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ON
CONTRACTS
VOLUME I
General Principles



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the relevant obligation as the obligation to pay the employee's wages rather than a wider obligation to honour the contract's terms governing the determination of pay, including its future determination.

2-031 **Significance after IP completion day** The position taken by the EU legislature and by the Court of Justice of the EU to freedom of contract is significant to UK law after the departure of the UK from the EU took full effect on IP completion day in two ways. First, the case law of the European Court before IP completion day became "retained EU case law" (renamed as "assimilated EU case law" after the end of 2023) and is in principle binding on UK courts in relation to the UK legislation that implemented EU law, with the exception of the Supreme Court and listed appellate courts which may depart from this case law under the same test as the Supreme Court departs from its own decisions.²¹⁷ Secondly, the EU Charter of Fundamental Rights has changed as a result of the UK's leaving the EU. Thus, first, the Charter itself was not retained by UK law by the European Union (Withdrawal) Act 2018,²¹⁸ but s.5(5) of that Act as enacted provided that this did not affect the retention of:

2-029 "...any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)."²¹⁹

It is submitted that the principle of freedom of contract could be said to exist in the European case law irrespective of the Charter of Fundamental Rights, despite the Court of Justice's use of art.16 of the Charter's recognition of freedom to conduct a business in *Alemo-Herron v Parkwood Leisure Ltd* to buttress its interpretation of the requirements of freedom of contract in the context.²²⁰ However, this position changed on the coming into force on 1 January 2024 of s.4 of the Retained EU Law (Revocation and Reform) Act 2023 which deleted s.5(5)'s qualification on the non-retention of Charter rights²²¹ and which also removed "retained general principles of EU law" from domestic law.²²² It is submitted that this means that in UK domestic law the Court of Justice's case law before IP completion day which refers to freedom of contract must stand simply on its status as "assimilated EU case law" in relation to particular examples of "assimilated EU law".²²³

2-032 **Freedom of Contract and the ECHR** It is convenient to add here that, while the European Convention on Human Rights does not refer to freedom of contract, the

²¹⁷ European Union (Withdrawal) Act 2018 s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)) and later by the Retained EU Law (Revocation and Reform) Act 2023 s.5(3) and Sch.2 para.8(3); on the interpretative regimes governing retained EU law and assimilated law see above, paras 1-027—1-031 and paras 1-043—1-049.

²¹⁸ European Union (Withdrawal) Act 2018 s.5(4) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(4)(a)) and see 2018 Act Sch.8 para.39(1), which provides that this applies "in relation to anything occurring before IP completion day (as well as anything occurring on or after IP completion day)".

²¹⁹ European Union (Withdrawal) Act 2018 s.5(5) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(4)(a)).

²²⁰ (C-426/11) EU:C:2013:521 above, paras 2-0029—2-030.

²²¹ 2023 Act s.4(2)(b), as noted above, para.1-043 (note).

²²² 2023 Act s.4(2)(a) as noted, above, para.1-042.

²²³ However, the 2023 Act s.22(5) provides that s.4 does not apply in relation to anything occurring before the end of 2023: above, para.1-050.

European Court of Human Rights has held that the extent to which a State interferes with an owner of property's freedom of contract relating to the property is relevant to the assessment of its compliance with its duties in respect of the right to property under art.1 of the First Protocol. This body of law is noted in the context of the wider relationship between the Human Rights Act 1998 and contracts.²²⁴

3. GOOD FAITH, CONTRACTUAL FAIRNESS AND REASONABLENESS

(a) Introduction

2-033 **The increased significance of good faith** Until relatively recently, the question whether the English law of contract required the parties to act in good faith could be dealt with very briefly—if not passed over in silence altogether. While there was earlier authority suggesting that good faith is a requirement in all contracts,²²⁵ good faith as a legal requirement was generally seen as applicable only in a restricted class of contracts—principally insurance (where *uberrima fides* required disclosure both before and during the course of the contract²²⁶), partnership²²⁷ and contracts giving rise to fiduciary duties (which may notably include agency).²²⁸ Moreover, at times English judges have expressed something very close to hostility to the idea of good faith in the contractual context, the most famous example being Lord Ackner's view that:

2-036 "... 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 negotiations²²⁹ ... [and] ... unworkable in practice."²³⁰

And judges have stated very clearly that English law contains no general legal principle or doctrine of good faith or fairness.²³¹ However, as will be explained, while it remains the case that English law does not recognise a general legal principle of good faith (whether at the stage of negotiations, in the performance of contracts or in relation to their breach), good faith has become more prominent both in contractual practice and in the law itself.²³²

²²⁴ *Hutten-Czapska v Poland* App. No.35014/97 (2006) 42 E.H.R.R. 15 at [151]; *Edwards v Malta* App. No.17647/04 24 October 2006 at [69]–[71]; *Amato Gauci v Malta* App. No.47045/06 (2011) 52 E.H.R.R. 25 at [58]. See further on the relationship between "Convention rights" under the Human Rights Act 1998 and contract law, below, paras 3-105 et seq. and esp. at para.3-118.

²²⁵ Notably, *Carter v Boehm* (1766) 3 Burr. 1905, 1910 and see below, para.2-045.

²²⁶ See Vol.II, para.45-033.

²²⁷ Banks (ed), *Lindley & Banks on Partnership*, 21st edn (2022 updated to 2024), Ch.16.

²²⁸ See below, para.2-062.

²²⁹ [1992] 2 A.C. 128, 138. The agreement was held unenforceable on the grounds of uncertainty, and see below, paras 4-170—4-172.

²³⁰ [1992] 2 A.C. 128, 138 and see below, paras 4-170—4-171.

²³¹ Below, paras 2-046—2-053.

