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A LEAP OF GOOD FAITH IN SINGAPORE CONTRACT LAW

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It is commonly assumed that the Court of Appeal rejected a doctrine of good faith in contract law in *Ng Giap Hon v. Westcomb Securities Pte Ltd*, and as a result there has been no serious debate in Singapore of the proper role, nature and function of good faith. This article explores the definitional, normative and methodological aspects of the debate, and argues for the introduction of a duty of good faith in Singapore contract law. The content of such a duty must nonetheless be fact-sensitive in order to preserve contractual autonomy and commercial certainty. A series of recent decisions is also examined to demonstrate the courts' support for such an approach.

I. INTRODUCTION

In *Ng Giap Hon v. Westcomb Securities Pte Ltd*,[1] the Court of Appeal, in a decision authored by Andrew Phang Boon Leong J.A., declined to accept that a term could be implied in law obliging parties to perform their contracts in good faith, declaring that:[2]

> [T]he doctrine of good faith continues… to be a fledgling one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere.

Surprisingly, there has been almost no academic commentary in response to *Westcomb*,[3] perhaps because the ultimate decision was consistent with the traditional hostility the common law adopts towards a generalised doctrine of good faith in contract.[4] It might be more accurate to observe, however, that the Court of Appeal had simply preferred not to enter the debate regarding the proper role, nature and function of good faith in contract law (referred to in this article as the "good faith

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* B.A., University of Oxford. The usual caveats apply.

1 [2009] 3 S.L.R.(R.) 518 (C.A.) [*Westcomb*].

2 *Ibid*. at para. 60.

3 See for an exception Louis Joseph, "A Doctrine of Good Faith in Singapore? A Missed Opportunity!" (2010) 5(1) TMC Academic Journal 50, online: TMC Academy <http://www.tmc.edu.sg/images/stories/tmc/Docs/Journal/V5I1/A%20Doctrine%20of%20Good%20Faith%20in%20Singapore.pdf>.

4 *Westcomb*, *supra* note 1 at para. 54.

debate" or simply the "debate").[5] In doing so, the Court of Appeal postponed for another day a definitive resolution of the good faith debate in Singapore.[6]

That day is fast approaching, for, notwithstanding the stance taken in *Westcomb*, a number of first instance decisions have clearly signalled the High Court's willingness to entertain and deploy concepts of good faith, bringing to Singapore's shores the very debate that *Westcomb* had intended to stave off. In addition, the Court of Appeal has recently engaged with good faith in a very significant manner, which suggests that it is only a matter of time before the debate must be resolved. Part II of this article considers some aspects of the good faith debate, and suggests that there is much to be said in principle for recognising a doctrine of good faith, while Part III examines what contributions *Westcomb* and a number of other cases have made to the debate, concluding that there is sufficient authority for the reception of such a doctrine. Finally, Part IV offers some concluding observations.

II. The Good Faith Debate

It has been noted that the good faith debate in its current form is simply a contemporary iteration of a problem "as old as human trade",[7] that is, the inevitable trade-off between commercial certainty and fairness. Consequently, it has by now attracted a significant number of participants,[8] but, as a result, the debate is not always conducted within the same parameters. Sometimes, it is limited to good faith in the *performance* of the contract (good faith in pre-contractual *negotiations* being regarded as a controversy for another occasion),[9] and this article likewise focuses on that aspect of the debate. In addition, the debate has spawned many battlegrounds between those hostile to a generalised doctrine of good faith in contract (the "opponents") and those receptive to it (the "proponents"), as well as skirmishes even within the latter camp. These may be broadly divided into: definitional debates regarding the meaning of good faith, normative debates concerning the possible justifications

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5 See the authorities and academic literature cited in *Westcomb*, *supra* note 1 at paras. 43, 47-58. The Court of Appeal's refusal to enter the debate might be thought surprising in view of Phang J.A.'s earlier contributions to it: see Andrew Phang, "Tenders, Implied Terms and Fairness in the Law of Contract" (1998) 13 Journal of Contract Law 126; Andrew Phang, "Security of Contract and the Pursuit of Fairness" (2000) 16 Journal of Contract Law 158.

6 Singapore's apex court has not been alone in avoiding the debate: see *Royal Botanic Gardens and Domain Trust v. South Sydney City Council* (2002) 240 C.L.R. 45 at para. 40 (H.C.A.) [*Royal Botanic Gardens*].

7 The Hon. Justice James Douglas, "Exploring the Recent Uncertainty Surrounding the Implied Duty of Good Faith in Australian Contract Law: the Duty to Act Reasonably—Its Existence, Ambit and Operation" (Paper presented to the LexisNexis Contract Law Master Class, 24 August 2006) [unpublished] at para. 2, online: Supreme Court of Queensland Library <http://archive.sclqld.org.au/judgepub/2007/douglas240806.pdf>.

8 See, in addition to *supra* note 5, the comprehensive list compiled by the Hon. Justice James Allsop, "Good Faith and Australian Contract Law—A Practical Issue and a Question of Theory and Principle" (The 2010 Sir Frank Kitto Lecture delivered at the EBL Lecture Theatre 4, School of Law, University of New England, 28 October 2010) at note 14, online: New South Wales Court of Appeal <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/allsop281010.pdf/$file/allsop281010.pdf>

9 James Davies, "Why a Common Law Duty of Contractual Good Faith is Not Required" (2001-2002) 8 Canterbury L. Rev. 529 at 530; Douglas, *supra* note 7 at para. 1; but compare A.F. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 Law Q. Rev. 66 at 77-83.

for the existence of a doctrine of contractual good faith, and finally debates over the methodology to be employed in order to give effect to an obligation of good faith in contractual performance.

A. *Definitional Debate*

One major front in the good faith debate concerns definitional disagreements over the scope and content of the doctrine of good faith.

As the Court of Appeal noted in *Westcomb*, there is little consensus even among the proponents as to what good faith means.[10] There is support for a range of views, with some suggesting that good faith merely means the exclusion of bad faith,[11] while others argue that it has real substantive content and imports honesty,[12] reasonableness or rationality,[13] "fair and open dealing",[14] and/or "fidelity to the bargain",[15] with proponents usually arguing for a combination of these,[16] or occasionally even positing other formulations.[17]

The opponents seize upon this profusion of concepts and terminology as a reason to reject the introduction of good faith,[18] either because this is perceived to be some inherent vice in the doctrine,[19] or because such uncertainty is anathema to the law of contract, which should aim to provide clear and predictable rules to reliably facilitate business transactions.[20]

Insofar as the former objection is concerned, however, this recalls the scepticism that was levelled against the principles of natural justice half a century ago, and which was firmly scotched by Lord Reid in his Lordship's admonition that such objections were "tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist".[21] As a number of commentators have noted, similar imprecision is the hallmark of many other legal tools—such as the concept of "reasonableness" in the law of negligence—which the

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10 *Westcomb*, *supra* note 1 at paras. 47-49.

11 John McGhee, ed., *Snell's Equity*, 32nd ed. (London: Sweet & Maxwell, 2010) at para. 10-019; Robert S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54:2 Va. L. Rev. 195 at 196.

12 Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 Law Q. Rev. 433 at 438 [Steyn, "Contract Law"].

13 Jeannie Marie Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009) 35:1 Monash U.L. Rev. 45 at 58-61.

14 *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 at 439 (C.A.), Bingham L.J.

15 That is, acting consistently with the purpose of the contract and doing all that is necessary for the benefit of the contract to be enjoyed. See Allsop, *supra* note 8 at para. 60.

16 Allsop, *supra* note 8; Mason, *supra* note 9; Steyn, *supra* note 12.

17 Roger Brownsword, "'Good Faith in Contracts' Revisited" (1996) 49:1 Curr. Legal Probs. 111 at 113, 114, 120; J.W. Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 Journal of Contract Law 155; Jane Stapleton, "Good Faith in Private Law" (1999) 52:1 Curr Legal Probs 1 at 7, 8.

18 See *e.g.*, Davies, *supra* note 9 at 530.

19 Angelo Capuano, "Not Keeping the Faith: A Critique of Good Faith in Contract Law in Australia and the United States" (2005) 17:1 Bond Law Review 29 at 34.

20 *Ibid*. at 35; Davies, *supra* note 9 at 538.

21 *Ridge v. Baldwin* [1964] 1 A.C. 40 at 64, 65 (H.L.).

law has embraced without undue difficulty.[22] The Court of Appeal, too, has observed in a similar context that "[i]t is not more difficult to determine what is "equitable" than what is "reasonable" at common law".[23] In any event, it would now seem that the Court of Appeal's own view is that "good faith" can in fact be defined with reasonable clarity in a manner very similar to that advocated by the proponents, for the Court of Appeal has very recently opined that:[24]

> We think that the concept of good faith is reducible to a core meaning… At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of *observing accepted commercial standards of fair dealing in the performance of the identified obligations*. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.

