

*RELATIONAL THEORY, CONTEXT AND
COMMERCIAL COMMON SENSE: VIEWS ON
CONTRACT INTERPRETATION AND
ADJUDICATION*

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One of the key insights of relational contract theory is that context matters — in all contracts, but particularly in long-term commercial ones. The use of context in the interpretation of contracts appears to be on the rise in South Africa, in line with increased subjectivity in contract adjudication. Interesting parallels can be drawn with the shifting sands of contract interpretation in the UK, where contextualism is on the rise, but remains controversial. Indeed, even the concept of good faith is under discussion in English law, particularly with regard to relational contracts. Appropriate construction of the agreement seems to be the favoured approach to achieve results which make ‘commercial common sense’. This article will also draw on the English reception of relational contract theory. These comparative insights will then be applied in a discussion of the proper approach to South African contract adjudication, using a case study of the Everfresh case, which is a leading example of a post-constitutional relational contract dispute.

I INTRODUCTION

Relational contract theory exists today in many hybrid forms, with proponents in several jurisdictions.¹ Indeed, the insight that relationships and context matter in contracting should hardly come as a surprise to any member of the human race. The origins of this theory are described in almost mystical terms by adherents as having arisen under the auspices of Professors Macaulay and Macneil, who independently developed a new socio-legal

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¹ The literature is fairly extensive. By way of introduction, see the essays collected in David Campbell (ed) *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001); Jean Braucher, John Kidwell & William C Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay* (2013); David Campbell, Linda Mulcahy & Sally Wheeler (eds) *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2016). For a South African perspective, see: Luanda Hawthorne ‘Relational contract theory: Is the antagonism directed at discrete exchanges and presentation justified?’ in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 137 and ‘The first traces of relational contract theory — The implicit dimension of co-operation’ (2007) 19 *SA Merc LJ* 234.

theory during the 1960s and 1970s as to how to view contracting.² These scholars focused on the inter-dependence of the parties to commercial contracts and their ensuing business practices, rather than strict doctrinal law.³ The resultant relational theory hence makes empirical sense and rings true with the human experience, which allows it to be transposed to new settings.⁴

This article will consider mostly materials from the English legal system by way of comparison, due to the strong parallels in court structure and legal culture to South Africa.⁵ There are, of course, key post-constitutional differences between these countries too, but this article will argue that English insights are useful in analysing commercial contracts and the disputes related to these. Relational contract theory has also had a deeper impact in the UK than in South Africa (at least in the academic discourse⁶) although I would argue that many of the central tenets of relational theory fit very nicely with the post-constitutional approach to contract adjudication in South Africa.⁷ Indeed, by way of example, South Africa has seen a clear shift from literalism to contextualism in the judicial interpretation of legal texts.⁸ I shall also argue that there is an increased awareness of subjective contextual

² Parts of the history can be gleaned from David Campbell 'Ian Macneil and the relational theory of contract' in Campbell (ed) op cit note 1 at 3. See also the brief preface by Jean Braucher & William Whitford in Braucher, Kidwell & Whitford op cit note 1 at vii.

³ See the sources in note 2 above, as well as the collections listed in note 1.

⁴ Clear evidence of the transposable nature of relational contract theory may be gleaned from its impact in the UK: a perusal of the above works will only scratch the surface of a detailed UK literature on relational theory. The author refers the reader to works of scholars like David Campbell, Roger Brownsword, Hugh Collins, John Wightman and Catherine Mitchell.

⁵ For an historical overview of the impact of English law on South African law, the reader is referred to Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996).

⁶ The English Court of Appeal rejected the tenets of the relational theory of contract in *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 (see para 16). In that case, a long-term supply relationship, which had extended over several decades, but was based on a 'partnering' arrangement, rather than a detailed long-term contract, was held not to give Baird any rights other than those contained in the overall umbrella agreement. M&S were thus entitled to stand on the letter of their contract as written, despite the lengthy relationship, and terminate the partnering agreement.

⁷ This will be briefly illustrated in part IV below, and applied in part V.

⁸ With regard to contractual interpretation in particular, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17–26; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10–12; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) paras 24–31. With regard to statutory interpretation, see (by way of example) the Constitutional Court dicta in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) paras 21–6; *African Christian Democratic Party v The Electoral Commission* 2006 (3) SA 305 (CC) paras 20–5; *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 51–5. In a private-

factors in other aspects of contract adjudication in the post-constitutional era.⁹ This rise of context in contract adjudication is paralleled by developments in the UK, most famously espoused by the Law Lords Hoffmann and Steyn.¹⁰ The position of contextualism and related doctrines such as ‘commercial common sense’, ‘reasonable expectations’, and even good faith remains controversial in that jurisdiction, however.¹¹ South African legal culture is also ambivalent about these concepts, although our Constitutional Court seems to be leading us in that direction.¹²

The aim of this article is very briefly to describe the key insights of relational contract theory and then to explore the links between this concept and contextualism. The UK case law will be used to illustrate this connection as a comparative study of a jurisdiction with a conservative judicial culture and strong historical links to South African law. Finally, by way of illustration, the insights obtained in the theoretical and comparative excursus will be applied to an analysis of South African law and the controversial Constitutional Court decision in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.¹³

II CONCEPTUALISING THE INQUIRY

The first step in developing an argument about the potential role of context in South African contract law is to position this article against certain other broad discussions in the contract literature. I provide brief definitions of how

law context, see the approaches of the various judgments in: *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC).

⁹ This view will not be developed in great detail, but see by way of example the Constitutional Court dicta concerning the factual circumstances of the parties in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 64–7; *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) paras 73–6.

¹⁰ This point will be developed in detail below with regard to the jurisprudence and personal writings of both of these Lord Justices.

¹¹ See on interpretation Christopher Staughton ‘How do the courts interpret commercial contracts?’ (1999) 58 *Cambridge LJ* 303; Martin Hogg ‘Fundamental issues for reform of the law of contractual interpretation’ (2011) 15 *Edinburgh LR* 406. See on good faith Ewan McKendrick ‘Good faith in performance of a contract in English law’ in Larry A DiMatteo & Martin Hogg (eds) *Comparative Contract Law: British and American Perspectives* (2016) 196; David Campbell ‘Good faith and the ubiquity of the relational contract’ (2014) 77 *MLR* 460; Simon Whittaker ‘Good faith, implied terms and commercial contracts’ (2013) 129 *LQR* 463.

¹² On the good faith question in SA, see (ex pluribus) Reinhard Zimmermann ‘Good faith and equity’ in Zimmermann & Visser (eds) op cit note 5 at 217; Dale Hutchison ‘Good faith in the South African law of contract’ in Roger Brownsword, Norma J Hird & Geraint Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 213; Gerhard Lubbe ‘Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law’ (2004) 121 *SALJ* 395. For Constitutional Court dicta on good faith in contract, see: *Barkhuizen* supra note 9 paras 79–82 (per Ngcobo J); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 72; *Botha v Rich* NO 2014 (4) SA 124 (CC) paras 45–6.

¹³ Supra note 12.

certain concepts will be used, to facilitate the understanding of what is to follow. The following descriptions are only short summaries of what is an extensive literature.

(a) *Relational contracts and relational contract theory*

Relational contract theory is an off-shoot of the inter-disciplinary study of law, particularly by socio-legal scholars, and was initially formulated in the United States.¹⁴ The major insight of this school of thought is that doctrinal contract law is only one aspect of the process of contracting and that there are broad social and economic aspects to this everyday institution as well.¹⁵ Hence, to study doctrinal law alone misses a large part of the world of contracting, and doctrinal contract law may be out of touch with the practicalities of contracting in business and other contexts. As this brief introduction will hopefully make clear, relational contract theory is thus largely focused on contextualising contracts within the broader factual matrix of background circumstances.¹⁶

(i) *Relational contract theory*

As stated in the introduction, the initial proponents of relational contract theory were US scholars Macaulay and Macneil. Macaulay is famous for his empirical studies of commercial contracting practices.¹⁷ By interviewing businessmen and their lawyers, he developed key insights into commercial contracting, the foremost of which was that doctrinal law is not at the forefront of much commercial contracting and that business relationships were far more important.¹⁸ Indeed, most businessmen only involved lawyers in their contracts once relationships had completely broken down.¹⁹

Macneil developed an elaborate socio-legal theory of contracting, involving key insights such as that there is a difference between one-off contracts, where relationships were largely irrelevant ('discrete transactions') and longer-term contracts which were highly relationship dependent ('relational

¹⁴ See by way of introduction the sources listed in note 1.

¹⁵ The archetypal account of this possible incongruence is Stewart Macaulay 'Non-contractual relations in business — A preliminary study' (1963) 28 *American Sociological Review* 55. See further for a UK example: Hugh Beale & Tony Dugdale 'Contracts between businessmen: Planning and the use of contractual remedies' (1975) 2 *British Journal of Law and Society* 45.

¹⁶ A detailed discussion of the role of context in commercial contracting can be found in Catherine Mitchell *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (2013). For a briefer account from a UK perspective, see John Wightman 'Contract in a pre-realist world: Professor Macaulay, Lord Hoffmann and the rise of context in the English law of contract' in Braucher, Kidwell & Whitford (eds) *op cit* note 1 at 377.

¹⁷ The classic example of his work is the article cited above in note 15. Some selected samples of his scholarship, as well as a full list of his publications may be found in Braucher, Kidwell & Whitford *op cit* note 1.

¹⁸ See Macaulay's conclusions in *op cit* note 15.

