that the use of sophisticated views on the role of good faith in contract will be largely superfluous.[67] However, one should not forget that clear language is sympathetic as a goal for any drafter, but often unreachable in practice (the Chalmers are few amongst us, as we know). If we take the lessons of our great Teachers of linguistics and philosophy seriously, however, we may realise that there is no incapacity involved here but a fundamental condition any user of any language has to face, and live with. Clear words have been proved to be highly unclear and ambiguous in practice, although crystal clear on first reading, examples abound in every jurisdiction. For English contract law, in this context I refer to the clear words: "any claim" (*BCC v Ali* [2001] UKHL 8), "actually paid" (*Charter Reinsurance v Fagan*), "12 January" (*Mannai Investment*) and "(ship)owners" (*The Stolt Loyalty v Soframar* [1995] 1 Lloyd's Rep 598).[68]

Finally, it is worth mentioning that as always in a major conflict between schools of thought, both views have support and therefore it is not hard to find supporters for either school. In the comparative literature, as is the case in French law, also for English law it is possible to find authors adhering to certainty of law and denying the contribution of *ICS* in 1998 and subsequent decisions, for instance by quoting authors as Staughton or Lord Steyn. In consequence, on the Continent a still generally held view among commercial lawyers (and related academics) is that England, with its solid trade tradition, is the land of "a contract is a contract", literal interpretation by sticking to the letter of the contract (with the support of the "four corners of the document" rule). If one would check a popular book like *Schmitthof on Trade*, such an idea would only be confirmed.[69]

A last observation is on the relevance of the past in this context. Surprising as it may seem, the English judiciary of the 18th century was often referring to a

[67] There is a strong parallel here with the doctrine of misrepresentation: making representations part of the contents of contract, if not by way of warranty at least as a term of contract, may save much trouble later on.

[68] *Charter Reinsurance Co Ltd (In Liquidation) v Fagan* [1997] A.C. 313; [1996] 2 W.L.R. 726; [1996] C.L.C. 977; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749; [1997] 2 W.L.R. 945; [1997] C.L.C. 1124. See my article, a comparison of English and Dutch law: "Normatieve uitleg *à l'anglaise*. Investors Compensation Scheme (1998) als de Engelse Haviltex-zaak", in: *Contracteren internationaal, Grosheide Bundel*, 2006, pp.103–118, also on my website, *http://www.esl.eur.nl/normatieveuitleg* [Accessed December 30, 2014].

[69] As for French law, its normative interpretation method is not commonly known abroad, even among European comparative law scholars, I noticed.

general requirement of good faith in contracting. For example, Lord Mansfield in *Carter v Boehm* states:

> "The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary".[70]

Another judge, Buller J in *Salomons v Nissen* says "[i]t has been uniformly laid down in this Court, as far back as we can remember, that good faith is the basis of mercantile transactions …"[71]

Mike Macnair (of Oxford) has presented a host of cases in which such general statements and also casual references demonstrate the breadth of the doctrine in equity. Between the 1850s and 1870s the general requirement of good faith ceased to be referred to and we find instead beyond a large number of references to parties having acted in good faith, an amount of special duties of good faith accepted. What occurs then, is what the author describes as:

> "The older landscape of good faith is being drowned in a flood of will-theory *stricti iuris* or *caveat emptor*, leaving only some former mountains sticking up as islands."

In this lively image, it is suggested, one may discern "The Moorcock" in the distance, moored at one of the former mountains.

Interestingly, the will theory on the Continent already had reached its peak in 1875, in which year almost simultaneously all over Western Europe a legal revolution took place. This episode may seem as obscure as the English one just revealed. In sum, in 1875 the reliance theory emerged in a number of appearances: France had its *la confiance légitime*, Germany the *Erklärungstheorie* (or *Vertrauenstheorie*), the Netherlands the *vertrouwensleer* and Scandinavia the *Løfte* (promise) theory. Basically, the consensus ad idem was replaced by the exchange of promises and the reliance it had created between the parties (in later time the basis in the American Restatement on Contracts Second and the UCC). The movement was triggered by the urgent need felt in commerce and society at large at the time that an offer once made, should be irrevocable, a view which ran counter to the ruling will theory. From 1875 on, the influence of the reliance theory or the "New doctrine" has only increased, until our time.[72]

So much for the decline of good faith in England of the 19th century.[73] An author as Michael Furmston seems not to be aware of the local history when he,

[70] *Carter v Boehm* 97 E.R. 1162; (1766) 3 Burr. 1905. See also M. Macnair, "Good Faith in English Law before 1850", in J.P. Coriat, R. Fiori and J. Hallebeek (eds), *Inter cives necnon peregrinos. Essays in Honour of Boudewijn Sirks*, (Goettingen: V&R Unipress, 2014), pp.469–481. Lord Hardwicke and Lord Kenyon are also quoted there. I am indebted to my colleague in Roman Law at Erasmus University Rotterdam, Laurens Winkel, for drawing my attention to this article.

[71] *Salomons v Nissen* 100 E.R. 363; (1788) 2 Term Rep. 674.

[72] For a detailed survey of this development, I refer to my book J. van Dunné, *Normatieve uitleg van rechtshandelingen* (Leiden: Kluwer, 1971), pp.305–438, including comparisons with English and American law.

[73] One of the interesting consequences here is that Scottish law no longer has the isolated position in this area with its acceptance of good faith under civil law. Incidentally, from the 17th century on Scots lawyers went for their eductation to the Netherlands, Leiden University, but also to universities that since have disappeared, in Harderwijk and Franeker. Lord Hope of Craighead, recently retired from the Supreme Court, in October 2013 gave a lecture on the subject in Leiden. In the debate, I asked him for his view on the Supreme Court's position on good faith, and his

commenting on the old maxim: "Chancery mends no man's bargain" as doing scant justice to modern law, reiterates: "The twentieth century has refused to be sterilised by the dead hand of the seventeenth".[74] Meanwhile, the statement in the paragraph on good faith in his textbook, after discussing the American Uniform Commercial Code's s.1–203 on good faith and Australian decisions to the same extent, is most positive and inspiring: "[i]t is not inconceivable that on appropriate facts and with skilful argument, English law may make tentative steps in the same direction". This was written in 2012, a year before the Queen's Bench cases discussed above.

A last remark in closing. The gap between the laws of the Continent and the British Isles has been regularly referred to in this article. It is perhaps appropriate to present the English lawyer, interested in the comparative context of "good faith", a modern caveat: "Please, do *not* mind the gap!"

reply was that he always was slightly amused at the difficulties his brethren had with the concept, so self-evident for a Scots lawyer. Lord Hope's lecture will be published in 83 *Legal History Review* (2015) 1-2, Leiden.

[74] M.P. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 16th edn., (Oxford: OUP, 2012), p.795..