

Workshop Studiekring 'Normatieve uitleg'  
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» UITLEG VAN OVEREENKOMSTEN NAAR  
COMMON LAW EN CIVIL LAW  
Of: De opmars van *Good faith* in het  
Engelse contractenrecht »

“De receptie van ‘*Good faith*’ in de Engelse  
rechtspraak en bouwcontracten,  
zoals NEC3”

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# OUTLINE

1. Recent developments in UK law
  - \* Case law in 2013, introducing good faith
  - \* Standard Contract Forms and good faith (e.g. NEC3)
2. Duty of good faith, in relation to interpretation of contract
3. The Great Divide: Common law vs. Civil law
  - \* Nature of general principles in civil law
  - \* *Fides phobia*, anyone?
  - \* How does good faith work in practice, e.g. in France?

4. The origin of all confusion: Will theory vs Reliance theory

The 1875 Legal Revolution in Western Europe:

Reliance theory introduced in France, Germany, Netherlands, Scandinavia. Albion in perfect isolation?

5. Lord Mansfield's heritage: was there life for good faith after *Carter v Boehm* (1766)?

A well kept secret: the Scots are not that isolated as it seems

6. Conclusions

# The acceptance of the duty of good faith in U.K. Contract law

## 1. Recent developments in UK law:

- case law in 2013, introduction of good faith, in comparison to Civil Law (French, German, Dutch law):  
e.g. *Yam Seng*, EWHC, 2013; *Mid Essex Hospital*, EWCA, 2013  
[see: back-ground Materials]
- Standard Contract Forms and good faith:  
e.g. NEC3, Acting in a 'spirit of mutual trust and co-operation',  
Clause 10.1: introducing the duty of good faith?

# General Obligations under NEC3

## Clause 10.1 and the 'spirit of mutual trust and co-operation'

10.1 “The *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* shall act as stated in this contract and in a spirit of mutual trust and co-operation.”

The ‘shall’ word, in combination with good faith *à l’anglaise*

## Other U.K. Standard forms, containing good faith duty:

- PPC 2000, Clause 1.3: “work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Project”
- JCT Non-Binding Partnering Charter: “act in good faith; in an open and trusting manner, in a co-operative way, in a way to avoid disputes by adopting a no blame culture” (2007)
- JCT Be Collaborative Constructing Excellence Form: ‘duty of good faith’ as an over-riding principle, taking precedence over all other terms (2007)

Compare:

- Shy Jackson, “Good Faith in Construction – Will it Make a Difference and is it Worth the Trouble?”, (2007) 23 *Cons. Law J.*, p.420
- Jim Mason, “Contracting in Good Faith – Giving the Parties What They Want”, (2007) 23 *Cons. Law J.*, p.436

## What is “good faith”?

- An elusive term? A vague and nebulous term?
- A concept undermining contractual certainty?
- The danger of a definition which would “either spiral into the charybdis of vacuous generality or collide with the scylla of restrictive specificity”? (M. Miner, 2004)
- Or is it: “We in England find it difficult to adopt a general concept of good faith ... we do not know quite what it means” (Roy Goode, 1992)

- Judge Humphrey Lloyd in *Birse Construction*, 1999, on “a spirit of mutual trust and co-operation”, in Partnering Charter, See: Rowlingson, *Practical Guide NEC3 / PSC*, 2012, p.20
- Australian Courts on good faith obligations: overlap between ‘unreasonableness’ and ‘unconscionability’, *Automasters* case, 2002: Guidelines, which may illuminate Clause 10.1 NEC3, “mutual trust and co-operation”

# Guidelines

- (1) “What good faith is will depend on circumstances of the case and context of the whole contract”
- (2) “Good faith obligations do not require parties to put aside self-interest”
- (3) “Normal reasonable business behaviour is permitted but a court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive”
- (4) “The duty is one to have due regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms”

*See: Keating on NEC3, David Thomas, Ed., 2012, p.11*

In sum, according to *Keating on NEC3*, Clause 10.1 is a balance between:

- Acting as stated in the contract, and
- Acting in mutual trust and co-operation: parties must , whilst maintaining their commercial interests, behave so
  - that their words and deeds are honest, fair and reasonable,
  - they are not attempting to improperly exploit, and
  - are facilitating each other's roles in the contract.

