Good the contract. this essay will argue that

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Good faith was first mentioned by the judiciary in Carter v Boehm. 1 However, there is no clear definition of goodfaith. Bingham LJ, in Interfoto vStiletto, 2 (saying that partiesshould act in good faith): ‘ This does not simply mean that they should notdeceive each other…its effect is perhaps most aptly conveyed by suchmetaphorical colloquialisms as … ‘ coming clean’ or ‘ putting one’s cards faceupwards on the table.’3When interpreting contracts, the courts have a choice fromtwo main approaches: the literal approach4 orthe purposive approach.

5The literal approach aims to achieve certainty by ensuring that the courts onlyconsider the written wording of the contract, thereby minimising the courts’interference and upholding sanctity of contract. The purposive approach favoursaccuracy, with the courts considering the wording of the contract according tothe wider context and background of the contract. This essay will argue that the courts have, due toprioritising different factors at different points in time, failed to take aconsistent approach towards deciding whether to intervene in parties’ contractsand this has led to a lack of clarity surrounding the law on both good faithand contractual interpretation. The essay develops, first, by considering thecurrent approaches taken by the courts when interpreting contracts and willanalyse the extent to which the courts only give effect to the written contentof the contracts, or whether they should also consider the context of thecontract.

It will be explained that the courts have made several conflictingdecisions regarding contractual interpretation. Secondly, it considers how thelaw on good faith has changed over the past 30 years, and then the currentstate of the law. It suggests that the approach taken by the courts recently,

particularly by Leggatt J, 6 isunsatisfactory. Finally, it will contemplate the actions of the courts in suchcases and assess whether the courts have achieved consistency in theirapproach.

It will be suggested that, despite the adaptability of the law todifferent situations, the approach of the courts is inconsistent, due to thecourts considering each case individually, and so effect is not always given tothe written content of contracts. In InvestorsCompensation Scheme v West Bromwich Building Society (ICS), 7Lord Hoffman set out five principles of contractual interpretation. Althoughthese principles recognised the importance of the wording of the contract, theyprimarily favoured the contextual approach. Principles 2, 3, 4 and 5, inparticular, demonstrate the courts' willingness to interfere with the wordingof contracts that parties have freely agreed to. This is due to the principles'breadth and because they allow the courts to ' depart from the natural and ordinarymeaning of the words used by the parties', 8which goes against the principles of party autonomy and sanctity of contract. Anexample of the extensiveness of these principles can be seen in the secondprinciple, which says that the courts can include ' absolutely anything' fromthe matrix of fact when considering the background of an agreement. The vastnessof this rule led to Sir Christopher Staughton describing it as being ' hard to imagine a rulingmore calculated to perpetuate the vast cost of commercial litigation.'9 He, instead, advocates that the background should include facts that ' the partiesmust have had in mind'.

10 Thesecond principle also encourages parties to write contracts in a morecomplicated manner, as there is more room for debate over any clauses, should adispute arise. 11 In addition to Principle 2, Principles 4 and 5 havealso been subject to disapproval from members of the judiciary, particularlyfrom Lord Sumption. 12He criticises Lord Hoffman's ignorance of the language and his eagerness toconsider the background of the agreement, rather than focusing on the meaningof the actual language used. The language of the contract is the primaryevidence to consider when interpreting a contract, as it has been agreed to byboth parties and is, therefore, likely to be reflective of their intentions. In contrast to ICS, in Arnold v Britton, 13the courts focused on the importance of the words: they did not get distractedby their consequences. The Supreme Court took this approach, despite it leadingto the service charge payments being at extremely high levels at the end of thelease.

