



JUDICIARY OF  
ENGLAND AND WALES

**Negotiation in Good Faith: Adapting to Changing Circumstances in  
Contracts and English Contract Law**

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**Jill Poole Memorial Lecture**

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**Introduction**

1. I did not have the good fortune to know Jill Poole. In an attempt to compensate for that disadvantage, when Adam Shaw-Mellors did me the honour of inviting me to give this lecture,<sup>2</sup> I read her books on contract law. That may have been an optimistic approach, as legal textbooks seldom reveal much about their authors. But in Jill's case I was rewarded. From her books, particularly the disarming introductions, I learnt much about her, and also about her children and her obvious pride in them. I noted, for instance, that in her many practical examples illustrating points of contract law we do not find that, say, A offers to sell his bicycle to B for £150 but that Alex offers to sell his bicycle to Becky for £150. I also got a very strong sense of Jill's passionate enthusiasm for contract law and of what an inspiring teacher of the subject she must have been.
2. I share with Jill Poole a belief in the vital interest and importance of our law of contract. It is not too much to say that human prosperity depends on the ability to make contracts which are enforceable through a fair and effective system of law. Without such a system, trade and commerce cannot flourish. Increasingly in international commerce, parties are free to choose the law that will govern their contract, and very often – for what we like to think are sound reasons – the law they choose is the law of England and Wales.<sup>3</sup>

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<sup>1</sup> A Lord Justice of Appeal.

<sup>2</sup> I am grateful to Professor Jane Stapleton and Dr Jonathan Morgan for their helpful comments on a draft of this lecture. The views expressed are mine alone.

<sup>3</sup> For example, a study by the Singapore Academy of Law published in January 2016 found that, in a survey of 500 lawyers dealing with cross-border transactions in Singapore and the region, English law was by far the most popular choice, being the preferred choice of 48% of respondents.

3. Last year Lord Thomas of Cwngiedd, giving the first of these lectures, took as his topic “keeping commercial law up to date”.<sup>4</sup> He emphasised the importance, particularly at a time of rapid technological and economic change, of ensuring that English commercial law moves with the times and remains attractive to businesses both here and abroad. Lord Thomas focused on the institutional arrangements and procedures needed for that purpose: on what should be done, for example, to maintain the expertise of our judges and on the need for procedural innovation. In this lecture I would like to continue the same general theme as Lord Thomas – the theme of keeping our commercial law up to date in times of rapid change – but by addressing some matters of substance rather than procedure.

### **Changing patterns of commercial litigation**

4. If you open at random any volume of the Lloyd’s Law Reports dating from the second half of the twentieth century, you will find that very many of the commercial cases that were being decided in our courts – I would guess the great majority – were concerned with the sale and shipment of goods. When I started practising in the mid-1980s, that was the main focus of the work. In September 1983 Sir Robert Goff, recently appointed as a Lord Justice of Appeal, gave a public lecture on “Commercial Contracts and the Commercial Court”. In that lecture he observed that “a large proportion of the contracts which are considered by commercial practitioners and by the Commercial Court in this country are contracts made on the markets in the City of London”. He noted that many of those contracts were maritime contracts and commodity sales conducted using standard forms and described these as the “staple diet” of the Commercial Court.<sup>5</sup>
5. Cases of these kinds still form a significant part of the work of the Commercial Court today. But the proportion of the work which they represent has diminished. A notable shift is that many of the disputes no longer derive from contracts made on the markets in the City of London – important as those markets still are. Often the cases have no connection at all with this country apart from the fact that the parties have chosen English law and jurisdiction to govern their contractual relationship. To give you an example which is by no means untypical, my last trial as a judge of the Commercial Court involved a dispute between an Arab sheikh and a Greek businessman who had

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<sup>4</sup> Now published in R Merkin and J Devenney (eds) *Essays in Memory of Professor Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate Laws* (Routledge, 2018) ch 1.

<sup>5</sup> R Goff, “Commercial Contracts and the Commercial Court” [1984] LMCLQ 382, 386-7.

gone into business together to develop a chain of luxury hotels in the Eastern Mediterranean.<sup>6</sup> The facts of that case had no connection with the UK apart from the parties' choice of English law and jurisdiction.

### **Collaborative ventures and the need for flexibility**

6. There is another feature of that case which I believe reflects a growing trend. And it is this trend and its significance for the law of contract that I want to consider this evening. The contractual relationship between Sheikh Tahnoon and Mr Ioannis Kent was a form of joint venture. The term "joint venture" is not a term of art and can be used to describe a variety of different arrangements. But a characteristic feature of such arrangements is that they require a high degree of collaboration between the participants. The revolution in information technology and other forces of economic globalisation have increased exponentially the opportunities for commercial cooperation across borders of many different kinds and have spawned a multitude of networks, alliances and joint venture projects.
7. Drafting contracts to govern such collaborative business relationships involves particular challenges. Especially when the relationship is one which is expected or intended to last for a long time, it is impossible to anticipate and provide in advance for all the changes in circumstances that may occur over the course of the relationship. What is foreseeable is that, if the joint venture is to deliver the benefits of long-term cooperation, the parties will need to be ready to adapt their bargain when circumstances change. To facilitate this, contractual obligations may need to be phrased in broad, flexible terms.<sup>7</sup>
8. This explains, I think, why it has become much more common to find in contracts that come before our courts clauses expressed in the language of "best endeavours" or "reasonable endeavours" or of obligations to act "in good faith". Twenty or thirty years ago it would, in my experience, have been unusual to find such language in a commercial contract. Now it is an everyday occurrence.

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<sup>6</sup> See *Sheikh Tahnoon v Kent* [2018] EWHC 333 (Comm).

<sup>7</sup> This point was made presciently by Professor Ewan McKendrick in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford, 1995) ch 12, and has more recently been endorsed by Beatson LJ in *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2016] 1 CLC 712 at [64]-[68] and [75].

