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Good faith: Helping commercial parties or creating an unnecessary burden?

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Good Faith –
Helping Commercial Parties Or Creating An Unnecessary Burden?

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I. Introduction

1. The concept of good faith in contacts has been making inroads into common law legal systems in recent years, and it has been said that jurisdictions not adopting some form of good faith are swimming against the tide. However, it is still questionable whether such a duty makes sense for all contracts; in particular, for commercial contracts between sophisticated parties. This paper will argue that while allowing a implication of good faith in contracts may be helpful in some instances, it is an unnecessary burden in cases of contracts among sophisticated parties such as corporations.

2. To be clear, this paper is not advocating poor behavior by parties in contracting. However, the general idea behind imposing a duty of good faith in contracts is to ensure that parties essentially "play fair" in contract negotiations and/or performance. This idealistic rationale does not necessarily translate well into practice, especially in commercial transactions among companies and other sophisticated parties. Indeed:

> The predictability of the legal outcome of a case is more important than absolute justice. It is necessary in a commercial setting that businessmen at least should know where they stand … The last thing that we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable.[1]

3. This paper will illustrate these issues through examining cases involving good faith in Asia and relevant jurisdictions such as the UK and Australia. Part II will provide some background on the concept of good faith. Part III discusses some of the realities of applying good faith in practice, and Part IV will use cases to illustrate the abovementioned problems. This paper will conclude that allowing good faith to be implied in commercial contracts between companies and other sophisticated parties is problematic, especially in an Asian context. Any steps towards allowing an implication of good faith in commercial contracts should thus be taken cautiously.

II. Good faith as a concept

4. Much ink and paper has been spent on what good faith means, exactly. Most recently, a court held that good faith requires acting honestly in the performance of the contract, meaning that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[2]

5. Courts have also defined good faith in the sense of observing reasonable commercial standards of fair dealing in the course of the transaction,[3] or more simply by what it is not (i.e. not bad faith)[4]. Other definitions range from requiring reasonableness or rationality, fair and open dealing, to fidelity to the bargain.[5]

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[1] Sergio Freire, "Implied Obligation of Good Faith in Contracts: Only "Vulnerable" Parties Need Apply" (2006) 25 ARELJ 99 at 102 (citing Roy Goode, "The Concept of "Good Faith" in English Law", Centro di studi e ricerche di diritto comparato e straniero (Rome 1992), No. 2).
[2] *Bhasin v Hrynew* [2014] SCC 71 ("*Bhasin*") at [73].
[3] *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 ("*Westcomb*") at [48] (citing Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433).
[4] *Id*, at [49] (citing R S Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va L Rev 195 ("Under this thesis, the concept of

6. There is also of course the well-known definition by Carter and Peden, who have argued that good faith is not an independent concept but something "already inherent in contract doctrines, rules and principles" and that there is therefore no reason for a term concerning good faith to be implied into a contract.[6]

7. As it is not our goal to go into the doctrinal aspects of good faith in this paper, I will now move onto some practical implications of allowing good faith to be implied in commercial contracts.

III. Good faith in practice

8. It is anticipated that a few problems will arise from allowing good faith (howsoever defined) to be implied into commercial contracts between companies.

9. The most obvious, of course is that the parties' intentions at the time of contracting are subverted. Commercial contracts between companies generally reflect what the parties intended. These are sophisticated parties, know what they want in their contracts, and have good lawyers working for them to ensure this outcome. For a court to imply or impose an additional duty of good faith where there was no such intention at the time of contracting undermines the intentions of the parties as well as the certainty of defined contractual obligations.

10. Even if it is assumed that there may indeed have been some leanings towards good faith by one or both parties, a finding of good faith (or lack thereof) is fact-intensive and needs to be determined on a case-by-case basis by the courts[7]. This is obviously inefficient and time-consuming.

11. Moreover, contextual interpretation prevents parties from predicting how contract terms and language will be interpreted in subsequent transactions and prevents enforcement of even apparently clear obligations by summary procedures.[8] This shall be illustrated, for instance, in *Renard Constructions (ME) Pty Ltd v Minster for Public Works*.[9]

12. It has been argued that contracts, rather than being clear expressions of the parties' intentions, are merely a "rough indication" of how parties intend to effect their relationship.[10] Hence "by signing contracts, parties consent not only to be bound by the express obligations but also to be bound by the norms of the relationship."[11] Thus, the

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"good faith" is "a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith").

[5] Colin Liew, "A Leap of Good Faith in Singapore Contract Law" 2012 Sing. J. Legal Stud 416 at 2 (citing various sources).

[6] J W Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155.

[7] *See e.g., Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) ("*Yam Seng*"); *Bhasin, supra* n 2.

[8] Robert E Scott, "The Death of Contract Law" (2004) 54 U Toronto L.J. 369 at 5.

[9] *Renard Constructions (ME) Pty Ltd v Minster for Public Works* (1992) 26 NSWLR 234 ("*Renard*").

[10] Arlen Duke, "A Universal Duty of Good Faith: An Economic Perspective" (2007) Monash University L.R. (Vol 33 No 1) at 196.

[11] *Ibid*.

argument goes, imposing an "implied duty of good faith can be seen as effecting the intentions and reasonable expectations of the parties."[12]

13. The difficulty is that in such a world, either party can claim that an apparently complete and integrated written contract is subject to private meanings and collateral understandings.[13] This undermines the very purpose of having written contracts – to have the parties' expectations and requirements written down for clear understanding and performance.

14. Moreover, such an interpretation of the role of contracts generally does not hold true for contracts involving corporations and other sophisticated parties. Indeed, such parties spend much time and effort on negotiating contracts that reflect the parties' final intent and expectations, and address as many contingencies as the parties can think of. This shall be seen in the cases of *Renard* and *GDH Ltd v Creditor Co Ltd*[14]. Having to further consider and incorporate counterparties' unwritten expectations and norms is an additional and unexpected burden in performing contracts.

15. Following this line of thought, it has also been argued that Asian cultures regard the written contract as "tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations."[15] Even if this were true – and it is by no means established that this is so (witness, for instance, the number of disputes that have arisen over poor treatment of counterparties by Chinese companies) – such a cultural tendency could in fact be undermined by allowing an implication of good faith in contracts.