²³² See generally: Bridge (1984) 9 Can. Bus. L.J. 385; Collins, *The Law of Contract*, 4th edn (2003), Chs 13 and 15; Finn in Finn (ed.), *Essays on Contract Law* (1987), p.104; Lücke in Finn (ed.), *Essays on Contract Law*, p.155; Steyn (1991) Denning L.J. 131; Carter and Furmston (1994) 8 J.C.L. 1; Brownsword (1994) 7 J.C.L. 197; Staughton (1994) 7 J.C.L. 193; Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), especially the essays by Beatson and Friedmann, p.3; Cohen, p.25; McKendrick, p.305; Friedmann, p.399; Brownsword in Deakin and Michie (eds), *Contracts, Co-operation and Competition* (1997), p.255; Stein (1997) 113 L.Q.R. 433; Teubner (1998) 6 M.L.R. 11; Brownsword [1997] C.L.P. 111; Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000); Smith, *Atiyah's Introduction to the Law of Contract*, 6th edn

2-034 **Good faith as a legal value and as a legal concept** In the following discussion, it is helpful to bear in mind the distinction between good faith or fairness as giving expression to a legal value or values (or possibly objectives) and good faith or fairness as legal concepts. Most if not all English lawyers would agree that English contract law reflects a value of good faith and fair dealing and where it does not do so it should be changed accordingly. For example, Lord Steyn (writing extra-judicially) saw “a thread [running] through our contract law that effect must be given to the reasonable expectations of honest men,”²³³ this being “the central objective of the law of contract”.²³⁴ Noticing use of good faith by civil laws and international instruments, Lord Steyn identified two meanings:

“... good faith has a subjective requirement: the threshold requirement is that the party must act honestly. That is an unsurprising requirement and poses no difficulty for the English legal system. But good faith additionally sets an objective standard, viz., the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned.”²³⁵

Although Lord Steyn expressed an openness to use of good faith by the law itself (for example, in the context of pre-contractual negotiations), he put forward:

“... no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions.”²³⁶

This argument therefore reflects both roles of good faith or fair dealing: as a purpose or value (in Lord Steyn’s view, the need to give effect to the reasonable expectations of the parties) underlying particular rules, and good faith as a legal concept. The two significances of good faith or fairness can also be seen in the work of legal scholars. For example, Collins has argued that the basis of implied terms in English law (whether implied in fact or in law) is the idea of good faith and fair dealing in performance, and that this means that it is generally unnecessary to recognise a general legal duty or an independent implied term of good faith and fair dealing.²³⁷ Sometimes, however, it is not completely clear which significance is being given to use of the language of good faith. For example, Leggatt LJ (as he then was, with whom Rose and Flaux LJ joined) has observed that the doctrine of rectification of

(2006), pp.164–166; Collins (2014) 67 C.L.P. 297; Campbell (2014) 77 M.L.R. 475; Tan (2015) J.B.L. 420; Foxton (2017) L.M.C.L.Q. 360; Campbell (2017) Edinburgh L.R. 376; Cheung (2017) 34 International Construction L.R. 242; Saintier (2017) J.B.L. 441; Bridge (2017) Uniform L.R. 98; McKendrick, *Contract Law, Text, Cases and Materials*, 10th edn (2022), Ch.15; Bridge (2019) 135 L.Q.R. 227; Leggatt (2019) J.B.L. 104; Davies [2019] *Journal of Commonwealth Law* 1; Davies in Davies and Raczynska, *Contents of Commercial Contracts, Terms Affecting Freedoms* (2020) Ch.6; Collins (2021) 137 L.Q.R. 426; Rowan (2021) 84 M.L.R. 1066; Burrows, *A Restatement of the English Law of Contract*, 2nd edn (2020) commentary to s.5, p.50; commentary to s.15(3), pp.96–97.

²³³ Steyn (1997) 113 L.Q.R. 433.

²³⁴ (1997) 113 L.Q.R. 433, 434.

²³⁵ (1997) 113 L.Q.R. 433, 438.

²³⁶ (1997) 113 L.Q.R. 433, 439.

²³⁷ Collins (2014) 67 C.L.P.297 esp. at 330–331. A similar view was much earlier taken by Addison, *A Treatise of the Law of Contracts and Rights and Liabilities arising Ex Contractu*, 1st edn (1847) at pp.206–207 who referred to the law’s recognition of implied covenants in certain contracts “in order to give a proper force and effect to the contract to promote good faith and make men act up to the spirit as well as to the letter of their engagements”.

a contractual document to give effect to a subjective common intention was based on an “equitable principle of good faith”,²³⁸ With respect, as a view of the justification or basis of rectification this is uncontroversial, but as a recognition of a wider legal principle, it is more open to discussion.²³⁹

This is not to say, of course, that some laws or international legal instruments do not pose a general principle of good faith or fair dealing or otherwise generally require good faith; and, where they do so, such a legal requirement reflects a general ethical stance or overall purpose of the law.²⁴⁰ For example, in French law the two significances of good faith run together. Having defined a “contract”, the provisions on contract law in the Civil Code as reformed in 2016 start by making two general statements recognising freedom of contract and the binding force of contracts²⁴¹ and then immediately provide that “contracts must be negotiated, formed and performed in good faith” and that this is a matter of public policy (*ordre public*) so that it may not be excluded or restricted by agreement.²⁴² In the words of its authors:

“... this choice to highlight three fundamental principles expresses one of the essential aims pursued [by the reforming legislation]: to find a balance between contractual fairness and the autonomy of the will.”²⁴³

Various concepts used by the law The following discussion will, however, be concerned with the use of good faith and fairness as legal or contractual concepts, that is, ones which are used by the law itself or by contractual practice rather than with broader justifications for legal doctrines or rules. In this respect, it should be noticed, though, that sometimes a duty or requirement of good faith is expressed positively: the parties must behave honestly, in good faith or in accordance with good commercial practice. Sometimes, however, a substantively similar position is reached by the use of negative language, notably, by the law (or the contract) sanctioning (in one way or another) *bad* faith. A clear example of the latter may be found in the long-established rules governing fraud in the sense of the making of a

²³⁸ *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch. 365 at [142] and see also at [54]–[55] and [146]–[147] and on rectification generally see below, paras 5-084–5-101.

