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TO RECOGNIZE OR NOT? GOOD FAITH UNDER NIGERIAN LAW OF CONTRACT

OLABISI D. AKINKUGBE*

ABSTRACT. Unlike jurisdictions such as Canada and the United Kingdom, Nigerian courts have not engaged with the doctrine of good faith. On the contrary, there is a dearth of academic scholarship that examines this aspect of the Nigerian law of contract. This paper examines how the Nigerian courts have operationalized the common law of good faith in the performance of contracts. Rather than suggest that good faith as “an organizing principle” has an internally consistent meaning by which we can transplant the doctrine from one jurisdiction to another, or even apply the so-called duty of honest performance as enunciated by the Supreme Court of Canada. The author contends that there is an inherent value for the Nigerian courts to carry on with the piecemeal/traditional approach in the application of the doctrine of good faith.

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KEYWORDS: *Good faith, contracts, Nigeria, Bhasin v Hrynew, bad faith, organising framework.*

I. INTRODUCTION

In contemporary contract law scholarship in some Common law and Civil law jurisdictions, the concept of good faith has been the subject of numerous academic inquiries.¹ The 2014 decision of the Supreme Court of Canada in *Bhasin v. Hrynew* has reignited contentious debates on the question whether the common law should recognize a duty of good faith.² Unlike common law jurisdictions such as Canada (with the exception of Quebec), the United Kingdom, Australia and the United States of America, the analysis of the concept of good faith in the law of contract has not received much judicial or academic inquiry in Nigeria.³ Indeed, there are only a handful

¹ For examples of commentaries on the operation of the good faith duty in the United States of America, Canada and South Africa, see: Allan Farnsworth, 'Good Faith in Contract Performance' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (OUP 1995) 153 – 170; John McCamus, 'The Implied Duty to Perform in Good Faith' in *The Law of Contracts*, (Toronto, 2nd edn, Irwin Law 2012) 835 – 868; and Andre Louw, 'Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can we Banish the Law of the Jungle, While Avoiding the Elephant in the Room' [2013] 16:5 Potchefstroom Electronic Law Journal 43, 614.

² *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 (Hereafter *Bhasin*); See: Jeannie Marie Paterson, 'Good Faith Duties in Contract Performance' [2014] 14:2 OUCIJ 283, 309; Geoff Hall, 'Bhasin v. Hrynew: Towards an Organizing Principle of Good Faith in Contract Law' [2015] 30:2 BFLR 335, 344; Daniele Bertolini, 'Decomposing Bhasin v. Hrynew: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance' [2017] 67:3 RDUT 348, 410; Claire Mumme, 'Bhasin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins' [2016] International Journal of Comparative Labour Law 117, 129.

³ For a historical account of the Nigerian legal system, see, Akintunde Olusegun Obilade, *The Nigerian Legal System* (London, Sweet & Maxwell 1979). The

of cases where the Nigerian courts have examined the common law doctrine of good faith. In an emerging economy like Nigeria, inequality and imbalance in commercial bargains, and the risk that a party will privilege a subjective bad behaviour in the performance of its obligations accentuates the need for academic debates on the role, if any, of the doctrine of good faith addressing them. Yet, there is a dearth of scholarship on the subject in Nigeria.

Against the background of how the concept has developed most recently in other Commonwealth jurisdictions such as the United Kingdom and Canada, my aim in this article is to analyze the trajectory of the doctrine of good faith under Nigerian contract law. In analyzing the Nigerian cases, I ask: what common sense, if any, emerges from the application of the doctrine of good faith by the Nigerian courts? In this regard, I also ask whether the Nigerian courts should embrace the contemporary analyses of good faith as developed in *Bhasin*? Rather than suggest that good faith has an internally consistent meaning by which we can transplant the doctrine from one jurisdiction to another, or even apply the so-called duty of honest performance, I contend that there is an inherent value for the Nigerian courts to carry on with the piecemeal/traditional approach in the application of the doctrine of good faith.

Like all human relationships, modern judicial interpretation of contracts acknowledge that contracts are negotiated and concluded against a background of unstated but shared understandings that inform their meaning.⁴ In other

most popular book on the law of contract did not also discuss this concept, see, Itsejuwa Esanjumi Sagay, *Nigerian Law of Contract*, (Sweet & Maxwell 1985).

⁴ See: *Yam Seng Pte Ltd v ITC Ltd* [2013] EWHC 111 (QB) (Hereafter *Yam Seng*) (Leggatt J) [133]-[135], [139]. It is worth quoting in full:

words, while there are shared values and norms of behaviour, such as industry custom, that regulate the interpretation of contracts, socio-economic and cultural background that are relevant to the construction of individual agreements vary.⁵ They are not universal.⁶ In other words, there is no need not to adopt a general duty of good faith as an organizing principle or even a new duty of honest performance as the Canadian Supreme Court did in *Bhasin*. The argument for the non-recognition of general duty of good faith in Nigeria are two-fold: first, that the flexibility the judges have in the application of the doctrine under the traditional approach allows them to continue to address the diverse commercial disputes that may be brought before them; second, as the post-*Bhasin* cases so far reveal, there are significant challenges associated with applying

The modern case law on the construction of contracts has emphasised that contracts, like all human communications, are made against a background of unstated shared understandings which inform their meaning. The breadth of the relevant background and the fact that it has no conceptual limits have also been stressed . . . Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement. A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically upon trust . . . The central idea [behind fidelity to the parties' bargain] is that contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract.

⁵ See: Menachem Mautner, 'Contract, Culture, Compulsion, or: What is So Problematic in the Application of Objective Standards in Contract Law', [2002] 3:2 Theoretical Inquiries in Law, 545-575.

⁶ See: *Yam Seng* (n 4) (Leggatt J).

the decision. To be sure, I do not suggest that the Nigerian courts have systematically examined good faith in the law of contract, or, that there is necessarily a coherence that emerges from an examination of the cases. Rather, what I hope to generate at the end of the article is an understanding of the extant application of good faith in the law of contract in Nigeria. While I acknowledge the autonomy of the will theory of contracts embedded in the classical law of contract, I conceptualize the underlying role of the law of contract by emphasizing its important social function as a crucial component that judges must take into consideration. In other words, simply viewing contractual relations between parties as an incidence of free will and intention, not only obscures but also ossifies the inequality of bargaining power that are at times embedded in economic relations.⁷ In addition to other principles in the law of contract, good faith continues to provide a valuable tool to address the imbalance of power in contractual relations, particularly in the context of developing countries like Nigeria.

Following this introduction, in Part I, I examine the doctrine of good faith under two rubrics: the traditional/piecemeal and contemporary approaches. Whereas the traditional/piecemeal approach broadly refers to the pre-*Bhasin* era approach to good faith – which has continued in many jurisdiction, the contemporary approach is undertaken primarily by examining *Bhasin's* case. In Part II, I turn to the extant application of the duty of good faith under Nigerian law of contract by examining the cases where the doctrine has been applied – the outcome being that there is no coherence in how the courts have implied or applied the doctrine of good faith

⁷ See: Peer Zumabansen, 'The Law of Society: Governance Through Contract' [2007] 14:2 Indiana Journal of Global Legal Studies, 191-223.

under Nigerian law of contract. In Part III, following the analysis of the Nigerian cases, I ask which way forward: that is, should the Nigerian courts recognize the development in *Bhasin* or not? In the conclusion, I summarize the core arguments in the paper and the rationale for the case that the Nigerian courts should carry on with the traditional/piecemeal approach.