16. In studies looking at the effect of the probability of contractual enforcement on the likelihood of continuing reciprocity and cooperation between parties, it was found that "the longer a group plays in [a] low enforcement environment, the strongest the preference for reciprocity and the higher the rate of performance of that group."[16] It was suggested that this was because in such environments where "[t]he norms of honesty and reciprocal fairness influence the decision making process," parties will engage in a "detailed screening process to ensure they deal with fair individuals," while overall fewer contracts were concluded[17] (possibly because of the difficulty of finding such fair individuals). Similarly, high enforcement environments were also found to promote high rates of performance, as the prospect of high enforcement "raises the opportunity cost of breach to a level that encourages performance."[18]

17. Conversely, in medium enforcement regimes, the results suggest that in such environments "reciprocity is crowded out and self-interested norms prevail" as "the decision of whether or not to perform contracts is made by asking whether the terms of the contract, as they will be

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[12] *Id*, at 197.
[13] Scott, *supra* n 8, at 5.
[14] *GDH Ltd v Creditor Co Ltd* [2010] HKEC 818 ("*GDH*").
[15] *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 ("*Toshin*") at [40].
[16] Duke, *supra* n 10, at 189. A low enforcement regime is defined in that article as one where it is difficult to enforce contracts. *Id*, at 189 footnote 45. For the purposes of this paper, I will narrow the definition of a low enforcement regime to one where it is difficult to enforce or even imply good faith clauses.
[17] *Ibid*.
[18] *Id*, at 190.

interpreted by the court, require performance rather than by reference to the desire to reciprocate."[19] And a regime of implying good faith on a case-by-case basis would be the quintessence of a medium enforcement regime.

18. Thus it is suggested that the courts should leave the alleged Asian cultural tendency towards reciprocity and cooperation well alone, and let the contractual parties police themselves (and punish the wrongdoers by refusing to enter into contracts with them): i.e. let the low enforcement regime continue in this regard. This paper will discuss this issue further in the sections discussing *Yam Seng*[20] and *Toshin*.[21]

19. Finally, allowing good faith to be implied in contracts will increase the costs of negotiation and transactions, as parties deal with yet another layer of uncertainty and try to pre-empt being sued for breach of good faith. Parties may even have to begin considering the other party's expectations and consider putting others' interests ahead of their own. This will be discussed further in the analysis of *GDH* and *Toshin*, as well as *Westcomb*[22] and *Bhasin*[23].

20. Of course, it is arguable that as parties get used to a new regime of good faith, the costs of negotiation and litigation will go down. However, as stated, good faith is an inherently fact-intensive concept, reliant for instance on industry standards and expectations, *see, eg, Yam Seng*, *Bhasin* and *Toshin*, not to mention individual expectations, *see, eg, Westcomb*. Thus it is unlikely that there will be anywhere near bright-line rules and standards for determining good faith.

21. Moreover, the reality is that contracting parties typically need specific guidance regarding their performance obligations.[24] Parties will find it hard to accurately predict the behaviors that courts will find sufficient to satisfy the vague language of good faith, and a misjudgment by either side could lead to substantial liability[25], an especial concern for corporations with comparatively deep pockets. They will also have to police for moral hazard and the potential evasion of contractual responsibilities by counterparties, as contracting parties have an incentive to interpret ambiguous circumstances in their favour when it is unclear what any party must do.[26]

22. Companies will also have to review their in-house practices to consider if their normal business practices may potentially violate some notion of good faith when engaging in transactions with third-parties, as shall be seen in the discussion of *Toshin*.

23. As parties try to pre-empt being sued for breach of amorphous standards of good faith and to police the other side's actions for lack of such good faith, the cost of negotiations and other transactions will also increase. Parties will also increasingly seek more extensive and sophisticated legal advice in this regard. (This is in addition to increased costs due to courts engaging in an extensive factual analysis.) Indeed, with the increasing emphasis on fact-based analysis, parties (and their lawyers) now have to play a defensive game, resulting in

[19] *Ibid*.
[20] *Yam Seng*, *supra* n 7.
[21] *Toshin*, *supra* n 15.
[22] *Westcomb*, *supra* n 3.
[23] *Bhasin*, supra n 2.
[24] Scott, *supra* n 8, at 4.
[25] *Ibid*.
[26] *Ibid*.

the costly situation where "*[s]tanding on one's contract now requires a full trial, with all its attendant costs*" (emphasis in original).[27]

IV. Cases involving the practical application of good faith

24. To illustrate the above points, this paper will look at a few well-known cases involving the implication and interpretation of good faith in contracts between commercial parties. The following cases discuss certain important principles in contracting: the importance of implementing the parties' intentions; the required extent of disclosure to counterparties; and the degree to which a party can elevate its own self-interest above others'.

25. This paper will first discuss the case of *Renard*, and compare it with *GDH*. Both cases involved large scale projects among corporations. It will be argued that the finding of good faith in *Renard* was problematic, as it rendered toothless certain contract terms that the parties had agreed to at the time of contracting – in particular one party's power to have full discretion in terminating the contract. In contrast, the *GDH* court correctly adhered to the letter of the signed contract.

26. This paper will then discuss cases of alleged violation of good faith due to lack of disclosure, being *Yam Seng* and *Toshin*. It is suggested that part of the problem in *Yam Seng* was failure to conduct basic due diligence, and allowing the implication of good faith would encourage such problematic behavior by companies. As to *Toshin*, while I agree with the court's holding in favour of the respondent, the court's statements regarding good faith may nonetheless create conflicts between a company's obligations in contract and its own internal obligations, and thereby impose unnecessary burdens in contracting.

27. Finally, this paper will address *Westcomb* and *Bhasin*, and discuss what is owed by a company to its agents under good faith. The paper will argue that while it is not disputed that the counterparties could have behaved better, nonetheless *Westcomb* was decided correctly, while *Bhasin* should have been decided on other grounds.

A. Renard vs GDH: reliance on letter of contract

28. In the Australian case of *Renard*, a dispute between a contractor (Renard Constructions (ME)) and its principal (the Minister for Public Works) grew into what appears to be an approximately seven year arbitration and litigation odyssey. The dispute revolved around a show-cause clause in the parties' contract.

