
HUMBLE GOOD FAITH
“3 X 4”

QUESTIONS

1. Should we recognize good faith?

2. What would be the effect of such recognition?

Which version of good faith?

3. What is the nature of good faith?

ARGUMENTS *AGAINST* RECOGNIZING GOOD FAITH

X

1. Interference with freedom
2. It's Parliament's job
3. Uncertainty
4. Inconsistency with common law incrementalism
5. Reduce the exportability of English contract law

DONOGHUE V. STEVENSON

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

✓ ARGUMENTS FOR GOOD FAITH

1. We already do it!

2. Transparency and coherence

3. Widely recognized

4. Protects the institution (game) of contract and parties from abuse

THE BULL IN THE CHINA SHOP

The Relentless Woodpecker

THE MEASURED TORTOISE

3 GOOD FAITH ATTITUDES

1. HONESTY

2. FAIR DEALING

3. FIDELITY TO THE CONTRACTUAL PURPOSE

4 CATEGORIES OF CONTRACTS

1. **Arm's length**

   "We look after ourselves"

2. **Symbiotic**

   "The contract requires me to rely on you"

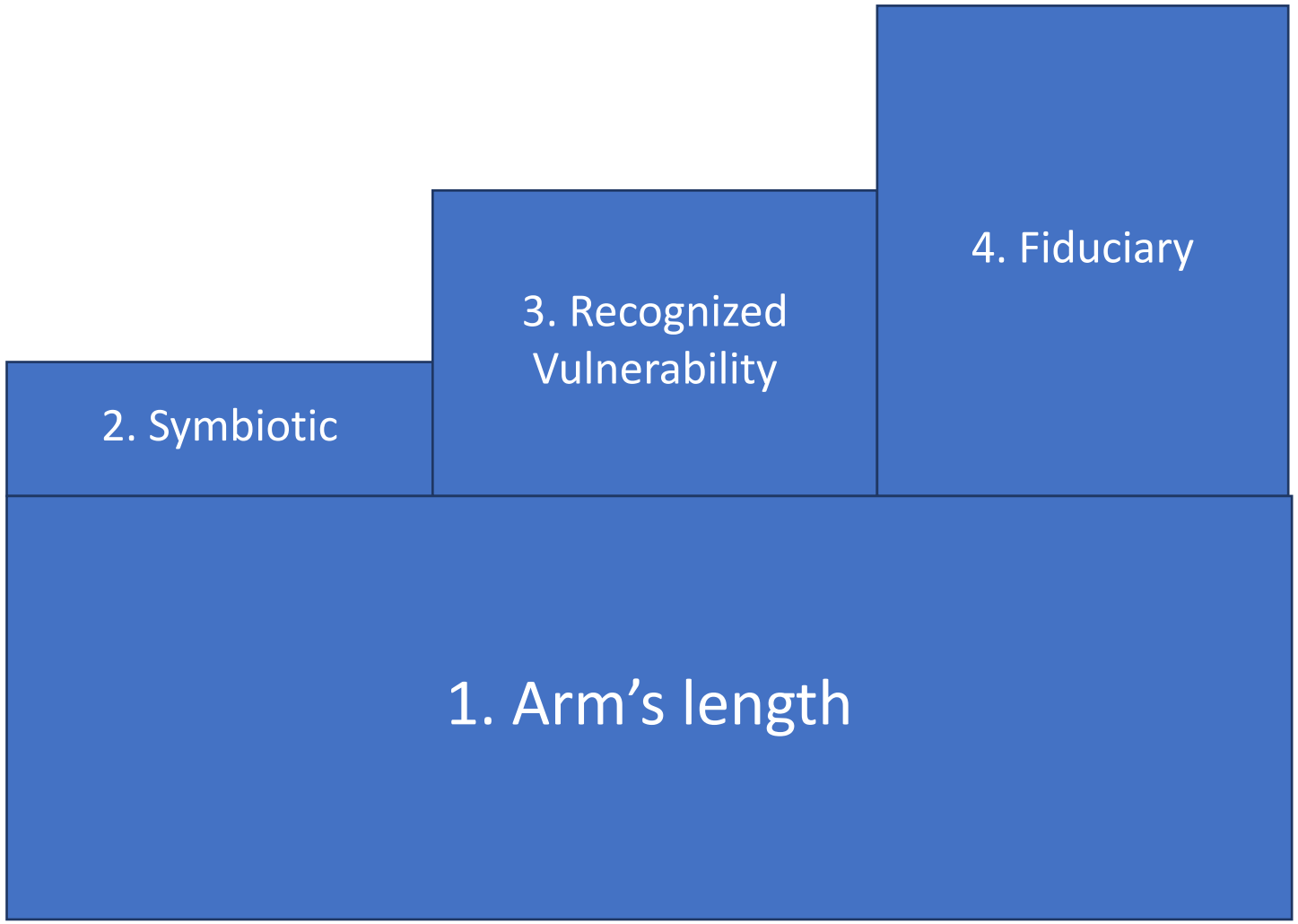
3. **Recognized vulnerability**

   "I put trust and confidence in you";

