

***"Good Faith in Contractual Performance"***

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The Hon Justice Susan Kiefel AC  
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It has been observed<sup>1</sup> that because some legal systems regard good faith as vitally important to the modern law of contract this raises the question as to how other legal systems cope without it. The answer may be that they do not, at least not altogether. Aspects of good faith may be seen in the doctrines and remedies already provided by the common law and by equity. However, most common law systems refuse to accept an overarching principle of good faith in performance of contractual rights and duties as governing the exercise by parties to a contract of their rights under it or the carrying out of their obligations in accordance with it. In this respect they differ from legal systems in Europe and in the United States.

It is well known that good faith has its roots in Roman law and has been part of European legal culture for a long time. English law allowed recourse to notions of good faith and commercial expectations which were

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<sup>1</sup> Whittaker and Zimmermann, "Good Faith in European Contract Law: Surveying the Legal Landscape", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 7 at 13.

part of the early law merchant<sup>2</sup>. This may in part explain Lord Mansfield's statement in *Carter v Boehm*<sup>3</sup>, in 1766, that "[t]he 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." The context for Lord Mansfield's statement was a contract of insurance, which even today would remain subject to the requirement of utmost good faith both at common law and by statute.

It has been said that Lord Mansfield "believed in the importance of certainty in mercantile transactions ... but fairness, not certainty, was his lodestar for the general run of contract cases."<sup>4</sup> This was not the view which prevailed in 19th and early 20th century English law, which regarded the commercial need for certainty in contract law as a reason for rejecting requirements of good faith in performance. Other reasons may include notions of individual freedom in relation to the exercise of contractual rights and the pursuit of self-interest. These views were maintained by English law, as evidenced by statements such as "[t]here is

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<sup>2</sup> Goode, "The Concept of Good Faith in English Law", speech delivered at Centro di Studi e Ricerche di Diritto Comparato e Straniero, March 1992 at 3.

<sup>3</sup> (1766) 3 Burr 1905 at 1910 [97 ER 1162 at 1164].

<sup>4</sup> Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, (1992) vol 1 at 242.

no general doctrine of good faith in the English law of contract. The plaintiffs are free to act as they wish, provided they do not act in breach of a term of the contract"<sup>5</sup>, and "[a] person who has a right under a contract ... is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all."<sup>6</sup> However, the tide may be turning.

### A basis for good faith

In *First Energy (UK) Ltd v Hungarian International Bank Ltd*<sup>7</sup>, Lord

Justice Steyn said:

"A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. ... [I]f the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness."

It is the notion of good faith as fulfilling what the parties to a contract may be taken reasonably to expect which informs much of the current thinking

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<sup>5</sup> *James Spencer & Company Limited v Tame Valey Padding Company Limited* unreported, Court of Appeal, 8 April 1998 per Potter LJ.

<sup>6</sup> *Chapman v Honig* [1963] 2 QB 502 at 520 per Pearson LJ.

<sup>7</sup> [1993] 2 Lloyd's Rep 194 at 196.

about a good faith standard<sup>8</sup>. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*<sup>9</sup> Lord Bingham said that "[p]arties entering into a commercial contract ... will assume the honesty and good faith of the other; absent such an assumption they would not deal." And in *Yam Seng Pte Ltd v International Trade Corporation Ltd*<sup>10</sup> an expectation of honesty was described as a general norm in commercial dealings. More recently, in *Bhasin v Hrynew*<sup>11</sup> Cromwell J, delivering the judgment of the Supreme Court of Canada, said that good faith doctrine should be accepted because the common law is itself uncertain, the current approach to good faith performance lacks coherence and is out of step with the reasonable expectations of commercial parties to a contract.

#### Arguments to the contrary

The "traditional hostility" of English law to the doctrine of good faith is said to be explained, in part, by its preferred method, which is to proceed incrementally by fashioning particular solutions to particular

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<sup>8</sup> See, eg, Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing", (2000) 116 *Law Quarterly Review* 66 at 72.

<sup>9</sup> [2003] 2 Lloyd's Rep 61 at 68 [15].