²³⁹ In *FSHC Group Holdings Ltd* [2019] EWCA Civ 1361 at [51]–[55] Leggatt LJ traced the history of the equitable jurisdiction to rectify written documents on the ground of mistake, referring in particular to *Calverley v Williams* (1790) 1 Ves. Jun. 210 at 211 where Lord Thurlow LC explained that, as Leggatt LJ expressed it, “it would be contrary to good faith for a party to take advantage of a mistake made in drawing up a written contract by seeking to apply the contract inconsistently with what that party knew to be the common intention of the parties when the document was executed”. Later in his judgment (at [146]–[147]), Leggatt LJ referred to an underlying moral principle of good faith as the rationale justifying the subjective approach to intention in the context of common mistake rectification.

²⁴⁰ e.g. art.1:201(1) of the *Principles of European Contract Law* provides that “[e]ach party must act in accordance with good faith and fair dealing”. cf. the provision in the proposed Common European Sales Law (above, para.1-016), art.1(1) which provides that “Each party has a duty to act in accordance with good faith and fair dealing”; see further below, para.2-044.

²⁴¹ arts 1102–1103 C.civ.

²⁴² art.1104 (trans. Cartwright, Fauvarque-Cosson and Whittaker).

²⁴³ *Rapport au Président de la République relatif à l’ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, at p.4 (trans. editor) and see further Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017) Ch.3, 29, 44–46. Cf. above, para.2-011 on the notion of the “autonomy of the will” in French law.

2-032 false statement knowingly or reckless as to its falsity.²⁴⁴ Moreover, the terminology used by the law may vary more widely, and very closely related concepts may be used instead of good faith, bad faith or fairness: in particular, English law often refers to the reasonableness/unreasonableness or (negatively) the unconscionability of a party's behaviour. Where used by the law itself, what all these various concepts typically have in common is that they require an assessment or evaluation of the party's behaviour by reference to an external, legal standard rather than merely by reference to whether or not the party has fulfilled the terms of the contract as made. While the focus of the present discussion will therefore be on good faith, it will also at times refer to these other related evaluative concepts.

2-037 **Increased significance of good faith as a legal concept** As earlier noted, the significance of good faith has increased considerably over the 30 years or so since Lord Ackner expressed the hostile view quoted above.²⁴⁵ This can be seen in three main ways.

2-038 **Good faith in EU law** First, a number of EU directives have used the concept of good faith in the legislation to be implemented in Member States.²⁴⁶ This is most prominent in relation to consumer contracts, where good faith is a distinct element both in the general test of the fairness of contract terms²⁴⁷ and in the general test of the fairness of commercial practices by traders to consumers.²⁴⁸ However, in EU law good faith has also been used in rules governing commercial contracts in relation to the control of contract terms governing late payments and to set the standard of the duties of commercial agents to their principals.²⁴⁹ All the UK law implementing these directives became part of "retained EU law" on IP completion day, subject to relatively minor amendments, later becoming part of "assimilated law".²⁵⁰

2-039 **Express terms requiring good faith** Secondly, the courts have been increasingly willing to give effect to express contract terms requiring the parties to negotiate (or renegotiate) a contract in good faith or to act in good faith towards each other.²⁵¹

2-040 **Implied terms requiring good faith** Thirdly, and most strikingly, the courts have proved increasingly willing to imply terms requiring good faith, fairness or rationality. There are here three distinct but related strands of common law authority.

²⁴⁴ Where A's fraud induces B to contract, B has remedies against A of rescission and damages in the tort of deceit: below, paras 10-055 et seq. And more generally, the tort of deceit can give rise to liability in damages, e.g. where A's fraud induces B to contract with C: below, para.10-095.
²⁴⁵ Above, para.2-033.
²⁴⁶ Below, para.2-044.
²⁴⁷ See Vol.II, paras 41-314 et seq.
²⁴⁸ See Vol.II, paras 41-196 and 41-201. Good faith can also be found in relation to the information requirements imposed on suppliers of financial services to consumers: above, para.2-044 and see Vol.II, para.41-152.
²⁴⁹ Below, para.2-044.
²⁵⁰ See below, paras 2-059 and 2-061. On retained EU law and assimilated law generally, see above, paras.1-016 et seq. However, while the law governing unfair commercial practices business-to-consumer in the Consumer Protection from Unfair Trading Regulations 2008 became part of retained EU/assimilated law, it has been replaced by the Digital Markets, Competition and Consumers Act 2024 Pt 4 Ch.1. The new law makes very similar provision to the law under the 2008 Regulations, but does not belong to "assimilated law": see below, para.2-061.
²⁵¹ Below, paras 2-065—2-078.

First, there are a number of established examples where terms requiring good faith or its equivalent expressed in other words, are implied in law in particular types of contract. This can be seen in particular in relation to contracts of employment.²⁵² Secondly, the courts have recognised that the unilateral exercise of a contractual power by one party to a contract may sometimes be qualified by an implied term that it be exercised honestly, rationally and in good faith.²⁵³ And, thirdly, since the decision of Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp Ltd*,²⁵⁴ English courts have increasingly considered whether the commercial contract before them should be held to contain an implied term requiring good faith.²⁵⁵

Two key questions Finally, it is helpful to note that two key questions arise in relation to each of these usages of good faith. First, in what circumstances is good faith used as a legal concept? Where it is used by legislation this is straightforward, but it is much less so, in particular, in relation to the incidence of implied terms.²⁵⁶ Secondly, where it is used, what is its significance? In this respect, its significance may refer either to its meaning: does good faith merely require honesty, or does it also require adherence to a higher standard such as good commercial behaviour or consideration for the other party's legitimate interests?²⁵⁷ Or its significance may equally refer to the role which it plays within the law: does a failure in good faith provide a ground of rescission of the contract?²⁵⁸ Does it impose a duty whose breach gives rise to damages and/or termination of the contract?²⁵⁹ Does it qualify the exercise of an apparently discretionary contractual power?²⁶⁰ Or does it form part of a wider evaluative standard as, for example, in the test of fairness of the terms of consumer contracts?²⁶¹ Wherever good faith is used, therefore, we need to consider both its meaning and its role in the particular law in which it is contained.

