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F S DETHRIDGE MEMORIAL ADDRESS

**The *MV Good Faith*:
The Relevance of Good Faith in Shipping Disputes**

The Hon Sir Bernard Eder

1. It is a great honour and pleasure to have been invited to give this opening memorial address today. This is my very first visit to your wonderful city, Melbourne – and indeed my first time in Australia. So thank you very much for the invitation.
2. I should start by saying that I never knew Frank Dethridge. That seems a great pity because by all accounts, he was a man of great wisdom, kindness and moderation. I understand that he died just over 40 years ago in 1976. That was the year I was taken on as a tenant at Essex Court Chambers. When I started in practice all those years ago, I hardly knew the difference between port and starboard or bow and stern. I remember struggling to understand endless abbreviations, acronyms and technical jargon – like the meaning of “*chop*” (charterer’s option, of course), “*wibon*” (whether in berth or not), “*butterworth*” (ah yes: the equivalent of a power-shower) and, most mysterious of all, PANDI. I confess that I originally thought PANDI was the name of some Greek shipowner. It was not until some time later that someone told me that it referred to the P and I Club – although I learnt even later that there was a famous shipowner whom everyone referred to as Pandi. How confusing.
3. So my life in shipping law has been something of a steep learning curve. Thankfully, I was helped along the way by a number of great lawyers including one of your former Dethridge speakers – Michael Mustill. He died last year. He was also a man of great wisdom, kindness and moderation. But he was not alone. There were many others who helped me along the way – including Tony Colman, another great lawyer and

former Head of my Chambers and High Court Judge, who sadly died a few months ago. So perhaps this is an opportunity to recognise the important part played by such individuals in the development of maritime law – and to thank them for their contribution over the years.

4. When I was asked by Matthew Harvey to give this address, he told me – in no uncertain terms – that it should have the “*whiff of ozone*” and need not be too heavy going. I promised that I would try to obey. So I have chosen this subject today partly because it seems topical and in the hope that it might provoke some further thought during this conference.
5. The notion of good faith is, of course, well known in the context of the law of insurance. Marine insurance cases abound with interesting – and difficult points – concerning the nature and scope of the duty of good faith in that context. The recent – and somewhat controversial - decision of the Supreme Court in the “*DC MERWESTONE*”¹ provides an interesting discussion of the nature and scope of the duty of “good faith” in the insurance context. However, that is not part of my enquiry today.
6. Instead, my focus concerns what I think is the common belief – certainly in England - that any general doctrine of good faith outside the field of insurance is a concept foreign to the common law of contract. Professor McKendrick has explored the main reasons for what he describes as the “*traditional English hostility*” towards the doctrine of good faith². However, in *Yam Seng PTE Ltd v International Trade Corporation Ltd*³, Leggatt J expressed the view that such hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is “*misplaced*”⁴. He reached this conclusion after a detailed and scholarly analysis of the relevant authorities both in England and various

¹ *Versloot Dredging BV & Anor v HDI Gerling Industrie Versicherung AG & Ors* [2016] UKSC 45, [2017] AC 1

² *Contract Law* (9th Ed) pp.221-2

³ [2013] 1 Lloyd's Rep 526

⁴ see [153]

other jurisdictions including Scotland, Canada, New Zealand and here in Australia⁵. It is a tour de force and, if you have not read it already, I commend it to you. Unsurprisingly, Leggatt J has been referred to in a recent article as the “...one judicial cheerleader in the current Commercial Court [in England] for the broader concept of good faith in all contracts.”

7. Leggatt J returned to the subject more recently in another case, *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*⁶ where he sought to draw support for his conclusion in that case by reference to a general duty of good faith. I consider that decision later in this lecture but, at this stage, I would simply note that his espousal of a general duty of good faith did not meet with the approval of the Court of Appeal. Thus, we find Moore-Bick LJ stating⁷:

“.....The judge [Leggatt J] drew support for his conclusion from what he described as an increasing recognition in the common law world of the need for good faith in contractual dealings. The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case. It is interesting to note that in the case to which the judge referred as providing support for his view, *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 S.C.R.494, the Supreme Court of Canada recognised that in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland* [2013] EWCA Civ 200 this court had recently reiterated that English law does not recognise any general duty of good faith in matters of contract. It has, in the words of Bingham L.J. in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439, preferred to develop “piecemeal solutions in response to demonstrated problems of unfairness”, although it is well-recognised that broad concepts of fair dealing may be reflected in the court’s response to questions of construction and the implication of terms. In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some “general organising principle” drawn from cases of disparate kinds. For example, I do not think that decisions on the exercise of options under contracts of different kinds, on which he also relied, shed any real light on the kind of problem that arises in this case. There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.”

