FECHA DE RECEPCIÓN: 03/07/2020
FECHA DE APROBACIÓN: 05/11/2020

Good Faith under English Law: Evolution or revolution?

Buena Fe bajo la ley inglesa: ¿Evolución o revolución?

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Abstract:
The doctrine of good faith is not part of the general English law of contract and has a very limited role in the legal framework that applies to commercial relationships, including construction contracts. That position however has been slowly changing and this paper examines how the concept of good faith has been developing in English law and the legal basis on which it has been introduced, including the recent acceptance by the English courts of the concept of relational contracts. This is relevant in particular to construction law because there has been a growing emphasis in the UK on the use of collaborative contracts (such as partnering and alliancing contracts), which seek to put more emphasis on the wider relationship between the parties and not just the strict legal obligations expressly provided for in the contract. This paper therefore also looks at whether the changing approach to good faith can support the use of collaborative contracts but recognizing that applying such principles, in general, provides limited guidance and this paper, therefore, uses several factual scenarios to test the application of the principles and examine what their actual impact may be and would it result in any different outcomes.

Resumen:
La doctrina de la Buena Fe no es parte de la legislación contractual inglesa y su rol se encuentra limitado en el marco legal que aplica a las relaciones comerciales, incluyendo los contratos de construcción. Aquella posición, sin embargo, ha variado lentamente y en este artículo examinamos la manera de cómo el concepto de buena fe se ha desarrollado en la legislación inglesa y la base jurídica sobre la que ha sido introducido, incluyendo la reciente aceptación por los tribunales ingleses sobre el concepto de los contratos relacionales. Esto es relevante en particular para el derecho de construcción, porque ha ido existiendo un énfasis cada vez mayor en el Reino Unido acerca del uso de contratos colaborativos (como la asociación y la asignación de contratos), que tratan de poner más énfasis en la relación más amplia entre las partes y no sólo en las estrictas obligaciones jurídicas, expresamente previstas en un contrato. Por lo tanto, en este artículo también se examina si el enfoque cambiante de la buena fe puede apoyar el uso de contratos de colaboración, pero reconociendo que la aplicación de esos principios proporcional, de manera general una orientación limitada y, por lo tanto, este artículo utiliza una serie de escenarios fácticos para probar la aplicación de los principios y examinar cuál puede ser su impacto real. En efecto, se daría lugar a diferentes resultados.

Keywords:
English law - Contract law - Good faith - Construction law - relational contracts -collaborative contracts - NEC form of contract - alliancing contracts

Palabras Clave:
Derecho inglés – Derecho contractual – Buena fe – Derecho de la construcción – Contratos relacionales – Contratos colaborativos – Formas de contratos NEC – Asignación de los contratos

Summary:

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1. Introduction

Over the last decade, the topic of good faith has become the subject of increased debate in England. That may seem odd to a civil law lawyer who is used to this concept and sees no difficulty with its application, but the position is quite different under English law. The background to this debate in England seems to be a combination of a few factors that have come up at the same time.

In that regard, the construction sector has been encouraged to use collaborative contracts and the use of such contracts, which include good faith type clauses, is now the norm in the UK. In addition, the leading judgment in *Yam Seng*[1] by Mr. Justice Leggatt, as he then was, put forward a forceful argument for the adoption of good faith, which has been followed to some extent, most recently in the decision in *Bates*[2] which highlighted the relevance of relational contracting. Separately, there has been increasing interaction between civil law and common law lawyers, often as members of tribunals in international arbitration, which has helped demonstrate how good faith principles can be applied in practice.

The purpose of this paper, however, is not to set out the full position under English law in relation to good faith and how it has developed. Instead, this paper will provide a background to good faith by way of an introduction but will highlight the recent developments in order to consider whether and to what extent they affect construction contracts, as well as trying to put the principles of good faith in a practical context by considering several scenarios. As will be discussed later, there is the narrow issue of whether good faith gives rise to any enforceable obligations but also a wider issue as to whether it is in the interests of English law to accept good faith as a concept for certain contracts and whether it can be used to encourage or enforce certain collaborative behaviors that will lead to better outcomes.

Before looking at the detail, there are several preliminary observations which need to be made:

First, good faith is often described as a key difference between common law and civil law systems. This paper cannot cover the position in other jurisdictions in any detail but that has been covered extensively by other commentators[3] and it is correct that this principle is embedded in civil code systems and not in the common law, but it is necessary to recognize that many common law systems have adopted and recognized good faith as part of their jurisprudence. This is the case in the United States as well as in Canada, where the Canadian Supreme Court in *Bhasin v Hrynew*[4] decided to recognize good faith contractual performance as a general organizing principle. In places such as Singapore[5] and Australia, the position is less clear but there seems to have been a greater willingness to consider whether and how good faith may apply.

In addition, while civil law systems are often mentioned in any comparison, such a comparison has limited value. As Mr. Justice Leggatt pointed out in *Yam Seng*, good faith in civil law systems is an overarching policy-based principle that applies even before the contract comes into existence, while under English law it is a duty anchored in the contract based on the parties' intentions[6].

Second, English law operates perfectly well without the concept of good faith. This is addressed below in more detail, but English law has other principles that apply where other legal systems may rely on good faith[7]. The popularity of the English legal system has not suffered due to the absence of good faith and some

1 *Yam Seng Pte Ltd v International Trade Corp Ltd* (2013) EWHC 111 (QB).

2 *Bates v Post Office Ltd, N° 3* (2019) EWHC 606 (QB).

3 See for example Julian Bailey, "Comparing "good faith" in civil and common law systems" , *Construction Law Journal* (2019): 233, Kelda Groves, "The doctrine of good faith in four legal systems" (1999) *Construction Law Journal* (2019): 265, Stefan Leupertz, "The Principle of Good Faith in German Civil Law", *International construction law review (2016): 67, Peter Rosher, "Good Faith in Construction Contracts under French Law and Some Comparative Observations with English Law" International construction law review (2015): 302, and Rupert Jackson's lecture which covers the position in numerous jurisdictions including China - Does Good Faith have any Role in Construction Contracts? The Pinsent Masons Lecture,* 22 November (Hong Kong,2017) now an SCL paper downloadable at www.scl.org.uk.

4 The Supreme Court held that "*finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations*". The Supreme Court referred to what it described as "*enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine*". (2014): SCC 71 at paragraph 57.

5 See *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* (2012) SGCA where the Singaporean Court of Appeal held that there was no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. See however the more recent decision, *One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* (2015) SGCA 21, where the Singaporean Court of Appeal rejected the suggestion that good faith should be implied into commercial contract and *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26 where it was held it was possible to argue for an implied duty of good faith but the court rejected an argument such a duty allows recovery of punitive damages.

6 But see Fuchs' suggestion that a German court would enforce clause 3.5 in *Mid Essex* and would consider such deductions to be excessive by looking at the underlying value (Dr Jur Sebastian Fuchs and Shy Jackson, "Good Faith: An Anglo-German Comparison" *International construction law review* (2015): 404.

7 See Shy Jackson, "Good Faith in Construction – Will it make a difference and is it worth the trouble?" *Const L J* 420 (2007) :23

would argue that it has benefited from avoiding the uncertainty which some lawyers say is inherent in a good faith concept and prioritizing the strict application of the contractual terms.

Third, regardless of the view that English lawyers have about good faith, it is a concept that commercial people have no difficulty with and often incorporate in contracts. This is especially the case in construction, where the rise of collaborative forms of contract in the UK includes such clauses in the standard forms of contracts used on large infrastructure projects. This requires tribunals to address the issue of what the parties intended when including such clauses and to what extent they give rise to binding obligations.