(b) Good Faith in Other Laws

Good faith in other common law systems As Lord Browne-Wilkinson observed:

"... throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships"²⁶²

and other common law systems have taken varying positions as to the relevance of good faith in the creation or the performance of contracts.²⁶³ Perhaps the most extensive use is taken by lawyers in the United States, the Restatement (Second)

²⁵² Below, para.2-080.
²⁵³ Below, paras 2-083—2-103.
²⁵⁴ [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526.
²⁵⁵ Below, paras 2-104 et seq.
²⁵⁶ Below, paras 2-085—2-095 and 2-104—2-112.
²⁵⁷ See below, paras 2-068—2-077 (express terms), 2-083, 2-085—2-086, 2-088 and 2-096 (*Braganza* implied terms) and paras 2-113—2-114 (implied terms of good faith more generally).
²⁵⁸ As in the case of fraud inducing contract: below, para.10-122.
²⁵⁹ See, in particular, the discussion in relation to *Braganza* implied terms, below, paras 2-095—2-096, 2-102—2-103.
²⁶⁰ See, in particular, the discussion in relation to *Braganza* implied terms, below, paras 2-097—2-099.
²⁶¹ See below, paras 2-059 and 2-061 in relation to contracts between traders and consumers.
²⁶² *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R. (Comm) 849 (PC) at [54].
²⁶³ See also works noted above, para.2-033.

of Contracts requiring that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement".²⁶⁴ In Australia too, courts and writers are generally quite open to the use of good faith, holding that an agreement to negotiate in good faith may be contractually enforceable,²⁶⁵ and willing to find implied terms requiring co-operation in performance between the parties and implied terms of good faith subject to the normal requirements of the implication of terms.²⁶⁶ Moreover, although earlier Canadian cases showed considerable hesitation in accepting a general duty of good faith in either negotiation or performance of contract,²⁶⁷ in 2014 the Canadian Supreme Court ruled that there is:

"... a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance"

and that:

"... as a further manifestation of this organizing principle of good faith, ... there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations."²⁶⁸

However, the Canadian Supreme Court acknowledged that

"... the principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest."²⁶⁹

2-043

Good faith in civil law systems As Bingham LJ's observations quoted below illustrate,²⁷⁰ in modern discussions of the English position contrasts are often drawn with the use of the concept of good faith in civil law systems, i.e. those whose

²⁶⁴ *Restatement (Second) of Contracts* para.205. cf. Uniform Commercial Code s.1-203 and see for a general introduction Summers in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000), Ch.4.

²⁶⁵ *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 N.S.W.L.R. 1 at 21-27.

²⁶⁶ Carter, *Contract Law of Australia*, 8th edn (2023), paras 2-11-2-17, who notes (at para.2.14) that Australian courts of the intermediate level have explicitly rejected the view that good faith is an implied term of all contracts.

²⁶⁷ McCamus, *The Law of Contracts*, 2nd edn (2012) 139 and 159-162.

²⁶⁸ *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 at [33] per Cromwell J giving the judgment of the S.C. of Canada, which reviews earlier Canadian cases and wider common law literature. An "organizing principle" was defined by the court as one which "states in general terms a requirement of justice from which more specific legal doctrines may be derived" and is "not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations": *Bhasin v Hrynew* at [64]. However, the list of these specific legal doctrines "is not closed": *Bhasin v Hrynew* at [66]. The Supreme Court of Canada saw the duty of honest performance as a "general doctrine of contract law" rather than as an implied term, thereby operating "irrespective of the intentions of the parties": *Bhasin v Hrynew* at [74]. As a result, the duty was mandatory and was not affected by an express entire agreement clause in the contract, though there may be circumstances in which it could be influenced by the agreement of the contracting parties: *Bhasin v Hrynew* at [75]-[78]. The SC of Canada explained the significance of good faith further in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* 2021 SCC 7 (CanLII), [2021] 1 SCR 32. And see also Percy in Degeling, Edelman and Goudkamp (eds), *Contract in Commercial Law* (2016), Ch.11 and Waddams, *The Law of Contracts*, 8th edn (2024) paras 17, 448-449, 502-514 and 556.

²⁶⁹ 2014 SCC 71 at [70].

²⁷⁰ Below, para.2-046.

private law has derived substantially from doctrines and rules of Roman law.²⁷¹ The practical interest of this use became significant for English contract law by the increasing reference to good faith or "good faith and fair dealing" in European legislation in the area of contract law and the possibility of the Court of Justice of the EU drawing on its existing significance in the laws of the Member States in interpreting its significance there.²⁷² In this respect, though, it is helpful to note that, even restricting the discussion to the legal systems of western Europe, there are very considerable divergences both in the significances given to "good faith" and its supposed linguistic equivalents and in the uses to which they are put within each legal system. So, in some (but not in all) systems, good faith has provided the basis of some pre-contractual grounds of relief or compensation (notably, as regards duties of disclosure and information and breaking-off from negotiations); the addition of "supplementary" obligations to those expressly provided either by the parties or by legislation; the control of unfair contract terms; the toughening of the sanction of deliberate breaches of contract; the control of the exercise of a party's contractual right; and relief on account of supervening circumstances or the substantively unfair nature of the contract as a whole.²⁷³ In the result:

"... the notion of good faith (or its equivalents in the various languages ...) actually means different things both *within* a particular legal system and *between* the legal systems."²⁷⁴

And while in those legal systems which possess a general requirement of good faith:

"... good faith is not devoid of meaning, a pious hope or incantation or simply a super-technique waiting to be put to whatever legal end a legal system wishes (though it may act as a super-technique if required) ... even where a particular meaning of good faith is accepted in two systems, this does not entail that they will take the same view of what it in fact requires in any given situation."²⁷⁵

Moreover, the extent of the use to which a legal system puts a potentially corrective principle such as good faith depends on the extent to which it is dissatisfied with its more particular, established laws of contract, on the availability of other legal techniques which have a similar corrective possibility and on the perceived appropriateness of judicial as opposed to legislative intervention in the area in question.