II. THE CONCEPT OF GOOD FAITH – A BRIEF OVERVIEW

The quest to define ‘good faith’ has informed the ‘locking of horns’ by established contract law scholars in the past years.⁸ It has, indeed, been asserted that the concept is devoid of any precise definition.⁹ The imprecision of the good faith concept speaks more to its broad and diverse application in the law of contract, than a limitation *per se*. In the ensuing sub-section, I synthesize the traditional understanding of good faith.¹⁰ It is important to highlight that the traditional approach to good faith most accords with the contemporary application in Nigerian law. This is then followed by an examination of the contemporary approach via the decision in *Bhasin*.¹¹

⁸ See for example the summary of the debates among Professors Robert Summers, Steven Burton and Allan Farnsworth on the meaning of ‘good faith’ in the United States in Farnsworth, (n 1) 161 – 163.

⁹ Robert Summers, ‘Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code’ [1968] 54:2 Va. L Rev 195, 196. See also the Supreme Court of New Jersey decision in *Brunswick Hills Racquet Club, Inc. v Route 18 Shopping Centre Associates*, 864 A. 2d 387 (N.J. 2005), where the court noted that “good faith is a concept that defies precise definition”.

¹⁰ For a very concise synthesis of the pre-*Bhasin* era in Canadian law of Contract, see: John McCamus, ‘The Implied Duty to Perform in Good Faith’ in *The Law of Contracts*, (Toronto, 2nd edn, Irwin Law 2012) 835 – 868.

¹¹ For cases that have attempted to apply *Bhasin*, see: *Salvation Army v Angus Partnership Inc.* [2018] AJ No 688, 2018 ABCA 206; *Atos IT Solutions and Services GMBH v Sapient Canada Inc.* [2018] OJ No. 2064, 2018 ONCA 374; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing* [2017] AJ No. 666, 2017 ABCA 157.

A. The Traditional Approach

Often criticized as incoherent and vague, the traditional analysis of the doctrine of good faith is developed based on the commonalities from the various cases where the principle has been invoked. From the various analyses, some features emerge. First, honesty is an often referenced 'expression' of good faith.¹² The concept, however, transcends 'honesty'. It includes 'fair dealing' and 'reasonableness' or conduct that is not contrary to the community standards of honesty, reasonableness and fairness.¹³ More normative expressions of good faith have also been identified. For example, according to FDJ Brand, Judge of the South African Supreme Court of Appeal:

[I]n South African legal parlance, the concept of bona fides or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to the extended meaning, it has an objective content which includes

¹² See: Article 1 of the American Uniform Commercial Code (UCC) where good faith is defined as "honesty in fact in the conduct or transaction concerned". UCC, 1 – 201(19).

¹³ Article 2 of the UCC, defined 'good faith' in the case of a merchant to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in trade". See: UCC 2 – 103(1)(b). And as Ian McNeil notes:

[T]he essence of good faith in any society is adherence to the common contract norms. If a person has sufficiently met those norms in any given instance – something that can never be determined except in a particular social context – the person has acted in good faith; if the person has not met those norms, he has not acted in good faith.

Ian MacNeil, 'Values in Contract: Internal and External' [1983 – 1984] 78:2 Northw. L. Rev., 340 – 341, 342 footnote 21.

other abstract values such as justice, reasonableness, fairness and equity.¹⁴

Second, good faith is an exclusionary concept. It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith.¹⁵ In Robert Summers' view, good faith "takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit".¹⁶ Some Nigerian courts have adopted a similar reason to that posited by Robert Summers in defining good faith. In *Shodeinde & Ors. v. Registered Trustees of the Ahmadiyya*, the Supreme Court of Nigeria defined good faith as "the absence of bad faith – of *mala fides*".¹⁷ In the latter case of *Akaninwo & Ors. v. Nsirim & Ors*, the highest court described bad faith as projecting:

[A] sinister motive designed to mislead or deceive another ... (it) is more than bad judgment or mere negligence. It is a conscious doing of a wrong arising from dishonest purpose or

¹⁴ See: FDJ Brand, 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influenced of the Common Law and the Constitution' [2009] 126 SALJ 71, 73.

¹⁵ Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (n 6) 201.

¹⁶ *ibid* 202. Examples of these excluded forms of bad faith include: the concealing of defect in a product sold, willful failure to perform in full, open abuse of bargaining power, deliberate prevention of other party's consummation of a deal, lack of diligence in mitigating other party's damages, arbitrary and capricious exercise of power to terminate, "overreaching interpretation of contract language", and harassment for repeated assurances of performance.

¹⁷ *Shodeinde & Ors. v. Regd. Trustees of the Ahmadiyya* [1983] LPELR – 3064 (SC), 53 – 54.

moral obliquity. Mala fide is not a mistake or error but a deliberate wrong emanating from ill-will.¹⁸

In relation to conceptual clarification, it is difficult to see how Summers' approach, which the Nigerian approach mirrors, provides greater clarity to an attempt to define good faith. Indeed, the approach has been criticized as being "tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached. This hardly advances the cause of intellectual inquiry and it provides absolutely no guide to the disposition of future cases..."¹⁹ Steven Burton notes that with this approach "...good faith performance consequently appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable and inconsistent applications".²⁰

Third, good faith has also been construed simply as a 'gap-filler'; "a rechristening of fundamental principles of contract law".²¹ It has been suggested that it is in this sense that most common law scholars and lawyers appreciate 'good faith'.²² While admitting to the narrowness of this conception, Farnsworth opined that "the chief utility of the concept of good faith performance has always been as a rationale in a process which is not entrusted to the trier of the facts – that of implying

¹⁸ *Akaninwo & Ors. v Nsirim & Ors.* (2008) LPELR – 321 (SC), 43 paras D – F.

¹⁹ Michael Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' [1984] 9:4 CBLJ 385, 398.

²⁰ Steven Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 Harv. L Rev 369, 369 – 370.

²¹ See: *Tymshare Inc v. Covell* 727 F. 2d, 1145 - 1152 (DC Cir 1984) (Scalia J); Farnsworth (n 1) 161 – 163.

²² *ibid* 161.

contract terms".²³ Farnsworth's approach can be viewed as a response to the alleged subjectivity of Summers' 'excluder' concept. For Farnsworth, good faith as an incidence of implied terms "can be measured by an objective standard based on the decency, fairness or reasonableness of the community, commercial or otherwise, of which one is a member" as against "the individual's own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance".²⁴

Like Farnsworth, John McCamus argues that good faith might be construed by 'stitching' together the "existing rules of common law that appear to implement the good faith duty".²⁵ Seeking to clarify the conceptual challenge therefore, McCamus proposed that the duty of good faith might be defined as: (1) the duty to exercise discretionary powers conferred by contract reasonably and for the intended purpose; (2) the duty to cooperate in securing performance of the main objects of the contract; and (3) the duty to refrain from strategic behavior designed to evade contractual obligations.²⁶ The limitation of McCamus's proposed definitions is that they were derived from his tri-categorization of cases where Canadian courts have invoked the duty of good faith. Beyond, the Canadian courts,

²³ Allan Farnsworth, 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' [1963] 30 U. Chi L Rev 666, 672.

²⁴ *ibid* 671 - 672. Another writer has similarly argued that "good faith is simply another embodiment of the basic principle of contract law – the protection of reasonable expectations" see: Jay Feinman, 'Good Faith and Reasonable Expectations' [2014] 67 Arkansas Law Review 525, 526.

²⁵ McCamus, 'The Implied Duty to Perform in Good Faith' (n 7) 863.

²⁶ *ibid*. See also: John McCamus, 'Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance' [2004] 29 The Advocates Quarterly 72, 77 – 90.

their application may be limited to the extent that different socio-economic and political contexts have impact on the performance of contractual arrangements.