The position is therefore that English law has traditionally resisted attempts to recognize a concept of good faith, with lawyers seeing such a concept as a cause for uncertainty which would be difficult to apply in practice and which would go against the preference for objectivity. That however being challenged, by the commercial world and, more recently, by the growing emphasis on the concept of relational contracts, and the use of collaborative contracts in construction. As will be demonstrated below, the treatment of good faith has evolved in recent times and while the process is yet to come to an end, and it is not clear what the practical impact may be, it is worth considering the potential impact it may have on construction contracts.

2. English law and good faith

As noted above, English law has different ways of addressing issues that other jurisdictions resolve based on good faith obligations. The traditional English position has been summarised by Bingham LJ, in *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*[8] as follows:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes 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. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.
>
> 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 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."[9]

This is consistent with statements that were made by Bingham LJ in subsequent cases[10]. The simple point is that English law does not require a good faith concept as it has a range of other principles that serve the same purpose. On that basis, English law is not hostile to good faith, and indeed recognises it in specific areas of law such as the law of partnerships or insurance law but does not consider it necessary to the operation of contract law. Still, there was an expectation around that time that this concept will develop, and it was suggested by Colledge that a move towards explicit recognition of good faith obligations in English law was within reasonable contemplation[11].

A more principled objection was made a few years later in the House of Lords' decision in Walford v Miles[12], which concerned the pre-contractual position. Lord Ackner stated that:

8 See the case Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd [1989] QB 433.

9 [1989] QB 433 at 439.

10 See for example *Timeload Limited v British Communications Plc [1995] EMLR 459 at page 468 and Balfour Beatty Civil Engineering Limited v Docklands Light Railway Limited (1996) 78 BLR 42 at pages 46 and 47.*

11 Barbara Colledge, "Good faith in construction contracts - the hidden agenda" *Construction Law Journal* (1999): 288

12 [1992] 2 AC 128. The same approach was followed in *Ultraframe (UK) Limited v Tailored Roofing Systems [2004] EWCA Civ 585 at [17],* where Waller LJ agreed with Bingham MR's observation in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 at page 484 that the implication of terms is so potentially intrusive that the law enforces strict constraints on the exercise of this extraordinary power, all the more so when parties enter into lengthy and carefully drafted contracts.*

> "(…) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations (…) A duty to negotiate in good faith is unworkable in practice as it is inherently inconsistent with the position of a negotiating party".[13]

This view represents the idea that good faith is contrary to the principle of contractual freedom, where each party can take any steps it wishes to further its interests, as long as its conduct does not amount to misrepresentation. The statement concerned the pre-contract negotiation phase but can be seen to apply equally to any discussions and negotiations that take place after a contract is executed, as is common under construction contracts where claims for additional time and payment, or for losses due to delay, are often agreed through negotiation.

Nonetheless, courts have had to accept that where parties choose to include express good faith terms in their contracts, these need to be given some effect, even if on a limited basis. In *Petromec Inc v Petroleo Brasileiro SA Petrobas* (Nº 3)[14] the court did not find it difficult to enforce an obligation to negotiate in good faith, by ascertaining what reasonable costs would have been agreed upon if good faith negotiations had been carried out.

The Court of Appeal however took a different approach in the case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*15. This was a dispute concerning a long-term facilities contract, which included a mechanism for service failure points and deductions taken from a PFI (Private Finance Initiative) form of contract. Under clause 3 of the contract, headed "Performance of the Services", clause 3.5 imposed a good faith obligation in the following terms.

> "The Trust and the Contractor 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."

There were difficulties with the performance of the services from the beginning and this ultimately led to the Trust using the performance deduction mechanism to prepare a schedule of deductions amounting to £587,000, including deductions such as out of date ketchup sachets at £46,320; 3-day old bagels at £96,060 and a one-day old chocolate mousse at £84,450. The relationship deteriorated and ultimately Medirest gave the Trust notice of termination. The Trust issued its own termination notice two months later.

In the first instance decision[16], the judge noted that the parties had entered a long-term contract, the performance of which required continuous and detailed cooperation between the parties at several levels. In the circumstances, his view was that it was highly likely that the parties intended that there should be a general obligation that they should cooperate in good faith with each other and he held that there was a breach of this duty.

In the Court of Appeal[17], Jackson LJ looked again at clause 3.5. He began by reminding himself that there was no general doctrine of good faith under English law and concluded that the Trust's narrow interpretation of clause 3.5 was the correct one and there was no breach of the good faith obligation, reversing the decision of the first instance judge. Beatson LJ referred to the decision in the Yam Seng case, decided a few weeks earlier and discussed below, but pointed out that the scope of the obligation to cooperate in good faith had to be considered in light of the rest of the contract and the overall context and warned against construing a good faith clause in a general and open-ended manner, as that may cut across the more specific express terms of the contract. The same point was made later by Lord Justice Moore-Bick in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*[18] when he confirmed that English law did not recognise a general duty of good faith and warned of the danger that a general principle of good faith would often be invoked to undermine the terms in which the parties have reached agreement.

13 [1992] 2 AC 128 at 138.
14 [2005] EWCA Civ 891.
15 [2013] EWCA Civ 200.
16 *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB).
17 *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200. See also Shy Jackson, "Of Chocolate Mousse and Good Faith" in Julian Bailey (ed), *Construction Law, Costs and Contemporary Developments: Drawing the Threads Together A Festschrift for Lord Justice Jackson*, (Hart Publishing, 2018).
18 *[*2016] EWCA Civ 789 at paragraph 45.

Despite the general reluctance by the courts to recognise arguments based on good faith, the growing awareness of this issue has led to more cases where the same issues had to be considered, often only to be rejected on the basis of the established principles.

New Balance v Liverpool Football Club[19] was a recent case where the parties accepted that there was an implied duty of good faith (it is unclear what was the basis for such agreement) but could not agree on what it meant and in which circumstances it applied. The Court rejected the argument that one of the parties failed to act in good faith, observing that as long as it honestly believed it could meet its obligations, it would not be acting in breach of the implied duty of good faith, even if its grounds for holding such a belief were unreasonable or if its conduct was careless or unwise[20].

Where a party seeks to argue that a good faith obligation should be implied, this is now often on the basis that the contract is a relational contract, as further discussed below in more detail. This however is still on the basis of the general test for implying terms, rather than the existence of a relational contract. This was confirmed in another recent case, *SDI Retail Services v Rangers Football Club*[21], and the judge applied the test in the *Marks & Spencer v BNP Paribas Securities*[22] case to find that considerable care needs to be taken before implying a term of good faith into a commercial contract and holding that on the facts of this case the implied term was not obvious, was not necessary to give business efficacy and it cut across the express terms of the agreement. It is therefore necessary to consider the concept of relational contracts and identify whether it represents a fundamental shift in approach and the wider acceptance of good faith or a principle that will only be relevant in limited circumstances.

3. The introduction of relational contracts

Mr Justice Leggatt's decision in *Yam Seng Pte Ltd v International Trade Corp Ltd*[23] was the start of a series of cases that sought to use the concept of relational contracts to introduce an implied duty of good faith. This case concerned an agreement providing exclusive rights to distribute fragrances under the Manchester United brand in the Far East. It was a brief agreement, which was drafted by the individuals concerned without the benefit of legal advice. The relationship between the parties deteriorated and there were allegations of competitive pricing and a failure to disclose information. Ultimately, the agreement was terminated.

