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De receptie van 'Good faith' in de Engelse rechtspraak en bouwcontracten, zoals NEC3

De Cases *Yam Seng* (2013) en *Mid Essex Hospital* (2012)

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On a Clear Day, You Can See the Continent – The Shrouded Acceptance of Good Faith as a General Rule of Contract Law on the British Isles

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Introduction

With its decisions in ***Yam Seng* (2013)** and ***Mid Essex Hospital* (2012)** the High Court has given a striking contribution to the discussion that developed over the last decades what role the civil law concept of 'good faith' may take in the contract law of a common law jurisdiction as that of the U.K.[1] Although in the last case the decision was overturned by the Court of Appeal in 2013, with the first case discussed in an *obiter*, illustrating the sensitive character of this issue, the decisions raised much comment in the legal press. In particular the Queen's Bench April 2013 decision in *Yam Seng*, accepting good faith as a source of contractual obligations, has drawn the attention of most contract lawyers, in the U.K. and abroad. Was this the announcement of a new spring, English common law joining its civil law sisters in accepting the good faith principle as the leading standard of conduct in the law of contract? It is perhaps no coincidence that the case was about the sale of fragrances under a distribution contract.

[p. 8 ff.]

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

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

"In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making ad carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing.

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[1] *Yam Seng PTE Ltd v International Trade Corp. Ltd* [2013] EWHC 111 (QB); *Compass Group UK and Ireland Ltd (trading as Midirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB), overturned in appeal: [2013] EWCA Civ 200.

[…..]
English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contributions, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways."[2]

It is noted that in *Mid Essex Hospital* in appeal, Jackson LJ appears to be of the same view when he dismissed the idea of English contract law knowing a general doctrine of 'good faith'. It however remains to be seen whether the Appeal Court justices with their decision had a convincing hand in applying the "piecemeal solutions" in the style of Bingham LJ, a topic to be dealt with below.
Of the "many other ways" in which according to Bingham LJ the English courts succeeded in repairing unfairness in a contractual situation, mention can be made here of the use of implied terms, as the annex of construction of contract, and also of estoppel. A notable recent example of the latter figure is the decision in *ING Bank v Ros Roca SA* of 2001.[3] It all nicely demonstrates that justice can be served by the use of either a *sword* (reasonable term implied, on which a party may rely) or a *shield* (estoppel, applied in defence of a party against the other party's unfair reliance on the letter of the contract), both when justified under the circumstances and generally accepted commercial practices. Which is phrased as "in accordance with commercial common sense" in the decision of 2011 in *Rainy Sky*, thereby giving a perfect picture of the English climate, in a broad sense.[4]

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

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

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

A few years later, Bingham LJ expressed a comparable view concerning the doctrine of frustration of contract, so often the battlefield of the reasonable solution and contractual fairness since the days of Lord Wright, in *Denny, Mott and Dickson* (1944) providing the foundation

[2] *Interphoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1988) 1 All ER 348 CA.
[3] (2011) EWCA Civ 353. For the relevance of estoppel for construction contracts, see: *Keating on Construction Contracts*, 9th edn., 2012, Ch. 12, "Various equitable doctrines and remedies", at 12-001 ff. For implied promises to pay for extra work, see: 4-040 ff.
[4] *Rainy Sky v Kookmin Bank* (2011) UKSC 50.

for what was to become the 'just and reasonable solution' theory.[5] In the *Wijsmuller SuperServant Two* case of 1990 Bingham LJ had stated:

"The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ..".[6]

It is noted that a similar approach recently was followed by the Supreme Court in the *Lloyds TSB* case of 2013, where in the context of the circumstances prevailing at the time the contract was made (1997) the literal meaning of the contract text was put aside, in favour of how the words of the deed had to be read in the light of what a reasonable person would have taken them to mean in 1997. The "landscape, matrix and aim of the 1990 Deed … could not be clearer", making the issue now "how its language best operates in the fundamentally changed and entirely unforeseen circumstances in the light of the parties' original intentions and purposes" (*per* Lord Mance).[7]
But let us leave the domain of frustration of contract, the ultimate stress test of a contract once agreed between the parties in happier times, and return to the calmer waters of performance of contract under normal conditions, and the question what additional value the principle of good faith can offer here to a party in distress.