   "My bargaining power is markedly inferior"

4. **Fiduciary**

   "You must look after my interests"



3 attitudes of good faith:

(1)Honesty
(2) Fair Dealing
(3) Fidelity to the contractual purpose

apply with different intensity in the 4 categories of contracts

THE NATURE OF GOOD FAITH

1. Attitude of respect for the counterparty and for the contract made
2. Expressed in existing doctrines, varies with type of contract
3. Externally imposed / internally assumed
4. Scope for freedom and self-interest
5. Coloured by social and legal culture
6. Episodic and incremental

HSBC Institutional Trust Services (Singapore) Ltd. (Trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd. [2012] 4 SLR 738, [40]

[I]t is fairly common practice for Asian businesses to include in their commercial contracts . . . "friendly negotiations" and "confer in good faith" clauses . . . . [They] are consistent with our cultural value of promoting consensus whenever possible. Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences.

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GOOD FAITH

Lite

Half fat

Full fat


SLOW & STEADY: CHILL!

Contractual Negotiations and the Common Law: A Move to Good Faith? – England and Wales, and Canada

Professor Paula Giliker (Bristol)

The common law and the problem of good faith

- Common v. civil law?
- Art. 1104 of the French Civil Code provides that "Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy."
- Art. 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG): contract interpreted by having, amongst other things, due regard to the observance of good faith in international trade.
- US Uniform Commercial Code section 1-304: "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".
- US Restatement (Second) of Contracts, §205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."
- Objections to duty to negotiate in good faith: *Workable in practice? Consistent with the position of a negotiating party? Freedom of/from contract? Inefficient? Too much power to judges? Difficulties in estimating damages?*

Good faith and contractual performance in England and Wales

- Piecemeal solutions but no overall principle: *Interfoto v Stiletto* (1989)
- Unless special types of contracts e.g. involving fiduciaries; classified as *uberrimae fidei*
- Or EU directives e.g. Unfair Contracts Terms Directive (but primarily consumer law)
- **Express good faith terms in commercial contracts**
- *Compass Group v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200
- *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch)
- **Implied good faith terms in (relational) commercial contracts**
- *Yam Seng v International Trade Corporation Limited* [2013] EWHC 111 (QB)
- *Sheikh Tahnoon v Kent* [2018] EWHC 333 (Comm)
- *Essex CC v UBB Waste* [2020] EWHC 1581 (TCC)

Critical reaction?

- **Whittaker**: "to the extent to which [these decisions] argue for the imposition of a general requirement of good faith in performance even in the guise of an implied term then they invite courts to go well beyond the proper function of judicial law-making. English law's rejection of a general legal doctrine of good faith should not be undermined by such a general implied term".
- **Bridge**: "it is far from clear whether [Leggatt J] has more than basic honesty in mind and there are few signs that his call possesses a general appeal outside the ranks of those academic lawyers who are waiting for a sign to lead them into the promised land of ethical contracting".
- **Saintier:** "the traditional hostility of English law towards good faith is gradually being replaced by a cautious acceptance of a role for the notion as a behavioural norm with a basis of honesty and co-operation."
- **Bell and McCunn:** fundamental questions remain to be clarified, not least whether such terms should be implied by fact or by law, which urgently needs the intervention of a higher court.

Extract duties from case-law?

- A duty to act honestly, with fidelity to the parties' bargain and reasonably in the spirit of fair dealing, that is, refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people;
- That parties act with integrity and in a spirit of co-operation;
- An expectation of loyalty (importantly not to the other party but to the agreement itself);
- Communication and predictable performance; and
- Parties will be committed to collaborate with another in the performance of the contract.

Canadian law: *A duty to perform honestly*

Bhasin v Hrynew 2014 SCC 71, [2014] 3 S.C.R. 495

•… it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance 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. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations: [33] per Cromwell J.