Mr Justice Leggatt considered an argument for an implied duty of good faith, which started by undertaking an extensive review of the cases relating to good faith both in England and internationally. He observed that the refusal to recognise, if there was such refusal, a general obligation of good faith in England would appear to be swimming against the tide, pointing out that the concept of good faith has been gaining ground in other common law jurisdictions, including the Canadian, Australian and American courts.

Mr Justice Leggatt began by looking at the test for implying terms as set out in Attorney-General of Belize v Belize Telecom Ltd[24] and the emphasis in case law dealing with construction contracts being made against the background of unstated shared understandings which informed their meaning. In his view, good faith was not simply limited to acting honestly, but there were other aspects which could be described as fidelity to the parties' bargain. He also thought that, in order to apply a contract to circumstances not specifically provided for, the language had to be given a reasonable construction which promoted the values and purposes expressed, or implicit, in the contract.

His suggestion was that a good faith duty could be relevant to contracts which involve longer term relationships between the parties, in which they make a substantial commitment. He used the term 'relational contracts' and provided examples of such relational contracts as joint venture agreements, franchise agreements and long-term distributorship agreements.

While this approach has not been fully adopted by the English courts, it has been followed in some decisions. In *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*[25] Richard Spearman QC considered both the Yam Seng and Mid Essex decisions in detail and held that the agreement (relating to training materials

19 [2019] EWHC 2837 (Comm).
20 Similar to the Court of Appeal reversal of a finding of economic duress in *Times Travel v PIA* [2019] EWCA Civ 828, based on an honest but mistaken belief.
21 [2019] EWHC 1929.
22 [2016] AC 742.
23 FN 1.
24 [2009] UKPC 10, as later considered in the *Marks & Spencer v BNP Paribas Securities* decision at FN21.
25 [2014] EWHC 2145 (Ch).

for the UK Civil Aviation Authority and the EU Joint Aviation Authority) was a 'relational contract' of the kind referred to in Yam Seng and that there was an implied duty of good faith. Similarly, in *D&G Cars v Essex Police Authority*26, which concerned a contract for the recovery of vehicles for the Essex Police Authority, Mr Justice Dove held this was a 'relational' contract par excellence" and that there was an implied term that the parties would act with honesty and integrity in operating the contract.

The influence of Yam Seng was seen in the more recent decision in *Bates v Post Office Ltd (Nº 3)*[27] which required the court to consider:

> "Was the contractual relationship between the Post Office and Sub-postmasters a relational contract such that the Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (in this regard, the Claimants rely on the judgment of Leggatt J in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111)?"

This case concerned a dispute between the Post Office and around 550 claimants as to the operation of a new computerised accounting system which was said to have contained errors and defects that resulted in alleged payment shortfalls. Mr Justice Fraser recognised that whether the contracts were relational contracts may prove to be one of the most important issues in the litigation and he went on to consider it in quite some detail. He began by making it clear that the concept of relational contracts was well established in English law and listed a number of recent cases that supported that proposition[28].

He then went on to consider good faith and found that the learned editors of Chitty on Contracts[29] were wrong to suggest that good faith meant honesty and that there was more to it, holding that:

> "(…) that there is a specie of contracts, which are most usefully termed "relational contracts", in which there is implied an obligation of good faith (which is also termed "fair dealing" in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people."

The judge then identified a non-exhaustive list of factors which identify relational contract, as follows:

"*1.* There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.

2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.

3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present."

This decision shows the growing acceptance of relational contracts as a type of contract which has certain characteristics which provide a basis for a duty of good faith to be implied, described here on the basis

26 [2015] EWHC 226 (QB) at paragraph 176.
27 *Bates v Post Office Ltd (Nº 3)* [2019] EWHC 606 (QB).
28 *Bates v Post Office Ltd (Nº 3)* [2019] EWHC 606 (QB) at paragraph 705.
29 Hugh Beale, *Chitty on Contracts 33rd Edition, (UK: Sweet & Maxwell, 2020)*

of what reasonable and honest people would regard as commercially unacceptable is similar to other variations of how a good faith duty has been described.

The decision in *Bates* has been seen by some as suggesting a different approach whereby the court first identifies whether a contract can be described as relational and, if this is found to be the case, then the court will find that a duty of good faith can be implied. This is however an over simplified approach which ignores the need to apply the established test for the implication of contractual terms. This has become clear from the cases that followed, which demonstrate that identifying a relational contract as a basis for an implied duty of good faith is not straightforward. In *UTB LLC v Sheffield United Ltd*[30] the judge said it is not entirely clear what is meant by a relational contract and not all long-term contracts that require co-operation are relational contracts, stating:

> "There is a danger in using the term "**relational contract"** that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as "relational contracts" may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith."

The subsequent decision in *Russell v Cartwright*[31] approved the approach in *UTB LLC v Sheffield*, making it clear that, rather than trying to identify first whether a contract is a relational contract and for that reason includes an obligation of good faith, the better starting point is still to apply the conventional test for implying contractual terms. When applying this test, the judge was influenced by the fact this was a relatively detailed contract with limited express obligations of good faith. In his view this meant it was neither obvious nor essential to the proper working of the contract to imply some broader obligation of good faith.[32]

In the recent decision in *TAQA Bratani v RockRose UKCS8 LLC*[33] the judge was willing to treat the agreement as being at least arguably relational contract but went on to find that this did not necessarily lead to a finding of good faith and that in that case there was no basis for implying a good faith duty which qualified the absolute right to terminate.

While the position on relational contracts is developing, it seems clear that the test for implying a duty of good faith is the same as for implying any other terms[34]. It is the test set out in *Marks and Spencer Plc v BNP Paribas Securities Service Trust Co (Jersey) Ltd*[35], which has refined the earlier test in *Attorney General of Belize v Belize Telecom Ltd.*[36] and made a clearer distinction between contract interpretation and the implication of terms. That decision confirmed that their terms could be implied based on either the express terms, commercial common sense and the facts known to both parties at the time the contract was made or because the law implies certain terms into certain classes of relationship (for example in the case of the terms implied into almost all construction contracts under the Housing Grants, Construction and Regeneration Act 1996). The implication of good faith obligations falls under the former limb.

That approach is also in line with the series of cases on contract interpretation shifting the emphasis from the underlying commercial rationale to the literal meaning, such as *Arnold v Britton*[37]. As Beatson LJ commented on *Yam Seng* in *Globe Motors Inc. v TRW Lucas Verity Electric Steering Ltd*[38], the implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permitted it but it was not a special rule of the interpretation for that type of contract. Interestingly, another way of approaching this issue was suggested by Harrison, who in the context of contract interpretation

30 [2019] EWHC 2322 (Ch), paragraph 202.

31 [2020] EWHC 41 (Ch) paragraphs 80–98. See also *Drive (Edgware) Ltd v S&T (UK) Ltd* [2019] EWHC 3139 (TCC), at paragraph 43 where an argument based on a fair dealing team working clause was rejected.

32 This is in line with Fraser J's statement in *Bates* that while none of the indicators he listed was determinative, the first indicator was an exception, because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. The same approach was taken in *Wales v CBRE Managed Services Ltd* [2020] EWHC 16 (Comm) where the judge held there was no basis for implying a good faith duty into an agreement an independent financial adviser had with a pension scheme and a pension provider.

33 [2020] EWHC 58 (Comm) at paragraphs 44-56.