29. The contractor had entered into an agreement with the principal for the construction of two reinforced concrete pumping stations.[28] The contractor had difficulties in fulfilling its obligations under the contract, partly due to its own shortcomings but partly also as a result of the principal's failure to supply materials to the contractor, as required under the contract.[29] The contractor asked for and received several time extensions to perform the work.[30] When the principal issued the first show cause notice under the contract, the

[27] *Id*, at 5.
[28] *Renard*, *supra* n 9, at 272. The estimated final value of the contract was $208,950. The contractor had also entered into another contract with the principal at the same time, but that is not in dispute here.
[29] *Ibid*.
[30] *Id*, at 238, 272.

contractor resolved the relevant concerns and obtained another time extension.[31] Nonetheless, the work was still not completed approximately 5 months after the contractual completion date of January 1986.[32] Finally in May 1986, the principal once again invoked the show-cause clause.[33]

30. At this point, the principal suffered some internal miscommunication, such that the senior officer was not made aware of certain issues relating to the delays (including the principal's previous failure to supply parts).[34]

31. At the end of May 1986, the principal exercised its power under the contract to exclude the contractor from the site and take over the remaining work.[35] The contractor treated this as a wrongful repudiation of the contract, while the principal alleged that it was a valid exercise of its contractual powers.[36]

32. The case turned on the interpretation of the show-cause clause (subclause 44.1) in the contract, which reads:

> If the Contractor defaults in the performance or observance of any covenant, condition or stipulation in the Contract or refuses or neglects to comply with any direction as defined in clause 23 ... the Principal may suspend payment under the Contract and may call upon the Contractor, by notice in writing, to show cause … why the powers hereinafter contained in this clause should not be exercised…
>
> If the Contractor fails … to show cause to the satisfaction of the principal why the powers hereinafter contained should not be exercised the principal … may --
>
> (a) take over the whole or any part of the work remaining to be completed and … exclude from the site the Contractor …; or
> (b) cancel the Contract… .[37]

33. The claim of good faith came about when the contractor claimed that the principal's actions in excluding the contractor from the worksite was lacking in the aforesaid good faith, and that the principal was acting unreasonably. [38]

34. The Court of Appeals decided in favour of the contractor. Priestly JA held that the powers conferred on the principal under subclause 44.1 were to be exercised reasonably.[39] As this had not, in his opinion, occurred, he found for the contractor and allowed damages in quantum meruit.[40] As to the issue of good faith, Priestly JA stated that "the kind of reasonableness … [he was] discussing seems to … have much in common with the notions

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[31] *Ibid*.
[32] *Ibid*.
[33] *Id*, at 272.
[34] *Id*, at 239-240.
[35] *Id*, at 240.
[36] *Id*, at 274.
[37] *Id*, at 239.
[38] *Id*, at 242.
[39] *Id*, at 259-260.
[40] *Id*, at 259-260, 271.

of good faith which are regarded in many [other jurisdictions] … as necessarily implied in many kinds of contract."[41]

35. However, Priestly JA's explanation concerning reasonableness and good faith was problematic insofar as it denied the plain meaning of subclause 44.1. He acknowledged that it was "clear that the words of the clause empower the principal to give a notice to show cause upon any default in carrying out any requirement in the contract," and that "for a completely trivial default the principal can give a notice to show cause."[42] And the analysis should have ended there – under the terms of the agreement, the principal had the clear right to cancel the contract upon any default, without need to prove reasonableness.

36. However, Priestly JA decided that the analysis could not end there. Presumably of the school of thought that contracts are merely a "rough indication" of parties' intentions, he simply decided that "no contractor in his senses would enter into a contract under which such a thing could happen."[43] Thus, he held that the principal had not acted reasonably, and by extension in good faith, in terminating the contract.[44] To decide otherwise, the judge stated, would violate the purpose of the contract, which was "to have the contract work completed by the contractor in accordance with the contract, in return for payment by the principal in accordance with the contract."[45]

37. The most fundamental objection to such an approach is that the contractor did in fact enter into the contract. And the contract, which Priestly JA himself acknowledged, indeed empowers the principal to ask the contractor to show cause upon any default in carrying out any requirement in the contract, and to cancel the contract if the reasons provided were not to the principal's satisfaction.

38. Granted, this was probably a contract where the power was relatively one-sided, and it was probably difficult for the contractor to negotiate or amend the terms of the contract. Nonetheless, it is not uncommon to find such clauses in contracts between companies, where one party has the power to sever relations at its discretion. Loan agreements, for instance, regularly include such statements.[46] This was also a standard industry contract[47], and the contractor must have been familiar with its terms.

39. The usual way to ameliorate the effect of such clauses is through the insertion of qualifiers (or a side letter amending the terms of the contract). Thus, if the parties had intended to require *reasonable* behavior by the principal or a default only upon a *substantial* breach of a contract term, it would have been but the work of a moment to add in the words "reasonable" or "material" to the subclause.

40. Thus subclause 44.1 could have been amended as follows: "[i]f the Contractor fails within the period specified in the notice in writing to show cause to the *reasonable* satisfaction of the principal why the powers hereinafter contained should not be exercised", or, alternatively, "[i]f the Contractor *materially* defaults in the performance or observance of

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[41] *Id*, at 263.
[42] *Id*, at 258.
[43] *Ibid*. ("The reasonable contractor, the reasonable principal and the reasonable looker-on would all assume that such a result could not come about except with good reason.")
[44] *Id*, at 258, 263.
[45] *Id*, at 258.
[46] *See, eg*, APLMA standard form loan agreements and home mortgage agreements.
[47] This was a NPWC Edition 3 (1981) contract. *Renard, supra* n 9, at 261.

any covenant, condition or stipulation." Further amendments could also have been made to the effect that any delay or breach which resulted from the principal's actions or omissions would not constitute a default under subclause 44.1.

41. None of this was done here. Instead, the contractor agreed to this contract and all its terms, without amendment or qualification. In fact, "[a]t all times during th[e] litigation the contractor has accepted that it was in default under the contract."[48]

42. If we follow this approach towards contracts – i.e. allow an implied term of good faith to modify clauses which on their face allow one party full discretion to take a specified action (even if such action is arguably unreasonable) – we have a problem. There are, in fact, many situations where a party may wish full discretion to terminate a contract, and the other party agrees to such a term in order to get the benefit of the contract. But under this requirement of "reasonableness," it would seem that there is no way a party could enforce a condition allowing absolute discretion on its part, even if that was the express and mutually agreed intention of the parties at the time of contracting.

43. Additionally, such an approach of not allowing terms based on their face value would increase moral hazard, as it allows counterparties to later claim that they believed that such a clause(s) were only to be enforced "reasonably." Then it becomes a case of "who said what" and results in a costly, extensive factual analysis of the situation at the time. Far better, for certainty of contract and enforcement, not to mention acceptance of commercial intentions, to accept that a contract means exactly what it says.

