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GOOD FAITH IN CONTRACTS: IS THERE AN IMPLIED PROMISE TO ACT HONESTLY?

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ABSTRACT. *This article critiques the model for implementation of good faith suggested by Leggatt J's* obiter *comments in* Yam Seng Pte Ltd v International Trade Corp Ltd*. He considered that a general term of good faith may be implied as a matter of construction or as a factual implication under traditional implied terms rules; and that further terms might be implied as specific manifestations of the general term. These further terms would reflect "shared values and norms of behaviour", including the "core value of honesty". The article contends that the reasoning to support the general implication contradicts the proposition — accepted by Leggatt J — that good faith has not been recognised "as a duty implied by law"; and that, for several reasons, the analysis used to support implication on the basis of shared norms is flawed.*

KEYWORDS: *good faith, implied terms, construction, repudiation.*

I. INTRODUCTION

In *Bhasin v Hrynew*,[1] the Supreme Court of Canada introduced into Canadian law a duty "to act honestly in the performance of contractual obligations". Breach of the duty sounds in contract damages. This was one of two major contributions by the court towards the implementation of a generalised contractual duty of good faith and fair dealing.[2] Superficially at least, Leggatt J. had made a more modest contribution a few months earlier in *Yam Seng Pte Ltd. v International Trade Corp Ltd*.[3] He held that the one-off contract at issue included "good faith" as a term implied in fact and that one element was a promissory "duty of honesty".

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[1] *Bhasin v Hrynew* 2014 SCC 71; [2014] 3 S.C.R. 494, at [33], per Cromwell J. (for the court). Noted in this Journal by C.D.L. Hunt, "Good Faith Performance in Canadian Contract Law" [2015] C.L.J. 4.

[2] The second contribution is noted in our conclusion.

[3] *Yam Seng Pte Ltd. v International Trade Corp Ltd*. [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526.

Associating good faith with honesty is uncontroversial – that is, after all, the meaning of "good faith" at common law. When used in that sense, an implied term of "good faith" is by no means unusual.[4] What is controversial about *Yam Seng* is that Leggatt J. implied a term stating a promissory duty. Strictly, this was by way of *obiter dicta*. However, the reasoning used to justify the implication would apply with equal force to *any* contract. Therefore, if Leggatt J. is correct, English and Canadian law are to all intents and purposes as one on this issue. The only difference is the implied term rationale.[5]

Leggatt J.'s conclusion on honesty was the product of a general analysis of good faith which has attracted a good deal of commentary.[6] The analysis suggests a model for the implementation of good faith. In this article, we seek to show that Leggatt J.'s model does not work and that the reasoning which led to the implied term of honesty is unconvincing. We are not concerned here to map out the full scope and content of good faith in English contract law.

II. The Decision in *Yam Seng*

Very briefly, *Yam Seng* concerned a distribution contract between the claimant (Yam Seng) and the defendant (ITC). Their respective principals were Mr. Tuli (a Singapore businessman) and Mr. Presswell (an English businessman). The contract, which related to fragrances bearing the Manchester United brand, was governed by English law. ITC acquired the product from manufacturers and, pursuant to the contract, sold it on to Yam Seng for the purpose (inter alia) of sale at duty-free outlets in Singapore. It was common ground that duty-free prices are normally lower than those charged in the general retail market. ITC also distributed product to suppliers in that market. Several disputes arose between the parties. In the result, Leggatt J. held that Yam Seng was justified in terminating the contract for "repudiatory breach" by ITC and entitled to damages.[7]

Yam Seng's pleadings alleged that ITC had breached certain implied terms. One (the "good faith term") was "that the parties would deal with each other in good faith".[8] The content of this term was not defined at a

[4] A recent example is *Braganza v BP Shipping Ltd.* [2015] UKSC 17; [2015] 1 W.L.R. 1661, where the implied term included a requirement of rationality as well as honesty.

[5] Whether the duty is non-excludable (as under Canadian law) is unclear.