## Clauses requiring good faith negotiation

9. This is a large topic. I do not have time to survey it all. So for the purpose of this lecture I propose to concentrate on one particular type of clause. These are clauses which, if circumstances change in some material way, require the parties to hold discussions or negotiations to try to find an agreed solution. Such clauses come in a variety of forms. Sometimes the clause will provide for the consequence of failure to reach agreement. That consequence is often that the matter will be referred to an arbitrator to decide whether the contract should be amended and, if so, in what way. Sometimes no consequence of failure to agree is stipulated.
10. To take a concrete example, here is the wording of a price review clause in a contract for the supply of Liquefied Natural Gas.<sup>8</sup> The contract has a term of 30 years. It is governed by English law, although neither party has any connection with this country, and provides for any dispute which cannot be resolved by discussion in good faith between the parties to be settled by arbitration. The price review clause provides that, at five yearly intervals during the term of the contract:

“if Seller or Buyer desires a review of the prices set out in this Agreement due to a change in relevant circumstances resulting in such prices being significantly disadvantageous to either Seller or Buyer compared with the prices for other LNG sold into Japan on similar terms to this Agreement, then ... **Buyer and Seller shall meet and discuss in good faith to review such prices.**” [emphasis added]
11. Taking this clause as an example, what is the effect of the requirement to meet and discuss in good faith a review of the prices set out in the agreement? What exactly does this clause oblige the Buyer and Seller to do?
12. There is no doubt that, until recently at least, the answer that most English commercial lawyers would have given to this question is “nothing at all”. That is because a promise to hold discussions in good faith would have been regarded as too uncertain to be enforceable. That is still the view that some might take of such a promise. On this view the clause I have quoted does no more than express an aspiration and is unenforceable in English law.

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<sup>8</sup> For this example, I am indebted to Paul Griffin of White & Case and the University of Dundee, whose experience in drafting and advising on such contracts is second to none.

## Some core principles

13. Before I examine the basis for this view and the two leading cases which support it, allow me briefly to recap some core principles which underpin this area of the law and with which the students here this evening will, I am sure, already be familiar.
14. It is important to distinguish between two different reasons why an agreement or clause of an agreement may be unenforceable. One is that the parties did not intend it to have the force of law.<sup>9</sup> The other is that, although the parties intended it to have legal force, it is too uncertain to be capable of enforcement by an arbitrator or court.

## Intention to create contractual obligations

15. The proposition that an agreement is enforceable only if the parties intend it to be so flows from the principle of freedom of contract which is fundamental to English contract law. As Lord Toulson put it in *Prime Sight Ltd v Lavarello*:<sup>10</sup> “Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them.” The other side of that coin, which is equally fundamental, is that parties are free not to contract and, if they choose not to create legal obligations, it is not the court’s role to impose them.
16. Disputes about whether parties intended to create legal obligations are usually about whether they intended to enter into a contract at all. Sometimes the issue turns on the status of a document – for example, whether a document described as a “comfort letter” is intended to be legally enforceable or not.<sup>11</sup> Another common source of disputes is whether parties who have left one or more matters to be agreed in the future nevertheless intend to be contractually bound with immediate effect or only if and when the further matters are agreed.<sup>12</sup> Where a court finds that parties intended to conclude a contract, that finding usually applies to the whole of their agreement. It is perfectly possible to draft a contractual document containing words that are not intended to create obligations: recitals at the start of formal contracts typically fall into this category. But generally, the very fact that the parties have chosen to include a

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<sup>9</sup> When we refer to the parties’ intention, we are of course in English law concerned primarily with their intention as objectively ascertained – in other words, the intention reasonably to be inferred from the language used in its context.

<sup>10</sup> [2013] UKPC 22; [2014] AC 436 at [47].

<sup>11</sup> See e.g. *Kleinwort Benson Ltd Malaysia Mining Corp Bhd* [1989] 1 WLR 379.

<sup>12</sup> See *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 WLR 753 at [45]-[49].

provision in what is intended to be a legally binding contract is a compelling reason to conclude that they intended that provision to have legal force.

## Uncertainty

17. Occasionally, a court is forced to conclude that a clause in a contract is so vague or unintelligible that it cannot be given any sensible meaning.<sup>13</sup> But such cases are and should be rare. Where a court is satisfied that a clause is intended to create a legal obligation, respect for the principle of freedom of contract requires the court to strive to give effect to that intention by interpreting the language used in a way that gives the obligation practical and legal content.<sup>14</sup> It does commercial parties a disservice and defeats their legitimate expectations if a provision which they intended to have legal force is treated as mere empty rhetoric. Thus, to hold a clause void for uncertainty is a last resort or, as Lord Denning once put it, “a counsel of despair”.<sup>15</sup>
18. It is not a reason to hold a clause void for uncertainty that the parties have chosen to express an obligation in broad, evaluative language (for example, using words such as “fair”, “equitable” or “reasonable”). Indeed, courts will sometimes imply terms which import such a standard – for example, an obligation to pay a reasonable price where no price is specified by a contract for the sale of goods.<sup>16</sup> Of course, in deciding what is fair, equitable or reasonable, there is often ample scope for differences of opinion. But that does not prevent an arbitrator or judge from making a sensible decision about what such a standard requires on the facts of a particular case. Moreover, commercial parties are obviously aware that there is no uniquely or demonstrably right view of what is a fair specification of timber<sup>17</sup> or an equitable decrease in hire<sup>18</sup> or a commercially reasonable result in calculating the close-out amount under a swap.<sup>19</sup> So when parties use such language in a contractual document they can be taken to intend that, if they cannot agree with each other on what is fair, equitable or reasonable in circumstances that arise, they wish that evaluation to be made by an independent adjudicator.

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<sup>13</sup> See e.g. *Scammell v Ouston* [1941] AC 251.

<sup>14</sup> See e.g. the cases that I cited in *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm); [2017] 1 Lloyd's Rep 476 at [65] and in *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm); [2017] 1 BCLC 414 at [60].

<sup>15</sup> *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 QB 933, 943.

<sup>16</sup> See s8(2) of the Sale of Goods Act 1979.

<sup>17</sup> See *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503; 43 Ll L R 359.

<sup>18</sup> See *Didymi Corp v Atlantic Lines and Navigation Co Inc* [1988] 2 Lloyd's Rep 108.

<sup>19</sup> See *Lehman Brothers Special Financing Inc v National Power Corp* [2018] EWHC 487 (Comm).