<sup>10</sup> [2013] 1 All ER (Comm) 1321 at 1351 [135] per Leggatt J.

<sup>11</sup> [2014] 3 SCR 494 at 514 [32], 518 [41].

problems rather than enforcing broad, overarching principles<sup>12</sup>. This is not the approach taken in other common law systems, such as the United States and Canada, which have shown a willingness to apply broader principles in contract law. Since it is accepted that general legal principle or rules may evolve from a series of decisions in a particular area of the law over time, the question may be whether that point of evolution has now been reached in other common law jurisdictions.

Of course it should not be assumed that each common law system has developed in exactly the same way and to the same point in the evolution of the topic. As will shortly be discussed, English law has not developed the same doctrines as have other common law countries. And it has been suggested that Anglo-Australian law has developed in a way different from Canadian law. An example which is given is the law relating to the implication of terms, which has developed with a greater emphasis on specifics rather than identification of a genus expressed in wide terms<sup>13</sup>.

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<sup>12</sup> *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at 1348-1349 [123], referring to McKendrick, *Contract Law*, 9th ed (2011) at 221-222.

<sup>13</sup> *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 96 per Gummow J.

The fears most commonly expressed about the adoption of a doctrine of good faith is that it is inconsistent with the principle of freedom of contract and will create uncertainty in the law and for commercial dealings because its content is vague and subjective<sup>14</sup>, and it would permit ad hoc judicial moralism<sup>15</sup>. This is compared with the process by which intentions are imputed to the parties, which courts say is undertaken objectively.

Commentators on the famous good faith provision of the German *Civil Code* (the BGB), s 242, also express concerns about its use, but there is no suggestion that its application has led to uncertainty there<sup>16</sup> or in other legal systems which employ it. It is perhaps more likely to be regarded as flexible, rather than uncertain, if it is viewed as a standard rather than as a rule.

A premise often stated for the adoption of a requirement of good faith in contractual performance is that it is necessary to fill the gaps in the law. This directs attention to the field covered by the doctrines which

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<sup>14</sup> *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at 1349 [123].

<sup>15</sup> *Bhasin v Hrynew* [2014] 3 SCR 494 at 534 [79].

<sup>16</sup> Lücke, "Good Faith and Contractual Performance", in Finn (ed), *Essays on Contract*, (1987) 155 at 165-167.

have thus far been developed by the courts. This may raise the question whether an overarching principle of good faith is really necessary.

#### Where good faith has been adopted

A notable contrast to the movement in the 19th and early 20th centuries by the English common law away from the doctrine of good faith is the United States. Its courts maintained the connection to Lord Mansfield's approach. In 1918, in *Wigand v Bachmann-Bechtel Brewing Co*<sup>17</sup> it was said that "[e]very contract implies good faith and fair dealing between the parties to it." In the late 1960s, when the Uniform Commercial Code ("the UCC") was adopted and § 205 of the *Restatement of the Law Second, Contracts* was being drafted, there was a large body of case law which invoked the concept of good faith and used its terminology<sup>18</sup>.

Section 1-203 of the UCC contains the general provision for good faith in commercial contracts. Section 205 of the *Restatement* provides

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<sup>17</sup> 118 NE 618 (NY 1918) at 619.

<sup>18</sup> Summers, "The Conceptualisation of Good Faith in American Contract Law: A General Account", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 118 at 119.

more generally that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

One of the reasons given in *Bhasin v Hrynew*<sup>19</sup> for the adoption of a good faith doctrine is that Anglo-Canadian law is out of step not only with the civil law of Quebec, but also with most jurisdictions of Canada's trading partner, the United States. In that case, an agreement between C and B, who was one of C's retail dealers, was subject to an automatic renewal of the three year term unless one of the parties gave six months' notice to the contrary. H wanted to capture B's lucrative market and had encouraged C to force a merger of B and H's agencies. C appointed H to review C's retail dealers for compliance with securities laws, a task which required H to have access to B's confidential business records, to which B objected. C misled B by saying that H was under an obligation to treat the information confidentially. C did not answer B's enquiries about whether it was proposing a merger. When B continued to refuse H access to its business records, C gave notice of non-renewal. B lost the value of his business and most of his sales agents were solicited by H's agency. It was held that there was a general duty of honesty in contractual performance and C had not acted honestly in exercising the non-renewal

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<sup>19</sup> [2014] 3 SCR 494 at 514 [32].



clause<sup>20</sup>. Damages were awarded on the basis of what B's position would have been had C fulfilled its obligation of honesty<sup>21</sup>.