¹⁹ *Ibid* at 61.

contracts’).²⁰ Macneil’s argument was that doctrinal (‘classical/neoclassical’) contract law concerned itself largely with discrete contracts and that the formal process of contractual negotiation and conclusion involved anticipating and planning for future events (‘presentation’) at the time of entering into the contract.²¹ In a long-term, relational contract, Macneil argued, it was difficult fully to predict the future over a long period of time, and hence norms like reciprocity, trust and co-operation were extremely important in this type of contract.²² Indeed Macneil developed a theory that most contracts were more toward the relational than the discrete end of the continuum, along with a list of ten ‘common contract norms’ which governed the process of contracting from a socio-legal point of view.²³ His central argument was that doctrinal contract law should be developed to allow greater resort to relational norms and should thus be less formalist and more standards-based.²⁴ Indeed Macneil described a progression from the ‘classical’ contract law as developed in the early part of the twentieth century in the USA before the rise of legal realism (he mentions Williston as a key proponent); through to the ‘neo-classical’ contract law introduced by realists (such as Llewellyn and Corbin), which incorporated greater flexibility, such as purposive interpretation of contracts and implied duties of good faith in contracting; to a ‘relational’ contract law, where contracts would be secondary to business relationships.²⁵ The final stage is not formally part of US, UK or South African contract law, but evidence of it can be seen in commercial practice, such as: ‘partnering’ arrangements in the construction industry;²⁶ the ‘networks’ phenomenon studied by students of

²⁰ These ideas are central to Macneil’s work on relational contracts. See by way of example Ian R Macneil ‘The many futures of contracts’ (1974) 47 *Southern California LR* 691 and *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980). For a South African summary of these ideas see the work of Hawthorne op cit note 1.

²¹ Macneil 1974 *Southern California LR* ibid 800–4; Macneil *The New Social Contract* ibid at 19. For a discussion of the differences between ‘classical’, ‘neo-classical’ and ‘relational’ contract law, see Ian Macneil ‘Contracts: Adjustment of long-term economic relations under classical, neo-classical and relational contract law’ (1978) 72 *Northwestern University LR* 854.

²² See Macneil *The New Social Contract* ibid, particularly with reference to the ‘common contract norms’ at 39–59.

²³ Ibid. The norms are listed in *The New Social Contract* as: (1) role integrity; (2) reciprocity; (3) implementation of planning; (4) effectuation of consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance and expectation interests; (8) creation and restraint of power; (9) propriety of means; and (10) harmonization with the social matrix. (Some of these require further explanation — the reader is referred to the cited work, which explains each norm in full.)

²⁴ See the argument advanced in 1974 *Southern California LR* op cit note 20 at 805–16 (‘Postscript’). See further Macneil *The New Social Contract* ibid at 72–7.

²⁵ This argument is clearly set out in Macneil 1978 *Northwestern University LR* op cit note 21.

²⁶ By way of example of legal authority for this approach, see the standard form NEC3 Engineering and Construction Contract, which is widely used in certain sectors of the construction industry in both the UK and SA. See further *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC).

management and business;²⁷ and the concept of an ‘umbrella’ agreement as can be seen in *Baird Textile Holdings Ltd v Marks & Spencer plc*.²⁸ This article discusses the rise of neo-classical contract law in South Africa and the UK, rather than the socio-legal contract behaviour of pure relational contract theory, a distinction which will be explained in part II(a)(iii) below.

(ii) *Relational contracts*

Although Macneil viewed most contracts as having a relational aspect to them, this article will discuss relational contracts in a narrower sense of specifically long-term, relationship-dependent contracts.²⁹ Some examples would be ongoing relationships between suppliers of raw materials and manufacturers; the relationship between franchisor and franchisee; the relationship between lessor and lessee under a lease; and the bank-customer relationship. Other classic examples are employment relationships and marriage — surely two of most relationship-dependent contracts in society (to the extent that marriage constitutes a ‘contract’).³⁰ This article will focus on commercial relational contracts, however, and will ignore employment and consumer contracts, which are subject to detailed statutory regulation and are hence niche areas in their own right.³¹

In relational contracts changes in circumstances and the effluxion of time make it necessary to continue to engage with the other contracting party in order to preserve the viability of the contract for both parties.³² Thus a spirit of trust and co-operation is necessary to facilitate contract performance.³³ This is relationship dependent: while the black-letter law of doctrinal contract may not be sufficiently developed to take account of this relational law of contracting, it nevertheless is a vital part of the factual matrix of the

²⁷ For legal scholarship on networks, see the essays collected in Marc Amstutz & Gunther Teubner (eds) *Networks: Legal Issues of Multilateral Co-operation* (2009).

²⁸ *Supra* note 6. See further on umbrella agreements: Stefanos Mouzas & Michael Furmston ‘From contract to umbrella agreement’ (2008) 67 *Cambridge LJ* 37.

²⁹ Compare the arguments of Jay Feinman ‘Relational contract theory in context’ (2000) 94 *Northwestern University LR* 737 at 739–40 and Ewan McKendrick ‘The regulation of long-term contracts in English law’ in Jack Beatson & Daniel Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 305.

³⁰ This is discussed by Macneil 1974 *Southern California LR* op cit note 20 at 720–25.

³¹ See the list of statutes in note 132 below.

³² The question of how to deal with changes in circumstances over time is discussed from an English perspective in McKendrick op cit note 29.

³³ See the discussion in Simon Deakin, Christel Lane & Frank Wilkinson ‘Contract law, trust relations, and incentives for co-operation: A comparative study’ in Simon Deakin & Jonathan Michie (eds) *Contracts, Co-operation, and Competition* (1997) 105.

contract.³⁴ In order to facilitate the ongoing contractual relationship (so the argument goes), the doctrinal law should be flexible enough to allow the parties to structure their relations and to plan for the future.³⁵ This is why some relational scholars advocate for standards such as ‘good faith’ or ‘reasonable expectations’ to be used in resolving relational contract disputes.³⁶ This may be as an express or tacit term of the contract, or even a term implied by law.³⁷

(iii) *Contract behaviour versus contract law*

A final point to be aware of when approaching the relational contract literature, or even a superficial account of it (such as this one) is that there is a clear formal distinction between contract behaviour and contract law.³⁸ Contract behaviour is the field of socio-legal studies and is not necessarily concerned with doctrinal law.³⁹ Contract law is a more positivist study of what is the appropriate law to govern relational contracts and involves arguing for developments of the doctrinal law to take account of the findings of socio-legal studies. This article is of the latter variety. Use will be made of insights from relational studies to argue for adaptation of the doctrinal law, through the use of context and more flexible legal standards.

(b) *Context and its uses*

Since this article aims at developing contract doctrine, rather than discussing legal theory or business practices, this discussion of relational contracts will

³⁴ Compare the discussion of the role of black-letter law in relational contracts in Lisa Bernstein ‘Merchant law in a merchant court: Rethinking the Code’s search for immanent business norms’ (1995–1996) 144 *University of Pennsylvania LR* 1765. For a defence of black-letter law in the face of relational theory, see Richard Austin-Baker ‘A relational law of contract?’ (2004) 20 *J of Contract Law* 125.

³⁵ This is a key argument explored in Mitchell op cit note 16. McKendrick op cit note 29 at 332 argues that this problem is best addressed through contract drafting (by the use of force majeure or hardship clauses for example) or by consumer legislation.

³⁶ See for example Catherine Mitchell ‘Interpreting commercial contracts: The policing role of context in English law’ in DiMatteo & Hogg (eds) op cit note 11 at 231 (arguing for contextual interpretation to incorporate contract policing standards); John Wightman ‘Good faith and pluralism in the law of contract’ in Brownsword, Hird & Howells (eds) op cit note 12 at 41 (defending the important distinction between commercial and consumer contracts).

³⁷ This description draws on the English common law of contracting. In South Africa, there could potentially even be an enforceable duty of good faith as a generally applicable rule of contract law, given our Roman-Dutch basis of contracting. This does not appear to be the position at present, but the question of a duty of good faith in contract law has been raised by the Constitutional Court: see the cases cited above at note 12.

³⁸ This point is made forcefully by Austen-Baker op cit note 34 at 125–6 and underlies the discussion in David Campbell’s introduction in Campbell (ed) op cit note 1 and Mitchell op cit note 16.

³⁹ The relevance of this distinction can be seen from the impact of Macaulay’s socio-legal research in fields outside of law. See for a brief account the preface to Braucher, Kidwell & Whitford op cit note 1 at vii.

be grounded squarely on existing approaches to taking account of the surrounding factual matrix. In South African (and English) law this is usually discussed under the debate about the extent to which ‘context’ can be used in contractual disputes, particularly during the construction of the contract phase.⁴⁰ The focus will be on contractual interpretation, with a residual focus on the use of standards such as good faith and reasonable expectations in this phase of construction of the contract.

(i) *Literalism versus contextualism*

The modern South African case law on contractual (as well as statutory) interpretation evidences a clear shift from literalism to contextualism.⁴¹ Literalism is often viewed in South Africa as an evil, to be associated with our formalist past.⁴² Of course, formalism has been shown to be an approach not sufficiently nuanced enough to deal with a given dispute and has led to injustices, particularly in the field of statutory interpretation.⁴³ In contractual interpretation there are still many proponents of literal interpretation, who argue that the ‘four corners’ approach leads to contractual certainty, which is good for ex ante planning, insurance of risks, and hence commerce in general.⁴⁴ These themes will be developed below.

In South Africa, a contextual approach to contractual interpretation now has the stamp of approval of our highest courts, so there is no need for this article to argue further for the merits of this approach; but this issue will be touched on below in part IV.⁴⁵ Suffice it to say that in the South African contractual setting, ‘context’ would include the rest of the contract, background and surrounding circumstances to the transaction, as well as of course the Constitution and the Bill of Rights.⁴⁶ This would be tempered, however,

⁴⁰ On the use of context in contractual interpretation in South Africa see Malcolm Wallis ‘What’s in a word? Interpretation through the eyes of ordinary readers’ (2010) 127 *SALJ* 673. For a UK perspective, see Ewan McKendrick *Contract Law: Text, Cases, and Materials* 6 ed (2014) 366–84.

⁴¹ See the cases cited above at note 8.