34 In *General Nutrition Investment Company v Holland and Barrett* [2017] EWHC 746 (Ch) Mr Justice Warren refused to find an implied duty of good faith because the contract had no need for communications to operate effectively so it was not a relational contract.

35 [2015] UKSC 72.

36 [2009] UKPC 10.

37 [2015] UKSC 36.

38 [2016] EWCA Civ 396 at paragraph 68.

suggested good faith could deal with the inevitable ambiguities or gaps that can exist in any contract, but also serving as a compass and providing guidance on the basis that responsibility will broadly be based on power and access to relevant information[39].

Some of these decisions on relational contracts were considered in Professor Hugh Collins' paper "*Is a relational contract a legal concept?*"[40] in which he suggested that the building blocks for relational contracts as a legal concept were in place, allowing for what he described as a loose legal concept as opposed to particular rules. This would mean that courts take a more contextual approach towards interpretation, giving equal weight to the express wording and the need to support the long-term payoffs for the business or preserve the necessary trust in the relationship. He thought that this would usually be achieved by implying terms, but these would not necessarily include a requirement of good faith in performance.

The issue is that while relational contracting has been proposed as a contractual theory, it is now being applied by the courts without always considering the academic basis for proposing such a concept. MacNeill, who introduced the term relational contracts in the late 70s, sought to promote a system that provides the flexibility for complex and long-term contracts that does not exist under classical contracts that try to address each eventuality. In his view this would lead to a very different structure and as he put it[41]:

> "Somewhere along the line of increasing duration and complexity, trying to force changes into a pattern of original consent becomes both too difficult and too unrewarding to justify the effort, and the contractual relation escapes the bounds of the neoclassical system. That system is replaced by very different adjustment processes of an ongoing-administrative kind in which discreteness and presentation becomes merely two of the factors of decision, not the theoretical touchstones. Moreover, the substantive relation of change to the status quo has now altered from what happens in some kind of market external to the contract to what can be achieved through the political and social processes of the relation, internal and external. This includes internal and external dispute-resolution structures. At this point, the relation has become a minisocierty with a vast array of norms beyond the norms centered on exchange and its immediate process".

The challenge is to translate such an aspiration into a practical concept which gives rise to certain and enforceable obligations. It is clear that the use of a term relational contract on its own and referring to the issues that arise with long term complex contracts do not provide an easy answer to how collaborative contracts are viewed from a legal perspective in the context of specific circumstances.

In 2003, McInnis considered in detail the NEC form of contract and pointed out that, as it operated at cross purposes to traditional contract law, it must be seen as operating on a different theoretical basis, as a relational contract which operated on the basis of cooperation, drawing on the notions of good faith and fairness[42]. More recently, Professor David Mosey[43] considered relational contracts in the context of what he described as 'classical contracts' such as a contract for the purchase of building materials and a 'neo-classical contract' which involves a more complex transaction where it is not possible to provide for all future contingencies, such as a contract for complex construction works. He identified the risk of uncertainty which makes contractual structures vulnerable but has proposed that where the parties agree to utilise machinery set out in the contract itself in order to arrive at more complete information, then their collaborative contract should not be opened to challenge as unenforceable.

This would lead to the use of techniques resulting in what he describes as an enterprise contract. This is a contract that includes machinery for a joint activity that governs the collection and development of information and limits negotiation, to deal with the evolving scope of works. This would go beyond the

39 Reziya Harrison and Christian E.C. Jansen, "Good faith in construction law: the inaugural King's College construction law", *Construction Law Journal* 15(5), (1999): 346-373. In the same paper, Jansen criticises the European approach to good faith and suggested that a general duty of good faith should not be part of a harmonised European law of contract.

40 Hugh Collins, "*Is a relational contract a legal concept?*", *Contracts in Commercial Law* edited by Simone Degeling, James Edelman and James Goudkamp (Thomson Reuters, 2016).

41 Ian MacNeil, "Contracts Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law" *Alliance Contracting Electronic Law Journal* Vol. 72, Nº 6 (1977-1978)

42 Arthur McInnis, "The New Engineering Contract: Relational Contracting, Good Faith and Cooperation Part 1" *International construction law review* 128 (2003) and Arthur McInnis, "The New Engineering Contract: Relational Contracting, Good Faith and Cooperation Part 2" *International construction law review* 290 (2003)

43 See David Mosey, Collaborative Construction Procurement and Improved Value (UK: Wiley, 2019) and David Mosey and Shy Jackson "Good Faith and Relational Contracting – Do Enterprise Contracts Offer a Way Through the Woods?" *Society of Construction Law p*aper D228, (March ,2020)

reactive adaptations of a neo-classical contract and by providing for a brief and a timetable of actions, this would be more precise than the open-ended goals and objectives of a relational contract.

In the UK, Project 13 was set up as an industry-led response to infrastructure delivery models that have failed, by developing a new business model based on an enterprise. This would be different from traditional transactional arrangements and will boost certainty and productivity in delivery, improve whole life outcomes in operation and support a more sustainable, innovative, highly skilled industry[44]. This initiative was set up in 2018 and it is too early to judge whether it will achieve its goals, but it is a clear signal of the desire to find a better contractual model that does not suffer from the problems besieging traditional contractual models in construction. That is however part of ongoing and existing efforts to use more collaborative contracts in construction and it is worth looking as the interaction between the more general principle of good faith and the specific contracts that are being used for the construction projects.

4. The use of collaborative contracts in the construction industry

As noted above, whether a duty of good faith should be implied is a very different question from how the courts should enforce an express duty of good faith that the parties choose to include in the contracts. This is directly relevant in England, where over the last few decades there has been a shift in the construction industry towards the use of collaborative contracts driven by the government and other major public bodies[45].

This led to the widespread use of forms such as the NEC standard form of contract[46], the ACA Standard Form of Contract for Project Partnering (PPC 2000)[47] and the JCT Constructing Excellence Contract 2016[48]. While the drafters of these forms have not always used the term good faith, mindful of the judicial approach to this term, words which have a similar effect have been used and the courts have treated such clauses in the same way as if they had expressly referred to good faith. Nonetheless, it has been suggested that while the courts may be reluctant to enforce good faith obligations, the obligation of mutual trust and cooperation in the NEC form of contract, and its overall collaborative nature, can be used as a framework in which to interpret and apply the concept of good faith[49].

In 2017, NEC published a new standard form alliancing contract for consultation and a new Framework Alliancing Contract (FAC-1) was also published. Professor Mosey described the FAC-1 form as providing collaborative machinery and governance that goes beyond a relational contract and has highlighted the government's support for collaborative contracting, aimed at delivering efficiencies and cost savings[50].

This is becoming more relevant in an international context, as can be seen from the introduction in 2017 of the international standard ISO44001 for collaborative working, which sets out the requirements for the effective identification, development and management of collaborative business relationships within or between organizations. It is stated to apply to the full range of private and public organizations, from large international companies and government bodies to smaller business and non-profit organizations.

From a legal perspective, this means that in the construction industry contracts are often used which contain express terms which refer to good faith or impose similar obligations and that try to create a collaborative framework which is not solely based on express contractual provisions. This has led to the courts having to look at how such obligations operate in practice and in the context of construction operations. This is therefore quite different from the cases above that consider good faith in a variety of commercial arrangements, sometimes focusing on whether such a term should be implied.