19. It is always open to the parties to formulate obligations more precisely if they choose. But sometimes they choose not to do so. There may be many reasons for this. They may not wish to spend the time or incur the expense of preparing a more detailed contract. They may be unable to agree on a particular matter and deliberately leave the contract open-ended or ambiguous in order to get the deal done.<sup>20</sup> More fundamentally, there is always a trade-off to be made in drafting contracts between the relative advantages of certainty and flexibility. The more detailed, specific and precise the wording, the less scope there is for future disputes about what the contract requires, but the more chance there is that the contract terms will turn out to produce unsatisfactory results when circumstances change. I have drawn attention to the fact that, particularly in contracts of a long-term nature, obligations may deliberately be phrased in broad, flexible terms to enable the parties to adjust their bargain to meet changing circumstances. In interpreting such contracts, courts for their part need to be willing to adopt a flexible approach.<sup>21</sup>

***The Associated British Ports case***

20. A recent case which provides a good illustration of such an approach is *Associated British Ports v Tata Steel UK Ltd*.<sup>22</sup> In that case the port authority which operates Port Talbot in Wales had granted a licence to the owner of a nearby steel works to use the port for 25 years in return for annual fees. The contract provided that, at any time after the mid-point in the contract period, in the event of “any major physical or financial change in circumstances affecting the operation” of the steel works or the port, either party could serve a notice on the other requiring the terms of the licence to be re-negotiated. If such a notice was served, the parties were required to “seek to agree amended terms reflecting such change in circumstances” and, if agreement was not reached within six months, to refer the matter to an arbitrator.
21. When the owner of the steel works served a notice seeking a substantial reduction in the licence fees as a result of what was said to be a major financial change in circumstances affecting the operation of the steel works, the port authority asked the court to declare the clause unenforceable. Two arguments were made. First, it was argued that the reference to “any major physical or financial change in circumstances”

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<sup>20</sup> See the observations of Staughton J in *Chemco Leasing SpA v Rediffusion Plc* (19 July 1985, unreported) quoted by Hirst J in *Kleinwort Benson Ltd Malaysia Mining Corp Bhd* [1988] 1 WLR 799, 806; affirmed at [1989] 1 WLR 379, 383.

<sup>21</sup> See *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2016] 1 CLC 712 at [64]-[68] and [75], per Beatson LJ.

<sup>22</sup> [2017] EWHC 694 (Ch); [2017] 2 Lloyd's Rep 11.

was too uncertain to create an enforceable obligation to refer a dispute to arbitration. Second, it was argued that the clause was too uncertain because there were no criteria by which, if a dispute was referred to arbitration, an arbitrator could decide how to amend the terms of the licence.

22. Rose J rejected both arguments. She held that, although it may be difficult to decide whether there had been a “major physical or financial change in circumstances”, the fact that one can posit some changes in circumstances that would clearly fall within that description and some which clearly would not meant that the phrase was sufficiently certain to be enforceable. Nor would it be impossible for an arbitrator to arrive at a reasonable decision as to how the contract should be amended to reflect such a change in circumstances. The bargain was therefore upheld.

### **The price review clause**

23. What then of the price review clause that I quoted to you? The clause forms part of a long, detailed and professionally drafted contract and it would be unrealistic to suggest that it is not intended to be legally binding. Is it so uncertain that it cannot be given any sensible meaning?
24. You will recall that on the wording of the clause the right to require a price review arises only where there has been “a change in relevant circumstances resulting in [the prices set out in the Agreement] being significantly disadvantageous to either Seller or Buyer compared with the prices for other LNG sold into Japan on similar terms to this Agreement.” It would be hard to argue that an arbitrator or court could not, if necessary, decide whether that condition has been met: compare the *Associated British Ports* case which I have just cited. The clause then provides that, where the condition is met, “Buyer and Seller shall meet and discuss in good faith to review such prices.” It is here that we come up against a line of cases which have held that an agreement to negotiate, or to negotiate in good faith, is void for uncertainty.

### **The *Courtney & Fairbairn* case**

25. Of the two leading cases in this line of authority, the first is *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*, decided in 1974.<sup>23</sup> In that case the parties had agreed to “negotiate fair and reasonable contract sums” for building work. The Court of Appeal held that the agreement was unenforceable. The main judgment was given by

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<sup>23</sup> [1975] 1 WLR 297.



Lord Denning MR. The claimant had relied on the opinion of Lord Wright in *Hillas & Co Ltd v Arcos Ltd*, a decision of the House of Lords in 1932, that there can be a valid contract to negotiate (if there is good consideration), even though the damages for breach may be nominal.<sup>24</sup> After quoting what Lord Wright had said, Lord Denning commented:

“That tentative opinion by Lord Wright does not seem to me to be well founded.”

(I interject that, although Lord Wright’s words were undoubtedly *obiter dicta*, I cannot myself discern anything “tentative” about his opinion.) Lord Denning then said this:

“If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.”<sup>25</sup>

The other judges agreed. Lord Diplock (who sitting as a judge of the Court of Appeal) added that Lord Wright’s *dictum*, though “an attractive theory”, should in his view be regarded as bad law.

26. I am a great admirer of Lord Denning and, as Ben Jonson said of William Shakespeare, “do honour his memory on this side idolatry as much as any.” But as Jonson also said, in answer to those who claimed it to be a virtue of Shakespeare that in his writing he never blotted out a line: “Would he had blotted a thousand.”<sup>26</sup> In the key passage that I have quoted from what was clearly an *ex tempore* judgment, Lord Denning gave two reasons for saying that a contract to negotiate was (in his words) “not a contract known to the law”. Neither reason seems to me to be sound.
27. The first was that, because the law does not recognise a contract to enter into a contract (or, as it is often put, an “agreement to agree”), the law cannot recognise a contract to negotiate. But the analogy is not a good one. Parties who agree to negotiate do not agree to agree. They agree to engage in a process – a process of holding discussions with a view to trying to reach an agreement. They give no

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<sup>24</sup> (1932) 147 LT 503, 515; 43 Ll L R 359, 369.

<sup>25</sup> [1975] 1 WLR 297, 301-2.

<sup>26</sup> Ben Jonson, *Timber: or Discoveries made upon Men and Matter* (1641) “De Shakespeare Nostrati”.

undertaking about what the result of the process will be. They do not promise that the negotiations will be successful and that they will then enter into a contract.