⁴² Compare (from a statutory interpretation perspective) Lourens du Plessis *Re-interpretation of Statutes* (2002) ‘Prolegomenon’ vii–xviii; Christo Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 12–14; G E Devenish *Interpretation of Statutes* (1992) 26–33 and 290–1. Compare the negative sentiments about the literal interpretation of contracts in Wallis op cit note 40 at 677–8.

⁴³ The classic example of this is *S v Kola* 1966 (4) SA 322 (A). Compare the use of formalism by the majority in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, however, for a contrary result.

⁴⁴ An interesting book which develops this type of argument is Rob Merkin & Jenny Steele *Insurance and the Law of Obligations* (2013) ch 7, particularly at 168–70. For a convincing defence of formalism in contract law, see Jonathan Morgan *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (2013).

⁴⁵ See the cases cited in note 8 above.

⁴⁶ This statement of the law is derived from *Natal Joint Municipal Pension Fund* supra note 8 paras 24–6. The Bill of Rights is not mentioned there, but given the supremacy clause (s 2 of the Final Constitution) this is definitely a contextual factor to bear in mind in an appropriate case. See generally Wallis op cit note 40.

by the parol evidence rule and the rule prohibiting the admission of evidence of prior contractual negotiations;⁴⁷ as well as express clauses stating that the written contract constitutes the ‘entire agreement’, or a ‘no representations’ clause.

(ii) *Subjective versus objective approaches to contract*

A related discussion to the role of context is the proper theoretical approach to take to contract interpretation. Is the law concerned with the inner motives and subjective intentions of a contracting party (as per the will theory), or his or her outwardly professed intention (as per the declaration and reliance theories)?⁴⁸ English law of course is famous for its objective approach to contract formation and interpretation.⁴⁹ Indeed, the ‘reliance theory’ as expounded in *Smith v Hughes*⁵⁰ is a commonly referenced English export often discussed in the South African case law and literature on contract.⁵¹ In South Africa, the continental ‘will theory’ is part of our Roman-Dutch heritage, but has been tempered by the influence of English law in this country, as well as the decline of the ‘will theory’ world-wide.⁵² The academic discourse on mistake in contract is an informative starting point for researching these topics in South Africa.⁵³

In the field of legal interpretation, the prevailing view in this country seems to be that contracts and statutes are to be interpreted objectively.⁵⁴ This is also the position in English law.⁵⁵ Essentially this means that rather than

⁴⁷ *Van Aardt v Galway* 2012 (2) SA 312 (SCA) para 9 (per Wallis JA). For the UK view, see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 paras 28–47, per Hoffmann LJ.

⁴⁸ See (for example): Chris-James Pretorius ‘The basis of contractual liability in South African law’ (2004) 67 *THRHR* 179, 383 and 549.

⁴⁹ See for textbook authority Edwin Peel *Treitel — The Law of Contract* 14 ed (2015) at 1-002 and 6-009; McKendrick op cit note 40 at 19–42 and 375.

⁵⁰ (1871) LR 6 QB 597 (CA).

⁵¹ See *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239H–I; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para 17; Dale Hutchison ‘Contract formation’ in Zimmermann & Visser (eds) op cit note 5 at 187–93; Pretorius op cit note 48 at 188–92.

⁵² Dale Hutchison op cit note 51 (1996) 180–93. For a classic account of the decline of the will theory and classical contract law from a more international perspective, see P S Atiyah *The Rise and Fall of Freedom of Contract* (1979), especially ch 22. For a US perspective, see Grant Gilmore *The Death of Contract* (1974).

⁵³ See for example Pretorius op cit note 48 and Hutchison op cit note 51.

⁵⁴ *Natal Joint Municipal Pension Fund* supra note 8 para 18 (discussing both contracts and statutes). For an approach which makes room for the subjective influence of context (including the intentions of the parties) on the construction of the contract, see the unanimous judgment of Lewis JA in *Novartis* supra note 8 paras 27–31. In her personal capacity, Lewis has argued that South African law tempers the objective approach to interpretation received from English law with a measure of (Roman-Dutch) subjectivity, introduced by means of consideration of the context of a contract. See Carole Lewis ‘Interpretation of contracts’ in Zimmermann & Visser (eds) op cit note 5 at 195.

⁵⁵ See McKendrick op cit note 40 at 366–84.

consider the subjective (and possibly never expressed) intentions and motives of a party, the law should consider the actual text used to set out the contractual terms, as it would be understood by the reasonable reader of that text, with all the contextual knowledge which the parties had at the time of the transaction.⁵⁶ This, of course, is not a purely objective approach, and has been labelled ‘subjective objectivity’ by some commentators.⁵⁷ When combined with a resort to the ‘commercial common sense’ rule,⁵⁸ I believe that objective interpretation is capable of dealing with the nuances of relational theory, since there is still scope for relational norms to influence interpretation, without resort to subjective intention. Whether a standard such as commercial common sense should include further aspects of honesty, fair dealing, reasonable expectations, or even good faith, is a factor which will be explored below with regard to the English literature.

(iii) *Substance and form*

The overall concern of modern constitutional contract law in South Africa appears (in the views of some) to be a search for social justice, and possibly even fairness *inter partes*.⁵⁹ The latter is a much debated point in the academic literature. Should the law have regard to the underlying substance of a transaction and use broad standards to achieve fairness on a case-by-case basis, or are contractual certainty and *ex ante* planning more important, so that clear rules need to be set out by the courts?⁶⁰ This is an ongoing dispute, not only in South Africa, but also in the world literature on contract.⁶¹ Relational theorists (as stated above) typically argue for flexible standards to be used in contract adjudication, whether as generally applicable principles of

⁵⁶ This is the first rule of interpretation stated by Lord Hoffman in *Investor's Compensation Scheme Ltd v West Bromwich Building Society* ICS [1998] 1 WLR 896 (HL) at 912. See text below in part III(b).

⁵⁷ See for example Hogg *op cit* note 11 at 408. Note the distinction here from Wallis *op cit* note 40 at 675–7, who describes this type of contextual approach as ‘objective’. The difference in terminology may lie in the different traditional starting points of English and South African law on contractual interpretation. For a South African example of a ‘subjective objectivity’-type approach, see the work of Lewis, discussed above at note 54. See further: Catherine Maxwell ‘Interpretation of contracts’ in Dale Hutchison & Chris-James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 271–3.

⁵⁸ See part III(b) below.

⁵⁹ Compare the views of Dennis M Davis & Karl Klare ‘Transformative constitutionalism and the common and customary law’ (2010) 26 *SAJHR* 403; Jaco Barnard-Naudé ‘Of Dorothy’s dog, ‘poststructural’ fairy tales ... and the real: Power, poverty and the general principles of the South African law of contract’ (2013) 29 *SAJHR* 469; Deeksha Bhana ‘The role of judicial method in contract revisited’ (2015) 132 *SALJ* 122.

⁶⁰ The classic source is Duncan Kennedy ‘Form and substance in private-law adjudication’ (1975–1976) 89 *Harvard LR* 1685. See also Alfred Cockrell ‘Substance and form in the South African law of contract’ (1992) 109 *SALJ* 40.

⁶¹ Compare for a trans-Atlantic perspective the debates about good faith in DiMatteo & Hogg (eds) *op cit* note 11 chs 10–11.

contract doctrine, or as a more context-specific backdrop to the construction of contractual obligations.⁶² This is possibly explained by the nature of long-term relational contracts, in which co-operation is necessary and terms are often deliberately left vague to facilitate future adaptation to changing circumstances.⁶³

(c) *The link to relational theory*

The link between discussions of ‘context’ and ‘relational theory’ appears to lie in the use of flexible standards derived from the parties’ own dealings and environment to facilitate the use of relational norms in contract adjudication and dispute resolution generally. Relational theory does not require fairness *inter partes* — instead what is required is that business norms of a particular contracting community are preserved.⁶⁴ In other words, contextual concepts such as trade customs and industry norms should play a key role. It should be stressed that some relational-contract scholars are from the law-and-economics movement and hence have a more market-driven focus, based on economic efficiency.⁶⁵ Judges in both the UK and South Africa have called for commercial contract adjudication to take account of commercial practices.⁶⁶ There is scope for this type of argument within the relational contract fold. Increased contextual sensitivity, particularly in long-term relational contracts, can achieve this end, while at the same time promoting norms such as reciprocity and good faith.⁶⁷ This increased sensitivity has been achieved in

⁶² See Roger Brownsword ‘After *Investor’s*: Interpretation, expectation and the implicit dimension of the “new contextualism”’ in David Campbell, Hugh Collins & John Wightman (eds) *Implicit Dimensions: Discrete, Relational and Network Contracts* (2003) 103; John Wightman ‘Good faith and pluralism in the law of contract’ in Brownsword, Hird & Howells (eds) *op cit* note 12 at 41; Campbell *op cit* note 11.

⁶³ Compare the facts of the case of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) (contract drafted in broad terms by the parties themselves without legal help); the standard ‘duty to negotiate in good faith clause’, complete with deadlock-breaking arbitration provision, as discussed in *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); and hardship clauses, commonly used in drafting long-term contracts.

⁶⁴ Brownsword *op cit* note 62; Campbell et al *op cit* note 62; Wightman *op cit* note 62.

⁶⁵ The differences between ‘law and society’ and ‘law and economics’ scholars of relational contract theory are explored in detail in Robert E Scott ‘The promise and peril of relational contract theory’ in Braucher, Kidwell & Whitford *op cit* note 1 at 105.

⁶⁶ In South Africa, see F D J Brand ‘The role of good faith, equity and fairness in the South African law of contract: The influence of common law and the Constitution’ (2008) 126 *SALJ* 77; Carole Lewis ‘The uneven journey to uncertainty in contract’ 2013 (76) *THRHR* 80; Malcolm Wallis ‘Commercial certainty and constitutionalism: Are they compatible?’ (2016) 133 *SALJ* 545. In the UK, see Lord Devlin ‘The relation between commercial law and commercial practice’ (1951) 14 *MLR* 249; Lord Goff ‘Commercial contracts and the commercial court’ [1984] *Lloyd’s Maritime & Commercial LQ* 382; Lord Steyn ‘Contract law: Fulfilling the reasonable expectations of honest men’ (1997) 113 *LQR* 433.