None of the Australian, New Zealand, Hong Kong or UK courts have embraced a good faith standard at final appeal court level. It is of interest to note that despite the civilian aspects of the law of Scotland, its courts have not adopted it either.

In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*<sup>22</sup>, the High Court of Australia noted that there had been no definitive statement on the existence of a good faith obligation in Australian contract law, but did not consider that case to be an appropriate vehicle for a discussion of the principle. More recently, in a case involving a contract of employment<sup>23</sup>, it was argued that there should be implied a duty of mutual trust and confidence, but this duty was treated as distinct from a duty of good faith more generally and it was not argued that the latter duty arose.

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<sup>20</sup> *Bhasin v Hrynew* [2014] 3 SCR 494 at 532 [73], 544 [103].

<sup>21</sup> *Bhasin v Hrynew* [2014] 3 SCR 494 at 545-546 [108].

<sup>22</sup> (2002) 240 CLR 45 at 63 [40]; [2002] HCA 5.

<sup>23</sup> *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; [2014] HCA 32.

Neither the Supreme Court of New Zealand nor the Court of Final Appeal of Hong Kong have considered good faith as a general rule applying to the performance of contracts. The Supreme Court of the United Kingdom has not pronounced upon the matter, although in *Walford v Miles*<sup>24</sup>, the House of Lords denied the existence of a duty of good faith in connection with negotiations.

The question of an acceptance of a general rule or standard of good faith has however received the attention of judges of lower courts.

In *Yam Seng*, Leggatt J surveyed the arguments for and against adoption and concluded<sup>25</sup> that there was nothing novel or foreign to English law in recognising an implied duty of good faith. In *Hyundai Engineering and Construction Co Ltd v Vigour Ltd*<sup>26</sup>, Reyes J of the Court of First Instance of Hong Kong considered that the parties to a contract were under an obligation of good faith to attempt to resolve a dispute through the agreed contractual process. In Australia, Priestley JA of the Court of Appeal of the Supreme Court of New South Wales in *Renard*

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<sup>24</sup> [1992] 2 AC 128.

<sup>25</sup> *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at 1353 [145].

<sup>26</sup> [2004] 3 HKLRD 1 at 40 [99].

*Constructions (ME) Pty Ltd v Minister for Public Works*<sup>27</sup>, considered that the law should imply an obligation of reasonableness, in the sense of a duty of good faith and fair dealing. His Honour may have spoken too soon in saying<sup>28</sup>, in 1992, that "[a]lthough this implication has not yet been accepted to the same extent in Australia ... there are many indications that the time may be fast approaching when the idea ... will gain explicit recognition in the same way as it has in Europe and in the United States." His Honour's approach has been applied in other decisions<sup>29</sup> but there is not unanimity about it<sup>30</sup>. In New Zealand, Thomas J, in his dissenting judgment in *Bobux Marketing Ltd v Raynor Marketing Ltd*<sup>31</sup>, considered that good faith, in the sense of loyalty to a promise, to be the latent premise of much of the law of contract and to be closely associated with notions of fairness, honesty and reasonableness already recognised by the law.

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<sup>27</sup> (1992) 26 NSWLR 234 at 268.

<sup>28</sup> (1992) 26 NSWLR 234 at 263-264.

<sup>29</sup> See, eg, *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [12]; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 at 566-567 [145]-[154]; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369.

<sup>30</sup> See, eg, *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 96-97; *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 at [134]-[136].

<sup>31</sup> [2002] 1 NZLR 506 at 515-516 [40]-[41].

