would be more helpful to articulate that the issue is not one of a sentence ceasing to serve *any* legitimate penological purpose but rather that sentencing necessarily entails multiple competing legitimate penological purposes and that one (rehabilitation) can eventually over-ride the others (retribution, deterrence and incapacitation). If a Secretary of State can decline to release a reformed whole-life-sentence prisoner on the grounds that their continuing detention serves the legitimate penological purposes of retribution and deterrence, it would appear that successfully challenging this decision by way of judicial review may be rather difficult. And anyone anticipating the first release of a whole-life-sentence prisoner by the Secretary of State under s. 30 without recourse to judicial review is likely to be in for a long wait.

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GOOD FAITH PERFORMANCE IN CANADIAN CONTRACT LAW

IN *Mellish v Motteux* (1792) 170 E.R. 113, 157, Lord Kenyon observed that "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith". This passage echoes a similar statement by Lord Mansfield 25 years earlier in *Carter v Boehm* (1766) 97 E.R. 1162, 1910. Despite these early statements of principle, the modern common law has been notoriously hostile to the notion that contracting parties are under a general duty of good faith in the performance of their obligations (see W.P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001) 1 Oxford U. Commonwealth L.J. 195), and there is certainly "no firm line of modern cases to support such an obligation" in English law (see L.E. Trakman and K. Sharma, "The Binding Force of Agreements to Negotiate in Good Faith" [2014] C.L.J. 598). Nevertheless, some recent decisions in Australia, Canada, and England have begun to imply obligations to perform certain types of promises, in certain classes of contracts, in an honest manner, crafting, in the words of Lord Bingham, "piecemeal solutions in response to piecemeal problems" (*Interfoto Picture Library v Stiletto Visual Programmes Ltd*. [1989] 1 QB 433, 439 (CA)). A recent English example is *Yam Seng Pte Ltd. v International Trade Corporation Ltd*. [2013] EWHC 111 (QB) in which Leggatt J. found there to be an implied duty of "honesty" and "fidelity to the bargain" in the context of a long-term distribution contract. Importantly, His Lordship emphasised that whether such obligations can be implied is a matter of construction, which involves ascertaining the parties' objective intentions through conventional

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techniques such as the principle of business efficacy. As implying such obligations depends entirely on the context of each contract (at paras [137]–[143]) there is, at present, no *general* principle of good faith performance in English contract law, despite some case-by-case recognition (see *Mid-Essex Hospital Services N.H.S. Trust v Compass Group UK and Ireland Ltd*. [2013] EWCA Civ 200, at [105], [150]).

Until the decision in *Bhasin v Hrynew*, 2014 SCC 71, the situation in Canada was similar to that in Australia and England. Duties of good faith had been implied on a case-by-case basis, and were incident to certain classes of contracts (such as insurance), but were not otherwise recognised as being of general application. Cromwell J.'s reasons in *Bhasin*, delivered on behalf of the unanimous Supreme Court of Canada, appear to change this. His Lordship held that it was appropriate to take "two incremental steps to make the common law less unsettled and piecemeal, more coherent and more just" (at para. [33]). The first step was to acknowledge that "good faith contractual performance is a general organizing principle of the common law of contract" (at para. [33]). His Lordship justified this proposition by noting that aspects of good faith have long influenced doctrines related to contract law, such as unconscionability (at para. [42]), estoppel (at para. [88]), and aspects of civil fraud (at para. [88]), as well, in Canada at least, of being implied as a matter of law in contracts of employment (at para. [54]), insurance (at para. [55]), and construction tenders (at para. [56]). Cromwell J. emphasised that an "organizing principle" is "not a free-standing rule" but rather is a "standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations" (at para. [64]). That said, it appears that this organising principle does have some independent force, for His Lordship held that it means parties "must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (at para. [63]). Furthermore, His Lordship observed that good faith "exemplifies the notion" that a "contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner", which means, at a minimum, that one party not seek to undermine those interests in "bad faith" (at para. [65]). The second step in *Bhasin* was to recognise, "as a further manifestation of this organising principle of good faith", that there is a "common law duty which applies to all contracts to act honestly in the performance of contractual obligations" (at para. [33]). This means that, at a minimum, parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" and it could well evolve to require more than that (at para. [73]). Importantly, this obligation should "not be thought of as an implied term, but a general doctrine of contract law" and thus it operates in *all* contracts "irrespective of the intentions of the parties" (at para. [74]). Despite this rather categorical statement, Cromwell J. did however suggest that contracting parties may through

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clear language "relax the requirements of the doctrine so long as they respect its minimum core" which, presumably, means the obligation not to lie or knowingly mislead the other party about matters material to the performance of the contract (at para. [77]).