⁶⁷ Compare the argument of Mitchell *op cit* notes 16 and 36.

the UK through adjustment of the theoretical approach to contractual interpretation.⁶⁸ This argument will now be illustrated with a brief account of the shifting approach to contractual interpretation in the UK and the potential of this approach to facilitate relational contracting.

III THE RISE OF CONTEXTUALISM IN THE UNITED KINGDOM

(a) *Relevance to South Africa?*

For historical reasons, English contract law has been influential in South Africa, but sound practical reasons also speak to the value in comparative study of English contract law. Such reasons would include the extent of commercial activity and resultant contract adjudication within the English jurisdiction; the reputation of English contract law for certainty; the common choice of English law as a governing regime to international contracts; and the quality of the English legal academic discourse. Finally, for someone interested in ‘fairness’ in contract, there is an extensive literature on standards such as good faith and reasonableness in the UK, given new impetus by recent case-law developments.

(b) *The construction of contracts*

The UK is of course well known for its tradition of positivism and a doctrinal approach to law.⁶⁹ Contract formation and interpretation is viewed as being objective in English law and there is an established hostility to generally applicable standards such as good faith in the commercial context.⁷⁰ Nevertheless, the recent case law in this jurisdiction, particularly following the judgments of Lord Hoffmann in the Judicial Committee of the House of Lords (the Supreme Court since October 2009) has shown a growing tendency to concern itself with the context of a contractual transaction. The starting point for a discussion of this topic must be Lord Hoffmann’s restatement of the rules of interpretation in *Investor’s Compensation Scheme Ltd v West Bromwich Building Society* (only the first three are reproduced below):

- ‘1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

⁶⁸ Ibid. For negative views on this development, see: Hogg op cit note 11.

⁶⁹ Compare H L A Hart *The Concept of Law* (1961) for a famous description of a nuanced version of (British) positivism. Compare also the comparative study of P S Atiyah & Robert S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987).

⁷⁰ See the detailed account in McKendrick op cit note 40 at 366–84. For a comparative study of good faith in English law, see Simon Whittaker & Reinhard Zimmermann, ‘Good faith in European contract law: Surveying the legal landscape’ in Reinhard Zimmermann & Simon Whittaker (eds) *Good Faith in European Contract Law* (2000) 7.

2. The background was famously referred to by Lord Wilberforce as the “matrix of fact”. ... Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
3. The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent.⁷¹

The reader will immediately note that Lord Hoffmann’s rule one introduces a measure of subjectivity into the interpretation inquiry by the linking of context to the knowledge of the parties to the contract. Commentators have described this approach, as I have already indicated, as ‘subjective objectivity’, since the reader is placed within a particular contextual point of view, rather than focusing merely on semantics.⁷² Although Lord Hoffmann was careful to defend his restatement as being clearly grounded in existing authority, the shift in emphasis was unsettling to some who were worried about the open-endedness of what could constitute the ‘factual matrix’⁷³ and the potential increase in litigation costs resulting from parties leading greater amounts of evidence.⁷⁴ Lord Hoffmann’s use of context in the construction of contracts was firmly entrenched and clarified in following decisions, however.⁷⁵ Indeed, this reformulation was extended to the implication of terms (to flow from a construction of the contract as a whole)⁷⁶ and remoteness (does an interpretation of a contract as a whole in its commercial setting indicate a tacit assumption of risk).⁷⁷ Lord Hoffmann also defended his views in his own personal writing.⁷⁸ Lord Hoffmann retired from the bench in 2009, leaving his legacy of contextualism to be developed or distinguished by later Supreme Court judges.

A further development worth mentioning in the context of construction of the agreements is the shift towards purposive construction, particularly under the banner of achieving ‘commercial common sense’.⁷⁹ This interpre-

⁷¹ [1998] 1 WLR 896 (HL) at 912–13.

⁷² Hogg op cit note 11 at 408; Mitchell op cit note 36 at 233.

⁷³ Lord Hoffmann late clarified the meaning of factual matrix as being limited to ‘anything which a reasonable man would have regarded as relevant’ in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 para 39.

⁷⁴ Lord Steyn ‘The intractable problem of the interpretation of legal texts’ (2003) 25 *Sydney LR* 5 at 8–10; Staughton op cit note 11 at 307.

⁷⁵ See the judgments of Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali* supra note 73 and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

⁷⁶ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 para 16 (per Lord Hoffmann).

⁷⁷ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 para 11 (per Lord Hoffmann).

⁷⁸ See Lord Hoffmann ‘The intolerable wrestle with words and meanings’ (1997) 114 *SALJ* 656. See also Lord Steyn op cit note 74.

⁷⁹ See e.g. *Lloyds TSB Foundation for Scotland v Lloyd’s Banking Group plc* [2013] UKSC 3 para 21 (per Lord Mance). See too McKendrick op cit note 40 at 381.

tative standard appears to have evolved contemporaneously with Lord Hoffmann's restatement, and to form part of a new approach to interpretation.⁸⁰ The role of 'business common sense' was squarely raised in the unanimous Supreme Court decision in *Rainy Sky v Kookmin Bank*, where Lord Clarke stated: 'If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.'⁸¹

If, under English law, contract interpretation is to be contextual and purposive, with a preference being given to a commercially sensible construction, there is significant scope for judicial intervention in deciding contractual disputes. Some questioned whether this was an appropriate approach to commercial contracts. Hogg has asked whether a party should be rescued from her bad bargain ('commercially unsensible') by the imposition of a new commercially sensible bargain by the judiciary.⁸² Some have questioned whether judges, usually drawn from the ranks of advocates, have the experience of contract drafting and of business to determine what prevailing commercial practices are or even should be.⁸³

Others have been more positive about the potential contract-policing role which the 'commercial common sense' rule can play. Mitchell argues that the greater element of fact sensitivity in the new approach avoids the tendency to obscure power and information asymmetries, which may result from literalism's focus on semantics.⁸⁴ This new approach, she argues, indicates a preference for presenting this process as a choice between interpretative outcomes, rather than as an imposition of an external standard.⁸⁵ Hence contextualism is capable of providing a vehicle for greater fairness in contract adjudication and perhaps even playing a contract-policing role.⁸⁶ Similar sentiments had earlier been expressed by Brownsword, who argued that context should be used to allow for recognition to be given to a particular contracting culture: is it more individualist, or more co-operative in nature?⁸⁷ He feels that such an inquiry may render a more helpful result than the use of an externally imposed standard, such as good faith or fair dealing.⁸⁸

The latest Supreme Court judgment on contractual interpretation seems to present a shift away from a contract-policing 'commercial common sense'

⁸⁰ Compare *Lord Napier and Ettrick v RF Kershaw Ltd* [1999] 1 WLR 756 at 763 (per Lord Steyn).

⁸¹ [2011] UKSC 50 para 21.

⁸² Hogg op cit note 11 at 419–20.

⁸³ *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] CSOH 208 para 24 (per Lord Reed); *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43 para 10 (per Lord Drummond-Young, disagreeing with this view).

⁸⁴ Mitchell op cit note 36 at 234.

⁸⁵ *Ibid* at 231–2.

⁸⁶ *Ibid* at 235.

⁸⁷ Brownsword op cit note 62 at 123–7.

⁸⁸ *Ibid* at 123.

rule back toward literalism. In *Arnold v Britton*⁸⁹ the Supreme Court considered the validity of a contractual formula intended to effect annual inflationary increases of a service charge levied against individual holiday properties in a caravan park under separate lease agreements. These were long-term relational contracts, with some of the leases dating back to the late 1970s. The inflation rate of that period had been running high, sometimes above 10 per cent per annum, and the formulas were tailored with this market backdrop in mind to be a flat rate of a 10 per cent increase per annum, compounded annually. At the date of the hearing, the UK's inflation was down to a negligible rate and hence the service charges were completely out of kilter with market rates. The Supreme Court upheld this pricing mechanism, however, with only Lord Carnwath dissenting.⁹⁰

In the main judgment, Lord Neuberger repeated Lord Hoffmann's rule one of interpretation, with regard to interpretation being from the point of view of a reasonable person with all the background knowledge of the contracting parties, and also stressed the role of the documentary, factual and commercial context.⁹¹ He went on, however, to emphasise seven factors, first and foremost of which was that 'commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed'.⁹² He emphasised in this regard the fact that the parties to a contract have control over the language which they use.⁹³ Another point of interest for present purposes was the fourth point mentioned, namely that commercial common sense should not be used to reject a provision because it seemed imprudent when viewed with the advantage of hindsight.⁹⁴ The net result was that the offending portions of the contract were upheld, despite the manifest hardship caused to the lessees.⁹⁵

Thus the contextual approach seems to be firmly entrenched, although the commercial-common-sense rule and the use of this device to police contract terms may have a more uncertain future. It would also seem that there is a re-emphasis taking place on the plain meaning of the contract itself.⁹⁶ Indeed a contextual factor to consider in interpretation may well be the fact that detailed planning, complete with legal advice, has gone into the drafting of a contract, as was decisive for the Court of Appeal in *BMA Special Opportunity*

⁸⁹ [2015] UKSC 36.

⁹⁰ *Ibid* para 60 (per Lord Neuberger, Lord Sumption and Lord Hughes concurring); para 79 (per Lord Hodge).

⁹¹ *Ibid* para 15.

⁹² *Ibid* para 17.

⁹³ *Ibid*.

⁹⁴ *Ibid* para 20.

⁹⁵ See *ibid* para 60 (per Lord Neuberger, Lord Sumption and Lord Hughes concurring); para 79 (per Lord Hodge).