While the foregoing synthesis of the traditional approach to good faith underscores the claim that the trajectory of the concept of good faith is “confusing and disorganized” is perhaps not an exaggeration,²⁷ I contend that the piecemeal approach to the development of good faith in the traditional era can also be understood based on the diverse categories of commercial disputes that the courts had to deal with. In my view, the inherent advantage of this approach is its flexibility. It does not require the judges to fit into any established category or exclude any cause of action so easily. Despite what one may describe as its limitations, the Nigerian courts continue to apply the traditional approach. I will get to this shortly.

B. The Contemporary Approach: Bhasin v. Hrynew

In *Bhasin*, the Supreme Court of Canada (SCC) was presented with an opportunity to make the traditional “piecemeal, unsettled and unclear” state of law on good faith “more coherent and more just” – at least according to the SCC.²⁸ The decision prompted an “incrementally radical evolution” in the Canadian law of contract on good faith;²⁹ to wit, the endorsement of good faith as a general organizing principle of

²⁷ Jacob Young, ‘Justice Beneath the Palms: Bhasin v. Hrynew and the Role of Good Faith in Canadian Contract Law’ [2016] 79 Sask LJ 79, 82.

²⁸ *Bhasin* (n 2) [32] - [33].

²⁹ For some critical analyses of this decision, see: Joseph T. Robertson, ‘Good Faith as an Organizing Principle in Contract Law: Bhasin v. Hrynew – Two Steps Forward and One Look Back’ [2015] 93 Can Bar Rev, 809-866; Angela Swan, ‘The obligation to Perform in Good Faith: Comment on Bhasin v Hrynew’ [2015] 56 Can Bus LJ, 395; Jacob Young (n 27) 80.

the common law of contract and the recognition of the duty of honest contractual performance.³⁰ The impact of the decision has also been felt beyond the borders of Canada, with courts in New Zealand, Australia and the United Kingdom, to varying degrees, considering the implications and applicability of the decision in their jurisdictions.³¹

Bhasin revolved around a contractual relationship between Mr. Bhasin (the Appellant) and Canadian American Financial Corporation (Can-Am) and events surrounding the termination of the relationship by Can-Am. This contractual arrangement involved the appellant serving as a retail enrollment director for Can-Am, a company which deals in education saving plans.³² The contract, *inter alia*, entailed an automatically renewable successive terms of three years subject to either parties' 6 months notification in writing of the party's desire to terminate the contract.³³ Another relevant term in the agreement is the "entire agreement clause", which in effect constricted the terms governing the relationship to the explicitly stated terms in the contract.³⁴ Mr. Hrynew, one of

³⁰ *Bhasin* (n 2) [33].

³¹ For example, although eventually overturned by the English Court of Appeal (CA), a Queens Bench Division decision in 2015 citing *Bhasin* affirmed the principle of good faith as the general organizing principle of the common law of contract. The decision was however overturned on appeal, with the English CA instead indicating preference for the traditional piecemeal application of the principle. See generally: *MSC Mediterranean Shipping Co v Cottonex Anstalt* [2015] All ER (D) 172 (Feb); *MSC Mediterranean Shipping Company S.A. v. Cottonex Anstalt*, [2016] EWCA Civ 789. See also: Paul Davis, 'English Court of Appeal Rejects the "Organizing Principle of Good Faith"' (*Canadian Appeals Monitor*, 5 December 2016) <<https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/english-court-appeal-rejects-organizing-principle-good-faith>>.

³² *Bhasin* (n 2) [6].

³³ *ibid* [4].

³⁴ *ibid* [25].

Can-Am's enrollment director and a competitor to the appellant was said to be on good terms with the Alberta Securities Commission (ASC).³⁵ Both Mr. Hrynew and the appellant had an acrimonious history due to the former's rejection of the latter's proposals for a merger.³⁶ Following ASC's compliance queries in respect of some of Can-Am's enrollment directors and the requirement that the company appoints a single provincial trading officer (PTO) to audit the enrollment directors, the company appointed Mr. Hrynew. Naturally, the appellant objected to having Mr. Hrynew, a competitor, entitled to access and review its business records.³⁷ In a bid to prevent the revocation of its licence by the ASC, Can-Am informed the ASC about the restructuring plan of its operations in Alberta, which included the subsuming of the appellant's agency under Mr. Hrynew's establishment. Apart from not informing the appellant of this plan, Can-Am was untruthful with the appellant on the merger plans and the conditions under which Mr. Hrynew will operate as PTO.³⁸ As a result of the appellant's refusal to allow the PTO access to his books, Can-Am triggered the expiration process.

Based on these facts, the appellant argued that the actions of the respondents (Can-Am and Hrynew) constituted a breach of the duties of good faith and honest performance and amounted to conspiracy and unlawful inducement of breach of contract. In opposition, the respondents argued that the good faith duty only features in limited types of contract, to the exclusion of the type of contract with the appellant. Further, the

³⁵ *ibid* [8].

³⁶ *ibid* [9].

³⁷ *ibid* [10].

³⁸ *ibid* [12].

contract between parties expressly provides for how a termination will be triggered. More so, the contract explicitly forbids reliance on extrinsic terms; hence, disallowing implied conditions. The trial court agreed with the appellant, holding in the main that, while the contract between the appellant and Can-Am did not come under categories previously recognised as covered by the duty of good faith, it was analogous to some of those categories, to wit, franchise and employment contracts. It further held that good faith can be implied from the intentions of the parties “in order to give business efficacy to the agreement” and exclusion clauses will not be given effect to when it is unjust and inequitable to do so.³⁹ The Court of Appeal however disagreed with the trial court and accordingly overturned the decision. The court held that there was no analogous comparison between the extant contract and employment and franchise contracts, and more so, implied terms are inapplicable in the face of terms expressly contained in a contract.⁴⁰ It is worthy of note that the *pro* and *anti* duty of good faith positions of the two lower courts are indicative of the historical dispositions of both levels of courts to the principle. As noted elsewhere, it has been empirically demonstrated that “trial-level courts are more willing to grapple with a broader application of good faith than appellate level courts”.⁴¹

In holding that there was a breach of duty of good faith, the SCC canvassed “two incremental steps”. *First*, the SCC recognized good faith as a “general organizing principle”⁴² of the

³⁹ *ibid* [24].

⁴⁰ *ibid* [27] – [28].

⁴¹ McCamus (n 25) 91; Young (n 28) 86.

⁴² The court defined ‘organizing principle’ as stating “in general terms a requirement of justice from which more specific legal doctrines may be derived” *Bhasin* (n 2) [64].

common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance".⁴³ Beyond describing the principle simply as parties performing "their contractual duties honestly and reasonably and not capriciously or arbitrarily",⁴⁴ the SCC deliberately refrained from delineating the limits or scope of the general organizing principle.⁴⁵ Rather, the Court held that the principle "is not a free-standing rule, but ... a standard that ... is manifested in more specific legal doctrines and may be given different weight in different situations".⁴⁶ Further muddying the already murky pool is the Court's explanation that the principle compels "a contracting party (to) have appropriate regard to the legitimate contractual interests of the contracting partner".⁴⁷ The Court held that 'appropriate regard' is context dependent, and while it "requires that a party not seek to undermine those (contractual) interests in bad faith", it does not entail acting to serve the interest of such party in all cases.⁴⁸ The court also stated that the organizing principle must of necessity fall within existing doctrines in which the law mandates "honest, candid, forthright or reasonable contractual

⁴³ *Bhasin* (n 2) [33]; Chris Hunt, 'Good Faith Performance in Canadian Contract Law' [2015] CLJ, 7; Hall, (n 2) 336.

⁴⁴ *Bhasin* (n 2) [63].

⁴⁵ The court noted that rather than have a close list of situations coming under the good faith bracket, the application of the principle to specific situations "should be developed where the law is found to be wanting and where the development may occur in a way that is consistent with the structure of the common law of contracts and gives due weight to the importance of private ordering and certainty in commercial affairs" *ibid* [66].