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

For a survey of the development of the courts' piecemeal approach in the years since *Interphoto* it is suggested to take the recent High Court decisions in *Yam Seng* (2013) and *Mid Essex Hospital* (2012) as guidance.[8] In the first case, concerning a long-term distribution agreement, Leggatt J discussing the acceptance of a general obligation of good faith quoted the 'piecemeal solution' statement of Bingham LJ of 1988, noting that the general view appears to be that in English contract law there is no legal principle of good faith of general application. In judge's view, however, "any traditional English hostility towards a doctrine of good faith in the performance of contract, to the extent that it still persists" is "misplaced". For further details I refer to Shy Jackson's article in this issue, just a few observations of my own here.
Interestingly, Mr. Leggatt's argument that the application of the good faith principle is entirely consistent with the case by case approach favoured in common law is based on his observation that the content of that duty is heavily dependent on context and established through a process of construction of the contract, and therefore the presumed intentions of the parties. Any doubts what is meant by these last words can be solved by turning to the judge's earlier citation of Lord Hoffmann's approach in the *Belize* case of 2009. The traditional tests for implication of terms could be analysed as part of the exercise of construction of the contract: what would the

[5] Compare: *Cheshire, Fifoot & Furmston's Law of Contract*, 16th edn., 2012, at p. 717 ff.
[6] *J Lauritzen AS v. Wijsmuller BV, The Super Servant Two* (1990) 1 Lloyds Rep 1, CA.
[7] *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* (2013) UKSC 3. Construction of contract is seen as the basis for frustration of contract by Treitel, *The Law of Contract*, 10th edn. 1999, p. 858 (1979, p.683), against the 'just and reasonable solution' as advocated by Lord Denning, Michael Furmston and others. For a comparative analysis of this doctrine, see my article: "The Changing of the Guard: *Force Majeure* and Frustration in Construction Contracts: the Foreseeability Requirement Replaced by Normative Risk Allocation", 20 (2) International Construction LR, 2002, pp. 162-186, also available on my Website, see above footnote 1.
[8] For sources, see above, footnote 1.

contract, read as a whole against the relevant background, reasonably (and objectively) be understood to mean?[9]
In this context also the judge's citation of the *Berkeley Community Village* case of 2007 is illuminating. In that case Morgan J described good faith as an "obligation to observe reasonable commercial standards of fair dealing in accordance with their actions that elated to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectation of the other party to the agreement".[10] For the proper construction of the contract (a planning promotion agreement) the judge relied on *Interphoto* (1988) with the result that such agreement could create an obligation to act in utmost good faith towards each other, and reasonably and prudently at all times. The breach of that obligation was thereupon established since reasonable commercial standards of fair dealing or faithfulness to the agreed common purpose were not observed and the other party's justified expectations violated.

Equally interesting is the support for his view Leggatt J sought in the acceptance of good faith in English law in certain categories of contracts, for example contracts of employment and partnering contracts, where the relation of the parties has a fiduciary character. He extended that notion to what was termed 'relational contracts', such as joint venture agreements, franchise agreements and long-term distribution agreements. It is not hard to see construction contracts fitting into that category, as by definition long-term and relational, which makes the judge's qualification particularly worth reading. Such agreements namely 'may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements". The contours of NEC3 are looming in the background here.

Our next case is *Mid Essex Hospital* (HC 2012, CA 2013), where for an outline of the facts and de decisions another reference is made to the article by Shy Jackson in this issue. Therefore only a few supplementary remarks, followed by comments on what the appeal court decided. The case already is a running gag in legal circles, also on the Continent: "the tomato ketchup sachets and the mousse being out of date", in this 7 year services contract, providing the hospital several catering facilities. I expect these objects will get the same status as the snail in the proverbial ginger ale bottle of the 1930's, when tort received its modern form. The tomato ketchup found in a fridge actually was not de brand used by the Contractor (Midirest) and the mousse was only one day out of date, which did not prevent the Employer (the Trust) to apply staggering deductions. Together with the other failures found by the Trust (such as a fridge not indicating temperature – while being defrosted; out of date bagels – belonging to staff or patients, and two spoons wedging open fire doors) and the size of deductions applied (between 30,000 and 90,000 GBP for each failure) not surprisingly, brought Cranston J to the view that these deductions were "patently absurd" and made in "in the most cavalier fashion".
As so often is the case in a dispute, in my experience as arbitrator, it was the action of one person within the Trust, clearly on a collision course with the Contractor (usually because such person has another contractor in mind to put on the job, for personal reasons – again my arbitral practice is leading me here). The Trust, after obtaining legal advice much later however reduced its deductions considerably, which in court proved to be an essential fact in establishing whether the breach was of a 'repudiatory' nature. It then was considered sufficient to repair the repudiatory character of the breach, required for entitlement to terminate the contract.