An early example is the decision over 20 years ago in *Birse Construction Limited v St. David Limited*[51]. The issues in this case revolved around whether there was a binding contract between the parties but it was

44 See Project 13, acces in http://www.p13.org.uk

45 See Sir Michael Latham, Constructing the Team, (London: HMSO,1994). https://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf and Sir John Egan, Report Rethinking Construction, (1998). https://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf

46 *New Engineering Contract*, published by Thomas Telford Limited

47 *ACA Standard Form of Contract for Project Partnering* (PPC 2000) published by the Association of Consulting Architects

48 JCT Constructing Excellence Contract 2016, published by Sweet & Maxwell, launched in 2007

49 David S. Christie, "How can the use of 'Mutual Trust and Collaboration' in the NEC Suite of Contracts Help Collaboration: *International construction law review 93 (2017)*

50 Davis Mosey, "Improving Value Through the FAC-1 Framework Alliance Contract", *Society of Construction Law* paper D209, (November, 2017). For the position in Australia, see Andrew Chew "Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services in Australia – An Overview of the Legal Framework" *International construction law review* (2004): 319, who discusses how an express duty of good faith would apply in an alliancing contract.

51 [1999] BLR 194.

clear that the parties had intended to enter into an alliancing arrangement based on the JCT 1980 form of contract. Lloyd J observed as follows:

> "The terms of that [partnership charter], though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured. If Mr Heath had thought that Mr Goff had agreed to something that he ought not to have accepted Mr Heath would have said so, for that would be consistent with an expression of "mutual co-operation and trust" and a relationship which was intended "to promote an environment of trust, integrity, honesty and openness" and "to promote clear and effective communication"."

The suggestion that a non-binding charter has the effect of requiring a party to be open with the other and point out where that other party may have made a mistake is in direct contrast to the view of commercial negotiation *in Walford v Miles* where short of misrepresentation, parties were only expected to act in their own interest. As pointed out by Colledge, it is not easy to predict how the courts will enforce good faith obligations in the context of partnering contracts and whether it would extend beyond merely honesty and fair dealing, but parties will expect more than is covered by traditional contracting and the same reasoning underlies this decision[52].

Working together openly and collaboratively should not be a controversial concept in construction as it may be in other sectors, but in *Willmott Dixon Housing Ltd v Newlon Housing Trust*[53] this was extended to cover dispute resolution where the contract was PPC 2000. Here the contractor commenced two adjudications in front of the same adjudicator but there was some confusion as to the service of the referrals. This was addressed during the course of the adjudication and noted in the decision, but the employer later sought to resist enforcement of the adjudicator's decision by relying on this issue.

This is the type of argument that rarely succeeds in the Technology and Construction Court (TCC) but Ramsey J did not just address the specific arguments about timely service of the referrals but also made the point that the parties had agreed to use the standard form of project partnering contract, including the agreement to work in mutual cooperation, and that this obligation also included performing the problem-solving and dispute-avoidance or resolution provisions, including the adjudication process. The party that failed to contact the other to confirm the position with regard to the referral document was in breach of its obligation to work in mutual cooperation and could not therefore rely on a failure to receive the referral document which was due to its own breach of contract.

This decision is interesting, as it applies the general partnering obligation not only to the performance of the contractual obligations relating directly to the construction project, but also to the obligations relating to the dispute resolution process and diverges even more from the *Walford v Miles* view of how parties should behave in an adversarial context. This approach however is consistent with adjudication being a contractual process and part of the dispute resolution mechanism agreed by the parties, so there is no reason to apply obligations related to dispute resolution differently from other obligations which are part of the construction contract.

A similar issue arose in *Mears Ltd v Shoreline Housing Partnership Ltd*[54], which concerned the NEC3 Term Service Contract. Having agreed and executed an Option C version (target cost with price list), both parties proceeded to operate the contract on a different basis (an agreed schedule of rates). The employer then sought to revert to the terms of the executed contract and ignore the way the parties conducted themselves. The contractor argued that there was a cause of action based on the trust and partnership language used in the NEC3 form of contract and clause 10.1. The contractor claimed that this resulted in an implied term that a party would not take advantage of the other party due to a departure from the strict terms of the contract, when it was aware of the departure, and without warning and letting the other party have an opportunity to change.

The judge rejected the employer's claim, but on the basis of estoppel by convention. With reference to clause 10.1, the judge stated that:

> "However, I am, further, not satisfied that there would be any such implied term or that the obligation to act in a spirit of mutual trust and cooperation or even in a "partnering way"

52 Barbara Colledge, "Obligations of Good Faith in Partnering of UK Construction Projects" *International construction law review* (2005):175

53 *Willmott Dixon Housing Ltd v Newlon Housing Trust* [2013] EWHC 798 (TCC).

54 [2015] EWHC 1396 (TCC) at paragraph 70.

would prevent either party from relying on any express terms of the contract freely entered into by each party"[55].

This application of good faith however may not extend more widely where a dispute takes place outside the contractual procedures. That type of situation came up in *Costain Ltd v Tarmac Holdings Ltd*[56] where there was an issue as to whether a claim had to be brought in court or whether there was an arbitration clause. The claimant argued that the effect of clause 10.1 of the NEC Supply Contract standard form, which requires the parties to act in a spirit of mutual trust and cooperation, meant the other party should have been open about its position as to which was the applicable tribunal and should have sought to reach agreement.

Mr Justice Coulson (as he then was) agreed with a statement in another case[57] to the effect that good faith was a form of contractual duty which requires the obligor to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting, he also agreed with Keating on NEC which refers to not exploiting the other party. He however went on to hold that in this case there was no breach of clause 10.1 and observed that he was a "(…) *little uneasy about a more general obligation to act 'fairly'; that is a difficult obligation to police because it is so subjective*".[58]

This was also the approach taken in *TSG Building Services Plc v South Anglia Housing Ltd,* which also addressed the interaction between an express good faith clause and the specific contractual right to terminate the contract. The contract was based on the ACA standard form of contract for term partnering (TPC 2005, amended 2008) and one of the issues was whether the right to terminate under clause 13.3 of the contract had to be effected in good faith, or at least reasonably. Akenhead J held that, properly construed, clause 1.1, which required the partnering team to "(…) work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme (…)", did not require South Anglia to act reasonably in terminating under clause 13.3. In his view, this clause entitled termination for any, or even no reason. In addition, by including this clause, there was no basis for implying a separate good faith duty.

The Court clearly felt that having provided a clear and unqualified right of termination, the parties did not intend it to be affected by the general partnering obligation[59].

A good example of how a good faith duty can be applied in line with the other contractual provisos and to support the principles behind collaborative contracts can be found in the two decisions which came out of a dispute under the NEC form of contract in relation to the carrying out of an asbestos survey.

In the first decision, in *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd*[60] the Northern Ireland Court of Appeal considered the interpretation of clause 61.1 of the NEC3 Professional Services Contract and suggested that interpreting that clause had to be done in the context of clause 10.1. In the second decision in the same dispute,[61] the Court looked at a party's refusal to provide relevant documents and commented that such refusal was " entirely antipathetic to a spirit of mutual trust and co-operation. Further clauses in the contract such as Clause 15 reinforce that spirit." Both decisions rely on clause 10.1, not a free-standing obligation but as a principle that supports the more specific obligations

Considering the cases above, it is difficult to draw a single conclusion that will provide guidance on how the courts will treat good faith or collaborative contracts. It is trite to say that this will depend on the facts in each case, but that is the nature of such disputes. What seems clear is that at least some judges feel comfortable relying on such clauses and feel they give rise to tangible obligations. All the more so when such clauses support the other more specific obligations that can be found and are used to reinforce a decision. At the same time, the courts have made it clear that good faith or collaboration is unlikely to cut across or be seen as qualifying other express obligations and some judges are more reluctant to accept that good faith clauses can lead to enforceable obligations.