⁴⁶ *Bhasin* (n 2) [64].

⁴⁷ *ibid* [65].

⁴⁸ *ibid*.

performance”.⁴⁹ In addition, the Court affirmed that the application of the principle calls for “a highly context-specific understanding of what honesty and reasonableness in performance” require.⁵⁰ Lastly, the Court articulated an important caveat to the effect that applying the principle is not a fiat to engage in “ad hoc judicial moralism or “palm tree” justice”, neither should it be used as “pretext for scrutinizing the motives of contracting parties”.⁵¹

Second, the SCC created a general duty of honesty in contractual performance under the “umbrella of the organizing principle”.⁵² This duty obliges parties not to lie or knowingly mislead another on issues directly linked to the performance of the contract.⁵³ According to the SCC, this duty should not be equated with a “duty of disclosure or fiduciary loyalty”.⁵⁴ This new duty is solely performance-oriented, operates as a matter of law, and can therefore not be excluded by explicit contractual

⁴⁹ *ibid* [66].

⁵⁰ *ibid* [69].

⁵¹ The court further held that “a party may sometimes cause loss to another – even intentionally – in the legitimate pursuit of economic self-interest” *ibid*, [70] – [71].

⁵² *ibid* [72] – [73].

⁵³ *ibid* [73].

⁵⁴ *ibid* [85]. The court further distinguished between “failure to disclose a material fact” and “active dishonesty”. While the new duty entails the latter, it does not include the former. See: *Yam Seng* (n 4) [86]. The court elsewhere employed the descriptors “actively misleading or deceiving the other contracting party”. See: *Yam Seng* (n 4) [87]. It has however been noted elsewhere that in identifying some of the dishonesties of *Can-Am*, the court “crossed the line into breach ... by equivocating rather than plainly lying...” See John McCamus, ‘The New General Principle of Good Faith Performance and the New “Rule of Law” of Honesty in Performance in Canadian Contract Law’ [2015] 32 *Journal of Contract Law* 103, 114.

terms.⁵⁵ Although, parties cannot exclude the duty of honest performance from their contract, the Court recognised parties' right to, via express terms in their contracts, "relax the requirements of the doctrine so long as they respect its minimum core".⁵⁶

Bhasin has been said to raise "more questions than it answers".⁵⁷ These unanswered questions include: what does *good faith* mean? While it is clear that the new duty to act honestly is by operation of law, from whence do other *good faith* 'affiliates' like 'reasonableness' emanate?⁵⁸ Similarly, what decisions qualify as exercise of a contractual discretion and can a good faith obligation override an express and unambiguous provision of a contract?⁵⁹ Again, do the guiding principle and duty of honest performance extend beyond the performance of a contract, does it for instance, cover the negotiation phase?⁶⁰

⁵⁵ *Yam Seng* (n 4) [73] – [75]. See also: Lisa Peters, 'Tell Me No Lies – The New Duty of Honesty in Contractual Performance' (December 10th, 2014) <<https://www.lawsonlundell.com/the-business-law-blog/tell-me-no-lies-the-new-duty>> 3 – 4.

⁵⁶ *Yam Seng* (n 4) [77] – [78]. While the court did not expressly define what it meant by "minimum core", it noted elsewhere that "contracting parties must be able to rely on a minimum standard of honesty ... as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interest" [86].

⁵⁷ Krish Maharaj, 'An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel' [2017] 55:1 Alta L Rev 199.

⁵⁸ As noted by Young, the refusal of Justice Cromwell to "clarify whether a good faith term can be implied-in-law or implied-in-fact, or what does two concepts mean in relation to each other" was "a missed opportunity". See: Young (n 27) 105. It however appears that courts have engaged *Bhasin* as authority that good faith should not be considered as implied or express terms, but rather as a doctrine, hence, same cannot be excluded by parties. See: *High Tower Homes Corporation v. Stevens* 2014 ONCA 911, 328 OAC 265 referenced in Robertson (n 29) 856.

⁵⁹ Robertson (n 29) 816 – 817.

⁶⁰ See: Tamara Buckwold, 'The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hryniew* and the Organizing Principle of Good

In a particularly biting critique of the judgment, Young stated that, post-*Bhasin*, good faith “remains nothing more than a boilerplate addition to pleadings and a superfluous addition to what proponents of the classical model believed was an already capable bundle of doctrines”.⁶¹ In Angela Swan’s view, the decision meant nothing more than to refrain from lying and that “Cromwell J. just fathered a number of separate instances into his “general organizing principle””.⁶² And, to Joseph Robertson, *Bhasin* has a narrow “precedential significance”.⁶³ It is also interesting to note the other interpretations by scholars who have analyzed *Bhasin*. For instance, while Angela Swan is of the view that the SCC, in *Bhasin*, developed the duty of good faith as a non-implied term,⁶⁴ Young opines that “*Bhasin*, cannot ... be taken as striking down the previous jurisprudence with respect to implied terms of good faith...”⁶⁵ The criticisms regardless, scholars have been charitable enough to point to some of the positives of *Bhasin*. For example, whereas Young argues that *Bhasin*’s significance is to move “the common law of

Faith in Common Law Canada’ (April 6th, 2016) <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2758844> , 1.

⁶¹ Young (n 27) 108.

⁶² Angela Swan, ‘The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*’ [2015] 56:3 Can Bus LJ 395, 403, referenced in Young, (n 28) 108; Angela Swan, ‘Good Faith in Contract Performance: *Bhasin v. Hrynew* Two Years On’ (April 28th, 2017) <<https://www.ryerson.ca/content/dam/csrinstitute/pdf/Angela-Swan-Bhasin-Two%20Years%20On-Session%20Two%20April%202-2017.pdf>>, 3.

⁶³ Robertson (n 29) 864.

⁶⁴ Angela Swan, ‘The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*’ [2015] 56:3 Can Bus LJ 395, 403.

⁶⁵ Young, (n 27) 106.

contract in Canada closer to full rationality”;⁶⁶ Robertson, despite his critique, opines that the decision provides “a solid foundation upon which the tenets of the good faith doctrine can be applied in such a manner that certainty and predictability in the law are preserved”.⁶⁷

The foregoing critiques and commentaries must not be taken to have undersold and undervalued the decision.⁶⁸ When situated in the context of Cromwell J.’s stated agenda in *Bhasin* as well as the limited precedential value it has generated so far, the significance of these critiques becomes more evident. Starting out, Cromwell J., articulated the overarching objective of the ‘*Bhasin* principle’ as making the common law of contract “less unsettled and piecemeal, more coherent and more just”.⁶⁹ It is on this scale, that *Bhasin* can be most fairly assessed. Simply restated, has *Bhasin* made the common law of contract more coherent and more just or does it have the potential to? While the actual effect of *Bhasin* on cases will warrant an empirical research on how courts have applied it over a reasonable period of time, based on the current evidence, it is contestable that the decision indeed has the potential of making the common law of contract more coherent, cohesive and just.⁷⁰ For example,

⁶⁶ Young construes ‘full rationality’ as lying in ‘substantive rationality’: “the notion that people should be able to rely on each other to act fairly, honestly, and be mutually cooperative...” *ibid* 109.

⁶⁷ Robertson (n 29) 866.

⁶⁸ Daniele Bertolini, ‘Decomposing *Bhasin v Hrynew*: Towards an institutional understanding of the general organizing principle of good faith in contractual performance’ [2017] 67 RDUT 3, 348-410.

⁶⁹ *Bhasin* (n 2) [32] – [34].