28. The second reason given by Lord Denning was that, because no one can tell whether the negotiations would be successful, a court could not estimate the damages. Now inability to tell what the result of the negotiations would have been may certainly make it difficult to prove that a refusal by one party to negotiate has caused the other party loss. I will come back later to how damages might be calculated in such a case. But if no loss can be shown or if damages are impossible to estimate, that is a reason – as Lord Wright observed in *Hillas v Arcos* – for a court to award only nominal damages. It is not a reason to hold that no contract known to the law exists.<sup>27</sup>

### ***Walford v Miles***

29. The view taken by the Court of Appeal in the *Courtney & Fairbairn* case that the law does not recognise an agreement to negotiate was followed at first instance in a number of cases.<sup>28</sup> A critical moment came when it was approved by the House of Lords. That occurred in *Walford v Miles*<sup>29</sup> – a case which has cast a long shadow over this area of the law.
30. Mr and Mrs Miles had accepted an offer, subject to contract, to sell their photographic business to the two Walford brothers for £2m. In return for the Walfords obtaining a comfort letter from their bank indicating that the bank was willing to provide finance for the purchase, Mr and Mrs Miles agreed not to deal with any other potential buyer. They nevertheless did so and sold their business to a third party (for the same price of £2m).
31. It is worth noticing two features of the case. First, it was not a case in which the parties had expressly agreed to negotiate with each other in good faith, or indeed to negotiate with each other at all. The only agreement made which was intended to be binding was what is often called a “lock-out” agreement – that is, an agreement not to negotiate with any third party. There was consideration for it in the form of the comfort letter provided by the Walfords.<sup>30</sup> But the House of Lords held that the

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<sup>27</sup> In *Walford v Miles* (1991) 62 P & CR 410, 429, Dillon LJ thought that Lord Denning could not really have meant this.

<sup>28</sup> See the cases cited in *Walford v Miles* [1992] 2 AC 128 at 137F-G.

<sup>29</sup> [1992] 2 AC 128.

<sup>30</sup> As Lord Ackner accepted: see [1992] 2 AC 128 at 139A.

agreement was too uncertain to be enforceable because no period of time had been specified for which the “lock-out” was to last.

32. A second point to note is that the Walford brothers made two claims for damages. One claim was to recover costs wasted on preparing contract documents after they had provided the comfort letter. That claim succeeded, as it was found that Mr Miles had falsely represented that he and his wife were no longer in discussion with any other potential purchaser, when in fact they were, and that the Walfords had incurred expenditure in reliance on that misrepresentation.<sup>31</sup> The Walford brothers were awarded damages of £700 and that award was not contested in the House of Lords.<sup>32</sup>
33. So far so good, you may think. But it was not that claim for £700 which the Walford brothers were chiefly interested in. Their main and much more ambitious claim was for £1 million. It was put on the basis that, if Mr and Mrs Miles had complied with the lock-out agreement, they would have sold their business to the Walfords for £2m when, according to the Walfords, the true value of the business was £3m. The Walfords were therefore claiming to have lost a very valuable bargain.
34. The obvious objection to this claim was not just that Mr and Mrs Miles had never committed themselves contractually to selling their business to the Walfords: it was that they had not even promised to have any further negotiations. The only promise made was a negative one that they would not, for an unspecified period, deal with anyone else. The way the Walfords tried to overcome this difficulty was to argue that there was an implied term of the lock-out agreement that Mr Miles would continue to negotiate with them. They submitted that without such an implied term the lock-out agreement was unworkable. Even such an implied term would not have taken their case very far if Mr Miles was free to break off the negotiations at any time and for any reason. To try to meet this further difficulty, the Walfords argued that Mr Miles was bound to negotiate in good faith and that a further term was to be implied that the negotiations could only be terminated for an honest reason.
35. A short answer to this whole line of argument was that a lock-out agreement is not unworkable without a positive duty to negotiate. It is of some comfort and benefit to a potential buyer to know that the seller is bound not to deal with any third party, even if the seller has not given any positive undertaking to negotiate or continue to negotiate

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<sup>31</sup> See *Walford v Miles* (1991) 62 P & CR 410, 427-8, 432 (CA).

<sup>32</sup> [1992] 2 AC 128, 136B.

with the potential buyer. It is therefore unnecessary to imply a positive duty to negotiate.

36. Lord Ackner, with whose opinion the other law lords agreed, indeed gave this answer to the claim.<sup>33</sup> But this was not his main reason for rejecting the Walfords' case. He went further than he needed to go for the purpose of dismissing the appeal and held that an agreement to negotiate, or to negotiate in good faith, is not an agreement which has any legal content.
37. Like Lord Denning in the *Courtney & Fairbairn* case, Lord Ackner gave two reasons for this opinion. They were, however, different reasons from the reasons given by Lord Denning. The first was that the concept of a duty to negotiate in good faith is "inherently repugnant to the adversarial position of the parties when involved in negotiations." The second reason was that a duty to negotiate in good faith is "unworkable in practice".<sup>34</sup>
38. Once again, both reasons seem to me problematic. As to the first, Lord Ackner's point was that it is inherent in the position of negotiating parties that, "while negotiations are in existence, either party is entitled to withdraw from those negotiations at any time and for any reason".<sup>35</sup> As a statement of the normal position, that is, I think, undeniable. Unlike in some civil law jurisdictions,<sup>36</sup> there is no duty at common law to negotiate contracts in good faith (although the tort of deceit and other doctrines such as duress and undue influence perform some of the same function). But I cannot see why parties should not enter into a binding agreement to negotiate with each other in good faith and limit the grounds on which they are entitled to break off those negotiations, if that is what they choose to do.<sup>37</sup> I cannot discern any legal policy or principle which would justify preventing parties from making such a contract if they wish. At all events no such policy or principle is identified in Lord Ackner's speech.

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<sup>33</sup> [1992] 2 AC 128, 139G-H.

<sup>34</sup> [1992] 2 AC 128, 138G-H.

<sup>35</sup> Ibid.

<sup>36</sup> See article 1104 of the French Civil Code, discussed by Catherine Pédamon in M Heinemann & J Lee (eds), *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives* (Springer, 2018).