44. This paper also takes issue with the notion that allowing the clear meaning of such a clause would undermine the purpose of the contract. First, that is a simplistic interpretation of contract intentions. Certainly the underlying idea is to have the work completed in return for payment. However, as Priestly JA himself indicated, the work has to be "in accordance with the contract". If, as in this case, the work was not done in time or in accordance with the stipulated requirements, that would also violate the purpose of the contract.

45. Moreover, there can be more than one purpose of a contract. One purpose, as was stated, was certainly "to have the contract work completed by the contractor in accordance with the contract, in return for payment by the principal in accordance with the contract."[49] The other purposes were probably to protect the principal by ensuring that the government (as represented by the Minister) was not cheated; that the work was completed on time in accordance with the government's requirements; and to protect the government's reputation (by ensuring that the work was timely and well done).

46. As Priestly JA himself pointed out, the contract was part of a standard form contract, with clauses which provided for situations "which experience has shown it is prudent to provide for in advance"[50] – in this case non or poor performance. Similarly, companies in commercial contracts may well include such clauses in their contracts, due to past bad experiences. Being unable to enforce such a term would thus be an unnecessary burden in contracting, requiring companies to resort to more onerous and expensive methods to ensure that the work was done in the way required and contracted for (including perhaps increased supervision and numerous interim reports and inspections).

[48] *Id*, at 272.
[49] *Id*, at 258.
[50] *Id*, at 261.

47. The court probably had sympathy for the contractor's position. Nonetheless, this is not a reason to shoe-horn in a duty of good faith, in a way that altered the expectations of the parties post-hoc. Priestly JA could well have found for the contractor on other grounds; for instance Meagher JA found for the contractor based on other well-established contract principles.[51]

48. In contrast to the approach taken in *Renard*, the approach taken by the *GDH* courts in Hong Kong is straightforward and not easy to misconstrue or misapply, and without such negative implications for future contracts and negotiations.

49. The GDH case involved a complicated cross-border transaction over a debt restructuring, including multiple parties from various jurisdictions as well as the Guangdong Provincial Government ("GPG"). As background, Guangdong Enterprise (Holdings) Ltd. ("GDE") was the investment vehicle of GPG, with about 250 subsidiaries ("GDE Group").[52] One of GDE's subsidiaries was GD Invest SARL ("GDI").[53]

50. In 1992, GDI entered into a financing agreement with certain French banks (the "French banks") to finance the acquisition of a Parisian hotel; GDI's liability under the agreement was guaranteed by GDE.[54]

51. The GDE Group subsequently defaulted on its collective debt, including GDE's obligations under the abovementioned guarantee.[55] The creditors involved approximately 170 banks and bondholders, along with trade and other debtors.[56]

52. The GPG, GDE Group and the creditors entered into a debt restructuring, through a Debt Restructuring Agreement ("DRA"). The DRA, which "was worked upon by teams of lawyers and financial experts, [was] a considerable document of detail and complexity."[57] It ran to "84 pages, 27 Schedules, and has 41 pages of signatories."[58] The negotiations took two years to complete, and would probably have taken longer if not for pressure from the GPG.[59] In the end it was finalized "at breakneck pace," with the claims procedure for contingent and unascertained claims being worked out in around 3 months' time.[60]

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[51] *Id*, at 276 ("the principal's mind, on the arbitrator's findings, was so distorted by prejudice and misinformation that he was unable to comprehend the facts in respect to which he had to pass judgment. Since he was unable to be "satisfied" -- and, if it matters, that inability arose solely through his own fault -- his action in taking over the contract and excluding the contractor lacked contractual justification and amounted to a repudiation").
[52] *GDH Ltd v Creditor Co Ltd* [2008] 5 HKLRD 895 ("*GDH I*") at [2].
[53] *GDH*, *supra* n 14, at [4].
[54] *Id*, at [6] - [8].
[55] *Id*, at [9] - [10]. The debt was in the region of US$4.9 billion. It was "common ground that financial impropriety led to the collapse of the GDE Group, and the [GPG] feared that failure to re-structure the Group would impact adversely upon foreign lending in China and on the Hong Kong banking sector; the [GPG] also was keen to avoid any investigation into the circumstances which had led to the collapse of the GDE Group." *Ibid*.
[56] *GDH I*, *supra* n 52, at [3].
[57] *GDH*, *supra* n 14, at [16].
[58] *Ibid*.
[59] *GDH I*, *supra* n 52, at [52] ("After two years of negotiation and towards the end of October 2000, the GPG required that the entire restructuring be completed in the calendar year 2000 on the basis that the provision was in the GPG's budget for 2000 but not for the following year").
[60] *Id*, at [5].

53. The restructuring package also involved a fund pool for distribution to creditors, and the GPG contributed to the pool via its vehicle GDH Limited ("GDH").[61] At the time of negotiations, it was "envisaged that the creditors would be entitled to share pari passu" in the fund pool, and any creditor who failed to agree to this restructuring arrangement and the related claim procedure would be unable to benefit from this fund pool.[62]

54. US$15.5 million notionally was also set aside from the fund pool to meet the French banks' claims.[63] These banks were treated as unsecured contingent creditors and their claims classified as "Unrelated Guarantee Claims" (so-called because their claims were based on a guarantee where the guarantor GDE was a company involved in the restructuring but the primary obligor GDI was not).[64]

55. The dispute in question arose from a side arrangement between the French banks, GDI and GDH. After the DRA was completed, GDH approached the French banks for "immediate settlement" of GDI's obligations.[65] The upshot was that GDI would to bring forward its purchase of the hotel from the French banks, and GDH in turn would pay a revised purchase price on behalf of GDI (involving an immediate payment of €3.5 million to the French banks).[66] In return, the French banks agreed not to submit any claims under the DRA, even a "Nil Proof" claim.[67] As a result of this arrangement, GPG would be able to clawback the US$15.5 million from the amounts set aside for the claims of the French banks, thereby making a saving of about US$10 million.[68]

56. The other creditors obviously had something to say about this arrangement, and the fund custodian refused to release the US$15.5 million.[69] GDH sued for breach of contract, and the custodian counterclaimed (in part) for breach of contract by the French banks.[70]

57. The DRA claim process involves, in part, the following:

> If a holder of an Unadmitted Unsecured Restructuring Claim *has not submitted a Proof of Claim* … in accordance with the Claims Procedure on or prior to [date] the Restructuring Consideration transferred to Creditor Co in respect of such [claim] … *shall be transferred to GDH* and … may be distributed at the discretion of GDH to the Accepting Creditor with the Unadmitted Unsecured Restructuring Claim or otherwise applied by GDH for its own use and benefit.[71] (emphasis in original.)