[6] See e.g. S. Whittaker, "Good Faith, Implied Terms and Commercial Contracts" (2013) 129 L.Q.R. 463; E. Granger, "Sweating over an Implied Duty of Good Faith" [2013] L.M.C.L.Q. 418; D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014) 77 M.L.R. 475; H. Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing" [2014] C.L.P. 297. See also Lady Justice Arden, "Coming to Terms with Good Faith" (2013) 30 J.C.L. 199.

[7] Leggatt J. also held that Yam Seng was entitled to damages under the Misrepresentation Act 1967 for ITC's pre-contractual conduct.

[8] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [119].

general level, save that it incorporated a "core value" of "honesty". The other implied terms (the two "specific terms") were said to capture the "relevant content"[9] of the good-faith term in the circumstances of the case. Leggatt J. reformulated each of the two specific terms. The first became "that ITC would not *knowingly* provide false information on which Yam Seng was likely to rely".[10] The second was recast[11] as "an obligation not to approve a retail price for any product for any domestic market which was lower than the duty free retail price for the product agreed with Yam Seng".[12]

As we understand the judgment, Leggatt J. implied all three terms.[13] The second specific term was not breached. By contrast, he held that the first specific term was breached by ITC in email correspondence with Yam Seng. Tuli had sought confirmation that the Singapore retail price for the fragrance would not be less than the duty-free price. Presswell replied that he had told the supplier to that market (Kay Ess) to increase the price. In fact, he only did so three days later. Nor did Presswell disclose the response he received, to the effect that increasing the retail price would take some time. Leggatt J. considered that this conduct struck at the "heart of the trust which is vital to any long-term commercial relationship"[14] and amounted to a "repudiatory breach". It is not clear whether this was because the implied term was an essential term or an intermediate term the breach of which had significant consequences[15] or because ITC's conduct evidenced a refusal to perform the contract. Since these are conceptually different bases for termination, this aspect of the case illustrates a lack of precision which is regrettably becoming common.[16] Assuming Leggatt J. was right in assessing the seriousness of ITC's conduct, in our view the last of those grounds is preferable. That is, ITC's conduct in sending the email, when considered in light of all the facts, could have amounted to "an intimation of an intention to abandon and altogether to refuse performance of the contract".[17] Yam Seng was entitled to justify its termination on the straightforward basis of repudiation by refusal to perform, aside from any implied term of good faith.

[9] Ibid., at para. [154].
[10] Ibid., at para. [156].
[11] Ibid., at para. [159].
[12] Cf. *Livock v Pearson Bros* (1928) 33 Com. Cas. 188.
[13] There may be some doubt as to whether he implied the "good-faith" term. See note 34 below.
[14] Ibid., at para. [171].
[15] This seems unlikely, but cf. *Malik v Bank of Credit and Commerce International S.A.* [1998] A.C. 20, 38, per Lord Nicholls.
[16] See J.W. Carter, *Carter's Breach of Contract (*Oxford 2012), §3–36.
[17] *Freeth v Burr* (1874) L.R. 9 C.P. 208, 213, per Lord Coleridge C.J. (approved *Mersey Steel and Iron Co. Ltd. v Naylor Benzon & Co.* (1884) 9 App. Cas. 434). See also note 59 below.

III. The Good-Faith Reasoning

Yam Seng includes a wide-ranging discussion of the role of good faith in contract law, with references to case law in the US and many Commonwealth jurisdictions.[18] Leggatt J. also noted European influences. He doubted[19] that English law "is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts". In that respect, he considered[20] English law to be "swimming against the tide".

For Leggatt J., a term implied in fact stating a duty of good faith is a different matter. There is "no difficulty, following the established methodology of English law" in implying such a duty "in any ordinary commercial contract".[21] Developing that theme, Leggatt J. described[22] as the "essence of contracting … that the parties bind themselves in order to cooperate to their mutual benefit". This is particularly evident, Leggatt J. said,[23] in "relational contracts" such as long-term distributorship agreements, where "mutual trust and confidence" is "implicit in the parties' understanding and necessary to give business efficacy to the arrangements". At a more general level, he was influenced by the well-known statement of Lord Steyn in *First Energy (UK) Ltd. v Hungarian International Bank Ltd.*[24] that giving effect to the "reasonable expectations of honest" people is a theme which runs through contract law as a whole.