<sup>37</sup> I am unpersuaded by Professor David Campbell's ingenious defence of Lord Ackner's approach as protecting the voluntary nature of any eventual agreement: see D Campbell, "Adam Smith and the Social Foundation of Agreement: *Walford v Miles* as a Relational Contract" (2017) 21 Edin LR 376. This is because I can see no good policy reason why parties should not (voluntarily) limit their future freedom of choice. See further H Hoskins, "Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose" (2014) 130 LQR 131.

39. Lord Ackner's second reason was that an agreement to negotiate in good faith is unworkable in practice because it is impossible to police. In particular, he suggested that a court cannot be expected to decide whether a party who withdraws from further negotiations honestly believed in the reason given for withdrawing.
40. I must say that I find it difficult to see why not. Courts are often expected to decide whether things people have said are things they honestly believed. Such an issue arises whenever a claim in deceit is made. (Indeed, it arose in *Walford v Miles* itself in relation to the misrepresentation claim which succeeded.) Absence of an honest belief may be hard to prove. But the fact that breach of a duty is hard to prove is not a reason to conclude that there is no duty. More specifically, the fact that dishonesty is hard to prove is not a reason to conclude that the law does not recognise a duty to act honestly. It is merely a reason why a claim alleging lack of an honest belief may fail. In any case it is in fact quite easy to think of situations in which bad faith of the kind with which Lord Ackner was concerned could be proved. Take a case, for example, where a seller withdraws from negotiations saying that he or she has decided not to sell after all and then immediately accepts another offer. It might well be possible to prove that the reason given was a bogus one.

### Subsequent developments

41. In a lecture given in 1996, only four years after *Walford v Miles* was decided, Lord Steyn discussed the concept of good faith and expressed the view that there is no reason why this concept should cause difficulty for English lawyers.<sup>38</sup> He thought it surprising that the House of Lords had held in *Walford v Miles* that an agreement to negotiate in good faith is unenforceable. He said:

“If the issue were to arise again, with the benefit of fuller argument, I would hope that the concept of good faith would not be rejected out of hand. There is no need for hostility to the concept: it is entirely practical and workable.”

42. More than two decades have passed since those observations were made and the opportunity has still not arisen for the UK's highest court to reconsider the issue. *Walford v Miles* has not been overruled. But the law has not stood still in the meantime.

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<sup>38</sup> J Steyn, “Contract law: fulfilling the reasonable expectations of honest men” (1997) 113 LQR 433, 438-9.

43. Several developments since *Walford v Miles* was decided confirm the validity of Lord Steyn’s observation – not uncontroversial when he made it – that there is no reason why the concept of good faith should cause difficulty for English lawyers. One such development is that English courts have not found difficulty in giving practical and legal effect to express contractual obligations to act with good faith.<sup>39</sup> Our courts have also found no conceptual difficulty in implying such an obligation as a contract term.<sup>40</sup> Leaving aside other, still controversial questions about when a contractual duty of good faith is to be implied, it is now well established that, where a contract gives one party a discretion in a matter which affects the other’s interests, a term is generally to be implied that the discretion must be exercised in good faith and not arbitrarily, capriciously or unreasonably.<sup>41</sup> The recognition of this general rule is inconsistent with the notion that a standard of good faith is inherently uncertain and impossible to police.<sup>42</sup>
44. Another development which in my view should itself give serious pause for thought is that *Walford v Miles* has – uniformly so far as I can find – been criticised by legal scholars.<sup>43</sup>
45. It is also instructive to consider the approach taken in other common law jurisdictions. Agreements to negotiate in good faith have long been held enforceable in the United States. A Federal appellate authority to that effect was cited to the House of Lords in *Walford v Miles* but did not impress Lord Ackner. He thought that the reasoning of the US Third Circuit Court of Appeals was flawed because, in deciding that an agreement to negotiate in good faith is enforceable, that court had relied on authorities holding

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<sup>39</sup> See *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) at [95]-[97]; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [246]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [109]-[112].

<sup>40</sup> See *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469 at [50].

<sup>41</sup> See e.g. *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star)(No 2)* [1993] 1 Lloyd's Rep 397, 404; *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466; [2002] 1 WLR 685 at [39]-[41]; *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116; [2008] 1 Lloyd's Rep 558, 575–577; *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42 at [37]; *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661.

<sup>42</sup> See E Peel, “The status of agreements to negotiate in good faith” in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford, 2010) ch 3.

<sup>43</sup> See J Cumberbatch, “In Freedom’s Cause: The Contract to Negotiate” (1992) OJLS 528; A Mason, “Contract, good faith and equitable standards in fair dealing” (2000) 116 LQR 66; A Berg, “Promises to Negotiate in Good Faith” (2003) 119 LQR 357; E Peel, “The status of agreements to negotiate in good faith” in A Burrows and E Peel (eds), *Contract Formation and Parties* (Oxford, 2010) ch 3; A Mills and R Loveridge, “The uncertain future of *Walford v Miles*” [2011] LMCLQ 587; H Hoskins, “Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose” (2014) 130 LQR 131; E Trakman and K Sharma, “The binding force of agreements to negotiate in good faith” (2014) 73 CLJ 598.

that agreements to use best endeavours to reach an agreement are enforceable<sup>44</sup> – an analogy which Lord Ackner described as “unsustainable”.<sup>45</sup> It is ironical in these circumstances that our own Court of Appeal has since used exactly the same analogy to reason in the opposite direction, by inferring from Lord Ackner’s opinion in *Walford v Miles* that an agreement to use best endeavours to reach agreement is unenforceable.<sup>46</sup>

46. *Walford v Miles* was followed in New Zealand<sup>47</sup> and Hong Kong,<sup>48</sup> and initially in Canada.<sup>49</sup> In Australia the position was for some time unclear.<sup>50</sup> But in *United Group Rail Services Ltd v Rail Corpn New South Wales*,<sup>51</sup> decided in 2009, the New South Wales Court of Appeal declined to follow the English authorities of *Courtney & Fairbairn* and *Walford v Miles* and recognised as valid and enforceable a clause of an agreement which required the parties, in the event of a dispute or difference arising, to “meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference”.
47. Another common law jurisdiction which has diverged from the approach taken in *Walford v Miles* is Singapore, where in 2012 the Court of Appeal held that a clause in a lease directing the parties to “in good faith endeavour to agree” on the new rent when carrying out a rent review created an enforceable obligation.<sup>52</sup> An interesting aspect of the judgment in that case is the endorsement of “negotiate in good faith clauses” as being in the public interest and consistent with the Asian tradition of promoting consensus wherever possible.<sup>53</sup>

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<sup>44</sup> *Channel Home Centers, Division of Grace Retail Corp v Grossman*, 795 F 2d 291 (1986).