⁵ see [118]-[154]

⁶ [2015] 1 Lloyd’s Rep 359 at [97]

⁷ *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] 2 Lloyd’s Rep 494 at [45]

8. However, legal scholars would do well to bear in mind that Moore-Bick LJ retired at the end of last year; and even more recently, Leggatt J has been promoted to the Court of Appeal. So I doubt that this is the last word on the topic. Plenty of ozone here ! Watch this space !
9. In any event, a very different view from that expressed by Moore-Bick LJ is to be found, for example, in the Judgment of your very own Chief Justice of the Federal Court of Australia delivered a few years ago when he was President of the New South Wales Court of Appeal in *United Group Rail Services Ltd v Rail Corporation of New South Wales*⁸:

“...good faith is not a concept foreign to the common law, the law merchant or businessmen and women. It has been an underlying concept in the law merchant for centuries: L Trakman The Law Merchant: The Evolution of Commercial Law (Rothman 1983) at p 1; W Mitchell An Essay on the Early History of the Law Merchant (CUP 1904) at pp 102 ff. It is recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions: for example Uniform Commercial Code ss 1-201 and 1-203 (1977); Wigand v Bachmann-Bechtel Brewing Co 118 NE 618 at 619 (1918); Farnsworth on Contracts (3rd Ed) Vol 1 at pp 391-417 § 3.26b; UNIDROIT Principles of International Commercial Contracts (2004 Ed, Rome 2004) Art 1.7; R Zimmerman and S Whittaker Good Faith in European Contract Law (CUP 2000). It has been recognised by this Court to be part of the law of performance of contracts: Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 263-270; Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (1993) 31 NSWLR 91; Burger King Corporation v Hungry Jack’s Pty Ltd at 565-574 [141]-[187]; and Alcatel Australia Ltd v Scarcella at 363-369....”

10. I have cited these two passages at length because they reflect two starkly different views – and provide a suitable backcloth to this lecture.
11. However, you may be pleased to hear that I do not intend to add to the huge mass of learned writings that have been generated over recent years as to whether there should – or should not – be some “general organising principle” of good faith including, most recently, Sir George Leggatt (the same Leggatt J but in a non-judicial capacity) “*Contractual duties of good faith*”⁹; JW Carter and Wayne Courtney, “*Good faith in*

⁸ [2009] NSWCA 177 at para 58

⁹ COMBAR lecture, 18 October 2016

*contracts: is there an implied promise to act honestly?*¹⁰; David Foxton QC, “A Good Faith Goodbye? Good Faith Obligations And Contractual Termination Rights”¹¹.

12. Rather, my task today is much more limited: it is to consider some of what Bingham LJ has referred to as the “*piecemeal solutions*” that have been adopted in response to demonstrated problems of unfairness in the specific context of shipping disputes and which involve considerations of “good faith”.

13. It is convenient to start at the beginning viz the making of a contract. Is there any place in that context for a duty of “good faith”? I think most people would agree that there is no such duty where the parties are not already in some form of relationship – contractual or otherwise. In England, the leading case frequently cited to support that view is, of course, *Walford v Miles*¹². Over the years since that case, there has been the odd murmuring to suggest that English law should adopt a different position. However, for the time being at least and until the Supreme Court decides otherwise, English law is as stated in *Walford v Miles*.

14. The so-called rule in *Walford v Miles* is – or at least may be – distinguishable where the parties are already in some form of contractual relationship and they have “*agreed to negotiate*”. This is not uncommon in many shipping contracts. However, even in such a case, a “bare” open-ended agreement to negotiate will probably be unenforceable in English law: see for example, *Itex Shipping v China Ocean Shipping*¹³ (provision that “*any dispute on this agreement will be settled amicably*” before it could be arbitrated held unenforceable); and *Sul*

¹⁰ [2016] CLJ 608

¹¹ [2017] LMCLQ 360

¹² [1992] AC 128

¹³ [1989] 2 Lloyd's Reports 522

*America v Enesa Engenharis*¹⁴ (obligation on the parties to "seek to have the Dispute resolved amicably by mediation" held unenforceable)¹⁵.