55 Similarly, an argument based on good faith was rejected in *ING v Ros Roca* [2011] EWCA Civ 353 at paragraph 92 where the Court of Appeal relied in estoppel to sanction a failure to disclose significant information but observed that "*Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion*".

56 [2017] EWHC 319 (TCC) at paragraph 123.

57 *F & C Alternative Investments (Holdings) Limited v Barthelemey (Nos. 2 and 3)* [2011] EWHC 1731 (Ch) referring to Macquarie International Health Clinic PTY Limited v South West Area Health Service [2010] NSWCA 268.

58 [2017] EWHC 319 (TCC) at paragraphs 122–123.

59 See also *Ilkerler Otomotiv & Anor v Perkins Engines Company Ltd* [2017] EWCA Civ 183 at paragraph 29 where the Court of Appeal noted that Leggatt LJ's comments in *Yam Seng* about the requirement for communications and cooperation did not apply to termination.

60 *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2014] NICA 27 at paragraph 29.

61 *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited* [2017] NIQB 43 at paragraph 43.

Also, in the context of the construction industry, Private Finance Initiative (PFI) contracts would appear to fall within the definition of relational contract, as long term contracts that require cooperation and often include good faith clauses. This was considered *in Portsmouth City Council v Ensign Highways Ltd*[62] which concerned a long term PFI contract for the maintenance and operation of the Council's highway network. In the usual way, the agreement provided for the award of service points against breaches of the agreement and the council would award a number of serviced points against defined default events. This included a range and maximum event value. After a few years, cuts were made to the Council's funding and it realised the contract would become unaffordable.

It appears that the Council then engaged in a strategy of awarding a high number of service points, refusing to communicate, finding breaches which were difficult to remedy and storing points so Ensign could be ambushed with a large number of service points at once. Ensign referred the dispute about the service points to expert determination and it was found that the Council acted in bad faith, without mutual cooperation and unfairly, but that Ensign's performance was not always as it should have been.

In the court proceedings, Edward-Stuart J reviewed clause 44 of the contract which was concerned with best value and stated that the parties "(…*) shall deal fairly, in good faith and in mutual co-operation with one another and with Interested Parties*". The judge, however, stated that he had some difficulty with a term that required fairness or impartiality and observed that a duty to act fairly when awarding service points might be taken as introducing wider considerations beyond the circumstances of the breach. He also thought such words created some uncertainty or could provide a scope for a dispute. His formulation of the term was based on the authorities cited in *Mid Essex* in connection with discretion, leading to the wording "*act honestly and on proper grounds and not in a manner that is arbitrary, irrational or capricious* ".

Lord Justice Jackson considered similar issues in *Amey Birmingham Highways Ltd v Birmingham City Council*[63] in the context of a 25 year PFI project. He observed that such a contract may be classified as a relational contract but declined to consider the matter further, limiting his views to the following comment:

> "Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain."

The nature of PFI contracts was also considered recently in *Essex County Council v UBB Waste (Essex) Ltd*[64] where the court considered an argument for an implied duty of good faith. The judge held that the 25-year PFI contract in that case was a paradigm example of a relational contract in which the law implies a duty of good faith. He went on to hold that whether a party has not acted in good faith is an objective test and made the point that dishonest conduct will be a breach of the duty of good faith, but dishonesty is not of itself a necessary ingredient of an allegation of breach and that the question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people. On the facts of that case, there was no breach of a good faith obligation.

The above cases demonstrate that in the construction industry there have been various attempts to create collaborative contracts, which raise the very same issues that good faith raises in the context of other commercial contracts. What seems clear is that the mere inclusion of a good faith obligation, whether as an express term or an implied term, does not ensure that parties behave in a more collaborative manner. Even in PFI contracts, which should be seen as the paradigm of a relational contract, the application of good faith is far from straightforward. Including such clauses is useful and reinforces the need for collaborative behaviours. In any event, what is yet to be provided is sufficiently clear guidance as to how good faith obligations apply in practice and this may well be an impossible task and it will not be possible to provide the certainty that lawyers, and client, desire. Having said that, the level of certainty should increase as more matters come before the courts and as more thought is given to the likely effect of such clauses and in what circumstances they may have a practical impact.

5. Good faith in practice

Part of the difficulty in identifying how good faith obligations operate is that it is not easy to identify what is the relevant test, especially as the courts have used similar but not entirely consistent terms.

62 [2015] EWHC 1969 (TCC).
63 [2018] EWCA Civ 264 at paragraphs 92 and 93.
64 [2020] EWHC 1581 (TCC).

In Berkeley Community Villages Ltd v Pullen[65], the judge suggested that good faith meant an obligation to observe reasonable commercial standards of fair dealings in relation to contractual obligations, saying this also required faithfulness to the agreed common purpose and consistency with the justifiable expectations of the claimant. In Gold Group Properties Ltd v BDW Trading Ltd the judge observed that good faith "does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract". In CPC Group Ltd v Qatari Diar Real Estate Investment Co[66] the judge observed:

> "Thus, it seems to me that the content of the obligation of utmost good faith in the SPA was to adhere to the spirit of the contract (…) to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties."

In the *Bates* decision, the obligation was described as requiring the parties to "(…) *refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people*". The issues to be decided appear to be as follows:

1. Is it conduct that reasonable and honest people would regard as lacking fidelity to the parties' bargain or "commercially unacceptable"?

2. Did the parties observe reasonable commercial standards of fair dealing?

3. Is a party improperly exploiting the other party?

4. Are parties having greater candour and cooperation and greater regard for each other's interests than ordinary commercial parties?

5. Is it conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people?

These attempts by the courts to define the scope of a good faith duty serve to highlight the uncertainty with such a term when considered by a traditional English lawyer. If the emphasis is on certainty of terms with very well-defined obligations, it is easy to see why a more nebulous obligation which requires a subjective consideration of a party's conduct is seen as presenting a risk to a party's ability to enforce an agreed bargain. For a practising lawyer having to advise a client, the wider academic considerations are less relevant when the aim is to achieve certainty in a given set of circumstances.

For that reason, a number of factual scenarios are considered below in order to identify how the general principles may apply in practice. The scenarios have not been selected for any particular reason and are meant to represent some of the typical situations that come up in construction projects. No doubt each reader will have his experience and can identify other scenarios that can be used in a similar way, but it is hoped that these provide a useful starting point and that readers will also bring in their own knowledge of the law of good faith and consider how their own legal systems would address such situations.

5.1. Scenario 1

An unexpected snowstorm hits the construction site in mid-summer and the contractor does all he can to deal with it, keeping the employer fully informed. Once it is over, he notifies the claim relying on a clause which makes exceptionally adverse weather conditions an employer risk. The Employer responds and states that the claim has been rejected because the notice was 2 days late beyond the 28 days notification period and the hard copy notice was served on the wrong address (both of which are stated as conditions precedent), which means the contractor has no entitlement under the contract.

In this scenario, the risk event was neutral and not caused by either party's fault so there is no easy way to identify which party is better placed to bear this risk or may be seen as responsible for it, but the contractual allocation puts it on the employer. It is also clear that the employer did not suffer any prejudice due to the notice being late or served at the wrong address, as the employer was fully aware of what was happening on site. If the express terms of the contract are clear, however, the employer is correct in stating that the entitlement has been lost, but would such insistence on the strict wording of the contract where there is no real prejudice constitute breach of good faith?