<sup>45</sup> [1992] 2 AC 128, 139C.

<sup>46</sup> See *Little v Courage Ltd* (1994) 70 P & CR 469, 475; [1995] CLC 164, 169; and *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355 at [39].

<sup>47</sup> *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486.

<sup>48</sup> *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2005] 3 HKLRD 723.

<sup>49</sup> *Edperbrascan Corp v 117373 Canada Ltd* (2000) 50 OR(3d) 425, affd (2002) 22 BLR (3d) 42.

But see *Molson Canada v Miller Brewing Co* (2013) ONSC 2758.

<sup>50</sup> See the history of the authorities summarised in *United Group Rail Services Ltd v Rail Corpn New South Wales* (2009) 74 NSWLR 618; 127 Con LR 202 at [38]-[54].

<sup>51</sup> (2009) 74 NSWLR 618; 127 Con LR 202.

<sup>52</sup> *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Developments Singapore Pte Ltd* [2012] 4 SLR 378.

<sup>53</sup> *Ibid* at [40].

## The *Petromec* case

48. A significant development in this jurisdiction occurred in 2005 when the Court of Appeal considered *Walford v Miles* in *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)*.<sup>54</sup>
49. Under the relevant clause in that case one party had agreed to negotiate in good faith with the other certain “reasonable extra costs” of upgrading an oil rig. In the event it was not necessary to decide whether this obligation was enforceable or not, but Longmore LJ (who gave the judgment of the court on this issue) found that it was. He identified what he called “the traditional objections” to enforcing such an obligation – objections which I have already discussed and which he found wanting. He distinguished *Walford v Miles* on the grounds that there was no concluded contract in that case since all the negotiations were ‘subject to contract’, and there was no express obligation to negotiate in good faith but rather an attempt to imply such an obligation into a lock-out agreement. Contrasting the relevant clause of the agreement in the *Petromec* case, Longmore LJ said:<sup>55</sup>

“It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors ... It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. ... To decide that it has ‘no legal content’ to use Lord Ackner’s phrase would be for the law deliberately to defeat the reasonable expectations of honest men ...”

50. These are strong words. But it must be said that the grounds given in the *Petromec* case for distinguishing *Walford v Miles* are open to question. The view categorically endorsed by the House of Lords in *Walford v Miles* was that an obligation to negotiate in good faith is unenforceable. If that is so, it surely cannot make any difference whether the agreement containing the obligation is simple or complex and whether it is devised by the parties themselves or drafted for them by City of London solicitors. Although in *Walford v Miles* the negotiations for the sale of the business were ‘subject to contract’, that did not apply to the lock-out agreement, which was undoubtedly intended to be binding. It is true that, as I have noted, there was in *Walford v Miles* no express obligation to negotiate in good faith and the issue was whether such an obligation was necessarily to be implied into a lock-out agreement. To distinguish

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<sup>54</sup> [2005] EWCA Civ 891; [2006] 1 Lloyd’s Rep 161.

<sup>55</sup> *Ibid* at [121].



*Walford v Miles* on that basis, however, requires a court to refuse to accept the main reason given by the House of Lords for holding that no such term was to be implied.

### ***The Emirates case***

51. Since the *Petromec* case, there have been several further cases in which lower courts have treated *Walford v Miles* as distinguishable.<sup>56</sup> Among these, the fullest analysis is to be found in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,<sup>57</sup> a decision of the Commercial Court in 2014.
52. In the *Emirates* case a long-term contract for the sale and purchase of iron ore contained a dispute resolution clause which required disputes to be finally resolved by arbitration but also required the parties to “first seek to resolve the dispute or claim by friendly discussion”. A dispute arose and the seller invoked the arbitration clause. The buyer claimed that the arbitrators lacked jurisdiction because there had not first been an attempt to resolve the dispute by friendly discussions as the contract required.<sup>58</sup> The seller argued in response that this obligation was too uncertain to be enforceable. Teare J rejected that argument – though he also found that on the facts there had been discussions which complied with the obligation.
53. Teare J quoted at length from the impressive judgment of Allsop P in the New South Wales case of *United Group Rail Services*,<sup>59</sup> which, as he rightly said, merits close attention. He also referred to the decision of the Singapore Court of Appeal which I have mentioned. The judge dealt with *Walford v Miles* robustly. He said:<sup>60</sup>

“[W]here commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations. The decision in the *Walford* case arguably frustrates that expectation. For that reason there has been at least one clear indication [and the judge here cited the *Petromec* case] that the decision in the *Walford* case may in appropriate circumstances be distinguished ...”

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<sup>56</sup> See *Tramtrack Croydon Ltd v London Bus Services Ltd* [2007] EWHC 107 (Comm) at [86]-[91]; *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [144]-[154]; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC) at [87]. See also *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch); [2017] 5 CMLR 5 at [59]-[61] and [70]-[73], where an obligation to renegotiate prices in good faith seems to have been treated as valid without reference to *Walford v Miles*.

<sup>57</sup> [2014] EWHC 2104 (Comm); [2014] 2 Lloyd’s Rep 457.

<sup>58</sup> It appears to have been accepted that this objection went to the jurisdiction of the arbitral tribunal. But Professor Rob Merkin has pointed out to me that the issue raised does not appear to fall within the scope of s30 of the Arbitration Act 1996 which defines the substantive jurisdiction of the tribunal.

<sup>59</sup> (2009) 74 NSWLR 618; 127 Con LR 202.

<sup>60</sup> *Ibid* at [40].

Teare J proceeded to distinguish *Walford v Miles* on the ground that it was not concerned with a dispute resolution clause within a binding contract.<sup>61</sup>

54. The judge concluded that the obligation to seek to resolve disputes by friendly discussions necessarily imported an obligation to seek to do so in good faith and that the obligation was enforceable.<sup>62</sup> It was not uncertain, as it had an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving the dispute. Furthermore, enforcement of such an agreement is in the public interest, first, because commercial parties expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is to avoid what might otherwise be an expensive and time-consuming arbitration.