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[61] *GDH*, *supra* n 14, at [12].
[62] *Id*, at [13].
[63] *Id*, at [19].
[64] *Id*, at [20].
[65] *Id*, at [22].
[66] *Id*, at [22] - [23].
[67] *Id*, at [23], [32].
[68] *Id*, at [26]. "[T]he sum of US$15.5 million notionally was set aside from the pool of funds for the purpose of meeting the French banks' claim of about US$23 million, albeit the maximum loan amount outstanding at that time in favour of these banks, excluding default penalties, was in the order of US$13 million." *Id*, at [19].
[69] *Id*, at [28].
[70] *Id*, at [29].
[71] *Id*, at [63].

58. The issue of good faith arose over whether the French banks were in fact required to submit a "Nil Proof" of claim under the DRA. Had they done so, the US$15.5 million would have stayed in the pool and been distributed to other creditors on a *pari passu* basis.[72]

59. The creditor group claimed that the DRA obliged all creditors to "refrain from taking steps which would prejudice other creditors, all of whom required to be treated equally, and to act in good faith"; hence the French banks' failure to file a "Nil Proof" claim under the DRA "was a breach of the obligations held by the banks to the other creditors".[73]

60. The High Court, affirmed by the Court of Appeal and Court of Final Appeal,[74] found for the French banks and GDH, finding "no principle of good faith of general application" in Hong Kong law.[75] The Court of Appeal also explained that:

> all that occurs in the event of the non-submission of a Proof of Claim is that the relevant part of the Restructuring Consideration is paid to a party different to the one to which it would have been paid had a Proof been filed. *Thus the DRA provides for one consequence in one event (payment to a proving creditor in the event of a claim) and a different consequence in another (in the present instance payment to GDH in the event of no proving creditor).*[76] [emphasis added]

61. In other words, the creditors got exactly what they bargained for, and could not post-hoc complain about the consequences. This makes perfect sense, especially from a commercial point of view.

62. Negotiations over the restructuring had taken over two years, and would probably have gone on longer had not the GPG intervened. Although the claims process was only decided towards the end of the negotiations, nonetheless reams of lawyers had gone over the details of the claims process (and the lawyers' bills were probably correspondingly high). The DRA itself was a 84-page document (including 27 Schedules), and had been presumably reviewed by at least 41 pages of signatories. If the creditors did not at any point in this spot the loophole in the arrangements, that was not GDH's or the French banks' problem.

63. Obviously, the creditors felt that GDH and the banks should not have used the said loophole. But, as the Court of Appeal pointed out, the French banks had essentially settled with their primary obligor GDI, and therefore had no reason to make a claim under the DRA, especially since there was no requirement under the DRA to submit a "Nil Proof" claim.[77] This approach also avoids the problems with a contextual interpretation of contract, as found with *Renard*.

64. The alternative approach, to allow the implication of a duty of good faith into the contract, would not necessarily have ended the issue in the creditors' favour either. As a finding of good faith is a fact-intensive exercise, the courts would have to analyze why GDH approached the French banks with the proposal, and if either side had an intention to undercut the other creditors when they entered into the proposal, or even when they agreed to the terms of the DRA (including the fatal clause). As the Court of Appeal stated, "there

[72] *Id*, at [32].
[73] *Id*, at [53].
[74] *GDH Ltd v Creditor Co Ltd* [2010] HKEC 1238.
[75] *GDH I*, *supra* n 52, at [64].
[76] *GDH*, *supra* n 14, at [84].
[77] *Id*, at [69].

could be entirely legitimate reasons why a putative claimant may not wish to file a Proof" – e.g., the claim "may have been satisfied between the signing of the DRA in December 2000 and the deadline for the filing of a Proof of Claim by end March 2002" or a claimant may have been satisfied with the prospect of its debtor's ability to ultimately repay its debt and did not wish to become involved with the contractual restructured debt procedure.[78]

65. Moreover, had the court decided in the creditors' favour, it would mean that parties could not rely on the letter of their contract, even in a highly negotiated situation such as this. Alluding to the creditors' claim that GDH was obliged to treat all the creditors fairly, parties would also be obliged to consider and ameliorate the negative impact of their actions on their competitors. As a general rule, this goes against normal business principles, particularly when it concerns companies and sophisticated parties, and would have a dampening effect on commerce. In the words of Meagher JA in *Renard*, there is no reason why a commercial party should have regard to any interests except its own.[79]

66. It should be further noted that such extensive negotiations are, in a sense, an exercise in preventing the parties from performing as the other contracting parties would *not* want them to. It is generally expected that counterparties in a contract negotiation will try to find loopholes, and the written contract is meant to pre-empt any such loopholes. It is not then for the court to renegotiate the deal for the losing party, on the grounds that one side played the game better than the other side(s). To do so would be to essentially punish the (winning) side for creating a better deal, or spotting a loophole in the transaction; essentially bringing transactions down to the dumbest negotiator.

B. Yam Seng vs Toshin: disclosure vs diligence

67. I now turn to *Yam Seng* and *Toshin*, which deal with alleged violations of good faith due to failure to disclose.

68. In the UK case of *Yam Seng*, International Trade Corporation Limited ("ITC") – controlled by one Roy Presswell – entered into a contract with Yam Seng Pte Ltd ("YS") – controlled by one Sunil Tuni – for the (mostly) duty-free distribution of toiletries branded to show an association with Manchester United, in various territories including China and the Middle East.[80] It later turned out that ITC did not, at the time of signing, actually possess the license for the manufacture and distribution of the said toiletries, despite assurances to the contrary.[81] In fact, the licensing agreement was signed some months after the conclusion of the agreement between YS and ITC.[82]

69. ITC also negotiated a separate agreement with another company ("KS") for the domestic market.[83] ITC confirmed to YS that the domestic price charged by KS was higher than the duty-free price required under the YS contract, when in fact ITC was aware that this was not so.[84]

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[78] *Id*, at [72].
[79] *Renard*, *supra* n 9, at 275.
[80] *Yam Seng*, *supra* n 7, at [1].
[81] *Id*, at [15].
[82] *Id*, at [17].
[83] *Id*, at [60].
[84] *Id*, at [68] - [69].