As for the latter objection, it is of course true that certainty is of great importance to the stability and regularity of contracts, but, as Justice Allsop has noted, "certainty is not necessarily value-free",[25] for what is needed is not certainty that sharp practice and bad faith will be condoned and rewarded, but rather certainty that contracting parties' reasonable expectations will be protected by the law. Properly understood, good faith need not cause uncertainty, as Roger Brownsword has demonstrated.[26] On his view, the doctrine is utilised as a sophisticated way of giving effect to the parties' expectations by setting contractual disputes against a more holistic understanding of such classical precepts as freedom of contract. In doing so, contract law recreates the environment of trust and honesty in which the parties actually dealt, rather than (as may be the case under traditional contract law principles) artificially imputing to them antagonistic intentions of self-interest and utility-maximisation which they might not necessarily have possessed. Lest this argument be thought unrealistic, it should be noted that courts are already prepared to imply terms requiring contractual parties to cooperate, based on the notion that, where parties agree to be bound in contract, they are deemed by the law as intending that their agreement should be given effect to.[27]

In any event, it must be questioned just how certain and settled "orthodox" contract law really is. For instance, in recent years the House of Lords has rendered controversial judgments concerning remoteness[28] and assessment of damages,[29] two areas where the law arguably has to be at its clearest, and unsurprisingly detractors of

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22 Elisabeth Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 Sydney L. Rev. 222 at 237 [Peden, "Incorporating Terms"]; Stapleton, *supra* note 17 at 10.

23 *Chwee Kin Keong v. Digilandmall.com Pte Ltd* [2005] 1 S.L.R.(R.) 502 at para. 81 (C.A.) [*Digilandmall*].

24 *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] SGCA 48 at para. 45 (see also para. 47) [*Toshin*] [emphasis in original].

25 Allsop, *supra* note 8 at para. 12.

26 Brownsword, *supra* note 17.

27 *Evergreat Construction Co Pte Ltd v. Presscrete Engineering Pte Ltd* [2006] 1 S.L.R.(R.) 634 at paras. 48, 49 (H.C.) [*Evergreat*]; *Toshin*, *supra* note 24 at para. 39. See also text accompanying note 35 below.

28 *Transfield Shipping Inc v. Mercator Shipping Inc* [2009] 1 A.C. 61 (H.L.).

29 *Golden Strait Corporation v. Nippon Yusen Kubishika Kaisha* [2007] 2 A.C. 353 (H.L.).

those decisions have accused them of potentially generating uncertainty and confusion.[30] Compared to these avulsive developments, it seems unlikely that introducing a doctrine of good faith will result in untold unpredictability. This is especially so given that, as is often recognised, much of the work that such a doctrine would do is already accomplished under other guises, whether via the implication of terms requiring parties to cooperate, or the requirement that onerous and unusual terms must be specifically drawn to a party's attention before they can be incorporated into the contract.

In addition, there tends to be a certain amount of parochialism involved when the value of certainty to contract law is promulgated. The implication seems to be that uncertainty is perhaps more tolerable in public law or equity, both of which employ techniques designed to restrain *mala fides* that could easily be pressed into contract law's service,[31] as if public bodies and those subject to equity's control (and, indeed, all the law's subjects generally) are not equally entitled to the benefits of predictability and consistency as a basic tenet of the rule of law.[32]

The objections of the opponents to contractual good faith, at least insofar as they are based on definitional challenges, therefore seem questionable. The more important concern, however, is whether a doctrine of good faith in contract is intellectually defensible or justifiable.

B. *Normative Debate*

The normative aspect of the good faith debate concerns questions such as why we need a doctrine of good faith in contract law or how it is to be justified, and here the debate is perhaps at its most intense.

1. *The alleged redundancy of good faith*

The opponents point out that good faith is unnecessary when the problems it aims to tackle are already adequately addressed by other tools provided by contract and/or the general law.[33] The law's armoury against bad faith, so the argument goes, is filled with various weapons spanning contract, tort, restitution and equity. Thus, promises sought to be resiled from in bad faith may be met by promissory estoppel, while promises sought to be enforced in bad faith may be voided by mistake or frustration, or vitiated by duress and unconscionability. Furthermore, according to the opponents, the economic torts, or those of negligence and deceit, as well as the various forms of restitution, can deal satisfactorily with all the other situations where contractual remedies are not available.

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[30] *MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd* [2011] 1 S.L.R. 150 at para. 127 (C.A.) [*MFM Restaurants*]; Jonathan Morgan, "A Victory for "Justice" Over Commercial Certainty" (2007) 66:2 Cambridge L.J. 263.

[31] The Hon. Justice Stephen Kós, "Constraints on the Exercise of Contractual Powers" (2011) 42 V.U.W.L.R. 17.

[32] Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011) at 37.

[33] *Service Station Association Ltd v. Berg Bennett & Associates Pty Ltd* (1993) 117 A.L.R. 393 at 406 (F.C.A.), Gummow J. [*Service Station*]; Capuano, *supra* note 19 at 40; Davies, *supra* note 9 at 534.

The proponents, on the other hand, consider this to be evidence that the common law is already poised to recognise a master concept of good faith.[34] Radical as this latter view may seem, intuitively, there is something to be said for its premise; after all, simply because it may be possible to satisfactorily remedy all the individual symptoms of a disease does not mean that identifying and treating its root cause is not desirable, or that doctors should pretend the disease does not exist.

More importantly, however, given that it is usually accepted (even by the opponents) that courts may, depending on the context, imply contractual terms of cooperation,[35] of reasonableness,[36] of natural justice,[37] and by analogy to the equitable doctrine of fraud on a power,[38] the opposition to a doctrine of good faith in contract law is hard to understand. Indeed, the strenuous reluctance to recognise a general doctrine of good faith echoes the days when the law of restitution was confined to instances of "quasi-contract",[39] and when no less than Lord Diplock felt able to say that "there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment..."[40]

It is true that the opponents do sometimes concede that, insofar as the law of contract already provides these piecemeal solutions to problems of good faith, agglomerating them into a generalised doctrine may not be unduly disruptive to contract law's orthodox paradigm of deriving from the will of the parties (and consequently to commercial certainty).[41] However, this reluctant admission is often accompanied by an accusation that such a change would be merely cosmetic.[42]

Yet, if such instances are but manifestations of the law's response to a common underlying problem, then that should be openly recognised and addressed, in a manner which best allows the various doctrines to be rationalised and, if need be, harmonised, rather than permitting intellectual incoherence to be perpetuated under the guise of analytical inertia.[43] Certainly, it seems incongruous that the opponents' entrenched objections to implied terms of good faith are matched by their readiness to concede, almost in the same breath, the acceptability of reaching the same result by a process of construction and/or logic.[44] For instance, in *Service Station*, despite Gummow J.'s rejection of a general doctrine of good faith in contract, his Honour appeared perfectly willing to accept that such an obligation (or something

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34 *Alcatel Australia Ltd v. Scarcella* (1998) 44 N.S.W.L.R. 349 at 367, 368 (N.S.W.C.A.); Mason, *supra* note 9 at 84-94.

35 *Toshin*, *supra* note 24; *Evergreat*, *supra* note 27. See also H.G. Beale, ed., *Chitty on Contracts*, 30th ed., vol. 1 (London: Sweet & Maxwell, 2008) at paras. 13-011, 13-012 [*Chitty*].

36 *Chitty*, *supra* note 35 at para. 13-026; Capuano, *supra* note 19 at 40.

37 *Wood v. Woad* (1874), L.R. 9 Ex. 190 at 196 (Kelly C.B.) [*Wood*].

38 Geoffrey Kuehne, "Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?" (2006-2007) 33 U.W.A. L. Rev. 63 at 73-76.

39 *Cf.* Johan Steyn, "Does Legal Formalism Hold Sway in England?" (1996) 49:1 Curr. Legal Probs. 43 at 53.

40 *Orakpo v. Manson Investments Ltd*. [1978] 1 A.C. 95 at 104 (H.L.).

41 Kuehne, *supra* note 38 at 107.

42 Douglas Meagher Q.C., "Will Good Faith Falter in the High Court?" (Paper delivered to LexisNexis Professional Development Conference, Melbourne, 7 March 2006) at 17, online: Meldrum & Hyland List <http://www.barristersclerk.com.au/Good%20Faith%20&%20High%20Court.pdf>.

43 *Cf.* Brownsword, *supra* note 17 at 132.

44 *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992) 26 N.S.W.L.R. 234 at 276 (N.S.W.C.A.), Meagher J.A. [*Renard*].

quite similar to it) could be implied in law, or construed from the contract, or implied in fact.[45]

2. *Justifying good faith*

When it comes to the question of how a duty of good faith is to be justified, the proponents speak of infusing contract with "community standards" of fairness and decency which reasonable people have come to expect,[46] while the opponents decry this as lacking any empirical support,[47] a mere mask for judicial legislation[48] and inconsistent with the paradigm of contracting parties' autonomy to protect their own self-interests.[49]

Admittedly, assertions that "[p]eople, including commercial people, expect a degree of common sense, fairness and justice in the law and in the rules that govern commercial behaviour"[50] cannot be proven in any scientific sense. However, it is difficult to see how it might convincingly be argued otherwise: for people to expect nonsense, unfairness and injustice in any branch of the law is surely to stultify its purpose. This is especially so in contract law, which is concerned with agreements, understandings and other such meetings of minds. The superstructure of contract law is built upon foundational notions of accord, cooperation and common purpose, and it is suggested that those foundations are likely to be strengthened, not weakened, by adopting a doctrine of good faith.[51]

Indeed, this line of reasoning finds clear expression in many well-established cases imposing upon contracting parties a "duty to cooperate" in order to achieve a common contractual outcome.[52] As the High Court recognised in *Evergreat*:[53]

> When parties make and seal a contract, *they are deemed to have done so on the basis that they intend and desire the contract to be performed and taken to its conclusion*…
>
> This is a well-known and respectable principle… *Another facet of a contracting party's obligation to honour its undertaking is the implied duty to co-operate*.