This analysis led Leggatt J. to conclude that an implied in fact term could deliver a duty comprising "good faith", "fair dealing"[25] and "fidelity to the parties' bargain".[26] The use of background was the key to both implying and giving content to "good faith" (or "good faith and fair dealing") as a term implied in fact. Calling in aid Lord Hoffmann's judgment in *Bank of Credit and Commerce International S.A. v Ali*,[27] Leggatt J. said[28] that, because there are "no conceptual limits" to the background material available in construction and implication, direct use may be made of shared norms and values from contexts of varying specificity.[29] Leggatt

[18] There is no reference to the Singapore Court of Appeal's denial of a general rule duty of good faith in *Ng Giap Hon v Westcomb Securities Pte Ltd.* [2009] SGCA 19; [2009] 3 S.L.R.(R.) 518.
[19] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [131].
[20] Ibid., at para. [124].
[21] Ibid., at para. [131].
[22] Ibid., at para. [148].
[23] Ibid., at para. [142].
[24] *First Energy (UK) Ltd. v Hungarian International Bank Ltd.* [1993] 2 Lloyd's Rep. 194, 196. See also Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 L.Q.R. 433.
[25] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [150].
[26] Ibid., at para. [139].
[27] *Bank of Credit and Commerce International S.A. v Ali* [2001] UKHL 8; [2002] 1 A.C. 251, at [39], per Lord Hoffmann. Leggatt J. also relied on *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912–13, per Lord Hoffmann.
[28] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [133].
[29] Ibid., at para. [134].

J. described[30] an expectation of honesty as a "paradigm example of a general norm which underlies almost all contractual relationships". However, because the content of the good-faith term in a given case is "sensitive to context",[31] "other standards of commercial dealing" may also be "so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document".[32] Therefore, duties in addition to the "core requirement to act honestly"[33] may be included. These are also established by ad hoc implication.

IV. A Model for Implementing Good Faith?

The reasoning in *Yam Seng* presents a model of good faith under which the initial step is to establish "good faith" as a term implied in fact. If the facts at issue justify that step, the model conceives that the implied term may have one or more incidents. The "core" incident is a promissory duty of honesty. Other incidents are established by further implication with the aid of general and specific background. In *Yam Seng*, having implied the good-faith term, Leggatt J. implied the first specific term to give relevant content to the core incident, while the second specific term stated an incident derived "from features of the particular contractual relationship". Since honesty is a standard applicable to contracts governed by English law, the initial step can always be taken.[34] The impact of the model is therefore that good faith is a term implied in all contracts and the only question is whether incidents other than honesty can also be established.

There is an alternative interpretation of the judgment, namely that Leggatt J. only implied the two specific terms. The terms were justified as good-faith implications, but no term of "good faith" was actually implied. This interpretation is more attractive, as it has a stronger claim to consistency with orthodox analysis. It also avoids the awkward technique of deriving secondary terms[35] (the two specific terms) from a primary implication (good faith) and the idea that, apparently, breach of a secondary term does not amount to breach of the primary term.

V. Problems with the Model

In our view, the model generated by the reasoning in *Yam Seng* is not viable. It depends on an initial conclusion in favour of a primary term implied

[30] Ibid., at para. [135].
[31] Ibid., at para. [141].
[32] Ibid., at para. [138].
[33] Ibid., at para. [149].
[34] Although Leggatt J. referred to "almost all contractual relationships", he also expressed himself more broadly. See note 42 below and cf. also note 21 above.
[35] Cf. Granger, "Sweating over an Implied Duty of Good Faith", p. 424 ("sub-terms").

in fact ("good faith") which contradicts the view that there is no good-faith default rule. Leggatt J. could not both reject the default rule and treat all contracts as including an implied term having as its minimum ("core") content a *promise* to act honestly. This suggests that something must have gone wrong with the implied term analysis.