15. However, as emphasised by, for example, Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobras*¹⁶, *Walford v Miles* concerned a case where there was no concluded contract at all (since it was "subject to contract"). He contrasted it with a case where the agreement to agree was but one term of an otherwise concluded contract. In *Petromac*, the Court of Appeal noted that the enforceability of a provision requiring negotiation in good faith with regard to the cost of a disputed upgrade of a drilling rig was not essential to the disposition of the appeal; but Longmore LJ (with whom Mance LJ (as he then was) and Pill LJ agreed) considered that in the particular circumstances there were no good reasons for saying that the obligation to negotiate the discrete issue as to the extra cost of the upgrade was unenforceable: the task was defined and of comparatively narrow scope; the provision in question was part of a complex agreement drafted by London City Solicitors; and whilst recognising the difficulty of determining when a requirement to negotiate in good faith has been satisfied (the concept of bringing negotiations to an end in bad faith being "somewhat elusive") nevertheless the Court should not deny enforcement on that ground: "...the difficulty of a problem should not be an excuse for a court to withhold relevant assistance from the parties by declaring a blanket enforceability of the obligation".

16. A similar approach is to be found in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*¹⁷, where Teare J held that a dispute resolution clause in an existing and enforceable contract which required the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute might be

¹⁴ [2012] 1 Lloyd's Reports 671

¹⁵ Although an "unreasonable" failure to mediate existing legal proceedings may result in an adverse costs order: see eg. *Gore v Naheed & Anor* [2017] EWCA Civ 369

¹⁶ [2006] 1 Lloyd's Rep 121

¹⁷ [2014] 2 Lloyd's Rep. 457

referred to arbitration was enforceable. It is perhaps noteworthy that in reaching that conclusion, Teare J. referred extensively to the Judgment of Allsop P in *United Group Rail Services Ltd*¹⁸.

17. It is, of course, also important to bear in mind that parties who are in negotiation prior to entering into a contract are subject to the law concerning misrepresentation - both common law and statute. In that context, the concept of “good faith” may be very important indeed. Thus, of course, a fraudulent misrepresentation which induces a contract will entitle the innocent party to claim damages and, in principle, rescind the contract. *Armagas Ltd v Mundogas (The Ocean Frost)*¹⁹ (fraudulent conspiracy to bring into existence a 3 year charterparty) is just one of a large number of such cases that fill the shipping law reports. Moreover, in the context of misrepresentations, the concept of “good faith” extends beyond those which are fraudulent. Thus, in England, s2(1) of the Misrepresentation Act 1967 provides, in effect, that a party will be liable in damages in the stipulated circumstances for a misrepresentation “.....*unless he proves that he had reasonable ground to believe and did believe up to the time of the contract was made that the facts represented were true.*” (emphasis added). Thus, in such a case, the burden lies on the defendant to show that he believed that the facts represented were true. Again, the shipping law reports are replete with examples of claims for damages under s 2(1) of the 1967 Act: see, for example, *Howard Marine and Dredging Co. Ltd v A. Ogden & Sons (Excavations) Ltd*.²⁰ (burden discharged).

18. Once the contract is made, the question then arises as to how it is to be construed – and what it means. As a matter of English law, the traditional view has, of course, been that the meaning of a written contract is to be determined “objectively”. In broad terms, the exercise involves consideration of the words used by the parties in their written contract

¹⁸ [2009] NSWCA 177

¹⁹ [1986] AC 717

²⁰ [1978] QB 574

having regard to what may now conveniently be referred to as the “*factual matrix*”. This is not the time or place to examine the scope of that term. Rather, the important point, for present purposes, is that the test is one which is essentially “objective” and that any enquiry beyond the actual words used is limited to what was known to both parties prior to the contract and what may have “crossed the line”. The corollary, of course, is that the exercise of construction is not concerned with the subjective intentions of any of the parties.