It is this positioning of good faith within the common contractual interest which addresses the fear that the introduction of good faith cannot be reconciled with the inherent entitlement of contracting parties to advance their own positions: while our counterparties are entitled to look out for themselves, they are not entitled to traduce the spirit and purpose of the bargain in order to do so. In this vein, it is notable that

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45 *Service Station*, *supra* note 33 at 403, 404.

46 *Renard*, *supra* note 44 at 268, Priestley J.A.; Allsop, *supra* note 8 at para. 19; Steyn, "Contract Law", *supra* note 12 at 434.

47 Tyrone M. Carlin, "The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia" (2002) 25:1 U.N.S.W.L.J. 99 at 108.

48 *Service Station*, *supra* note 33 at 405; Meagher, *supra* note 42 at 13,14.

49 *Royal Botanic Gardens*, *supra* note 6 at para. 87, Kirby J.; Davies, *supra* note 9 at 538, 539.

50 Allsop, *supra* note 8 at para. 19.

51 *Ibid*. at para. 126; Brownsword, *supra* note 17 at 124.

52 *Mackay v. Dick* (1881), 6 App. Cas. 251 at 263 (H.L.), Lord Blackburn [*Mackay*]; *Meehan v. Jones* (1982) 149 C.L.R. 571 (H.C.A.) [*Meehan*]. *Cf. Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd (No. 2)* [2001] 2 All E.R. (Comm) 299 at para. 72 (C.A.), Mance L.J. [*Gan Insurance*].

53 *Supra* note 27 [emphasis added].

both courts[54] and commentators[55] have advocated the peaceful co-existence of good faith and the pursuit of legitimate business interests, reflecting a growing acceptance that the two notions do not necessarily have to be regarded as being in opposition to each other.

3. *Existing authorities*

Much attention has also been focused on the extent to which the existing authorities justify the recognition of a general doctrine of good faith.

Lord Mansfield's remark in *Carter v. Boehm* that good faith is the "governing principle applicable to all contracts and dealings"[56] is well-known, but the opponents rightly point out that this pronouncement has long since been confined to insurance contracts.[57] As has been noted, however, there are no very convincing reasons why this should be the case.[58] In fact, one would have thought that, if good faith is as destructive to commercial certainty and contractual freedom as the opponents assert, insurance contracts would very quickly have been rendered largely unworkable by such a development.

In truth, echoes of Lord Mansfield's broad sentiments can still be found in contemporary jurisprudence. For instance, Lord Justice Steyn has declared that protecting the "reasonable expectations of honest men" is "the objective which has been and still is the principal moulding force of our law of contract".[59] Such impulses, the proponents often argue,[60] form the true foundation for longstanding and authoritative decisions in which obligations of cooperation to achieve a contractual objective have been imposed,[61] or apparently unqualified contractual powers and discretions have been curtailed.[62]

On the other hand, the opponents avail themselves of equally powerful pronouncements by Lord Reid that "[i]t might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way".[63]

Robust as this latter view may be, however, the extent to which it holds true in Singapore is questionable. For instance, in *Digilandmall*,[64] the Court of Appeal expressly declined the invitation to abolish the doctrine of unilateral mistake in equity.

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54 *Burger King Corporation v. Hungry Jack's Pty Limited* (2001) 69 N.S.W.L.R. 558 at 573 (N.S.W.C.A.); *Socimer International Bank Ltd v. Standard Bank London Ltd* [2008] 1 Lloyd's Rep. 558 at 587 (C.A.), Rix L.J. [*Socimer*]. See also *Toshin, supra* note 24 at para. 39.

55 Allsop, *supra* note 8 at para. 61; Brownsword, *supra* note 17 at 125, 126; Paterson, *supra* note 13 at 62-65.

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

57 *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd* [2003] 1 A.C. 469 at paras. 42-45, Lord Hobhouse.

58 Mason, *supra* note 9 at 73.

59 See *e.g.*, *First Energy (UK) Ltd v. Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194 at 196 (C.A.).

60 See *e.g.*, Mason, *supra* note 9 at 75.

61 *Mackay*, *supra* note 52; *Meehan*, *supra* note 52.

62 *Equitable Life Assurance Society v. Hyman* [2002] 1 A.C. 408 (H.L.); *Gan Insurance*, *supra* note 52; *Socimer*, *supra* note 54.

63 *White and Carter (Councils) Ltd. v. McGregor* [1962] 1 A.C. 413 at 430 (H.L.), Lord Reid.

64 *Digilandmall*, *supra* note 23.

Instead, a court may allow a contracting party to rescind the contract where that party is mistaken as to an important or fundamental term, and the other party is guilty of "sharp practices" or "unconscionable conduct".[65] In such circumstances, it seems more plausible to say that a court in Singapore would not, in fact, support an attempt to enforce contractual rights in an unreasonable way.

Indeed, the question of good faith and the role that it plays, or should play, in the law goes beyond the field of contract, and it is not difficult to find numerous instances of the concept in administrative law, property law, company law and equity,[66] and even further afield in areas such as admiralty law.[67] Should it prove necessary for contract lawyers to look to other areas of law for inspiration, therefore, they will find exceptionally fertile fields from which to harvest.

However, it should be acknowledged that cross-pollination from other areas of the law has not always been considered suitable, even by the proponents. For instance, in *Lymington Marina Ltd v. Macnamara*,[68] despite unanimous acceptance by the English Court of Appeal that a unilateral contractual power had to be exercised in "good faith", the use of public law principles to obtain such a result was deprecated.[69] Likewise, in *Socimer*,[70] the drawing of an analogy to the duty of good faith owed by a mortgagee exercising a power of sale[71] was thought to be unnecessary and unhelpful to the question of good faith in contract.[72] Similar sentiments have been expressed in more forceful terms by Gummow J., who has suggested that to weave together the disparate strands of established common law doctrines and remedies into a new tapestry of good faith in the performance of contractual obligations would be to require a "leap of faith".[73]

Even in Australia, where the decision of the New South Wales Court of Appeal in *Renard* is usually regarded as having sparked off the good faith debate, views differ as to precisely what *Renard* decided, or should be taken to have decided. On the one hand, the views of Priestley J.A. in *Renard* espousing contractual good faith have been said to be the "new orthodoxy" in New South Wales.[74] On the other hand, it has been argued that, properly understood, *Renard* was not concerned with good faith at all: rather, it only decided the more modest proposition that seemingly unlimited contractual powers should be exercised reasonably.[75] In addition, it has also been pointed out that other Australian jurisdictions have not followed unquestioningly in the wake of *Renard*,[76] leaving some doubt as to the force of its authority.

Given the extent to which the proponents and opponents disagree over authorities emanating from their own jurisdictions, it is perhaps unsurprising that foreign authorities have also been marshalled onto the battlefield. So, for instance, while the

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65 *Ibid*. at para. 77.

66 Allsop, *supra* note 8 at para. 69; Kuehne, *supra* note 38 at 73-76; Mason, *supra* note 9 at 73; Meagher, *supra* note 42 at 6.

67 *The "Vasiliy Golovnin"* [2008] 4 S.L.R.(R.) 994 at paras. 113-137 (C.A.).

68 [2007] 2 All E.R. (Comm) 825 (C.A.) [*Lymington Marina*].

69 *Ibid*. at paras. 37, Arden L.J. and para. 69, Pill L.J.

70 *Supra* note 54; *Renard*, *supra* note 43.

71 See *Beckkett Pte Ltd v. Deutsche Bank AG* [2009] 3 S.L.R.(R.) 452 at para. 27 (C.A.).

72 *Supra* note 53 at para. 122, Rix L.J. and paras. 148-55, Lloyd L.J.

73 *Service Station*, *supra* note 33 at 406. See also Meagher, *supra* note 42 at 6, 7.