⁹⁶ It should be noted that a similar shift away from the Lord Hoffmann approach can be seen with regard to the test for tacit terms in *Marks & Spencer plc v BNP Paribas Securities Services Trust Company Ltd* [2015] UKSC 72.

Hub Fund Ltd v African Minerals Finance Ltd.⁹⁷ This in itself, may be a sound contextual reason for preferring a more literal interpretation of a contractual provision. The fact remains, however, that despite the undermining of the potentially equitable device of the commercial common sense test in *Arnold v Britton*, there is a growing movement in support of protecting reasonable expectations, or possibly even good faith, in English commercial contract law, particularly in the setting of long-term relational contracts. The question whether such a duty exists and its relation (in English law) to the issue of the construction of a contract will be considered next.

(c) *Reasonable expectations/good faith*

Much ink has been spilt over the perceived absence of a governing principle of good faith in English law. The better view would appear to be that while there is no over-arching external standard as there is in, say, German law, there are piecemeal solutions to particular problems of bad faith by which English law ensures that contractual relations are conducted in an acceptable manner.⁹⁸ Notions of an implied term of good faith or objective reasonableness in commercial contracts, which would be the English-law approach to establishing a default rule of contracting, have not traditionally been well received in the English courts.⁹⁹ A notable recent departure from this approach was in the case of *Yam Seng Pte Ltd v International Trade Corporation Ltd*, where a high court judge, Leggatt J, found (obiter) that there was an implied duty of good faith in English commercial contracts.¹⁰⁰ One of the key features of this case was the relational nature of the contract in question: a long-term distributorship agreement, giving Yam Seng, a company based in Singapore, the rights to distribute in parts of Asia fragrances and toiletries produced by a British company. The relationship in question was a personal connection between just two men, who represented the interests of their respective companies and met in person several times and corresponded often.¹⁰¹ The agreement itself was not drafted by lawyers, but by the parties themselves, with only vague general terms.¹⁰² The relationship broke down when Yam Seng's representative purported to terminate the relationship, alleging bad faith conduct by the representative of ITC and breach of the

⁹⁷ [2013] EWCA Civ 416 paras 24–5.

⁹⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 WLR 615 (CA) at 621 (per Bingham LJ). See further Whittaker & Zimmermann op cit note 70.

⁹⁹ In the negotiation phase, see *Walford v Miles* [1992] 2 AC 128 (HL) at 138 (per Lord Ackner). In the performance stage, see *Abu Dhabi National Tanker Company v Product Star Shipping Limited* [1993] 1 Lloyd's LR 39 at 404; *Ludgate Insurance Company Limited v Citibank NA* [1998] Lloyd's Rep IR 221 paras 35–6; *Paragon Finance PLC v Nash* [2001] EWCA Civ 1466 paras 37–42; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047 paras 67–76; *Socimer International Bank Limited (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 para 66.

¹⁰⁰ *Yam Seng* supra note 63 paras 119–54.

¹⁰¹ *Ibid* paras 5–8.

¹⁰² *Ibid* para 26.

contract.¹⁰³ Leggatt J found that ITC was indeed in breach and that it had also made misrepresentations to Yam Seng.¹⁰⁴

The interesting part of the judgment is the discussion of an implied duty of good faith, however. Leggatt J began by stating that English law was not yet in a position to recognise a term of good faith implied by law in all commercial contracts.¹⁰⁵ He did, however, feel that such a term might be implied on the facts.¹⁰⁶ He noted the influence of the doctrine of good faith in most civil law systems and in the various attempts to codify a common European law of contract.¹⁰⁷ He also noted the growing impetus in this direction in Canada, Australia, New Zealand and Scotland.¹⁰⁸ Leggatt J noted the existence of accepted contractual norms of behaviour, such as honesty and 'other standards of commercial dealing', which should not be 'improper', 'commercially unacceptable' or 'unconscionable'.¹⁰⁹ A further issue was 'fidelity to the bargain', particularly in a situation where a contract could not detail every possible eventuality: a purposive construction could ensure that fidelity was maintained.¹¹⁰ Furthermore (in the same vein) the requirements of good faith were context sensitive, although the test for what good faith entailed was objective and depended on a standard of commercial acceptability to reasonable and honest people.¹¹¹ Leggatt J described the contract before him as 'relational', which would necessitate 'a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and could involve expectations of loyalty which [were] not legislated for in the express terms of the contract, but [were] implicit in the parties understanding and necessary to give business efficacy to the arrangements'.¹¹² This conception of good faith, Leggatt J argued, was not novel or foreign to English law, but since he had found that good faith was context sensitive, the law was best developed on a case-by-case approach.¹¹³

The impact of this decision in the case law and literature continues to be felt. The Court of Appeal was quick to distance itself from this approach in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*,¹¹⁴ which suggests that Leggatt J's argument may not take hold immediately, if at all, in the highest courts of English law. There are recent high court decisions which have quoted Leggatt J's dicta on good faith with approval, though,

¹⁰³ Ibid paras 74–83.

¹⁰⁴ Ibid para 230.

¹⁰⁵ Ibid para 131.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid para 124.

¹⁰⁸ Ibid paras 126–30.

¹⁰⁹ Ibid paras 135–8.

¹¹⁰ Ibid para 139.

¹¹¹ Ibid paras 141–4.

¹¹² Ibid para 142.

¹¹³ Ibid para 145.

¹¹⁴ [2013] EWCA Civ 200 para 105.

particularly with regard to long-term relational contract disputes.¹¹⁵ To this author, writing from a comparative perspective, the usefulness of Leggatt J's approach is (with respect) the detailed discussion of what an implied duty of good faith might entail in a commercial context. This would certainly include honesty, but may also extend to further duties of commercial fair dealing. Also important for present purposes is that the content of a duty of good faith is context dependent, which supports nicely the argument advanced herein that commercial context should play a role in the adjudication of contractual disputes, especially those of a relational nature.

The academic reception of the *Yam Seng* judgment appears mixed.¹¹⁶ Whittaker reiterated his support for the proposition of Lord Steyn that contract law should give effect to the reasonable expectations of honest people,¹¹⁷ but felt that an 'open-textured standard' to regulate conduct would lead to uncertainty.¹¹⁸ He also argued that if *Yam Seng* is interpreted as allowing the implication of a duty of good faith, this was acceptable, but the imposition of a generally applicable external standard was not.¹¹⁹ Campbell, writing from a relational contract theory perspective, was open to the *Yam Seng* judgment, provided the duty of good faith rested on the objective implication of a term based on reasonable commercial expectations, rather than an external standard.¹²⁰ This duty would then be 'endogenously' determined from an objective, contextual reading of the contract.¹²¹

The Lord Steyn argument alluded to by Campbell above and indeed cited by Leggatt J in *Yam Seng* presents the concept of good faith in contract in a manner which is perhaps more palatable to the average English contract lawyer.¹²² This argument rests on an alternative concept of the 'reasonable expectations of honest men', which are protected in English contract law through the use of doctrinal law, rather than a general resort to good faith itself, and includes inter alia the proper approach to the interpretation of written contracts.¹²³ Bradgate, in exploring the link between commercial law and commercial practice, has written in defence of reasonable expecta-

¹¹⁵ See eg *Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd* [2014] EWHC 2104 (Comm) para 51; *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) paras 174–5.

¹¹⁶ See for a general overview of the case and its subsequent impact Ewan McKendrick 'Good faith in the performance of a contract in English law' in DiMatteo & Hogg (eds) op cit note 11 at 196.

¹¹⁷ Simon Whittaker 'Good faith, implied terms and commercial contracts' (2013) 129 *LQR* 463 at 463.

¹¹⁸ *Ibid* at 468.

¹¹⁹ *Ibid* at 469.

¹²⁰ Campbell et al op cit note 62 at 488.

¹²¹ *Ibid*.

¹²² Lord Steyn op cit note 66, cited in *Yam Seng* supra note 63 para 145. See further, for an example of Lord Steyn's use of reasonable expectations in his judicial capacity, *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's LR 194 at 201 and 204.

¹²³ Steyn op cit note 122 at 439–41.

tions as congruent with an objective approach to contracting and contract interpretation, as well as being sensitive to existing business practices.¹²⁴ Bradgate argues that by protecting ‘reasonable expectations’, the law is made more flexible and able to reflect the norms of the business community.¹²⁵ This reflects again a contextual approach to the imposition of normative standards in contracting, albeit by a piecemeal, rather than general approach. A context-sensitive approach to normative adjudication was also suggested by Wightman, who argued (under the banner of ‘good faith’) for an approach which took into account the norms and customs of the contracting community in question, rather than blunt generally imposed standards (which were better suited to consumer transactions).¹²⁶

Hence, the typical view of the English commercial contract discourse appears to be that there is no general standard of good faith in the sense of an externally imposed duty of objective reasonableness, but more limited norms are imposed in a context-sensitive manner through the technical doctrines of contract law. This lends credence to the arguments of relational scholars such as Mitchell that the use of context (and related concepts such as ‘business common sense’) has an important role to play in developing relational norms such as co-operation in existing contract doctrine.¹²⁷ Rather than applying flexible standards, English courts appear to resort to context-sensitive answers at the stage of construction of the agreement.

IV CONTEXT AND THE DEVELOPMENT OF THE SOUTH AFRICAN COMMON LAW OF CONTRACT

(a) *Contextualism in post-constitutional contract law*

(i) *The final Constitution, 1996*

As briefly alluded to above, a major goal of the South African constitutional enterprise is the transformation of both law and society.¹²⁸ Part of this process is the furthering of social-justice aims. Section 2 of the final Constitution declares this legal text to be the supreme law of South Africa, which the Constitutional Court has unequivocally interpreted to mean that all law is subject to the Constitution — there is no separate, sacrosanct sphere of (for

¹²⁴ Robert Bradgate ‘Contracts, contract law and reasonable expectations’ in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (2003) 651 at 666–74.