19. That being the case, I have to say that I have always been somewhat baffled by the suggestion that contracts should be interpreted by reference to the “*reasonable expectations of honest men*”²¹. I understand the reference to “reasonable”. However, the reference to “honest men” seems to involve a notion which is alien to the traditional view that contracts should be construed objectively. Leggatt J sought to explain this seeming conundrum in *Yam Seng PTE Ltd v International Trade Corporation Ltd*²² in the following terms:

“.. 144. Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378 at pages 389 to 390. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had...”

20. This is clever stuff – but I remain largely unpersuaded. Be that as it may, there is no doubt that in recent years, the yardstick of the “*reasonable expectations of honest men*” has become something of a magic mantra. Thus, in his judicial capacity, Steyn J (as he then was) said:

²¹ See, for example, the articles by Johan Steyn, “*The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?*” (1996) CLP 43, “*Contract Law: Fulfilling the Reasonable Expectations of Honest Men*” (1997) 113 LQR 433

²² [2013] 1 Lloyd's Rep 526

*"A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a Judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, the criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness."*²³

21. That and other similar statements of principle have been approved at the highest level in England both in the shipping and non-shipping context²⁴.

22. So I hesitate to put my own head above the parapet. In any event, the real difficulty, in my view, is that most disputes concerning the proper construction of a contract have little, if anything, to do with what an honest man might or might not think. Let us look at some concrete examples:

- a. What is the meaning of the term "*taking at sea*" in a contract of marine insurance? That was the main issue in *The Salem*²⁵ with regard to a cargo of oil was stolen by the ship's master. In particular, does such theft come within the scope of the words "*taking at sea*". The cargo of oil in that case was no doubt stolen i.e. "taken" by the Master. And, as a matter of common sense, the cargo was certainly taken at sea when the ship diverted in the course of the carrying voyage and the cargo was discharged clandestinely under the cover of darkness at an SBM off the coast of South Africa. However, it was held that the cargo was not "taken at sea" on the basis that such phrase was, in effect, a term of art which did not cover a taking by the Master or the ship's own crew? I am not sure that that decision of the House of Lords could be justified on the basis of the reasonable expectations of honest men particularly since it involved overturning a decision of the

²³ *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194, at 196

²⁴ See eg, *Rainy Sky SA & Orsd v Kookmin Bank* [2011] UKSC 50 at [25] et seq.

²⁵ *The Salem* [1982] 1 Lloyd's Rep 369

Court of Appeal to the contrary some 12 years previously which had stood without comment or criticism in any textbook or other legal journal.

- b. What is the meaning of “*wibon*” in a port charterparty which was considered by the House of Lords in *The Kyzikos*²⁶? In particular, in such a charterparty, can an owner serve a valid notice of readiness when still outside port limits in circumstances where he cannot proceed to the designated berth because of fog or bad weather. Again, I do not think that that question is assisted much, if at all, by asking what the reasonable expectation of honest men might be.
- c. Is the obligation to pay hire by a certain date a “*condition*” or an “*innominate term*”²⁷? In particular, if hire is paid late, can the Owner bring the charter to an end and claim substantial damages for the balance of the original charter period.
- d. Are “*spread costs*” recoverable under a charter for a drilling rig – and, in particular, is liability for such cost excluded as “*consequential loss*”²⁸.
- e. What about the line of authority which deals with clauses in a charterparty or bill of lading giving the owner a right to depart from the contractual route. It has long been established that any such stipulation, however widely phrased, must generally be construed with reference to the contractual route in accordance with established principles²⁹.

²⁶ *The Kyzikos* [1987] 1 Lloyd's Rep 48

²⁷ *Spar Shipping* [2016] 2 Lloyd's Rep 447

²⁸ *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] 2 Lloyd's Rep 51

²⁹ See e.g. *Glynn v Margetson* [1893] A.C. 351

23. In my view, all these questions are to be determined by giving effect to the words used by the parties in the context of the charterparty as a whole in light of fairly basic rules of construction as enunciated most recently by the Supreme Court in *Arnold v Britton*³⁰. I readily accept that such exercise is not necessarily straightforward in all cases; and there is often no easy or obvious answer. However, to my mind, the suggestion that these and other similar questions of construction might be determined by reference to the “*reasonable expectations of honest men*” does little, if anything, to assist in the process of contractual interpretation. On the contrary, in my view, it serves as much to confuse as to clarify. For my part – and I say this as a self-confessed heretic - I would jettison any reference to the “honest man” as a relevant factor in the construction of a commercial contract – save perhaps in the most exceptional circumstances.