A. Good Faith as a Term Implied in Fact

In some legal systems, a freestanding duty or concept of good faith provides a gateway through which external norms can be recognised and accommodated within the law of contract.[36] English contract law, lacking that facility, works differently. The norm must be introduced using more general principles, in a manner consistent with those principles. Under the model presented in *Yam Seng*, the good-faith term is implied because it gives effect to norms and values found in "background". For a term to be implied, its content must be known at the time of entry into the contract and it must be capable of clear expression.[37] One difficulty with the good-faith term (as conceived by Leggatt J.) is that it does not have a defined content. Although a promissory duty of honesty is one incident, content is actually determined by further implied terms.

Terms are implied in fact on the basis of specific considerations. The basic contrast with terms implied in law is that the latter are implications for classes (or subclasses) of contract and "based on wider considerations".[38] Accordingly, a second objection to the analysis in *Yam Seng* is that it places more weight than is permitted on the "wider considerations" represented by "shared values and norms of behaviour". At least in relation to minimum content, the good-faith term operates as if it were a term implied in law, but is not determined by reference to a class of contract. Indeed, Leggatt J. clearly thought "good faith" is a term implied in fact for all contracts. This contradicts the nature of the implication. Although a handful of terms, relating to matters such as co-operation, are *capable* of being implied into any contract, a term implied in all contracts is simply a default rule of the common law.[39] This intrinsic inconsistency alone is a sufficient basis for rejecting his model.[40]

[36] See generally R. Zimmerman and S. Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge 2000), chs 1, 2; W. Ebke and B. Steinhauer, "The Doctrine of Good Faith in German Contract Law" in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford 1995), ch 7. See also the *Principles of European Contract Law*, art. 6:102(c), where "good faith and fair dealing" is a distinct basis for implying terms, and note arts 1:201, 1:202.

[37] See e.g. *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108, 115–17, per Viscount Simon L.C.

[38] *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 307, per Lord Bridge.

[39] See *Southern Foundries (1926) Ltd. v Shirlaw* [1940] A.C. 701, 717, per Lord Atkin (referring to the implied term that neither party will prevent the other from performing the contract).

[40] Cf. *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd.* [2013] EWCA Civ 200, at [105], per Beatson L.J. ("If the parties wish to impose such a duty they must do so expressly"); *MSC Mediterranean Shipping Co. SA v Cottonex Anstalt* [2016] EWCA Civ 789, at [45], per Moore-Bick L.J.

The major objection is Leggatt J.'s use of "background" in the form of "shared values and norms of behaviour" to generate his good-faith term. Whether termed background, the factual matrix or surrounding circumstances, context is a circumstantial guide to construction conclusions and ad hoc implications. The extent of its influence depends on many factors, including the degree of specificity. As a specific element of context, objective purpose can be crucial. At the intermediate level of a trade or industry understanding, a term can be implied in law for a particular class of contract or if the requirements of custom and usage are satisfied. But general background norms do not by themselves generate specific terms implied in fact.[41]

It is therefore hardly surprising that Leggatt J.'s analysis to establish the minimum content of his good-faith term by reference to the "expectation of honesty" is unconvincing. He remarked that "[a]s a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance".[42] This evokes the constructional approach to implication developed in *Attorney-General of Belize v Belize Telecom Ltd*.[43] That assimilation has since been deprecated, with the Supreme Court affirming that construction and implication are distinct processes.[44] Thus, to the extent that the *Belize* approach made it easier to rationalise the terms found by Leggatt J., that route is no longer available.

However, Leggatt J. also said that the same result arose upon the application of the traditional tests of "obviousness" and "necessary to give business efficacy". If it is so easy to imply a promise to act honestly into an ordinary commercial contract, it is surprising that no prior authority is cited to support this view. Of course, a court's conclusion in favour of a term implied in fact for a one-off contract could hardly be dictated by precedent. That is because such terms reflect specific matters and state particular resolutions. But "good faith" in Leggatt J.'s model is different. Even if restricted to the core requirement of "honesty in … performance", it is a generalised term.

Under the obviousness criterion, what must be obvious is that the parties intended to include a specific term resolving a *particular* issue. For a promise to act honestly to be implied, it must be obvious not only that the parties

[41] See e.g. *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444; [2011] 1 W.L.R. 2066, at [45], [50]–[53], per Aikens L.J.

[42] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [137]. See also at [132]–[135].