"Good faith" and "good faith and fair dealing" in EU law EU legislation has had increased recourse to the concept of good faith in setting standards for various legal purposes. In this respect, a particularly prominent example is found in the reference to the "requirement of good faith" in the test of unfair terms in consumer

2-044

²⁷¹ On the significance of good faith in the ancient Roman law of contracts see Schermaier in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000), Ch.2.

²⁷² Below, para.2-044.

²⁷³ For an overview see Whittaker and Zimmermann in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000), Ch.1. On the significance of the broad legislative recognition of a principle of good faith in relation to contracts in the reformed French Civil Code see Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017), Ch.3.

²⁷⁴ Whittaker and Zimmermann in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000) at p.690 and cf. *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 507 at [17], per Lord Bingham of Cornhill (Member States "have no common concept of ... good faith").

²⁷⁵ Whittaker and Zimmermann at p.699.

contracts under the Directive of 1993.²⁷⁶ The concept of “good faith and fair dealing” has also been used in the directive on late payment in commercial transactions as part of its control on unfair terms.²⁷⁷ Moreover, good faith has been used for legal purposes other than the control of unfair terms. So, the Financial Services Distance Marketing Directive of 2002 refers to the “principles of good faith in commercial transactions” in setting the information which a supplier must provide to a consumer prior to the conclusion of the contract²⁷⁸ and the Unfair Commercial Practices Directive of 2005 sets its general test of an “unfair commercial practice” in part by reference to the “requirements of professional diligence”, which is then itself defined as:

“... the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity.”²⁷⁹

Finally, “good faith” is used by Commercial Agents Directive 1986 to set the standard of the agents’ duties to their principals, providing that the “agent must ... act dutifully and in good faith”.²⁸⁰ Apart from these particular examples of the use of “good faith” by EU legislation, the European Court of Justice has referred to good faith as a “principle of civil law”, although in a way where it is not explicitly clear whether this principle is a principle of EU law or merely of the national law before the court.²⁸¹ Support for the existence of such a general principle may be found in the earlier proposed Regulation on a Common European Sales Law (CESL), art.2 of which provided that:

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.

²⁷⁶ art.3(1) which was implemented by the Consumer Rights Act 2015 s.62(4) (on which see Vol.II, para.41-310).

²⁷⁷ Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. 48/1 art.7(1)(a) (“any gross deviation from good commercial practice, contrary to good faith and fair dealing” relevant to whether a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is grossly unfair to the creditor). Directive 2011/7/EU was implemented in UK law by the Late Payment of Commercial Debts (Interest) Act 1998 (as amended), on which see below, paras 30-298—30-300.

²⁷⁸ Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16, art.3(2) implemented by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.7(2). Article 3(2) provides that the information to be supplied (as earlier specified by art.3(1)): “the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors”. On these Regulations see Vol.II, para.41-152.

²⁷⁹ Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/16 art.5(2) and art.2(h) implemented by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) regs 3(3) and 2(1) “professional diligence”. See further below, para.2-061.

²⁸⁰ Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17: art.3(1) which was implemented in UK law by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) reg.3(1), and see paras 22-021—22-022 and 22-155.

²⁸¹ *Messner v Krüger* (C-489/07) EU:C:2009:502, [2009] E.C.R. I-7315 at [26]. cf. *Gruber v Bay Wa AG* (C-464/01) EU:C:2005:32, [1997] E.C.R. I-3767 at [53] where the European Court used good faith in the application of the special jurisdiction provisions in art.13 of the Brussels Convention.

3. The parties may not exclude the application of this Article or derogate from or vary its effects.”²⁸²

The Proposed Regulation defined “good faith and fair dealing” as:

“... a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.”²⁸³

The proposed optional CESL would have been available only to contracts for the sale of goods, the supply of digital content and related services,²⁸⁴ but many of its provisions were equally appropriate to contract law in general. Apart from the general principle of good faith and fair dealing, the proposed CESL made specific use of good faith and fair dealing in its provisions governing duties of information in commercial contracts,²⁸⁵ mistake,²⁸⁶ fraud,²⁸⁷ contractual interpretation,²⁸⁸ the implication of terms²⁸⁹ and unfair contract terms.²⁹⁰ However, the CESL Proposal was not pursued by the Commission,²⁹¹ and the legislative proposals put forward by the EU Commission instead are of much narrower scope than the CESL and do not refer to the concept of good faith.²⁹²

(c) No General Legal Principle of Good Faith

Historical background English law long accepted the use of broad notions of good faith and commercial expectation under the *lex mercatoria* or law merchant which was current throughout western Europe,²⁹³ but by the middle of the seventeenth century, the law merchant was considered part of English law and by the end of the century the common law courts no longer felt the need to take evidence of mercantile custom.²⁹⁴ Even so, in 1766, in the context of recognising the duty of disclosure in contracts of insurance,²⁹⁵ Lord Mansfield CJ (who was well-versed in the civil law²⁹⁶) stated that:

“The governing principle is applicable to all contracts and dealings. Good faith forbids

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²⁸² Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final Annex I, CESL Proposal Annex I, art.2 CESL. On the CESL Proposal generally, see above, para.1-015.

²⁸³ CESL Proposal art.2(b).