24. Now, of course, this is not to say that there may not be particular circumstances where “good faith” may be important – and, indeed, critical. For example, s.5(2) of the Carriage of Goods by Sea Act 1924 provides that a person shall be regarded for the purposes of that Act as having become the lawful holder of a bill of lading “...*wherever he has become the holder of the bill in good faith...*”. The Act does not define “good faith”. However, in *The Aegean Sea*³¹, the Court held that the term connotes “*honest conduct*” and not a broader concept of good faith such as “*the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned*”.

25.

26. That is an example of a situation where the term “*good faith*” is expressly stated. However, even where that is not so, the effect of a provision, properly construed, may be such as to import a duty of “*good faith*”. Perhaps the best example of such a provision is the “*expected ready to*

³⁰ [2015] AC 1619

³¹ [1998] 2 Lloyd's Rep 39 @ p60

load” clause that one finds in many charters. The normal standard wording usually just states that the vessel is “*expected ready to load under this charter at [date]...*” It is now almost a 100 years since it was held that these words mean that, in the light of the facts known to the owner at the time of making the contract, he honestly expected that the vessel would be ready as stated and, further, that such expectation was based on reasonable grounds: *Samuel Sanday and Co. v. Keighley, Maxted and Co.*³². For present purposes, the important point is that the test is not simply whether a reasonable shipowner expected the vessel to be able to load at the stated date but whether the shipowner actually had such honest expectation in fact at the time of entering the charterparty.

27. The obligation to act in good faith is also to be found in other areas – in particular where a charterparty confers a power or discretion on one of the parties. For example, in *Govt of The Republic of Spain v North of England SS Co Ltd*³³, Lewis J commented on the discretion of a master and owners under certain war clauses. He expressed the opinion – perhaps unsurprisingly - that the discretion has to be exercised fairly as between the parties. Similarly, in *The Vainqueur José*³⁴ Mr. Justice Mocatta said of the discretion of a committee of a P&I club to decide matters under its rules: “*To the exercise of such discretion the common law principles must apply and these undoubtedly include fairness, reasonableness, bona fides, and absence of misdirection in law*”.

28. These authorities were referred to by Leggatt LJ³⁵ in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The “Product Star”)(No.2)*³⁶ when considering the exercise of the discretion of a ship’s master in deciding whether a port was “dangerous”. Leggatt LJ accepted that the

³² (1922) 10 Ll. L Rep 738

³³ (1938) 61 Ll. L. Rep 44

³⁴ [197] 1 Lloyd’s Rep 55

³⁵ For the sake of clarity,. I should mention that this is Leggatt Sr. !

³⁶ [1993] 1 Lloyd’s Rep 397 @ p404. See also *Braganza v BP Shipping Ltd* [2015] 2 Lloyd’s Rep. 240.

discretion must be exercised “honestly” and in “good faith”. However, the case is important because, as Leggatt LJ emphasised, where A and B contract with each other to confer a discretion on A the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. This “dual” test may be very important. Thus, the conclusion reached by Leggatt LJ on the facts in that case was that even if the owners had *bona fide* considered the passage to Ruwais dangerous by comparison with the risks which obtained at the date of the charter-party, any such conclusion would have been unreasonable and capricious – and, on that basis, the owners were held to be in breach in refusing to proceed to the designated port.

29. So “good faith” on its own may not be enough to save the day. Another good illustration of that proposition appears from the facts in *The Fontevivo*³⁷. That was a case reported in Lloyd’s Reports in 1975. I remember it well because I had just started pupillage at the time in what was then 4 Essex Court. I always felt rather sorry for the Master and crew in that case. At the time, the vessel was under a voyage charter and discharging an oil cargo at Lattakia, Syria when Israeli jets flew over the port and Syrian forces attacked with anti-aircraft gunfire. As found by the arbitrator, the master yielded to pressure from the crew - who were under shock and very frightened - and decided to leave the port and anchor in international waters for a short period. The question was whether laytime ran during this period. There was no express finding that the Master acted otherwise than in “good faith” but all the findings point in that direction. Nevertheless, Donaldson J held that the crew of the vessel had what he described rather memorably as “..a severe attack of cold feet in a hot climate...”. So laytime continued to run throughout.