[9] *Attorney General of Belize v Belize Telecom Ltd* (2009) UKPC 10.
[10] *Berkeley Community Villages v Pullen* (2007) EWHC 1330 (Ch) at [97].

Incidentally, there were initial difficulties with Midirest's performance of the contract, partly due to the fact that it had to take over personnel from the hospital, but at the time of 'ketchup and mousse' incidents these problems had been solved. I mention these facts because it makes it easier to understand the position the judge in first instance, Mr. Cranston, was taking in the dispute.
The legal battle concentrated on the meaning of clause 3.5 with its reference to good faith, in particular when the case later was heard in appeal. What counted, however, for Cranston J was that the Trust by its actions had destroyed the working relationship. After making the deductions, soon totalling 716,000 GBP, more importantly it refused to provide any justification to the Contractor Midirest nor to respond to its requests for high-level meetings to resolve the matter or to implement the dispute resolution provisions. The judge found these breaches going to the heart of the contract, and therefore material. In a devastating conclusion it was held "difficult to imagine, in practice, behaviour more likely to result in a breakdown of relationship with Midirest than what the Trust adopted".

In this context the judge had referred to the *Berkeley Community Villages* case (2007), discussed before, with the acceptance of "a duty to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose and to act consistently with justified expectations". The judge further reviewed the *Qatari Diar* case (2010) also involving a contract where parties in a long term contract had to act in the utmost good faith, a joint venture agreement requiring continuous and detailed cooperation between the parties. Also *Manifest Shipping* (2001) was considered wherein the court had doubted how, without bad faith, there could be a breach of the duty of good faith.[11] The Trust had argued namely that the duty to cooperate in good faith could only be breached by behaviour undertaken in bad faith. This view was rejected by the judge. Turning to clause 3.5, he accepted that it would of course catch acts done in bad faith, but it was seen broader than that: the clause qualified how the duty to cooperate should be performed. The wording, in the judge's view, referred to the common purpose that the Trust was pursuing with Midirest, namely both parties trying to deliver a service which would benefit the general public when using the hospital. The objective standard of conduct demanded in this case of both parties primarily encompassed faithfulness to this common purpose. Fair dealing and acting consistently with justified expectations were, in a sense, corollaries of that.
In this approach of the judge in first instance, the *common purpose* of the long-term services contract is taken as central element in the construction of clause 3.5. This is the more important, as in appeal this aspect seems to be largely lost out of sight, as we will see shortly.

Finally, it is noted that the judge made use of an additional argument, namely that the discretion the Trust had under the contract in the calculation of service point failures (under clause 5.8) according to the authorities is not to be exercised in an arbitrary, irrational or capricious manner.[12] Such obligation was likely to be implicit in any commercial contract under which a party has the right to make a decision that affects both parties whose interests are not the same. In the interpretation of reasonable persons such clause would be considered as conferring power on the Trust to act with a purpose of curbing performance failure and not to generate discounts on service payments. The judge also held that this implied obligation to exercise discretion properly could not have been excluded under the contract, as alleged by the Trust. Mr Cranston thereby relied on the *Belize* case: one cannot preclude the implication of terms which are

[11] *CPC Group Ltd v Qatari Diar* (2010) EWHC 1535 (Ch); *Manifest Shipping Co v Uni-Polaris Shipping Co* (2001) UKHL 1.
[12] Cranston J referred here to *Socimer v Standard Bank* (2008) EWCA 116.

necessary to give business efficacy and which give effect to what the parties must be taken to have meant.