70. The relationship between YS and ITC subsequently deteriorated, and suit was filed. YS claimed that there was an implied term of good faith in the agreement, interpreted by the court as an implied duty of honesty in the provision of information by ITC, as well as an implied duty not to approve a domestic price for a product which undercut the duty-free price provided by YS.[85]

71. The court, while declining to imply a general duty of good faith in all contracts at this point (although stressing that the English courts were swimming against the tide), decided in YS' favour. It found that while ITC had not breached the latter duty (because it had no power to dictate the domestic price), it had in fact breached the former duty (of honesty), because Presswell gave YS the impression that "the domestic retail price was being increased when he knew that this information was false".[86]

72. Engaging in a discussion of good faith as *obiter*, the *Yam Seng* court stressed that an analysis of good faith "depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people."[87]

73. *Yam Seng* is an interesting case of a contract made between 2 companies who, though putatively sophisticated parties, yet did not act in such a manner. The court described Presswell as someone with a "striking ability to treat wishful thinking as fact" and other comments of a similar nature.[88] The agreement was also described as "a short document … evidently prepared by the parties themselves without the assistance of lawyers,"[89] which, while by itself is not an problem, does in the overall scheme of things indicate some naiveté about conducting business.

74. But more importantly, and which was not addressed in the court's opinion, YS appeared to accept ITC's statements that it had obtained a licensing agreement from Manchester United without question, i.e. without asking to see the actual licensing agreement or at least obtain written confirmation from Manchester United concerning the existence of such an agreement. This violates the most basic rule in negotiations and contracts: doing your homework.

75. Presumably if YS had ascertained that ITC did not actually have the licensing agreement in hand at the point of contracting, it would not have signed the distribution agreement until

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[85] *Id*, at [119], [165].
[86] *Id*, at [168]-[169].
[87] *Id*, at [144].
[88] *Id*, at [16] ("Under cross-examination Mr Presswell would not admit that his statement that he had signed a licence agreement was untrue. He sought to justify the statement on the basis that the licence agreement for Manchester United fragrances which he did ultimately sign at the beginning of May 2009 specified the licence period as having begun on 1 January 2009. The fact that Mr Presswell was able to convince himself that this somehow made true the [previous statement] … is symptomatic of the attitude I have described." *Id*, at [15] – [16]. "Mr Presswell acknowledged … he had made no inquiries and knew nothing about the process of registration in China and had no basis other than optimism for stating that four products would be registered in China within the next four months. He later learned that the registration process was much more laborious and bureaucratic than he had imagined [at least 12 months]." *Id*, at [23].)
[89] *Id*, at [26].

the said license was executed, and would also have treated ITC's other statements with greater suspicion.[90]

76. The question then becomes whether YS should be rewarded for not conducting basic due diligence. If YS had known it was operating in a low-enforcement regime, it would probably have engaged in a more "detailed screening process" to ensure that ITC could, in fact, deliver what it claimed it could. However, YS did not conduct basic due diligence, and got into trouble thereby.[91] Illustrating the moral hazard faced by allowing implied good faith in contracts, YS was allowed to had to seek refuge in a medium enforcement regime, where a term of good faith or honesty could be implied and enforced.

77. This approach, if accepted more widely, could lull companies into not doing simple due diligence for their deals (for instance, confirming that counterparties can deliver what they promise, or confirming that they are dealing with "fair" or even competent counterparties). This is not a trend that should be encouraged; at the very least there will be more such claims of lack of good faith crowding the dockets.

78. On the flipside, to avoid allegations of breach of implied good faith, companies may well have to ensure that their counterparties did their due diligence, and make sure that they understood the implications of the agreed contractual terms. This would, again, go against normal business principles and commercial interests.

79. A similar issue of disclosure (or lack thereof) was pursued in the Singapore case of *Toshin*. The underlying contract was a lease between appellant landlord HSBC Institutional Trust Services (Singapore) Limited and the respondent tenant, Toshin Development Singapore Pte Ltd.

80. The lease contained a rent review mechanism ("the RRM"), which provided that the parties "shall in good faith endeavour to agree on the prevailing market rental value" for the premises in question, or, failing agreement on the rent, jointly appoint three international firms of licensed valuers to determine the said rental value.[92]

81. The next contract renewal was due in June 2011.[93] Between July 2010 and early 2011, the respondent unilaterally approached all eight "international firms of licensed valuers" present in Singapore to prepare valuation reports on the rental value of the premises as of June 2010, and subsequently engaged the seven firms which agreed to prepare reports ("the Toshin valuations").[94]

82. In January 2011, the parties arranged for a meeting to discuss the new rent for the upcoming rental term.[95] Unable to agree on a rental value, the parties jointly issued proposal requests

[90] Indeed, as time went on and more and more of ITC's promises went unfulfilled, YS' emails to ITC became increasingly testy.
[91] If ITC had taken more active steps to lie to YS, for instance by showing YS a forged licensing agreement, then of course this would be in the realm of fraud, but there is no indication here of such actions.
[92] *Toshin*, *supra* n 15, at [6].
[93] *Id*, at [3].
[94] *Id*, at [2].
[95] *Id*, at [10].

to five valuation firms to provide valuation services under the RRM.[96] The respondent did not disclose the existence of the Toshin valuations during this meeting.[97]

83. The appellant subsequently discovered the existence of the Toshin valuations, and claimed that the respondent unfairly procured an advantage for itself.[98] As remedy, the respondent provided copies of the reports from the five firms jointly chosen to provide valuations, and also suggested that the parties issue joint instructions to the designated valuers that they "shall be independent and fair to both parties and in particular shall not be bound by any previous valuations which they have carried out for either party."[99] The appellant was not appeased and brought the case to court.

84. Acknowledging that there was an express term of good faith in the lease and that there was "no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld,"[100] the court nonetheless concluded that the RRM remained operable and dismissed the case.[101] The court decided that the respondent's remedial actions were sufficient to cure the abovementioned issues, and further that the valuation firms could be relied upon to act professionally and provide independent reports.[102]

85. This paper agrees with this analysis. It made good commercial sense for the respondent to undertake a pre-evaluation of the property; in fact it turns out the respondent had carried out such interim valuations of the property since 1993, for business forecasting purposes.[103] It was also valid to assume that the valuation agents were professionals who would act independently in assessing the market rental value of the premises, regardless of whether they were appointed jointly or individually by one of the parties in the transaction.[104] Singapore, after all, is not that big a market, and there would inevitably be some overlap of agents at some point.