In this instance, the Supreme Court focused on upholding sanctity ofcontract, and refused to get the lessees out of a bad bargain. Lord Neuberger, particularlyin the third14 and fourth15factors he explained in his judgment, emphasised that the clarity of thelanguage meant that there was no reason to depart from the language in thecontract, despite the commercially absurd outcome. This is due to his beliefthat ' Judges are not always the most commercially minded, let alone the mostcommercially experienced of people.'16 Although the decision in Arnold helps with certainty, this comes at the expense ofcommercial common sense. If the courts interpret contracts according tocommercial common sense, this prevents the harsh or unfair consequences fromoccurring. Often, both parties put forward arguments

which could both be used, for ambiguous clauses, so the court must make their decision based on whichinterpretation would be commercially sensible, as they did in Rainy Sky v Kookmin Bank17and Pink Floyd Music v EMI Records. 18 However, the lack of consistency in the law can be seen in Jackson v Dear19 where, just two years after Pink Floyd, theCourt of Appeal said that courts should ‘ not elevate commercial common senseinto an overriding criterion.’20 Conversely, if the courts did decide to focus oncommercial common sense, there is a risk that they will not just interpret thecontract but will end up re-writing it: this is not their job.

Parties arelikely to be better at judging what is commercially sensible than the courts, and it is clear to see what the parties thought was commercially sensible bylooking at the contract. Judges are likely to help the weaker party to try tomake the outcome fairer, simply because the other party negotiated a goodbargain. This view has been echoed by Lord Sumption, who said that ‘ Partiesenter into contracts in a spirit of competitive interest, with a view toserving their own interest.

This is a contrast to Leggatt J’s views, regardinggood faith, who says that ‘ the essence of contracting is that the parties bindthemselves … to co-operate to their mutual benefit.’21From ICS to Arnold, it is clear to see that thecourts failed to achieve consistency in their approach to giving effect to thewritten content of parties’ contracts. In ICS, the context and background of the contract was the main focus of the court intheir decision-making process whereas, in Arnold, the wording of the contract was the most important factor in reaching thedecision. Considering this substantial change

in approach, it is noteworthythat even Lord Sumption has said that the Supreme Court retreated from ICS ‘ with muffled tones’22and did not overrule the decision from ICS. In Wood v Capita, 23 theSupreme Court, once again, reinstated the importance of context and suggestedthat the language of agreements should be looked at using either ‘ textualism’or ‘ contextualism’. Textualism prioritises the specific wording of theagreement, when interpreting it whereas contextualism prioritises the contextof the agreement. The inconsistency of the courts can be seen by how, in Arnold, the court said that the startingpoint, for interpretation, was the language, whereas Wood says they can consider the context first and then look at thelanguage. However, having considered the context, their view of the language maybe tainted.

Wood allowedthe court to revive the iterative approach to interpretation, which originatedin Ford v Beech. 24 Thisprocess involves checking the potential meanings of a clause, against thecontractual document as a whole, and then considering the commercialconsequences of each interpretation. It is suggested that this should happeneven if the wording of the disputed term is, in the abstract, clear. 25 Althoughusing this approach may lead to the correct decision in individual cases, itwill provide less certainty in the law, for contracting parties, as they cannotbe certain whether the court will give effect to the specific wording of thecontract. Having considered these cases, it is evident that, with regard to contractual interpretation, there is a lack of clarity andconsistency.

The court has changed their approach from Arnold to Wood, and they hadpreviously changed their approach from ICSto Arnold. The only thing that doesappear to be clear is that ‘ no word or group of words has a fixed meaning.’26 InWood, it appears as if the courtshave tried to find a mid-point between Arnoldand ICS, by not favouring thelanguage over the context, and vice versa. As Lord Carnwarth’s dissenting judgment27in Arnold makes clear, it is key forthe judiciary to perform a balancing act between commercial common sense andcertainty: although both are important, a judgment should not be such that itcompletely ignores one of these in favour of the other. It was said that it isimportant look at what happened when the matter got to the courts, rather thanlooking at it from the context of when it was made. This disagrees with Lord Neuberger’sview, that the issue should be looked at from the perspective of when theagreement was made. The current position of English law is that it doesnot recognise a duty for parties to act in good faith. This position applies toboth the performance of existing contractual obligations and also to pre-contractualnegotiations, as established in Walford vMiles.