Having outlined these twin developments, Cromwell J. then turned to apply them to the facts of the case. The background facts of *Bhasin* are lengthy and complex. To simplify, the case involved a species of franchise agreement between the appellant Bhasin and the respondent Can-Am. The parties were in the business of marketing education savings plans. Pursuant to their agreement, Bhasin acted as an enrolment director responsible for marketing Can-Am's plans to potential investors. The contract between Bhasin and Can-Am provided for an automatic renewal after three years, subject to Can-Am's right to terminate by invoking an express non-renewal clause within six months of the expiry of the first term. Can-Am also had a separate contract with the other respondent, Hrynew, who also acted as an enrolment director for Can-Am and happened to be one of Bhasin's competitors. In the months leading up to the expiry of the first three-year term, Can-Am engaged in a series of what Cromwell J. found to be dishonest behaviours; principal among these was Can-Am's decision to appoint Hrynew as a "provincial trading officer" that would perform an audit of Bhasin's compliance with provincial securities laws. Bhasin was extremely unhappy about this, as Hrynew was in an obvious conflict of interest (being Bhasin's direct competition) and in fact used this office to pressure Can-Am to terminate its agreement with Bhasin. Importantly, Cromwell J. found that Can-Am lied to Bhasin multiple times about Hrynew's role and about its (Can-Am's) intentions to renew the contract with Bhasin. Taken together, His Lordship determined that "this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement" with Bhasin and constituted a breach of its common law duty to act honesty when exercising the non-renewal clause (at para. [103]). Damages were calculated using the ordinary measure of contractual expectation damages, namely to put Bhasin in the position it would have been in had Can-Am not breached its obligation to behave honestly about the process of renewing the contract. This resulted in Bhasin being compensated for the value of his business that eroded, because, according to Cromwell J., had Can-Am not lied to Bhasin about the renewal process, Bhasin could have retained the value of his business by contracting his services to others (at paras [108]–[110]).

Bhasin is a revolutionary decision. Its immediate effect is to create a non-derogable duty on contracting parties to perform their obligations honestly (or, at least, to refrain from active dishonesty). While in theory this obligation reflects a serious restriction of freedom of contract—insofar as it operates irrespective of the parties' intentions—in practice it is arguably not terribly restrictive, for, in the words of Lord Leggatt , "an expectation

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of honesty" is a "paradigm example of a general norm which underlies almost all contractual relationships" (*Yam Seng Pte Ltd.*, at para. [135]) and hence could easily be implied in virtually all contracts by reference to the parties' objective intentions. In my view, the more significant impact of *Bhasin* concerns the precise meaning and future development of "good faith" as a "general organizing principle" of contractual performance. Unfortunately, Justice Cromwell declined to elucidate the scope of this principle, noting simply that it "may be invoked in widely varying contexts" and that future development necessarily calls for a "highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties" (at para. [69]). This principle has the potential to generate an unforeseen host of discrete obligations, and, with respect, seems inescapably to pose a significant threat to freedom of contract. In both of these respects, *Bhasin* engages with the long-standing policy concerns that Professor McKendrick has identified as underpinning the "traditional English hostility" towards a doctrine of good faith, namely the inherent subjectivity and uncertainty of the concept itself, and the doctrine's ostensible discordance with the ethos of individualism in which parties are free to pursue their own self-interest (McKendrick, *Contract Law*, 9th ed. (London 2011), 221–22).

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FREE SPEECH AND SCANDALISING THE COURT IN MAURITIUS

AT the behest of the Law Commission, *Contempt of Court: Scandalising the Court* (18 December 2012), Parliament recently abolished the common law offence of scandalising the court (s. 33 of the Crime and Courts Act 2013). But the offence is still frequently found in many parts of the common law world and the decision of the Judicial Committee of the Privy Council in *Dhooharika v DPP of Mauritius* [2014] UKPC 11; [2014] 3 W.L.R. 1081 may indicate its future in common law jurisdictions. The Privy Council was asked to decide, inter alia, whether the common law offence was compatible with s. 12 of the Constitution of Mauritius. Section 12 protects a person's freedom of expression but also makes saving for any law, or any act done pursuant to law, which aims to maintain the authority and independence of the courts and which is reasonably justifiable to that end.

Those who see judging the laws of other jurisdictions as exercises in diplomacy as well as justice will likely applaud the decision: the Privy Council found itself able to avoid the controversial result of declaring the offence to

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