²⁸⁴ CESL Proposal art.1 above, para.1-015.

²⁸⁵ CESL Proposal Annex I, art.23(2) CESL.

²⁸⁶ CESL Proposal Annex I, art.48 CESL.

²⁸⁷ CESL Proposal Annex I, art.49 CESL.

²⁸⁸ CESL Proposal Annex I, art.59 CESL.

²⁸⁹ CESL Proposal Annex I, art.68 CESL.

²⁹⁰ CESL Proposal Annex I, arts 83, 86 and 170 CESL.

²⁹¹ European Commission, *Annex 2 to the Commission Work Programme 2015* COM(2014) 910 final, p.12. See also the Communication from the Commission, *A Digital Single Market Strategy for Europe* COM(2015) 192 final, pp.4–5 and see above, para.1-015.

²⁹² Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods etc of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28 and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1.

²⁹³ Goode, *The Concept of ‘Good Faith’ in English Law* (1992) at p.2; O’Connor, *Good Faith in English Law* (1990) at 39. For the following see Whittaker and Zimmermann in Zimmermann and Whittaker (eds) *Good Faith in European Contract Law* (2000) Ch.1 at pp.41–43.

²⁹⁴ Holdsworth, *History of English Law*, Vol.V (1966) 112 et seq.

²⁹⁵ See Vol.II, paras 45-030 et seq.

²⁹⁶ Holdsworth, *History of English Law*, Vol.V (1966) at p.147.

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. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon."²⁹⁷

It will be seen that, while expressed as applicable to "all contracts and dealings", the significance of good faith was limited by Lord Mansfield to generating a duty of disclosure in a party of what he knows where the other party believes the contrary. Even as so narrowed, such a broad proposition is inconsistent with later authority (such as *Smith v Hughes*²⁹⁸) and has been seen instead as expressing the special position governing contracts of insurance.²⁹⁹ Certainly, no trace of good faith as a legal principle applicable to all contracts can be seen in the rationalising textbooks of the nineteenth century by Anson³⁰⁰ and Pollock.³⁰¹

046 No general legal principle, but "piecemeal solutions" The modern view is therefore that there is no legal principle of good faith of general application in English contract law. As Bingham LJ famously observed:

"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."³⁰²

The fact that at least some English judges have not been attracted by the idea of a general ground for relief for unfairness is also clear from judicial treatment of the attempt of Lord Denning MR to construct a general principle of "inequality of bargaining power" in *Lloyds Bank Ltd v Bundy*³⁰³ and the House of Lords' refusal in *Walford v Miles*³⁰⁴ to imply a term in a "lock-out" agreement that a party to it be obliged to continue to negotiate in good faith.

²⁹⁷ *Carter v Boehm* (1766) 3 Burr. 1905, 1910.

²⁹⁸ (1870-71) L.R. 6 Q.B. 597; see further below, para.5-025.

²⁹⁹ See Vol.II, paras 45-033—45-034.

³⁰⁰ *Principles of the English Law of Contract and of Agency in Relation to Contract*, 1st edn (1879).

³⁰¹ *Principles of Contract at Law and in Equity*, 1st edn (1876). cf. however, Addison's reference to good faith as the justification for the implication of covenants in certain contracts: *A Treatise of the Law of Contracts and Rights and Liabilities arising Ex Contractu*, 1st edn (1847) at pp.206-207; above, para.2-034 (note).

³⁰² *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439. Bingham LJ gave as illustrations of these solutions equity's striking down of unconscionable bargains (see below, paras 11-172 et seq.), statutory control of exemption clauses (see below, paras 18-073 et seq.) and hire-purchase (see Vol.II, paras 42-376 et seq.) and the ineffectiveness of penalty clauses (see below, paras 30-205 et seq.). See similarly, *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 507 at [17] (Lord Bingham of Cornhill), on which see Vol.II, para.41-319. In *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369 at 385 Brooke LJ discussed Bingham LJ's observations and argued that good faith in contracts should justify directly an assessment of whether it was in all the circumstances fair to hold a party bound by the particular contract term rather than "Byzantine" interpretative devices, but this suggestion has not been followed: below, para.18-070.

³⁰³ [1975] Q.B. 326, 339; and see below, para.11-192.

³⁰⁴ *Walford v Miles* [1992] 2 A.C. 128, 138. cf. *Little v Courage Ltd*, *The Times* 19 January 1994; *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964 at [4]. The CA's

Similarly, Potter LJ, in denying relevance to an injured party's motive in termination of a contract, observed that:

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"There is no general doctrine of good faith in the English law of contract. The [injured parties] are free to act as they wish, provided that they do not act in breach of a term of the contract."³⁰⁵

Moreover, according to Rix LJ in *ING Bank NV v Ros Roca SA*:

"Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). 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. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune."³⁰⁶

And, in 2016 Moore-Bick LJ observed that:

"... the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organising principle' drawn from cases of disparate kinds ... There is ... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."³⁰⁷

A very stark example of the preference of English judges for the strict application of the terms of a contract rather than tempering their effect on the grounds of fairness may be found in *Union Eagle Ltd v Golden Achievement Ltd*.³⁰⁸ There, the Privy Council refused specific performance of a contract for the sale of land to its purchaser who had paid the price 10 minutes late, time for performance of this obligation having been made expressly of the essence. The Privy Council rejected the argument that the courts enjoyed a discretion to relieve a party from the contractual consequences of late performance (stemming from its jurisdiction to

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decision on the facts applying the doctrine of proprietary estoppel was overturned by the House of Lords: see [2008] UKHL 55; [2008] 1 W.L.R. 1752 and below, para.7-082.

³⁰⁵ *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* unreported 8 April 1998, CA (Civ Div). See similarly *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWCA Civ 977, [2004] 2 Lloyd's Rep. 352 at [113]; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105]; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All E.R. (Comm) 483 at [45]. cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526 at [121]–[154] where Leggatt J discussed, obiter, the arguments in favour of and against the recognition of an apparently general implied duty of good faith in the performance of commercial contracts.