65 [2007] EWHC 1330 (Ch).
66 [2010] EWHC 1535 (Ch).

Some would say the real cause of the lack of entitlement is the contractor's failure to comply with what are not onerous provisions which the contractor could have easily complied with. As noted in *Multiplex Constrictions (UK) Ltd v Honeywell Control Systems Ltd*[67], time bar provisions serve an important purpose. As noted in some of the judgments above, the courts are reluctant to let a general good faith obligation cut across an express obligation. To date, there do not appear to be any English law decisions that relieve a party of such an express obligation based on good faith[68].

5.2. Scenario 2

A main contractor invests substantial sums in an off-site manufacturing facility for tunnel segments, based on its past work and long-term relationship with the national rail authority, who are planning a high-speed rail project with lengthy tunnelling sections. The rail authority and the contractor enter into a framework agreement, but the rail authority then decides to get the segments from a cheaper overseas source, saying the agreement does not provide for a minimum number of orders.

Will the contractor be able to argue that such conduct by the rail authority, which resulted in a loss of the investment constitutes a breach of good faith under the framework agreement? A similar situation arose in *Baird Textile Holdings Ltd v Marks & Spencer Plc*[69]. This was a case where long-term supply arrangements were terminated and the supplier argued that if one party intentionally induces a particular belief in another, on which the other relies, such conduct attracts legal responsibility. There was an attempt to argue in that case that the contract was relational, but this was rejected, and the primary case was based on estoppel, which is often used to deal with such issues. On the facts of the case however, the contractual terms were upheld, and the claim based on estoppel failed, demonstrating that contractual terms will be upheld even when they may allow conduct which some may see as a breach of good faith.

5.3. Scenario 3

There are significant cost overruns on a processing plant and the contractor has submitted several claims for a substantial increase in the costs. The employer is concerned at how the engineer is managing such claims and decides that the best way to avoid cost overspend is to refuse payment and see if the contractor becomes insolvent. The employer replaces the engineer with one of his employees who then refuses to certify any other payments, resulting in the contractor becoming insolvent.

The refusal to make payments which are known to be due is something that sometimes occurs when an employer seeks a commercial advantage or as part of an overall strategy. This is not conduct that can be justified but in practice sometimes has to be tolerated due to the lack of an effective remedy. This was a situation that arose in the recent case of *ICI v Merit Merrell*[70] where the works were governed by the NEC form of contract and the Employer replaced the project manager with an employee of the holding company who then refused to certify a payment of over £7m. It became clear at the trial that at least some of the employer's directors were in favour of a strategy of deliberate non-payment in order to avoid cost over runs. The case was decided on the merits and it was held that the contractor was entitled to the payment but the employer's conduct in replacing the project manager with a person who was not acting as an independent certifier was criticised by the court.

It was not argued in that case that there was a breach of good faith, as the substantive issue was whether there was an entitlement to payments due to the substantial variations to the works. This serves to show that a good faith argument may not add much to the substantive dispute as to whether there is a payment due. Indeed, it is rare for a good faith argument to be raised on its own and it will often only be raised in support of the substantive claim.

5.4. Scenario 4

An employer has a clause allowing termination for no cost if the price of overseas steel increases by more than 80%. In the first year the parties agreed to source all steel from a local supplier but two years later the

67 [2007] EWHC 447 (TCC). The same strict approach to enforcement of time bar clauses was recently followed by the Hong Kong Court of Appeal in *Maeda Kensetsu Kogyo Kabushiki Kaisha (aka Maeda Corporation) v Bauer Hong Kong Ltd* [2020] HKA 830

68 See Patrick M M Lane SC, "The Tension between the Application of Good Faith and Pacta Sunt Servanda" *International construction law review (2020):* 294 who considers the position in South Africa and suggests that the impact of recent decisions by the Constitutional Court could affect how time bar clauses are enforced.

69 [2001] EWCA Civ 274.

70 [2018] EWHC 1577 (TCC).

price of overseas steel doubles. The employer decides to rely on this clause and terminate the contract as he can get the works done for less.

This scenario raised the question of whether a strict application of a contractual provision which ignores its intended purpose can be seen as a breach of good faith. It is clear here that the termination clause was intended to protect the employer against the risk of an increase in the price of overseas steel and not to allow a termination for different commercial reasons, yet the employer is acting within the strict wording of the clause. As noted above, there are several decisions where it was held that a right to terminate was not qualified by express or implied good faith provisions but in this scenario, it is clear the termination right is not used in the way the parties intended.

5.5. Scenario 5

The contract provides for payment based on the actual costs of repetitive maintenance works but both parties decide to agree a schedule of rates and use that as the basis for payment, as it is more practical and easier to operate in practice. The schedule of rates is used for 2 years by both parties but the employer than claims that the contractor has been overpaid and seeks recovery based on the contractual terms which refer to actual costs.

This scenario highlights the risk of departing from the contractual provisions without formally amending the contract, but that is not an uncommon situation. The issue is then whether the employer can ignore the course of conduct which served both parties and insist on the original contractual terms being enforced? Putting aside arguments as to whether the contract has in fact been amended by conduct, a similar situation was considered in *Mears Ltd v Shoreline Housing Partnership Ltd*[71], referred to above. As the works were provided under the NEC form of contract, there was an argument based on a breach of good faith. That argument failed but the argument based on estoppel succeeded, providing a good example of how English law can effectively manage such situations. The doctrine of estoppel, however, has its limitations and can only be used in certain circumstances. It cannot therefore be seen as an alternative to a doctrine based on good faith.

5.6. Scenario 6

A large supermarket chain is facing various claims from one of its main contractors, with whom it has worked for many years in building many of its stores. Indeed, the majority of the contractor's business relies on store construction for this chain. The supermarket chain then tells the contactor that unless it gives up its claims, it will never appoint it for any other job.

This scenario reflects the common position of a large employer who can exert commercial pressure on smaller suppliers who are dependent on it for work. The issue is whether such pressure is legitimate in the context of a long-term relationship and can it be seen as breach of good faith when commercial pressure is applied in that way. The issue of what commercial pressure is legitimate was considered in a similar context by the Court of Appeal in *Times Travel v Pakistan International Airlines*[72] which looked at the test for economic duress, another doctrine that can be used to address issues that may otherwise rely on good faith.

In that case the claimants were a small family operated travel agency, catering mostly to the Pakistani community. Under the rules of the International Air Transport Association, they were required to enter into a standard agreement with the Pakistan International Airlines Corporation (PIAC) and the claimants argued that they had agreed to give up claims against PIAC for old commissions and entered into new agreement due to the threat of termination. In the High Court it was held that the pressure from PIAC was illegitimate and that as a result the new agreement could be rescinded.

That decision was approved and followed in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent*[73] where the court suggested that a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand. The Court of Appeal however reversed the first instance decision in *Times Travel* and was more influenced by the need to ensure the enforceability of contracts validly made, which it did not think should be affected by factors such as inequality of bargaining power or the exploitation of a monopoly position.

71 [2015] EWHC 1396 (TCC).
72 [2019] EWCA Civ 828.
73 [2018] EWHC 333 (Comm) at paragraphs 167 to 176.