[43] *Attorney-General of Belize v Belize Telecom Ltd*. [2009] UKPC 10; [2009] 1 W.L.R. 1988, at [21] ("whether [the implication]…would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean").

[44] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd.* [2015] UKSC 72; [2016] A.C. 742, at [25]–[31], per Lord Neuberger (Lords Sumption and Hodge agreeing), [75]–[76], per Lord Clarke, cf. [67]–[70], [73], per Lord Carnwath. See also *Philips Electronique Grand Public S.A. v British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472, 481–82, per Sir Thomas Bingham M.R.

intended to make some provision for honesty, but also that the term would be promissory. On the particular facts in *Yam Seng*, it also had to be obvious that the scope of the promise extended to communications. Leggatt J. seems to have considered the obviousness requirement satisfied because people never bother to include such a promise in their contracts. He said[45] that, although an expectation of honesty is "essential to commerce", it is "seldom, if ever, made the subject of an express contractual obligation". Practical experience suggests otherwise. The judgment refers to recent cases in which courts have considered express terms of "good faith".[46] Moreover, preliminary agreements such as letters of intent commonly include such a term. If, as Leggatt J. considers, "good faith" always includes a promise to act honestly, every express promise to act in good faith must state a promise to that effect.[47] Given his perception of the usual approach to honesty, it seems paradoxical to suggest that if "an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".[48] However, it seems sufficient to say that taking judicial notice of a general community understanding that people act honestly is not a proper basis for concluding that the obviousness criterion is satisfied for a promise of honesty.

In relation to "business efficacy", while it can be said that a passenger on the Clapham omnibus would expect the parties to commercial contracts to act honestly, that does not mean that a promise to do so must be implied in order to give a particular contract business efficacy. The question in *Yam Seng* was whether, assuming there was no implied term of good faith, the express terms were sufficient to enable the contract to work as a matter of business in the circumstances which occurred. The fact that Leggatt J. was able to reach a decision in favour of Yam Seng independently of the good-faith analysis shows that was the case.

B. Ramifications

Leggatt J.'s treatment of the contract as including a term of good faith owes much more to the use of community norms and standards than the application of implied term criteria. His good-faith term was implied to give effect

[45] *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [135].

[46] In addition, exclusions of liability (e.g. *Banque Financière de la Cité S.A. v Westgate Insurance Co. Ltd.* [1991] 2 A.C. 249 (fraud or deception)) and qualifications on exclusions (e.g. *Walker v Stones* [2001] Q. B. 902 (liability of trustee)) sometimes include references to dishonesty.

[47] Recent cases seem concerned to support good-faith negotiation clauses on that very basis. See *United Group Rail Services Ltd. v Rail Corporation of New South Wales* [2009] NSWCA 177; (2009) 74 N.S. W.L.R. 618; *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd.* [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145.

[48] *Shirlaw v Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227, per Mackinnon L.J. (affirmed *sub nom Southern Foundries (1926) Ltd. v Shirlaw* [1940] A.C. 701). See generally A. Phang, "The Challenge of Principled Gap-Filling: A Study of Implied Terms in a Comparative Context" [2014] J.B.L. 263.

to a norm, not because the criteria were satisfied. This use of norms as "background" must have significant ramifications.

There are many norms of conduct to which Leggatt J.'s conclusory analysis would logically apply. No contracting party expects to be assaulted or defamed, or to be subjected to unlawful threats or unconscionable conduct. Nor is there any expectation that people will unjustly enrich themselves. Since all such matters can be characterised as background norms, freedom from each could be characterised as a legitimate expectation of the parties. Such norms find their expression, and definition, in legal concepts. *Yam Seng* does not explain whether effect is given to norms according to the community understanding or how they operate as a matter of law. There are also weaker norms, such as not profiting from wrongdoing, which merely inform legal concepts. If terms can be implied to give effect to these as well, there seems a much easier path to the result in *Attorney-General v Blake*.[49] There is no difficulty in saying that societal norms underlie the law in general, including the law of contract. But that does not provide any legal basis for saying that contracting parties must intend to implement the norms as contractual terms.