On the latter and the subsequent case law see below, paras 2-105 et seq. [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92]. Having stated this as a general rule, Rix LJ held that, in the circumstances, the relationship between the parties and the unconscionable conduct of the silent party justified the latter being estopped from relying on the contract as concluded: at [93]–[107], [111]. Carnwath LJ agreed on the basis of estoppel by convention ([66]–[71]). Stanley Burton LJ agreed with both judgments: [2011] EWCA Civ 353 at [76].

³⁰⁷ *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [45]. The learned judge at trial was Leggatt J, who had earlier given judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 discussed below, paras 2-105–2-118.

³⁰⁸ [1997] A.C. 514.

relieve from forfeitures in equity³⁰⁹). According to Lord Hoffmann:

“The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority ... but also upon considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty.”³¹⁰

It is to be noted, though, that Lord Hoffmann recognised that “the same need for certainty is not present in all transactions”.³¹¹

2-049 Unconscionability Moreover, the House of Lords has had occasion to hold that a party is not prevented from relying on the formal invalidity of a contract on the ground merely that it would be “unconscionable” to do so, in the absence of an unambiguous representation of the contract’s validity (not being the promise to be enforced itself) on which to base an estoppel.³¹² In the words of Lord Clyde:

“Without entering into questions of categorisation of different classes of estoppel, it seems to me that some recognisable structural framework must be established before recourse is had to the underlying idea of unconscionable conduct in the particular circumstances.”³¹³

Similarly, in *Cobbe v Yeoman’s Row Management Ltd*³¹⁴ (which concerned claims, inter alia, for proprietary estoppel and/or constructive trust arising from an oral agreement to develop another person’s land intended to be binding “in honour alone”), Lord Scott of Foscote observed that:

“... unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present ... To treat a ‘proprietary estoppel equity’ as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.”³¹⁵

In the view of Lord Walker of Gestingthorpe, no cases cited before the House:

“... cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as

³⁰⁹ See below, paras 30-275—30-276.

³¹⁰ [1997] A.C. 514 at 518.

³¹¹ [1997] A.C. 514 at 519. cf. *O’Neill v Phillips* [1999] 1 W.L.R. 1092, 1098 where Lord Hoffmann observed in the context of contracts of partnership and a company’s duty not to engage in conduct “unfairly prejudicial” to its members that: “One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith.” See also the significance of “unconscionability” in the context of the law of duress in *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718 (below, para.11-047) and *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40, [2021] 3 W.L.R. 727 (below, paras 2-050—2-053; 11-040—11-041, and 11-048).

³¹² *Actionstrength Ltd v International Glass Engineering IN.GLEN SpA* [2003] UKHL 17, [2003] 2 All E.R. 615 especially at [16]–[20], [51] and see below, paras 8-051—8-052.

³¹³ [2003] 2 All E.R. 615 at [34].

³¹⁴ [2008] UKHL 55, [2008] 1 W.L.R. 1752, on which see below, para.7-082.

³¹⁵ [2008] UKHL 55 at [16].

fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.”³¹⁶

The Times Travel case: no “overriding doctrine of good faith in contracting” In *Pakistan International Airline Corp v Times Travel (UK) Ltd* a majority of the Supreme Court reaffirmed the absence of a general principle of good faith in contracting in English law, which it saw as related to the absence of a doctrine of inequality of bargaining power and of a general doctrine of unconscionability.³¹⁷ As will be explained in Ch.11 below, the context of these observations was the proper conditions under which a contract can be avoided on the ground of lawful act duress.³¹⁸

Times Travel: the minority view For this purpose, Lord Burrows JSC (in the minority in terms of reasoning) considered that in the context of a demand for what is claimed to be owing (or analogously a demand for the waiver of a claim, as was the case on the facts before the Court):

“... it is a necessary requirement for establishing lawful act economic duress that the demand is made in bad faith in the particular sense that the threatening party does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the threatened party.”³¹⁹

This test is therefore “concerned with either a dishonest assertion of an existing right or the dishonest removal (by waiver) of an existing right”.³²⁰ As a result, in his Lordship’s view, the case was not an appropriate one

“... in which to rely on a general principle of good faith dealing in so far as that would require a court to try to apply a standard of what is commercially unacceptable or unreasonable behaviour. That would be a radical move forward for the English law of contract and the uncertainty caused by it seems unlikely to be a price worth paying.”³²¹

Since there had been no finding of bad faith in Lord Burrows’ special sense on the part of the party whose threats had led to the waiver of the claim, the doctrine of lawful act duress did not apply.³²²

Times Travel: the majority view While Lord Hodge DPSC (with whom Lord Reed PSC, Lord Lloyd-Jones JSC and Lord Kitchin JSC concurred) agreed with this result (holding that lawful act duress did not apply to the case before the Court³²³), he disagreed with Lord Burrows’ reliance on a requirement of “bad faith demand”.³²⁴ In Lord Hodge’s view:

“... the courts should approach any extension [of the boundaries of lawful act duress] with caution, particularly in the context of contractual negotiations between commercial

³¹⁶ [2008] UKHL 55 at [81].

³¹⁷ [2021] UKSC 40, [2021] 3 W.L.R. 727.

³¹⁸ See below, paras 11-036—11-054.

³¹⁹ [2021] UKSC 40 at [102] and see further below, para.11-049.

³²⁰ [2021] UKSC 40 at [125].

³²¹ [2021] UKSC 40 at [95] and see also at [133] (Lord Burrows “not advocating a general principle of good faith dealing”).

³²² [2021] UKSC 40 at [138].

³²³ [2021] UKSC 40 at [60]–[61].