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

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

In the Court of Appeal's decision, which was also summarised by Shy Jackson in his article in this issue, two topics are placed in the centre: the meaning of clause 3.5 with its reference to good faith, and the conviction that under English law no general obligation of good faith is accepted. The first consequence of this approach is, that if clause 3.5 is ineffective or upon interpretation held to be not applicable to the alleged breach of duties by the Trust with its deduction actions (under clause 5.8), the only way a party may rely on the rule of good faith would have been to expressly put it into the contract. Secondly, a party making use of clause 5.8, with no good faith duty in place, is free to make use of that clause as its discretion – exactly what was happening in this case. In both lines of thought, rejection of good faith as a general principle is crucial for the outcome.
To understand the decision of the appeal court, an analysis is needed of the road the justices are following here, deviating from the one taken by the judge of first instance. It is suggested, that the Appeal Court justices, leaning over backwards in their effort to keep good faith out, appear to have lost track of the more traditional, 'piecemeal solutions' approach to the issues of construing clauses 3.5 and 5.8 in the context and under the given circumstances.
The subject of interpretation, clause 3.5, to start with, reads as follows:

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

This clause does not strike as a prime example of contract drafting. The Court of Appeal took the view that the first sentence of Clause 3.5 contains "a jumble of different statements, set out in an incoherent order", which resulted in the clause having a very malleable meaning "depending upon where one placed the caesuras and what imaginary punctuation one inserted". It is noted however that, if read with the acceptance of a general rule of good faith in mind it is not hard to see the "reasonable action" necessary for "efficient transmission of information and instructions" as just an elaboration of such rule, giving examples of duties it creates. The general character of the good faith rule is emphasised in the last part of this clause: 'to enable the Trust and any Beneficiary to get the full benefit of the contract'.
Jackson LJ, writing the controlling opinion, clearly held the opposite view, guided by the observation that "there was no general doctrine of 'good faith' in English contract law" and

parties for that purpose had to impose such obligation expressly. In consequence, the true construction of this clause in the Lord Justice's view was that the general duty to cooperate in good faith existed only in respect of the two stated aims: (a) the efficient transmission of information and instructions and (b) enabling the Trust or any Beneficiary to derive the full benefit of the contract (para 105-107). Therefore, clause 3.5 only held that the parties would "work together honestly endeavouring to achieve the two stated purposes".

Thus, the Trust's use of clause 5.8 applying gigantic deductions on the contractor for minimal, alleged failures was not curbed by good faith. It neither was influenced by an implied term that the Trust "would not act in an arbitrary, capricious of irrational manner in relation to awarding servicer failure points", according to the Court of Appeal as set out in previous paragraphs. There was "an absolute contractual right" in place and the Trust's discretion will "simply permit the Trust to decide whether or not to exercise an absolute contractual right" (para. 90-91).

The Court of Appeal also held that with the allegedly wrongful deductions the Trust did not breach clause 3.5 for two reasons (para 114). In the first place, there was no required finding that it had acted dishonestly, as opposed to mistakenly. Secondly, the deductions did not relate to the two stated purposes and therefore did not fall within the range of clause 3.5. Although there was "the breakdown of personal relationships at management level, there was no breach of clause 3.5 on either side" (para. 120).

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

The indicated two foundations of the Court of Appeal's position on the present issue each raise questions in regard to the traditional way of handling such cases by the courts, Lord Bingham's 'piecemeal solutions'. The way of dealing with the true construction of clause 3.5 by the appeal court is hard to reconcile with what the courts are doing since the *ICS* case of 1998, the 'purposive and contextual interpretation', when taking into account purpose and context of the contract, which was the manifest approach in first instance, by Cranston J. Only the year before, the Court of Appeal itself had stressed the "overall commercial purpose of the purchase agreement" to determine the meaning of an unclear exemption clause, in *Mir Steel*.[13] Also the phrase used by Lord Hoffmann in *ICS* comes to mind, that "something may have gone wrong with the language". It is suggested that here the 'jumble of statements in an incoherent order' may suffice to accept bad drafting of clause 3.5 and forget about taking literally the words of the clause or their syntactic order and punctuation.
Furthermore, against the view on the absolute right of a party and its absolute discretion, that is, dismissing the use of an implied term holding its reasonable and non-capricious application, there is a wealth of authorities, some of which were examined by Cranston J.[14] The weakness of this foundation of the decision in appeal is perhaps best illustrated by citing the decision in *Costain v Bechtel* of 2005 by Jackson J (as he then was), which is completely of another