74 Douglas, *supra* note 7 at para. 18.

75 Carlin, *supra* note 47 at 104, 105, 121.

76 Meagher, *supra* note 42 at 15.

proponents have frequently cited[77] § 205 of the *Restatement (Second) of Contracts*,[78] as well as § 1-304 of the Uniform Commercial Code,[79] the authority or relevance of these "soft" laws has just as frequently been rejected by the opponents.[80] It remains to be seen whether a similar stalemate will arise in relation to the proponents' arguments that, given the demands of transnational commerce, domestic laws must inevitably evolve concepts or doctrines analogous to good faith to keep pace with and/or assimilate more exotic sources of law, such as the laws of civil law jurisdictions or the UNIDROIT Principles of International Commercial Contracts, both of which employ some notion of good faith.[81]

The question is particularly acute where the *United Nations Convention on Contracts for the International Sale of Goods*[82] is concerned, which Singapore is a party to and which by virtue of the *Sale of Goods (United Nations Convention) Act*[83] is part of Singapore's law. Article 7(1) of the *CISG* provides that, in the interpretation of the *CISG*, regard is to be had, *inter alia*, "to the need to promote… the observance of good faith in international trade".[84] Article 7(1) may not necessarily impose a positive obligation of good faith on parties to a contract to which the *CISG* applies, but the point is that, by virtue of art. 7(1), the language and concept of good faith is now expressly part of Singapore law, insofar as contracts governed by the *CISG* are concerned. It is perhaps surprising that, despite Singapore's growing role and ambition as the regional capital of international commerce and arbitration, little attention has been given to whether and how the debate has been or will be affected by art. 7(1) of the *CISG*.

In any event, the debate is not limited to definitional or normative points; in recent years, the methodology by which any obligation of good faith is to be effected has also become a key point of dispute.

C. *Methodological Debate*

Where the parties do not expressly include good faith in their contractual arrangements, the question is how any such obligation arises. Although some judgments, in endorsing good faith or analogous concepts, do not clarify the source of such duties,[85]

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77 See *Renard*, *supra* note 44 at 266, 267, Priestley J.A.; Allsop, *supra* note 8 at paras. 41, 44; Brownsword, *supra* note 17 at 119; Kuehne, *supra* note 38 at 79-83; Mason, *supra* note 9 at 69.

78 *Restatement (Second) of Contracts* § 205 (1981) provides that "[e]very contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement".

79 U.C.C. § 1-304 (2011) provides that "[e]very contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement".

80 *Service Station*, *supra* note 33 at 401-406; Capuano, *supra* note 19 at 33; Carlin, *supra* note 47 at 111; Meagher, *supra* note 42 at 8.

81 See Allsop, *supra* note 8.

82 11 April 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, 696; A.T.S. 1988 No. 32 (entered into force internationally 1 January 1988) [*CISG*].

83 Cap. 283A, 1996 Rev. Ed. Sing.

84 *CISG*, *supra* note 82.

85 *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (The "Product Star") (No. 2)* [1993] 1 Lloyd's Law Rep. 397 at 404 (C.A.), Leggatt L.J. [*The Product Star (No. 2)*]; *Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd.* (1996) 78 B.L.R. 42 (C.A.).

it would seem that there are essentially three possible approaches: construing the contract so as to derive an obligation of good faith, implying good faith as a term "in fact", and implying it as a term "in law".

Under the construction approach, championed by Elisabeth Peden,[86] good faith is seen as inherent in the institution of contract law, and contracts should be construed accordingly so that there is an expectation of good faith. On this view, once the contract is properly interpreted, a duty of good faith follows as a matter of course, just as if good faith had been expressly stipulated for.

The construction approach has the benefit of explaining how it is that good faith can be said to be present in all contracts, regardless of their subject-matter and whether the tests for the implication of terms in fact have been satisfied,[87] and why it is that in some cases a breach of good faith has not resulted in the award of any damages.[88] In addition, it is strongly consonant with the modern trend in the interpretation of contracts, under which contractual language must be located within its background and context. As the Court of Appeal has noted, "the "context" of a contract is wide enough to encompass its commercial object and purpose as well",[89] and so Peden's approach will inevitably focus on the extent to which good faith and its antecedent concepts are consistent with or reinforce the contract's very rationale. This is particularly important if good faith is to be understood as "loyalty to the contract",[90] for that naturally requires an examination of the common contractual purpose in order to determine what it is that the parties undertook to facilitate or cooperate in executing.

Not everyone has been convinced by Peden's arguments, however, and critics contend that an approach based on construction eventually boils down to an implied term analysis. Marcel Gordon, for instance, argues that, once it is accepted that the same search for the parties' intentions is involved in both construction and implication in fact, "construction is simply a re-branding exercise".[91] Justice McDougall, on the other hand, argues that Peden's approach is not a process of construction as such, since it is not concerned with ascertaining what the contracting parties truly meant in using the language that they did, but is in reality an analysis of whether good faith should be implied in law.[92]

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86 Carter & Peden, *supra* note 17; Peden, "Incorporating Terms", *supra* note 22. See also, by Elisabeth Peden, "'Cooperation' in English Contract Law—to Construe or Imply?" (2000) 16 Journal of Contract Law 56 [Peden, "Cooperation"]; Elisabeth Peden, "'Implicit Good Faith'—or Do We Still Need an Implied Term of Good Faith?" (2009) 25 Journal of Contract Law 50.

87 Namely, the "business efficacy" test (*The Moorcock* (1889) 14 P.D. 64 at 68 (C.A.)) under which the term sought to be implied in fact must be necessary to give business efficacy to the contract, and the "officious bystander" test (*Shirlaw v. Southern Foundries (1926) Limited* [1939] 2 K.B. 206 at 227 (C.A.)) under which the term sought to be implied in fact must be "so obvious that it goes without saying".

88 Peden, "Cooperation", *supra* note 86 at 67.

89 *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 S.L.R.(R.) 1029 at para. 53 (C.A.).

90 See *supra* note 15.

91 Marcel Gordon, "Discreet Digression: The Recent Evolution of the Implied Duty of Good Faith" (2007) 19:2 Bond Law Review 26 at 34.

92 The Hon. Justice Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (Speech delivered on 21 February 2006) at 4, online: New South Wales Court of Appeal <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcdougall210206>.

It may perhaps be asked whether the methodological debate really matters, given the Privy Council's opinion in *Attorney General of Belize v. Belize Telecom Limited*,[93] in which Lord Hoffmann appeared to have reformulated the rules on implying terms in fact by equating them with the rules on contractual interpretation,[94] implying that there was no substantive difference between construing a contract and implying a term into it in fact. In Singapore, the High Court had indicated that there was a difference between the two,[95] and this has now been confirmed by the Court of Appeal, which has very recently rejected *Belize*[96] and declared that the process of interpretation is separate and distinct from that of implication.[97] The methodological debate, therefore, is still a live one.

Similarly, the suggestion that there may be a great deal of overlap between construction, implication in fact as well as implication in law[98] is unlikely to be accepted in Singapore, given the Court of Appeal's position that terms implied in fact are to be clearly distinguished from terms implied in law.[99] Indeed, it is submitted that such a distinction is particularly important where an obligation of good faith is concerned. Whereas the *incidence* of good faith may be implied by law, the *content* of that term must be fleshed out by a process of construction or implication in fact, for it is neither realistic nor desirable to expect that good faith should have the exact same meaning in every single contract.[100] The nature and content of an obligation of good faith in a joint venture or exclusive distributorship agreement, for instance, may be very different from that to be found in a typical contract between banker and customer.

In this regard, a parallel may perhaps be drawn to the tort of negligence, where the existence of a duty of care is commonly regarded as a question of law that sets a precedent for analogous cases, whereas the question of whether that duty has been breached (in other words the content of the duty) is generally seen as a question of fact that depends crucially on the circumstances of each case.[101]

In fact, effecting good faith via a combination of methodologies may help to resolve the definitional and normative aspects of the debate, for what good faith means in any given case will obviously then depend on what the parties intended that it should mean. In some cases, it might mean that parties expect each other to display a "fidelity to the bargain" in cooperating to effect their common contractual objective. In a suitable case, however, it might be entirely appropriate to hold that the parties have "contracted out" of good faith:[102] not in the sense that they intended

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93 [2009] 1 W.L.R. 1988 (P.C.) [*Belize*].

94 See John McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus" (2011) 70:3 Cambridge L.J. 607 for a critical view on this understanding of *Belize*.

95 *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2012] 3 S.L.R. 801 at para. 60 (H.C.), stating that interpretation and implication, while "related", nonetheless remained "separate and distinct".

96 *Foo Jong Peng v. Phua Kiah Mai* [2012] SGCA 55 at para. 36, although arguably the writing had been on the wall ever since *MFM Restaurants*, *supra* note 30 at para. 98

97 *Ibid.* at paras. 38 and 39.

98 *Renard*, *supra* note 44 at 255 and 260; the Hon. Chief Justice Marilyn Warren A.C., "Good Faith: Where Are We at?" (2010) 34 Melbourne U.L. Rev. 344.

99 *Westcomb*, *supra* note 1 at para. 38. See also *Chua Choon Cheng v. Allgreen Properties Ltd* [2009] 3 S.L.R.(R.) 724 (C.A.) [*Allgreen*].

100 *Cf. Toshin*, *supra* note 24 at para. 49.

101 But see Colin Liew, "Keeping it Spick and *Spandeck*: A Singaporean Approach to the Duty of Care" (2012) 20 Torts Law Journal 1 for a critical view of this methodology in relation to the tort of negligence.

102 *Cf.* Capuano, *supra* note 19 at 38; Douglas, *supra* note 7 at paras. 35-37.

to behave in bad faith, but in the sense that they only intended to deal with each other honestly, and that all other conduct, distasteful, unreasonable or otherwise, would be acceptable.