•[80]: "*Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply.*"

A bijural approach: *Callow v Zollinger* 2020 SCC 45

* "Applying *Bhasin* to this case, and drawing on the illustration provided by the Quebec civil law sources … [t]he termination right was exercised dishonestly … notwithstanding the fact that its terms — the 10-day notice — were otherwise respected. Pointing to the dishonest representations … the duty to act honestly was linked to the termination of the contract and the exercise of that right in the circumstances was a breach of contract": [73] Kasirer J.

* "At the end of the day, whether or not a party has 'knowingly misled' its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies": [91]

* **Minority**: "[T]he majority's resort to the civil law as a 'source of inspiration' is inappropriate…Drawing from civil law in these circumstances departs from this Court's accepted practice in respect of comparative legal analysis. Rather than permissibly drawing inspiration or comfort from the civil law in filling a gap in the common law or in modifying it, the majority's approach…risks subsuming the common law's already−established and distinct conception of good faith into the civil law's conception. And to the extent it does so, it confuses matters significantly, the majority's assurances to the contrary notwithstanding."

- **Canada?**
- Civil Code of Québec recognizes broad duty of good faith which extends to the *formation*, performance and termination of a contract.
- Potential in the light of *Bhasin* and *Callow*?
- **England and Wales?**
- *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891: express term
- McKendrick: "It cannot be said that English law presently recognises the validity of an express obligation to negotiate in good faith but it *may* develop in that direction if greater weight is given to freedom of contract and sanctity of contract over arguments that such an obligation is too uncertain to be enforceable".
- **Likely?**
  - Too uncertain to enforce prior to main contract?
  - Difficult to say whether negotiations were terminated in good or bad faith?
  - How do you assess losses caused by failure to negotiate in good faith?

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Conclusions

(1) Leggatt in 2016:

"… it is the contract which imposes a duty of good faith. The duty does not exist, therefore, when there is no contract and the parties are merely negotiating with each other. And what the contract imposes, the contract can also exclude or limit. The underlying aim is to give effect to the intentions of contracting parties and to support their bargain, not to restrict their freedom of contract in the interests of a broader public policy that parties should deal fairly with one another."

(2) Even if English law, like Canadian law, does move to accept duties to perform contractual obligations honestly and in good faith, this does not per se affect the pre-contractual period.

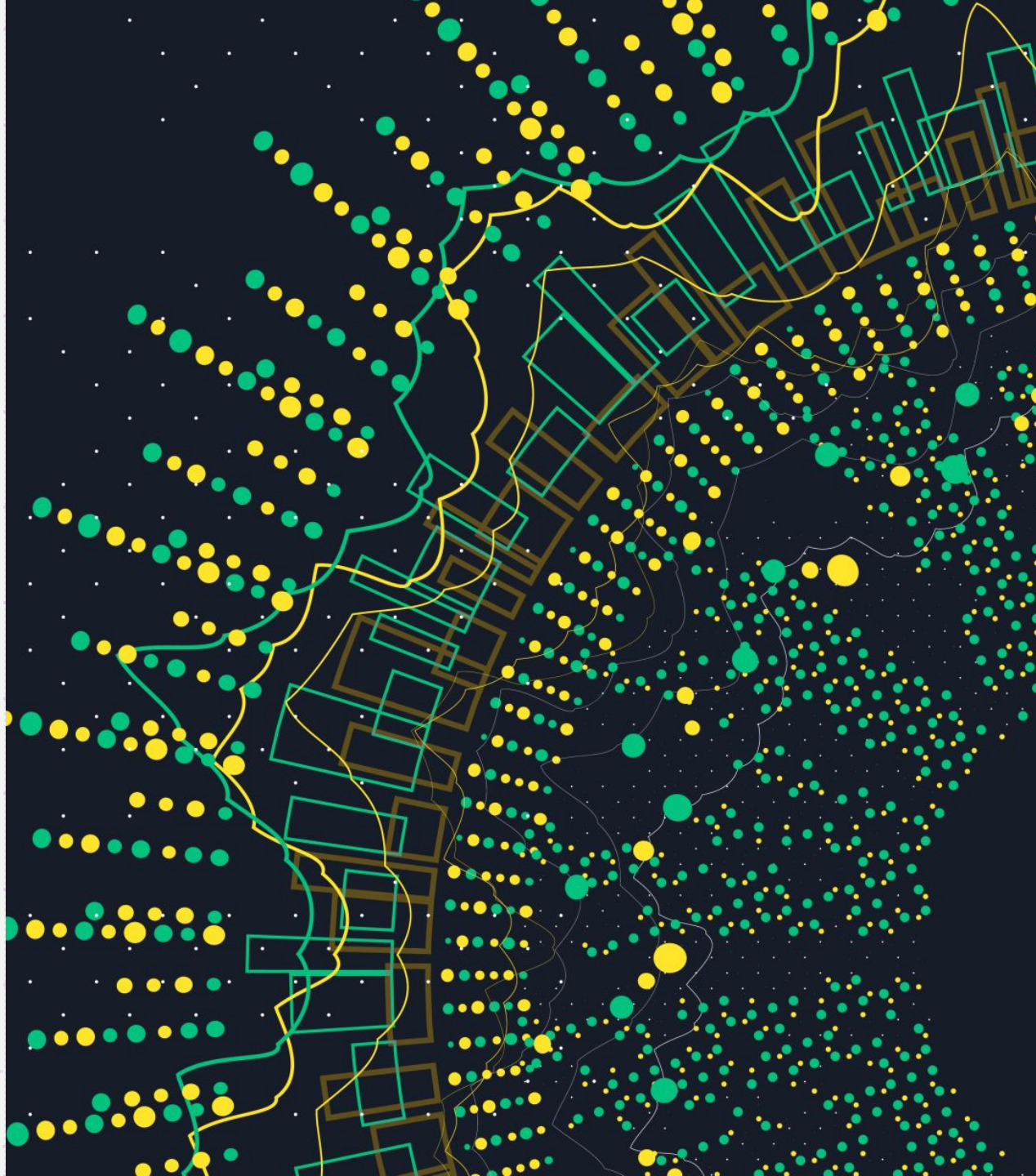
(3) To find pre-contractual duties to negotiate in good faith requires further elements that will counteract the objections identified in *Petromec*.