[13] *Mir Steel UK v Morris & Alphasteel Ltd* (2012) EWCA Civ 1397. In this case, Mir Steel relied on *Canada Steamship* (1952) for the strict interpretation of the exemption clause, however without success. See also *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* (2013) EWCA Civ 38, where an exclusion clause was not taken for its literal meaning, but construed consistently with business common sense.
[14] The authorities reviewed by Leggatt J. in *Yam Seng* include: *Anglo Group plc v Winther Brown & Co Ltd* (1997) TCC 413 and the cases mentioned before: *Berkeley Community Villages* (2007), *Quatari Diar* (2010), and *Manifest Shipping* (2001).

nature.[15] It concerned a contract under NEC2, with what is now clause 10.1 under NEC3 contained in the Recitals, therefore the obligation 'to act in the spirit of mutual trust and co-operation' (which is 'good faith' for non-Continentals). Mr. Jackson in that case held, in a decision that contains in his words: "significance extending beyond the boundaries of the present litigation", that, although the NEC is more specific and objective than 'conventional' construction contracts,

"there are still many instances where the project manager has to exercise his own independent judgment … When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in *Sutcliffe* do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor".

The project managers had argued that *Sutcliffe v Thackray* (1974) did not apply since the contract was not a conventional contract, and also that under the Entire agreement clause an implied term by custom was prevented by cause Z.11. Jackson J however accepted the view that a normal duty which any certifier has on these occasions is holding a balance between employer and contractor, which leaves no room for any term implied by custom: "The implied obligation of a certifier to act fairly, if it exists, arises by operation of the law not as a consequence of custom".
In another argumentation the certifier's duty was formulated with the phrase 'in good faith'. In the light of the *Mid Essex Hospital* decision it is interesting to read Mr. Jackson's observation on the term 'good faith' in 2005. It starts with saying: "Sometimes it is used as a synonym for 'impartiality'. Sometimes it is used as a synonym for 'honesty'". Criticising the term as 'ambiguous', the judge further said that "A semantic debate about the precise meaning of the phrase 'in good faith' in the context of certification seems to me to serve no useful purpose. I have therefore concentrated on the question whether there was a duty of impartiality and whether, arguably, that duty was breached."[16]

The duty to cooperate as an implied term is not a novel thing, it was accepted already in 1977 in *Liverpool City Council v Irwin* in a contract for the tenancy of a flat[17]. It is also used to control the misuse of contractual powers during performance of the contract, such as in the case of *Mallone v BPB Industries* of 2002 where the contract stated that the amount of share options granted to a dismissed manager should depend on whatever grant "the directors in their absolute discretion determine". The Court of Appeal held that the apparently absolute discretion was limited by an implied term that required the power to be exercised honestly, not capriciously or for an improper motive, and not irrationally in the sense that no reasonable employer would have exercised the power this way.[18] The decision to award no stock options was held to be irrational because the option scheme implied that this deferred remuneration would be assessed by reference to good performance and loyalty.

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[15] *Costain Ltd v Bechtel Ltd* (2005) EWHC 1018, TCC, on the Channel Tunnel High Speed Rail Link Project. See on this case also *Keating on Nec3*, David Thomas QC, 2012, p.41, and on implied terms to co-operation in general (which are "usual to imply"): *Keating on Construction Contracts*, 9th edn, 2012, para.3-046.
[16] In the same sense, the decision of Jackson J in the TCC in the case of *Scheldebouw v St James Homes (Grosvenor Dock) Ltd* (2006) BLR 113.
[17] (1977) AC 239, (1976) 2 All ER 39, HL, discussed by Hugh Collins, *The Law of Contract*, 4th edn. 2003, p.334, in: Ch. 15, *Co-operation*. The author, interestingly, also develops the principle of 'fairness' as substitute for good faith, see Ch. 13 and Ch. 2.
[18] *Mallone v BPB Industries plc*, (2002) EWCA Civ 126; (2002) ICR 1045, CA, see Hugh Collins, at p.340, quoted here.