⁷⁰ For cases that have attempted to apply *Bhasin*, see: *Salvation Army v Angus Partnership Inc.* [2018] AJ No 688, 2018 ABCA 206; *Atos IT Solutions and Services GMBH v Sapient Canada Inc.* [2018] OJ No. 2064, 2018 ONCA 374; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing* [2017] AJ No. 666, 2017 ABCA 157.

according to a 2016 analysis of post-*Bhasin* cases where it had been cited over one thousand times before the courts, the authors concluded that “despite the excitement *Bhasin* incited, evidenced by the volume of cases citing the decision after its release, appellate courts have narrowly construed the duty of honest contractual performance.”⁷¹

Two new developments, courtesy *Bhasin*, are worth noting in this regard. First, the decision has broken down the wall of separation of previous categorisations of contractual situations where *good faith* is applicable or not. In other words, parties cannot by express agreement contract themselves out of good faith in the performance of their agreements.⁷² Second, through the development of the ‘duty of honest performance’, the decision provided an avenue for courts to make incremental improvements where existing principles are insufficient.⁷³ It is in this regard that despite agreeing with the Court of Appeal that the facts of the case do not come under existing categories where good faith has been recognized, the SCC formulated a new rule of honest performance admitting of the said facts was formulated. For all its claim to a fundamental change in Canadian common law of contract doctrine of good faith, *Bhasin* so far has been a modest incremental step.

⁷¹ Cynthia Spry, Julia Webster and Morgan Westgate, ‘Appellate Court Treatment of *Bhasin v. Hrynew*: The Developing Duty of Good Faith in 2016’ 1:1 Commercial & Business Litigation Review 1-4, 4.

⁷² For an early application of *Bhasin*, see: 0856464 *B.C. Ltd. v TimberWest Forest* [2014] BCSC 2433 (CanLII)

⁷³ On the extension of the duty of honesty in *Bhasin* to contract formation, see: *Paulus v. Fleury* [2018] O.J. NO. 906; ONSC 1188, [58] (T. A. Heeney J.) “While [the principle in *Bhasin*], strictly speaking, applies to the performance of contracts, as opposed to their formation, [the principle has been] applied both to the negotiation of a contract as well as to its performance.”. Also see *Antunes v Limen Structure Ltd.*, [2015] ONSC 2163.

III. GOOD FAITH IN THE NIGERIAN LAW OF CONTRACT: A PIECEMEAL APPROACH

Good faith has not been a subject of robust judicial or scholarly discourse in Nigeria. Nigeria's leading text on the law of contract⁷⁴ only made a remote reference to 'contracts *uberrimae fidei*' in the context of exceptions to the non-disclosure rule on misrepresentation.⁷⁵ In this section, based on the analysis of some cases, I ask to what extent does Nigerian law recognize duties of good faith in the performance of contracts? In the limited cases where the question of good faith has arisen, the Nigerian courts have simply resolved those disputes on a piecemeal basis. From the analyses of the cases below, the outcome is that the Nigerian courts have followed the traditional approach, that is, good faith under Nigerian law of contract does not have a coherent, technical or established meaning outside of the requirement to act honestly, without malice or fraud. Beyond this, the concept remains ambivalent and susceptible to the charge of incoherence. The contemporary application of good faith in Nigeria is thus akin to the pre-*Bhasin* era in Canada. I will now turn to a consideration of some of these cases.⁷⁶

In *Williams v. Williams*,⁷⁷ a dispute ensued among brothers in respect of their deceased father's estate. After a period of conflict, the brothers had recourse to mediation, and subsequently entered an agreement which confirms that their

⁷⁴ I.E. Sagay, *Nigerian Law of Contract* (Ibadan, 2nd edn, Spectrum Books Limited 2001).

⁷⁵ *ibid* 305 – 308.

⁷⁶ My analysis of the Nigerian caselaw excludes the analysis of "good faith" in Insurance contracts.

⁷⁷ [2014] LPELR – 22642 (CA), 42 – 43. See also: *Zenith Bank Plc v. Arthur John* [2012] LPELR – 21295 (CA); *Jadesinmi v. Egbe* [2003] 10 NWLR (Pt. 827) 1.

father died intestate having revoked every testamentary disposition made by him before his death. The agreement contained a sharing formula for the estate and provided that any dispute arising therefrom will be referred to arbitration. Subsequently, some of the brothers claimed to have discovered a holographic will deposited by their father at the court's registry. They approached the court to give effect to the will. The remaining brothers opposed and applied to the court to refer the action to arbitration as agreed. The trial court agreed with the Plaintiffs that construing the terms of the contract strictly, the arbitration clause did not pertain to the newly discovered will on which the action is founded, but just the terms of the agreement. They further argued that the agreement was obtained by misrepresentation and concealment of material facts, i.e. the existence of the holographic will. In overruling the decision of the trial court, the Nigerian Court of Appeal (NCA) held:

An agreement voluntarily entered by parties such as in this case, must of necessity be honoured in good faith ... Where therefore the words in an agreement are clear, precise and unambiguous, the court shall without much ado expound those words in their ordinary and natural sense in order to give a true and genuine effect to the intention of the parties ... In the instant case, given that the parties in the appeal decide to enter into an amicable family agreement ... It accords with morality and good conscience for the parties concerned to abide by the terms of the said family agreement in the event of any subsequent development which might have been unforeseen like the alleged emergence of (the holographic will).⁷⁸

⁷⁸ *ibid* 42 – 43.

The *Williams*' decision essentially endorsed the settled common law position on the sanctity of contract and the imperatives of adhering to contractual terms. The standard is not just to honour or perform a contract, but to do so, 'in good faith'. From *Williams*' case, the concealment of the holographic will was crucial to the decision of the appellate court. Beyond this, one might however ask if the inclusion of the phrase 'in good faith' is superfluous or raises the obligation of a party to a contract to perform a contractual duty in a way or manner that exceeds its explicit terms. Or posed differently, is there any good faith element in the *Williams*' case, which if absent, the court might have reached a different conclusion? It is indeed difficult to answer these questions from *Williams*, as the court only went with the literal interpretation of the agreement, although it referenced *good faith*. But what does the phrase 'honoured in good faith' mean? Does it mean honoured 'without dishonesty or reprehensibility' or 'strictly performed according to the terms of a contract'? These questions are key to appreciating the approach and understanding of Nigerian courts to the doctrine of good faith. These questions, and the foregoing points, are best considered under various factual contexts in which Nigerian courts have engaged the good faith principle whether tacitly or directly.

A. Mortgages

The Nigerian approach to good faith in the context of mortgages is best represented by *West African Breweries Ltd. v. Savannah Ventures Ltd (WAB Ltd.)*⁷⁹ The crux of this action revolves around an allegation of bad faith on the part of a receiver in relation to the undervaluation and sale of the assets

⁷⁹ [2002] LPELR – SC. 180/1997.

of North Brewery Plc under receivership. The appellant was a 50% equity holder of North Brewery and the Nigerian Federal Government held the remaining 50%. The government indicated its interest to sell its holding, and the appellant indicated its interest in procuring it. In the course of its negotiation to buy the government's interest, the creditor, UBA Plc., acting for a conglomerate of creditors, exercised its power under a debenture deed and appointed one Hassan Abdulraman as receiver/manager. The receiver agreed with the debtor that it would keep the brewery running and retain the General Manager and company staff. Rather than keeping to his word, the receiver sacked the General Manager, and subsequently, decided to sell some assets of the debtor to Savannah Ventures Ltd. (respondent) with the agreement that the respondent will be responsible for making good North Brewery's debts to other creditors. The debtor's auditors conducted two audits in 1986 and 1990 putting the values of the company for both years at N39,691,000 and N158,848,000, respectively. Rather than relying on these reports, the receiver commissioned another auditor in 1991 which assessed the company's asset at N59,724,920. The receiver was aware that the appellant had agreed to pay off the debtor's indebtedness after conclusion of the sale agreement and had proceeded to pay for the federal government's equity. After the appellant discovered that some of the assets of the debtor had been sold to the respondent, it initiated an action contending that the receiver acted in bad faith particularly based on the undervaluation of assets.