28 In Walford, the House of Lords rejected the argument that the defendant was under anobligation to conduct negotiations in good faith. This conclusion was reachedon the basis that such agreements, to negotiate in good faith, lack certaintyand are fundamentally inconsistent with how a negotiation process is conducted: it is an adversarial process. Similarities can be drawn between this and LordHoffman’s principle, in ICS, thatpre-contractual negotiations are inadmissible as evidence of the parties’intentions, due to their uncertainty. The decision in Walford is further evidence of the courts

intervening in contracts, despite what the parties may have agreed to. In contrast to the position in Walford, the Court of Appeal, in Petromec v Petroleo, 29 waswilling to uphold a promise to negotiate in good faith, where the promise wasan express term in the contract. This was because it was felt that, if bothparties have come to an agreement, it is not the job of the courts to getinvolved in this. This attitude is evident within Longmore LJ's judgment in Petromec: ' It would be a strong thing todeclare unenforceable a clause into which the parties have deliberately andexpressly entered.

' The approach from Petromecwas confirmed in Emirates Trading vPrime Mineral Exports. 30In AstorManagement v Atalaya Mining, 31Leggatt J upheld a term requiring a party to use ' reasonable endeavours', inthe context of entering an agreement with a third party. His Lordship, as henow is, followed the decisions from Petromecand Emirates, and disregarded AndrewsJ's judgment in Dany Lions v Bristol Cars. 32The contrasting opinions of two judges, with both being first-instancedecisions, demonstrate how there is still not clarity over the rulessurrounding good faith. However, the Astordecision appears to reflect the prevailing attitude of the courts, due to thepragmatic approach it takes and its upholding of party autonomy: ' The role ofthe court in a commercial dispute is to give legal effect to what the partieshave agreed.'33 Taking such an approachshows that the courts are, sometimes, willing to give direct effect to thewritten content of parties' contracts and are not interfering with thecontracts. This is similar to the approach taken in Arnold, where the express wording of the agreement was focused on. Recently, there has been a change in the approach thatcourts take toward implied terms.

This has primarily been due to the efforts ofLeggatt J. In Yam Seng v InternationalTrade Corp, 34 Leggatt J addressedwhether there was an implied term that parties would deal with each other ingood faith. He concluded that courts should presume that parties intended tohave an implied term of good faith, i.

e. It should be implied in fact. 35 Leggatt J's judgment is unsatisfactory for severalreasons. One of the fundamental characteristics of English contract andcommercial law is that it is inherently adversarial, despite Leggatt J's beliefto the contrary, 36 and implying good faithwould restrict self-interest. Parties should not have to contract out of goodfaith; it is their choice as to what is in the contracts, not the courts'. Whenthe contracts were drafted, it is likely that good faith was considered and so, unless there has been some form of misrepresentation, there is no need for the courtsto interfere with the content of contracts.

To do so would increase judicialintervention to unwelcome levels. Lord Grabiner expressed similar views againstimplying terms, saying that ' a court should be reluctant to alter the terms ofa contract and nor should it add to those terms...'37In this essay, it was found that the courts havefailed to take a consistent approach with regard to whether they will giveeffect to the written content of parties' contracts or whether they willintervene. They are, effectively, dealing with issues on a case-by-case basis, as is evident with the constant changes in which factors will be prioritised, and this is leading to a lack of consistency and clarity. In the context of contractual

interpretation, it appears that the courts have taken the correct decision in Wood, regarding using textualism andcontextualism.

It is not as black and white an issue as the courts appeared tobelieve it was with their decisions in ICSand Arnold. They should develop aconsistent approach, which considers the language of the contract, but whilstnot forgetting the wider context of the agreement, in order to ‘ ascertain theobjective meaning of the language’38and ensure that that a commercially absurd outcome is not reached. With regard to good faith, it was found that, despitethe general position of English law being that parties do not have a duty ofgood faith to each other, the law has developed significantly over recent yearsand is likely to do so in the future. This is due to the ascension of LeggattJ, to the Court of Appeal, where he will have further scope to reform the law. Theapproach taken by the courts is considerably more consistent than that takenwhen interpreting contracts.

If the position of good faith does change in thefuture, this could threaten English law’s place as the leading law used forcontracts around the world due to the uncertainty that would arise.