86. It should be further noted that the appellant itself had engaged in opportunistic activity of its own, including proposing Savills as one of the designated valuers despite Savills having a close relationship with the appellant.[105] There were no innocent parties here, as is usually the case in such situations.

87. The real problem, according to the court, was the respondent's concealment of its actions. The preferred approach, the court stated, would have been for the respondent to disclose the valuations at the outset of negotiations, to avoid providing an "unfair advantage that would afford one party a commercially-significant insight into the conduct of the negotiating process."[106]

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[96] *Ibid*.
[97] *Ibid*.
[98] *Id*, at [12], [14].
[99] *Id*, at [14], [16].
[100] *Id*, at [40].
[101] *Id*, at [72].
[102] *Id*, at [57] - [65].
[103] *Id*, at [14], [53].
[104] *Id*, at [11].
[105] *Id*, at [14]. The appellant insisted that its prior appointment of Savills had been of a different nature and, thus, Savills was not in a position of conflict.
[106] *Id*, at [52].

88. This is not as straightforward as stated, however. As the court noted, "[t]here is often no clear line between seeking an advantageous but legitimate position in business dealings and negotiations on the one hand, and offending the basic standards of commercial fair play on the other."[107] To avoid allegations of non-disclosure and lack of good faith, a company might have to disclose, to all counterparties, advantageous positions resulting from its own strong corporate governance policies or business forecasting exercises, so as to start all parties off on a conceptually level playing field. On the other hand, the company would also have to be wary of giving up so much information that it went against its own interests and corporate duty to maintain an advantageous position in business. Such a determination would require the input of internal compliance officers and business analysts, as well as experts and lawyers, resulting in an expensive and time-intensive exercise.

89. *Toshin* was based upon an express term of good faith in the contract. If, however, a contract does not contain an express term of good faith (and this case should have scared off any competent company from having any such expression in their contracts), can a party still nonetheless be held to such standards under an implied term of good faith? Based on the remarks made by the *Toshin* court, the answer may be yes. As such, companies will have to be much more cautious in their approach towards negotiations and performance. Finally, this approach may undermine any Asian "cultural value of promoting consensus"[108] as parties instead focus on protecting themselves against accusations of breach of good faith.

C. Bhasin vs Westcomb: corporations vs their agents

90. Finally, this paper will address *Westcomb* and *Bhasin*, cases involving the behavior of corporations with regard to their employees/agents.

91. The Canadian case of *Bhasin* involved a dispute between respondents Canadian American Financial Corp ("Can-Am") and Larry Hrynew, and appellant Harish Bhasin.

92. Both Bhasin and Hrynew were successful enrollment directors for Can-Am (which markets education savings plans), as well as competitors: Hrynew wanted to capture Basin's lucrative niche market, and had previously proposed mergers between their agencies which Bhasin repeatedly declined.[109] Hrynew then approached Can-Am with a proposal that Can-Am force a merger between Hrynew's and Bhasin's agencies.[110]

93. Can-Am then "repeatedly misled" Bhasin on several counts: that Hrynew was obliged to treat Bhasin's information confidentially in his role as Can-Am's provincial trading officer ("PTO") (to review enrollment directors for compliance with securities laws); that the Alberta Securities Commission had rejected a proposal by Can-Am to have an outside PTO; and "responding equivocally" when asked by Bhasin whether the proposed Hrynew-Bhasin merger was a "done deal".[111]

94. Bhasin worked for Can-Am pursuant to an enrollment director's agreement; this included a renewal clause which operated automatically unless one of the parties gave 6 months' written notice to the contrary.[112] When Bhasin continued to refuse to allow Hrynew to audit

[107] *Id*, at [68].
[108] *Id*, at [40].
[109] *Bhasin*, *supra* n 2, at [7]-[9].
[110] *Id*, at [9].
[111] *Id*, at [12].
[112] *Id*, at [4], [6].

his records (as PTO), Can-Am threatened and then actually declined to renew his contract.[113] Bhasin "lost the value in his business" at the expiration of the contract, and was forced to take less renumerative work with one of Can-Am's competitors.[114] Consequently, Bhasin sued Can-Am and Hrynew.[115]

95. The *Bhasin* court held that Can-Am failed to act honestly with Bhasin in exercising the non-renewal clause, and was thereby in breach of the contract.[116] Similar to the *Yam Seng* court, the *Bhasin* court held that commercial parties "reasonably expect a basic level of honesty and good faith in contractual dealings," hence "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."[117] Additionally, in performing the contract "a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner", with the extent of such regard "depending on the context of the contractual relationship."[118]

96. This approach is problematic and burdensome, as discussed previously. But focusing this discussion on the issue of what is due from companies to their agents, the question is raised: at which point does a company's behavior shift from legitimately keeping confidential its information and acting in its own interests, to acting dishonestly or without appropriate regard for its agent's (or employee's) interests?

97. Can-Am, in this case, was probably trying to keep Hrynew, a valuable agent, happy, especially in light of Can-Am's difficulties with the securities commission and Hrynew's "good working relationship" with the commission.[119] Can-Am also probably did not want to disclose to Bhasin its significant problems with the securities commission (including a possible revocation of its license). None of these are, on their face, unreasonable actions or interests or illegitimate commercial concerns. It was the totality of the actions which the court found problematic – something which companies will have to keep in mind in their daily actions as well.[120]

98. It is also be noted that Bhasin was also a sophisticated player in the industry, whose business "thrived" and who over the course of his career received multiple awards and prizes from Can-Am recognizing him as "one of their top enrollment directors in Canada."[121] And since he clearly had concerns regarding Can-Am's and Hrynew's behavior, it seems unlikely that he was completely blindsided by events. He could well have chosen to pre-empt Can-Am and Hrynew's actions and "governed himself accordingly so as to retain the value in his agency."[122] (In fact, he was arguably in a better position to leave his contract than the contractor in *Renard*.)

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[113] *Id*, at [12].
[114] *Id*, at [13].
[115] *Ibid.*
[116] *Id*, at [1].
[117] *Id*, at [60], [73].
[118] *Id*, at [65].
[119] *Id*, at [8]. Hrynew had even made "veiled threats" to leave Can-Am if no merger took place. *Id*, at [9].
[120] *See* discussion at [88].
[121] *Id*, at [3].
[122] This is a reference to the trial court's finding that "had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency." *Id*, at [16].