At the court of first instance, it was held that the receiver's conduct was "...suggestive or admit of fraud and collusion and have thereby seriously eroded, dented and cast unlimited doubts and aspersions on the *bona fide* of the

(receiver).⁸⁰ At the Court of Appeal, the decision was overturned on the ground that “no paragraph of the pleadings provided a basis for the numerous serious findings made by the learned trial judge”.⁸¹ On further appeal, the Supreme Court of Nigeria (SCN) overruled the Court of Appeal and re-affirmed the decision of the trial court.

The SCN identified the issue of undervaluation as the core of the dispute thereby centering good faith. Relying on the decision of Kay J. in *Warner v. Jacob*⁸², the House of Lords’ decision in *Kennedy v. De Trafford*⁸³ and its previous decision in *Ekaeteh v. NHDS Ltd. & Anor.*,⁸⁴ the SCN held that

[T]he only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in the mortgage deed is that he should act in good faith”. “... lack of good faith cannot be stated with ... precision. Lack of good faith covers a multitude of conduct having, I venture to think, dishonesty or reprehensibility as common elements”.⁸⁵

According to the SCN, when good faith is in issue in a mortgage transaction, collusion with a purchaser must be proved. In particular, the SCN held that:

[T]he same strictness that apply to an allegation of fraud does not, ..., apply to an allegation of bad faith, even though an allegation of bad faith is sometimes held to be equivalent to an allegation of dishonesty ... For my part, I do not think that

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² [1882] 20 Ch D 220.

⁸³ [1897] AC 180.

⁸⁴ [1973] NSCC 373, 381.

⁸⁵ (n 79) 31.

an allegation of lack of good faith always necessarily implies dishonesty, even though allegation of dishonesty will imply absence of good faith ... In this case, the general good faith of the receiver had been impugned ... the sale at gross undervalue and the lack of preciseness in the statement of the obligation of the supposed purchaser are all aspects and manifestations of the absence of good faith. . . .

It is clear from the evidence before the court that to achieve his aim, the receiver threw caution and fairness to the wind ... There is abundant evidence that the receiver was clearly grossly negligent and reckless in dealing with the properties of the North Breweries. It cannot be said that he acted in good faith.⁸⁶

It is worth noting that although the SCN tacitly held that the sale was at gross undervalue, it did not emphasize the position of the law on a mortgagee acting in what he considers to be its best interest. It appears that in reaching its decision, the existence of a better arrangement to make good the indebtedness of the company, and the defendants' acceptance of an offer which was gravely inimical to the company, impacted the court's decision. In a sense therefore, the interest of the mortgagee does not appear to be the sole consideration of the court, marking a slight shift in the application of the duty of good faith in Nigerian mortgage transaction.

To reiterate the overlap between the approach by the Nigerian SCN and the traditional analysis of good faith developed by Summers for example, it can be argued that the receiver's – and by extension mortgagee's – actions, amounts to a "conscious lack of diligence in mitigating" the damages of the

⁸⁶ *ibid* 33.

other parties.⁸⁷ However, in the context of mortgage transactions, subsequent decisions of Nigerian courts have not recognized or given effect to the more liberal application of the good faith duty.⁸⁸

B. Admiralty Contracts

Another category of commercial agreements where the Nigerian Court has dealt with good faith is in respect of admiralty contracts where, as a specie of international business transactions, the 'choice of law' clauses are of critical importance.⁸⁹ In *Sonnar (Nig.) Ltd. & Anor. v. Partenreedri M.S. Nordwind Owners of the Ship M.V. Nordwind & Anor (Sonnar)*⁹⁰, the SCN departed from the express term of a contract in relation to the choice of law on the ground of good faith. The Plaintiffs, Nigerian companies, sue for damages for breach of contract in respect of goods that were not delivered in Lagos from Bangkok on board the M.V. Nordwind. The first Defendant, owners of the M.V. Nordwind carries on their business as shipowners in Germany, whereas the second Defendant, Barbridge Shipping Company is based in Liberia and it issued the Bill of Lading that

⁸⁷ (n 15) 203.

⁸⁸ See for examples, *Babatunde & Anor. v Bank of the North Ltd. & Ors.* SC. 350A/2002, SC. 350/2002 (Consolidated) and *Salami v WEMA Bank Nig. PLC & Ors.* [2009] LPELR – 8875 (CA).

⁸⁹ See: *Lehman Brothers Comm. Corp v Minmetals Int'l Nonferrous Metal Trading Co.*; No. 94 Civ. 8301, 2000 WL 1702039 (S.D.N.Y. Nov. 13, 2000) – a decision of the Federal Court in the Southern District of New York that brought to the fore the proposition that choice of law clauses in commercial agreements are no longer viewed as conclusive or absolute. In the context of unequal bargaining powers and choice of law, see the Canadian case of *Douez v. Facebook, Inc.* 2017 SCC 33.

⁹⁰ [1987] LPELR – 3494 (SC); [1987] 4 NWLR (Pt. 66), 520.

contained the disputed choice of law clause in this case.⁹¹ The implication of Clause 3 of the Bill of Lading is that in the event of any dispute, recourse will be made to arbitration, with Germany and German law being the place of arbitration and applicable law respectively.

In spite of this clause, one of the parties instituted an action before the Federal High Court of Nigeria alleging breach of the contract. The shipowner and shipping company contended the jurisdiction of the court and filed an application for stay of proceedings pending the determination of the dispute before an arbitral panel in Germany. The trial court upheld the choice of law clause. This decision was affirmed by the Nigerian Court of Appeal on the basis of the sanctity of contract. On further appeal to the SCN by the Plaintiffs, the decisions of the two lower courts were overturned. In reaching its decision, the SCN noted that

It is also conceded that when the intentions of parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention is general and as a general rule determines the proper law of the contract. *But to be effective the choice of law must be real, genuine, bona fide, legal and reasonable.* It should not be capricious and absurd. Choosing German law to govern a contract between a Nigerian shipper and a Liberian “shipowner” is to my mind capricious and unreasonable.⁹²

⁹¹ According to Clause 3 of the Bill of Lading: “Any dispute arising under this bill shall be decided in the country where the “Carrier” has his principal place of business and the law of such country shall apply except as provided else where herein.”

⁹² (Emphasis added). Continuing, the SCN noted that: “In this case, the rice was to be shipped from Thailand, the shippers are in Nigeria and the contract was to be performed in Nigeria by delivery in Lagos, Nigeria. The Bill of Lading was issued

More interestingly, it is important to note that the plaintiff attempted to call in aid one of the 'piecemeal' good faith concepts under the English contract law – contracts of adhesion.⁹³ Such contracts are between unequal parties; here, the party with the bargaining power dictates and imposes the terms on the weaker party.⁹⁴ In the event of a dispute where the weaker party is gravely disadvantaged by virtue of the unfair terms, English courts have prescribed an objective test of reasonableness.⁹⁵ The SCN however found this argument inapplicable to sophisticated contracts such as this one.

While it would be farfetched to conclude that *Sonnar* provides a general rule as per derogation from the explicit terms of a contract, the relative openness of Nigerian courts to guarantee justice in a contractual relationship can be gleaned. It must be emphasized that as the contrary position held in a later decision with similar facts shows, the decision of the SCN in *Sonnar* was informed by the inability of the plaintiff to initiate the action in Germany and not because a jurisdiction other than Nigeria was chosen by the parties.⁹⁶

by a Liberian company. The whole transaction from beginning to end had little or nothing to do with Germany. Why then invoke German law as the proper law of the contract?" [1987] LPELR – 3494 (SC), 44.