2. Duty of good faith: its relation to contractual interpretation, in particular:

- ‘contextual and purposive’ interpretation in case of unforeseen circumstances,  
e.g. *Lloyds TSB*, UKSC, 2013;
- ‘business common sense’ as criterion of interpretation,  
e.g. *Rainy Sky*, UKSC, 2011;
- implied terms, as instrument of contractual interpretation;
- ‘relevant trade usages’, Article 17.1, ICC Arbitration Rules;
- ‘Entire agreement’ clauses. Rectification as instrument

The development of Construction of contract (interpretation) under U.K. law, and the use of implied terms, before 2013

*'Purposive interpretation'* (context + purpose):

- *ICS case: Lord Hoffmann in Investor's Compensation Scheme v. West Bromwich Building Society, 1998;*
- *Chartbrook v. Persimmon Homes, 2009;*
- *Rainy Sky, 2011*

Recent English case law on interpretation of contract and the (implied) duty of good faith, of 2013:

- *Yam Seng v. International Trade Corp*, EWHC, 2013
- *Mid Essex Hospital*, EWCA, 2013.
- *Lloyds TSB*, UKSC 2013

See: back-ground Materials

# *Mid Essex Hospital (2013)*

## **Contractual obligation to cooperate in good faith in clause 3.5:**

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

# *Mid Essex Hospital (2013)*

- Initial performance was poor and an action plan was required
- The Trust instructed its staff to “*pull it to bits*”. Poisoning of the relationship
- Deductions for failures escalated in total from £3,500 to £587,207:
  - Out of date ketchup sachets - £46,320
  - Lack of signature on cleaning schedule – £11,842.50
  - One day out of date chocolate mousse – £84,540
  - Out of date bagels - £96,060

# *Yam Seng (2013)*

- Distribution agreement concerning sale of Manchester United Toiletries in the Far East
- Business relationship between two individuals
- Brief agreement signed, with no advice from lawyers
- Dispute revolved around allegations of misleading statements and behaviour which went against the aims of the agreement, resulting in termination

# Recent English case law, 2014 and 2015

- ***Bristol Groundschool v Intelligent Data Capture*** [2014] EWHC 2145:  
Judge finds relational contract existed and approved ***Yam Seng*** decision
- ***D&G Cars v Essex Police Authority*** [2015] EWHC 226:

See: back-ground Materials

*D&G Cars v Essex Police Authority* [2015] EWHC 226:

*“There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest. Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour. They would amount to behaviour which the parties would, had they been asked, have identified as obvious acts which were **inconsistent with the maintenance of their intended long-term relationship of fair and open dealing and therefore would amount to a breach of their contract.**”*

# “Clear words” and interpretation

Are there limits to interpretation of contract? What about “clear words”? Language and Law

Examples from English contract law:

- “any claim” – *BCC v Ali* [2001, UKHL]
- “actually paid” – *Charter Reinsurance v Fagan* [1997, AC]
- “12 January” – *Mannai Investment v Eagle Star* [1997, AC]
- “(ship)owners” – *The Stolt Loyalty v Soframar* [1995]

### **3. The Great Divide: Common Law versus Civil Law, *alias* the Great Misunderstanding**

- What's going on? General principles of Contract Law, their true nature under Civil law.
- The role of the good faith principle in contract law: *fides phobia* in the U.K. and elsewhere, is it justified?
- How does good faith (*bona fides*) actually work as a principle, in theory, and above all, in practice? The *French connection*.

## Misunderstanding 'good faith' as applied in Civil Law (1)

The common view in the U.K. on the application of good faith (*la bonne foi*) in French law (or civil law in general) in contract interpretation:  
is erroneously seen as based on the *subjective (actual) intention* of the parties.  
Thus:

- Lord Hoffmann in *Chartbrook* (2009)
- text books: Jonathan Morgan, *Great Debates in Contract Law*, 2012, p.99

What went wrong? Source: Catherine Valcke, Univ. Toronto, 2008 article:  
'subjective interpretation' allegedly accepted in French law. *Sic!*

## Interpretation of contract in civil law, e.g. French law:

- *l'interprétation créatrice du contrat*, Charles Jarrosson, 1987
- See: Josserand, 1933: *le forçage du contrat*  
[Clémentine Caumes, diss. Avignon 2010; Aurore Portefaix, Nimes 2007; Fanny Bugnet, Montpellier 2007]

**See also the text books on French Contract Law, discussing:**

- ‘l’interprétation objective’; ‘la thèse objective’;
- ‘le forçage du contrat’, etc.