Nor does this reduce the law of contract to incoherent uncertainty; on the contrary, it ensures that contractors are presumed by the law to be honest and rational agents, while preventing the courts from too readily rewriting agreements on the basis of some undefined notion of "fair play". In other words, combining methodologies in this manner holds the line between the excessive paternalism of the proponents and the cynical formalism of the opponents.

D. *Conclusion*

The foregoing sections have examined the good faith debate in its definitional, normative and methodological aspects. Much has been written on both sides of the debate, and it has been suggested that, on balance, the position of the proponents is more convincing than that of the opponents. A general obligation of good faith can be introduced into the law of contract, as long as the meaning of good faith is carefully calibrated in any given case. While Singapore has largely avoided being embroiled in the good faith debate, the question to be considered in the next Part of the article is how receptive Singapore law is or should be to a doctrine of good faith in contract law in the light of recent authorities.

III. Good Faith in Singapore

A. *Westcomb*

Although there have been earlier decisions which could conceivably be viewed through the prism of good faith,[103] it is convenient to take *Westcomb* as the starting point for this Part of the article, given the Court of Appeal's express engagement of good faith in that case.

Westcomb concerned a dispute between a stockbroking firm, Westcomb, and its agent, a remisier named Ng, in which Ng claimed to be entitled to commissions in respect of placement shares allocated to two of Westcomb's customers, Sandt and Aktieninvestor. Sandt had opened a trading account with Westcomb through Ng, and Ng claimed that Aktieninvestor would have opened a trading account through him but for the fact that Westcomb had surreptitiously "intercepted" Aktieninvestor, with the result that it opened a trading account with Westcomb through another remisier instead. In the event, Westcomb dealt directly with Sandt and Aktieninvestor, and did not charge them a commission when they subscribed for placement shares. Ng claimed to be entitled to a commission in respect of these transactions, on the basis that there was implied into his agency agreement with Westcomb a duty of good faith (the "First Implied Term"), or, alternatively, a term that Westcomb would not do anything to deprive him of earning a commission (the "Second Implied Term").

The Court of Appeal rejected Ng's claim, though not without some reluctance and a clear sympathy for Ng's plight. In doing so, in the course of a characteristically

[103] See *e.g.*, *Digilandmall*, *supra* note 23.

erudite judgment, Phang J.A. examined in detail the law relating to the implication of terms, both in fact and law, as well as the more general issue of good faith in contract law.

In relation to the First Implied Term, Phang J.A. considered that this was more aptly viewed as a term sought to be implied in law, and concluded that such an implication could not succeed because the doctrine of good faith was a "fledgling" one.[104]

As for the Second Implied Term, Phang J.A. viewed this as a term sought to be implied in fact. Phang J.A. held that, in view of the principles laid down in *Luxor (Eastbourne), Limited v. Cooper*,[105] the factual matrix presented in *Westcomb* was not such as to satisfy either of the established tests for the implication of terms in fact,[106] with the result that the Second Implied Term could not be accepted.

A number of comments are appropriate at this juncture about Phang J.A.'s discussion of good faith in *Westcomb*.

First, Phang J.A. cited a number of Australian authorities such as *Renard* and *Service Station*[107] as well as a copious amount of academic literature, but apart from a lengthy discussion of *Luxor* and a passing reference to *Socimer*,[108] *Westcomb* is surprisingly silent on English cases which appear to envisage a significant role for good faith in curbing contractual powers, such as *The Product Star (No. 2)* and *Lymington Marina*. This is particularly notable given that, in *The "Asia Star"*, the Court of Appeal had expressly approved of *The Product Star (No. 2)* as being authority for the proposition that:[109]

> Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim… [T]he authorities show that not only must the discretion be exercised honestly and *in good faith*, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.

Second, and still on the normative dimension of the good faith debate, Phang J.A. suggested that any abatement of the traditional English hostility towards good faith could largely be explained by civil law influences owing to the United Kingdom's membership of the European Union, a consideration which was not relevant to Singapore.[110] Although it is true that the proponents have often argued that English contract law cannot remain ignorant of good faith in the light of the European dimension,[111] it should be noted that virtually no English case has resorted to such reasoning in order to justify the recognition of good faith. Consequently, it is submitted that it would not be right to give much weight to the United Kingdom's increasing engagement with European Union law in assessing English contract law's treatment of good faith.

Third, in terms of methodology, Phang J.A. expressly accepted that there were some situations in which a court would be prepared to imply a term in fact into an

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104 See *supra* note 2.
105 [1941] A.C. 108 (H.L.) [*Luxor*].
106 See *supra* note 87.
107 *Westcomb*, *supra* note 1 at para. 51.
108 *Ibid*. at para. 61.
109 [2007] 3 S.L.R.(R.) 1 at para. 63 (C.A.) [emphasis added].
110 *Westcomb*, *supra* note 1 at para. 53.
111 See *e.g.*, Steyn, "Contract Law", *supra* note 12 at 438-440.

agency agreement that "the principal will not refuse to complete the transaction" which would entitle the agent to earn a commission,[112] or to prevent the principal from "conduct[ing] itself in such a manner as to prevent the agent from performing its part of the bargain".[113] Although Phang J.A. was careful not to use the language of "good faith" in positing these examples, such implied terms clearly operate on the basis of a "duty to cooperate",[114] which is arguably a facet of good faith. In addition, Phang J.A.'s concern to control conduct which "strikes at the very heart of the commission contract"[115] is strongly reminiscent of the view that good faith operates as, *inter alia*, "fidelity to the bargain".[116]

Fourth, Westcomb was vested with a contractual discretion as to whether to deal directly with its customers without going through its remisiers.[117] Phang J.A.'s reluctance to imply a term limiting Westcomb's discretion to do so seems to suggest that contractual powers and discretions can be entirely unfettered, a conclusion which is at odds with the view expressed in *The "Asia Star"*,[118] and which may have to be further re-examined in the light of subsequent decisions.

Finally, Phang J.A. explicitly left the door ajar for the implication of good faith in fact *and* in law.[119] That door appears to be in danger of closing after the Court of Appeal in *Allgreen* stated that "the common law *does not* recognize a principle of good faith, in the sense of fair dealing, to be of general application".[120] Nonetheless, despite the somewhat peremptory tone of this pronouncement, the Court of Appeal in *Allgreen* made it clear that its views remained the same as those expressed in *Westcomb*,[121] and in those circumstances *Allgreen* probably does not materially affect the position laid down in *Westcomb*.

B. *Subsequent Cases*

Since *Westcomb* and *Allgreen*, there have been a number of significant developments in this area which makes it increasingly difficult to say that good faith remains a "fledgling" doctrine in Singapore contract law.

In *Straits Advisors Pte Ltd v. Behringer Holdings (Pte) Ltd*,[122] Straits Advisors, a corporate advisory firm, entered into a Consultancy Agreement with Behringer for the provision of consultancy services in relation to a proposed initial public offering ("IPO") of Behringer's shares. Clause 4 of the Consultancy Agreement provided, *inter alia*, for the issuance of a number of Behringer shares to Straits Advisors if Behringer wrongfully terminated the appointment of Straits Advisors before a successful IPO. Straits Advisors claimed that the operation of Clause 4 had been triggered, while Behringer contended that, on the true construction of the

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112 *Westcomb*, *supra* note 1 at para. 83.
113 *Ibid*. at para. 84.
114 See *supra* note 52.
115 *Westcomb*, *supra* note 1 at para. 84.
116 See *supra* note 15.
117 *Westcomb*, *supra* note 1 at para. 92.
118 *Supra* note 109.
119 *Westcomb*, *supra* note 1 at para. 97.
120 *Allgreen*, *supra* note 99 at para. 83 [emphasis added].
121 *Ibid*. at para. 84.
122 [2010] 1 S.L.R. 760 (C.A.) [*Straits Advisors*].

Consultancy Agreement, Clause 4 was only operative upon "IPO Activation", an event defined in the Consultancy Agreement as "one month after Straits Advisors receives written notification from Behringer of [its] decision to proceed… to list on a recognised stock exchange".[123] As no IPO Activation had ever occurred, Behringer argued that Straits Advisors was not entitled to any shares under Clause 4.

The Court of Appeal agreed with Behringer, and Straits Advisors' claim therefore failed. In the concluding paragraph of a brief judgment authored by Phang J.A., however, the Court of Appeal stated:[124]

> [W]hile it is Behringer alone who decides whether or not to issue a written notice to trigger IPO Activation, thereby triggering [Clause] 4 of the Consultancy Agreement, it must act *in good faith* and *for proper purposes* in arriving at its decision. *It cannot, for example, refuse to issue a written notice to trigger IPO Activation with respect to Straits Advisors in order to avoid issuing the Shares, while at the same time pursuing its IPO ambitions with another set of advisors instead.*

Although this passage was an *obiter dictum*, it is significant in at least three respects. First, and most obviously, is the mere fact of Phang J.A.'s express reference to "good faith". Second, good faith is linked by Phang J.A. to "proper purposes", and the example given in the final sentence of the quoted passage clearly suggests that such behaviour on the part of Behringer would be for an improper purpose, and hence in bad faith. Despite, therefore, the concern in *Westcomb* (which was not referred to in *Straits Advisors*) over the indeterminacy of the meaning of "good faith",[125] *Straits Advisors* demonstrates that, where necessary, the concept of good faith can be given sufficiently definite content. Third, good faith was seen by Phang J.A. as a means of controlling Behringer's apparently unfettered contractual discretion whether or not to issue a written notification to trigger IPO Activation. This, of course, stands in contrast to Phang J.A.'s apparent acceptance in *Westcomb* that Westcomb's contractual discretion whether or not to deal with its customers through its remisiers was absolutely unlimited.[126] As will be seen, the position adopted in *Straits Advisors* now appears to be the prevailing one.