Looked at in another way, Leggatt J.'s analysis gives certain members of the community – those who enter into contracts – privileged positions. The interaction between the law of contract and other law is complex. As a general proposition, however, and subject to its terms, the existence of a contract does not displace the operation of other legal principles between the parties. Tortious liability for deceit is just one illustration, apropos of *Yam Seng*. It is almost invariably a good reason for *not* implying a term that it would deal with a matter addressed by statute or the common law.[50] As a matter of ad hoc implication, it is not necessary for business efficacy to replicate a legal duty or create a substantially similar duty. Carrying Leggatt J.'s analysis to its logical conclusion, contracting parties may enjoy a right to damages in contract in addition to their rights at general law for the wrongful conduct. Even if the content of the implied term exactly replicates the general law duty, the remedy in contract for contravention of the duty may be governed by different – contractual – principles.

In *Bhasin v Hrynew*, the Supreme Court of Canada did not shrink from this position. The court said "[B]reach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on, and breach of it supports a claim for damages according to the contractual rather than the tortious measure".[51]

[49] *Attorney-General v Blake* [2001] 1 A.C. 268.

[50] See generally *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] A.C. 80; *Hawkins v Clayton* (1988) 164 C.L.R. 539; *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296; *CGU Workers Compensation (NSW) Ltd. v Garcia* [2007] NSWCA 193; (2007) 69 N.S.W.L.R. 680, at [143], per Mason P.

[51] *Bhasin* 2014 SCC 71; [2014] 3 S.C.R. 494, at [88], per Cromwell J. (for the court).

Therefore, like the good-faith term implied by Leggatt J. in *Yam Seng*, not only is dishonesty actionable *per se*, but the promisee is entitled to damages assessed in accordance with contract rules, with all that that entails. The decision in *Yam Seng* is a major development which, in our view, could only be taken at a much higher level.

VI. Dealing with Dishonesty

There seems to us little difficulty in saying that the law deals adequately with dishonest conduct in the performance of a contract. Terms implied in fact do not play a major role. For example, the so-called "fraud exception" in relation to letters of credit does not depend on the implication of a term. If an insured makes a dishonest claim, it is not only disentitled to recover on the claim, but also disentitled to make a claim which could honestly have been made.[52] The context most relevant to the analysis of honesty in *Yam Seng* is the right to terminate for repudiation.

For a time, the doctrine of repudiation (like several other common law doctrines) was thought to be based on an implied term of the contract – that is, an implied term not to engage in conduct amounting to a refusal to perform.[53] While the implied term rationale has never formally been departed from under English law,[54] it is not invoked in the modern authorities. As in areas such as frustration[55] and the breach of an intermediate term,[56] the matter is governed by a rule of the common law. If a promisor alleges that the promisee repudiated the contract, good faith – bona fides – has a twofold relevance. Bona fides may be relevant to whether the promisor's conduct amounts to a repudiation.[57] In addition, there is a long line of authority to the effect that dishonesty in performance may, and usually will, be a repudiation.[58] Most of the cases relate to classes of contract which include "fidelity" as an implied-*in-law* term: typically, agency and employment contracts.[59] Although dishonesty is within the scope of the term,

[52] *Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd.* [2001] UKHL 1; [2003] 1 A.C. 469, at [62]. See also *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, esp. at [8], per Lord Sumption; and Insurance Act 2015, s. 12(1).

[53] See e.g. *Hochster v De la Tour* (1853) 2 E. & B. 678, 689; 118 E.R. 922, 926.

[54] Contrast *Wight v Foran* (1987) 11 N.S.W.L.R. 470, 486, per McHugh J.A. (reversed on other grounds *sub nom. Foran v Wight* (1989) 168 C.L.R. 385); *Spira v Commonwealth Bank of Australia* [2003] NSWCA 180; (2003) 57 N.S.W.L.R. 544, at [48], per Handley J.A.

[55] *Davis Contractors Ltd. v Fareham Urban District Council* [1956] A.C. 696, 729, per Lord Radcliffe.

[56] *Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 71, per Diplock L.J.

[57] *Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.* [1980] 1 All E.R. 571; [1980] 1 W.L.R. 277.

[58] See *Carter, Carter's Breach of Contract*, §8–09.