¹²⁵ *Ibid* at 687–90.

¹²⁶ John Wightman ‘Good faith and pluralism in the law of contract’ in Brown-sword, Hird & Howells (eds) *op cit* note 12 at 42–46.

¹²⁷ Mitchell *op cit* note 16 at 243–4.

¹²⁸ This aspect of transformative constitutionalism is much discussed in the literature on the constitutional development of private law. See by way of introduction Pius Langa ‘Transformative constitutionalism’ (2006) 16 *Stellenbosch LR* 351; Dik-gang Moseneke ‘Transformative constitutionalism: Its implications for the law of contract’ (2009) 20 *Stellenbosch LR* 3; Davis & Klare *op cit* note 59; Karl Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146.

instance) commercial contract law.¹²⁹ Section 39(2) of the final Constitution further declares that the common law should be developed in accordance with the 'spirit, purport and objects' of the Bill of Rights.

As the subsequent case law of the Constitutional Court has made clear, this means that contract law, even commercial contract law, must be sensitive to the context of the South African situation, with its attendant socio-economic challenges.¹³⁰ Through the medium of indirect development of the common law, the Constitutional Court has attempted to bring contract law into line with its own view of contractual justice.¹³¹ This development is also mirrored in a wide array of statutes aiming to ameliorate specific aspects of the law of contract, particularly in sectors where there is inequality of bargaining power, such as employment law, consumer law and the law of residential leases.¹³² The legislative and judicial context in which South African commercial contract law operates has thus changed dramatically in its post-apartheid setting.

(ii) *Academic discourse*

In the interests of brevity, this article will consider the positions of just two scholars who have written on South African constitutional/contract law with reference to the role of context. The first of these, Wallis, a justice of the Supreme Court of Appeal, has written several times in his personal capacity in defence of a more commercial perspective being brought to bear on the constitutional development of contract law, often at variance with views expressed by the Constitutional Court.¹³³ The second, Bhana, an academic at a South African university, has often written in favour of a stronger role for human rights considerations and greater constitutional development of the existing common law of contract, usually with the emphasis being placed on protecting the weaker party.¹³⁴ Without engaging with the merits of what is

¹²⁹ *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 44.

¹³⁰ See (for example) the passages cited above at note 8. See also the minority judgment dictum of Yacoob J in *Everfresh* supra note 12 para 23.

¹³¹ Authority for indirect horizontality in a contractual setting may be found in *Barkhuizen* supra note 9 paras 27–30. For the Constitutional Court developing the law of contract see, in addition to the cases in notes 8 and 10 supra, *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC); *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

¹³² Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; National Credit Act 34 of 2005; Consumer Protection Act 68 of 2008; Rental Housing Act 50 of 1999.

¹³³ See on interpretation Wallis op cit note 40. On constitutional/contract law, see Wallis op cit note 66; Malcolm Wallis 'The common law's Cool Ideas for dealing with Ms Hubbard' (2015) 132 *SALJ* 940.

¹³⁴ Deeksha Bhana & Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2006) 123 *SALJ* 865; Deeksha Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *SAJHR* 351; Deeksha Bhana 'The role of judicial method in contract revisited' (2015) 132 *SALJ* 122; Deeksha Bhana &

in both cases a detailed jurisprudential vision for the constitutional development of contract law, this article will attempt to reconcile a common element of both authors' writing, namely an argument for a greater resort to context.

Wallis has argued both in his personal and judicial capacities for an objective, contextual approach to the interpretation of commercial agreements, drawing extensively on the work of Lord Hoffmann.¹³⁵ For example, in his analysis of the *Everfresh* decision, Wallis brings his advocacy, judicial (and indeed personal) experience to bear on the dispute, highlighting the fact that many evictions simply involve the lessee playing for time.¹³⁶ This type of practical insight, difficult to incorporate into a decision based on a literal interpretation of a written contract, is a highly relevant contextual factor to be determined from the surrounding factual matrix and indeed from 'commercial common sense'. It is hard to dispute the contention that commercial law should reflect commercial practice and business norms.

Bhana's arguments highlight the very real plight of a large proportion of the South African population, who lack the education, financial literacy, or resources to compete on a level playing field with better-resourced commercial contracting parties. This issue of inequality of bargaining power is an extremely important one and goes to the heart of debates around improperly obtained consensus, mistake in contract formation, capacity to contract, and indeed the validity and enforceability of contract terms.¹³⁷ These too are contextual factors: indeed Bhana has explicitly called for greater subjective awareness in contract adjudication, demanding that courts inquire who the parties to a contract are and under what circumstances they contracted.¹³⁸ This is an argument for social justice in contract law, which is highly necessary in the post-apartheid contracting context.

The reconciliation which this article will offer between the schools of thought represented by Wallis and Bhana is that they are both concerned with incorporating a greater role for context in contract adjudication. Perhaps the distinction is that Bhana is more consumer focused and Wallis more commercially orientated. The argument to be advanced herein will focus on commercial, rather than consumer, disputes, which in the opinion of this author should be clearly distinguished from consumer-related transactions and treated with appropriate regard for their commercial context. This article will hence not offer insights on the proper approach to inequality of bargaining power. (Although this admittedly may be an issue in commercial transactions too, there is arguably less scope for abuse.) The problem to be

Anmari Meerkotter 'The impact of the Constitution on the common law of contract: *Botha v Rich NO (CC)*' (2015) 132 *SALJ* 494.

¹³⁵ For Wallis's personal writing, see Wallis op cit note 40 (on interpretation). For Wallis's SCA judgments on the proper approach to interpretation, see (inter alia): *Natal Joint Municipal Pension Fund* supra note 8; *Comwezi Security Services* [2014] ZASCA 22; *Bothma-Batho Transport* supra note 8.

¹³⁶ Wallis op cit note 66 at 557–61.

¹³⁷ Bhana 2015 *SALJ* op cit note 134 at 134–44.

¹³⁸ Bhana & Meerkotter op cit note 134 at 504–5.

addressed below and in part V which follows is how to create context-sensitive doctrinal law, capable of applying commercial practices in a commercial dispute resolution setting.

(b) *Relational contracts*

(i) *Doctrinal law*

Long-term relational contracts, where co-operation and trust are vital, are of course as prevalent in the South African case law as in the UK.¹³⁹ There are several doctrinal areas of relevance in disputes involving this type of contract, particularly: certainty and the validity of ‘agreements to agree’; interpretation of contracts; and how to deal with the problem of changed circumstances.

The validity of an ‘agreement to agree’ provision was squarely before the Constitutional Court in *Everfresh*,¹⁴⁰ which will be discussed in detail in part V. I have written previously on so-called ‘duty to negotiate in good faith’ clauses and whether or not these should be binding.¹⁴¹ The point for relational contracts is that it is difficult for parties to a long-term relationship fully to anticipate the future, necessitating a certain amount of vagueness in contract drafting to facilitate future negotiation. The law on this issue was previously settled by the SCA in *Southernport Developments*: to be enforceable, a duty to negotiate provision must have a deadlock-breaking mechanism, such as an arbitration clause.¹⁴² Absent this, such a provision may well be too vague to enforce and hence reflect merely an aspiration, rather than a binding provision.¹⁴³ This would appear to also be the law in the UK¹⁴⁴ and is arguably in line with ‘commercial common sense’, which would probably

¹³⁹ See by way of example *NBS Boland Bank v One Berg River Drive CC & others; Deeb & another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) (the power of a bank to adjust interest rates in a mortgagor/mortgagee relationship); *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) (‘SAFCOL’) (the power of supplier to adjust purchase price in a long-term supply contract); *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) (the power of a train company to terminate a contract granting a business owner permission to operate a shop on the train); *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) (the power of a bank to terminate a long-standing bank/customer relationship); *Silent Pond Investments CC v Woolworths (Pty) Ltd* 2011 (6) SA 343 (D) (the power of a franchisor to establish a rival outlet in close proximity to the franchisee’s business).

¹⁴⁰ *Supra* note 12.

¹⁴¹ Andrew Hutchison ‘Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith’ (2011) 128 *SALJ* 273. In retrospect, my contention at 294–5 that an agreement to agree provision which is not accompanied by an arbitration clause should be possible of specific performance through court-ordered appointment of an arbitrator is perhaps slightly over-stated and best read in the context of bad faith conduct by the party refusing to negotiate. As discussed below in part five with particular reference to the *Everfresh* case, this author is not of the opinion that Shoprite’s refusal to renew Everfresh’s lease was in bad faith.

¹⁴² *Southernport Developments* *supra* note 63 para 17.

¹⁴³ *Ibid* paras 15–16, citing the Australian case of *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1.

value the freedom not to contract¹⁴⁵ above the relationship-dependent notion of co-operation.

The correct approach to the interpretation of contracts in South Africa has gone through a period of fairly rapid development in recent times.¹⁴⁶ The Supreme Court of Appeal has come out strongly in favour of an objective, contextual, purposive approach.¹⁴⁷ This reflects the UK developments set out above. It also reflects a move away from literalism and formalist decision-making in post-apartheid South African legal interpretation, as can clearly be seen in the Constitutional Court's approach to the interpretation of statutes.¹⁴⁸ As to the role of standards such as commercial common sense, reasonable expectations, or good faith in contractual interpretation, these have often played a decisive role.¹⁴⁹ Perhaps the most memorable instance was the use of 'good faith' in interpreting the obligations of the parties in *SAFCOL v York Timbers*.¹⁵⁰ Here the SCA, despite taking a conservative stance on the role of good faith as not constituting an independently enforceable duty in contract law in one part of the judgment,¹⁵¹ nevertheless found York to be in breach of contract, due to its continued efforts to frustrate SAFCOL's exercise of its rights to adjust the terms of the contract.¹⁵² This case represents a clear use of good faith in contractual interpretation to address an issue of bad faith failure to co-operate under a long-term relational contract.¹⁵³

The appropriate way in which to address the problem of changed circumstances at common law has not yet been considered by the Constitutional Court.¹⁵⁴ Although the South African Law Commission proposed

¹⁴⁴ See *Walford v Miles* [1992] 2 AC 128 (HL) at 138 (per Lord Ackner). See, however, the obiter dicta of the Court of Appeal in *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 paras 115–21, to the effect that the question of enforceability of such a clause may depend on how it is drafted. For more detailed discussion of this question, see Michael Furmston & G J Tolhurst *Contract Formation: Law and Practice* (2010) ch 12.