³⁷ [1975] 1 Lloyd’s Rep 339

30. But in other circumstances, good faith may be the critical factor as it was, or at least might have been, in *The Hill Harmony*³⁸. That case concerned the duty of a master to comply with the orders of the charterers under a time charter. In summary, the vessel had sailed from Benicia (near San Francisco) to Tsukumi, Japan and during the course of that voyage, on a northerly trans-Pacific route, had suffered serious heavy-weather damage. The charterers gave orders to the master that the vessel was to take the shorter northern Great Circle route. However, the master insisted on proceeding by the more southerly rhumb line route with a resulting increase in the time taken for the voyage and the bunkers consumed. In the Court of Appeal, the leading judgment agreed to by the other members of the Court, was given by Potter LJ. He held that the ocean route to be followed by the vessel was a matter of navigation for the master and not a matter of employment upon which the charterers could give the master orders. Provided that the master acted *bona fide* ie in good faith, it did not matter whether he acted reasonably because the owners were protected by the exception in art. IV, r. 2(a). In the event, the House of Lords overruled the Court of Appeal on the basis that (i) the master was obliged to comply with the charterers' orders (because they were a matter of "employment") and (ii) the owners could not rely upon Art. IV(2)(a) of the Hague Rules because the master's error was not an act, neglect or default of the master "*in the navigation or in the management of the ship..*". For present purposes, the important point is the statement in the Court of Appeal to the effect that provided that the master acted *bona fide* ie in good faith, it did not matter whether he acted reasonably.

31. In certain circumstances, even bad faith may be irrelevant. Thus, where an exception of negligence of the shipowner's servants is clearly expressed, full effect will be given to it; and the exception will generally apply even if the master has acted in bad faith³⁹.

³⁸ [2001] 1 Lloyd's Rep. 147

³⁹ See generally *Scrutton on Charterparties*, 23rd Ed. Art 134; *Tasman Orient Lines CV v New Zealand China Clays Ltd* [2010] 2 Lloyd's Rep 13

32. More controversial perhaps is whether the exercise of a contractual option is circumscribed in any way by a duty of “good faith”. The ultimate contractual option is, of course, the option to bring a contract to an end. Is such an option limited in any way by an obligation of good faith ?
33. Before considering that question, it is perhaps important – or at least convenient – to consider how such a question might arise in practice. The usual situation in which the good faith argument is run – sometimes disguised under a different strapline – is where the party seeking to exercise the option is doing so for purely financial reasons on grounds which are generally described as “technical”.
34. The obvious example of such a case is where an owner purports to withdraw a vessel under a time charter – and, in effect, to bring the charter to an end - for late payment of hire. The payment may be only a minute or even a second late. The breach by the charterer may be of no – or very little – consequence. But, the owner decides to serve a notice of withdrawal – no doubt because the market has gone up and it is therefore in the financial interest of the owner to do so. We now know from the decision of the Court of Appeal in *Spar Shipping*⁴⁰ that, absent an express provision making time of the essence, the obligation to pay hire by a certain date/time is not a condition of the contract. Nevertheless and, on this point, at least, English law is clear, the owner will still be able to withdraw the vessel and to bring the charter to an end. Good faith is irrelevant. In this respect, English law has, until recently at least, been crystal clear i.e. the innocent party enjoys an unfettered choice. Thus, for example, we find Lord Reid in *White & Carter (Councils) Ltd v McGregor*⁴¹ saying: “..It has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way”. And, as

⁴⁰ *Grand China Logistics v Spar Shipping AS* [2016]2 Lloyd's Rep 447

⁴¹ [1962] A.C. 413 at 431

confirmed by the House of Lords in *The Scaptrade*⁴², there is no question of any sidewind based upon any equitable doctrine of relief against forfeiture.

35. A similar situation often occurs in the context of shipbuilding contracts which contain what is often referred to as a “dropdead” date for delivery of the ship. Clauses vary – but, in essence, many shipbuilding contracts contain a clause which provides that the buyer is entitled to terminate the contract and to recover all pre-delivery instalments if the vessel is not ready for delivery on a certain date. I did a case once where the vessel was virtually ready but still had large areas that required a final coat of paint and which would take only a week or so to complete. The Tribunal rejected the argument that this was *de minimis* and held that the Buyer was entitled to reject on the basis that the vessel was not ready at the dropdead date. I did another case where the vessel was again virtually ready before the dropdead date but just as the vessel was about to be delivered, there was a major glitch with the navigation software such that the vessel could not sail until that problem was resolved. Again, the Tribunal rejected the yard’s arguments and held that the buyer was entitled to terminate the shipbuilding contract in that case. No question of good faith here.