### **The content of an agreement to negotiate in good faith**

55. I return to my example of the price review clause in a long-term supply agreement which, when there has been a material change of circumstances, requires the buyer and seller to meet and discuss in good faith a review of the prices set out in the agreement. I would like to consider how such a clause might be interpreted so as to give it legal and practical effect – if the view were to be taken that a court or arbitrator is not precluded by authority from treating it as enforceable. I emphasise that my suggestions are provisional, untested and open to further and better thoughts when subjected to forensic scrutiny.
56. A straightforward case of breach would be one where a party simply refused to meet or engage in discussions about pricing.<sup>63</sup> Much more contestable is what is required by the obligation to discuss a review of prices “in good faith”. One way of interpreting this obligation is by reference to what constitutes bad faith. There is a school of thought, which has been very influential in the United States, that “good faith” is best conceived as an “excluder”: that is to say, a phrase without a general meaning of its own but which serves to exclude a wide range of heterogeneous forms of bad faith.<sup>64</sup> Adopting such an approach, examples of bad faith conduct might include: giving spurious excuses for putting off meetings; ignoring proposals made by the other party; adopting a negotiating position which is designed to frustrate any

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<sup>61</sup> Ibid at [59].

<sup>62</sup> Ibid at [51] and [60].

<sup>63</sup> Even if that were the only circumstance in which a party would be in breach, it would be enough to give some content to the obligation.

<sup>64</sup> The seminal article which inspired this approach is R Summers, “Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code” (1968) 54 Va LR 195.

prospect of reaching an agreement; giving a trumped up reason for breaking off discussions; or covertly holding parallel discussions with a third party about entering into a replacement contract.

57. It seems to me, however, that it may be possible to give a more positive and systematic meaning to the obligation to discuss in good faith, analysed in its context, building on the fact that the trigger for the obligation (in my example) is the existence of a significant discrepancy between the prices payable under the agreement and the prices charged by one or more alternative suppliers of Liquefied Natural Gas. Suppose that the Buyer could show that LNG of equivalent specification was available much more cheaply from another source and on that basis proposed that the prices payable under the agreement should be reduced to match. The obligation to discuss in good faith could be interpreted as requiring the Seller to give genuine and serious consideration to the Buyer's proposal. Thus, the Seller could not simply reject the proposal out of hand. It might also be required, if it rejects the proposal, to give reasons for doing so. Not only would those need to be genuine reasons, but arguably at least they could not simply be that the Seller would make less profit if the contract prices were reduced – as that is inherent in the situation which gives rise to the obligation to hold a price review. By contrast, the sort of reason which might count as a good faith justification for refusing to lower prices (or to lower them as much as Buyer wants) could be a reason based on the Seller's costs of production or on the need to recoup expenditure invested in the joint venture.
58. Another aspect of good faith concerns the disclosure of information. On any view a duty to discuss in good faith must surely comprise a duty not knowingly to mislead the other party in the discussions or to make any representation of fact which the maker does not believe to be true. But it is arguable that the obligation would also include a duty to disclose relevant information, at least on request. For example, if the Buyer requested information about the prices which the Seller was charging other customers, the Seller might be obliged to provide this information.
59. I emphasise again that these suggestions about how the price review clause could be interpreted are no more than proposals for discussion on my part. But they may serve to illustrate possible ways in which legal and practical content could be given to a promise to negotiate in good faith.

## Assessing damages

60. Lastly, let me return (as I said I would) to the question of damages and to what the legal consequences of breach of a duty to negotiate in good faith might be. Note first that recognising such a duty as legally enforceable has other potential consequences apart from damages. In the *Emirates* case, for example, the question whether the duty had been performed determined (or at least was taken to determine<sup>65</sup>) whether an arbitrator had jurisdiction over a dispute. There might also be circumstances in which a refusal to hold discussions, or bad faith in the conduct of discussions, could amount to a repudiatory breach of the contract which would entitle the other party to terminate it.
61. But turning to damages, it is and has long been the law that where there has been a breach of contract and no other monetary award is being made, the claimant has a right to nominal damages which have the purpose of recognising formally that there has been a breach of contract.<sup>66</sup> With respect to Lords Denning and Diplock, therefore, I think it impossible to fault Lord Wright's opinion in *Hillas v Arcos* that breach of an obligation to negotiate would, if nothing else and even if no loss can be shown, entitle the injured party to nominal damages.
62. Lord Wright also raised the possibility that substantial damages might be awarded on the basis that "the opportunity to negotiate was of some appreciable value to the injured party".<sup>67</sup> In other words, he was contemplating that damages might be awarded for loss of a chance. It is now well established that damages can be awarded for the loss of a chance that the claimant would have successfully negotiated an agreement with a third party.<sup>68</sup> There is authority which suggests that damages cannot be awarded on such a basis where the chance depends on what the defendant would have done.<sup>69</sup> However, that may not always be so. It worth recalling that in the well-known case of *Chaplin v Hicks*,<sup>70</sup> where the plaintiff was awarded damages for loss of a chance of winning a beauty competition, the person responsible for picking the winners of the competition was the defendant, Mr Hicks.

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<sup>65</sup> See fn 58 above.

<sup>66</sup> See e.g. A Burrows, *A Restatement of the English Law of Contract* (Oxford, 2016) s.29(2); *McGregor on Damages* (20<sup>th</sup> Edn, 2018) at 12-002; *Marzetti v Williams* (1830) 1 B & Ad 415; 109 ER 842.

<sup>67</sup> *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, 515; 43 Ll L R 359, 369.

<sup>68</sup> See e.g. *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602.

<sup>69</sup> See *Bolitho v City & Hackney Health Authority* [1998] AC 232.

<sup>70</sup> [1911] 2 KB 786.