The scenarios described above are set out in brief terms and there is no doubt that other factual circumstances will affect how such conduct is viewed, but it is hoped that they are effective in demonstrating the tensions that can exist between the express contractual terms and the underlying commercial relationship which is often more extensive and complex than what the contractual terms provide for. Each reader may well apply the legal principles they are familiar with to identify the legal outcome but, whether they are legally relevant or not, these scenarios encourage the reader to form a view on the morality of the actions concerned, which naturally brings in a large degree of subjectivity and may well depend on the reader's view of the commercial world and how business should be conducted[74].

This was raised by Mr Justice Leggatt in his 2016 talk[75] when he referred to the tendency of lawyers to see commerce as a Darwinian struggle where each party tries to gain at the expense of the other, an adversarial activity and a 'zero sum game'.

This was also recognised by Arden LJ in her 2013 paper[76], which set out some of the traditional objections to good faith clauses but suggested that while certainty is important, it should not always be upheld when other principles should be preferred. In her view, English law was developing in a way that could accommodate the concept of good faith and could give English law more flexibility and make it more attractive in the global market for commercial law. She observed as follows:

> "As I see it, there could also be economic advantages in providing a more appropriate structure for co-operative arrangements. It would lead to stability in these arrangements and they may produce costs benefits as well as more secure employment. Our relatively new statutory codification of directors' duties requires directors to have regard to the long-term consequences of their actions. This is some confirmation of the economic desirability of long-termism. The new principle was called "enlightened self-interest" to replace what was previously seen as the naked self-interest of companies. Walford v Miles was a case where great value was set on the principle of contract law of freedom to act in accordance with naked self-interest."

Similar views were expressed by Chief Justice Allsop, a judge of the Federal Court of Australia, who stated as follows[77]:

> "The proper balance of values and norms in the fabric of the law and the creation of certainty in the law must also recognise the requirement that principle and rule conform to moral standards as the gauge of the law's flexibility and as its avenue for growth, but without confounding law with the suspension of principle and rule by the drift into a void of sentiment and personal intuitive benevolence, being the antithesis of law as the exercise of personal will."

Putting it in simple terms, the tension is between, on the one hand, the traditional English approach that emphasises the certainty of the bargain and is reluctant to engage in considering subjective issues such as good faith or commercial morality, and, on the other hand, the view that the risk of uncertainty is outweighed by the benefits of recognising that a commercial relationship is not based on the contract alone and that collaborative contracts must have some degree of enforceability and recognise that both parties benefit when their interests are aligned.

6. Conclusions

The way good faith is being treated by the English courts makes it clear that there is no revolution, in a great number of cases the reluctance to recognise good faith is maintained and the emphasis remains on the application of the express contractual terms. But that is not to say that the position has remained static, the earlier decision in *Yam Seng* and the more recent decision in *Bates* demonstrate that the traditional hostility to the concept of good faith is much reduced and that there is a growing acceptance that, at least in certain circumstances, English law will recognise and enforce obligations of good faith. Whether this trend will gather force and develop remains to be seen but it is clear that English law has evolved from the position stated in *Walford v Miles* and some of the earlier decisions.

74 See Brian Mason, Good Faith Clauses in Construction Contracts: Fine Sentiments in Search of Substance [2011] *International construction law review* 5, who also sought to identify whether good faith will have practical implications by looking at specific situations and concluded that the impact would be negligible but that good faith could catalyse the development of English law.

75 Contractual duties of good faith, Lecture to the Commercial Bar Association, 18 October 2016.

76 Coming to Terms with Good Faith, Singapore Academy of Law, 26 April 2013.

77 Allsop, Justice James "Conscience, Fair Dealing and Commerce – Parliaments and the Courts" *FedJSchol* (2015): 17.

In his recent paper 'Winners, Losers and a Coda on Good Faith'[78] Sir Rupert Jackson provided a different perspective on this issue and suggested that the increasing recourse by judges to 'good faith' was influenced by common lawyers and civil lawyers who work together in international arbitration and that the divide between the traditional English approach and the calls for recognition of good faith was a distinction without a difference as both approaches eventually lead to the same result. This may well be the case, and this is a pragmatic observation that is helpful to the practicing lawyer who must advise clients on how such legal principles apply. It reflects the fact that, as highlighted in *Interfoto*, English law has developed different ways of dealing with what would be addressed in other jurisdictions by relying on good faith. The difficulty is that there is still a great degree of uncertainty as to how English law will apply the developing approach to good faith and at present it does seem that this will have a practical impact in only a small number of cases.

It can therefore be said that English law has operated perfectly well without a concept of good faith and that any growing acceptance of such a concept should be kept within narrow bounds in order to achieve certainty and avoid having to determine disputes based on what some see as nebulous and subjective grounds. There is force in that view but, insofar as the construction sector is concerned, it appears to ignore what the industry sees as a better way to deliver projects and the growing use of collaborative contracts.

For that reason, it is necessary for lawyers to listen and understand why parties prefer to include such obligations and what they seek to achieve. Indeed, from a commercial perspective it may be seen as odd for one party to inform the other party that it is unwilling to agree to act in good faith, even if that gives rise to legal uncertainty. In law, like other industries, it is important to listen to what the users of the system want and then provide it to the extent that it is possible to do so. Accepting this desire to use contracts as a way to achieve better outcomes, going beyond lists of rights and obligations, can lead to English law evolving to recognise and encourage the types of behaviours that in certain circumstances, not in all contracts, parties are willing to accept as binding obligations. This is because such parties are willing to accept that their performance should be judged by a higher standard based on 'enlightened self-interest' and the wider commercial context, but with the contractual rights and obligations serving as a basis. It may well be that it is just a fortuitous coincidence that the development of relational contracts and good faith is taking place during the same period when there are increased efforts to use collaborative contracts in the construction industry, but both trends reflect a desire to find a new contracting model that can lead to better outcomes.

In the construction industry, like many other industries, there is now a strong push for innovation and trying to modernise in order to improve delivery. That applies equally to how contractual frameworks are set up and used and as noted above there are good enough reasons to argue that the modernisation and evolution of English law can be based on recognising that the existence of longer-term commercial relationships cannot be ignored by focusing on the short term direct contractual relationships. Indeed, Twombley[79] has argued for seeing obligations within relational contracts as fiduciary in nature, "(…) asserting that relational contract theory recognises the move from the classic imperative of personal self-interest to a more egalitarian and normative consensual social contract behaviour". This is especially relevant in the construction industry, where it is common to adversarial behaviours that have an adverse impact on how complex infrastructure projects are delivered. Good faith obligations on their own may not result in different behaviours and there are other measures that can be sued, but they can certainly support such an approach.

The traditional approach has been for each party to focus on its contractual and commercial position in order to ensure that it protects its position, often at the cost of the other party. That type of behaviour can carry on, but it is difficult to see why in this day and age parties should not try to see if there is a better way to deliver such complex projects which will lead to improved performance and mutually beneficial long-term relationships as well as an improved resolution of disputes. This will of course still require applying the contractual terms, but also recognising different norms of behaviour and the importance of the wider long term relationships. If such a change can be achieved, that would certainly be regarded as revolutionary. The legal principles that apply to good faith no doubt will continue to evolve in the next few years but that should not stop parties from using collaborative contracts and recognising that they need to be considered in a wider commercial context if they are to achieve better outcome.

78 Rupert Jackson, "Winners, Losers and a Coda on Good Faith', *Society of Construction Law p*aper D227 (March,2020). https://www.scl.org.uk/papers/winners-losers-coda-good-faith

79 Jessica Twombley, "Good Faith and Fiduciary Obligations in Alliance Contracts", *International construction law review* (2019): 558.

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