⁹³ See: Friedrich Kessler, 'Contracts of Adhesion - Some thoughts about freedom of contract' [1943] 43:5 C L Rev 629 – 642.

⁹⁴ See: *Instore v A. Schroeder Music Publishing Co. Ltd* [1974] 1 WLR 1308.

⁹⁵ See: *Gillespie Bros. & Co. Ltd. v Roy Bowles Transport Ltd.* [1973] Q.B. 400.

⁹⁶ In *The Owners of the M.V. Lupex v Nigerian Overseas Chartering and Shipping Ltd.* [2003] LPELR – 3195 (SC) - where the bill of lading stated England as the place of arbitration- the SCN held in favour of the arbitration clause. The court in the latter case noted that the *Sonnar* decision was not applicable as no injustice will be done to the plaintiff.

C. Contracts of Employment

Another category of contracts where Nigerian courts have avoided fidelity to the sanctity of contracts approach to contractual interpretation is when a party attempts to escape an obligation under a contract of employment⁹⁷ by claiming that such contract is illegal or contains illegal element. The case of *West Construction Company Ltd. v. Santos M. Batalha*⁹⁸ involved a Nigerian company which employed a Portuguese as project engineer. The dispute that led to the case arose over failure of the defendant/appellant, to pay the plaintiff/respondent outstanding balance of salary /allowance for services rendered to the appellant company. The company contended that the contract with the respondent was illegal as it breached the Central Bank of Nigeria's regulations prohibiting paying salary of expatriates in foreign currency and contrary to the Nigerian Immigration Act, and the respondent had no resident permit to work with the company. The trial court's decision in favor of the company, i.e. that the contract was illegal, was overruled by the Court of Appeal. The Supreme Court upheld the decision of the Court of Appeal. The supporting decision of Pats-Acholonu JSC more comprehensively responded to the company's bad faith. His Lordship identified, *inter alia*, the question "is it conscionable for the appellant knowing fully well that the respondent had no work permit entered into contract of employment with him by which it enjoyed his services and now falling on a skewed or contrived and hackneyed argument that

⁹⁷ Contracts of employment are a classic example of a relational contract. In an employment relationship both employer and employee typically have mutual expectations, in terms of loyalty and cooperation from the other party, which cannot be reduced to a set of contractual rules.

⁹⁸ SC. 168/2002, [2006] LPELR – 3478 (SC).

the contract of service was *ab initio* tainted with illegality?" In answering this question, he held that:

A defence to an action which is ignoble on its face and tainted or besmirched with an oddity that is inherently dubious, dishonest and reprehensible does violence to a principle of equity and good conscience ought not in my view win the support of this court. This court should not lend itself to a defence for breach of contract which is embarrassing to any conscientious being and is an affront to civilized behaviour and decency ... If there is any act of illegality about the nature of the relationship between the parties in respect of the alleged infraction of the prescription of Immigration Act, such knowledge shall be imputed to the appellant who closed its eyes in order to reap where it did not sow, to hoodwink and bamboozle the ignorant foreigner to work for it and fall back on a questionable defence of illegality. Nothing could be more ungallantly than this posture ... It can therefore be seen that the appellant has no leg to stand in respect of the rather disgusting and revolting offensive attitude it adopted to shirk its responsibility when its acts traduced all known decent procedures in the circumstances. It is this type of sickening and condemnable behavior that gives Nigeria a bad name.

The above has been quoted *in extenso* to highlight the deep-seated normative or moral consideration which actuates the decisions of Nigerian courts in contractual cases showing clear case of injustice. It is important to note that, indeed, the court agreed that the respondent had no resident permit, and by section 8 of the Immigration Act it was illegal for him to work without a permit in the country. This was however not enough to justify the appellant's action, which was seen for what it really was – an attempt to deprive the respondent of his wages.

On the one hand, this case demonstrates the attitude of the Nigerian Supreme Court to apply the traditional piecemeal approach in reaching its decisions without expressly making the case for the development of a coherent principle of good faith or the recognition of a duty of honest performance. The next case illustrates this position further. On the other hand, I contend, as argued in the concluding section of this paper that out rightly recognizing the broad umbrella of good faith as an organizing principle as the Canadian Supreme Court did in *Bhasin's* case will in fact provide an important framework for this type of cases in the future without necessarily jeopardizing the flexibility of the courts to continue to ensure that contractual agreements are interpreted to achieve social functions.

D. Banker-Customer Relationship

In *Diamond Bank Ltd. v. Ugochukwu*,⁹⁹ one of the issues was whether the operation of a particular account was tainted with illegality? The respondent was a co-signatory to a company account. He, however, subsequently notified the bank of his revocation of the co-signatoryship of the second signatory to the account. Thereafter, the respondent issued a series of cheques. While the bank honored one of the cheques, it dishonored subsequent cheques, citing incomplete mandate and the freezing of the account by a government taskforce as reasons. In resolving this appeal, the court noted *inter alia* that banker-customer relationship borders on good faith.¹⁰⁰

However, in reaching its decision, the court called in aid the principle of estoppel by conduct; the fact that after the revocation of the co-signatoryship, the bank honoured a cheque

⁹⁹ [2007] LPELR – 8093 (CA).

¹⁰⁰ *ibid.*

solely signed by the respondent.¹⁰¹ Relying on the provision of the Nigerian Evidence Act, the court concluded that having accepted a solely signed cheque after the notification of revocation of co-signatoryship, the bank is estopped from turning around to lay claim to the requirement in a previous agreement that for money to be drawn the cheque must be signed by two signatories. The court further held that:

[A] party is estopped from denying or withdrawing his previous assertion or from going back on his own act, even if it is to tell the truth. The reasoning is simple it would promote fraud and litigation if a party is allowed to resile from his own act or representation on which the other part acted. *The object of estoppel has always been to prevent fraud and enthrone justice between the parties by ensuring that there is honesty and good faith at all times.*¹⁰²

It is implicit in the decisions on estoppel by conduct that the express terms of a contract regardless, a party can be held to representations made at the performance level. This much can be gleaned from a more recent decision of the NCA – *Oloro Jay Jay v. Skye Bank Plc.*¹⁰³ Here, the appellant was contracted to execute a project at a polytechnic. To access the mobilization fee, he was required to obtain an Advanced Payment Guarantee

¹⁰¹ The court relying on conduct referenced section 151 of the Nigerian Evidence Act, (now section 169 of the Evidence Act, 2011) which provides that: When one person has, either by virtue of an existing court judgment, deed or agreement or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.

¹⁰² *Diamond Bank Ltd. v. Ugochukwu* (2008) 1 NWLR (Pt. 1067) 1 at P. 26. paras. F - H; Pp. 26-27, paras. H - D

¹⁰³ [2016] LPELR – 40185 (CA).

(APG) from a Bank. The respondent bank provided the APG with the condition that the mobilization fee will be deposited with it and given to the appellant as a loan. By the time the mobilization fee was released however, the APG had expired. Yet, the appellant issued a cross cheque depositing the mobilization fee with the bank, pursuant to the prior agreement. At the point of withdrawal, the bank requested that the appellant make a loan application. The appellant refused, contending that since the APG had expired, there was no need to apply for the loan anymore as the money was now his. The court, relying on the SCN's decision in *A.G. Rivers State v. A.G. Akwa Ibom State & Anor*,¹⁰⁴ held that having deposited the money with the bank despite the alleged expiration of the APG, the appellant was estopped from seeking an escape from the terms of the APG. Like it did in *Diamond Bank Ltd. v. Ugochukwu*, the court stated that to allow the appellant to renege from his representation will negate equity, justice, fairness and good conscience.¹⁰⁵

From the foregoing cases, it is clear that there is no coherent approach to the analysis of the doctrine of good faith by the Nigerian courts. The lack of coherence is not a problem. As I argued above, it affords the courts the much need flexibility of not only when to draw on good faith, but also, to continue to rely on established principles of contract if necessary. The ebb and flow of which interpretation is given has simply depended on the facts and justice that each case requires. In other words, there is judicial discretion or choice in respect of when the courts will invoke the good faith. In such situations, they have

¹⁰⁴ [2011] 8 NWLR 31.