[59] See e.g. *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 38 Ch. D. 339, 362, per Bowen L.J.; *English and Australian Copper Co. Ltd. v Johnson* (1911) 13 C.L.R. 490; *Concut Pty Ltd. v Worrell* [2000] HCA 64; (2000) 176 A.L.R. 693, at [25], per Gleeson C.J., Gaudron and Gummow JJ.

"honesty" does not describe its full operation. Therefore, no specific implication is required. For example, in *Malik v Bank of Credit and Commerce International S.A.,*[60] Lord Nicholls said that the employer's implied obligation "not to conduct a dishonest or corrupt business" was "one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required" by the employment relationship.

It is doubtful whether distributorship contracts form a class of transaction into which a duty of fidelity is implied in law. Leggatt J. may have thought otherwise in *Yam Seng*.[61] If so, he could have decided this aspect of the case on that basis. However, the important point is that repudiation of a contract may be proved whether or not a term of honesty is implied in fact or law. Without implying any term, it was open to Leggatt J. to decide that ITC repudiated the contract when Presswell lied to Tuli.

VII. Conclusion

Like many other *obiter* discussions extolling the virtues of good faith as a concept and lamenting the absence of a common law rule of good faith, Leggatt J. succeeded in *Yam Seng* in proving that the same result is achieved by the orthodox processes construction and implication. However, by seeking to base a factual implication on general community understandings, the reasoning necessarily contradicts the premise: the effect is to recognise a common law (default) rule having a "core requirement". Accordingly, his model, under which the incidents of an implied duty of good faith are established and applied as further ad hoc implications, is flawed. It is also largely conclusory: *because* parties contract against various norms, they must intend those norms to be replicated in contractual promises. Leggatt J.'s reasoning therefore illustrates another feature of decisions promoting good faith as implied terms, namely a lack of rigour in applying the implied terms criteria.[62]

Of course, we would never deny that honesty is a fundamental norm to which the law (including the law of contract) gives effect. But that is not the same as saying that each party promises to act honestly. In a situation like

[60] *Malik* [1998] A.C. 20, 34. See also *Shepherd v Felt and Textiles of Australia Ltd.* (1931) 45 C.L.R. 359 (wilful disregard of a principal's instructions); *SOS Kinderdorf International v Bittaye* [1996] 1 W.L.R. 987, 993 (unauthorised loan by employee to third party); *Nigel Fryer Joinery Services Ltd. v Ian Firth Hardware Ltd.* [2008] 2 Lloyd's Rep. 108 (agent's unauthorised pursuit of outside activities); *Concut Pty Ltd. v Worrell* [2000] HCA 64; (2000) 176 A.L.R. 693, at [51], per Kirby J. (dishonesty).

[61] See e.g. *Yam Seng Pte Ltd.* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep. 526, at [142]. See also Collins, "Implied Terms", pp. 328–29.

[62] See e.g. *Renard Constructions (ME) Pty Ltd. v Minister for Public Works* (1992) 26 N.S.W.L.R. 234, per Priestley J.A. (three terms of reasonableness were implied in a single clause of a third-party standard form building contract); *Burger King Corp v Hungry Jack's Pty Ltd.* [2001] NSWCA 187; (2001) 69 N.S.W.L.R. 558 ("terms of good faith and reasonableness" implied in law when no class of contract was identified).

that which arose in *Yam Seng*, the only question that needed to be discussed was whether ITC's dishonesty amounted to a repudiation of the contract. Moreover, Leggatt J. clearly thought other norms could be used in the same way. The impact is to place contracting parties in a privileged position.

We introduced this article by noting one of the Supreme Court of Canada's two contributions to good faith in *Bhasin v Hrynew*. We conclude it by mentioning the other: the recognition[63] of "good faith contractual performance" as a "general organizing principle". In *Yam Seng*, Leggatt J.'s analysis of good faith suggests that a good deal more than that can be achieved for English law.

[63] *Bhasin* 2014 SCC 71; [2014] 3 S.C.R. 494, at [33], per Cromwell J. (for the court). On these contributions, see Hunt, "Good Faith Performance in Canadian Contract Law"; J.D. McCamus, "The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015) 32 J.C.L. 103.