Aspects of good faith present in some legal systems

Although the 19th century has been regarded as a time when English law turned its face against the good faith principle, it has been pointed out<sup>32</sup> that the notion of fraud at this time was very wide and that courts of law and of equity would provide remedies based upon that wide notion in relation to contractual performance. Nevertheless, as Bingham LJ said in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*<sup>33</sup>, "English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness." English law has developed doctrines such as frustration and economic duress, which relieve against the strictness of contracts, defences to actions for specific performance and injunctions and it provides relief against forfeiture and penalties. A review of some of these doctrines shows how aspects of good faith can be found in legal systems even outside its adoption as an overriding principle.

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<sup>32</sup> Whittaker and Zimmermann, "Good Faith in European Contract Law: Surveying the Legal Landscape", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) at 43-44.

<sup>33</sup> [1989] 1 QB 433 at 439.

In Canada, Australia and New Zealand, the doctrine of unconscionable bargains comes close to an overarching principle, albeit not one expressed to be based on good faith principles. It goes further than the doctrine of undue influence in its requirement that advantage not be taken of a person in an inferior bargaining position because they suffer from a special disadvantage. It is used to relieve a person from a bargain which has been procured in a way which is oppressive and unreasonable, because the person was suffering from some serious disability or disadvantage of which the other party knew or ought to have known. Thus, in Australia, a guarantee taken by a bank from a customer's parents who had limited English and an imperfect understanding of the nature of the guarantee and the risk to which they would be exposed, was set aside on the basis of this doctrine<sup>34</sup>.

Like good faith, unconscionability of bargain has been said by some to be vague or uncertain. Nevertheless, it has continued to be applied. Sir Anthony Mason<sup>35</sup>, a former Chief Justice of the High Court of Australia, observes that whilst it is true that unconscionability does not lend itself to precise definition and involves value judgments, guidance will

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<sup>34</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14.

<sup>35</sup> Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing", (2000) 116 *Law Quarterly Review* 66 at 89-90.

come from decisions dealing with particular situations. He suggests that "equity" and "good conscience" may develop into synonyms for "good faith" and "fair dealing".

In Australia, a representation or a mistaken assumption created with respect to present or future conduct will found an estoppel<sup>36</sup>. The basis for an estoppel is the prevention of an unjust departure from an assumption which has been created by the representor's conduct.

These doctrines, or extended doctrines, may be thought to reflect notions of fair dealing, which is a standard of good faith. However not all share this view. It has been suggested<sup>37</sup> that although notions of good conscience may play a part in some of these developments, "it requires a leap of faith to translate these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."

The courts also regulate, to an extent, the exercise of certain contractual powers. For example, they will not allow a power given to one party to be used in an arbitrary or capricious manner. In an article on

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<sup>36</sup> *Foran v Wight* (1989) 168 CLR 385 at 411-412, 435.

<sup>37</sup> *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 97 per Gummow J.

the topic of good faith, Sir Anthony Mason gives examples of Australian and Canadian cases which limit the power given by clauses in contracts for the sale of land which entitle a vendor to rescind the contract if the vendor is unable or unwilling to comply with, or remove, objections or requisitions made by a purchaser<sup>38</sup>.

The courts will imply certain terms, in order to give "business efficacy" to a contract, for example by requiring the parties to co-operate in order to achieve the objects of the contract, or so that one party can receive the benefit from it, or to secure its performance<sup>39</sup>. It may be said that in doing so the courts are giving effect to the unexpressed intentions of the parties, but the results often accord with those of other legal systems which employ the requirements of good faith principle<sup>40</sup>. And it may be observed that the courts are requiring performance by the contracting parties in a way which takes account of the interest of the other. This stands in contrast to claims that contract law recognises the right to act purely in self-interest.

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<sup>38</sup> Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing", (2000) 116 *Law Quarterly Review* 66 at 76 fn 56.

<sup>39</sup> *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607; [1979] HCA 51; *Dynamic Transport Ltd v OK Detailing Ltd* [1978] 2 SCR 1072 at 1083-1084.

<sup>40</sup> Whittaker and Zimmermann, "Good Faith in European Contract Law: Surveying the Legal Landscape", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 7 at 45-46.