It should also be noted that, in contrast to the detailed discussion in *Westcomb*, in *Straits Advisors* there was no examination of the methodology by which the duty of good faith arose: it is not clear, for instance, whether Behringer was bound by good faith as a matter of construction of the Consultancy Agreement, or as a matter of implying a term into the Consultancy Agreement (and if the latter, whether such a term was implied in fact or in law).

Shortly after *Straits Advisors*, the High Court handed down its grounds of decision in *Indulge Food Pte Ltd v. Torabi Marashi Bahram*,[127] which involved a tripartite Subscription Agreement between the plaintiff ("Indulge"), a company named Euoro International Pte. Ltd. ("Euoro"), and the defendant, Euoro's managing director ("Marashi"). Under Clause 3.4 of the Subscription Agreement, Marashi was to transfer all his shares in Nate Corp., a Californian corporation, to Euoro, and

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123 *Ibid*. at para. 6.
124 *Ibid*. at para. 18 [emphasis added].
125 *Westcomb*, *supra* note 1 at para. 47.
126 See text accompanying *supra* note 117.
127 [2010] 2 S.L.R. 540 (H.C.) [*Indulge Food*].

to provide evidence of the transfer to the satisfaction of Indulge. Failure to do so would allow Indulge to terminate the Subscription Agreement. Indulge purported to terminate the Subscription Agreement in accordance with Clause 3.4 on the basis, *inter alia*, that Marashi had not provided satisfactory evidence of the share transfer.

In rejecting this argument, Belinda Ang Saw Ean J. noted that, by requiring Marashi to provide evidence "to the satisfaction of Indulge", Clause 3.4 of the Subscription Agreement conferred a discretion on Indulge in deciding whether or not to accept Marashi's evidence. Crucially, however, Ang J. held, citing *Straits Advisors*, that the contractual discretion in Clause 3.4 was conferred for the specific purpose of satisfying Indulge that the transfer of Nate Corp shares had taken place, and that it must have been the parties' intention that the discretion was to be "exercised in *good faith* for this purpose and this purpose only".[128] In addition, Ang J. held that Indulge's contractual discretion also had to be exercised "*reasonably*".[129]

On the facts, Ang J. held that Indulge's alleged "grounds" for rejecting Marashi's evidence of the share transfer were merely *ex post facto* rationalisations, and hence unreasonable, with the result that Indulge's purported exercise of Clause 3.4 was invalid.

Indulge Food is significant in its express acceptance, as a matter of *ratio decidendi*, that an apparently unfettered contractual discretion must be exercised in good faith. While it is questionable how far the *dictum* in *Straits Advisors* provides the authority which Ang J. sought to derive from it, Ang J.'s decision is certainly consistent with an established line of English authorities, such as *The Product Star (No. 2)*, *Gan Insurance* and *Socimer*. More importantly, *Indulge Food* is also consistent with the Court of Appeal's approval of *The Product Star (No. 2)* in *The "Asia Star"*,[130] and it is perhaps no coincidence that Ang J. authored the Court of Appeal's judgment in *The "Asia Star"*.

It is slightly ambiguous whether, as a matter of methodology, Ang J. adopted an implied term analysis (as opposed to a construction approach) in *Indulge Food*. It is also not quite clear whether, in holding that Indulge had acted "unreasonably" (and hence presumably in bad faith), Ang J. was applying a lesser standard than the "irrationality" or *Wednesbury* unreasonableness required by the English cases.[131]

Ang J. revisited and clarified these matters, however, in *MGA International Pte Ltd v. Wajilam Exports (Singapore) Pte Ltd*,[132] which, like *Westcomb*, concerned a commission dispute. In *MGA International*, it was common ground that the defendant, Wajilam, was entitled to some commission in consideration of its provision of trade finance to the plaintiff, MGA, a log trader. The real issue, therefore, was how that commission was to be quantified. MGA's case was that there was an implied term that Wajilam's commission was to be calculated with reference to the quantity of logs traded, which worked out to US$5 per cubic metre, while Wajilam argued that there was an implied term that it had absolute discretion to decide its own commission.

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[128] *Ibid*. at para. 14 [emphasis in original].
[129] *Ibid*. at para. 15 [emphasis in original].
[130] *Supra* note 109.
[131] See *Socimer*, *supra* note 54 at para. 66, Rix L.J., but *cf. Lymington Marina, supra* note 68 at para. 37, Arden L.J. and para. 69, Pill L.J.
[132] [2010] SGHC 319 [*MGA International*].

In rejecting Wajilam's argument, Ang J. expressly approved of the English authorities such as *The Product Star (No. 2)* and *Socimer* that a discretion conferred on one contractual party by the other is not wholly unfettered.[133] Without referring to *The "Asia Star"*, *Straits Advisors* or *Indulge Food*, Ang J. appeared to accept that:[134]

> [T]he courts will impose an *implied term* that the discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally. "Irrationally" in this connection… is *not an objective test of reasonableness* but is used in an analogous sense to the [*sic*] *Wednesbury* unreasonableness…

Technically, however, these comments were *obiter dicta*, as Ang J. rejected Wajilam's contentions on a more fundamental basis, *viz*, that the evidence did not establish that Wajilam had a discretion to determine its own rate of commission.[135] Indeed, Ang J. *also* rejected MGA's argument that Wajilam's commission was fixed at US$5 per cubic metre.[136] Instead, Ang J. adopted a *via media* by implying a term in fact that a reasonable sum was to be paid to Wajilam as commission,[137] and some might even say that this result, too, could be viewed as an example of good faith in action.[138]

Ang J.'s *dicta* in *MGA International* were very recently adopted by Tay Yong Kwang J. in *Edwards Jason Glenn v. Australia and New Zealand Banking Group Ltd*,[139] leading Tay J. to hold that the contractual discretion enjoyed by the respondent bank was not "untrammelled",[140] despite the fact that the contractual documentation expressly provided that the bank's discretion was "absolute". On the facts, however, Tay J. accepted that the bank's exercise of discretion had not been "arbitrary or capricious or perverse",[141] and that it had acted "honestly and in good faith"[142] in the exercise of its contractual powers.

The effect of the foregoing cases thus seems to be that, at least insofar as the exercise of a discretion conferred by the contract is concerned, good faith does exist by way of an implied term. Given that contractual discretions may arise in many different factual contexts, it appears that the term is being implied in law rather than in fact, and that, for this purpose, the relevant "type" or "class" of contract into which the term is being implied by law is one in which a power or discretion is conferred in apparently unlimited terms on one of the parties. Furthermore, the content of an obligation of "good faith" appears to be coalescing around the concept of abuse of power on the grounds of irrationality or proper purposes. Such a concept is also seen in other areas of private law, such as where a trustee with an absolute discretion must nonetheless exercise such powers *bona fide* and with proper motives,[143] and it is of

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133 *Ibid*. at paras. 103-106.
134 *Ibid*. at para. 105 [emphasis added].
135 *Ibid*. at para. 88.
136 *Ibid*.
137 *Ibid*. at para. 89.
138 Allsop, *supra* note 8 at para. 58.
139 [2012] SGHC 61 [*Edwards Jason Glenn*].
140 *Ibid*. at para. 101.
141 *Ibid*.
142 *Ibid*. at para. 102.
143 *Gisborne v. Gisborne* (1877) 2 App. Cas. 300 at 305 (H.L.), Lord Cairns L.C.; *Foo Jee Seng v. Foo Jhee Tuang* [2012] 4 S.L.R. 339 at paras. 55-61 (C.A.).

course a very familiar method of controlling the improper exercise of discretion in public law.

In this regard, Justice Stephen Kós has noted in a recent article that:[144]

> [W]hen it comes to substantive principles such as error of law, improper purpose and irrationality, there is no fundamental difference between the interests to be protected in contract law, trusts law and public law; and there is no fundamental difference between the tools used by each to provide that protection.