36. These are examples of cases where one party i.e. the owner seeks to bring the contract to an end and has been held entitled to do so regardless of any question of good faith. But what of the observe situation ie where the owner may have the option or right to bring the contract to an end but doggedly seeks to keep the contract alive ? In such cases, the owner may have very good financial reasons for keeping the charter alive. For example, in a time charter, the owner may be better off financially seeking hire day by day until the end of the charter period rather than simply claiming damages. Similarly, an owner under a

⁴² *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694

voyage charter may have good financial reasons for claiming demurrage day by day as it falls due. Question: Can the charterer in effect force that owner to bring the contract to an end and to claim damages (if any) rather than maintain a series of almost never-ending debt claims ? In particular, can the charterer say that that is something that the owner must, in effect, do on the basis that to do otherwise would be contrary to good faith ?

37. The traditional contract lawyer would probably answer emphatically “No” – on the basis that there is no obligation on an innocent party to bring a contract to an end – see, again, *White & Carter v McGregor*⁴³ - at least where continued contractual performance does not depend upon on the co-operation of the other contracting party. However, since that landmark decision in the House of Lords over 50 years ago, the law has been slowly evolving – driven by a number of shipping cases. In this context, the starting point is the Judgment of Lord Denning in *The Puerto Buitrago*⁴⁴ which concerned redelivery of a vessel at the end of a demise charter. The facts are probably well known but in summary, they were as follows. The charter contained standard wording to the effect that the vessel was to be redelivered to the owner in the same good order and condition as on delivery. The charterer purported to redeliver the vessel – albeit that it was in poor condition. The owner refused to accept such purported redelivery. The main question was whether the owner was entitled to do so – and to claim hire until the vessel was repaired; or whether the owner was, in effect, bound to accept redelivery and claim damages. In the event, it was held by the Court of Appeal (reversing Mocatta J.) that the owner was not entitled to refuse redelivery. The case is particularly interesting in the present context because it illustrates the general approach of English law to questions of this sort i.e. by reference to an analysis of the nature of the contractual rights and obligations of the parties. Thus, it was held that the obligation to repair was not a

⁴³ [1962] AC 413.

⁴⁴ [1976] 1 Lloyd's Rep 250

condition precedent to the right to redeliver, but only a stipulation giving a remedy in damages and that therefore on the true construction of the charter-party, the redelivery of the vessel was effective notwithstanding that the vessel was not in proper repair.

38. So far so good. But the case is also particularly interesting because of further comments by Lord Denning. Bold as ever, he referred to *White & Carter* and said:

“.... The decision has been criticized in a leading textbook (Cheshire & Fifoot, pp. 600 and 601). It is said to give a "grotesque" result. Even though it was a Scots case, it would appear that the House of Lords, as at present constituted, would expect us to follow it in any case that is precisely on all fours with it. But I would not follow it otherwise. It has no application whatever in a case where the plaintiff ought, in all reason, to accept the repudiation and sue for damages-provided that damages would provide an adequate remedy for any loss suffered by him. The reason is because, by suing for the money, the plaintiff is seeking to enforce specific performance of the contract-and he should not be allowed to do so when damages would be an adequate remedy....” (emphasis added)

39. There are two important points with regard to this passage. The first concerns Lord Denning's use of the words “..in all reason...”. Perhaps what he is really saying is that a plaintiff is bound to accept the repudiation in that situation because to do otherwise would be contrary to “good faith”. The second point concerns the suggestion that the claim for hire is in effect a claim for specific performance and that such a claim would not be allowed if damages were an adequate remedy. Both points might be regarded as somewhat heretical. A slightly different approach is to be found in the Judgment of Orr LJ. He referred to a passage in *White & Carter*⁴⁵ referred to the Scottish decision of *Langford & Co. Ltd. v. Dutch*⁴⁶ and stated:

“It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.” (emphasis added)