Compare: Jacques Ghestin, 1994; Boris Starck, 1995; Philippe Malaurie, 1990

Conclusion:

Good faith as a general principle of contract law, is also applied in the interpretation of contract

Jean Carbonnier, *Droit civil IV, Les obligations*, 22nd ed. 2000, nr. 142:

- “C’est selon l’esprit, *de bonne foi*, et non pas à la lettre, en droit stricte, qu’il faut appliquer les conventions” (Article 1134, section 3, *juncto* Article 1156 Code civil)

German law (par. 242 Civil code) and Dutch law (Art. 6-248 Civil code) have a similar system

## Misunderstanding 'good faith' as applied in Civil Law (2)

In a Civil law system, good faith as a general principle, governing the performance of contracts, generally is not directly applicable to solve a contract dispute.

In the course of the “détermination objective du contenu du contrat” or “le renforcement du contenu du contrat”, the French courts in the last century have developed specific obligations, as a duty of good faith, such as:

Contractual duties of good faith accepted by the French courts:

- *Obligation de sécurité*
- *Obligation de renseignement et conseil*
- *Obligation de surveillance*
- *Obligation de non-concurrence*
- *Obligation de collaboration*

Zie verder: Inleiding van Jurriaan Kien

These duties of good faith in French law are not uncommon in Common Law, e.g. U.K. law. Traditionally, they are construed as implied terms, in which commercial practice, usages, fair dealing, etc. are taken into consideration by the courts.

Compare L.J. Bingham's view of "piecemeal solutions" to deal with the subject of the good faith principle, requiring a party to act honestly or fairly and reasonably.

In: *Interphoto Picture Library*, 1989; *Beatty civil Engineering* (1996)

The use of implied terms in the construction (interpretation) of contract:

Discretionary power of a party. Court of Appeal held that:

the apparently absolute discretion of the directors 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 in this way.

*Mallone v BPB Industries*, 2002

## Drafting Issues

- What about contracting out a duty of good faith when drafting a contract, as was suggested by several solicitor's firms after *Yam Seng*, 2013?
- Why not contracting out then reliance on implied terms, estoppel and waiver?

Is hostility to good faith as a general principle a common law thing?

Not necessarily, see:

- American law: Uniform Commercial Code, s. 1-203:  
“Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement”
- Australian Law: e.g. *Pacific Brands Sport*, 2005
- Compare also New Zealand and Singapore law, developing in the same direction presently

Further influences on U.K. law:

EU law:

- e.g. Unfair Terms in Consumer Contracts Directive 1993: Reg.4, U.K. Regulations 1994, a term “contrary to the requirement of good faith”
- Commercial Agents Directive 1986
- And compare also Scots law

# Some related contractual issues in U.K. Law

Negotiations and pre-contractual dealings under U.K. law, in comparison to Civil Law systems

- The Entire Agreement clause of NEC3:  
the irrelevance of pre-contractual dealings
- Rectification as additional instrument under U.K. law

## 4. The origin of all confusion: Will theory vs. Reliance theory

Western Europe, the Legal Revolution of 1875:

- France: *la confiance légitime*
- Germany: *Erklärungstheorie* (or *Vertrauenstheorie*)
- Netherlands: *vertrouwensleer*
- Scandinavia: *Löfte* (promise) theory

Foundation of contract: *consensus ad idem* replaced by reliance or the exchange of promises.

## 5. Lord Mansfield's Heritage

Lord Mansfield in *Carter v Boehm* (1766), a unique decision?

But compare: Buller J in: *Salomons v Nissen* (1788):

“it has been uniformly laid down in this court, as far back as we can remember, that good faith is the basis of mercantile transactions ...”.

Idem: Lord Hardwicke and Lord Kenyon, in other cases.

See:

Mike Macnair (Oxford): “Good faith in English law before 1850”, in: *Essays in Honour of Boudewijn Sirks*, Göttingen, 2014

Quote Mike Macnair:

“The older landscape of good faith is being drowned in a flood of will-theory *stricti iuris* or *caveat emptor*, leaving only some former mountains sticking up as islands”.

*Note:*

Moored at one of the islands, we may see *The Moorcock* (1889)

## 6. Conclusions. Final observations on the good faith principle

As a conclusion may serve Mr Justice Legatt's note in *Yam Seng*, 2013:

“The fear that recognizing a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.” (para 152)

The alternative conclusion would be:

- “No principles please, we are British!”

\* \* \*

N.B.: This paper is based on an article published in *Construction Law Journal*, 2015-1, p.3-25: “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”.

Available on my website: [www.esl.eur.nl/normatieveuitleg](http://www.esl.eur.nl/normatieveuitleg)

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