Such sentiments would undoubtedly be anathema to the opponents, on the basis that it impermissibly conflates doctrines from disparate legal disciplines which have nothing in common other than an invocation of "reasonableness" or considerations of conscience.[145] This is particularly so where the analogy to judicial review concepts of *ultra vires* and *Wednesbury* unreasonableness are concerned, given the reluctance of some English courts to resort overtly to administrative law theories when dealing with the issue of good faith in contract.[146]

The astuteness of Justice Kós's observations, however, is clearly demonstrated by a decision of Judith Prakash J. in which public and private law principles collided.[147] In *Stansfield*, the first defendant (CASE) was a non-statutory consumer watchdog agency that administered an accreditation scheme called "CaseTrust for Education", which all private schools with foreign students were required to be members of. One of the requirements for membership was that a private school had to have measures in place to protect foreign students from losing their tuition fees in the event of the school's insolvency. This was done through the Student Protection Scheme ("SPS"), which, *inter alia*, required the private school to take out an insurance policy covering at least 70% of each foreign student's tuition fees. The plaintiffs, a pair of private schools, were issued SPS insurance by the second defendant (Income), and thus became accredited members of CaseTrust for Education. Subsequently, however, rumours of the plaintiffs' financial difficulties resulted in CASE investigating them. CASE informed Income of these rumours and of its investigation, which led to Income discovering that the plaintiffs had not made any online applications for SPS insurance in at least six months. Income thus decided to freeze all new applications for SPS insurance from the plaintiffs, by resetting their password to the online insurance application platform, initially without informing the plaintiffs of this. As a result of its investigation, CASE then discovered that the plaintiffs had not insured a large number of students. Once Income officially informed CASE and the plaintiffs that the latter's SPS insurance facilities had been frozen, CASE decided to suspend the plaintiffs from CaseTrust for Education.

The plaintiffs sued CASE and Income in contract and tort, alleging financial loss due to the suspension of their membership in CaseTrust for Education and the unavailability of SPS insurance facilities, but only the contractual claims and issues will be considered in this article.

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144 Kós, *supra* note 31 at 36.

145 *Service Station*, *supra* note 33 at 406.

146 See *Lymington Marina*, *supra* note 69.

147 *The Stansfield Group Pte Ltd (trading as Stansfield College) v. Consumers' Association of Singapore* [2011] SGHC 122, partially reported at [2011] 4 S.L.R. 130 [*Stansfield*].

It seems to have been common ground, and accepted by Prakash J., that the relationship between the plaintiffs and CASE was predominantly contractual, as it was governed by a number of contractual or quasi-contractual documents. As against CASE, the plaintiffs claimed damages for breach of contract on the basis that CASE had breached a number of implied terms to the effect that CASE would exercise its contractual powers reasonably and in a non-arbitrary manner, and that it would comply with natural justice in its dealings with the plaintiffs.[148]

Before examining how Prakash J. dealt with these arguments, it is worth considering in more detail what the plaintiffs were saying vis-à-vis CASE. In addition to the plaintiffs' claim for substantial damages, one of the reliefs claimed was a declaration that their suspension from CaseTrust for Education was "unlawful and void".[149] This is the sort of prayer that one normally expects to see when a plaintiff is seeking judicial review of administrative action rather than the vindication of private contractual rights. The complication, however, was that the plaintiffs were not actually alleging that CASE had breached public law principles of procedural propriety or rationality; rather, they were alleging that CASE was in breach of contract *because* it had breached those public law principles.

That public law should have featured in some way in *Stansfield* is not surprising, considering that CASE's role, status and function is akin to that of a public regulatory body. Why, then, did the plaintiffs not simply take out judicial review proceedings in the first place? The answer, it is submitted, is that there is some doubt as to whether CASE is amenable to judicial review: CASE belongs to the troublesome category of contractual associations exercising private monopoly powers, and whether such bodies are amenable to judicial review is not always easy to ascertain.[150]

Where entities such as CASE are concerned, therefore, if a direct judicial review challenge is considered unwise or unavailable, then a plaintiff's next best alternative is to invite the court to indirectly "judicially review" the impugned actions by alleging a breach of implied contractual terms, the content of which would inevitably have to be identical to the public law grounds of review that would otherwise have been invoked. Thus, in such cases, public and private law principles overlap, for if the courts accept that a breach of contract has occurred, the breach would have to be explained and justified by reference to public law ideas of abuse of power, irrationality and improper purposes, which, in private law terms, would be nothing more or less than bad faith. This is clearly demonstrated by *Graham Bradley v. The Jockey Club (No. 3)*,[151] where, despite the English Court of Appeal's recognition that the disciplinary decisions of the Jockey Club were not susceptible to judicial review,[152] it nonetheless accepted the first instance judge's conclusion that:[153]

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148 *Ibid*. at para. 113.

149 *Ibid*. at para. 4.

150 Contrast *R. v. Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] Q.B. 815 (C.A.) and *R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 W.L.R. 909 (C.A.) [*Ex parte Aga Khan*]. See also *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd* [2012] 3 S.L.R. 565.

151 [2005] EWCA Civ 1056 [*Bradley*].

152 Established in *Ex parte Aga Khan*, *supra* note 150.

153 *Bradley*, *supra* note 151 at para. 17 [emphasis added].

> [T]he nature of the court's supervisory jurisdiction over such a decision… is supervisory… *It is a review function, very similar to that of the court on judicial review*. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, *I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body*.

As it happens, in *Stansfield*, Prakash J. considered that, on the facts, there was no obligation on CASE to comply with natural justice in suspending the plaintiffs from CaseTrust for Education due to the urgency of the situation and the need for CASE to effectively protect the interests of foreign students. Nonetheless, Prakash J. accepted that,[154] according to G P Selvam J. in *Haron bin Mundir v. Singapore Amateur Athletic Association*,[155] as a mater of principle:

> The rules of natural justice are implied into every contract express or implied which contemplates a hearing affecting the rights and livelihood of persons. The rules are so implied as a matter of law and public policy…

The implication of such a term is of ancient lineage,[156] and has been approved by the Court of Appeal on more than one occasion.[157] It is clearly a term implied in law, and one that betokens minimum standards of fair dealing. Yet, oddly, few are inclined to see this as an example of good faith in contract, let alone one that can be generalised beyond the limited confines of contracts contemplating "a hearing affecting the rights and livelihood of persons". For instance, in many cases where one party is allowed to exercise a contractual discretion or power which might severely prejudice the other, it may be possible to argue that the parties contemplated some sort of hearing being held before the power is exercised.

More generally, it is difficult to see what makes natural justice appropriate to contracts constituting social clubs and private associations, but not to consumer or commercial contracts. Certainly it cannot merely be that memberships in private associations are valuable:[158] so are many other contractual rights. Nor can it be that members of private or social clubs are incapable of protecting their own interests and therefore need the law's paternalism: many such associations consist of highly educated and sophisticated individuals, while conversely many consumer contracts are entered into by persons who have no real bargaining positions.

Furthermore, it is but a short step from an implied term of natural justice to an implied term of rationality, and indeed in *Stansfield* Prakash J. accepted that there was an implied term that CASE would exercise its contractual powers in a reasonable manner, holding:[159]

> I think that *in a situation such as this*, which is not a strictly commercial contract but *where, although the form of the relationship is contractual, in fact one party*

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154 *Stansfield*, *supra* note 147 at para. 115.

155 [1991] 2 S.L.R.(R.) 494 at para. 23 (H.C.).

156 See *Wood*, *supra* note 37; *Dawkins v. Antrobus* (1881) 17 Ch. D. 615 (C.A.).

157 See *Singapore Amateur Athletic Association v. Haron bin Mundir* [1993] 3 S.L.R.(R.) 407 (C.A.); *Kay Swee Pin v. Singapore Island Country Club* [2008] 2 S.L.R.(R.) 802 (C.A.) [*Kay Swee Pin*].

158 *Kay Swee Pin*, *supra* note 157 at para. 4.

159 *Stansfield*, *supra* note 147 at para. 132 [emphasis added].

> *is an arbiter who decides whether the other party is able to do a particular act which affects the livelihood of that second party,* any decision taken by the first party which may have an adverse effect on the second's earning capacity must not be an *unreasonable* decision. *Anything else would be an abuse of power.* To me, this requirement would definitely satisfy the officious bystander test as both parties would operate on the unspoken assumption that those powers would be exercised in a *rational* manner and not *capriciously* and would inform the officious bystander so if he were to pose the question. But even if this term did not pass the officious bystander test, in the light of all the circumstances, it is my view that *administrative law principles should be imported* into the relationship between CASE and the plaintiffs in relation to CASE's decision-making powers.

Prakash J.'s language in the quoted passage is unmistakeably reminiscent of Justice Kós's observation that "common themes" run through "judicial review" of private and public discretion.[160] Furthermore, although Prakash J. appears to have conceived of rationality being implied in fact, it is arguable that the opening words of the quoted passage in truth envision a particular type or category of contract, and that the closing words indicate an appeal to considerations of public policy. If so, then the term is really being implied in law, and as such it would be no different from that discussed above in relation to *Straits Advisors*, *Indulge Food* and *MGA International*. After all, there is no good reason why obligations of natural justice, rationality and good faith exist when the contract is a multilateral one by which the contractors have agreed to form themselves into an unincorporated association or private club, but do not exist when the contract is bilateral. An entitlement to good faith should hardly depend on such vagaries.