¹⁴⁵ See Wendell H Holmes 'The freedom not to contract' (1985–1986) 60 *Tulane LR* 751.

¹⁴⁶ Compare the dicta of the unanimous SCA in *Comwezi* supra note 135 para 5 (plain meaning approach 'no longer appropriate'); *Bothma-Batho Transport* supra note 8 para 12 (old approach cited by counsel 'no longer consistent' with new approach).

¹⁴⁷ See the cases cited above at note 146.

¹⁴⁸ See the cases cited above at note 8.

¹⁴⁹ See Zimmermann op cit note 12 at 242–3.

¹⁵⁰ Supra note 139.

¹⁵¹ Ibid para 27.

¹⁵² Ibid paras 32–4.

¹⁵³ Compare the findings of Brand JA in paras 35–6.

¹⁵⁴ For South African academic discussion, see Andrew Hutchison 'The doctrine of frustration: A solution to the problem of changed circumstances in South African contract law?' (2010) 127 *SALJ* 84 and 'Gap filling to address changed circumstances in contract law — When it comes to losses and gains sharing is the fair solution' (2010) 21 *Stellenbosch LR* 414.

legislation on this issue as long ago as the 1990s,¹⁵⁵ this was never enacted and at present the South African law of contract knows no specific doctrine to alleviate hardship due to changed circumstances.¹⁵⁶ Existing doctrinal mechanisms such as interpretation (as per *SAFCOL* above); refusal to award specific performance (as per *Haynes v King William's Town Municipality*);¹⁵⁷ or supervening impossibility (for which the change of circumstances must be objective and absolute)¹⁵⁸ are not fully capable of addressing all forms of hardship.¹⁵⁹ A potential avenue of redress using a failed common supposition as to the future to render a contract void was cut short by the Supreme Court of Appeal in *Van Reenen Steel (Pty) Ltd v Smith NO*.¹⁶⁰ It is my hope that the future development of the South African law of contract will find a way to deal with this vital aspect of relational contracting.

(ii) *Relational contract theory*

Relational contract theory is not a particularly well-developed branch of South African contract scholarship, although there are traces of it in the literature.¹⁶¹ It has also had a certain impact in debates outside of contract law, such as the proper approach to traditional land ownership.¹⁶² I believe that this branch of legal theory has a lot to offer, particularly in the post-apartheid contract-law setting. Relational theory would lend support to the rise of flexible standards in the common law of contract, as appears to be heralded by several dicta of the Constitutional Court. The emphasis on contextual factors such as the identity and inter-dependence of contracting parties, as well as on customary commercial norms in a given business community, may provide the theoretical backbone for a more communitarian law of contract which still has commercial values and economic realism at its heart.

As has been illustrated above, there is support for this branch of legal theory even in the unlikely source of English case law and academic

¹⁵⁵ South African Law Commission (Project 47) *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (1998) 208–18. See clause 4 of the draft bill for the suggested provisions on hardship.

¹⁵⁶ Compare the discussion in R H Christie & G B Bradfield *Christie's The Law of Contract in South Africa* 7 ed (2016) at 547–9.

¹⁵⁷ 1951 (2) SA 371 (A) at 381B–E.

¹⁵⁸ See Christie & Bradfield op cit note 156 at 547; L F van Huyssteen, G F Lubbe & M F B Reinecke *Contract: General Principles* 5 ed (2016) 517ff.

¹⁵⁹ See Hutchison 2010 *Stellenbosch LR* op cit note 154 at 414 for discussion of the hardship problem and the deficiencies of the current South African approach.

¹⁶⁰ 2002 (4) SA 264 (SCA) para 8. The relevant case law and the concept of a supposition as to the future is discussed in Andrew Hutchison 'What's so wrong with *Williams v Evans*? An examination of the concept of the supposition in futuro' (2008) 125 *SALJ* 441.

¹⁶¹ See especially the work of Hawthorne, cited above in note 1.

¹⁶² See Aninka Claassens & Sindiso Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25 *SAJHR* 491. (This article draws on the relational theory scholarship of (the Canadian) Jennifer Nedelsky.)

literature.¹⁶³ The important, balancing point which comes out in the relational contract theory writing is that it is not an external normative standard of good faith which should be imposed, but an endogenous form of fair-dealing to be derived from an objective, contextual study of the parties' own interactions and immediate commercial backdrop.¹⁶⁴ An external standard may, however, be appropriate in a consumer setting, and indeed such a normative framework has been enacted through the mechanism of several statutes.¹⁶⁵ In the latter, commercial, setting it is the norms of the business community which should govern. Indeed, the words of one of relational theory's pioneering scholars, Ian Macneil, infused as they are with a healthy dose of economic realism, may suggest what relational theory is really about in a commercial setting:

“The word “solidarity” (or “trust”) is not inappropriate to describe this web of interdependence, externally reinforced as well as self-supporting, and expected future co-operation. The most important aspect of solidarity ... is the extent to which it produces similarity of selfish interests. ... [S]imilarity of interests may be produced by external forces such as sovereign law. But ... solidarity may and does arise internally in relations.”¹⁶⁶

Solidarity is a key theme of the Constitutional Court's jurisprudence on contract, most commonly expressed using the African term, 'ubuntu'.¹⁶⁷ Ubuntu, good faith and other standards expressing an aspirational code of conduct for contracting parties, were referred to in both judgments of the Constitutional Court in the *Everfresh* case in discussing the enforceability of an 'agreement to agree' provision.¹⁶⁸ The relevance of this particular decision, as one particular example from a growing line of constitutional/contract decisions from the Constitutional Court, was that it was a purely commercial dispute, with no proven inequality of bargaining power, and it involved a long-term relational contract, namely a commercial lease. This case will be briefly analysed below to illustrate the preceding discussion.

¹⁶³ See part III(c) above.

¹⁶⁴ This point is made forcefully in Campbell et al op cit note 62.

¹⁶⁵ See the statutes cited at note 132 above. See also the argument of Wightman op cit note 62 at 42–6.

¹⁶⁶ Ian Macneil 'Economic analysis of contractual relations: Its shortfalls and the need for a "rich classificatory apparatus"' (1981) 75 *Northwestern University LR* 1018 at 1034.

¹⁶⁷ See by way of example *Barkhuizen* supra note 9 para 51; *Everfresh* supra note 12 paras 24 and 72. For secondary sources, see generally Yvonne Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; T W Bennett 'Ubuntu: An African equity' in Frank Diedrich (ed) *Ubuntu, Good Faith & Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 3; Drucilla Cornell & Nyoko Muvangua *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012).

¹⁶⁸ *Everfresh* supra note 12 paras 24 (per Yacoob J) and 72 (per Moseneke DCJ).

V A RELATIONAL ANALYSIS OF *EVERFRESH**(a) Facts and proceedings*

This case concerned a commercial lease by the applicant, Everfresh, of premises in a shopping centre owned by the respondent, Shoprite. Shoprite was the successor in title to Everfresh's previous landlord and had taken over the lease. The dispute in this case concerned a clause permitting renewal of the lease, subject (inter alia) to agreement on an appropriate rental. Given the nature of the analysis to follow, I will reproduce the relevant parts of the clause in dispute:

'Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of four years and eleven months commencing on 1st April 2009, such renewal to be upon the same terms and conditions as in this Lease contained save that there shall be no further right of renewal, and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calendar months prior to the date of termination of this Lease. In the event of no such notice being received by the Lessor, or in the event of notice being duly received but the Parties failing to reach agreement in regard to the rentals for the renewal period at least three (3) calendar months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void.'¹⁶⁹

Within the time periods stated in this clause, Everfresh gave Shoprite notice of its intention to exercise its 'option' to renew the lease. Shoprite wrote back, claiming that the above clause did not give an enforceable right of renewal and that it refused to renew the lease since it wished to redevelop the shopping centre. Shoprite stated that it might reconsider its position following the refurbishment. This led to ejectment proceedings in the high court, where Shoprite was successful on the basis that the clause was too vague to be enforceable.¹⁷⁰ Further grounds for this decision were that there was no readily ascertainable external standard of good faith.¹⁷¹ Leave to appeal was refused by the high court and by the Supreme Court of Appeal.¹⁷²

In the Constitutional Court, Everfresh conceded that the high court had been correct on the common-law position, but argued that constitutional development of the common law was necessary.¹⁷³ Essentially, the argument was that it should be entitled to its right of renewal at a reasonable rental, since this was implied ex lege by clause 3.¹⁷⁴ In the alternative, Shoprite's

¹⁶⁹ This clause is reproduced from the Yacoob judgment in *Everfresh* supra note 12 para 3.

¹⁷⁰ *Ibid* paras 10–11.

¹⁷¹ *Ibid* para 11.

¹⁷² *Ibid* para 12.

¹⁷³ *Ibid* para 61 (per Moseneke DCJ).