•Canada: provided by civilian reasoning?

•England and Wales: Would require rethinking of the traditional perception of the relationship between the courts and the parties in terms of freedom of contract and freedom from contract. Would any court be willing to intervene to this extent, constructing a list of pre-contractual duties?

Discussion of Paula Giliker’s “Contractual Negotiations and the Common Law: a Move to Good Faith?”

Hector MacQueen



Paula’s questions

Paula's answers

(1) Uncertainty; anti-commercial; inappropriate for judiciary

(2) Distinguish pre-contract negotiation agreements from obligations to re-negotiate within contract (good faith enforceable in latter but not former; contract context critical)

(3) Implied terms of good faith are confined by, and to be interpreted in, the context of the contract as a whole (i.e. not over-riding, contra Civil Law)

(4) Canadian example suggests dangers in going any further with good faith in pre-contractual negotiations generally; problematic Civil Law influence via Quebec

Comments from a ‘mixed’ legal system

- Contractual and other agreed commitments to good faith suggest that there ***is*** a commercial understanding of the concept
- It may also exist without or before express agreement
- To take a simple example: I teach a course on contracts in the construction industry, in which I give the course members a problem in which a tenderer omits to price for one of the items of work to be done on the job. The question is concerned with what happens if that tender is accepted, and the answer in my opinion is that the price for that item is nil. The discussion of the problem invariably reveals, however, that in practice the employer receiving such a tender would before accepting it go back to the tenderer to check whether there had been a mistake. Almost equally invariably the tenderer would answer that there had been no mistake (even if there had been), because the employer’s inquiry shows that the tender is in with a chance of success. But the employer will always inquire, because with a clear answer ground for potentially costly later dispute is removed. Often too the employer deals constantly with the tenderers, and the overall relationship will be soured if one party seeks to take advantage of the other’s mistakes. It may indeed be in the overall best interests of each side to have some awareness of the interests of the other and to take them into account; self-interest can include the interests of others on whom one depends in some way. (MacQueen, 1999)

Contracts can be found to exist as negotiations continue

- Courts sometimes find contracts exist in contexts where the parties may have (subjectively) thought they were still negotiating
- e.g. *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] UKSC 14 (*held* contract despite non-compliance with provision that contract would not become effective until each party executed a counterpart and exchanged it with the other)

Legal relationships between negotiating parties (even if no contract results?)

Relationships between negotiating parties ***are*** recognized in tort (fraud, misrepresentation) and in unjust enrichment

The relevance of unilateral mistake known to, but not disclosed by, other negotiating party

Banks' duty to prospective guarantors (contrast *RBS v Etridge* with *Smith v Bank of Scotland* in Scotland)

“Stringing along”

Principles of European Contract Law

Article 2:301: Negotiations Contrary to Good Faith

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party.

(3) It is contrary to good faith, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

Paul Finn's scheme: three levels of behaviour in contracts

- "Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith", while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other—to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour." (P D Finn, "The fiduciary principle", in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Calgary, Vancouver, 1989) 1, at p. 4)

Suggestions