Turning now to the *Stansfield* plaintiffs' claim against Income, the relationship between the plaintiffs and Income was more obviously contractual. Clauses 6 and 7 of the Terms and Conditions of the SPS insurance policies gave Income "absolute discretion" to vary the maximum insurable limit of each SPS policy or withdraw the available balance thereof, and the right to otherwise reject or decline to provide insurance cover in respect of any new foreign student.[161] As against Income, the plaintiffs claimed that, in purporting to freeze their SPS insurance facilities under Clauses 6 and 7, Income had breached implied terms: (a) of utmost good faith, (b) that Income would act reasonably and not capriciously in administering the SPS policies, and (c) that it would act only upon relevant considerations and not irrelevant ones.[162]

Although Income was clearly not susceptible to judicial review, as can be seen, the implied terms alleged against it were not very different to those alleged against CASE, lending further weight to Justice Kós's views on the implausibility of rigidly segregating legal mechanisms for the control of discretion in private and public law. Somewhat surprisingly, however, despite Prakash J.'s acceptance that CASE was obliged to exercise its decision-making powers reasonably and in a non-abusive manner, her Honour declined to come to a similar conclusion vis-à-vis Income.

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[160] See *supra* note 144.
[161] *Stansfield*, *supra* note 147 at para. 22.
[162] *Ibid*. at para. 164.

Such a result might be thought all the more unusual in view of Prakash J.'s acceptance that contracts of insurance were contracts *uberrimae fidei*,[163] although it is not entirely clear whether Prakash J. considered that this principle applied to the SPS policies between the plaintiffs and Income, as her Honour stated that "these contracts were not actual insurance cover or insurance policies in substance".[164] In any event, Prakash J. was of the view that an insurer's duty of utmost good faith was "likely to be very limited" and did not generally encompass the insurer's conduct during the pendency of the contract, which was to be governed primarily by the terms of the policy.[165]

More importantly, Prakash J. held that a significant obstacle to the plaintiffs' argument was posed by *Westcomb* and *Allgreen*, which her Honour interpreted as holding that "the common law does not recognise a principle of good faith, in the sense of fair dealing, to be of general application".[166] The result of Prakash J.'s reading of the authorities, therefore, was that no term of good faith could be implied in law, and the plaintiffs had not sufficiently demonstrated how such a term could be implied in fact. In other words, Clauses 6 and 7 of the SPS policies gave Income:[167]

> [T]he *unqualified* right in any circumstance whatsoever to refuse to entertain new applications and thereby withdraw the Maximum Insurable Limit… *This is an unfettered right*. In the face of such an explicitly and clearly worded power, *it is not possible for me to impose any restriction on such power by implying that it is subject to a duty of good faith* on the part of… Income… [T]*here is no precedent for the type of obligation that the plaintiffs seek to persuade me to impose*.

It is difficult to reconcile these sentiments with the principles laid down in *The "Asia Star"*, *Straits Advisors*, *Indulge Food* and *MGA International*, as well as the corresponding English and Australian authorities recognising a duty of good faith (or some analogous concept). In all those cases, the discretion or power in question was ostensibly an unfettered one, and yet the courts were prepared to (and in some cases actually did) qualify their exercise by implying that they were subject to a duty of good faith. With respect, therefore, it cannot be said that there was "no precedent" for the type of obligation that the plaintiffs were contending for, and it may be that the plaintiffs did not draw these authorities to Prakash J.'s attention.[168] Arguably, an opportunity was thereby missed to rationalise the incidence and role of good faith in contract law.

Finally, mention should be made of *Toshin*,[169] which was decided by the Court of Appeal while this article was at the proof stage. In *Toshin*, the Court of Appeal confirmed the validity and enforceability of an *express* contractual term that parties were to "in good faith" endeavour to agree or negotiate the prevailing market rental value of certain demised premises. Although the Court of Appeal in *Toshin* appeared

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[163] *Ibid*. at para. 186.
[164] *Ibid*. at para. 199.
[165] *Ibid*. at para. 195.
[166] *Ibid*. at para. 192. See *supra* note 120.
[167] *Ibid*. at para. 197 [emphasis added].
[168] See also *ibid*. at para. 190 "[t]he plaintiffs did not put forward any basis on which I should imply a contractual obligation of good faith into the SPS policies which was separate from the good faith obligation implied by insurance law".
[169] *Toshin*, *supra* note 24.

to endorse[170] its earlier view in *Westcomb* that good faith was a "fledgling" doctrine, and that there was no implied duty of good faith at common law, much of what was said in *Toshin* is strongly consonant with what has been said in this article. For instance, not only did the Court of Appeal provide a definition of good faith almost identical to those suggested by the proponents,[171] the Court of Appeal also suggested that "friendly negotiations" or "confer in good faith" clauses were "consistent with our cultural value of promoting consensus whenever possible".[172] If *negotiation* in good faith is consonant with our cultural norms, it must surely be asked why *performance* in good faith would not be; and if it is, one then wonders why the law should not take the further step of implying such an obligation into any given contract.

C. *Conclusion*

As the foregoing discussion reveals, *Westcomb* and *Allgreen* seem to signal the Court of Appeal's ambivalence towards good faith, despite initial indications to the contrary in *The "Asia Star"*. Nonetheless, there are distinct signs that the apparently firm stance adopted in *Westcomb* and *Allgreen* is softening. What began as *obiter dicta* in the Court of Appeal in *Straits Advisors* has now become *ratio decidendi* in *Indulge Food*, *Stansfield* and *Edwards Jason Glenn*, demonstrating the High Court's willingness to deploy good faith as a substantive restraint to the abuse of contractual discretion. Most importantly, the Court of Appeal's decision in *Toshin* appears to herald that good faith is no longer something to be viewed with suspicion, but rather forms a credible part of our contract law jurisprudence.

Of course, to the extent that these developments contradict *Westcomb*, they cannot be accepted as good law. It is submitted, however, that properly understood, *Westcomb* did not actually reject a doctrine of contractual good faith: it merely chose not to enter the good faith debate for the time being. However, good faith can no longer be swept under the carpet and ignored merely on the grounds that its doctrinal status is uncertain and its development untried. Instead, the time has come for the debate to be seriously engaged in on its merits, and if good faith is to be rejected this must be for convincing, normative reasons.

IV. Concluding Observations

Ultimately, the resolution of the good faith debate calls for the making of a value judgment, and it is submitted that, as a matter of principle, good faith ought to be accepted by our courts.

Doing so would rationalise the law of contract by unifying otherwise disembodied rules and excising the stubborn formalism that pervades much legal thinking in this area. It would also signal the maturity of the common law in openly recognising that

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[170] *Ibid*. at para. 34.

[171] *Supra* note 24.

[172] *Ibid*. at para. 40, citing Philip J. McConnaughay, "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2001) 41 Va. J. Int'l L. 427 at 448-449.

basic virtues of honesty, rationality and common sense are simply inherent human values that form the substratum of any serious contractual transaction.

English contract law has traditionally eschewed any general doctrine of good faith in favour of piecemeal methods of controlling undesirable contractual behaviour. Cases such as *The Product Star (No. 2)*, *Lymington Marina* and *Socimer*, however, show that even in English law good faith now has a significant role to play in ensuring that contractual power is not wielded irrationally or abusively, but is exercised in furtherance of a proper contractual purpose or objective. It is submitted that there is no reason why Singapore's contract law should not have regard and give effect to these important developments. Good faith, properly understood, is not alien to the institution of contract; on the contrary, without mutual trust, candour and sincerity, it is difficult to see how contracts could be agreed at all.

If these premises are accepted, then the way is open for an obligation of good faith to be implied in law into every contract. What the content of that obligation is, however, must always be fact-specific, taking into account the intentions of the parties, the purpose of the contract, and the relevant matrix surrounding the contract's formation and operation. In other words, while a default obligation of good faith may be implied into every contract by law, the precise scope or extent of that obligation will always be a matter of construction or implication in fact. Such an approach adequately balances the communitarian interests of the proponents with the opponents' rightful insistence that agreements should be rooted in the will of the parties, and that contractual rules must therefore be clear and predictable in order to facilitate the implementation of such intentions. Being guided by the parties' intentions in this regard thus gives the doctrine of good faith both legitimacy and practicality.

In the absence of any indication of what the parties intended, however, the default content of an obligation of good faith will likely comprise, at the least, honesty and rationality, and loyalty to the common contractual purpose. These are well-worn concepts common to both private and public law, and they will ensure that courts do not intervene in consensual bargains in the absence of truly egregious conduct.

The High Court has given its imprimatur to the imposition of contractual good faith along just these lines in a series of recent cases, as has the Court of Appeal in *Toshin*, and it is interesting to note that commercial life seems to have gone on without undue difficulty. In this fashion, abuses of contractual power have been curbed, disputes have been resolved and just results achieved, while at the same time the law has accommodated the need for certainty and the proper respect for individual autonomy. Good faith can no longer be said to be an untested fledgling, but has instead been shown to be both operational and practicable, entailing no real doctrinal confusion or controversy.

In thus siding with the proponents in the good faith debate, the High Court has taken the leap of faith warned against by Gummow J.,[173] and it remains to be seen what position the Court of Appeal will adopt when the issue next arises for its determination.

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[173] *Service Station*, *supra* note 33 at 406.