99. Moreover, there was no argument that the plain words of the *Bhasin* contract did not allow Can-Am to refuse to renew the contract. However, similar to the concern raised by *Renard* on the inability to act in one's absolute discretion, if the *Bhasin* approach was adopted more widely, companies in the process of renewing contracts would have to be far more cautious in considering non-renewal. Paper trails and "reasonable" justifications would have to be produced for any non-renewal or termination of contract, regardless of the company's powers under the clear terms of the contract. While, of course, any prudent company should already be doing this, this still fundamentally negates the ability of a company to stand on the terms of its agreements, and undermines the certainty of contracts.

100. None of this is, of course, an excuse for Can-Am's and Hrynew's actions. However, the case should properly have been pursued on other grounds (perhaps fraud and fraudulent misrepresentation), rather than become the basis for creating an implied duty of good faith in commercial contracts.

101. Thus the *Bhasin* court's belief that its approach was "sufficiently precise that it [would] enhance rather than detract from commercial certainty"[123] is incorrect. Instead, it creates additional burdens and complications for commercial parties in contracting.

102. *Westcomb*[124] presents a similar case with a different approach. The appellant-remisier alleged that the respondents (being the stockbroking company and its associates) interfered with his relationship with his customers, and that the customers would have opened further accounts through him but for the actions of the respondents.

103. The appellant, who worked for his company pursuant to an agency agreement,[125] obtained a customer, one Julian Sandt ("Sandt") who opened an individual trading account with the appellant.[126] This was followed by the opening of a corporate trading account by Sandt's company.[127]

104. The appellant subsequently mailed out account opening forms to Aktieninvestor, another firm related to Sandt.[128] At some point, the appellant also allegedly arranged a meeting between his company (including some of the respondents) and Sandt and Aktieninvestor, where they discussed the possibility of Aktieninvestor taking up IPO placement shares.[129]

105. When the appellant did not receive Aktieninvestor's account opening forms after several months, he sought clarification from Aktieninvestor.[130] He was informed by the CEO (after a long email exchange) that the forms had already been sent to one of the respondents, at the request of said respondent.[131]

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[123] *Id*, at [34].
[124] *Westcomb*, *supra* n 3.
[125] *Id*, at [8].
[126] *Id*, at [10].
[127] *Ibid.*
[128] *Id*, at [12].
[129] *Ibid.*
[130] *Id*, at [13].
[131] *Id*, at [14] – [15] ("I did send the forms to … [the fifth respondent] because he told me to do so. First it was written [*sic*] your name and [for] your attention on the envelope which you sent to me. But Alex told me to mail the forms to his attention. So did I. I don't remember why Alex told me to

106. According to the respondents, this was done because "Sandt was too important a customer for the appellant and matters such as secondary listings of shares in overseas markets were 'too big' for the appellant to handle."[132] It should also be noted that Sandt and Aktieninvestor had also entered into share placement and share subscription transactions through the respondents, none of which involved the appellant.[133]

107. The appellant claimed that the respondents violated an implied duty of good faith. Despite significant sympathy for the appellant's position, however, the *Westcomb* court declined to "endorse an implied duty of good faith in the Singapore context."[134]

108. This was a better decision than *Bhasin*. While it was, as the court noted, "more than a little odd to find a stockbroking firm competing with its own remisiers,"[135] it remains the case that the appellant was an agent of the stockbroking firm (and by extension the respondents).[136] Coming to any other conclusion would have essentially forced the firm to place its agent's interests above that of its own.

109. More practically, if the respondents had told the appellant that they were intercepting the forms, the appellant would have kicked up a ruckus and possibly damaged any relationship with Sandt and Aktieninvestor.

110. Moreover, there was no objection to this arrangement from Aktieninvestor, who after all could well have insisted upon the appellant handling the account. As the email exchange showed, Aktieninvestor treated the appellant and respondents as one,[137] and hence the account opening with one of the respondents was in line with Aktieninvestor's expectations.

111. Finally, that is not to say that the company would not suffer any repercussions from its behavior. As the court suggested, "it may well be the case that the situation will resolve itself … in so far as the reputation of that firm might result in an exodus of its remisiers,"[138] an extralegal sanction which would make sense in a low enforcement regime.

V. Conclusion

112. Good faith as a doctrine should be approached cautiously. Allowing a general implication of good faith in commercial contracts, without due regard for the practical implications of such a change, could result in good faith becoming a catch-all doctrine, which contracting parties can use as a get-out-of-jail-free card. It is important to remember that:

> If one party to a contract is more shrewd, more cunning and outmanoeuvres the other contracting party who did not suffer a disadvantage and who was not vulnerable, it is

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do so. Maybe you were out of office that week… So did you find our forms within Westcomb finally?")

[132] *Id*, at [16].

[133] *Id*, at [11].

[134] *Id*, at [60].

[135] *Id*, at [91].

[136] *Id*, at [6] - [8].

[137] *Supra* n 129.

[138] *Id*, at [99]. The court, however, was careful to note that "[w]e do not, however, in any way suggest that this was, in fact, the situation based on the facts before us in the present appeal." *Ibid*.

> difficult to see why the latter should have greater protection than that provided by the law of contract.[139]

While this statement was directed at contracts between "commercial leviathans,"[140] there is no reason why this should not also apply to contracts involving corporations and/or reasonably sophisticated parties (within the bounds of the industry in question).

113. Corporations (and their lawyers) bargain long and hard for the terms of their bargain. If it so happens that one side does not do as well as hoped out of the deal, or failed to contemplate certain outcomes therefrom, it does not follow that it should be freed from the consequences of the deal because of a nebulous concept of good faith. To allow this would be to further complicate already complicated negotiations and contracts, and create unnecessary burdens on parties. "Subjective, highly contextual modes of interpretation sacrifice transactional efficiency on the altar of subjective intention."[141]

114. This is not to say that there is no situation where the application of good faith would be useful or in the interests of justice. However, "the interests of certainty in contractual activity should be interfered with only when the relationship between the parties is unbalanced and one party is at a substantial disadvantage, or is particularly vulnerable in the prevailing context."[142] Companies and sophisticated parties should not generally be considered in those categories. To do otherwise would be to significantly undermine the careful work done by parties in their negotiations, and also allow other parties to "cry wolf" when the results do not go their way.

[139] *Esso Australia Resources Pty* Ltd *v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed)*, [2005] VSCA 228 ("*Esso*") at [4].
[140] *Ibid.*
[141] Scott, *supra* n 8, at 6.
[142] *Esso*, *supra* n 137, at [4].