¹⁰⁵ *Diamond* (n 102)

found sufficient principles within the common law of contract to meet the need of justice while loosely referring to good faith.

IV. TO RECOGNIZE OR NOT? THE GENERAL DUTY OF GOOD FAITH AND DUTY OF HONEST PERFORMANCE UNDER NIGERIAN CONTRACT LAW

In this section, I examine whether there is a need for the Nigerian courts to shift towards contemporary approach by recognizing a duty of honest performance or simply stick with the piecemeal traditional approach. Based on two reasons: lack of clarity in the ramifications or method for applying the duty of honest performance or conceptualizing good faith as an organizing principle; and the flexibility of the traditional piecemeal approach including by drawing on the English case of *Yam Seng Plc*, I posit that there is no need for Nigeria to follow the decision of the Canadian court in *Bhasin*. The English courts, unlike their Canadian counter-part, has stuck to its piecemeal approach to the good faith duty.

In the *Yam Seng Plc*, two companies through their chief executives entered into a distributorship where Yam Seng Plc (claimant), which focuses on duty free sales, will distribute Manchester United branded products produced by ITC Ltd (defendant). At the point the initial agreement was signed by the parties, the defendant had untruthfully informed the plaintiff that it had signed a licence agreement with the brand owner to manufacture and sell Manchester United fragrances. Subsequently, the claimant failed to meet timelines set for the delivery of products. A situation which the defendant claimed had adverse impact on its goodwill with customers. The relationship however continued despite the several incidences of breach. The recourse to litigation was however actuated by a series of subsequent actions, including: the non-registration of

the product in China contrary to the representation made by the defendant, defendant's failure to pay an invoice for some testers contrary to prior agreement and a false representation that the retail prices of the products are lower than the duty-free retail prices, when in the actual sense, contrary to agreement and practice, they were higher. Particularly, the court described the pricing issue as "the final straw". The claimant had argued, in part, that there was "an implied term of the Agreement that the parties would deal with each other in good faith".¹⁰⁶

In deciding *Yam Seng*, Leggatt J., extensively engaged with the concepts of relationality and good faith. In a sense, representing the latter as an incidence of the former. Importantly, the court entered the 'fray' of the debate on the need for a general duty of good faith in English contract law. After considering arguments for and against, the court held that:

Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts ... What good faith requires is sensitive to context. That includes the core value of honesty ... The test of good faith is objective in the sense that it depends not on what 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 ... Understood in the way I have described, there

¹⁰⁶ *Yam Seng* (n 4) [119].

is in view nothing novel of foreign to English Law in recognising an implied duty of good faith in the performance of contracts ... Moreover such a concept is, I believe, already reflected in several lines of authority that are well established. ... Because the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil systems in order to accommodate the principle.¹⁰⁷

The court held in part that “in giving Yam Seng information about the Singapore domestic retail price on which Mr. Presswell knew that Yam Seng was likely to rely and which he knew to be false”, the defendant was in repudiatory breach of the Agreement.¹⁰⁸

While not completely clear, it appears Leggatt J’s position on a general duty of good faith in common law is not necessary as the duty is already reflected in “several lines of authority” and “consistent with the case by case approach favoured by common law”. The earlier finding that there is nothing strange in recognising “an implied duty of good faith in the performance of contract” however makes the above summation less clear. Assuming Leggatt J did not endorse a good faith as a ‘general doctrine’, it appears that he suggested honesty as an implied term applicable to every contract. This is deducible from his holding that “What good faith requires is sensitive to context. That includes the core value of honesty”.¹⁰⁹

¹⁰⁷ *ibid* [131] – [147].

¹⁰⁸ *ibid* [173].

¹⁰⁹ *ibid* [141].

The *Yam Seng* decision has been criticized on the basis of this 'general duty of honest performance' among other things.¹¹⁰

Perhaps, the most striking similarity between the Nigerian approach to good faith and the *Yam Seng* is the emphasis on good faith being an incidence of the intention of parties. The idea that good faith is endogenous to parties' intentions as deduced from their agreement. This is illustrated in Leggatt J's position that "...the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of parties".¹¹¹ Another similarity which flows from the first is that rather than being implied in law, the expressions of good faith in common law of contract are "implications of terms in fact".¹¹² Such finding is consistent with the dominance of implied terms as Nigeria's primary good faith expression. An interesting question, however, is if Nigerian courts would have resolved *Yam Seng* in the same way Leggatt J. did, in the light of how the previously considered Nigerian cases were approached. It is very likely that Nigerian courts would have found that the contract was indeed breached, however, not necessarily on the ground of breach of a 'good faith' duty. As noted earlier, the operation of good faith in Nigeria is often shorn of direct reference to 'good faith' *per se*. It is indeed doubtful if *Yam Seng* has added substantially to the common law approach to good faith other than its extensive re-articulation of what has always been recognized as good faith's role in English law of contract.

¹¹⁰ J.W. Carter and Wayne Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' [2016] 75:3 CLJ 608, 618 – 619.

¹¹¹ *Yam Seng* (n 4) [148].

¹¹² *ibid* [131].

There are striking similarities between *Yam Seng* and *Bhasin*. Although the words ‘organizing principle’ were not employed in *Yam Seng*, the court was clear that there are certain established categories where good faith has been implied and that the courts will develop other categories as time goes on.¹¹³ Also in *Yam Seng*, the court also recognised “the core expectation of honesty”.¹¹⁴ A major difference between both decisions, however, is the SCC’s finding that the duty of honest performance cannot be excluded by parties.¹¹⁵ Contrariwise, *Leggatt J* appears to have recognised the right of party to expressly exclude such duty.¹¹⁶ Importantly, while *Leggatt J.*, considered the ‘duty of honest performance’ as a fact inferable from the facts of the parties’ agreement, the SCC considered such duty as “analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability”.¹¹⁷ In fact, it is on the basis of construing the duty of honest performance as a doctrine rather than an implied term that the court found that the duty cannot be excluded by parties to a contract.

Apart from the foregoing, since Nigerian courts continue to find fortress in their construction of commercial contracts in other principles of the law of contract, I submit that this obviates the need for a stand-alone duty of honest performance in Nigeria. To adopt a stand-alone principle as the Canadian courts did would be to muddle up the waters of settled principles of the law of contract unnecessarily.

¹¹³ *ibid.*

¹¹⁴ *ibid* [141].

¹¹⁵ *Bhasin* (n 2) [74] – [75].

¹¹⁶ *Yam Seng* (n 4) [149].

¹¹⁷ *Bhasin* (n 2) [74].

V. CONCLUSION

My objective in this article has been to examine the trajectory of the doctrine of good faith in Nigerian law of contract with a view to teasing out an area that has received minimal focus. The analyses of the Nigerian case law in the article regarding good faith reveals a traditional or piecemeal approach as opposed to the contemporary approach represented by the Canadian case of *Bhasin*. Incoherent and disorganized as it may seem, I contend that Nigerian courts will benefit from the flexibility that they enjoy in constructing commercial contracts based on their contexts as opposed to being wedded to an 'organizing framework'; the modus operandi of which remains unclear.