Another, more recent example, also from the Court of Appeal, is the *Freesat* case of 2010, where Freesat had contractual discretion to allocate numbers on its broadcasting platform to JML's television channels. This discretion was subject to a contractual 'Listing Policy' which set out a number of factors that Freesat would consider. Moore-Bick LJ held:

"… Freesat should have the right to exercise its own judgment in the matter, subject only to compliance with the Listing Policy and the implied obligation not to act in an arbitrary, irrational or capricious manner. Such an obligation is likely to be implicit in any commercial contract under which one party is given the right to make a decision on a matter which affects both parties whose interests are not the same … [19]

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

This observation is supported by several High Court decisions, explicitly using the concept of good faith in this context. In the *Ross River* cases for instance, Morgan J in a decision of 2012 concerning a joint venture on development of building sites accepted the breach of a fiduciary obligation of good faith, not seen as a general obligation but tailored to the particular circumstances: defendants Waveley Commercial Ltd, were held to owe a duty "not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of" the other party.[20] Likewise, in an older decision involving Cambridge City FC, Briggs J established a breach of the duty of good faith notwithstanding that there were express provisions dealing with disclosure which were not operated in the circumstances.[21] The duty was not seen as a general duty to make full disclosure of all material information as that would run counter to the express disclosure provisions. The 'single-minded regard' to the interest of the purchaser when the adviser should have either declined to respond or been frank if responding, was held as a wrong, of tortious nature.

Returning to the *Mid Essex Hospital* case, some final remarks on that intriguing decision in appeal. The Lord Justices Lewinson and Beatson wrote concurring opinions. The latter addressed the *Yam Seng* decision that just had appeared (and relied upon by counsel), observing that as Leggatt J had stated "what good faith requires is sensitive to context" and that the test of good faith is objective in the sense that it is commercially acceptable to reasonable and honest people and that its content "is established through a process of construction of the contract" (para. 141 ff.; 151 ff.). Beatson LJ concludes then that the contract was

"a detailed one which makes which makes specific provision for a number of particular eventualities … care must be taken not to construe a general and potentially open-ended obligation such as an obligation to 'co-operate' or 'to act in good faith' as covering the same

[19] *JML Direct Ltd v Freesat UK Ltd* (2010) EWCA Civ 34. See in the same sense: *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 42, on the employer's agent's duties under JCT (DB), summarised as: "The agent must demonstrate a very high duty of good faith", thus David Chappell, *Building Contract Claims*, 5th edn. 2011,at p.352.
[20] *Ross River v Waveley Commercial Ltd* (2010) EWHC 81 (Ch).
[21] *Ross River v Cambridge City FC* (2007) EWHC 1330 (Ch).

ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them" (para 154).

If Beatson LJ did not approve of Leggatt J's decision, it was carefully wrapped in general statements. The last one, it is observed, clearly also runs counter to the other High Court and Court of Appeal decisions just discussed. The Lord Justice earlier in his opinion had stated that "the scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context" (para. 151). A statement that is scoring high on the range of truisms. It also is a Roman maxim of interpretation, found in all civil codes on the Continent inspired by the French Code civil (article 1161 CC).

In conclusion, Beatson LJ, nor his brethren, Jackson LJ first and foremost, when dismissing the approach in first instance by Cranston J in relation to an obligation of good faith, failed to give any convincing argumentation in the light of the state of legal authority, judicial or doctrinal. This conclusion of mine, in humble submission of course, may have relevance when evaluating recent decisions in which the present appeal court decision is followed, such as that of the High Court (TCC) in *TSG Building Service*, 2013, by Akenhead J.[22] Here I again refer to Shy Jackson's article in this Journal's issue for details. Prominently in this decision we find the rejection of an obligation to act reasonably in exercising a party's right to require rectification of defects, which is seen as an absolute right, whilst the same position was taken in relation to the obligation to act reasonably in proceedings with adjudication, a party's referring a dispute to adjudication.

We are coming to the final part of this article, observations on the legal policy undertones of the *Mid Essex Hospital* decision in appeal and, in particular, the current misunderstandings if not folk lore on what good faith as a general obligation of contract is all about, with the French *bonne foi* on the central stage. In short, the *fides phobia*. A malady which, incidentally, is not restricted to the British Isles. It is also found on the Continent, in some commercial legal circles where playing hard ball is a favourite sport.[23]

[22] *TSG Building Service PLC v South Anglia Housing Ltd* (2013) EWHC 1151 (TCC).

[23] Michael Furmston, in *Cheshire, Fifoot & Furmston*, always was sympathetic to good faith in contract law. In his latest edition (2012) a paragraph is dedicated to that subject, with reference to English literature of the 1990s, including an author by the name of J. Beatson (!). See *l.c.*, at p. 33 ff., and p.795.