³²⁴ [2021] UKSC 40 at [2] and see further below, paras 11-039—11-052.

entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power.³²⁵

In this respect,

“The courts have taken the position that it is for Parliament and not the judiciary to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law.”³²⁶

Lord Hodge went on to say that while English contract law seeks to protect the reasonable expectations of honest people,³²⁷ as can be seen in the interpretation of contracts, as Bingham LJ famously observed in the *Interfoto Picture Library* case,³²⁸ in contrast to many civil law systems, it has not recognised a general principle of good faith in contracting but has instead adopted piecemeal solutions to demonstrated problems of unfairness.³²⁹ The absence of the doctrines of good faith and inequality of bargaining power formed one of the grounds on which Lord Hodge rejected Lord Burrows’ approach based on a requirement of a “bad faith demand”,³³⁰ as it meant that this approach was not “anchored in established legal principle”.³³¹ Instead, in Lord Hodge’s view, the illegitimacy of the pressure in duress is closely aligned with the equitable concept of unconscionability³³² and requires reprehensible conduct that amounts to illegitimate means in which bad faith is potentially relevant both to the content of the demand and to the context in which the demand is made.³³³ Moreover, he observed that:

“Unconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable. Equity takes account of the factual and legal context of a case and has identified specific contexts which call for judicial intervention to protect the weaker party.”³³⁴

These specific contexts include the equitable doctrines of undue influence or unconscionable bargains.³³⁵

Times Travel: the majority’s view on good faith Thus the majority of the

³²⁵ [2021] UKSC 40 at [3].

³²⁶ [2021] UKSC 40 at [26]. Later (at [33]), Lord Hodge referred to statutory competition law as an example of this, to which could be added the regulation of consumer contracts on which see Vol.II, Ch.41.

³²⁷ Referring to Steyn (1997) 113 L.Q.R. 433 and see above, para.2-034.

³²⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433, 439 quoted above, para.2-046.

³²⁹ [2021] UKSC 40 at [27].

³³⁰ [2021] UKSC 40 at [3].

³³¹ [2021] UKSC 40 at [44]. cf. also [2021] UKSC 40 at [49].

³³² [2021] UKSC 40 at [20].

³³³ [2021] UKSC 40 at [56]–[59] and see below, para.11-050.

³³⁴ [2021] UKSC 40 at [23].

³³⁵ [2021] UKSC 40 at [23] and [24] and see below, paras 11-079 et seq. and 11-172 et seq. respectively.

For interpretations by the CA of the SC’s views on good faith in the context of the construction of express terms referring to bad faith and good faith see *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd* [2022] EWCA Civ 153, 203 Con. L.R. 57 at [90] and *Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd* [2022] EWCA Civ 440, [2022] 2 All E.R. (Comm) 1082 at [123]-noted below, para.2-074.

Supreme Court not only confirmed the absence of a principle of good faith in English contract law but also saw its absence as a reason for rejecting an approach to a particular doctrine of the law (there, lawful act duress) which relies directly on the concept of bad faith, even though understood in a specially defined way and even though this would require dishonesty by the party in question. In doing so, the Supreme Court related this absence of a principle of good faith to the law’s rejection of a doctrine of inequality of bargaining power, a general doctrine of unconscionability and, indeed, a general doctrine of the abuse of rights.³³⁶

Contractual rights and public law controls The courts do not generally allow a party to a contract to rely on public law defences (such as one based on its legitimate expectation) against its contractual partner where the latter’s claim is fundamentally for the enforcement of a commercial bargain, even if that partner was a public authority acting under statutory powers, though it has been accepted that they may do so where “a true public law defence vitiates a contractual claim”.³³⁷ For this purpose, in the view of Lewison LJ, it cannot “usually be an abuse of power [in a public body] to exercise contractual rights freely conferred, even if the result may appear to be a harsh one”.³³⁸

Reasons for the denial of a general legal principle of good faith or fairness It is submitted that there are several reasons behind the denial of a general legal principle of good faith or fairness. First, such a general principle would tend to qualify the two established principles earlier discussed,³³⁹ that is to say, freedom of contract and the binding force of contract, by preventing a party from relying on their strict rights under the contract or, conversely, imposing further duties on a party not contained in its express terms. Indeed, good faith could act as a counter-principle to freedom of contract and the binding force of contract,³⁴⁰ whereas English law sees these principles as requiring particular (if sometimes considerable) exceptions rather than general qualification. Secondly, as Bingham LJ observed,³⁴¹ instead of recourse to such a general corrective principle, English law has instead preferred to use “piecemeal solutions” to address problems of fairness and it has done so by a host of particular doctrines, rules and regulatory frameworks.

³³⁶ Lord Hodge agreed with the view of Professor Jack Beatson (later Beatson LJ) in explaining the basic approach of the common law in relation to commercial negotiation that “[a]ll that is not prohibited is permitted and there is no general doctrine of abuse of rights. If therefore a person is permitted to do something, he will generally be allowed to do it for any reason or for none”. [2021] UKSC 40 at [28] quoting Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford, 1991) Ch.5 at pp.129–130 in the context of the doctrine of economic duress.

³³⁷ *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [29] per Lewison LJ (with whom Treacy and Gloster LJ agreed) (local authority able to enforce covenant in lease as to re-conveyance of freehold transferred under option on the failure of a condition as to obtain timely planning permission). cf. below, para.3-099 on cases where a public authority has been held to have been acting “publicly” in relation to its contracts so as to attract the possibility of judicial review.

³³⁸ [2015] EWCA Civ 1123 at [49]. Lewison LJ also noted (at [50]) that in the case before the court, private law mechanisms which preclude a person from relying on his strict legal rights such as promissory estoppel had not been pleaded.

³³⁹ See above, paras 2-001 and 2-004–2-013.

³⁴⁰ On the idea of good faith in French contract law acting as a counter-principle to the principles of contractual freedom and the binding force of contract see Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017), Ch.3 at pp.44–46. Another example may be found in Supply Code of Practice which designated priority retailers must include Above, para.2-046.