The duty of a fiduciary requires the fiduciary to act in the best interests of the beneficiary at all times. More is therefore required of a fiduciary than a standard of good faith would require. The relevance of the imposition by the law of a fiduciary duty may be not so much in its likeness with good faith as in the number of persons in the commercial world who are subject to such a high standard – lawyers, agents, financial service providers, to name a few. It may at least suggest that a good faith standard in commercial dealings is not inappropriate. However, the courts in Australia have resisted applying a fiduciary duty more generally to commercial relationships<sup>41</sup>. On the other hand, courts in Canada have been more willing to do so<sup>42</sup>.

The point to be made about the development and use of other doctrines to ameliorate the harshness of contracts in their requirements of performance and the use made of contractual interpretation to produce normative results is that an acceptance of a more general conception of good faith is regarded by some as a natural progression. A question may be whether this is a sufficient basis for its acceptance.

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<sup>41</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64.

<sup>42</sup> *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.



### What is good faith?

In the United States, good faith is taken to be an overarching principle to be applied to each contract. In Canada, in *Bhasin v Hrynew*<sup>43</sup>, good faith is referred to as an organising principle. The notion that it operates as an organising principle, albeit one not openly articulated, accords with views expressed in Australia<sup>44</sup>. *Bhasin v Hrynew* however denies good faith the status of a free-standing rule. Rather, it is said to be a standard that underpins specific legal doctrines which may apply in different situations<sup>45</sup>. The notion that good faith is best expressed as a standard was the view of Priestley JA in *Renard*<sup>46</sup>.

Regardless of whether a requirement of good faith in the performance of contracts is regarded as a legal rule, an organising principle, a standard of conduct or a combination thereof, the question is what does it actually require? The difficulties of attributing a meaning or definitive content to good faith may have contributed to the reluctance of

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<sup>43</sup> [2014] 3 SCR 494 at 528-529 [62]-[64].

<sup>44</sup> *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 192 per Finn J.

<sup>45</sup> *Bhasin v Hrynew* [2014] 3 SCR 494 at 528 [64].

<sup>46</sup> (1992) 26 NSWLR 234 at 268.

courts in some legal systems to adopt it. In the United States, great controversy surrounds its meaning. In reality it may have many, depending upon the contractual setting and the act to be performed, or not performed.

A number of approaches to the question of its content have been suggested in the United States, where, as has been observed, good faith is sought to be maintained as an overarching principle. In these circumstances its definition perhaps assumes greater importance.

The commentary on § 205 of the *Restatement* relies partly on a conception of good faith as an "excluder" of bad faith. Professor Robert S Summers explains<sup>47</sup> that this involves identifying conduct which amounts to bad faith and then identifying the opposite. For example where a seller concealing a defect in what he is selling amounts to bad faith, good faith may be said to require full disclosure of material defects. Another conception of good faith performance<sup>48</sup> is when a party's discretion is

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<sup>47</sup> Summers, "The Conceptualisation of Good Faith in American Contract Law: A General Account", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law*, (2000) 118 at 125-129.

<sup>48</sup> Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", (1980) 94 *Harvard Law Review* 369, cited in Summers, "The Conceptualisation of Good Faith in American Contract Law: A General Account", in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000) 118 at 129-130.

exercised for any purpose within the reasonable contemplation of the parties at the time of formation, interpreted objectively. Yet another suggests that good faith is based upon fundamental notions of fairness and that its scope necessarily varies according to the nature of the agreement. The duty it encompasses may not only proscribe undesirable conduct, it may also require positive steps to be taken. The duty to co-operate is an example of the latter<sup>49</sup>.

An eminent comparative lawyer in Australia<sup>50</sup> suggests that good faith as loyalty – a steadfast true adherence to that which has been promised and agreed – may not be an unrealistic description. It accords with the meaning of the phrase in s 242 of the German BGB "Treu und Glauben". He asks: once the law takes the (larger) step of demanding performance of contractual promises, why should it not take the (smaller) step of requiring that promises be performed in good faith in order to fulfil expectations?