63. Another possibility is that the claimant could recover wasted expenditure incurred in reliance on the defendant's promise to negotiate in good faith. You will recall that such reliance damages were awarded in *Walford v Miles* as damages for deceit. But it might be thought that the ability to recover wasted expenditure should not depend on having to show that the defendant made a fraudulent misrepresentation of fact on which the claimant relied. In principle, if an agreement to negotiate in good faith is recognised as enforceable, such damages would be recoverable for breach of the agreement unless the defendant could prove that, even if it had negotiated in good faith, the parties would not have concluded a contract of greater value to the claimant than its wasted costs.<sup>71</sup>
64. I have been assuming that it is impossible to prove, on the balance of probability, what the outcome would have been if the defendant had performed its promise to negotiate in good faith. But what if, on the facts of a particular case, the court is able to conclude that in that hypothetical situation the parties would probably have reached agreement on particular terms? I do not think it difficult to envisage such a case. The view of Lord Denning in the *Courtney & Fairbairn* case that no one can ever tell what the result of negotiations would have been may strike some commercial arbitrators and judges as overstated. It would certainly have seemed so to Hobhouse LJ (as he was at the time) who said in *Allied Maples Group Ltd v Simmons & Simmons*:<sup>72</sup>
- “Negotiations may depend upon the will of the parties ... But it is unrealistic to treat the outcome of further negotiation between commercial parties as arbitrary and wholly unpredictable. Those with experience of commercial negotiation are able, with a reasonable degree of accuracy, to form a view of what can be achieved by such negotiation.”
65. On the facts of *Walford v Miles*, for example, it is not difficult to imagine a judge finding that, had they adhered to their agreement not to deal with anyone else, Mr and Mrs Miles would probably have sold their business to the Walford brothers for £2m. In such a case, should the claimant be entitled to damages for their loss of bargain as the Walfords were claiming?
66. That is not a simple question. It might be thought counterintuitive to award the claimant damages which would put it in the same position as if the defendant had entered into a contract which the defendant had no obligation to conclude. But it is

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<sup>71</sup> See e.g. *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm); [2011] 1 Lloyd's Rep 47.

<sup>72</sup> [1995] 1 WLR 1602, 1620.

interesting to note that in the United States the Supreme Court of Delaware has taken a different view.<sup>73</sup> There are two principles competing here. The issue was clearly identified by Patten LJ in *Durham Tees Valley Airport Ltd v Bmibaby Ltd*, when he said:<sup>74</sup>

“The question in cases of this kind is whether the argument or principle that a claimant should not receive damages for something which the defendant was not, strictly speaking, required to do should displace or limit the court's factual inquiry as to what, in the circumstances (bar the repudiation), the defendant would in fact have done.”

One way of limiting the court's factual inquiry might be by reference to the scope of the contractual responsibility undertaken by the defendant, using reasoning of the kind invoked in cases such as *The Achilles*.<sup>75</sup>

## Conclusions

67. What general conclusions might be drawn from this discussion? I would like to leave you with four thoughts.
68. First, it can be crucial to the long-term success of a joint venture that parties are able to adapt their bargain when circumstances change substantially. I have suggested that it is increasingly common to find in commercial contracts, particularly those of a long-term or ‘relational’ nature, obligations expressed in broad, flexible language which are intended to enable the contract to remain workable when there is a material change in circumstances. I have discussed the example of an obligation to renegotiate prices in good faith. If I am right in my perception, it is reasonable to expect that this type of contract term will become even more prevalent in future.
69. Second, I have sought to emphasise that a lodestar of English commercial law is the desire to give legal and practical effect to contracts. Sir Robert Goff expressed this aim in the lecture that I mentioned earlier, when he said (of English judges):<sup>76</sup>

“Our only desire is to give sensible commercial effect to the transaction. We are there to help businessmen, not to hinder them: we are there to give effect to their transaction, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.”

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<sup>73</sup> See *SIGA Technologies Inc v PharmAthena Inc*, 132 A 3d 1108 (Del, 2015).

<sup>74</sup> [2010] EWCA Civ 485; [2011] 1 Lloyd's Rep 68 at [64].

<sup>75</sup> See *Transfield Shipping Inc v Mercator (The Achilles)* [2008] UKHL 48; [2009] 1 AC 61 at [12]-[25] (Lord Hoffmann), [31] (Lord Hope) and [78], [87] (Lord Walker).

<sup>76</sup> R Goff, “Commercial Contracts and the Commercial Court” [1984] LMCLQ 382, 391.

I expressed the same sentiment rather less elegantly last year in a case called *Astor Management AG v Atalaya Mining Plc*,<sup>77</sup> when I said:

“The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy.”

If our courts and our commercial law are to remain true to that aim, then the English law of contract has itself to show the flexibility and resourcefulness needed to recognise and give practical meaning to obligations of the kind I have been discussing this evening.

70. Third, we have in the common law the inestimable advantage of a system which has an in-built capability of responding and adapting to change. It is often said that a virtue of English commercial law is its certainty, and there is much truth in that. But equally vital is its flexibility. Because it is driven by the facts of individual cases and involves a continual conversation with other judges, including those in other jurisdictions with a shared legal heritage, as well as the arguments made by advocates and jurists, the common law has the capacity to respond to the changing realities and needs of commerce. The example that I have discussed shows that the stream of the common law does not always run smoothly. The doctrine of precedent, which gives the law its coherence, can also act as an obstruction. Sometimes only legislation can unblock the channel. But very often, through the ability to reinterpret and occasionally to depart from past decisions, the common law has the flexibility to overcome or work its way around an obstacle to its development, even where – as in my example – the obstacle is a decision at the highest level.
71. Finally, this discussion has, I hope, given some idea of the challenge involved in keeping English commercial law up to date. Judges bear the brunt of that challenge. But the common law is a collaborative enterprise and we need all the help we can get. We rely on practitioners to present the arguments clearly and effectively and sometimes to raise innovative points. We rely on legal scholars to criticise our judgments and to show us how the law can be made more coherent. And we depend, for the long term, on students and – vitally – on those who teach and inspire today’s students of law to become tomorrow’s practitioners, academic lawyers and judges. Lord Goff (as he became) in one of his greatest judgments described jurists as

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<sup>77</sup> [2017] EWHC 425 (Comm); [2017] 1 Lloyd's Rep 476 at [64]; quoted with approval by the Court of Appeal in *Openwork Ltd v Forte* [2018] EWCA Civ 783 at [27].

“pilgrims with us on the endless road to unattainable perfection.”<sup>78</sup> Jill Poole is no longer with us on that pilgrimage. But through the many thousands of students whom she taught, in person and through her books, and through you who have attended this lecture in her memory tonight, the tales to which she contributed on that journey will still be told.

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<sup>78</sup> *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460, 488.