⁴⁵ at p431

⁴⁶ (1952) S.C. 15

40. It is this concept of “*no legitimate interest*” which has since been adopted in a number of subsequent shipping cases to provide the basis for saying that, in an appropriate case, an owner cannot insist on keeping a charter alive: see, for example, *The Alaskan Trader (No.2)*⁴⁷ and *The Aquafait*⁴⁸. On one view, the concept is perhaps not very different from the notion that a party should not be entitled to enforce contractual rights when it would be contrary to “good faith” to do so. That was, in effect, the approach adopted by Leggatt J at first instance in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*⁴⁹ (which concerned a claim for demurrage over an extended period) when he stated⁵⁰ that the legitimate interest principle can be seen in a “*wider context*” viz. “...*the increasing recognition in the common law world of the need for good faith in contractual dealings...*”. As I have already mentioned, Leggatt J has been referred to as the “cheerleader” of the principle of good faith. However, his “cheering” in this case at least was somewhat shortlived because, as appears from the passage from the Judgment of Moore-Bick LJ which I quoted at the very beginning of this lecture, the Court of Appeal in that case took a very different view and was not prepared to acknowledge the existence of any general duty of good faith. Again, the reasoning of the Court of Appeal is another good illustration of the strong preference of English law for a solution of a particular problem based on the application of legal principle rather than by reference to vague notions of good faith. Thus, in that case, the Court of Appeal held that the shipper was in repudiation of the contract of carriage by failing to take delivery of the cargo; that the commercial purpose of the venture had been frustrated by a certain date; and that where a contract was repudiated because it was no longer capable of performance by reason of frustrating delay, the contract came to an end and the innocent party was bound to accept the repudiation.

⁴⁷ [1983] 2 Lloyd’s Rep 645

⁴⁸ [2012] 2 Lloyd’s Rep 61

⁴⁹ [2015] 1 Lloyd’s Rep 369

⁵⁰ para 97]

41. I turn briefly - to the question of remedies. Where there is a proven breach, it is generally stated that the innocent party has a “right” to damages subject to proof of causation and other considerations such as remoteness and the so-called duty to mitigate. Time does not allow me to consider the recent spate of cases in this context – or the line of authority concerned with claims for specific performance where the absence of good faith on the part of the claimant may, of course, be highly relevant. But, so far as claims for damages are concerned, I challenge anyone here today to read cases like *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco)*⁵¹ and ask yourself whether the difficult issues which have arisen in such cases might be resolved any easier – or better – by applying the test of the reasonable expectations of honest men.

42. Finally, I would, if I may, like to say something about the important topic of ship arrest. As many of you may know, this is one of my own hobby-horses. Indeed, I have been campaigning to try to change the law in this area for over 30 years. In summary, the position as a matter of English law – and in most other common law jurisdictions – is that a shipowner will be unable to recover any compensation at all for so-called “wrongful arrest” save only on the basis that the arrest has been obtained by *mala fides* or *crassa negligentia*. That test derives, of course, from the decision of the Privy Council in *The Evangelismos*⁵². I have spoken about this topic on numerous occasions around the world including the 2013 William Tetley Lecture on Maritime Law at Tulane University Law School. My views are summarised in an article published in the Tulane Maritime Law Journal⁵³ and I do not propose to repeat what I said there. For present purposes, I would like to take this opportunity of saying – again – that it is my view that the requirement that a shipowner can only recover compensation by showing “bad faith” (or “*crassa negligentia*”) on

⁵¹ [2017] UKSC 43, SC [2017] 2 Lloyd’s Rep 177

⁵² (1858) 12 Moo PC 352, 359.

⁵³ “*Wrongful Arrest of Ships: A Time for Change*” (2013) 38 TMLJ 115

the part of the arresting party is archaic, unprincipled, bad law and – to boot - unjust. The fact that that has been the law for over 150 years is, in my view, no excuse whatsoever for allowing it to continue. The law needs to be changed. I have proposed possible alternatives as set out in my article and separate end-note. I say no more. So far as I am concerned, the sooner it is changed, the better.

43. With that revolutionary plea, it only remains for me to thank you again for inviting me to speak today. I hope that you will enjoy the interesting and varied programme which has been put together for the rest of this Conference. I look forward to meeting you over the next few days and to discussing points of interest.

44. Thank you.

Bernard Eder