¹⁷⁴ *Ibid*.

discretion whether to renew the lease had to be exercised reasonably ('arbitrium boni viri'), which obliged the landlord to negotiate reasonably.¹⁷⁵ In the further alternative, constitutional values required the recognition of a duty to negotiate in good faith on both parties.¹⁷⁶

For the majority (per Moseneke DCJ, six further justices concurring) this constitutional argument had been raised too late in proceedings.¹⁷⁷ Out of fairness to Shoprite and due to the importance of the issue at stake, which had now not been considered by the courts below, Everfresh's appeal had to fail.¹⁷⁸ In an obiter dictum, however, Moseneke DCJ did add:

'Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of Ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour.'¹⁷⁹

For the minority (per Yacoob J, three further justices concurring) the matter should have been referred back to the high court with the instruction to develop the common law. Yacoob J argued:

'A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a new constitutional contractual order.'¹⁸⁰

His suggested way of achieving this was to read the clause as obliging Shoprite to make at least one counter-offer.¹⁸¹

(b) Analysis

The Constitutional Court focused in both judgments on whether there was a duty to negotiate on a party to a preliminary 'agreement to agree' and, if so, whether this had to be done in good faith.¹⁸² In my analysis, I would like to highlight a few key issues.

First, this was a purely commercial dispute. Moseneke DCJ noted that both parties had been legally represented before and during litigation in all the courts.¹⁸³ There had been no claim by Everfresh that its legal representation had been inadequate or that it had been poorly advised.¹⁸⁴ There was hence no proven inequality of bargaining power; indeed the majority

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid paras 63–7.

¹⁷⁸ Ibid paras 78–80.

¹⁷⁹ Ibid para 72.

¹⁸⁰ Ibid para 36.

¹⁸¹ Ibid para 35.

¹⁸² Yacoob J notes in para 14 that the Constitutional Court had issued directions asking the parties for written argument on this point.

¹⁸³ Ibid para 66.

¹⁸⁴ Ibid.

judgment notes that Everfresh appears to have benefited by the lengthy delay of its eviction due to the appeal process.¹⁸⁵ Assuming that there is a standard of good faith applicable to the negotiation phase of contracting, the commercial nature of the agreement should surely have implications when determining what is reasonable in the context of the parties' dispute.

Secondly, this provision turned on the interpretation of the renewal clause reproduced above. It should be noted that this renewal clause was differently worded to the standard 'duty to negotiate in good faith' clause. Notably there is no express duty of good faith, thus this would have to be applied on the facts or *ex lege*. Furthermore, there is no deadlock-breaking mechanism: *Southernport Developments* requires a method of resolving potential disputes during the negotiation phase for such a clause to be enforceable.¹⁸⁶ An example of such a provision, as in that case and in *SAFCOL*, would be to insert an arbitration clause by which disagreement could be authoritatively settled.¹⁸⁷ Not only did the disputed clause in *Everfresh* not contain such a provision, it stated that in the event of the parties failing to reach agreement, that provision would be null and void. A literal reading of this clause must surely indicate that the reasonable meaning of the text is that the parties contemplated that the clause would be unenforceable should the parties fail to reach agreement on the terms of renewal, as was the case on the facts. Thus a duty to negotiate (in good faith) beyond the plain meaning of the provision must either rest on the implication of such a term into the contract or a development of the default rules of the common law of contract.

This introduces the third point: if there is to be a duty to negotiate implied by law into this type of rent renewal provision, does this not infringe the fundamental opposing principle, namely that freedom to contract involves the freedom not to contract? Should the express terms of the agreement not hold sway in the absence of a proven inequality of bargaining power, with no right of renewal? Moseneke DCJ suggests as much when he states even a "developed" common law ... would not compel the respondent to agree to a renewal of the lease'.¹⁸⁸ What does it compel then? The answer must surely lie in contractual interpretation: did the parties intend this provision to be enforceable (and hence would have inserted a deadlock-breaking mechanism) or unenforceable (and hence provided for voidness in the event of a failure to agree)?

The final point is about good faith. If the reader has disagreed with the argument above on freedom of contract and interpretation and maintains that there should be a duty to negotiate and to do so in good faith, then I would argue that a clearer definition as to what constitutes good faith, or the related concept of ubuntu, is required. The type of detailed unpacking of these concepts as per Leggatt J in *Yam Seng* should be undertaken by our

¹⁸⁵ *Ibid.* This view is echoed in Wallis's analysis: *op cit* note 66 at 558–9.

¹⁸⁶ *Southernport Developments* *supra* note 63 para 17.

¹⁸⁷ *Ibid* para 3; *SAFCOL* *supra* note 139 para 4.

¹⁸⁸ *Everfresh* *supra* note 12 para 78.

highest court in the interests of legal certainty. The authoritative statement on the role of good faith in South African contract law remains the majority decision in *Barkhuizen v Napier*.¹⁸⁹ There Ncgobo J confirmed the SCA position in *Brisley*¹⁹⁰ that '[g]ood faith ... has a creative, a controlling and a legitimating or explanatory function';¹⁹¹ and that '[t]he concepts of justice, reasonableness and fairness constitute good faith'.¹⁹² Since this dictum has not been overruled, it would appear that a limited role for an independent doctrine of good faith still prevails. This is a safer commercial standpoint than a loosely conceived equitable discretion, since commercial contracting through legal representatives is about ex ante planning and risk allocation. Ex post determination based on a broadly conceived judicial discretion undermines the commercial utility of a written contract.

(c) *A relational viewpoint*

This article has set out briefly the concept of relational contracting. Lease is a form of contract which has strong relational elements, due to the extended duration of the contractual relationship and the need for the parties to interact through the performance of obligations such as payment of the rental and observation of the shopping centre's rules on the tenant's side, and duties such as ongoing maintenance on the lessor's side. Flexibility as to future circumstances is necessary in a long-term contractual relationship, as was reflected in the wording of the clause in dispute. Good faith is essential in a relational contract in order to preserve the relationship. This is good-faith behaviour, however. Good faith as a legally enforceable duty should best be determined objectively, with reference to the context of contracting.¹⁹³ The test of what is a reasonable expectation in the context of the parties' relationship works well here. Shoprite was honest in disclosing its motivation for not wanting to negotiate further and indeed, surely the legal representation of both parties had advised at the conclusion of the initial lease agreement that the renewal clause was unenforceable. Everfresh's arguments essentially called for a duty of fiduciary loyalty on the part of Shoprite¹⁹⁴ — in

¹⁸⁹ Supra note 9.

¹⁹⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 22.

¹⁹¹ Ibid para 82.

¹⁹² Ibid.

¹⁹³ Compare the comparative English views in part III(c) above.

¹⁹⁴ For the view of the Canadian Supreme Court on this issue, see *Bhasin v Hrynew* [2014] SCC 71, where the court was careful to state in para 86 that: 'The duty of honest performance ... should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party.'

This is in part supported by *Yam Seng* supra note 63 para 142, subject to Leggatt J's view that some 'relational' contracts may require a 'high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements'. I would distinguish this particular dictum of Leggatt J

other words that Shoprite should put Everfresh's interests ahead of its own. While this type of duty may exist in certain recognised fiduciary contexts, and may even play a role in certain types of consumer contract, I would argue it is not appropriate in a fully commercial contractual setting, such as the lease in question in *Everfresh*.

VI CONCLUSION

This article has defended the important role which context has to play in contract law, particularly through the mechanism of contractual interpretation. This is a useful method by which the surrounding factual matrix, including the circumstances of the parties and indeed constitutional values, can be brought to bear on a contractual text. The UK has moved in this direction from the late twentieth century onwards, although the use of flexible standards such as commercial common sense to police contracts remains controversial. South Africa's increasingly communitarian outlook on contracting may be more fertile ground for this type of approach, but I would stress that in determining the factual context, a clear distinction should be drawn between commercial contracts concluded by legally represented parties and those which are subject to specific consumer regimes. In a business-to-business dispute greater scope should be given to considerations as to what constitutes a legitimate commercial expectation in the context of that particular contracting community.

Relational theory works best with long-term contracts where there is a clear element of interdependence between the parties and factors such as trust and co-operation are necessary. Flexibility may be necessary in contract drafting here, and may be a fundamental aspect of contract behaviour in resultant business relationships, but the strict doctrinal law should remain certain and determinable. This facilitates negotiation and dispute resolution, particularly when 'end-game' norms govern interactions.¹⁹⁵ If good faith is to be a governing standard in commercial contracting, it should be determined objectively in the context of the parties' own relationship and agreement. The Constitutional Court should adhere to its majority definition of this concept in *Barkhuizen* and attempt to maintain a clearly circumscribed sphere for its application. This article would not advocate using good faith as an independent external standard of objective reasonableness, capable of being invoked directly by a litigant. Rather, it should be

from the position argued for in the main text above on the facts of the respective cases in question.

¹⁹⁵ Bernstein op cit note 34 at at 1796–1802 argues that there is a distinction between 'relationship-preserving norms', which exist when there is co-operation under a contract, and 'end-game norms', which exist when the relationship breaks down and dispute resolution may become necessary. Bernstein argues (with reference to empirical research amongst merchants trading under the US Uniform Commercial Code) that merchants do not necessarily want relationship-preserving norms governing their end-game dispute, and would thus prefer strict rules rather than flexible standards at this stage.

derived from the express or implied terms of the contract itself. Certainly there should be no duty of fiduciary loyalty in non-fiduciary transactions.

Finally, a key point about relational contracts is that these usually only reach the courts once the business relationship has broken down. This means that relational norms no longer operate and an application of hard doctrinal law is necessary. A far superior form of relationship-preserving dispute resolution could be sought through commercial mediation where possible, which would facilitate negotiation and avoid a winner-takes-all situation.¹⁹⁶ This, after all, keeps relational disputes within the boundaries of the contractual relationship and avoids reference to the doctrinal law, which may not be adaptable to the nuances of a given contractual fact matrix.

¹⁹⁶ This argument is made by Linda Mulcahy ‘Telling tales about relational contracts: How do judges learn about the lived world of contracts’ in Campbell, Mulcahy & Wheeler (eds) *op cit* note 1 at 205–13. See further John Brand, Felicity Steadman & Christopher Todd *Commercial Mediation: A User’s Guide* (2012) ch 2 (concept of mediation) and 52–4 (relational contracts).