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<sup>49</sup> Farnsworth, *Farnsworth on Contracts*, 3rd ed (2004), vol 2 at 361-362.

<sup>50</sup> Lücke, "Good Faith and Contractual Performance", in Finn (ed), *Essays on Contract*, (1987) 155 at 162-163.

In *Bhasin v Hrynew*<sup>51</sup>, good faith is said to require parties to perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. A minimum requirement of acting honestly was stated by the High Court of Australia in *Meehan v Jones*<sup>52</sup>, but not as an aspect of good faith. The Court held that a contract for the sale of land that was subject to the purchaser obtaining satisfactory finance required the purchaser to act honestly in deciding whether or not he was satisfied.

The requirement of reasonableness was stated by Priestley JA in *Renard*. In that case it was said that the power given to a principal under a building contract to take over the whole or any part of the work, or to cancel the contract, if the contractor defaulted, must be exercised reasonably. In *Yam Seng*<sup>53</sup>, Leggatt J considered that the test of good faith is whether the conduct in question would be regarded as commercially unacceptable by reasonable people.

The following have been put forward as the obligations of good faith<sup>54</sup>:

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<sup>51</sup> [2014] 3 SCR 494 at 528 [63].

<sup>52</sup> (1982) 149 CLR 571; [1982] HCA 52.

<sup>53</sup> [2013] 1 All ER (Comm) 1321 at 1353 [144].

<sup>54</sup> Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing", (2000) 116 *Law Quarterly Review* 66 at 69; *Macquarie International Health*

- to act honestly;
- to act reasonably;
- to act with fidelity to the bargain;
- to act reasonably and with fair dealing having regard to the interests of the parties; and
- to co-operate in achieving the contractual objects.

How is good faith to be applied?

It is observed in *Bhasin v Hrynew*<sup>55</sup> that it is often unclear whether an obligation of good faith is being imposed as a matter of law, of implication, or of interpretation. Cromwell J did not suggest that the requirement of good faith as honesty, applied as a standard of conduct, necessarily reflected the parties' intentions. It was to be imposed as a doctrine despite those intentions, but nevertheless to give effect to their reasonable expectations. Yet in *Yam Seng*<sup>56</sup>, it is said that the content of the duty is established by a process of construction, the foundation for which is the presumed intention of the parties. Perhaps this is to say no

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*Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [12], referring to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 and following cases.

<sup>55</sup> [2014] 3 SCR 494 at 521-522 [48]-[49].

<sup>56</sup> [2013] 1 All ER (Comm) 1321 at 1350 [131].

more than it is an expectation of the parties, for Leggatt J in *Yam Seng* did not suggest that it gave rise to an implication by law, but rather in fact.

### Concluding observations

If good faith merely reflects the reasonable expectations of honest people and is to be applied as a matter of implication, the question arises as to whether a broad doctrine of good faith is really necessary. In the United States, one commentator has observed that "many of the uses to which the new concept of good faith is put today do not go beyond those to which the traditional techniques of interpretation and gap filling were traditionally put."<sup>57</sup> Lord Steyn, who has not spoken against its adoption, has observed that there is no need for English law to introduce a general duty of good faith so long as the courts approach contracts by reference to the reasonable expectations of the parties in accordance with the "pragmatic traditions" of English law<sup>58</sup>.

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<sup>57</sup> Farnsworth, *Farnsworth on Contracts*, 3rd ed (2004), vol 2 at 397 (footnotes omitted).

<sup>58</sup> Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men", (1997) 113 *Law Quarterly Review* 433 at 439.

Another observation may be made concerning the need for a general duty of good faith. It is that there are many doctrines which have been developed, and the process of construction has been used, by the courts to regulate contractual performance. One way of testing this may be to ask whether the decision in *Bhasin v Hrynew* could have been reached by the application of these doctrines, in which case what may be at stake is methodology. On one view, this regulation by the courts may be thought to fill the gap created by there being no general duty. On the other, it may be that the gaps are now largely closed. If that is the case, the argument for a general duty appears to come down to one of coherence.